

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
(CIVIL) A.D 2012



CLAIM NO:NEVHCV2012/0136

BETWEEN:

JESPER QVIST

Applicant

and

THE COMMISSIONER OF POLICE

THE SUPERINTENDENT OF PRISONS

Respondents

Appearances:

Mr. J. Hamilton appearing with Ms. K. Merchant for the Applicant
Mrs. P. Hendrickson, Director of Public Prosecution appearing with Ms. G Gordon
for the Respondents.

2012: September 6, 20 and October 10

DECISION

- [1] **WALLACE, J.:** Upon an application filed on 30th August 2012 supported by an Affidavit of the same date sworn to by the Applicant, the Applicant applied to the Court for an order that he be admitted to bail on such terms and conditions as the Court may deem just. The Applicant was charged for the offence of Rape contrary to Section 46 of the Offences Against the Persons Act Chapter 4:21 of the Revised

Edition 2002 of the Laws of the Federation. I commenced hearing the Application on 6th September 2012 and at the resumed hearing on the 20th September 2012 I made an order granting the Applicant bail on terms and conditions stipulated in that order and promised that I would provide my reasons in writing at a later date. I now state my reasons.

Grounds of the Application

- [2] The grounds of the application were that the Applicant was charged with the offence on the 17th day of August 2012 and that he had been in custody since the date of his arrest. The Applicant had made one prior application to be admitted to bail for the offence in the Magistrates Court. He further indicated that he was not a citizen of the Federation but was prepared to surrender his travel documents should he be admitted to bail. Further, that he had two sureties who are citizens of the Federation who were prepared to act as such. Lastly, that there were no legal or reasonable grounds that warrant objection to the Applicant being admitted to bail.

Background Facts

- [3] The Applicant stated in his Affidavit in support that he is the owner and proprietor of an internet-based company known as "byeground.com" that specializes in the enhancement and editing of images of items for sale. The Company is incorporated in Miami but due to the nature of the operations he is able to manage the affairs of the business from any location with the requisite information technology facilities. He is a citizen of Denmark and is 27 years of age.
- [4] He came to the Federation with his fiancé on 29th April 2012. The fiancé is a student at the Medical School and the Applicant plans to be in Nevis for the duration of her studies which should end in December 2013. He was arrested on the 12th August 2012 and charged on the 17th August 2012. The first application for bail was denied on the basis that the Applicant did not have sufficient ties to the community and so would be a flight risk. Given that no date has yet been set

for the commencement of the preliminary inquiry into the matter the period of remand could be considerable.

[5] The Applicant stated that prior to his arrest he was not a person known to the law in this or any other jurisdiction and had never been arrested or charged with any criminal offence whatsoever. He presented the Court with a copy of his criminal record from Denmark. Curiously, the certificate was addressed to the Applicant at a Miami Beach, Florida, USA address (650 West Avenue #1001 Miami Beach, Florida 33139) and was dated 10.04.2012. However, prior to the resumption of the hearing he filed a Supplemental Affidavit stating that other than brief vacations, the periods September 2004 and March 2005 and again July 2009 and April 2012 (when he arrived in Nevis), he has lived in Denmark all his life. For the latter two periods, he was in Florida for the purpose of furthering his studies and so the address indicated in the certificate is that of his then residence. Additionally, an affidavit of Jonathan H. Rosenthal, the Honorary Consul of Denmark for South Florida territory, stated that he, the deponent, obtained a report from the Florida Department of Law Enforcement which is the central repository for criminal history information for the state of Florida. He exhibited a copy of a report confirming that the Applicant did not have a criminal history record in the state of Florida.

[6] The affidavit of Sadiki Phipps, police constable, was filed on behalf of the Respondents. In it he stated that on 12th August at 1:30pm the police received a report of an incident of rape. The Applicant was identified as the offender and was apprehended and was subsequently charged for the offence. He recounted the circumstances of the alleged offence which I do not have to recount for the purpose of this decision except to say that the virtual complainant allegedly received a number of marks on both hands and other parts of her body where she alleged she was held down by the Applicant.

Counsel's Submissions

- [7] Counsel for the Applicant relied on the case of **Thelston Brooks v The Attorney General et al**¹ in support of his contention that the seriousness of the offence, without more, was not sufficient to refuse bail. While the seriousness of the offence may provide an incentive to abscond bail, it was only one of several other factors to be considered in determining whether the person is flight risk. Further, based on the reasoning of Hanprashad-Charles J in **Malcolm Maduro v The Commissioner of Police**,² it was not enough to say that the person is from another jurisdiction. The test is whether the person will appear for the trial. Counsel submitted that there was nothing in the Affidavit opposing bail that addressed that issue. Moreover, the Court in the **Maduro**³ case indicated that the Applicant should not have to prove anything. The burden of proof is on the prosecution to prove that the Applicant is a flight risk and the Court should not be a court of speculation⁴. He urged the Court to admit the Applicant to bail with the imposition of strict conditions which the Court may consider appropriate including depositing cash.
- [8] The Learned Director of Public Prosecutions vigorously objected to the grant of bail. She submitted that the Applicant was not a national and had no real connection with the jurisdiction. Accordingly, she contended that he posed a serious flight risk and even if he was made to surrender his travel documents this would not be enough to ensure that he would not abscond while on bail. She argued that the Applicant's willingness to deposit cash as a condition of bail indicated that he was a person of some means and therefore had the ability to finance his flight from the jurisdiction by any means. Learned Director of Public Prosecutions submitted that, if, despite her objections, the Court was still minded to grant bail, then as part of the conditions the Court should set a very high cash deposit condition.

¹ Claim No. AXA HCR 2006/0089 [unreported] Judgment of George-Creque J. delivered on 15 January 2007.

² Claim No BVIHCV2006/0262 [unreported].

³ *Ibid.*

⁴ *Ibid* paragraph 30.

Principles for granting bail

[9] There is no specific legislation that addresses the right to bail in the Federation⁵. Therefore, in my opinion, both the **Brooks**⁶ decision and the **Maduro**⁷ decision are very instructive in enunciating the general principles to guide the Court in this regard. The assessment by the Court of an application for bail is also to be framed by a consideration of the constitutional principle that enshrines and protects the right to liberty. Section 5(1)(f) of the Federation of St Christopher and Nevis Constitutional Order 1983 provides in part:

5.- (1) A person shall not be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say-

- a)...*
- b)...*
- c)...*
- d)...*
- e)...*
- f) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under any law;*

[10] Sections 5(4) further provides:

- (4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit a criminal offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a court* (emphasis added).

[11] The Constitutional provisions to secure protection of law are found at Section 10 and the doctrine of presumption of innocence has been specifically preserved at Section 10(2)(a). The Section states as follows:

- (2) Every person who is charged with a criminal offence-*

⁵ The Bail Act, 2012, which was assented to on 18th May 2012 is not yet in force.

⁶ See *supra* note 1.

⁷ See *supra* note 2.

- a) *shall be presumed to be innocent until he is proved or has pleaded guilty...*

[12] The Applicant is a national of Denmark currently residing within the Federation. I am of the opinion that notwithstanding that he is not a citizen of the Federation, the Federation of St Christopher and Nevis Constitutional Order 1983⁸ and in particular sections 5(1), 5(4) and 10 are drawn in the most inclusive of terms respectively referring to “a person” and “any person”. This specific inclusiveness is grounded by section 3 which provides:

3.- *Whereas every person in Saint Christopher and Nevis is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, birth, political opinions, colors, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-*

- a) *life, liberty, security of the person, equality before the law and the protection of the law...(emphasis added).*

[13] In the case of **Čonka v. Belgium**⁹, the European Court of Human Rights, was of the opinion that certain human rights protections (enshrined in many constitution), extend to non-nationals. While the issue in **Čonka** related to deportation of non-nationals, the court was of the view that even though Applicants were non-nationals, they were capable of invoking the jurisdiction of the court in enforcing those rights. While I am not bound to follow this decision, I see no reason why principle would not be applicable in the instant case.

[14] Accordingly, I am of the view that notwithstanding the Applicant's place of origin and birth being outside the Federation, the Constitution affords him the protections identified above. The assessment of the application must therefore proceed

⁸ Saint Christopher and Nevis Constitution Order, 1983 [SI 1983 NO.881]

⁹Application no. 51564/99), European Court of Human Rights

guided by the relevant sections of the Constitution identified hereinbefore and the principles laid down in *Brooks*¹⁰ and *Maduro*¹¹.

[15] In considering these principles and balancing them against the public good and the presumption of innocence, the Court has to assess whether granting bail in these circumstances would be an unacceptable risk. Such a determination is made where the court is satisfied that there is an unacceptable risk either that (a) the accused person, if released on bail would fail to surrender himself into custody in order to answer his/her bail or (b) he would commit an offence while on bail. It must be noted however that the burden of establishing either such risk lies on the Respondents.

[16] In the Caymanian case of *R. v Whorms and R. V Clarke*¹² the court considered who had the evidential burden on whether or not to grant bail. Although in that particular case the court was considering the application in light of the statutory provision in relation to bail, it provides some guidance with respect to this issue. There, Smellie, CJ after referring to the Convention for the Protection of Human Rights and Fundamental Freedoms and how it affects domestic law of the Cayman Islands went on to say:

"The burden may not, therefore, be reversed, by placing it upon a defendant, without infringing that principle and the presumption of innocence itself. If a person is presumed innocent until proven guilty, he cannot be required to prove that there should be no infringement upon his liberty, while his guilt is yet to be established."

[17] Further in *Hildebrandt v. DPP [2006] VSC 198*, King J at paragraph 12 reinforced the central considerations for the court thusly:

¹⁰*Su pra*, note 1 at paragraphs 12, 14, 17-19

¹¹*Su pra*, note 2, see paragraphs 13, 17, and 18 of that judgment.

¹²[2008] CILR 188

"The issue becomes one really of risk management – can the Court impose conditions sufficient to ensure his attendance at court and ensure that he does not commit further offences, or must he remain incarcerated to ensure those matters?"

[18] Guided by these principles, I now turn to consider the case at bar.

Application of the principles

[19] Rape is a very serious offence. It carries a heavy penalty. It is arguable that the severity of the penalty make it more likely than not that an accused person will want to abscond. However, it is a bailable offence and there was not much by way of evidence available to the Court to assess the strength of the case against the Applicant.

[20] The Prosecution intimated that the Applicant and the virtual complainant may live in close proximity and that would expose the virtual complainant to being threatened by the Applicant or otherwise obstruct the course of justice. There was no evidence presented to support this contention. It was stated that the Applicant and the virtual complainant live 10 minutes apart by car.

[21] The Police Certificate from Denmark and Report from the Florida Department of Law Enforcement which were exhibited in Court both showed that the Applicant has no criminal involvement or infractions. No evidence was presented by the Respondents to contradict this. There was therefore no evidence that the Applicant would likely engage in further criminal activities if granted bail.

[22] Again, no evidence was adduced to show or even suggest that the continued incarceration of the Applicant was necessary for the preservation of public order or to protect the Applicant.

[23] The only other matter for the Court to consider is whether the Applicant, being Danish citizen and by virtue of that, is such a likely flight risk as to be denied bail.

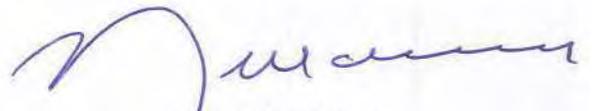
[24] It is true that in considering the factors for granting bail, the Court should have regard to what has often been termed "community ties". Blackstone's Criminal Practice 2005 defines these at D5.12 at page 1212 as encompassing "*matters such as how long the accused has lived at this present address, whether he is married or single, in employment or not, and whether he is buying or renting his house or merely 'squatting'. An accused on 'no fixed abode' or living in short-term accommodation is not automatically debarred from bail, but the ease with which he could disappear to another address is a factor to be considered.*"

[25] Ultimately it remains with the Respondents to satisfy the Court that bail ought not to be granted. The Respondents have not done so. Other than the allegation of flight risk, there have been no other substantive arguments to convince the Court that the Applicant ought to be deprived of his personal liberty. Indeed, not much has been presented to this Court in the way of evidence in relation to the charge against the Applicant to convince the Court that the interest of justice or the public good would be best served by the refusal of bail.

[26] Having considered the principles enunciated above, and in particular, the presumption of innocence coupled with the lack of a criminal record or evidence of poor character of the Applicant, I am of the view that the balance lies in favour of the grant of bail on the conditions which the Court considered sufficient. Said conditions would minimize the risks of the Applicant absconding. I accordingly made the following Orders on September 20th, 2012:

- (1) That the Applicant herein be admitted to bail.
- (2) That bail be granted in the sum of \$500,000.00 with 2 sureties in the sum of \$ 125,000.00 each and a cash deposit of \$ 250,000.00.
- (3) That the Applicant immediately surrender his passport and all other travel documents to the Registrar of the High Court pending the outcome of this matter.

- (4) That the Applicant refrain from going within 100 feet of the virtual complainant and from making any contact with the virtual complainant or the witnesses in this matter whether by himself or through the actions of his servants and/or agents.
- (5) The Applicant shall report to the Cotton Ground Police Station once daily between the hours of 7:00am and 5:00pm.
- (6) The Applicant is restricted by a curfew in which he is to be at his place of residence by 6:00pm every night and forbidden to leave until 6:00am the next day.
- (7) Any breach of the terms hereinbefore mentioned will result in the immediate revocation of bail.



Yvette A. Wallace
High Court Judge (Ag)