IN THE EASTERN CA.RIBBEAN SUPREME COURT
SAINT CHRISTOPHER CIRCUIT

IN THE HIGH COURT OF JUSTICE
A.D. 2013

CLAIM NO. SKBHCV2013/0239

BETWEEN:

ITESHA HUGGINS

Applicant

AND

[1] THE COMMISSIONER OF POLICE
[2] THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondents

Appearances
Ms Natasha Grey for the Applicant
Ms Greatess Gordon for the Respondents

2013: September 10; 28;
October 21
November 14 Re Issued

Application for Bail – The Bail Act No. 18 of 2012 St Kitts and Nevis – Principles applicable to the grant of bail – The statutory test for the grant of bail in certain cases - Presumption of bail applicable in certain cases - Approach to be taken by the Magistrate on an application for bail – Reasons for the grant or refusal of bail to be provided by the court.

The applicant in this case, a nursing mother of an infant, was arrested by the police of charges of Larceny and taken before the magistrate where, on objections by the prosecution, bail was refused. There was no evidence that the magistrate had provided reasons for the refusal of bail, and by the time the application was heard by the High Court, the applicant had already been in custody for over 14 days. Before the High Court, bail was objected to on the grounds that the applicant, having had two previous convictions which was part of one transaction, was likely to commit further offences while on bail, and further, having regard to evidence that she has been difficult to locate after the report was made to the police, she should be considered a flight risk.

Held, *granting bail to the applicant subject to conditions considered sufficient to ensure her attendance at trial:*

(1) The test for refusing bail to an applicant in a case where the offence is punishable with a term of imprisonment, and where the matter does not fall in the schedule to the Bail Act, is that there must be substantial grounds for believing that one of the statutory exceptions to bail is applicable.

(2) The Bail Act 2012 must be interpreted and applied so as to be consistent with provisions of sections 5 and 10 of the Constitution of St Kitts and Nevis relating to the presumption of innocence, and the presumptive right to be granted bail in cases such as the present. Accordingly, if the grant of bail is to be denied on the grounds that the defendant will commit other offences of bail, or will otherwise seek to pervert the course of justice, the court should approach the question with greater stringency than if the question was simply one whether, if granted bail he would turn up for his trial.

(3) In this case, the fact that an applicant had two previous convictions for similar offences flowing from one transaction was not a substantial ground to believe that she would commit other offences while on bail. Further, the fact that she could not be located by the police, after the offence had been reported, was not sufficient to ground any belief in the circumstances of this case, that she was a flight risk.

JUDGMENT

[1] RAMDHANI J (AG.): On the 10th September 2013, I heard this application for bail that was filed on the 4th September 2013. I granted bail to the applicant subject to certain conditions, and to be taken before the magistrate. I informed both parties that I would be providing my reasons in writing. These are my reasons.

[2] This was an applicant who was charged with two counts of Stealing. By the time the application came before the court, this applicant had already spent 14 days in prison, having been denied bail by the magistrate on the 27th August, 2013. Having regard to the fundamental right to liberty, and the presumption of innocence, both guaranteed by the constitution, the court became concerned in the manner in which the application may have been dealt with by the magistrate. This concern together with the fact that St Kitts and Nevis is now governed by a new Bail Act has persuaded me to set out those principles which the court consider to be applicable to the grant of bail in this jurisdiction when persons are

brought before the Magistrate's Courts charged with offenses punishable with imprisonment, as well as to add a few words regarding the approach which should be adopted by the magistrate in like cases for bail.[1]

The Law Relating to Bail in St Kitts and Nevis

[3] A useful starting point is section 10 of the St. Kitts and Nevis Constitution, the relevant portion of which provides that:

> "(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent an impartial court established by law.
> (2) Every person who is charged with a criminal offence –
> (a) shall be presumed to be innocent until he is proven guilty or has pleaded guilty;
> ...."

[4] Regard should also be had to section 5 of the Constitution, which provides protection for the right of personal liberty. It states *inter alia* that:

> (3) Any person who is arrested or detained-
> (a) ….
> (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under any law and who is not released, shall be brought before a court without undue delay and in any case not later than seventy two hours after his arrest or detention.
> (4) Where any person is brought before a court in execution of the order of the 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 an order of the court.
> (5) If any person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial, and such conditions may include bail so long as it is not excessive.

[1] I have noted the judgment of Wallace J in Jester Qvist v The Commissioner of Police and the Superintendent of Prisons NEVHCV2012/0136

[5] The combined effect of section 10 and section 5(4) of the St Kitts and Nevis Constitution is that everyone who is charged with a criminal offence is to be presumed innocent and should be tried within a reasonable time, and is to be released pending his trial unless the court orders otherwise. The constitutional intent of Section 5(4) is to prevent arbitrary detention. The European Court of Human Rights interpreting the equivalent to section 5, namely Article 5 of the *Human Rights Act 1998* have often emphasized the:

> "…fundamental importance of guarantees contained in Article 5 for securing the rights of individuals in a democracy to be free from arbitrary detention at the hands of the authorities… In that context it has been repeatedly stressed that any deprivation of liberty must not only have been effected in conformity with substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrary detention."[2]

[6] The constitution does not set out those principles upon which the court is to act in the refusal of bail. Accordingly the court is entitled to draw upon the common law or any relevant statutory provision. If the fundamental rights are to be given effect, whatever principles the courts should apply should be sufficiently clear and precise so as to avoid risks of arbitrariness[3], otherwise different courts could approach these issues in a less than judicial manner,[4] leading possibly to arbitrariness.

[7] Before the 18th of May 2012, bail in this jurisdiction was governed generally by a number of provisions found in separate pieces of legislation. Among these are the provisions to be found in Part XI of the Magistrate's Code of Procedure Act, which contain some general rules as to the power of the magistrate to grant bail to persons on the entering into recognizance with or without sureties. There is also section 17 of the Juvenile Act Cap. 4:15, which guides the magistrate in the grant of bail to juveniles. There are also sections 92 and 93 of the Criminal Procedure Act, Cap. 4:06, which speak to the power of both the Magistrate's Court and the High Court to grant bail generally on recognizance's with or without sureties.

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[2] Chakiki v Turkey App. No 23657/94, 8 July 1999, para. 104.
[3] Amuur v France (1996) Application No. 19776/92 del. 25 June 1996
[4] AG of St Lucia v Lorne D.C. Theophilus C.A. No. 13 of 2005; see also Hurnan's Case.

[8] Today in this jurisdiction, the grant or refusal of bail is primarily governed by a new Bail Act, which became law on the 18th of May 2012. The Bail Act 2012, by section 21(1) provides that:

> "Where there is a conflict, relating to bail, between the provisions of this Act and any other Act, the provisions of this Act shall prevail."

[9] Except for the provisions of the Juvenile Act, none of the other pieces of legislation prior to the new Act in 2012 has detailed any of the applicable principles relating to the grant of bail. In practice the English Common Law Principles relating to bail has always been applied in St. Kitts and Nevis. In fact it would appear that this jurisdiction courts were following only select practices relating to bail, and that there was likely to have been inconsistency in the approach of the courts in treating with bail applications. Parliament saw it fit to enact this new Act to give clarity to this area of the law. The questions are: "What did Parliament do to the applicable principles? Did it revert to the old common law principles? Did it give legislative force to present day English Practice?"

[10] An examination of the common law, some of the modern bail laws not only of England but also other jurisdictions such as Mauritius, and comparing it with the new Bail Act in St. Kitts and Nevis, reveal that the new Act is in fact a reforming law. Not only has it sought to codify the essence of both the common law and aspects of present day law in England and other jurisdictions, but it has also sought to cater for the distinct individuality of Caribbean jurisprudence. I will now, very briefly, trace the journey of this new law.

Principles relating to Bail at Common Law

[11] Early in the development of the common law, there was recognized a power to grant bail to persons charged with criminal offences. Even when it was accepted that inferior courts could not grant bail for capital offences, the High Court insisted on an inherent power to grant bail in these cases. As Lord Russel CJ of the English Court of Appeal stated in *R v Spilsbury*:

> The law relating to this subject is well stated in 1 Chitty's Criminal Law (2nd Edn) page 97 as follows: "The Court of King Bench, or any judge thereof in vacation, not being restrained or affected by the statute 3 Edward 1 c. 15(i) in the plenitude of that power which they enjoy at common law, may in their discretion, admit persons to bail in all cases whatsoever, though committed by the justices of the peace or others, for crimes in which inferior jurisdictions would not venture to interfere, and the only exception to their discretionary authority is, where the commitment is for contempt or in execution. Thus they may bail for high treason, murder, manslaughter, forgery, rapes, horse stealing, libels and for felonies and offences whatsoever."

This power of the High Court to grant bail in capital offenses has been principle recognised in this region. (*See **Thelston Brooks v The Attorney General and the Commissioner of Police** No 89 of 2006 Anguilla unreported; see also **Knody Samuel v The DPP** Suit No. ANUHCV 2003/0083 (Antigua and Barbuda) unreported*).

[12] Under the English Common Law, the generally accepted principle was that the object of bail was to ensure that the defendant appeared for his trial. This recognized the presumption of innocence, and the fact that bail should not be withheld as a means of punishing an accused person. Note ***Krishendath Sinanan, Basdeo Sinanan and Others v The State***[5]:

> "A person charged with a criminal offence is presumed to be innocent. It follows that, as far as possible, his liberty should not be unduly curtailed and, all things being equal, he is entitled to bail. It is not a vehicle of punishment. It is simply the means to secure the attendance of the accused at his trial: see R v Rose (1898) 67 LJQB 289"

[13] This principle of the English Common Law, however, underwent some changes beginning in the mid 19th century with the case of ***R v Phillips***[6]. This case involved a defendant who had a long record of larceny and housebreaking. Atkinson J stated that the Court:

> "... feels very strongly that the applicant ought not to have been released on bail . In cases of felony, bail is discretionary, and the matters which ought to be taken into consideration include the nature of the accusation,

[5] 44 WIR 359
[6] [1947] 32 Cr App R 47

> the nature of the evidence in support of the accusation, and the severity of the punishment which conviction will entail. Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail; but some are, and housebreaking particularly is a crime which will very probably be repeated if a prisoner is released on bail , especially in the case of a man who has a record for housebreaking such as the applicant had ... to turn such a man loose on society until he had received his punishment for an undoubted offence, an offence which was not in dispute, was, in the view of the court, a very inadvisable step. They wish magistrates who release on bail young housebreakers, such as this applicant, to know that in nineteen cases out of twenty it is a mistake."

[14] Whilst the requirement to ensure that the defendant attended his trial, the court was now prepared to give due regard to other matters such as the public interest, and the administration of justice. In *R. v. Pegg*[7], the court stated obiter that the justices should not grant bail in cases where it was not suggested that the prisoner has any answer to the charge and where the prisoner had a very bad record.

[15] In *R v Wharton*[8], the appellant had committed robbery with violence whist out on bail for another offence. The court stated that it had said time and time again that unless the justices felt real doubt about the strength of the case against the defendant, men with bad records should not get bail.

[16] In *Gentry*[155] an appeal against sentence for garage breaking and stealing was refused. Lord Goddard C.J. said that the court had said on many occasions that it was inadvisable to grant bail to men with long criminal records unless there was very real doubt as to the man's guilt.

Statutory Changes to the Bail Laws in England

[17] These decisions, and the underlying bail problem that they were treated with, must have, in some direct or indirect way, influenced the policy makers not only in England, but also in a number of other jurisdictions to enact legislation to treat with the issue of bail. It had become obvious that there was need to clarify the law in

[7] 1955 Crim LR 308
[8] 1955 Crim LR 565

this area. England passed the Bail Act 1976, which was accepted and clarified that bail could be refused for more than simply securing the attendance of the defendant at his trial. The English Bail Act 1976 decreed that bail could also be refused if there were substantial grounds to believe *inter alia* that the defendant might commit further offences whilst out on bail or that he is likely to interfere with witnesses in his case.

[18] Mauritius has been another jurisdiction to legislate on this issue. After a much criticized 1986 Act, that jurisdiction passed a new Bail Act in 1996. The 1996 Bail Act in Mauritius can, in some senses, be considered as bearing strong similarities to the English Bail Act of 1976. Not only does it attempt to give due regard to ensuring that the defendant turns up for his trial, but also allows the refusal of bail to protect those competing interests of the society at large. The Privy Council in *Hurnam*[9] captured the essence of the legislation when they stated:

> "The interest of the individual is of course to remain at liberty, unless or until he is convicted of a crime sufficiently serious to justify depriving him of his liberty. Any loss of liberty before that time, particularly if he is acquitted or never tried, will inevitably prejudice him and, in many cases, his livelihood and his family. But the community has a countervailing interest, in seeking to ensure that the course of justice is not thwarted by the flight of the suspect or defendant or perverted by his interference with witnesses or evidence, and that he does not take advantage of the inevitable delay before trial to commit further offences.

[19] Prior to the new Bail Act 2012, St Kitts and Nevis drew upon the principles of the common law and would have been caught up in that debate as to whether bail should be refused simply to ensure that the defendant turned up for his trial or whether a court was entitled to also refuse bail on other grounds as the English Judges were doing without any statutory basis prior to their Bail Act of 1976. No doubt, relying on the approach of the courts in other jurisdictions to guide the St. Kitts and Nevis' courts could have been grounded in this jurisdiction's unique development of its own common law. But this type of reliance may have, in fact

[9] Devendranath Hurnam v The State [2005] UKPC 49

resulted in the inconsistent approaches adverted to earlier, where courts were selecting which modern day principles they would adhere to in any given case.

The St. Kitts and Nevis Bail Act No. 18 of 2012

[20] That debate is of course now academic for this jurisdiction. An examination of the St Kitts and Nevis Bail Act 2012 reveals that the new Act also has gone further than the common law. The law bears certain material similarities with the English Bail Act 1976 and the Mauritius Bail Act 1996. A significant distinction between our new law and the English 1976 Act is the fact that in England no-one can be released on bail on their own recognizance, whilst the Bail Act 2012 ensures that in St. Kitts and Nevis this is still possible, clearly recognizing the nature of our societies.

[21] This new law reforms the law in this jurisdiction. Apart from formalizing the rules relating to the exercise of the discretion to grant bail, the new Act has now made it mandatory that magistrates who refuse bail must provide a copy of the written reasons for the refusal of bail, to the defendant. The new Act clarifies that both the accused and the prosecution has a right to make an application to the High Court in the event that bail is refused or granted as the case may be, by the magistrate. Both the accused and the prosecution have the right to appeal the grant or the refusal of bail to the Court of Appeal.

[22] The new Act also creates new offences of absconding and breaching bail conditions, each of which can now be charged and prosecuted separately from the original substantive offence.

[23] What the Act has retained, and perhaps assisted in clarifying is that there is a presumption of bail. Every person detained or arrested on suspicion of any crime is, by virtue of the section 5(3) of the Constitution of St. Kitts and Nevis entitled to be released, unless the court withholds bail in accordance with the Bail Act 2012, and those other relevant bail provisions, which continue to apply. Having regard to the similarities between the English and Mauritius Bail Act and the new Act in St.

Kitts and Nevis, and the approach of the Judicial Committee in Hurnam's case, the jurisprudence emanating from the European Court of Human Rights may provide useful guidance for the exercise of the court's power under the new Act. Thus, is appropriate to note that those courts have always made it clear that:

> "Whether it is reasonable for an accused to remain in detention must be assessed in each case according to its special features. Continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention…"[10]

[24] It is for the prosecution to establish on a balance of probabilities that one or more of the legitimate objections to bail exist. Having regard to the fact that this determination involves the liberty of the subject, the court accepts the reasoning in *Thelston Brooks*[11], that the court should look for greater strictness in applying this standard of proof.

[25] In the exercise of these powers, a court, for the purposes of this case, must be satisfied on relevant admissible evidence, that there are 'substantial grounds for believing' that one of the events described in Section 4 will occur. Where the application is being made to the High Court after the Magistrate's Court would have found as a fact there are substantial grounds for believing one of the events will happen, the High Court is allowed to revisit those finding of facts which constitute those 'substantial grounds' for any belief that the court may hold.

[26] The St. Kitts and Nevis Bail Act 2012 makes it clear that bail can only be denied in certain circumstances. Section 4 of the Act sets out, the 'circumstances in which bail may be denied' to a person charged with an offense which is punishable by imprisonment. The section states, *inter alia* that: "…it shall be within the discretion of the court to deny bail to the defendant in the following circumstances

(a) where the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail would

[10] Kevin O'Dowd v The United Kingdom - 7390/07 [2010] ECHR 1324 (21 September 2010)
[11] No 89 of 2006 Anguilla unreported

(i) fail to surrender to custody;
(ii) commit an offence while on bail; or
(iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;

(b) where the court is satisfied that the defendant should be kept in custody for his own protection or where he is a child or young person, for his own welfare;
(c) where he is in custody in pursuance to the sentence of a Court or any authority acting under the Saint Christopher and Nevis Defence Force Act Cap. 19:14';
(d) where the Court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decision required under this section for want of time since the institution of proceedings against him;
(e) where, having been released on bail in or in connection with the proceedings for the offence, he is arrested in pursuance of section 12;
(f) where he is charged with an offence alleged to have been committed while he was released on bail; or
(g) where his case is adjourned for inquiries or a report and it appears to the court that it would be impracticable to complete the inquiries or make the report with keeping him in custody."

[27] As might be the case in a majority of applications, the court, in this case has been called upon to exercise its discretion under section 4 subsection (2)(a), and as such the Parliament has directed by section 4 subsection (3) that the court may, in exercising this discretion, consider the following, namely:

"(a) the nature and seriousness of the offence or default and probable method of dealing with the defendant for it;
(b) the character, antecedents, associations and social ties of the defendant;
(c) the defendant's record with respect the fulfillment of his obligations under previous grants of bail in criminal proceedings;
(d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having failed to surrender to custody; and
(e) any other factors which appears to be relevant".

[28] A court should approach the exercise of its discretion under the new Act, in a manner which gives due recognition to the presumption of innocence and the protection afforded by section 5 of the Constitution. Thus, for instance, if the only issue arising on a decision whether to refuse bail is the question whether the defendant will turn up for his trial, and the imposition of conditions on the grant of

bail would be sufficient to overcome that risk, then the refusal of bail would be unreasonable and arbitrary, and accordingly contrary to the principles of the constitution.[12]

[29] Further, if the presumption of innocence is to mean anything, and the need to detain someone who is reasonably suspected as having committed an offence can be justified on constitutional grounds, then care has to be taken when a person's liberty is to be taken away on the basis that it is believed that he might either pervert the course of justice or commit offences whilst on bail. Any power to detain someone on the basis of this type of anticipatory conduct must be exercised with greater care than in cases where pre trial detention is simply being used to ensure that the person turns up for his trial. In other words this court would suggest that if bail is to be refused on grounds that the person is likely to commit offences on bail or otherwise perverse the course of justice, the court should examine the grounds with more stringency.

[30] The court will now outline some general guidelines in approaching those factors set out in Section 4(3) that are relevant to the question of bail in this case.

The Nature and Seriousness of the Offence and the Probable Method of Dealing with it.

[31] The 'nature' of the offence speaks to the offence as belonging to a particular class, whether it is a larceny, housebreaking, robbery or homicide. The 'seriousness' of the offence relate to the manner of the commission of the offence, as it is quite possible that the manner of commission may make a particular offence graver in its nature. Both of these have a correlation to both the risk of absconding and of reoffending.[13] Quite apart from the manner of commission, an offence may be considered to be prevalent, and so it might on principles of deterrence attract a greater custodial sentence – this might tempt the defendant to abscond. The

[12] Wemhoff v Germany A 7 (1968) 1EHRR 55 para. 15
[13] Ilijkov v Bulgaria (Application no 33977/96, 26 July 2001, (unreported)), para 80,

severity of the punishment might also tempt the defendant to attempt to interfere with witnesses or otherwise perverse the course of justice.

The Character, Antecedents, Associations and Social Ties of the Defendant

[32] These statutory factors are reflective to the common law guides that the court will consider in the decision to grant bail. Whether an accused of good character or not usually will have an effect on the bail hearing. What kind of person is this defendant? Has he failed to turn up for his trial on any previous occasion, or has he committed offences whilst previously on bail? These are all relevant matters.

[33] In considering the antecedents of the defendant, it would be wrong to jump to the conclusion that once a defendant has previous convictions it will mean that he is likely to commit further offences while on bail. The court considering bail must be able to draw that inference from the record of the defendant that there is a real risk that he will offend while on bail. "Previous convictions and other circumstances may be relevant, but the decision-maker must consider whether it may properly be inferred from them that there is a real risk that the defendant will commit an offence."[14]

[34] The criminal record of an accused person as noted is relevant in this process, but the court has to examine the list of convictions carefully. This is an exercise in predicting future conduct. This Court must note that it is possible that someone with a number of previous convictions might not commit any offences on bail, whilst someone who with no previous convictions might be the one to commit offences on bail. There is little information or data in this region of the number of persons who commit offences whilst on bail, and more so, what are the factors, which might have assisted in predicting this outcome. In fact, judges might only learn of those occasions when persons released on bail commit some particularly

[14] Clooth v Belgium A 225 (1991), 14 EHRR 717, see also Bail and the Human Rights Act 1998 Part III [2001] EWLC 269(3) (20 June 2001)

atrocious crime.[15] Notwithstanding, I am persuaded that if someone has a very bad record, it is to be weighed against him in the balance.

[35] It would also be important to consider whether he habitually consorts with known criminals. Apart from police intelligence, this information can sometimes be inferred from examining past convictions and finding that the defendant has been found jointly guilty with other known criminals.

[36] In considering his social or community ties, it is also important to consider matters such as whether the defendant has a fixed place of abode; how long he has been at this address? Whether he rents or sleeps at 'bunks' at some friend's home? A defendant with no 'fixed abode or living in short term accommodation is not automatically barred from bail, but the ease with which he could disappear to another address, is a factor to be considered.[16] Whether he is married or single, works at a permanent job, attends church or belongs to some reputable organization are also relevant under this head.

The Strength of the Evidence Against the Defendant

[37] In any case where the court is being called upon to consider the strength of the evidence against any defendant for the purposes of bail, there are a number of recommended factors that the court should consider, namely whether:

(i) there has been any admission by the defendant;

(ii) the instruments or objects of the crime (the firearm, stolen property, etc.) were found in the possession of the defendant;

(iii) there is any scientific evidence tying the defendant to the crime;

(iv) the defendant was caught in the commission of the offence;

(v) the witnesses are available, likely to be hostile, or are unreliable.

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[15] Note The Irish Law Commission Report on the Examination of the Law on Bail LRC 50 - 1995 which discusses various studies on predicting the possibility of offending on bail.

[16] Blackstone Criminal Practice 2005 at D5.12; see also Jesper Qvist v Commissioner of Police and Another footnote 1.

(vi) there has been the testing of any of the material evidence by way of cross examination (bail upon committal).

Other Relevant Factors

[38] Other relevant factors may include the defendant mental state. It will certainly include matters such as whether the defendant may have threatened witnesses. It is relevant also to consider whether the defendant lives near, or has a relationship with certain witnesses especially in cases involving domestic violence. So too, it is relevant to consider whether in addition to the proximity of the defendant, the witnesses are vulnerable, being children or old persons. It would also be a relevant factor if there is evidence that might suggest that the defendant is likely to source and destroy evidence or attempt to warn other suspects who are still at large.[17]

[39] An important matter for the court generally is how much time has elapsed since the defendant has been in custody. Having regard to the constitutional directive that every person charged with an offence should be afforded a trial within a reasonable time, it would be material for the court to consider how much time the defendant has spent in custody. Section 5(5) of the Constitution actually states that, "if the person charged with an offence is not tried within a reasonable time, then 'he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears' for his trial". This court also hold the view that apart from the issue of trial within a reasonable time, any of passage of time is relevant in determining whether there has been changed circumstances since bail was last denied.

The Statutory Test for the Refusal of Bail

[40] Today in St. Kitts and Nevis, on the issue of bail, the test is not simply whether the defendant will turn up for his trial, but also whether (relevant to this case) there

[17] Deelchand v DPP (2005) SCJ 215 where the judge drew upon "Bail in Criminal Proceedings" (1990), Neil Corre

are substantial grounds for believing that one or more of the statutory exceptions to bail apply, that if the defendant will either fail to surrender to custody, commit further offences whilst out on bail, interfere with witnesses or otherwise obstruct the course of justice.

[41] In applying this test, the court must ask itself some practical questions, what is likely to cause the defendant to either abscond, commit further offence whilst on bail, or otherwise perverse the course of justice? The factors must be carefully examined in the ground, and the further question must be asked: "Would the imposition of suitable conditions surmount these risks?" if the answer to this question is in the affirmative, then bail ought to be granted with the impositions of such suitable conditions.

[42] I will now turn to this application for bail.

The Application for Bail

[43] The applicant in this matter is a 28 year old female who was arrested by the police on the 27th August, 2013 on a warrant which accused her in the following terms:

> "….that you on the 8th August 2013 at Camps in the Parish of St George in the Magisterial District 'A' in the Federation of St. Christopher and Nevis being a person employed in the capacity of a cashier at Delta Petroleum (Nevis) Limited did steal the sum of Ten Thousand Nine Hundred and Ninety Six Dollars and Thirty Seven Cents Eastern Caribbean Currency ($10,996.37 XCD) the property of the said Delta Petroleum (Nevis) Limited. (sic) Contrary to section 18(a)(i)of the Larceny Act Chapter 4:16 of the Revised Edition 2002 of the Laws of the Federation."

[44] She was taken before the Magistrate of District 'A' on the 27th August 2013, and upon an application of bail being made on her behalf, she was refused bail. She states in her affidavit supporting her application, that the refusal of bail has caused hardship; she is a nursing mother of a one year and five months old baby, and is unable to nurse her child.

[45] Before me, essentially the respondents' objections to the grant of bail by this court were that if released on bail, the applicant would:

(1) fail to turn up for her trial, and

(2) commit further offences whilst on bail.

[46] In support of these two statutory exceptions to bail the ground objections before this court, the respondent relied on two affidavits, both sworn to by Jerry Watt Constable of Police No. 710 of the Royal St. Christopher and Nevis Police Force on the 10th day of September 2013, and his oral evidence taken on affirmation before the court. He deposes as follows:

> "4. On the 8th August, 2013 the Applicant was on duty at Delta 4pm – 12 midnight. At the end of her shift she failed to hand over the monies for respective shift that day. To date no monies has been handed over nor deposited in the bank in the company's account. The total outstanding monies amount to Ten Thousand Nine Hundred and Ninety Six Dollars and Thirty Seven Cents.
> *5.* The Applicant mentioned the fact that she has a 1 year and 5 month old baby boy who is still breastfeeding. I am informed and verily believe that provisions are made at the prison for nursing mothers to have their babies brought to and from prison to be fed.
> 6. Based firstly on the serious nature of the offence, coupled with the serious penalty; bail for the applicant should be denied. The applicant was previously convicted for the offense of Simple Larceny from her previous employer Ma Pau Restaurant and Casino. This shows that the Application has a propensity for stealing and should not be granted bail."

[47] In his affidavit, Watt also attempts to make out a case that the applicant was effectively evading arrest after the allegation was brought to the attention of the police. The applicant deposed in his first affidavit that:

> "3. On the 14th August, 2013 while investigating the allegation made by Mr Payne the manager of Delta Petroleum (Nevis) Limited, he was in conversation with the Applicant. During the conversation, the applicant asked to be excused and requested to use the bathroom. [he] looked outside and saw that she had left the premises without permission. She was scheduled to work at the time.
> 4. A warrant was then issued for her arrest but she could not be located. I visited here home several times and made several checks at various hours of the day and night but she was not found. I spoke to family members and asked for assistance in locating Ms Huggins but she (sic)

was not responsive. Several messages were sent to her through family members and friends but to no avail. I made several calls to her cell phone which was turned off. I then resorted to putting a bulletin on all radio stations, online media, and newspapers. She turned herself [in] after one week of evading all attempts to locate her".

[48] In his oral evidence, Watt explained that he discovered that she had left her infant child with the child's father and that she had left her vehicle with someone. He also stated that he had called for her several times a day for several days, but that her cell phone was 'turned off'.

The Magistrate's Reasons for Refusal of Bail

[49] In approaching this matter, I enquired of both counsel whether the magistrate had complied with Section 8(2) of the Bail Act 2012 which provides that the magistrate who refuses the grant of bail 'shall include a note of those reasons in its record for its decision and shall give a copy of that note to the police and to the accused person in relation to whom the decision is taken'. I was informed that the same objections were taken below before the magistrate but that there was 'no copy of any reasons' given to the applicant.

[50] I adjourned the matter to the afternoon on the 10th September 2013 and by 2 p.m. the magistrate had delivered to the registrar, a letter which set out what amounted to be his reasons for refusing bail. The letter certified that upon an application being made for bail, bail was objected to and denied, and reasons were set out. The relevant portion of that certificate reads as follows:

> "The prosecution objected to bail:
> The grounds of the objection:
> (1) The offense for which Ms Itesha Huggins is charged is a serious offence.
> (2) The Applicant was convicted on two counts of Larceny on the 26th March, 2013.
> (a) Fined $1,500.00 on three months or six months imprisonment.
> (b) Fined $2,500.00 to be paid in six (6) or six (6) months imprisonment.

(3) The Applicant was ordered to pay compensation of $5,400.00 and $8,400.00 respectively.
(4) The Applicant is likely to commit an offence while on bail.
The objection was upheld:

REASON
The time the applicant had to pay the fine has not elapsed before the Applicant committed a similar offence. Therefore the Court is of the view that if released the applicant would commit an offence while on bail, hence, bail is denied."

[51] The court commends the format used by the magistrate. On this certificate, the grounds of objections by the prosecution are clearly stated, and then the decision of the magistrate, followed by the 'reasons' for the decision. However, these reasons are inadequate. It appears that the reasons were, having regard to this Court's findings, a mere acceptance of the prosecution's objections. It further appears that the magistrate placed considerable emphasis on the fact that fines, which had been imposed for the two previous convictions (arising, it seems from one transaction) had not been fully paid before the applicant allegedly committed the present offence. I do not see the relevance of this to this application for bail. It is also unfortunate that the magistrate stated in his reasons that this applicant had 'committed' the offences with she was now charged. That is a matter still for the determination of the court, and the applicant is to be presumed innocent until proven guilty.

[52] Further, the magistrate, in upholding the objection, also appeared to be saying that he has refused bail because the offence is a serious one and having regard to the previous and recent convictions, the applicant was likely to commit an offence while on bail.

[53] It should be noted that the magistrate's reasons do not themselves bind this Court. In fact it is to be noted that section 8 actually states that the reasons are to be given to the defendant so that 'he may consider' whether he wishes to make an application to the High Court. The reasons therefore is a guide to the defendant for

him to consider whether there is merit, having regard to the reasons for refusal, for a further application to be made at this stage.

[54] Before leaving this aspect of the case, it is important to note that it is not essential that sworn evidence be presented to the magistrate. In many cases the court may find it proper to allow the prosecution to present, from the bar table, the grounds of objection and the second hand information upon which he is relying to ground his objections.[18] There might be cases in which the court should call for more formal evidence and such documents, which the prosecution might have adverted to. When sworn evidence is being presented, the defendant should be allowed to cross-examine. In all other cases the court should hear from the defendant on the issue of bail where it minded to refuse bail. If a bail application is to be vigorously objected to, and the strength of the evidence is going to be relied upon in a significant way, it would be proper that the prosecution provides disclosure of material, relevant to the bail issue to the defendant before hand.[19]

Whether this Applicant will fail to show up for her Trial

[55] As noted earlier, the respondents in this case argued that having regard to the evidence relating to the issue of 'flight risk', the court should believe that the statutory exception to bail created by section 4(2)(a)(i), was applicable; the court was being asked to believe that this applicant would fail to surrender to custody.

[56] Under this head, the nature and seriousness of the offence, the possible punishment that may follow a conviction, and the strength of the evidence against the applicant are matters that may be considered relevant.

[57] There is no doubt that this is a serious offence. Section 18(a) makes this offence a felony, which carries a maximum of seven years imprisonment with hard labour. There is no evidence before this court relating to the prevalence of this offence. For two counts of Larceny committed as a part of one transaction, in the past, she

[18] R v Guest ex parte Metropolitan Police Commissioner [1961] 3 All ER 1118
[19] R v DPP ex parte Lee [1999] 2 Cr App. R. 304 (CA)

was fined. It is possible that she may now face a custodial sentence. I placed this in the balance on this issue.

[58] I have also noted that the strength of the evidence against the applicant on the charge. In this case, in essence the applicant was employed at Delta Petroluem (Nevis) Limited, a 24 hours gas station, and after working the 4 pm to 12 midnight shift on the 8th August, 2013 allegedly failed to hand over the monies collected during that shift. There is no information before me to indicate how the applicant's failure is to be proved. But I note that it was not until the 14th August 2013 (six days after the alleged offence), that the manager apparently attempted to ask the applicant about the allegation. There is no indication if this is the first time the applicant was spoken to about her alleged failure to hand over the monies, or why the employer waited for six days before speaking with the applicant about her failure. This evidence by itself makes out a prima facie case against the applicant, but it is not in any sense compelling, having regard to the fact there was no indication how the alleged failure to hand over the monies is to be proved. There has been no admission by the applicant. I am aware that this court is not to embark on a mini trial, and I am equally aware that this matter is to go to trial where it is likely to be tested. Having said that, this Court has considered the strength of the evidence as one of those factors to be taken in ground.

[59] This court has also considered the character, antecedents, associations and social ties of the applicant. As regards to her associations and social ties, it has not been contradicted that at the date of her arrest she was also employed as a construction worker with one Jerome France, and that she also owns a shop located at Upper Monkey Hill, St. Peter's in St. Kitts. It is also not contradicted that she is a member of the Pentacostal Harvest Church and further she lived with her mother who depends on her. She is the mother of a 1 year and 5 months old baby. Watt in his evidence also indicates that the applicant has a circle of family members and friends. I note for that there is no evidence that the applicant habitually consorts with any known criminals.

[60] I have examined the specific evidence relating to the issue of 'flight risk'. I cannot give any weight to Watt's evidence relating to what transpired between the applicant and her employer when, as she was being tasked by her employer in relation to the allegations, she walked away from her workplace, and did not return. At this stage she had not been charged, and I cannot use this, in the circumstances of this case, as grounds for a belief that her 'walking away' meant that she would not turn up for her trial. There could be many reasons, apart from a desire to escape, why a person would choose to walk away from such a conversation.

[61] Watt's evidence regarding his attempts to locate this applicant prior to charging her is also not helpful. He describes his many efforts to locate the applicant. He states that he turned up at her home on a number of occasions but she was not there. It could be that she was avoiding him, but equally it could be that he simply turned up on the wrong occasions. Watt also states that he telephoned the applicant on her cell phone on a number of occasions and also asked family members to assist in locating her. He states that she failed to answer her phone, and speaks to the family members informing him that the applicant was 'not responding' to their calls. Again, this could mean that she was avoiding him, but equally, there could be innocent reasons for this.

[62] I have no doubt that evidence, which shows that someone has attempted to evade arrest, is relevant. But even if Watts was right in his belief, I believe that what is determinative of this issue in this case, is the fact that after the police bulletin was put out on Friday the 16th August, 2013, the applicant showed up at the police station with her lawyer on Tuesday the 20th, August, 2013, the weekend and day separating these events. I note that Watts stated that he discovered that the applicant had left her child with her father, and that she has left her car with someone else. There are strong reasons here for the view that this applicant may have been putting her affairs in order before turning herself in to the police. This is not a case where the police eventually located the applicant. I do not find that the

threshold has been met therefore I do not share the view that there are any substantial grounds to believe that this applicant was evading arrest, and more importantly that she would fail to turn up for her trial.

The Risk of Committing Offences if released on Bail

[63] The respondents have argued in this case that this applicant is likely to commit further offences if released on bail. The magistrate accepted that this is likely to be so. This Court is not satisfied that there are substantial grounds for such a belief.

[64] Under this head, there is authority to suggest that it is hardly ever relevant to consider as stand alone factors, the strength of the evidence, the nature and seriousness of the charges or even the likely punishment on conviction in deciding whether the applicant is likely to commit further offences if released. It would be illogical to do so.[20] But there is a school of thought that if the matter is a particular serious one which might merit a long custodial sentence, the defendant might be tempted to commit further offences on bail perhaps in a effort to prepare nest egg for himself or provide for his family during his likely incarceration.[21] Both of these theories make sense. However, in this case the court is unable to get to the point of believing that this applicant is likely to go out and commit other offences. Even if this last allegation were true, all that might reasonably be argued is that she seems inclined to steal from her employers, and not just generally from the public at large. There is no evidence therefore, of either of these risks. If the nature and seriousness of the offence and the likely consequences of this particular offense are to be relevant under this head, it would have to be on a consideration of the matter in the ground paying, in addition, particular attention to the past history and personality of the applicant.[22]

[20] Evans and Evans v AG [2011] JRC 199 (6 October 2011)
[21] R v Whitehouse sub non Postmaster-General v Whitehouse [1951] 51 Cr App. R. 8
[22] Shaw, Re Application for Judicial Review [2003] NIQB 68 (10 November 2003)

The Character of the Applicant

[65] The past history and the character of the applicant are crucial to the court's analysis under this head. In considering whether this applicant will reoffend whilst on bail, it is relevant to note her un-contradicted statement, that she owns a shop. It is also relevant to note that there is no evidence that she has broken bail conditions in the past.

[66] In this case, the respondent's evidence, outlined in some detail above, contends that the applicant had stolen from a past employer whilst in that employment. Submissions from crown counsel for the respondent was that this indicates that the applicant has the 'propensity', and therefore there is a real risk that she will commit further offences if released on bail. First, as noted before, it must be made clear the present allegation that she has stolen from her most recent employer whilst on the job has not been proven; she is to be presumed innocent on those charges. So what we have left is essentially one previous transgression against the law. It is unlikely that single previous conviction can 'show propensity unless it shows a tendency to unusual behaviour or where the particular circumstances demonstrate probative force in relation to the offence charged'.[23] This is not the case before the court. Simply stealing from an employer in the past is not to be regarded as unusual for this principle; there would have had to be some element attached to the stealing. Equally, there is nothing about the particular circumstances that demonstrate any probative force for the purpose of showing propensity. Thus, on a bail application, a court should generally look for more than one previous conviction which are relevant to showing the character of the applicant. A defendant who has had two previous convictions (not in the same transaction) involving dishonesty must be viewed differently from a defendant with two convictions, one for dishonesty and one for an unrelated offence such as common assault.

[23] Excerpt from the UK's Crown Prosecution's Policy Guidance on on the use of bad character. Note that this guidance relates to the prosecution of matters generally. This court considers this useful on bail applications. http://www.cps.gov.uk/legal

[67] There are no other factors in this case, that are relevant for consideration under this head. There is no evidence of mental instability. There is also no evidence of any threats of harm to herself or to others; in fact nothing else which could militate against the grant of bail.

Conclusion

[68] The test established by the Bail Act No. 18 of 2012 for the refusal of bail in case where the main exceptions to bail apply, is whether there is substantial grounds for believing that one or the other statutory exceptions to bail applies. It is not whether there is a likelihood, or reasonable grounds for believing that she will fail to surrender to custody or will be likely to commit further offences or otherwise obstruct the course of justice while on bail.

[69] In this case this Court finds that the respondents have failed to provide any substantial grounds for the court to believe that any of the statutory exceptions to bail created by section 4(2)(a) applies.

[70] In these circumstances, this Court directs that the magistrate do admit the applicant to bail in the sum of $25,000.00 with two sureties, $12,500.00 on each surety, and with the following conditions:

(i) The applicant is to surrender all her travel documents to the Magistrate's Court forthwith pending the disposal of the criminal trial;

(ii) The applicant is to report to the Basseterre Police Station every Monday, Wednesday and Friday between the hours of 7:00 a.m. and 7 p.m.;

(iii) The applicant is not to have any contact with or interfere with any witnesses involved in this matter either by herself or through any agent acting on her behalf or with her encouragement;

(iv) The applicant is to keep the peace and be on good behavior;

(v) Any breach of these conditions will result in immediate revocation of bail.

[71] There will be no order as to costs on this application.

Darshan Ramdhani
High Court Judge (Ag.)