IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)
ANGUILLA CIRCUIT
A.D. 2019

CLAIM NO. AXAHCV 2019/0018

BETWEEN:

GAVIN SCOTT HAPGOOD

Applicant

and

REGINA

Respondent

Appearances:

Mr. Thomas W. R. Astaphan, Q.C. instructed by Astaphan's Chambers of Counsel for the Applicant

Ms. Erica Edwards, Senior Crown Counsel, Attorney General's Chambers of Counsel for the Respondent

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2019: April 17;
July 12.

Bail application – CPR 58 – Review of decision of magistrate refusing bail – Manslaughter – American Citizen – Principles involved on grant of bail – Risk of absconding – CPR 11.6 (2) – Urgent applications – Whether the magistrate exercised his discretion to grant bail on proper legal principles – Approach to grant of bail – Anguilla Constitution Order, S.I. 1982 No. 334

JUDGMENT

[1] **INNOCENT, J (Ag.)**: This matter came on for hearing in the High Court on 17th April 2019 upon an oral application made pursuant to the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 (the 'CPR') Rule 58 and Rule 11.6 (2). The court agreed to hear the application orally and dispensed with the application being made in writing based on the representations made to the court by counsel on both sides. Mr. Astaphan, Q.C., urged the court that the application was an urgent one based on the fact that the applicant had previously been denied bail on

the same day and had been remanded to Her Majesty's Prison ('HMP') on even date. Mr. Astaphan, Q.C. also impressed upon the court that there was a strong likelihood, that both the Crown and defence had reasonable grounds for believing that the applicant, if remanded at HMP, would face personal harm and that there was a clear and present danger that such risk existed. It was also intimated to the court that the application could not be filed electronically due to a systemic failure being experienced with the e-litigation portal. Counsel Mr. Astaphan, Q.C. gave the undertaking to file the necessary papers electronically as soon as the technical issues had been resolved. The court is satisfied that this undertaking has been carried out.

[2] Ms. Erica Edwards, Senior Crown Counsel, who appeared for the Crown, indicated that the Crown had no objections to the grant of bail to the applicant. The court understood clearly the reasons for the Crown adopting this posture. Accordingly, bail was granted to the applicant with a promise to deliver written reasons subsequently. These are the reasons.

[3] The applicant was charged with the offence of manslaughter contrary to **section 192** of the **Criminal Code**, **R.S.A. c. C140**.[1] The charge arose in relation to an incident that occurred at a resort (the 'Resort') in Anguilla where the applicant, a citizen of the United States of America, was vacationing with his wife and minor children. The deceased was an employee of the Resort. The incident occurred in the applicant's hotel room. The substantive cause of death was stated to be positional asphyxiation. The applicant alleges that at the material time he was acting in self-defence.

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[1] **Manslaughter**
192. (1) Any person who, by any unlawful act or omission, causes the death of another person commits the offence of manslaughter.
(2) Any person who is convicted of manslaughter is liable to imprisonment for life.
(3) For the purposes of this section, an unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

Procedure

[4] **Rule 58.1 (1)** of the CPR deals with applications to the court to review a decision by a magistrate about bail. **Rule 58 (3)** provides that:

"58.3 (1) The court may confirm, modify or reverse the decision of the magistrate."

This clearly suggests that on the hearing of an application for the review of the decision of a magistrate denying bail operates as an appeal against the decision of a magistrate to the High Court. I think this is explicit in the language of **Rule 58.3 (1)**.

[5] The court wishes to consider the appropriate procedure to be followed on an application for the review of a decision by a magistrate about bail pursuant to **Rule 58** of the CPR.

[6] In the circumstances, the court is of the view that the application being in the nature of an appeal against the decision of the learned magistrate, is entitled to substitute its own findings for that of the magistrate who refused bail where he has failed to apply or had applied the relevant factors to be considered on an application for bail improperly. I am reminded that Anguilla has no Bail Act, unlike the Jamaican Bail Act which sets out the statutory procedure by which a person aggrieved by the refusal of a magistrate to grant bail may approach the High Court. There is no similar statutory provision in Anguilla. The Anguilla Magistrate's Code of Procedure Act (the 'Act') does not contain a similar provision setting out the procedure to be followed in such a case.

[7] **Section 67** of the Magistrate's Code of Procedure Act provides:

"67. (1) Where the offence with which the accused person is charged is an offence punishable with a fine or with imprisonment for any term not exceeding 2 years, the accused person is entitled to be admitted to bail as is hereinafter mentioned.

(2) Where an offence with which an accused person is charged is an offence, other than an offence mentioned in subsection (1) or (3), the Magistrate may in his discretion admit the accused to bail as hereinafter provided.

(3) The Magistrate shall not admit to bail any person charged with treason or murder.

(4) A Judge of the High Court may order the Magistrate to admit a person to bail in any case."

[8] It appears therefore that **section 67** of the Act merely grants a judge of the High Court the general power to grant bail where a magistrate has denied bail. Clearly, the section merely preserves the inherent jurisdiction of the High Court.

[9] The court is further fortified in this view by the provisions of **section 72** of the Act, which provides:

"72. In all cases of indictable offences or suspicion of indictable offences and in all cases of summary offences when an accused person has been committed for trial as hereinbefore provided by this Act or by any Act relating to the duties of Coroners, any Judge of the High Court may on application made to him for that purpose and on notice to the Attorney General or in his absence to the officer, if any, for the time being in charge of the Police Force in Anguilla, order the accused person to be admitted to bail on entering into recognizances with sufficient sureties before the Magistrate in such amount as the Judge directs and thereupon the Magistrate shall issue a warrant of deliverance and shall attach thereto a copy of the order directing the admission of the person to bail."

Again **section 72** of the Act simply confers power on the High Court to grant bail in certain circumstances. It does not deal with a situation where a person has been aggrieved by the decision of a magistrate to refuse bail.

[10] Therefore, it appears that sections 67 and 72 of the Act does not permit a judge of the High Court to exercise an appellate jurisdiction. The operation of sections 67 and 72 of the Act seems to invoke the inherent jurisdiction of the court and is distinguishable from the procedure set out pursuant to Rule 58. The court is fortified in this view by the judgment of the Supreme Court of Judicature of

Jamaica in the case of **Phillip Stephens v Director of Public Prosecutions**[2] where Sykes J. clearly distilled the principles involved when the High Court is called upon to exercise its appellate power and the correct approach to be adopted by the court on that occasion.

[11] Having arrived at the conclusion that the court is entitled to review the decision of the magistrate and treat such a review not as a rehearing of the actual application but rather to review the manner in which the learned magistrate arrived at his decision. That is whether he correctly applied the principles related to bail, and to apply the relevant and proper legal principles in determining whether the applicant ought to have been granted bail.

[12] It appears that when the applicant appeared before the magistrate there was no objection by the prosecution to the grant of bail. Having regard to the relevant issues to be considered in this decision it will be necessary to recite in full the learned magistrate's reasons for refusing bail. The magistrate's reasons for denying bail as appears from the magistrate's notes filed along with the application were as follows:-

> "Gavin Hapgood is charged with manslaughter contrary to section 192(1) of the Criminal Code of Anguilla. He was a visitor at the time. The incident allegedly occurred at Malliouhana Hotel. Learned QC, Mr. Astaphan, made an application for him to be granted a cash bond consistent with the Magistrate's court case of Commissioner of Police v. Scott Proctor but in a sum that this Court deemed appropriate to ensure the attendance of Mr. Hapgood to court. Learned QC, Mr. Astaphan, also submitted that he is instructed that Mr. Hapgood is determined to return to clear his name inter alia. Mr. Astaphan also submitted as the Prosecution is not objecting to bail suggested they have confidence Mr. Hapgood will return.
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> Inspector Millette for the Prosecution confirmed that the Prosecution is not objecting to bail.
>
> Section 67(2) of the Magistrate's Code of Procedure Act provides for the Magistrate to grant bail in his discretion for any offence other than treason or

[2] 2006 HCV 05020 (January 23, 2007) per Sykes J at paragraphs 27-39

murder. Therefore, the court has a discretion in this matter. While it is not unusual for the Prosecution not to object to bail for an accused person they are not required to give any reasons as if they were objecting.

In this case, like the Scott Proctor case, Mr. Hapgood is not a native and has no ties to Anguilla. However, the court must be satisfied that there is a good reason for bail to be granted and that the accused will return for his case. This Court has to balance the accused' interest against the public's interest and the interest of justice. The Court must ensure that "The community contravening interest is seeking to ensure that the course of justice is not thwarted by the flight of the suspect or the defendant…" **Thelston Brooks v. AG**, George-Creque J., quoting from Lord Bingham of Cornhill.

While the onus is on the Prosecution to adduce some evidence, and in this case they are not objecting to bail, the discretion must still be exercised responsibly. This is a serious offence and it is obvious that a person charged with a serious offence facing a severe penalty if convicted may well have a powerful incentive to abscond. Where there are reasonable grounds to infer that the grant of bail may lead to such a result, which cannot be effectively eliminated by the imposition of appropriate conditions, they will afford good grounds for refusing bail.

I find that Mr. Hapgood, not having ties to Anguilla, cannot provide suitable sureties and prima facie is a flight risk, the public interest and the interest of justice outweigh his interest and is a suitable case for the denial of bail. While I have considered Scott Proctor's case, it is not binding and the circumstances of the Scott Proctor's case were different from this case. Bail is denied and the defendant is remanded in custody."

[13] The issue that arises consideration is whether, in view of the representations made before the learned magistrate and considering his reasons for denying the applicant bail, he exercised the discretion that he had on relevant and proper legal principles related to the grant of bail in criminal proceedings.

[14] It appears, having regard to the foregoing discussion on the legal principles to be applied on an application for the grant of bail, which the learned magistrate failed to properly or adequately apply the principles regarding the grant or refusal of bail in criminal proceedings. Having arrived at this conclusion, the court must decide whether the applicant is entitled to bail based on the proper application of the principles regarding the discretionary grant of bail.

The presumption in favour of the grant of bail

[15] Unlike other jurisdictions in the Eastern Caribbean, Anguilla does not have a Bail Act, and accordingly, the principles to be applied upon an application for an offender's release on bail is not in statutory form.

[16] This lacuna was filled by the decision of **Thelston Brooks v The Attorney General and Anor**[3], incidentally a decision from the High Court of Anguilla. In that case Justice George-Creque, as she then was, set out the proper approach and the principles to be applied on the application for the grant of bail. Notwithstanding that the case of **Thelston Brooks** involved a juvenile who was on a charge of murder and, there were other special circumstances existing in that case, the relevant principles set out in that case in relation to the discretionary grant of bail are applicable to the present case.

[17] The European Convention on Human Rights has been extended to Anguilla, and, nearly all the provisions of the European Convention on Human Rights are mirrored in the Anguilla Constitution. Therefore, the prevailing jurisprudence and the approach of the European Court of Human Rights can be properly applied to this jurisdiction.

[18] **Section 3 (3)** of the **Anguilla Constitution Order 1982**, **S.I. 1982 No. 334** (the 'Constitution') includes a right to liberty. However, the right is a qualified right as set out in **Section 3** which provides that a person can be deprived of that liberty for the purpose of bringing the person before a court in the execution of the order of a court. **Section 3 (3)** of the Constitution reads:

"(3) Any person who is arrested or detained—

(a) for the purpose of bringing him before a court in execution of the order of a court; or

[3] AXA HCV 2006/0089 (January 15, 2007)

(b) upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of Anguilla,
and who is not released, shall be brought without delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence under the law of Anguilla is not tried within a reasonable time, then, without prejudice to any further proceedings which 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."

[19] The Court must therefore proceed on the basis that there is a presumption in favour of bail. This presumption arises from the constitutional guarantee not to be deprived of liberty save in the due execution of the law. Therefore, part of the constitutional safeguard is due process or more aptly described procedural fairness. In other words, a person who is lawfully in custody must be afforded an opportunity to make representations to a court on the question of why he ought not to be indefinitely detained. If it were otherwise, then the operation of the law as it relates to persons detained under the executive authority of the state would operate arbitrarily in relation to persons in lawful detention.

[20] Therefore, it is for the party seeking to persuade the court that bail should be refused to satisfy the court on the balance of probabilities of the justice of their case. The court in this instance has not been so persuaded. In fact, the respondent has given their consent to the grant of bail. In any event, that being the case, it is still necessary to distill the correct approach to the grant of bail. Notwithstanding the respondent's consent, the court must make a proper assessment on sound legal principles in deciding whether bail ought to be granted or refused. Ultimately, it is for the court to decide. One party's consent is merely a factor that the court should take into account in exercising its discretion.

[21] Notwithstanding that the applicant in the present case is not a citizen of Anguilla, he is entitled, like every other citizen of Anguilla, to the same gamut of rights and freedoms enshrined under the Constitution in the same way as any other citizen

once within the jurisdiction of Anguilla. Therefore, to deprive him of the right to bail purely on the basis that he is an American citizen without more reeks of unconstitutionality and operates disproportionately. The deprivation of the right to liberty ought not to operate as punishment in relation to him merely because of his nationality. Instead, the court must apply proper legal principles in each and every case to avoid the risk of the deprivation of liberty amounting to the breach of the rights of individuals enshrined under the Constitution.

The approach to the grant of bail

[22] In the case of **Devendranath Hurnam v The State**[4] the Privy Council dealt with the issues as they arose from the jurisdiction of Mauritius. The Mauritian Constitution contains identical rights and freedoms as in the Anguilla Constitution. Lord Bingham at paragraphs 2 to 3 of the judgment in that case said:

"1. The 1968 Constitution is, by virtue of section 2, the supreme law of Mauritius. Section 3, in Chapter II ("Protection of Fundamental Rights and Freedoms of the Individual"), provides (so far as relevant for present purposes):

> "It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms –
>
> > (a) the right of the individual to … liberty, security of the person and the protection of the law; ...
>
> and the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

2. Section 5, in the same chapter, is directed to protection of the right to personal liberty. So far as relevant for present purposes, it provides:

[4] [2005] UKPC 49

"(1) No person shall be deprived of his personal liberty save as may be authorised by law –

(d) for the purpose of bringing him before a court in execution of the order of a court;

(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence …

(3) Any person who is arrested or detained –

(a) for the purpose of bringing him before a court in execution of the order of a court;

(b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence; or

(c) upon reasonable suspicion of his being likely to commit breaches of the peace,

and who is not released, shall be afforded reasonable facilities to consult a legal representative of his own choice and shall be brought without undue delay before a court; and if any person arrested or detained as mentioned in paragraph (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 if any person arrested or detained as mentioned in paragraph (c) is not brought before a court within a reasonable time in order that the court may decide whether to order him to give security for his good behaviour, then, without prejudice to any further proceedings that may be brought against him, he shall be released unconditionally."

[23] At paragraph 15 of the judgment in **Hurnam** their Lordships distilled the principles to be applied on an application for the grant of bail in criminal proceedings. Their Lordships said:

"15. It is obvious that a person charged with a serious offence, facing a severe penalty if convicted, may well have a powerful incentive to abscond or interfere with witnesses likely to give evidence against him, and this risk will often be particularly great in drugs cases. Where there are reasonable grounds to infer that

the grant of bail may lead to such a result, which cannot be effectively eliminated by the imposition of appropriate conditions, they will afford good grounds for refusing bail. The Board cannot, however, accept the criticism made of the earlier decisions in *Labonne (JV)* and *Deelchand*. The judgment in *Rangasamy* does not adequately recognise the general right to liberty enshrined in section 5(3) of the Constitution and reflected in section 3 of the 1999 Act. It seeks to reinstate, in part at least, the rule deliberately discarded in the 1999 Act. It puts an onus on the detainee where it should be on the party seeking to deprive him of his liberty. It elides the general right to be released on bail and the right to be released if not brought to trial within a reasonable time, which are both important rights but distinct and different rights. The seriousness of the offence and the severity of the penalty likely to be imposed on conviction may well, as pointed out at the beginning of this paragraph, provide grounds for refusing bail, but they do not do so of themselves, without more: they are factors relevant to the judgment whether, in all the circumstances, it is necessary to deprive the applicant of his liberty. Whether or not that is the conclusion reached, clear and explicit reasons should be given."

[24] Firstly, as I have mentioned previously the onus should be on the party seeking to deprive a defendant of liberty to make out their case.

[25] Secondly, the seriousness of the offence and the severity of the penalty likely to be imposed on conviction will not of themselves provide sufficient grounds to refuse bail but it is a relevant element in the assessment of the risk of absconding and or the risk of reoffending.

[26] There are other recognised grounds for refusing bail, namely: the risk of a defendant absconding; the likelihood of the risk of the defendant interfering with the course of justice; the prevention of crime; the preservation of public order; and the necessity of detention to protect the defendant.

[27] The Court at this stage is not required to conduct a detailed assessment of the evidence.

[28] These principles were again reiterated by the Eastern Caribbean Supreme Court in the case of **Malcolm Maduro v The Commissioner of Police**[5] by Hariprashad-Charles J reiterated the principles set out in the case of **Hurnam**.

[29] When approaching the discretionary exercise as outlined by the Jamaican Court of Appeal in **Director of Public Prosecutions v Adams**[6] the court ought to consider a number of factors, including but not limited to, the nature and seriousness of the offence, the defendant's character and community ties, previous bail records, the strength of the evidence regarding the offence charged and of failing to surrender to bail, whether the defendant is a repeat offender, and other relevant factors which the court finds appropriate to consider.

[30] Although these considerations are usually couched in statutory terms, I am of the view that the same considerations would apply to Anguilla.

[31] The position is distilled in the authority of **Huey Gowdie v R**[7] a decision of the Jamaican Court of Appeal where at **paragraph 21** of the Judgment Brooks JA said:

> "[21] Bearing in mind those Constitutional and statutory foundations, the following principles may be of assistance to a court which is considering an application for the grant of bail. These principles may be distilled from the judgments in a number of cases including **Hurnam**, **Stephens**, and **Thelston Brooks v The Attorney General and Another** Claim No AXA HCV 2006/0089 (a decision of the Eastern Caribbean Supreme Court in the High Court of Justice in the territory of Anguilla (delivered on 15 January 2007)).
>
> 1. It is an international principle "that the right to personal liberty, although not absolute…is nonetheless a right which is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention…" (**Hurnam** – paragraph [16]).

[5] BVIHCV2006/0262 (April 18, 2007) at paragraphs [17] and [18]
[6] [2014] JMCA Crim 38
[7] [2012] JMCA Crim 56

2. The court should "begin with the high constitutional norm of liberty and therefore lean in favour of granting bail (i.e. restoring the constitutional norm)" (**Stephens** – paragraph [25]).

3. It should then consider the allegations against the accused. It should not "undertake an overelaborate dissection of the evidence" (**Hurnam** – paragraph [25]).

4. It should then "consider whether there are grounds for refusing bail" (**Stephens** – paragraph [25]). The grounds to be considered include:

"(i) the risk of the Defendant absconding bail,

(ii) the risk of the Defendant interfering with the course of justice,

(iii) preventing crime,

(iv) preserving public order, and

(v) the necessity of detention to protect the Defendant." (**Brooks** – paragraph [19])

In this context, the court may receive information which would not normally be receivable at a trial, including hearsay evidence. This information could concern previous convictions and unsavoury associations or practices of the accused person (see section 4 (2) of the Act). **In re Moles** [1981] Crim. L.R. 170 is authority for stating that the "strict rules of evidence were inherently inappropriate in a court concerned to decide whether there were substantial grounds for believing something, such as a court considering an application [for bail]".

Further guidance in this area may be gleaned from the judgment of Chilwell J in **Hubbard v Police** [1986] 2 NZLR 738. The learned judge said at page 739:

"There are two main tests involving factual questions which have to be considered by the Court in determining whether to grant or refuse bail. They are, first the probability or otherwise of the defendant answering to his bail and attending at his trial, and, secondly, the public interest.

So far as the first factor is concerned, the criteria to be considered include:

(i) The nature of the offence with which the person is charged, and whether it is a grave or less serious one of its kind.

(ii) The strength of the evidence; that is, the probability of conviction or otherwise.

(iii) The seriousness of the punishment to which the person is liable; and the severity of the punishment that is likely to be imposed.

(iv) The character and past conduct or behaviour of the defendant.

(v) Any other special matter that is relevant in the particular circumstances to the question of the likelihood of the accused appearing or not appearing.

Public interest criteria include:

(i) How speedy or how delayed is the trial of the defendant likely to be?
(ii) Whether there is a risk of the defendant tampering with witnesses.

(iii) Whether there is a risk that the defendant may re-offend while on bail.

(iv) The possibility of prejudice to the defence in the preparation of the defence.

(v) Any other special matter that is relevant in the particular circumstances to the public interest."

5. The court should then consider, as is required by section 4 (1) (a) of the Act, "whether the grounds for refusing bail are substantial" (**Stephens** – paragraph [25]).

6. Thereafter, if it finds that there are substantial grounds for refusing bail, the court would "consider whether imposing conditions can adequately manage the risks that may arise and how effective those conditions [would] be" (**Stephens** – paragraph [25])

7. If a Resident Magistrate hears and refuses an application for bail, or imposes conditions for the grant of bail, the Resident Magistrate must, if the accused person is not represented by counsel, inform the accused person of his right to appeal. The Resident Magistrate should also give reasons in writing for the decision. (Sections 8 and 9 of the Act)

8. An appeal to a judge of the Supreme Court is subject to the provisions of the CPR. The Director of Public Prosecutions, who is to be served with the notice of the appeal (pursuant to rule 58.2 (5), must be given adequate time in order to prepare a response. If sufficient notice has not been given, counsel appearing for the Director may wish to apply for an adjournment in order to obtain proper instructions in order to consider a response to the appeal.

9. All the material which was placed before the Resident Magistrate should be placed before the judge of the Supreme Court hearing the appeal."

[32] There needs to be substantial grounds for believing that one of the grounds for refusing bail is present. This is reinforced by the decision in **Gowdie** and also by the judgment of **Ramdhani J.** in the Eastern Caribbean Supreme Court (St. Kitts) in the matter of **Itesha Huggins v The Commissioner of Police and the Director of Public Prosecutions**[8] where at paragraph [25] His Lordship said:

"[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."

[33] There must be what has otherwise been described as 'an unacceptable risk' that the defendant would act out one of the grounds for refusing bail[9].

[34] The relevant legal test is also set out in **Archbold Criminal Pleading Evidence and Practice**[10] and also in the case of **R (on the application of Thompson) v Central Criminal Court**[11]**,** where **Collins J.** delivering the judgment of the court said:

"that the issue…. was not as to whether bail should be granted, but was whether it was necessary for the defendant to be in custody (custody being necessary where the court decides that, whatever conditions can reasonably be imposed, there are nonetheless substantial grounds for believing that the defendant would fail to surrender, etc.); and for the purpose of deciding whether custody was necessary, the severity of the sentence risked was a matter to be taken into account, but the risk of absconding on account of the severity of the potential sentence had to be assessed in the light of other relevant factors. As to the imposition of conditions, His Lordship said that the question of bail must be determined in the round,

[8] SKBHCV2013/0239 (October 21, 2013)
[9] Jesper Qvist v The Commissioner of Police and the Superintendent of Prisons NEVHCV2012/0136 (October 10, 2012) per Wallace J. at paragraphs [15] and [17]
[10] [2011] paragraphs 3-53
[11] [2006] A.C.D. 9

involving consideration of the question whether suitable conditions would make it unnecessary to remand in custody."

[35] It is also common ground that the magistrate must first be satisfied that there must be substantial grounds for believing that any of the identifiable factors which militate against the granting of bail are likely to occur.

[36] Therefore, the prosecution must demonstrate on a balance of probabilities that there is a risk that the applicant will abscond which cannot be cured by the imposition of conditions or that there is a risk that they are likely to commit further offences if admitted to bail.

[37] Having concluded that the learned magistrate erred in failing to apply the relevant legal test and approach to the grant of bail, based on the learned magistrate's reasons for denying bail, I now turn to consider whether on a proper application of the relevant principles this applicant is entitled to be granted bail.

Nature and seriousness of the offence

[38] There is no doubt that the offence of manslaughter is a very serious offence which carries a statutory sentence of life imprisonment. However, it is not every case of manslaughter that is the same. There are varying degrees of criminal culpability. As has been previously determined, this is not the overriding factor that needs to guide the court in carrying out the balancing exercise of the various factors highlighted in the existing case law.

Risk of absconding or failing to surrender

[39] During the course of the bail review hearing the court sought to illicit from both counsel the degree of cooperation in existence between the Government of the United States of America, the United Kingdom and Anguilla in criminal matters, in the event that the applicant should abscond or fail to surrender to custody in Anguilla. The court alerted counsel to the fact that once the applicant left Anguilla the court had no further jurisdiction over him. In other words, the courts of Anguilla

cannot exercise any extraterritorial jurisdiction to compel the applicant's attendance at court in Anguilla or to submit to the court's jurisdiction.

[40] Counsel for the respondent alluded to the fact that there was a British Consulate located in the United States, however, she was not aware of the level of cooperation in criminal matters between the two states and how far it extended to Anguilla.

[41] The court was reminded of the existence of the **Extradition Act, R.S.A. c. E95** (the 'Extradition Act') section 1 of which provides as follows:

> "1. All powers vested in and acts authorised or required to be done by a police magistrate or any justice of the peace in relation to the surrender of fugitive criminals in the United Kingdom under The Extradition Acts, 1870 to 1932 or any Act amending or substituted for those Acts, are hereby vested in, and may in Anguilla be exercised and done by the Magistrate or by the Governor in relation to the surrender of fugitive criminals under the said Acts."

[42] The footnote to this statutory provision cites **Statutory Instrument 1947 No. 1018**. I am satisfied that the arrangements for extradition between the United Kingdom and the United States are governed by the provisions of the Extradition Acts 1870, 1932 and 1989, including the treaties made thereunder, and are extended to Anguilla[12]. Counsel for the respondent gave the court the solemn assurance that in the event that the applicant were to abscond the respondent would utilise its best efforts to seek the intervention of the Secretary of State in securing the applicant's extradition, if necessary.

[43] The court also had the benefit of the testimony of the Consular Officer for the United States of America Embassy in Barbados representing the Eastern Caribbean and the British and French Overseas Territories (the 'Consular Officer') with particular responsibility for Anguilla and the British Virgin Islands. In a nutshell the Consular Officer testified to the effect that throughout the Eastern Caribbean

[12] Extradition (Overseas Territories) Order 2002, S.I. 2002 No. 1823

the United States Government has actively assisted regional governments to extradite fugitive offenders to the United States of America and that this cooperation in extraditing fugitive offenders is mutual. He also testified to the effect that the United States Embassy, in Bridgetown, Barbados works closely with the United States Embassy in London. The Consular Officer also declared the United States government's interest in the matter and that the applicant would be monitored closely by them. According to the Consular Officer, the interest in the applicant's case would remain as long as the case was within the court system in Anguilla; and, that it would be monitored not only by the Embassy in Bridgetown, Barbados but by the Embassy in London as well. The Consular Officer also gave the court the assurance that there would be a considerable amount of scrutiny of this case by the United States State Department.

[44] Having accepted the evidence and the undertakings giving by a high ranking diplomatic agent of the United States Government, it is my considered view that the likelihood of the risk of the defendant absconding can be alleviated by the imposition of conditions regarding the imposition of solely a cash component with respect to the recognizance imposed on the grant of bail.

The applicant's character and community ties

[45] This applicant for bail has no ties to Anguilla whatsoever. Applying the relevant test, this factor cannot by itself militate against him being admitted to bail. What the court is required to consider is whether this factor presents the likelihood of the risk of the applicant not submitting to the jurisdiction of the court when required to do so; and, whether the likelihood of this risk materialising can be curbed by the imposition of conditions.

[46] The court is of the considered opinion that the applicant's lack of community ties to Anguilla presents an unacceptable risk of him absconding. However, having considered other relevant factors, in particular the evidence and undertakings

given by the United States Consular Officer, I have arrived at the conclusion that the likelihood of the risk of the applicant absconding is minimised.

[47] The applicant in this case is 44 years old and he is employed as a banker by profession. He is married with three children and has no antecedents. This is his first offence.

The preservation of public order

[48] There was much hue and cry and public scrutiny regarding the commission of this offence. It seemed to have invoked the ire of members of the Anguillian public. Emotions immediately ran high and continued from the time of the commission of the offence to the day that the applicant was charged and beyond.

[49] The inflamed passions of the general public presented the almost imminent likelihood of public unrest. Therefore, the court was mindful of the fact that this atmosphere was untenable and also presented the likelihood of danger to even the applicant himself.

[50] It is necessary to stress that the court's function is to apply the law even in hard and difficult cases. Therefore, the court ought not to be swayed by public opinion but rather by the application of the law and relevant legal principles in the furtherance of the interest of justice. The law must be applied to everyone equally and must strive towards proportionality. This is the principle of equality before the law that is enshrined in the Constitution.

The protection of the applicant

[51] In the course of the proceedings Mr. Astaphan, Q.C. registered his concerns for the applicant's physical safety and well-being while remanded at HMP.

Ms. Edwards appearing for the respondent shared Mr. Astaphan's concerns. It was made to appear to the court that there were persons employed at HMP who hailed from the same jurisdiction as the deceased. The deceased was from

Dominica. The court was also informed that there were prison guards employed at HMP who were related to the deceased. This fact was verified by Ms. Edwards. This weighed heavily on the court's decision, particularly in view of the court's observations concerning the public furor that this incident excited. In the circumstances, when looking at the matter in the round, the court formed the view that it was necessary for the applicant's safety and protection that he be remanded at The Valley Police Station and then be permitted to leave the jurisdiction once the conditions regarding the taking of his recognisance had been satisfied.

Order

[52] Based on the reasons given in this decision the court is of the view that there is no impediment to the grant of bail to the applicant. The learned magistrate clearly misapplied the principles relevant to the discretionary grant of bail and in so doing failed to apply the correct approach. In the circumstances, the court is constrained to review the matter afresh and to determine the question of bail in light of the issues presented anew. Having applied the principles set out in this decision, that the risk of the applicant absconding cannot be regarded as an 'unacceptable risk' having regard to all of the relevant factors that have been considered. Therefore, the court's order is as follows:

1. Bail is offered to the applicant by way of cash security in the sum of Two Hundred Thousand Eastern Caribbean Dollars (EC$200,000.00).

2. The applicant shall return to the jurisdiction of Anguilla on or before the 19th August 2019.

3. Upon the applicant's return to the jurisdiction of Anguilla as set out at paragraph 2 above, he shall report to The Valley Police Station within a period of one (1) day of his arrival in Anguilla.

4. The applicant shall return to the jurisdiction of Anguilla on each adjourned sitting of the court to be present within the jurisdiction within three (3) days of each adjourned hearing and to report to The Valley Police Station within one (1) day of each arrival in the jurisdiction.

5. The applicant shall be remanded at The Valley Police Station immediately until his recognizance on bail has been taken.

6. A copy of this order shall be served on the Commissioner of Police, the Chief Immigration Officer and the Superintendent of Her Majesty's Prisons.

7. The applicant is to have carriage of this order.

Shawn Innocent
High Court Judge (Ag.)

By the Court

Registrar