



IN THE SUPREME COURT
THE TURKS AND CAICOS ISLANDS

CR36 of 2022

BRIAN FRANCIS

Applicant

v

REX

Respondent

BEFORE: The Honourable Mr. Justice Davidson Kelvin Baptiste (Ag)

APPEARANCES: Mr. Oliver Smith KC and Ms. Tennant for the applicant.
Mrs. Nayasha Hatmin for the respondent.

HEARD: 9th and 10th January 2024

DELIVERED: 15th January 2024



RULING

1. **Baptiste J:** This is the court's ruling on an application for bail. The application arises in circumstances where the applicant, a defendant on murder and firearm charges, was previously denied bail by a judge of the Supreme Court on 12th August 2022. The application accordingly engages the well - known principles appertaining to such an application.
2. Before delving into those principles, it would be instructive to refer to the salutary observation of Lord Bingham in **Hurnam v The State (Mauritius) [2005] UKPC 49**, at para. 1:

“In Mauritius, as elsewhere, the courts are routinely called upon to consider whether an unconvicted suspect or defendant should be released on bail, subject to conditions, pending his trial. Such decisions very often raise questions of importance both to the individual suspect or defendant and to the community as a whole. 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 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 or that he does not take advantage of the inevitable delay before trial to commit further offences.”

3. In **Duncan and Jokhan v Attorney General of Trinidad and Tobago [2021] UKPC 17**, the Board ‘emphasised the fundamental importance of the protection by law of the right of liberty.’ At para. 23 it was stated:

“The protection of liberty and the security of the person by law, is by long tradition, recognized as a fundamental value in the common law and this is reflected in the Constitution. It is also recognized as a fundamental value in international human rights instruments including the European Convention on Human Rights and the international Covenant on Civil and Political Rights ...”

4. With this background, the court, in considering whether bail should be granted or denied, will have regard to the following non - exhaustive factors:

The nature and seriousness of the offence;
the nature of the evidence in support;
the severity of the punishment which conviction will entail;
whether the applicant will commit an offence while on bail;
whether the applicant will interfere with witnesses or obstruct the course of justice;
the character, antecedents, association and community ties of the applicant; and

whether the defendant has previous convictions.

5. The relevance of the seriousness of the offence is that the temptation to abscond is likely to increase if the offence is likely to attract a serious penalty. However, in **Hurnam v Mauritius [2005] UKPC 49**, the Board pointed out that the seriousness of the offence cannot be treated as conclusive reason for denying bail. At paragraph 15 of Hurnam the Board stated:

“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 a witness likely to give evidence against him, and this risk will often be particularly great in drug 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.”

6. The strength of the evidence is relevant to (i) whether or not the defendant has an interest in absconding and (ii) a manifest and sometimes avoidable injustice that could occur from a remand in custody, particularly a long one, followed by an acquittal.
7. Whether an applicant has a previous conviction may likely to aggravate sentence. A person of good character is likely to be trusted by the court to a greater extent.
8. Any known negative or gang associations may give the court concern about the possibility of further offences being committed whilst on bail. The court will examine the community ties of the defendant to come to an informed decision as to the likelihood of absconding. In that regard, matters of relevance include: how long the defendant has lived at his address; his marital status, his family ties, especially whether he has dependent children; and whether he is employment and how long.
9. The court must also be concerned with the protection of witnesses and the protection and welfare of the community.

10. I now consider the applicable principles where an applicant renews an application for bail when bail was previously denied. The starting position of any new application for bail must always be the finding of the position when the matter was last considered by the court: **Donaldson L.J in R v Nottingham Justices ex parte Davies [1980] 2 All E.R 775** [[778-779.]]. In **Ferguson v Attorney General of Trinidad and Tobago TT 2010 HC 320** at paragraph 6, Mon Desir J stated that the first question is whether there has been “any change in circumstances” since the applicant last engaged this Court on the question of bail; or whether there are any “new considerations” which were not before the Court when the applicants were last remanded in custody. If there are, are these changed circumstances or new conditions relevant to the issue of the applicant’s entitlement to bail?
11. The matter relied upon as a change in circumstance is the issue of delay. The trial was scheduled for 9th January 2024, when the prosecution sought an adjournment on the morning of the trial. The application was strongly opposed by Mr. Smith KC. The court refused the application and ordered that the matter to begin on the following day. Mrs. Hatmin indicated that the prosecution was still not in a position to start the trial as they were awaiting a ballistic report which would not have been available before 1st February 2024.
12. Mr. Smith KC argued that the material change in circumstance is the delay occasioned by the Crown’s failure to be ready for trial and stated that there has been substantial delay in trying the matter because of delay by the Crown.
13. In opposing the bail application, Mrs. Hatmin argued that the applicant must demonstrate a material change of relevant circumstances since the last refusal, and submitted that the adjournment of the trial to June 2024 is not a new or exceptional circumstance. Mrs. Hatmin recognized that an adjournment can be considered a new circumstance but posited that that is not the case here.
14. Mrs. Hatmin stated that it is the ballistic lead during the investigation that led the prosecution to seek an adjournment to ensure that all of the material is before the court. The ballistic lead was relevant information pertinent to the trial, as analysis would help to state whether the firearm used was recovered and is in the hands of the police. In the

interest of justice, that information should be disclosed with any DNA report. The Crown has not been dilatory and the trial was vacated mainly on that basis. The ballistics lead was brought to the court's attention in December 2023; it was hoped that the analysis could be done before the trial. The ballistic report would be useful to both sides.

15. The question for my determination is whether the passage of time constitutes a relevant change in circumstances warranting the grant of bail. In **Ferguson v The Attorney General of Trinidad and Tobago**, Mon Desir J stated at paragraph 33: that time and the mere effluxion of it is not without more, a change in circumstances. The issue of delay was also addressed in **Trinh v R [2016] NSWCCA 110**. In **Trinh**, the applicant was charged with several indictable offences involving computer fraud and sought release on bail following his arrest on 22 July 2015. He was refused bail by the Supreme Court and made a further application to the Court of Criminal Appeal.
16. There was a likelihood that a trial would not be commence until some 18 months to 2 years after the bail application was determined. Under the relevant legislation, a court refusing bail for an offence is to refuse to hear another release application made by an accused person for the same offence unless there are grounds for a further release application. Grounds for a further release application include: material information relevant to the grant of bail is to be presented in the application that was not presented to the court in the previous application, or circumstances relevant to the grant of bail have changed since the previous application was made.
17. In **Trinh** considering the question of delay, the Court stated at paragraph 84: "... it may be accepted, as this court said in *R v Kugor* [[2015] NSWCCA 14]] at [35] that it is a very serious matter to deprive a citizen of liberty for a long period of time when he has not been convicted of any offence." The delay being considered by the court in that case was 15 months. The court noted that time in custody prior to conviction is a matter of considerable significance on a bail application.
18. In refusing bail, the court stated at paragraph 85:

"Although it is entirely unsatisfactory that an accused person should because of delays in the justice system, be detained in custody prior to trial for lengthy

periods, that is but one factor to be considered when assessing bail concerns to see whether they rise to the level of unacceptable risk. In the present case, the earlier matters to which I have referred seem to me to outweigh the significance of that delay. The seriousness of the charges, the nature of the offending, the amounts involved, the strength of the Crown case, the applicant's prior criminal record when considered with the entirely unsatisfactory relationship with his family and the proposed arrangements involving them lead me to the conclusion that there is an unacceptable risk that the applicant will fail to appear at any proceedings and will continue to commit serious offences.”

19. In **Al Saleh v Director of Public Prosecutions [2019] NSWCCA 31**, the applicant was arrested and charged with five offences arising out of a shooting incident which occurred on 31 January 2018. The charges against him were shooting with intent to murder, discharging firearm with intent to cause grievous bodily harm, unauthorized use of pistol, firing firearm in a manner likely to injure and possession of ammunition.
20. At paragraph 34 the court addressed the issue of delay, in these terms: The judge was advised that the trial was likely to occupy a minimum of six weeks and was unlikely to be convened before April / May 2019; that estimate was clearly optimistic. The committal hearing did not commence until early February 2019 and was adjourned part heard to 22nd March 2019. If, committed, it was unlikely that the trial would be heard before 2020.
21. At paragraph 35, the court cited the case of **Trinh**, that a deprivation of liberty for a long period pending trial was a matter of considerable significance in determining a bail application, which must be weighed against all relevant bail concerns. It is a factor favouring release which must be weighed against other relevant bail concerns. The court in Saleh observed that while there was some evidence before it as to the chronology of the proceedings, there was no submission that the proceedings have been delayed by unreasonable conduct on the part of the prosecution. The lapse of time until a likely hearing date was not determinative in the present case. The release application was refused.
22. The position then is, although the deprivation of liberty for a long period is undoubtedly a matter of grave concern in determining a bail application, and is a factor favoring

release, it has to be weighed against other relevant bail concerns. Therefore, it is not necessarily determinative of a bail application.

23. Mrs. Hatmin argued that there is a strong case against the defendant. He was seen on CCTV using a firearm; several eye witnesses at scene of the incident, including one who saw the defendant shoot the deceased. If the defendant is released on bail, witnesses are unlikely to come forward. Mrs. Hatmin stated that the defendant was denied bail on 12th August 2022, on the ground that he was a danger to the public. Mrs. Hatmin submitted that nothing has changed and there are no new circumstances warranting the grant of bail.
24. I recognize that the seriousness of the offence and the severity of the penalty likely to be imposed on conviction may well 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.
25. In **Steve Ferguson v The Attorney General of Trinidad and Tobago [2010]** at paragraph 16 and 17, Mon Desir J stated that a decision to refuse bail presupposes that the previous court had found as a fact that there were substantial grounds for believing that one of the events described in the Act would occur. A later court was therefore bound to accept that finding of fact, unless there was a material change of circumstances. I agree.
26. With reference to the nature of the evidence on a bail application, the strict rules of evidence are not applicable. Although the material upon which a court is entitled to base its conclusions are not restricted to “admissible evidence in the strict sense” the court “must take proper account of the quality of the material upon which [it] is asked to adjudicate”.
27. In **R v Richmond Justices ex parte Moles, Re Moles [1981] Crim LR 170**, Donaldson LJ dealt with an argument by the applicant’s counsel that the allegation of interference with witnesses was not proved if one applies the strict rules of evidence which would be applicable to a trial. In dismissing the criticism as misplaced, Donaldson LJ assumed the correctness of the statement that much of the information conveyed by the police officer would be inadmissible if it were to be treated as evidence to which the strict rules of evidence apply.

28. Donaldson LJ expressed his inability to understand why it is said that the Bail Act 1976 contemplates that applications for bail should be dealt with in accordance with the strict rules of evidence. He further opined that “any such proposition would render the operation of the Act wholly unworkable. This is an informed inquiry conducted by the magistrates to see whether there is anything to displace the prima facie entitlement of every person to bail.” Although Donaldson LJ expressed his views in relation to the Bail Act, I am of the view that they are quite apt to a situation where there is no bail legislation.
29. From the authorities, the following are clearly established: To deprive someone of their liberty for a lengthy period pending trial is a matter of considerable significance in determining a bail application. Delay or passage of time can constitute a change in circumstances. As a factor favouring release, delay is not in and of itself determinative; it must be weighed against other relevant bail concerns.
30. Looking at the matter in the round, I am not of the view that delay in this case is determinative. It has to be weighed with other bail concerns for example, the seriousness of the offences, the severity of the punishment and whether the applicant will interfere with witnesses. These factors outweigh the significance of the delay. While there is a presumption in favour of bail, the community has a countervailing interest in seeking to ensure that the course of justice is not thwarted by the applicant interfering with witnesses or otherwise obstructing the course of justice. In weighing the issue of delay with all the other relevant bail concerns, I am led to the conclusion that the bail application should be refused.
31. For all the reasons indicated, the bail application is refused.

The Hon. Mr. Justice Davidson Kelvin Baptiste
Judge (Ag) of The Supreme Court.

