In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
Case No. 27 of 2017

And

Case No. 10 of 2019

BETWEEN:

THE QUEEN

-and-

JAHMICO TROTT

Before: **The Hon. Justice Juan P. Wolffe, Acting Puisne Judge**

Appearances: Mr. Carrington Mahoney for the Prosecution
Mr. Mark Pettingill & Victoria Greening for the Defendant

Dates of Hearing: 9th April 2020
Date of Ruling: 23rd April 2020
Date of Reasons 7th May 2020

RULING

Bail Application – Delay - Possible health risks to Defendant whilst in prison during COVID-19 pandemic

1. On the 23rd April 2020 I declined the Defendant's application for bail and set out herein are my reasons for doing so.

2. The Defendant is currently in custody at the Westgate Correctional Facility ("Westgate") awaiting a retrial in respect of the following offences: (i) Attempted Murder, contrary to section 289 of the Criminal Code Act 1907 (the "Criminal Code"); (ii) Using a firearm whilst committing an Indictable Offence, contrary to section 26A of the Firearms Act 1973 (the "FA"); (iii) Carrying a Firearm with Criminal Intent, contrary to section 17 of the FA; (iv) Handling a Firearm, contrary to section 19A of the FA (i.e. the four counts in respect of Case No. 27 of 2017)(the "2017 Indictment"); (v) Corruption of a Witness, contrary to section 125(1)(b) of the Criminal Code; and (vi) Intimidating a Witness, contrary to section 125A(a) of the Criminal Code (i.e. the two counts in respect of Case No. 10 of 2019)(the "2019 Indictment). On the 14th October 2019, after hearing submissions from Prosecution and Defence Counsels I ordered that the offences of the 2017 Indictment were to be joined with the offences of the 2019 Indictment (more will be said about this later).

3. By way of a Summons dated 27th March 2020 which was supported by a First Affidavit dated 14th October 2019, a Second Affidavit dated 18th March 2020, a Third Affidavit dated 31st March 2020, and through oral submissions of the Defendant's Counsel, the Defendant applied for bail on the grounds that:

    (i) There has been and will continue to be a delay in the Defendant's retrial being heard, and, that as a result the Defendant has spent and will continue to spend an unreasonable amount of time in custody if not granted bail.

    (ii) The conditions at Westgate are such that the Defendant, given his underlying health issues, is more susceptible to contracting COVID-19.

    (iii) There is information now available which was not previously before the Court. In particular: (a) alibi evidence which supports the Defendant's defence; and (b) that at the retrial the Prosecution will not be relying on the

evidence of police witness PC Hart who gave material identification evidence at the Defendant's first trial.

(iv) Defendants in other serious cases have been granted bail.

The Defendant's Right to Bail

4. Pursuant to section 6 of the Bail Act 2005 (the "Bail Act") every person charged with a criminal offence has a general right to bail. Read with Clause 6 of the Bermuda Constitution Order 1968 (the "Bermuda Constitution"), which provides that any person charged with a criminal offence *"shall be presumed to be innocent until he is proved or he has pleaded guilty"*, the starting point must therefore be that a person will be granted bail unless there exists exceptions to the right to bail which are set out in Schedule 1, Part 1 of the Bail Act. It is therefore unsurprising that persons who have come before the Courts charged with the most heinous of crimes such as murder and serious sexual assault have been granted bail. In essence, the seriousness of the alleged offence does not automatically result in bail not being granted.

5. In respect of exceptions to the right to bail, paragraphs 3 to 9 of Part 1 of Schedule 1 of the Bail Act provides the following:

"2. The defendant need not be granted bail if the offence is—

(a) murder
(b) an offence under the Firearms Act 1973;
(c) or a serious arrestable offence, within the meaning of section 3 of the Police and Criminal Evidence Act 2006, involving the use of a firearm or ammunition, within the meaning of section 1 of the Firearms Act 1973.

3. The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would—

(a) fail to surrender to custody; or
(b) commit an offence while on bail; or

(c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

4. The defendant need not be granted bail if—

(a) the offence is an indictable offence or an offence triable either way; and

(b) it appears to the court that he was on bail in criminal proceedings on the date of the offence.

5. The defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a young person, for his own welfare.

6. The defendant need not be granted bail if he is in custody in pursuance of the sentence of a court.

7. The defendant need not be granted bail where the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this Part of this Schedule for want of time since the institution of the proceedings against him.

8. The defendant need not be granted bail if, having been released on bail in or in connection with the proceedings for the offence, he has been arrested in pursuance of section 10.

Exception applicable only to defendant whose case is adjourned for inquiries or a report

9. Where his case is adjourned for inquiries or a report, the defendant need not be granted bail if it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody."

6. Paragraph 11 of Part 1 of Schedule 1 of the Bail Act provides statutory guidance as to what factors the Court should have regard to when considering paragraphs 3 and 4 above. Such as:

"(a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it);

(b) the character, antecedents, associations and community ties of the defendant;

(c) the defendant's record as respects the fulfilment 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 defaulted,

as well as to any others which appear to be relevant."

7. As will be seen from the below paragraphs this bail application which is currently before the Courts is not the first one made by the Defendant as he has made multiple bail applications in both the Magistrates' Court and the Supreme Court. During which submissions for and against the Defendant being granted bail were fully aired out and decided upon. Many of those reasons for not granting bail in the past three (3) years still exists, and one may even argue that those reasons are even more pronounced today. Such as: the Defendant is still charged with offences under the FA; and, the serious nature of the offences for which the Defendant is now charged is even more serious with the addition of the offences of the 2019 Indictment (there did not appear to be any dispute in this regard). Moreover, the Defendant's trial and conviction for the offences of the 2017 Indictment speaks to the strength of the Prosecution's case as it was tested during a full blown jury trial in which the Defendant. I accept that this conviction was overturned by the Court of Appeal but as will be seen later it was on a narrow ground which did not pertain to the strength of the evidence lead by the Prosecution but to the manner in which the Defendant's trial attorney conducted his defence). These are factors which I too shall take into consideration in deciding whether to grant to Defendant bail on this occasion.

8. This Ruling however will primarily be focused on the submissions made by the Defendant's attorneys as to why the Defendant should now be granted bail, and, as to the Prosecution's submissions that the laying of the 2019 Indictment presents substantial grounds to believe that the Defendant, if granted bail, will commit further offences or interfere with witnesses (as per paragraph 3 of Part 1 of Schedule 1 of the Bail Act).

Delay

9. It is Ms. Greening's submission that over the last three (3) years the Defendant has spent an unreasonable amount of time in custody in the remand section of Westgate which she described as "stifling". However, the amount of time that the Defendant has been in custody must be reviewed in the context of what has actually occurred whilst the Defendant has been in custody for the past three (3) years. If one does so then it would be patently obvious that the Defendant has not been languishing in custody and that given all of the circumstances the Defendant's matter has progressed through the Courts with reasonable expedition. Throughout the three (3) years that the Defendant has been in custody the Defendant, who has had legal representation at each juncture, has participated in a full blown trial, an appeal in the Court of Appeal, multiple case management hearings and pretrial applications, and, the commencement of a retrial. Specifically:

- The Defendant first appeared in the Magistrates' Court on the 17th May 2017 to answer to the offences on the 2017 Indictment. A bail application made on his behalf in the Magistrates' Court did not succeed and the matter was sent to the Supreme Court Arraignment Session scheduled for the 3rd July 2017.

  Therefore, in just over a month from the time the Defendant first appeared in Magistrates' Court he appeared in the Supreme Court.

- On 25th May 2017 the Defendant's co-defendant, Mr. Troy Sinclair Burgess, appeared in the Magistrates' Court to answer to the offences of (i) attempted murder, and (ii) using a firearm while committing an indictable offence. Mr. Burgess was not granted bail and the matter was sent to the Supreme Court Arraignment Session along with the Defendant for the 3rd July 2017.

- On the 24th July 2017 both the Defendant and Mr. Burgess appeared in the Supreme Court and before they pleaded to the counts on the 2017 Indictment they, as they were entitled to do, indicated that they intended to make an application for dismissal under section 31 of the Criminal Jurisdiction and Procedure Act 2015 (the "section

31 application"). The Defendant, through his then attorney Mr. Kamal Worrell, had filed a section 31 application on the 14th July 2017, and on the 24th July 2017 Mr. Burgess, through his attorney Ms. Susan Mulligan, filed his submissions in this regard. The section 31 application was fixed for the 28th July 2017.

- On or about the 28th July 2017 the section 31 application was heard.

Therefore, within twenty (25) days of appearing in the Supreme Court for the first time the Defendant's and Mr. Burgess' section 31 application was heard.

- On 1st September 2017 the Defendant and Mr. Burgess appeared in Court on a mention and it appears that by then the Defendant had changed his attorney to Mr. Charles Richardson. Mr. Richardson indicated that he required a further two (2) weeks to determine whether he wished to make any further submissions in respect of the Defendant's section 31 application. The matter was therefore adjourned to the 22nd September 2017.

There was no indication on the file as to what transpired between the Defendant and Mr. Worrell which caused him to change to Mr. Richardson (no should there probably be any indication). But presumably, Mr. Richardson needed the time and opportunity to receive instructions from the Defendant and then render legal advice to the Defendant, particularly in relation to the already part-heard section 31 application.

- On the 22nd September 2017 Mr. Richardson informed the Court that he would not be making any further submissions in respect of the Defendant's section 31 application and on the same date the Court read out its ruling in respect of the Defendant and Mr. Burgess' respective section 31 applications. The Court declined both section 31 applications and the matter was set for mention to the 2nd October 2017.

- On the 2nd October 2017 the Defendant and Mr. Burgess formally pleaded not guilty to the counts on the 2017 Indictment and the matter was fixed for trial on the 5th February 2018.

  Therefore, in just over a week after a decision was made on the section 31 application the Defendant and Mr. Burgess pleaded to the charges on the 2017 Indictment and their trial was set for a date which was four (4) months later.

- On the 1st November 2017 however the matter was brought back before the Court on an application by the Prosecution that the 5th February 2018 trial date should be vacated due to the unavailability of a police witness. The matter was adjourned to the 16th November 2018 for an application to be made by the Prosecution to vacate the said trial date.

- On the 16th November 2017 Ms. Mulligan stated that she was before the Court of Appeal on that date and therefore could not attend the Prosecution's application to vacate. The matter was set for mention to the 1st December 2017.

  No fault or blame should be ascribed to the Defendant for his attorney not being available and indeed no-one should be blamed for the adjournment. It is well known and accepted in this jurisdiction that Court of Appeal matters take precedence over Supreme Court matters.

- On 1st December 2017 the trial date of the 5th February 2018 was not vacated.

- On 5th February 2018 the matter was adjourned to 13th February 2018 due to various preliminary issues.

- On 13th February 2018 the trial was set to commence on the 15th February 2018.

- On the 28th February 2018 it appears that the trial proper commenced.

It is unclear from the Court file as to why the trial did not commence on the 15th February 2018, however the commencement date of the trial on the 28th February 2018 was not so long after the initial trial date of the 5th February 2018 that it could be considered to be an unreasonable delay.

- In late February/early March of 2018 a full jury trial was conducted in respect of the 2017 Indictment and on the 7th March 2018 the jury, by a majority verdict, found the Defendant "Guilty" on all four (4) counts i.e. (i) attempted murder, (ii) using a firearm whilst committing an indictable offence, (iii) carrying a firearm with criminal intent; and (iv) handling a firearm. The Defendant's co-defendant Mr. Burgess was unanimously found "Not Guilty" by the jury on both of the counts on which he was charged.

- On the 6th April 2018 the Defendant was sentenced to a term of imprisonment of twenty-five (25) years. Soon thereafter the Defendant appealed his conviction and sentence on six grounds (Criminal Appeal No. 5 of 2018).

Therefore, in less than a month after being convicted the Defendant was sentenced.

- On or about 21st February 2019 the Defendant appeared in the Magistrates' Court for the offences of the 2019 Indictment i.e. (i) corruption of a witness; and (ii) intimidating a witness. The matter was sent to the Supreme Court's Arraignment Session scheduled for the 1st April 2019.

It must be illuminated that the offences of the 2019 Indictment were allegedly committed on the 22nd July 2018 which was after the Defendant was tried and convicted for the 2017 Indictment, whilst he was serving a sentence for the said conviction, and was awaiting the hearing of his appeal on his conviction and sentence. Moreover, the complainant and the alleged witness referred to in the 2019 Indictment was a material witness in the Defendant's trial for the 2017

Indictment. Presumably this complainant will also be giving evidence in the upcoming retrial.

- On or about 15th March 2019 the Court of Appeal upheld the Defendant's appeal on one ground only. Particularly, that his trial Counsel at the time, Mr. Richardson, failed to follow his instructions to call an alibi witness whom Mr. Richardson supposedly had a previous sexual relationship (this relationship was unknown to the Defendant at the time of the first trial). The matter was then remitted to the Supreme Court for a retrial date to be set.

  Therefore, just before and just after the Defendant's appeal was heard in the Court of Appeal he appeared in the Magistrates' Court and the Supreme Court respectively for the additional offences of the 2019 Indictment which were allegedly committed whilst he was in custody for the 2017 Indictment.

- On or about 17th April 2019 the Prosecution filed a Notice of Application in respect of an application to join the offences of the 2017 Indictment with the offences of the 2019 Indictment (the "Joinder Application"). The date for the Joinder Application was scheduled for 15th May 2019.

  From this I conclude that had the 2019 Indictment not been laid then there would have been no need for a Joinder Application and therefore the Defendant's retrial could have been set for an earlier date.

- On the 15th May 2019 Ms. Greening, who was junior counsel for Mr. Archibald Warner (who then represented the Defendant), advised the Court that the Joinder Application could not be heard due to the illness of Mr. Warner. The matter was adjourned to the 3rd June 2019 Arraignment Session.

  It was obviously no fault of the Defendant that his attorney was ill and nor was it the fault of Mr. Warner that he was ill. Unforeseen illnesses do occur. However,

the Joinder Application would have been heard earlier were it not for the Defendant's attorney's illness.

- On the 3rd June 2019 a trial date of the 2nd July 2019 was fixed and the matter was set for mention for the 19th June 2019 in respect of the Joinder Application.

- On the 19th June 2019 it appears that by agreement between Mr. Carrington Mahoney of the Prosecution and Mr. Warner that the 2nd July 2019 retrial date was vacated due to the outstanding Joinder Application. The Joinder Application was then set for the 23rd July 2019 and another retrial date of 23rd September 2019 was set for the 2017 Indictment i.e. even if the Joinder Application did not succeed.

  Obviously Mr. Mahoney and Mr. Warner had their mutual reasons why the Joinder Application did not take place prior to the 2nd July 2019 retrial date, and I assume that Mr. Warner advised the Defendant of such reasons and that the Defendant was satisfied with those reasons. From this, one can reasonably conclude that the Defendant fully understood and accepted that by not having the Joinder Application heard before the scheduled 2nd July 2018 retrial date that the said retrial date would have to be adjourned to a later date i.e. that his retrial date would be further delayed.

- On the 22nd July 2019 Mr. Warner wrote to the Court stating that he was unable to take full and proper instructions and asked the Court to have the Joinder Application administratively delisted to another date. Accordingly, on the 23rd July 2019 the Joinder Application did not proceed and the matter was adjourned for mention to the 5th August 2019 Arraignment Session.

  It is somewhat surprising that Mr. Warner was not able to take full instructions about the Joinder Application since the Joinder Application had been known about since the 17th April 2019 i.e. three (3) months earlier. One would have thought that this was ample time for Mr. Warner or Ms. Greening to have sought and received full instructions from the Defendant, particularly since the Defendant could have

easily been seen at Westgate. The reasons for Mr. Warner or Ms. Greening being unable to receive instructions are unknown, but whatever the reasons they surely lie at the feet of the Defendant and/or his attorneys.

- At the 5th August 2019 Arraignment Session the Joinder Application was tentatively fixed for the 16th August 2019. At this time Mr. Warner stated to the Court that he may not be available on the said fixed date due to medical reasons.

- On the 15th August 2019 the Court was in receipt of a letter from Mr. Warner indicating that he would not be available for the Joinder Application set for the 16th August 2019. By the request of Mr. Warner the matter was administratively adjourned to the 3rd September 2019 Arraignment Session.

  As said earlier, illnesses are unforeseen circumstances. The Defendant nor Mr. Warner should be blamed for the matter being adjourned to a later date because of Mr. Warner's illness. However, this was the second time that the matter was adjourned due to the illness of the Defendant's attorneys. It also has to be pointed out that but for Mr. Warner's illness the Joinder Application would have been heard and the matter would have been one more procedural step closer to the retrial being conducted.

- On the 3rd September 2019 the Joinder Application was fixed for the 13th September 2019 and the retrial of the matter was set for the 23rd September 2019.

- On the 12th September 2019 the Joinder Application which was set for the 13th September 2019, was administratively adjourned to a later date. It is unclear from the Court file as to the reason for this but it does appear from correspondence that the Prosecution and Defense Counsel were aware of the reasons.

- On the 18th September 2019 Ms. Greening wrote to the Court complaining about disclosure and that she wished for a case management hearing date to be set so that these issues may be addressed by the Court.

  It would appear from the Court file that this was the first time that such formal complaints about disclosure were brought to the attention of the Court post the Defendant's Appeal (I accept that disclosure matters may have been raised between Counsel and that there may have been disclosure issues disputed in ongoing correspondence between the parties, but not complained of to the Court).

- On the retrial date of the 23rd September 2019 Mr. Warner stated to the Court that he was still awaiting information from the Prosecution regarding certain prosecution witnesses' participation in the Justice Protection Programme ("JPP") under the Justice Prosecution Act 2010 (the "JPA"), in particular any incentives or benefits which may have been received by the said prosecution witnesses. Mr. Warner also complained about the Defence not being in receipt of the original statements of the Defendant's first trial from Mr. Richardson. The Prosecution were of the view that they had fully satisfied their disclosure obligations.

  Mr. Warner's application pursuant to section 22(2)(b) of the JPA was granted by the Court and the matter was adjourned to the 4th October 2019 for a date to be fixed for the Joinder Application.

  Whilst it is understandable that Mr. Warner required information about the prosecution witnesses' participation in the JPP, and that this information may be crucial at the retrial, it is confounding as to why this was only brought to the attention of the Court on the date of the retrial. By the time of the retrial date of the 23rd September 2019 there had already been several hearings and so if the request for the JPP information had been made months or even weeks earlier, and had the Prosecution not complied with the said requests, then this issue could have been resolved by the Court weeks or months prior to the retrial date.

The same could be said of receipt of the original statements from Mr. Richardson. One would have thought that the Defendant's attorneys would have requested receipt of the original statements from Mr. Richardson as far back as early 2019 when they came on the record as the Defendant's attorneys. One would also have thought that had the issue of not having received the original statements from Mr. Richardson been raised weeks or months prior then it could have been resolved, if necessary by the Courts, well in advance of the retrial date of 23rd September 2019.

Therefore, had these issues of not receiving the JPP information and the original statements from Mr. Richardson been raised reasonably in advance of the retrial date of the 23rd September 2019 the retrial would most likely have proceeded.

- On the 2nd October 2019 Ms. Greening wrote to the Court informing it that they had not yet received the information ordered under the JPA and that as a result they were requesting that the Joinder Application scheduled for the 4th October 2019 be administratively delisted.

- On the 4th October 2019 the Joinder Application came before me. Mr. Warner made an application that it should be adjourned to a later date on the basis that the information ordered under the JPA had not as yet been disclosed by the Prosecution and that this information was an integral part of the Joinder Application. The Prosecution stated that they were still awaiting the information from the persons administrating the JPP. After hearing submissions from both the Prosecution and Defense I declined to grant the Defendant's application for an adjournment and in doing so I cited, *inter alia*, my concerns about the time that had elapsed since the Court of Appeal had ordered a retrial on 15th March 2019. The Joinder Application therefore proceeded.

- On the 14th October 2019 I delivered my written decision on the Joinder Application ruling that the offences of the 2017 Indictment and the offences of the 2019 Indictment could be joined. The retrial was then fixed for the 3rd March 2020.

- On the 15th October 2019 the Defendant filed a Summons along with the said First Affidavit seeking a bail application. The bail application was scheduled for the 16th October 2019.

- On the 16th October 2019 the Defendant's bail application was heard before The Hon. Justice Charles-etta Simmons on the basis that: (i) the Defendant had been in custody since May 2017 and specifically since his first trial approximately eighteen (18) months earlier; (ii) the Defendant had secured full time employment and had secured permanent residence; (iii) other defendants before the Court on unrelated murder charges had been granted bail by the Courts; (iv) the retrial had been delayed through no fault of the Defendant; (v) eyewitnesses in the retrial are serving terms of imprisonment; and (vi) the Defendant has strong ties to Bermuda and is not a flight risk.

  In refusing to grant the Defendant bail Simmons J. concluded that by virtue of the fact that the Defendant was charged with offences related to the interference of witnesses i.e. those which comprise the 2019 Indictment, that she is satisfied that if granted bail that the Defendant (a) may become involved in the obstruction of justice by attempting to ascertain the whereabouts of protected prosecution witnesses, and (b) may commit further offences.

- On the 25th February 2020 the Court wrote to the Prosecution and Defense Counsel seeking to have a Case Management Hearing scheduled for the 27th February 2020. Ms. Greening was available, however Mr. Mahoney and his junior Ms. Karen King-Deane were unavailable as they were involved in an unrelated murder trial. The Case Management Hearing was set for the 3rd March 2020.

- On the 3rd March 2020 Case Management Hearing various disclosure issues were ventilated and resolved and the retrial was scheduled for the 6th March 2020.

- On the 6th March 2020 the Defendant's retrial commenced with the selection of a jury. After the jury selection process was completed, and before the jury members were sworn in, Mr. Mark Pettingill (who now represents the Defendant) rose to his feet and raised an issue as to the manner in which the Prosecution had exercised their statutory challenges pursuant to section 519 of the Criminal Code. Mr. Pettingill advised the Court that he intends to make application generally as to the constitutionality of section 519 of the Criminal Code, and specifically, that due to the demographics of the jurors selected that the Defendant cannot now have a fair trial. Both Mr. Pettingill and Mr. Mahoney submitted that the constitutional nature of the Defendant's application necessitated that the retrial be aborted and adjourned to a date after the Defendant's constitutional application is heard and decided upon.

- On the 9th March 2020 the Defendant, through his attorneys, filed an Originating Summons in respect of his constitutional application. On the same day I acceded to the Prosecution and Defence Counsel's position that the unsworn jury should be released and that the retrial, considering that it had only reached the jury selection stage, should be aborted. This was so that the Defendant may fully put before the Court proceedings as to his constitutional challenge of section 519 of the Criminal Code, and to give the Prosecution, Defence Counsel, and the Attorney-General's Chambers (which would need to be joined as a party in respect of any challenges to the Bermuda Constitution Order 1968) the time and opportunity to prepare for and argue what amounts to a fundamental constitutional issue.

  The Defendant nor his attorneys should in any way whatsoever should be faulted or blamed for the retrial not proceeding on the 6th March 2020 as a result of them raising the constitutional challenge. Nor should they on this basis be faulted or blamed for any delays in the hearing of any retrial as a result of any reasonable time

which may elapse for the hearing and full resolution of their constitutional application (no matter how far the matter may journey through the Court system).

10. Ms. Greening's bail submissions on the grounds of delay which were made before me on this occasion bears striking resemblance to the submissions for bail made on behalf of the Defendant on the 16th October 2019 before Simmons J. (references were also made to the Defendant's First Affidavit). By her Ladyship's decision to not grant bail one can presume that Simmons J. settled on the conclusion that in all of the circumstances that there was no unreasonable delay in the progress of this matter up to the 16th October 2019. If I am correct in this presumption then I concur with Simmons J. If my presumption is incorrect then given the procedural facts of this matter as I recited and commented on above then I independently conclude that there was no unreasonable delay of this matter up to the 16th October 2019.

11. As for what has transpired from the 16th October 2019 to the date of this hearing I see nothing materially different or unreasonable as to the pace by which this matter has traversed the Court processes when one takes into consideration the fixing of jury trial matters in this jurisdiction. Particularly when one bears in mind that the fixing of trial dates in the Supreme Court routinely involves synchronicity as to the availability of the Court, Prosecution, Defence Counsel, prosecution witnesses, and defence witnesses.

12. Ms. Greening also submitted that there is no telling as to when the Defendant's retrial will be heard given the unknown date of the final resolution of the Defendant's constitutional application (the hearing of which may be delayed because of the shelter-in-place regulations arising out of the COVID-19 pandemic). Indeed, both Prosecution and Defense Counsel indicated that given the fundamental constitutional significance of the Defendant's pending application that this is an issue which may ultimately find its way to the Privy Council no matter which side is successful in the Supreme Court and the Court of Appeal. It is indisputable that the time that a matter takes to be heard and determined could be a consideration when deciding whether or not to grant bail. Such often occurs in cases where bail is granted pending the hearing of an appeal because by the time the appeal is heard the

appellant may have served their term of imprisonment. The case at bar is not such a case and nor does it present circumstances which are even remotely analogous. The history of this matter, particularly the new offences charged against the Defendant under the 2019 Indictment, presents other salient factors which counterbalance any concerns one may have as to any uncertainty of the eventual date of the retrial.

13. Moreover, to conclude that there will be unreasonable delay in the hearing of the retrial as a result of the Defendant's constitutional application would at this stage be speculative and premature. As time passes, and as the legal mechanisms of the Defendant's constitutional application turn, the Court would be in a much better position to determine whether any unreasonable delay, if it exists, is such that the Courts would be satisfied that bail should be granted to the Defendant. Of course, this would depend on the entirety of the circumstances placed before the Court.

14. In consideration of the above paragraphs, I am satisfied that thus far there has been no unreasonable delay in how this matter has progressed through the Courts.

Defendant being susceptible to COVID-19 whilst at Westgate

15. Ms. Greening submits that the conditions at Westgate are such that the Defendant, who she says has an underlying health issue, is more susceptible to contracting COVID-19.

16. I probably would not be faulted if I were to take Judicial Notice of the uncertain, evolving and ravenous spread of the COVID-19 pandemic, and that confined places such as nursing homes and prisons can be petri dishes for the contraction of the coronavirus. I equally take notice of the scientific concerns that those with underlying health problems may be more susceptible to contracting the virus, and that once contracted they may be more likely to suffer more serious symptoms or even death.

17. There is no doubt that a person's mental and physical health are factors which can be taken into consideration when determining whether they should be granted bail. As to the

Defendant's health whilst at Westgate I must be satisfied that (a) the Defendant, because of underlying health concerns, falls into a category of persons which makes him more susceptible to contracting COVID-19; and (b) the conditions at Westgate are such that the Defendant is more likely to contract COVID-19 (including the lack of any precautionary measures being taken by Westgate).

18. Upfront, it has to be said that the Defendant adduced no credible evidence whatsoever, medical or otherwise, as to any underlying health issues which may make him more susceptible to contracting COVID-19 whilst at Westgate. It is correct that in his Third Affidavit the Defendant refers to a serious motorcycle accident in 2014 in which he sustained a collapsed lung, and that at some unknown time afterwards his lung filled up with fluid and that he had to be taken to the hospital. However, even if I take Judicial Notice of the fact that COVID-19 attacks the respiratory organs of the body the Defendant still has not adduced any evidence for me to be satisfied that six (6) years later in 2020 that he is still belaboured by his traffic accident injuries. This lack of medical evidence is problematic for the Defendant in his application for bail.

19. The recent Canadian authority of ***The Queen v. Nathaniel Nelson 2020 ONSC 1728*** lends some helpful and timely guidance in this regard. The defendant in ***Nelson*** was an inmate at the Central East Correctional Center awaiting trial on a slew of offences and it was argued on his behalf that *"he should not be subject to the heightened risk of contracting the virus – a risk that is heightened because of the conditions that exist in a prison environment"*. Like the Defendant in the case at bar the defendant in ***Nelson*** produced no medical evidence that he suffered from any medical condition that would make him susceptible to the virus. In this regard, Edwards J. in ***Nelson*** commented that there should be *"at least some rudimentary evidence that could suggest an accused is more susceptible to contract the virus due to underlying health issues"*. So while acknowledging the prevailing health crisis and accepting that the defendant in ***Nelson***, like everyone else who was incarcerated at the time, fell within a category of person who are at heightened risk of contracting the virus, Edwards J. went on to decide that the defendant did not meet his onus of presenting evidence of any pre-existing physical health that placed him in "*a category of persons that*

contracting the virus could result in severe health issues or even death". The defendant in *Nelson* was denied bail.

20. On the other hand, in addressing the Defendant's perceived susceptibility to COVID-19 the Prosecution produced an email from a Dr. C.M. Milroy of the Eastern Ontario Forensic Pathology Unit of the Ottawa Hospital dated 31st March 2020, and a Witness Statement from Acting Commissioner of Corrections at Westgate Ms. Keeva Joell-Benjamin dated 6th April 2020. Dr. Milroy essentially stated that (i) typically a collapsed lung does not have long term effects although people can have recurrent collapsed lungs if they have an underlying chest disorder, but not if it is from a traffic accident, and (ii) prison would not be expected to exacerbate the risk. Although Dr. Milroy was not cross-examined as to the contents of his email, nor was he required to do so by the Defendant's attorneys, what he did say is consistent with Acting Commissioner Joell-Benjamin's statement that over the past three (3) years while the Defendant has been in custody he has not complained of any major health concerns, and, that the Defendant is not on Westgate's list of vulnerable inmates.

21. Further, in her witness statement Acting Commissioner Joell-Benjamin also stated that as of 6th April 2020 there were no staff or inmates in the Department of Corrections who were suspected or confirmed of having COVID-19, and, that the Department of Corrections has put into place precautionary measures to minimize the entry/spread of the virus into their facilities. Such as: suspension of all inmate visits and visitors (including vendors); quarantine of new inmate receptions; increased cleaning regimes and hand hygiene; remote work for non-operational staff; COVID-19 information sessions for staff and inmates; and, the pre-screening of staff entering the facilities. It should also be added that the Defendant is on remand in his own cell and separated from the risks which may have been posed if he were mingling amongst the general inmate population at Westgate.

22. So while Ms. Greening may offer her considered views in the opinion piece of the 21st March 2020 edition of the Royal Gazette as to the potential COVID-19 threat to our prisoners, of which I do not completely disagree, I am satisfied that Westgate has taken the

necessary precautions to reduce the risks of the Defendant or any inmate at Westgate of contracting the virus.

23. Even if there is a potential or actual risk of the Defendant being exposed to COVID-19 whilst at Westgate, any decision to grant bail on this basis must not be made in a vacuum. It is imperative that the Court take into consideration all the circumstances of this matter (such as those enunciated in the above and below paragraphs). If not, then every inmate at Westgate, notwithstanding the seriousness of the offences which they are facing or have faced, would have a legitimate basis to be released on bail or even have their sentences commuted (as has occurred in some jurisdictions) during this COVID-19 pandemic (which could still germinate globally for many more months). This is simply not consistent with the rule of law or the proper administration of justice.

24. I am therefore not satisfied that the Defendant is in a category of persons which is more susceptible to contracting COVID-19 whilst at Westgate, and nor am I satisfied that the conditions at Westgate would make the Defendant more susceptible to contracting COVID-19. Consequently, I do not grant bail to the Defendant on this basis.

New Information which was not available to the Court

25. Ms. Greening relies upon section 9(3) of the Bail Act in submitting that there is now new and material information before the Court which can be taken into consideration in reconsidering whether the Defendant should now be granted bail. Specifically: (a) alibi evidence which supports the Defendant's defence; and (b) that at the retrial the Prosecution will not be relying on the evidence of police witness PC Hart who gave material identification evidence at the Defendant's first trial.

26. Section 9(3) of the Bail Act provides that:

> *"9(3) No application for the reconsideration of a decision under this section shall be made unless it is based on information which was not available to the court or police officer when the decision was taken."*

27. I fail to see how the recently produced written alibi evidence and the fact that the Prosecution will not now rely upon the identification evidence of PC Hart falls into the categories of information contemplated by section 9(3) of the Bail Act. It is correct that alibi evidence can have an impact on the strength of the Prosecution's case however nothing was presented to me that would lead me to conclude that the Defendant's alibi evidence weakens the strength of the Prosecution's evidence, or it is such that the Court should now reconsider keeping the Defendant in custody.

28. Further, while PC Hart's identification evidence may have bolstered the Prosecution's case at the first trial as to the identification of the Defendant its absence does not necessarily diminish the strength of the Prosecution's case at the retrial. As can be seen from the notes of the first trial, the Court of Appeal's decision, and the Court record, PC Hart's evidence does not appear to be the only or primary evidence as to identification of the Defendant. There is other, and arguably more direct, identification evidence from the complainant which the Prosecution could rely.

29. I therefore find that the Defendant's alibi evidence, and the fact that PC Hart may not give evidence at the retrial, do not constitute information not previously available to the Court and which could invoke a reconsideration of bail under section 9(3) of the Bail Act.

Defendants in other serious cases have been granted bail

30. This is a submission that was put before Simmons J. when the Defendant applied for bail on the 16th October 2019. But for one or two additional cases Ms. Greening referred me to the same cases that she brought to the attention of Simmons J. Such as the cases of: Khiari Flood; Katrina Burgess; Tonae Perinchief; and Zachary Fox. All of these cases can be distinguished from the case at bar in terms of the nature of the offences, the antecedents of the defendants; and the manner in which these matters progressed through the Court system. One glaring distinction which sets the case at bar apart from all of the cases cited

by Ms. Greening is the fact that the Defendant is charged with the offences of the 2019 Indictment. I will now turn to these offences.

Defendant committing further offences whilst on bail and the Interference with witnesses

31. The primary reason for Simmons J. denying the Defendant bail on the 16th October 2019 was because of the offences charged under the 2019 Indictment i.e. corruption of a witness and intimidation of a witness. I too deny the Defendant bail for this extremely compelling reason.

32. Of course, and as said earlier, the Defendant should be presumed innocent until proven guilty of all of the offences for which he has been charged. However, the fact that he has been charged for allegedly corrupting and intimidating Mr. Marecko Ratteray, who most likely will be the main Prosecution witness at the Defendant's eventual retrial, is a strong factor which I should seriously take into consideration when determining bail (as per paragraph 3, Part 1 of Schedule 1 of the Bail Act). By virtue of the fact that the Defendant is charged with these offences brings squarely into question as to whether he, if granted bail, will commit any offences by seeking to corrupt or intimidate Mr. Ratteray or any other prosecution witness, or have someone else do the same.

33. I therefore find that there are substantial grounds to believe that the Defendant, if granted bail, will commit further offences or interfere with witnesses.

Conclusion

34. In consideration of the above paragraphs, I am not satisfied that:

(i) There has been an unreasonable delay in this matter;

(ii) The conditions at Westgate or any underlying health concerns of the Defendant, make the Defendant more susceptible to contracting COVID-19;

(iii) There is any new information now before the Court which would invoke any reconsideration of bail under section 9(3) of the Bail Act.

35. I therefore decline to grant the Defendant's bail application and I do so for the following succinct reasons:

(a) The Defendant is charged with offences under the FA;
(b) The Defendant is charged with a serious arrestable offence involving a firearm;
(c) There are substantial grounds to believe that the Defendant, if granted bail, will commit further offences or interfere with witnesses;
(d) The nature of the offences charged are serious;
(e) The Defendant has previous convictions for offences of a violent nature;
(f) The strength of the Prosecution evidence for all of the offences charged are strong.

Dated the 7th day of May , 2020

The Hon. Acting Justice Juan P. Wolffe