In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
Case No. 30 of 2012

BETWEEN:

THE QUEEN

-and-

DEVON HEWEY

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

Appearances: Ms. Cindy Clarke (Director of Public Prosecutions) for the Prosecution
Mrs. Simone Smith-Bean for the Defendant

Dates of Hearing: 14th & 16th September 2022
Date of Ruling: 26th September 2022

RULING

Bail Application

WOLFFE J

1. The Defendant has been charged with the offences of (i) Premeditated Murder, contrary to section 286(1) of the Criminal Code, and (ii) Using a Firearm whilst Committing an Indictable Offence, contrary to section 26A of the Firearms Act 1973 (the "FA"). It should be said that the current iteration of the Indictment arises out of a successful application by the Prosecution on the 29th August 2022 to amend the original Indictment by (i) removing the name of Jay Thomas Dill as the Defendant's co-defendant, and (ii) including the name

of Mr. Dill in the "Particulars of Offence" to say that the Defendant was concerned with Mr. Dill in committing the offences.

2. To put this and the Defendant's bail application into context it would be useful to set out a brief chronology of this matter (which admittedly has some vintage):

31st March 2011: Date of alleged offences.

25th February 2013[1]**:** After a trial before a Jury, the Defendant and Mr. Dill are convicted of the offences of premediated murder and the use of a firearm to commit an indictable offence. They were both sentenced to life imprisonment with minimum terms of 25 years' imprisonment for the murder count, and concurrently 12 years' imprisonment for the use of a firearm to commit an indictable offence count.

2nd, 3rd, and 18th March 2016[2]**:** The Defendant's and Mr. Dill's appeal against their convictions was heard by the Court of Appeal of Bermuda.

13th May 2016: The Defendant's and Mr. Dill's appeals were dismissed by the Court of Appeal.

22nd May 2016: The Defendant filed an application for permission to appeal the decision of the Court of Appeal to The Judicial Committee of the Privy Council (the "Privy Council")[3].

1st and 2nd February 2022: The Privy Council hears the Defendant's appeal. My understanding from Mrs. Simone Smith-Bean (Counsel for the Defendant) is that the elapse of time was partly attributed to the Defendant awaiting approval for legal aid to appeal to

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1 The Court file does not indicate the date on which the Defendant and Mr. Dill first appeared in the Magistrates' Court and then in the Supreme Court to answer to offences charged.

2 The Court file does not indicate when the Defendant and Mr. Dill filed their grounds of appeal.

3 It does not appear that Mr. Dill sought leave to appeal to the Privy Council.

the Privy Council as well as the amount of time taken for the Privy Council to initially respond to the Defendant's application and then the setting down the Defendant's appeal.

11th April 2022: The Privy Council concludes that the Defendant's conviction and sentence should be set aside and that the matter should be remitted to the Court of Appeal to consider (i) whether the matter should be remitted to the Supreme Court of Bermuda for retrial, and (ii) whether the Defendant should be released on bail pending any retrial.

9th June 2022: The Court of Appeal hears submissions as to whether the Defendant should be retried.

12th August 2022: The Court of Appeal decides that the Defendant should be retried on Indictment No. 30 of 2012, and it refused the Defendant's application for bail.

29th August 2022: The Indictment is amended (as stated above).

3. It is unclear from the Court file currently in my possession as to the total amount of time that the Defendant actually has been in custody, but one may deduce that he has been in custody at least from the 25th February 2013 when he was convicted in the Supreme Court. In paragraph 16 of his affidavit sworn on the 14th April 2022[4] and paragraph 17 of his affidavit sworn on the 28th August 2022 the Defendant states that he has thus far served 10 years in prison in respect of this matter. I have no reason to doubt this as it is quite possible that the Defendant was remanded in custody in the months or years leading up to his trial date in February 2013. Therefore, by now the Defendant would have spent at least 10 to 11 years of the minimum 25 years' of the imprisonment imposed by trial judge Justice Carlisle Greaves (not two-thirds of his sentence as stated in paragraph 12 of the Defendant's August 2022 affidavit).

[4] The affidavit states a date of "14th April 2020" but this is obviously incorrect as the Privy Council decision was not handed down until the "11th April 2022".

Decision

4. It is trite that the Defendant has a right to bail and in this regard I repeat my following words written in *R v. Jahmico Trott, Case No. 27 of 2017 and Case No. 10 of 2019, Supreme Court of Bermuda*:

> *"The Defendant's Right to Bail*
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> *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.*
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> *5. In respect of exceptions to the right to bail, paragraphs 2 to 9 of Part 1 of Schedule 1 of the Bail Act provides the following:*
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> *"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."

5. There is no dispute that the Defendant falls within those category of cases in which there is an exception to the general right to bail which is afforded to offenders under section 6 of the Bail Act. Indeed, the nature of the offences for which the Defendant has been charged covers the trifecta of exceptions set out in paragraph 2 of Part 1 of Schedule 1 of the Bail Act. Specifically, he is charged with (i) murder, (ii) an offence under the FA, and (iii) a serious arrestable offence involving the use of a firearm. Whilst this goes a long way in determining that the Defendant should not be granted bail it is and should not be fatal to his application for bail. I must still go on to consider other factors such as those outlined in paragraphs 3 and 11 of Part 1 of Schedule 1 of the Bail Act.

6. In this regard, Ms. Simone Smith-Bean contends that the Defendant should be granted bail because in consideration of his successful appeal to the Privy Council, that he has already served over 10 years of imprisonment, and that any further incarceration would be unjust and unfair. Further, and given the Privy Council's decision, that the gun shot residue ("GSR") evidence and the oral testimony from a key Prosecution witness which will likely be advanced by the Prosecution at the retrial will be of limited probative value. I took this to mean that Mrs. Smith-Bean was submitting that the Prosecution's case has been severely weakened.

7. In support of his bail application the Defendant produced a letter from a Martha A. Dismont setting out her interactions with the Defendant over the years, her considered conclusions as to his character, that she vouches for the fact that the Defendant's "spirit is in the right place", how he is motivated to help others, and how she is happy to have the Defendant connect with her company to support their study on young black males. Additionally, I heard sworn oral evidence from Mr. Evard Cole (the step-father of the Defendant) and Ms. Eulie Hewey (the Defendant's maternal grandmother) who both indicated their willingness to assist the Defendant should he be granted bail.

8. Resisting the Defendant's bail application Ms. Cindy Clarke, the Director of Public Prosecutions ("DPP"), relies on paragraphs 2(a) & (b), 3(a), 3(b), 3(c) and 7 of Part 1 of Schedule 1 of the Bail Act. She submitted that:

(i) The Defendant would fail to surrender to custody and to this the DPP points to (a) 12 traffic offence related warrants which had been issued for the Defendant's non-appearance in the six (6) years prior to his remand for these current offences charged, and (b) the Defendant having no strong family ties to Bermuda.

(ii) The Defendant would commit further offences and in this regard she brought the Court's attention the fact that when the Defendant allegedly committed the offences charged he was on probation for a conviction in the Supreme Court for the offence of aggravated burglary. Further, that prior to his incarceration the Defendant was linked to gang-related activity.

(iii) The Defendant was convicted of perjury and the corruption of a witness on the 4th December 2015 as shown in the Court of Appeal authority of *Devon Hewey & Dujon Reid-Anderson, Criminal Appeals Nos. 21 & 23 of 2015 and 2 of 2016 (16th November 2016)*. The DPP says that having proceeded through the full appellate process in this case that the Defendant has the names of all of the witnesses who have testified against him and therefore there is reason to believe that the Defendant will interfere with witnesses in this matter.

9. Having heard both Counsel there is some credence in Mrs. Smith-Bean's submissions that the elapse in time from the Defendant's initial conviction on the 25th February 2013 and now, and that he has spent over 10 years' in prison, should be taken into consideration in determining whether the Defendant should be granted bail. I do take both of these factors into consideration. I also accept Ms. Smith-Bean's submissions that the occasions when warrants were issued as a result of the Defendant's non-appearance have little relevance

today given that they were for minor traffic offences and that they occurred years prior to the Defendant appearing in Court for the offences charged in this matter. However, Mrs. Smith-Bean's submissions pale in comparison to the rather strong reasons to deny the Defendant bail.

10. Firstly, I accept the DPP's submission that the Defendant would interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person. Often when Prosecuting Counsel submit such an objection to bail it is usually couched in terms of what may or is likely to happen without any concrete evidence of actual interference with witnesses. In this case however the DPP colloquially "has the receipts" through the Defendant's own authority of ***Hewey & Reid-Anderson***. The offences which are the subject of ***Hewey & Reid-Anderson*** were committed in May/June 2014 which is when the Defendant was in custody for the case-at-bar, and it involved the Defendant and Reid-Anderson causing a witness to give false evidence at another retrial of the Defendant and a man called Cox. The false evidence being that the Defendant was not one of two men on a motorcycle from which gun shots were fired at the victim. Interestingly, the Defendant, whilst he was incarcerated, found a way to telephone the witness on several occasions and to offer the witness $3,500 to give the false evidence. Eventually, at the retrial of the Defendant and Cox the witness did give the intended false evidence and on the 3rd November 2014 (again whilst the Defendant was in custody for this matter) the Defendant and Cox were found not guilty. In dismissing the Defendant's appeal in ***Hewey & Reid***-Anderson Baker P. stated that *"there was clear evidence that Hewey was directing operations overall and maintaining a close interest in what was happening"*.

11. It is therefore without hesitation that I conclude that there is a real likelihood that if released on bail that the Defendant will interfere with witnesses for the retrial in this case. If the Defendant was able to orchestrate and carry out the interference of witnesses from the confines of a secure prison facility as stated in ***Hewey & Reid-Anderson*** then he can and will likely do more with greater affect if allowed to wander about the community. Connected with this is therefore my real concern that the Defendant will commit further offences, such as perverting the course of justice, if released on bail.

12. Secondly, having heard and seen the oral testimony of Mr. Cole and Ms. Hewey at the bail hearing I am not satisfied that if the Defendant is released from custody that (i) they will ensure that the Defendant resides with Mr. Cole at #221 Middle Road in Southampton Parish; (ii) Mr. Cole will provide the Defendant with gainful employment; or that (iii) they will ensure that the Defendant appears in Court. I am in no way suggesting that Mr. Cole or Ms. Hewey fabricated their sworn evidence but what they did say lacked pertinent details and convinced me that any living arrangements for the Defendant upon his release will either inadequate, uncertain, and unsupervised. Such as: (a) the fact that it is anticipated that the Defendant would live with Mr. Cole in his apartment; (b) the murkiness surrounding the marital status of Mr. Cole and the Defendant's mother and whether the Defendant's mother permanently resides and works in the United Kingdom; and (c) no firm indication that Mr. Cole will provide the Defendant with gain employment.

13. My concerns are solidified by the fact that when the Defendant made his unsuccessful bail application before the Court of Appeal (after his matter was remitted from the Privy Council) he stated in his affidavit sworn on the 14th April 2022[5] that *"subsequent to my incarceration my mother, whom still owns a home in Bermuda, moved to the U.K. with my siblings. I hereby seek the courts consideration to extend a bail condition that will allow me to immediately depart Bermuda to be with my family while awaiting my next scheduled appearances before the court of appeal"*. As an alternative condition of bail the Defendant proffered that if granted bail that he could reside with a Charlotte Trott at her residence situate at #7 Orange Hole Road in St. Georges Parish. Granted, the Defendant could have reasonably changed his mind about joining his mother in the UK and about where he would live upon his release from custody. However, I am not convinced that he has primarily because I am not satisfied that Mr. Cole and Ms. Hewey, because of their vagueness, confirm that the Defendant has close ties to Bermuda. In my view, the Defendant's real ties are his mother and siblings who have permanency in the UK. That is where he really

[5] The contents of which are extensively similar to his affidavit sworn on the 28th August 2022 for the purposes of this bail application before me.

wants to be and if released from custody that is likely where he would go in contravention of any bail conditions which I may impose.

14. I will conclude by addressing Mrs. Smith-Bean's submission that the evidence of Mr. Kevin Busby, or the lack of it, somehow diminishes the strength of the Prosecution's case against the Defendant. At this point in time I am not convinced that it does. Of course, Mr. Busby may or may not come up to proof, or he may or may not give evidence which strengthens or weakens the Prosecution's case or bolters the defence of the Defendant. But these are possibilities which will only come to light at trial and therefore I will not take them into consideration in determining whether the Defendant is granted bail or not.

Conclusion

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

Dated the 26th day of September , 2022

The Hon. Mr. Justice Juan P. Wolffe
Puisne Judge