



# In The Supreme Court of Bermuda

## CRIMINAL JURISDICTION

2017 No: 21

**BETWEEN:**

**THE QUEEN**

**And**

**CHAE FOGGO**

## REASONS FOR REFUSAL OF BAIL

Date of Application: Monday 31 July 2017

Date of Decision on Bail: Monday 31 July 2017

Counsel for the Crown: Karen King on behalf of the DPP

Counsel for the Accused: Charles Richardson of Compass Law Chambers

*Application for Bail pending Sentence  
Reasons for Refusal of Bail  
Bail Act 2005 (Section 6 and Schedule 1)*

RULING of Assistant Justice S. Subair Williams

## **Introduction**

1. The indictment in this matter contains two counts:
  - (i) Count 1- Threatening to murder contrary to section 290 of the Criminal Code; and
  - (ii) Count 2- Improper use of public telecommunications service.
2. On Monday 31 July 2017, the Accused plead guilty to Count 1 on the Indictment. Count 2 was left on the file.
3. Preparatory to sentencing proceedings, the Court ordered a Social Inquiry Report (“SIR”) at the request of Counsel for the Accused.
4. In contemplation of a 4-6 week period before the completion of the SIR and a pursued non-custodial sentence, Defence Counsel made an application for bail pending sentence.
5. I refused the application after hearing full arguments. I now deliver my reasons in full for having refused bail.

## **Background of Court Appearances:**

6. The Accused entered not guilty pleas on 1 May 2017 when he was first arraigned in the Supreme Court. The matter was mentioned thereafter on 12 May 2017 and 1 June 2017. A further mention date was fixed for 12 June 2017 but it appears that the 12 June fixture was delisted as the record reflects that the hearing which next followed occurred on 20 June 2017 before Justice Carlisle Greaves.
7. On 20 June 2017 the Accused did not appear before the Court. A warrant was accordingly issued and the matter was next mentioned before Greaves J on 22 June 2017. On that date Mr. Richardson appeared and advised the Court that his Client had not been properly informed of the relisted date, hence his non-appearance. Notwithstanding, a warrant was issued and a trial date was then fixed by agreement to 24 July 2017.
8. On 26 June 2017 the matter was listed before Greaves J and the trial date for 24 July 2017 was confirmed. As the assigned trial judge, the matter was also listed for a mention before me on 17 July 2017. Notably, the time of the fixture was not stated by the Court.
9. On 17 July 2017 at 9:30am the matter was called but the Accused, Mr. Foggo, did not appear in Court. Mr. Richardson, in aid of his Client, suggested that Mr. Foggo was not under the impression that he was to appear until his 24 July trial date. The Court adjourned the matter

to 21 July 2017 at 9:30am and issued a warrant backed for bail. However, Mr. Foggo appeared later that morning and explained that he was not clear on the time he was supposed to attend for the 17 July mention.

10. On 21 July 2017 the Defence, having requested a judicial indication on the probable sentence prior to plea<sup>1</sup>, advised the Court that the Accused would likely enter guilty pleas. Mr. Richardson invited the Court to agree that the likely sentence would be a non-custodial one. The Court declined to give such an indication. Crown Counsel advised (having consulted with the DPP) that the Crown would not, in any event, support any indication in favour of a non-custodial sentence. Mr. Richardson then advised that he would have to take further instructions from his Client.
11. Given the circumstances, the Court confirmed that the trial would be fixed to proceed on 25 July 2017. On the said date, however, the Accused made a section 31 application challenging the sufficiency of evidence under Count 1. The Court refused the application and the Accused was arraigned (See my written ruling delivered also on 31 July 2017).

### **Bail Application before the Court:**

12. Defence Counsel submitted that the Defendant had a reasonable expectation for bail pending sentence on the argument that the nature and circumstances of this offence do not call for an immediate custodial sentence.
13. Mr. Richardson accepted that all of the previous recorded cases for threatening to murder resulted in the passing of immediate custodial sentences. However, he opined that there has never before been a proper challenge to the correct range of sentence to be handed down for an offence under section 290.
14. Mr. Richardson referred to the UK Sentencing Guidelines in respect of ‘threats to kill’ under section 16 of the Offences Against the Persons Act 1861 (OAPA). Counsel informed the Court that s. 16 OAPA, on summary conviction, carried a maximum sentence of a level 5 fine and/or 6 months imprisonment. If tried on indictment, the maximum sentence, he said, is 10 years imprisonment.
15. Counsel also stated that under the same UK Guidelines, one threat uttered in the heat of the moment with no more than a fleeting impact on the victim would attract, as a starting point, a medium level community order. He said the total range would be a low level community order to a high level community order.

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<sup>1</sup> See *Regina v. Goodyear 21 April 2005 Times Law Reports*

16. On Counsel's submission Mr. Foggo's commission of the offence can be described as an isolated threat that warranted no more than a community based sentence in accordance with the UK schedule on sentencing under s. 16 of the OAPA. He advised that in the UK, offences such as s. 290 would not be sent to the Crown Court unless the threat is coupled with the brandishing of a weapon or some other physical manifestation of the act. Counsel submitted that '*mere words alone, from time in memorial, in criminal law, have to be treated very very carefully*'.
17. Mr. Richardson suggested that his Client would be entitled to the full benefit of a guilty plea as a mitigating factor. This, he argued, was sufficient to render it unlikely that Mr. Foggo would be penalized with an immediate custodial term.
18. Counsel sought to standardize Mr. Foggo's threatening messages in describing them as the genre of remark that men often make in domestic disputes without meaning. He queried why time and money would be wasted on '*mere hot air*'. He explained that his Client had just discovered that the Complainant was co-habiting with another man and his son. Mr. Richardson stated that these threatening words were uttered only in the heat of that reaction. He told the Court that the threats were empty in that his Client never meant for any of the words to come to pass- he was merely '*venting*', as Mr. Richardson put it.
19. Mr. Richardson argued that the Court, in having regard to all of these factors, may be satisfied that an immediate custodial sentence is unlikely.

### **Objections to Bail:**

20. Crown Counsel, Ms. King, initially expressed her agreement to bail pending appeal. She said that the Accused had complied with his bail conditions without breach and that he had not made any contact with the Complainant during that period. She said this in favour of the Accused highlighting that he had recently become aware of the Complainant's place of abode through the Crown's disclosure of un-redacted witness statements to the Defence<sup>2</sup>. Ms. King told the Court that she had recently met with the Complainant herself. When advising the Court on the Complainant's attitude towards the Accused and the impact of the offence, Ms. King relayed that the Complainant simply said that she wanted for this to all come to an end.
21. In light of the Crown's indication that an immediate custodial sentence would be sought; I queried the basis on which the Prosecutor could agree to bail pending sentence. Ms King was unable to account for the apparent inconsistency. Having previously consulted with the DPP

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<sup>2</sup> There are previous cases where the details of a Complainant's place of abode have been redacted prior to disclosure to the Defence, by agreement or Court Order.

on sentence, Ms King was permitted a short adjournment to consult further on bail pending sentence. Mr. Richardson objected to this course and queried if it would be appropriate to stand the matter down. Notwithstanding, the Court adjourned for 15 minutes.

22. When the Court reconvened, Ms. King confirmed that she had taken instruction from the Deputy DPP, Carrington Mahoney. In accordance with those instructions, she withdrew her previous agreement to bail and apologized for having to do so.

23. Ms. King stated that she was not aware of any previous decisions from the Court which resulted in the passing of a non-custodial sentence for an offence committed contrary to section 290 of the Criminal Code. She drew my attention to previous sentences passed under section 290 by reference to sentencing certificates which she did not place before the Court. As the certificates are a matter of Court record, I have had regard to them which summarily report:

- (i) Detroy Anthony Smith - Threatening murder in writing (s.290 of Criminal Code) - Guilty Plea entered 11 March 2013 - Sentenced on 10 March 2013<sup>3</sup> - 6 months' imprisonment followed by 18 months' probation- Time spent in custody taken into consideration. (Ms. King explained that in this case the Defendant, who was in a previous relationship with the Complainant, sent the Complainant a picture of a gun.)
- (ii) Andre Nesbett - Threatening murder in writing (s.290 of Criminal Code)- Guilty Plea entered 2 January 2014 - Sentenced on 7 February 2014 - 6 months' imprisonment followed by 18 months' probation- Time spent in custody taken into consideration.
- (iii) Geontai Minors - Threatening murder in writing (s.290 of Criminal Code)- Convicted 4 February 2014 - 18 months' imprisonment followed by 3 years' probation- Time spent in custody taken into consideration.
- (iv) Kishauni Wolffe - Threatening murder in writing (s.290 of Criminal Code)- Guilty Plea entered 1 October 2010 - Sentenced on 20 January 2011 – sentenced to 5 years' imprisonment in the Supreme Court- Sentence reduced to 2 ½ years' imprisonment plus 2 years' probation in the Court of Appeal as agreed between both sides. (In summarizing the facts, Ms. King informed the Court that Mr. Wolffe sent a text message to father of the Complainant words to the effect, 'by tonight your daughter will be dead'.)

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<sup>3</sup> Date appears to be cited incorrectly on the sentencing certificate as it pre-dates the guilty plea. (Nothing turns on this in any event).

24. Notwithstanding the Prosecutor's undertaking to do so, Ms. King did not file the Summaries of Evidence which accord with the certificates. Consequently, I have not had regard to any of the facts beyond the points noted in the Court's record of Certificates of Sentence. However, in my view, an application for bail pending sentence does not call for the Judge to consider the likelihood of an immediate custodial sentence beyond the extent which I have already done.

## **The Law on Bail**

25. While neither Counsel referred to the relevant provisions of the Bail Act 2005 in the course of their submissions, it is uncontroversial that section 6 of the Act outlines the general right to bail.

26. Section 6(1) reads: "*A person to whom this section applies shall be granted bail except as provided in Schedule 1.*"

27. Section 6(4) reads: "*This section also applies to a person who has been convicted of an offence and whose case is adjourned by the court for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence.*"

28. Section 6(6) reads: "*In Schedule 1 "the defendant" means a person to whom this section applies and any reference to a defendant whose case is adjourned for inquiries or a report is a reference to a person to whom this section applies by virtue of subsection (4).*"

29. Part I of Schedule 1 at item 1. Reads: "*Where the offence or one of the offences of which the defendant is accused or convicted in the proceedings is punishable with imprisonment, the following provisions of this Part of this schedule apply.*"

30. Under the Part I 'Exceptions to the right to bail' at item 6 it reads: "*The defendant need not be granted bail if he is in custody in pursuance of the sentence of a court.*"

31. While Counsel did not address me on the construction of item 6, I accept that it is drafted in a way which, on a literal interpretation at least, it suggests that it applies to Defendants who are already in custody seeking bail as opposed to a Defendant already on bail looking to extend his bail right through to sentence.

32. However, the Courts have a long history of interpreting these provisions to generally exclude Defendants convicted on offences punishable by imprisonment from a general right to bail. In my view, a Defendant becomes even further removed from the prospect of bail where an immediate custodial sentence is likely.

## Reasons for Refusal of Bail Pending Sentence:

33. In my view, the nature and circumstances surrounding the commission of this offence are serious enough to render it likely, at this stage, that an immediate custodial sentence will be imposed. This indication does not, of course, bind the sentencing judge by any measure.

34. I have had particular regard to the evidence disclosed by the witness statements in this case. The Accused in sending a text message to the Complainant uttered the following:

*“YO ANSWER THE PHONE – ‘UMA GO TO FUKIN JAIL FOR U – REMEMBER I TOLD YOU THAG- LET ME SEE YOU UMA KILL YOU – UMA FUCKIN BEAT YA CAR, YA FACE, EVERYTHING – DON’T EVEN WANT A SON FOR U FUCK U AND HIM – YA A FAT WHORE AND UMA MAKE THAT LIL NIGGA HATE U WHEN HIS OLDER WATCH- FEEL SORRY FOR THAT BOY HONEST CAUSE YA NOTHING BUT A TRAMP STAMP YO”*

35. On the same day, he also sent a voice message which transcribes as follows:

*“I’M FUCKIN DEAD SERIOUS HEAR ME? I’M TRYIN TO GET THAT PUSSY HO’S NUMBER RIGHT NOW. IF I KNEW WHERE YOU STAY I’LL COME UP YOUR HOUSE AND BEAT YOUR FUCKIN ASS IN FRONT OF THAT LIL NIGGA’S SON. I WOULD FUCKIN BEAT YOU IN FRONT OF THAT NIGGA’S SON, I SWEAR TO GOD BAH. I’M A FUCKIN KILL YOU. I’M A KILL YOU, I DON’T WANT NO PARTS OF YOU, I DON’T WANT NO PARTS OF THAT LIL FUCKIN BOY NO MORE. MAKE HIM CALL THAT FUCKIN GUY DADDY, HEAR ME? DON’T FUCKIN TELL THAT BOY I’M HIS DADDY NO FUCKIN MORE. I WANT A PATERNITY TEST, TO MAKE SURE HE’S EVEN MY FUCKIN SON, AND HE CAN GO FUCK OFF, HEAR ME. DO NOT CONTACT MY MAMA NO MORE FOR NO FUCKIN SHIT! DON’T CONTACT ME, DON’T CONTACT NOBODY IN THIS FUCKIN HOUSE DUN. I FUCKIN SWEAR TO GOD BAH’.*

36. I also took into consideration, when forming my view on the likelihood of an immediate custodial sentence being imposed, the impact these statements had on the Complainant. In her witness statement to the police dated 31 March 2017 she said:

*“Listening to his voicemail, I really believe he is serious about wanting to hurt me. I feel truly threatened by him right now, and I’m just glad he doesn’t know where I live. I also don’t feel comfortable with him being anywhere near my son right now, because of the serious threats he is making towards us. I wish to have (Accused) for his threatening words towards myself, and don’t want to let him see my son. It’s obvious (Accused) has no respect for me or our son, and I believe he might follow through with his threats. I also wish to get a Protection Order against (Accused) to keep him away from us...”*

37. Having regard to the above portion of the victim's witness statement, I have not been persuaded that the Court will likely find that the impact of this offence was a fleeting one.
38. Based on the gravity of the offence and the circumstances in this case, in addition to the sentencing trend of this Court and the Court of Appeal in previous cases, I find that there is a real likelihood that the sentencing judge would find that only an immediate custodial sentence (whether combined with a community based order or not) is appropriate.
39. I am also duty-bound to take into consideration that this is an indictable-only offence punishable by a maximum term of 7 years imprisonment. While I take the view, as expressed in my previous ruling in this matter, that consideration is owed to changing the mode of proceedings for an offence under section 290 to an either-way offence, I feel that even if this application were being heard summarily, an immediate custodial sentence would be deemed likely.

### **Conclusion**

40. For the reasons outlined herein, I refused the Defendant's application for bail pending appeal sentence and remanded him into custody on 31 July 2017.
41. A Social Inquiry Report was ordered on 31 July 2017.
42. I also fixed this matter for mention at the monthly arraignment session on Friday 1 September 2017 for a date to be fixed for sentencing.

Dated this 15<sup>th</sup> day of August 2017

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**SHADE SUBAIR WILLIAMS**  
**ASSISTANT JUSTICE OF THE SUPREME COURT**