[2014] JMCA Crim 38

JAMAICA

IN THE COURT OF APPEAL

BAIL APPEAL NO 2/2014

BETWEEN THE DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

A N D KEVIN ADAMS RESPONDENT

Richard Small, Mrs Ann-Marie Feurtado-Richards and Miss Yanique Gardener for the Director of Public Prosecutions

Mrs Valerie Neita-Robertson, Oshane Cousins and Andrew Wildes for the respondent

3, 7, 8, 9, 10 and 31 July 2014

IN CHAMBERS

MANGATAL JA (Ag)

[1] This is a bail appeal filed by the Director of Public Prosecutions ('the DPP') in relation to the decision of Her Honour Miss Maxine Ellis, Resident Magistrate for the Corporate Area, holden at Half Way Tree, in the parish of Saint Andrew. On 30 June 2014, the learned Resident Magistrate granted bail to the respondent Kevin Adams ('Mr

Adams') in respect of four murder matters, in relation to Adiff Washington, Sylvester Gallimore, Anthony Trout and Andrew Bisson, in respect of which Mr Adams was charged. The terms and conditions of the order made in relation to bail were as follows:

> "1. Five Million Dollars bail with one or two sureties.
>
> 2. To report to the Area III Headquarters in Mandeville on Mondays and Fridays between the hours of 6:00 a.m. and 6:00 p.m.
>
> 3. Stop order at airport and other ports of entry and departure.
>
> 4. Surrender travel documents.
>
> 5. Curfew order between 8:00 p.m. and 6:00 a.m. daily."

[2] On 10 July 2014, after considering arguments advanced over several days by the Crown and on behalf of the respondent, I made the following orders:

> "1. The appeal is allowed.
>
> 2. The decision/order of Her Honour Miss M. Ellis made on the 30th June 2014, granting bail to the respondent Kevin Adams in respect of the four murder matters of Adiff Washington, Sylvester Gallimore, Anthony Trought, and Andrew Bisson, is set aside.
>
> 3. The respondent is remanded in custody."

I had promised that my written reasons would follow at the earliest possible time. These are my reasons for having allowed the appeal. I have produced them urgently because of the nature of the matter and because the end of this court term is upon us.

However, numerous submissions were made to me and I regret that I have not had more time to condense and streamline my discussion of them here. Thus, I apologize in advance for the length of this judgment.

[3] Section 10(2) of the Bail Act ('the Act') provides for the prosecution to have a right of appeal to a judge of the Court of Appeal in chambers in respect of a decision of a Resident Magistrate or a Supreme Court judge granting bail to a defendant. Neither I nor counsel for either side were able to find any written decisions from this court in relation to the prosecution's right of appeal since this right was first introduced into law in 2010. I trust that it may therefore prove useful to state the law and principles relevant to this area of the law, and their application to the circumstances of this case. This lack of written precedent is somewhat similar to the circumstances that obtained when Brooks JA delivered his decision in ***Huey Gowdie v R*** [2012] JMCA Crim 56. In that decision, Brooks JA provided admirable guidance. Brooks JA specifically addressed appeals from a Supreme Court judge or a Resident Magistrate's refusal of bail as the matter which came before him involved a refusal of bail.

[4] As I did at the hearing when I handed down my decision, I wish to commend counsel on both sides for their invaluable assistance. They have obviously conducted wide-ranging research and have provided comprehensive and thoughtful submissions.

[5] Section 3(1) of the Act provides that subject to the provisions of the Act, every person who is charged with an offence shall be entitled to be granted bail. However, section 3(4A) states that bail shall be granted to a defendant in relation to an offence specified in the Second Schedule, "only if the defendant satisfies the Court that bail should be granted". It is interesting to note that section 3(4A) was added to the Act in 2010, at the same time as the prosecution's right to appeal set out in section 10(2), was added to the statutory provisions. The first offence specified in the Second Schedule is murder. Mr Adams was at the time of the bail application made on his behalf before the court facing four murder charges.

[6] Sections 4(1) and (2) of the Act, which bear the marginal note "Circumstances in which bail may be denied", provide as follows:

> "4.-(1) Where the offence or one of the offences in relation to which the defendant is charged or convicted is punishable with imprisonment, bail may be denied to that defendant in the following circumstances-
>
> (a) the Court, a Justice of the Peace or police officer is satisfied that there are substantial grounds for believing that the defendant, if released on bail would-
>
> (i) fail to surrender to custody;
>
> (ii) commit an offence while on bail; or
>
> (iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;
>
> (b) the defendant is in custody in pursuance of the sentence of a Court or any authority acting under the Defence Act;

(c) the Court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this section for want of time since the institution of the proceedings against the defendant;

(d) the defendant, having been released on bail in or in connection with the proceedings for the offence, is arrested in pursuance of section 14 (absconding by person released on bail);

(e) the defendant is charged with an offence alleged to have been committed while he was released on bail;

(f) the defendant's case is adjourned for inquiries or a report and it appears to the Court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody.

(2) In deciding whether or not any of the circumstances specified in subsection (1)(a) exists in relation to any defendant, the Court, a Justice of the Peace or police officer shall take into account-

(a) the nature and seriousness of the offence;

(b) the defendant's character, antecedents, association and community ties;

(c) the defendant's record with regard to the fulfillment of his obligations under previous grants of bail;

(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 failed to surrender to custody;

(e) whether the defendant is a repeat offender, that is to say, a person who has been convicted on three previous occasions for offences which are punishable with imprisonment; or

(f) any other factor which appears to be relevant including the defendant's health profile."

[7] Sections 10(2), (3), (4), (5), and (6) of the Act provide as follows:

> "Right of appeal
>
> 10(1)….
>
> (2) Where bail is granted to a defendant by a Court pursuant to this Act, the prosecution may, in the manner set out in subsection (3), appeal to a Judge of the Court of Appeal in Chambers in respect of the decision.
>
> (3) Where the prosecution intends to appeal a decision to grant bail to a defendant, the prosecution shall-
>
> (a) at the conclusion of the proceedings in which the decision was communicated and before the release from custody of the defendant, give oral notice to the Court of that intention: and
>
> (b) give to the Court and the defendant, within twenty-four hours after the conclusion of the proceedings referred to in paragraph (a), a written notice of the appeal, setting out the reasons therefor.
>
> (4) Subject to subsection (5), upon the receipt of the oral notice referred to in subsection (3) (a), the Court shall remand the defendant in custody until the appeal is determined.
>
> (5) Where the prosecution fails to file a written notice of appeal in accordance with subsection (3) (b), the order for the grant of bail shall take immediate effect.
>
> (6) The hearing of an appeal under this section shall be commenced within seventy-two hours (excluding Saturdays, Sundays and days declared to be Public General Holidays under section 2 of the Holidays (Public General) Act), or such longer period, as the Court may in any particular case consider appropriate, after oral notice is given under subsection (3) (a)."

[8] The written speaking notes provided by the prosecution indicate that upon the ruling of the learned Resident Magistrate on 30 June 2014, the prosecution orally

indicated their intention to appeal the decision to grant bail. A written notice of appeal was filed by the DPP on 1 July 2014. The stated grounds of appeal are as follows:

> "1. The learned Resident Magistrate erred by exercising her discretion unreasonably in granting bail.
>
> 2. We respectfully seek this Honourable Court's leave in filing supplemental grounds upon receiving the written reasons of the learned Resident Magistrate."

[9] At the hearing of the appeal, the prosecution did not in fact seek leave to file supplemental grounds. However, the sole ground was particularized very helpfully under a number of heads under which the Crown's submissions have been grouped below.

Background

[10] Detective Corporal Kevin Adams has been charged with four offences, namely the murder of Adiff Washington in respect of which he is charged alone (***R v Kevin Adams***), and three other murders in respect of which he is jointly charged, i.e. Sylvester Gallimore (***R v Kevin Adams and Pete Samuels***), Anthony Trought (***R v Kevin Adams and Jerome Whyte***) and Andrew Bisson (***R v Kevin Adams, Carl Bucknor and Howard Brown***). All of these are cases in which the Independent Commission of Investigations ('INDECOM') has carried out investigations. INDECOM is a Commission of Parliament set up under the Independent Commission of Investigations Act to investigate, among other things, alleged misconduct on the part of members of the security forces and other agents of the State. An application for

bail was made on Mr Adams' behalf as well as on behalf of Mr Adams co-defendants (Jerome Whyte and Carl Bucknor on 27 March and 3 April 2014 in the Resident Magistrates' Court for the Corporate Area. This application was made before Senior Resident Magistrate Her Honour Miss Judith Pusey. Pete Samuels was the subject of a separate application.

[11] The learned Senior Resident Magistrate heard submissions from both sides and refused the application for bail in relation to Mr Adams and the other accused persons. In her written reasons for refusing bail, Her Honour indicated the following:

1. The court was concerned based on the allegations that it was not unlikely that witnesses would be intimidated and put in fear;
2. The prosecution's allegations were very serious;
3. The defendants, especially Mr Adams were a flight risk.
4. Nothing in the Act or custom could adequately safeguard the possibility of the concerns being realized;
5. The court was not satisfied that the defendants being on bail, would not interfere with the due prosecution of the matter.

[12] On 17 and 23 April 2014, Mr Adams' counsel applied for a review of the learned Senior Resident Magistrate's refusal of bail before a judge of the Supreme Court pursuant to the Act. Sections 8-11 of the Act deal with the authority given to a Supreme Court judge after a refusal of bail by a Resident Magistrate. Evan Brown J upheld the learned Senior Resident Magistrate's decision.

[13] On 30 June 2014, another bail application was made on behalf of Mr Adams as well as the other defendants jointly charged, this time before Her Honour Miss Maxine Ellis. Submissions were made by both sides and the learned Resident Magistrate granted bail to Mr Adams as outlined in paragraph one above. She also granted bail to Messrs Bucknor and Whyte on the same conditions as attached to the grant to Mr Adams, but they were each granted bail in the sum of $1,500,000.00 with one or two sureties. Verbal notice of appeal was given in court. On 1 July 2014, the prosecution gave written notice of appeal only in respect of Mr Adams.

The submissions

The prosecution's submissions

[14] It is convenient to discuss the submissions made by the prosecution under the heads of the particulars set out in the speaking notes.

> A. The learned Resident Magistrate erred in law in re-considering material that had already been considered and decided on by the learned Senior Resident Magistrate and upheld by a judge of the Supreme Court rather than to confine herself to new material(s).

[15] Mr Small, who appeared for the prosecution, submitted that the pillar of "*res judicata pro veritate accipitur*" is a pillar of our justice system. Reference was made to the case of ***R v Nottingham Justices, ex parte Davies*** [1980] 2 All ER 775 for the proposition that a judge or magistrate hearing a renewed application should not

consider the entire case but should confine themselves to the circumstances that occurred since the last application or to materials that were not brought to the attention of the court. At pages 778-779 Donaldson LJ stated:

> "Finally, I accept that the fact that a bench of the same or a different constitution has decided on a previous occasion or occasions that one or more of the Sch 1 exceptions applies and has accordingly remanded the accused in custody does not absolve the bench on each subsequent occasion from considering whether the accused is entitled to bail, whether or not an application is made.
>
> However this does not mean that the justices should ignore their own previous decision or a previous decision of their colleagues. Far from it. On those previous occasions, the court will have been under an obligation to grant bail unless it was was [sic] satisfied that a Sch 1 exception was made out. If it was so satisfied, it will have recorded the exceptions which in its judgment were applicable. This 'satisfaction' is not a personal intellectual conclusion by each justice. It is a finding by the court that Sch 1 circumstances then existed and is to be treated like every other finding of the court. It is res judicata or analogous thereto. It stands as a finding unless and until it is overturned on appeal. And appeal is not to the same court, whether or not of the same constitution, on a later occasion. It is to the judge in chambers. It follows that on the next occasion when bail is considered the court should treat, as an essential fact, that at the time when the matter of bail was last considered, Sch 1 circumstances did indeed exist. Strictly speaking, they can and should only investigate whether that situation has changed since then."

[16] Mr Small also referred to ***Gowdie***, where at paragraph 23, Brooks JA, sitting in chambers, held:

> "The exacting nature of the process explains why, although section 3(5) of the Act states that nothing in the Act "shall preclude an application for bail on each occasion that a defendant appears before a Court in relation to the relevant

> offence", the decided cases suggest that fresh applications should not be made unless there is new material to be placed before the court. The court should, however, not give the impression that it is refusing to consider a renewal of an application for bail, but it should enquire of counsel, if there is any new material to be advanced (see ***R v Slough Justices ex parte Duncan and Another*** (1982) 75 Criminal Appeal Reports 384 at page 389). The starting position of any renewed application "must always be the finding of the position when the matter was last considered by the court" (per Donaldson LJ ***Rv Nottingham Justices ex parte Davies*** [1980] 2 All ER 775."

[17] Counsel submitted that Her Honour Miss Ellis failed to identify the new materials and did not guide herself within the confines of the law on the new materials. The argument continues, that she was required to recognize that there was a previous decision of the learned Senior Resident Magistrate, Her Honour Miss Pusey as well as that of His Lordship, Mr Justice Evan Brown, and that the learned Resident Magistrate was not sitting as a court of review of those decisions.

[18] It was submitted that Her Honour Miss Ellis should only reverse the decision previously made if the findings of the court that existed before the refusal of bail no longer existed. She was simply to identify if there was any new material which was capable of justifying a review of the previous decision and if there was, she would then be required to determine whether the new material operated in favour of or against the grant of bail. It was submitted that the learned Resident Magistrate sat as a court of appeal when she ought not to have done so.

[19] Counsel, in his speaking notes at paragraph 13, pointed to the following as being included amongst the new materials that were before the learned Resident Magistrate:

> "a. Transcript of a taped conversation between the Respondent and Constable Collis Brown wherein both individuals admitted to their involvement in extra-judicial killings.
>
> b. Audio of conversation between the Respondent and Constable Collis Brown wherein both individuals admitted to their involvement in extra-judicial killings.
>
> c. Transcript of a caution interview of Collis Brown dated the 10th day of August 2013 which names the respondent as a member of an enterprise committing extra-judicial killings in Clarendon.
>
> d. Statement of Deputy Superintendent of Police Carlton Harrisingh which indicates that another bullet, found at the scene of the killing of Adiff Washington, was fired from a 'Glock' style firearm; notwithstanding that it lacked sufficient reproducible material for singular comparison. This statement supports the finding of the Ballistic expert that a bullet belonging to the respondent's firearm was recovered from the said scene.
>
> e. Crime diary entry of Woman Corporal Millicent Wilson-Morris which indicates that Mr Adams' 9mm Glock pistol serial number MTS108 was submitted by him.
>
> f. Statement of Woman Corporal Millicent Wilson-Morris which indicates that she issued the 9mm Glock pistol serial number MTS108 to Mr Adams, four days before the killing of Adiff Washington.
>
> g. The entry in the firearm register dated the 17th day of March, 2009 which indicates that Mr Adams was issued the firearm since 2009 and that he had same in his possession since that time save and except circumstances in which it was seized when he was involved in a shooting incident.
>
> h. Statement of Winston Trought which identifies Mr Adams as the driver of the car in the vicinity of the locus shortly before the killing of Anthony Trought.

i. Additional intelligence of threats of a direct intention to murder the Commissioner of Indecom, Terrence Williams, and a named Indecom Chief Investigator."

[20] Mr Small submitted that the new material were all against the grant of bail. He argued that they, particularly the tape recording, strengthened the Crown's case. The taped conversation, it was submitted, confirmed that Mr Adams is part of a conspiracy and that if one applies the ordinary meaning to the contents of this conversation, it revealed an admission on the part of Mr Adams that he commits extra-judicial killings and that he received orders from senior members of the Jamaica Constabulary Force. This, it was posited, is cogent evidence on a bail application, and the learned Resident Magistrate had erred in finding that Mr Adams had "distanced himself from that practice."

"B. At the time that the preliminary examinations were set by the Learned Senior Resident Magistrate, all the preliminary examinations could not have been started."

[21] If the preliminary examinations against Mr Adams had started, the four matters against him would not have been completed. Further, it was submitted that the purpose for which the additional material was requested was in order for the DPP to consider whether there was sufficient material to go by the route of a *nolle prosequi* of the preliminary examination so that a voluntary bill of indictment could be preferred in the Home Circuit Court. Most, not all, of the material has been submitted and

INDECOM have indicated that they are awaiting the final decision of the DPP in that regard.

[22] It was therefore argued that this is all quite contrary to what the learned Resident Magistrate sought to assert in the second and third paragraphs of her reasons. One plain reason is that the exercise of ultimately obtaining a voluntary bill of indictment is designed to reduce the amount of time before trial and therefore does not in fact constitute any disadvantage to Mr Adams.

C. That the Learned Resident Magistrate erred in law in holding that for the purposes of a bail application, she could only rely upon material that would be admissible at trial.

[23] It was submitted that the statement of Collis Brown demonstrates Kevin Adams' propensity to interfere with witnesses and evidence. These are factors that a court ought to take into account in determining the issue of bail. It was further submitted that the learned Senior Resident Magistrate already addressed this issue in finding that this concern was considerable.

[24] Reference was made to the decision in ***R v Richmond Justices Ex parte Moles, Re Moles*** [1981] Crim LR 170, where Donaldson LJ stated:

> "The justices considered the matter, as was their duty under the Bail Act 1976, and they were satisfied that there were substantial grounds for believing that the defendant, if released on bail, would interfere with witnesses or otherwise obstruct the

> course of justice whether in relation to himself or to some other person in accordance with the terms of paragraph 2 of the First Schedule to the Bail Act 1976.
>
> Mr Sinclair, who has appeared on behalf of the Applicant, submits that the justices should not have reached that conclusion because the allegation of interference with witnesses was not proved if one applies the strict rules of evidence which would be applicable to a trial.
>
> I assume that he is correct in saying 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. But for my part I am quite unable 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. It seems to me 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 accused person to bail.
>
> The wording of the Bail Act 1976 is that "the defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing". It is belief with which the statute is concerned. The magistrates have to consider whether they are satisfied that there are substantial grounds for belief; they are not finding facts. It seems to me that, apart altogether from the obvious difficulties in operating the Act on the basis of the strict rules of evidence, then rules are inherently inappropriate where a court is concerned to decide whether there are substantial grounds for believing something. In my judgment, therefore, that criticism is misplaced. "

[25] Reference was also made to the decision in ***R v Mansfield Justices ex parte Sharkey and others*** [1985] 1 All ER 193, in particular at pages 201j -202b, the judgment of Lord Lane CJ. This case refers to ***Re Mole*** and, it was submitted, reiterates that hearsay relayed by an investigator is sufficient. Further, that the justices could even use their own local knowledge of relevant circumstances. Reference was

made to the recent decision of the Bahamian Court of Appeal in ***Toni Sweeting v The Commissioner Of Police*** MCCr App No 133 of2013, delivered 28 May 2013. See also the judgment of Sykes J, at paragraph 19b in ***Stewart v R*** [2014] GCCCD 1 and ***Gowdie***, at paragraph [16].

[26] At paragraph four of the learned Resident Magistrate's written reasons, she indicated that she was unable to rely on the assertions of Mr Collis Brown as support for the submission that Mr Adams was a member of a team of police involved in extra-judicial killings. This, it was argued by Mr Small, was an explicit indication of her unwillingness to take into consideration material that is inadmissible during a criminal trial. This material, it was submitted, would support a successful objection to bail.

> "D. The learned Resident Magistrate erred in holding that there was unconvincing evidence that Mr Adams interfered with witnesses."

[27] Here again, the argument continues, that it was not open to the learned Resident Magistrate to review/revisit the findings of the learned Senior Resident Magistrate and of Brown J. If the court were to hold that there was new material relative to this issue, then the prosecution submitted that the learned Resident Magistrate erred in going outside of those new materials, making general findings on matters already considered and which were res judicata. If, however, this court was not in agreement with that submission and took the view that the learned Resident Magistrate was at large to review all of the evidence, then it was submitted that the most compelling evidence of witness interference by Mr Adams was the killing of Adiff

Washington. Mr Washington was murdered a day after he told a relative and a friend (who is a police officer) that police officers had shot him.

[28] It was argued that the shooting of Adiff Washington was itself an act of interference, indeed the elimination of a witness/complainant, in a case of shooting with intent. That is the only reasonable inference, the submission went on, given the circumstances. There is, in addition, evidence linking Mr Adams to the shooting. This in so far as, the submission continues, the bullet found beneath the mattress at the hospital when the scene was being processed by Corporal Eugine Mitchell from the Technical Services Department was identified by Deputy Superintendent of Police Carlton Harrisingh as having been discharged by Mr Adams' gun.

[29] It was further submitted that the learned Senior Resident Magistrate Her Honour Miss Pusey had already made a finding on 3 April 2014, that it was not unlikely that witnesses would be intimidated and put in fear. Further, the affidavits of Hamish Campbell made it evident that witnesses have come forward since Mr Adams has been in custody. Consequently, the learned Resident Magistrate ought to have taken into her consideration the incidents of witness intimidation in the other matters in the Clarendon investigation. Mr Adams, the submission continues, is a named participant in the joint enterprise and therefore, the apprehension of him committing an offence while on bail is very strong.

> "E. The Learned Resident Magistrate erred in law by setting a higher standard than is required for finding a reasonable apprehension of interference of witnesses by Mr Kevin Adams.

[30] It was submitted that there must be circumstances of interference by Mr Adams that are capable of being sufficient without the prosecution having to show an actual history of such interference. There was no new material as to the security guard's observations in the Adiff Washington case. Thus, in dissecting the accounts of the security officer the learned Resident Magistrate , Mr Small argued, has erroneously and wrongfully revised the findings of Her Honour Miss Pusey and those of Brown J.

> "F. The learned Resident Magistrate erred in finding that the identification evidence is of a poor (e) quality [sic].

[31] The learned Resident Magistrate in the fifteenth paragraph of her reasons stated that "it is my considered view that the case against each and all of the defendants are not of the best quality. In particular, the identification evidence is of a poor quality." However, Mr Small submitted, the identification evidence in the respective cases had already been considered by the learned Senior Resident Magistrate and Brown J on review. Furthermore, during counsel Mrs Valerie Neita-Robertson's arguments in all three relevant bail applications, she admitted, it was stated, that her client was present and participated in the killing of Andrew Bisson, Anthony Trought and Sylvester Gallimore. This position was confirmed in the affidavit of Mr Adams himself dated 15th April 2014 in relation to the application for review before Brown J.

[32] Counsel in addition stated that Mr Adams also told the initial investigators that he was present and fired in each of these incidents with which he is charged, except in relation to Adiff Washington. Even if the court finds that self-defence is a live issue, identification cannot therefore, Mr Small posited, be a live issue which the defence seeks to join with the prosecution.

[33] In relation to the murder of Adiff Washington, Mr Small submitted that there is scientific and other evidence of identification. The Crown is relying upon circumstantial evidence in this case. The Crown is not alleging that this is a visual identification case as the men were masked. The submission is that the security officer clearly indicated that he was not an eye witness to the actual shooting as he indicated that he was held in the hallway by one of the masked assailants. He therefore cannot speak to the non-existence of a Glock firearm on the scene. Counsel submitted that the learned Resident Magistrate erred in referring to the security officer's account that the men were carrying Browning pistols. Therefore, the absence of an identification parade does not compromise the Crown's case.

[34] In relation to the murder of Sylvester Gallimore, an identification parade was held for the eye witness to identify the person whom she referred to as "Gaza". This person is the respondent's co-accused, Pete Samuels. Constable Samuels indicated in a statement to the initial investigator that he fired. This, it was argued, buttresses the credibility of the eyewitness.

[35] It was also argued that the learned Resident Magistrate erred when she said, in relation to the Gallimore case, at the tenth paragraph of her reasons, that "no identification parades were held and the circumstances do not disclose that this was a recognition case." It was submitted that the learned Resident Magistrate completely misunderstood the information and evidence presented by the Crown, including the fact that the eye witness indicated that she had known Mr Adams from previous occasions. She provided a new statement outlining the circumstances surrounding this interaction, including the fact that Mr Adams had accompanied her to the post-mortem of her brother. Further, that ballistics evidence places Mr Adams at the scene.

[36] It was also argued that in the murder of Anthony Trought, there is identification by the father of the deceased that Mr Adams was in the vicinity of the location. He was seen in the vicinity, driving his vehicle and the eye witnesses say that the driver shot Anthony Trought. This, Mr Small submitted, is circumstantial evidence of Mr Adams' involvement in the killing. The ballistics material also places him at the scene as does his own affidavit filed in relation to the review before Brown J.

[37] In relation to the murder of Andrew Bisson, it was counsel's contention that the eye witnesses clearly indicated that they were not witnesses to the actual shooting, rather, they outline the circumstances before Mr Bisson was killed. The ballistic evidence, the statement of the initial investigator and Mr Adams affidavit place him at the scene of the killing. Therefore, the learned Resident Magistrate erred when she concluded that none of the defendants were identified.

> "G. The learned Resident Magistrate failed to appreciate that the strength and multiplicity of the matters for which the respondent is charged are important factors in any consideration of an application for bail."

[38] In relation to this head, it was argued that even if self-defence would be a live issue, identification could not therefore have been an issue that the defence seeks to join with the Crown. The learned Resident Magistrate failed to see that a review of these cases cumulatively would show that there was no basis for granting bail.

[39] It was counsel's view that the learned Resident Magistrate seemed to attach significance to the fact that District Constable Howard Brown was granted bail in respect of the murder of Andrew Bisson. However, Her Honour had asked counsel for the Crown what was the basis for the grant of bail. It was stated to Her Honour that there was no evidence of any interference with the witnesses between the time that the other accused was charged and the time that Mr Brown was charged (that is, one month). It was submitted that the learned Resident Magistrate should have taken into account, not only the individual effect of the cases relating to Mr Adams, but their cumulative effect as well.

[40] The submission continued that, however, in any event each case must be considered on its own merits. Further, that the learned Resident Magistrate failed to take an individualized approach during the bail applications as it concerns the strength of the cases against Kevin Adams.

The submissions on behalf of Mr Adams

[41] Mrs Neita-Robertson also filed written submissions on behalf of Mr Adams. She submitted that a discretion having been exercised by the learned Resident Magistrate, this discretion was not to be lightly disturbed. Reference was made to the decision of Sykes J in ***Stephens v DPP*** Claim No HCV 05020 of 2006 written unreported judgment delivered 23 January 2007 at paragraphs 35 and 36 and the English decision in the well-known civil matter dealing with the setting aside of default judgments, ***Evans v Bartlam*** [1937] AC 473 therein referred to. In paragraph [20] of ***Gowdie***, Brooks JA agreed with Sykes J's views as expressed in ***Stephens***. Brooks JA added a recommendation as to the proper approach. He recommended:

> "[20]….. the words of caution set out by Lord Diplock in **Birkett v James** [1977] 2 All ER 801 at page 804. Although given in the context of an interlocutory appeal in a civil case, the guidance is not inappropriate for appeals from the decision of a Resident Magistrate in respect of an application for bail:
>
> > 'It is only very exceptionally that an appeal on an interlocutory order is allowed to come before this House. These are matters best left to the decision of the masters, and on appeal, the judges of the High Court whose daily experience and concern is with the trial of civil actions…..Where leave is granted, an appellate court ought not to substitute its own 'discretion' for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either (1) where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account; or (2) as in **Ward v James** [[1965] 1 All ER 563, in order to promote consistency in the exercise of their discretion by the judges as a whole where they appear, in closely comparable circumstances, to be two conflicting schools

> of judicial opinion as to the relative weight to be given to particular considerations'."

[42] Mrs Neita-Robertson submitted that the right to personal liberty is a constitutional right which protects the individual from arbitrary detention. Reference was made to the decision of the Privy Council in ***Hurnam v The State*** PCA No 53 of 2004, delivered 15 December 2005. Counsel also referred to ***Stephens*** and ***Gowdie***. As such, it was submitted, that the court must lean in favour of granting bail in order to restore the constitutional norm.

[43] Counsel submitted that, in considering whether to grant or refuse bail, the court must approach the application as follows:

i. Start with the accused person's constitutional right to liberty.

ii. Examine the allegations (but with no over-elaborate dissection of the evidence) – see ***Hurnam***, particularly paragraph 25.

Reference was made by Mrs Neita-Robertson to ***Stephens*** at paragraph 14, where Sykes J stated:

> "In assessing the allegations against the defendant, the court should refrain from conducting too minute analysis of the proposed evidence. The cogency of the evidence cannot be ignored since clearly, the stronger the evidence the greater the incentive for the defendant to abscond. The nature and seriousness of the offence is important, but not determinative. I say this to say that the seriousness of the offence is but one factor to be taken into account, and ought not in the majority of cases to be the determining factor."

iii. Consider whether there are substantial grounds. Substantial grounds are different from reasonable grounds, and in this context means "rational, weighty and solid"- per Sykes J-paragraph 25 of ***Stephens***.

"Particular A

> The learned Resident Magistrate erred in law in re-considering material that had already been considered and decided on by the Learned Senior Resident Magistrate and upheld by a Judge of the Supreme Court rather than to confine herself to new material(s)."

[44] Counsel submitted that the court looks at two main tests involving factual questions. They are first, the probability or otherwise of the defendant answering to his bail and attending at his trial, and second, any relevant public interest issues. Counsel submitted that the prosecution have misunderstood the position of the court in ***R v Nottingham Justices, ex parte Davis*** concerning the matter of issues that were available for consideration by the magistrate, by arguing, in essence, that the magistrate was bound to consider only material not previously argued by any tribunal.

[45] It was submitted that in ***Nottingham Justices***, the court did not state that the new application should be confined to new material or points not previously urged, merely that either of those two grounds ought to be the basis for a court decision to allow a new application. Reference was also made to page 2 of ***Re Moles*** where it is stated:

> "If there has been a change of circumstances then they have to review the whole situation with regard to bail."

[46] Mrs Neita-Robertson referred to section 3(5) of the Act. That provision states as follows:

> "3 (5) Nothing in this Act shall preclude an application for bail on each occasion that a defendant appears before a Court in relation to the relevant offence."

[47] In her Further Skeleton Arguments, Mrs Neita-Robertson acknowledged that section 4 of the English Bail Act 1976, which was under consideration in ***Nottingham Justices***, is almost identical to section 3(5) of the Act. However, she reiterated that the new material acts as a trigger for the court to consider a new bail application. Therefore, having identified a new consideration relevant to bail, the defendant is entitled to make a full bail application in which both the old and the new arguments must be considered.

[48] To bolster her submissions, counsel also provided a very useful extract from Blackstone's Criminal Practice 2012, paragraph D7.48, "Right to Make Repeated Argued Bail Applications" and D7.49, "Interpretation of Part II A". It is there stated:

> "D7.48
>
> Right to Make Repeated Argued Bail Applications
>
> …
>
> Part IIA of sch.1 to the BA 1976 was intended to give statutory effect to the decision of the Divisional Court in ***Nottingham Justices, ex parte Davies*** [1981] QB 38. That decision may therefore be regarded as a useful aid to the interpretation of Part IIA. …
>
> D7.49
>
> Interpretation of Part IIA

(d) *What if the argument is based on a new set of conditions that might be imposed?* In ***R (B) v Brent Youth Court*** [2010] EWHC 1893 (Admin), there had been two bail applications to the magistrates and one at the Crown Court; the defence sought to make a further application to the magistrates on the basis, *inter alia*, of a new set of possible conditions. The magistrates ruled that the possibility of new conditions did not amount to a change of circumstances and that the revised conditions could have been put before the court on a previous occasion; accordingly, they refused to hear the application. This refusal was quashed by the High Court. Wilkie J referred to Part IIA, saying (at [9]) that the 'effect of this is that the court is obliged to entertain two bail applications regardless of whether the arguments put forward in the second are arguments which have been advanced previously. But if those arguments are sought to be put forward a third time the court is not obliged to entertain them, though it may do so. But this only applies to the extent that arguments put forward as to fact or law are arguments which the court has heard previously.' He went on to say this is almost invariably referred to as the 'change of circumstance' condition but that this phrase 'does not accurately reflect the statutory provisions'.

(e) Is the court obliged to consider only the new arguments? Where the accused has exhausted his automatic entitlement of fully argued applications but claims that a new consideration has arisen which has not been placed before the court on the earlier occasions, para.3 could be construed merely as obliging the court to hear the argument of fact or law not previously advanced, rather than obliging it to reopen the entire question of bail. It is submitted, however, that to consider only the new consideration in isolation from the other arguments for bail would be an artificial exercise, and that the identifying of a new consideration relevant to bail should entitle the accused to make a further full bail application in which both the fresh and the old arguments may be relied on.

(f) Does the court have a discretion to allow as many argued applications as it wishes? Paragraph 3 merely states that, at the third and subsequent remand hearings, the court 'need not' hear arguments which it has heard previously. Prima facie the paragraph does not debar the court from entertaining yet another fully argued application, but merely gives it a discretion in the matter. On the other hand, Donaldson LJ in Nottingham Justices, ex parte Davies based his approval of the practice of the Nottingham Justices on the principle of res judicata. It is unclear whether para. 3 is meant to override Ex parte Davies (in which

> case magistrates always have a discretion to hear as many fully argued applications for bail as they wish), or is merely giving statutory force to the main thrust of the decision (in which case a scrupulous bench might say that, much as they would like to reopen the question of bail, they are bound by their colleagues' earlier decisions and can do nothing in the absence of fresh arguments or considerations).
>
> (g) How should the justices express a decision not to allow an argued application? Since in theory the court is obliged to consider bail each time an accused who is entitled to the benefit of the BA 1976, s.4(1), appears before it in custody, it is unwise for the magistrates simply to say that they were not prepared to consider the matter of bail. It is more appropriate to say :'As there is no new material before us relevant to the question of bail, bail will be refused'. This avoids giving the impression that they have simply refused to consider the question (per Ormrod LJ in Slough Justices, ex parte Duncan (1962) 75 Cr App R 384 at p. 389)." (underlining emphasis provided)

[49] Reference was also made to the unreported decision of Desir J sitting in the High Court of Trinidad and Tobago, in ***Steve Ferguson et al v Attorney General of Trinidad & Tobago***, judgment delivered 22 December 2010. I found this case to be of great value and that Desir J has expressed some of the guiding principles and considerations with admirable clarity. In that decision, at paragraph 16, the learned judge explains that the sections of the Trinidad & Tobago Act, which are similar to our section 4 (1) (a), are similar to the pre-1988 English provisions and thus, he found the English pre-1998 UK authorities helpful, including ***Nottingham Justices*** and ***Slough Justices***.

[50] Mrs. Neita-Robertson submitted that the statutory right under section 3(5) is a fundamental right to make bail applications and must not be infringed. However, in

any event, she submitted that there was new material before the court when Her Honour granted bail to Mr Adams. As regards the prosecution's allegation that the learned Resident Magistrate failed to identify the new material, it was Mrs. Neita-Robertson's submission that there was no failure in that regard. She argued that the learned Resident Magistrate did in fact identify the new considerations, which included the voice recordings and transcript.

[51] In relation to the voice recordings and transcript, at paragraphs 35i, 36, and 37 of the written skeleton arguments filed on behalf of Mr Adams on 3 July 2014, it was pointed out that, in relation to the purported conversation between Collis "Chucky" Brown and the Respondent Kevin Adams, the defence had argued that this conversation portrayed the Respondent in a light contrary to Indecom's assertions that he was part of a Death Squad executing unarmed men. It was further submitted that the material shows that Mr Adams prevented Police officers from shooting a man in the presence of his family members and children. That he was castigated by a Senior Officer for 'doing the right thing' and accused of 'mashing up their operation. This, Mrs. Neita-Robertson argued, enured to the Applicant's benefit. This was a matter that the learned Resident Magistrate, counsel submitted, quite properly took into consideration and applied the appropriate weight.

> "**B. At the time that the preliminary examinations were set by the Learned Senior Resident Magistrate, all the preliminary examinations could not have been started**."

[52] It is convenient to discuss the issue of delay under this particular of the ground of appeal. Mrs Neita-Robertson submitted that the unreadiness of the matter has created a new circumstance of delay and that the court must consider under the heading of public interest criteria, how speedy or how delayed the trial is likely to be.

[53] In this regard, it was counsel's submission that at the time that the preliminary examinations were set by the learned Resident Magistrate, all of the preliminary examinations could not have been started. It was further argued that the Crown in setting the date of the preliminary examination for Kevin Adams had no intention of the examination commencing, as is evidenced by the fact that the Crown set the same date for the preliminary examination of numerous police officers charged in other matters.

[54] Mrs Neita-Robertson further submitted that, regardless of INDECOM'S desire to proceed with the matters involving Kevin Adams by way of a voluntary bill of indictment, there was never any such guarantee and as such the Crown ought to have been ready to proceed in the matters against Mr Adams. Further, that it was indicated in court that INDECOM had not completed certain steps to satisfy the DPP and as such there was no conclusive position as to whether the matters would be dealt with in the preliminary enquiry court or brought by way of a voluntary bill of indictment. Counsel submitted that it was not unreasonable in those circumstances for Mr Adams to argue that his right to a speedy trial was not being safeguarded, and for the learned Resident Magistrate in the face of the manifest uncertainty as to how the Crown was going to

proceed, to find that there had been undue delay. Reference was made to page 779 of ***Nottingham Justices***.

> "**C. That the learned Resident Magistrate erred in law in holding that for the purposes of a bail application, she could only rely upon material that would be admissible at trial."**

[55] As regards this aspect of the prosecution's ground, Mrs Neita-Robertson submitted that there is no merit to this claim. It was submitted that the learned Resident Magistrate clearly considered at the fifth paragraph of her reasons, evidence arising from voice recordings which the Crown alleged occurred between Mr Adams and another concerning extra-judicial killings. That none of the recordings would be admissible at any trial of Mr Adams as they are not directly relevant to any matter for which he is before the court.

[56] It was argued that additionally, the learned Resident Magistrate indicated that self-defence would arise on the Crown's case if they were to rely on the statement of Mr Adams. Thus, while counsel submitted that the statement of Mr Adams would not be admissible at a trial against him, the indication of the learned Resident Magistrate demonstrated her understanding that she was able to consider matters not admissible at a trial.

[57] It was further submitted that where in the fourth paragraph of her written reasons the learned Resident Magistrate states that she is "unable to rely on these

assertions as support for the submission that the applicant Kevin Adams is a member of a team of police involved in extra judicial killings", it is manifestly clear that the court was merely indicating that she is unable to attach the same weight and significance to the material as was urged by INDECOM. The court, it was submitted, was not there indicating that she rejected the material or would not consider the information, rather she was indicating that she would not place any faith in it as the prosecution had not themselves placed any faith in it, which faith would have been demonstrated had they secured a statement from the witness among other things.

> "**D. The learned Resident Magistrate erred in holding that there was unconvincing evidence that Mr Adams interfered with witnesses.**
>
> **E. The learned Resident Magistrate erred in law by setting a higher standard than is required for finding a reasonable apprehension of interference of witnesses by Mr Kevin Adams."**

[58] It is convenient to deal with these two particulars together. Mrs Neita-Robertson submitted that the learned Resident Magistrate applied the appropriate weight to the issue of interference with witnesses and was entitled to find that there was no material that could attribute interference to Mr Adams directly or indirectly.

[59] The actual words of the magistrate were, in the seventeenth and eighteenth paragraph of her reasons:

> "In respect of the allegations of the likely interference with the investigation and or witnesses, the court notes that these are matters in which it is alleged that senior police officers were

> involved in and led the operations. They have not been charged pursuant to the investigation.
>
> The court is of the view that given the state of the cases against the defendants and in the absence of any allegations of direct interference with any witnesses in the matters the court can impose adequate conditions to minimize the concerns highlighted by the Crown."

"F. The learned Resident Magistrate erred in finding that the identification evidence is of a poor (e)quality [sic]."

[60] I must confess to having extreme difficulty in dealing with Mrs Neita-Robertson's submissions under this head. This is because at paragraphs 46 ii a)-g), 47, and 48 of her skeleton arguments filed on 3 July 2014, counsel appears to be quoting the learned Resident Magistrate. However, none of the matters quoted appear in the three page written reasons under the signature of Her Honour provided to this court. Counsel on both sides advised that at the time of giving her decision, the learned resident magistrate had given oral reasons that are not referred to or set out in the written reasons provided to the court. I must comment that it seems inadvisable for magistrates or judges to give one set of reasons orally, and then another set of reasons in writing. This practice can in my view, not only give the appearance of uncertainty and unfairness, but it can result in potentially conflicting, and at the very least, confusing reasons. It certainly makes the task of the appellate judge extremely difficult. As I indicated to counsel on both sides, since I have not been provided with any of the Magistrate's oral reasons, I am limiting my examination to the written reasons signed by the learned Resident Magistrate.

[61] One point that counsel for Mr Adams did make in relation to this particular is that she submitted that the learned Resident Magistrate applied the appropriate weight to the issue of cogency of evidence in that she opined that the Crown was relying on the statement of accused persons to say that they were present on the scene; however the statements relied upon raised the issue of self-defence.

> **"G. The learned Resident Magistrate failed to appreciate that the strength and multiplicity of the matters for which the respondent is charged are important factors in any consideration of an application for bail."**

[62] In relation to this particular, it was Mrs Neita-Robertson's submission that the learned Resident Magistrate had correctly examined the cogency of the evidence and that led her to the view expressed in her reasons that the case against each of the defendants is not of the best quality. Counsel emphasized the fact that bail has been granted by the courts below in respect of all parties jointly charged in respect of the incidents with which Mr Adams is charged. She submitted that the decisions in the courts below were based upon almost identical objections and arguments and that further, the decisions in relation to those other defendants have not been appealed by the Crown.

[63] Counsel concluded her submissions on this score by submitting that it would be inconsistent to deny bail to Mr Adams simply because he is charged in multiple murders, whilst ignoring the fact that bail has been granted to the individuals co-

accused in the respective matters, and that the only other matter in which he is charged individually is weak.

Discussion and analysis

[64] I start my analysis from the position, that the learned Resident Magistrate was exercising a discretion in granting bail to Mr Adams. The approach of an appellate court in dealing with matters calling for the exercise of a judge's discretion is well-known. In the oft-quoted House of Lords decision in ***Hadmor Productions v Hamilton*** [1983] AC 191, at page 220, Lord Diplock provided invaluable guidance in relation to a civil case, dealing with the grant of an interlocutory injunction. This guidance has been accepted and applied time and time again in this court. In my view, this approach is plainly also relevant when considering an appeal in relation to the grant of bail. In ***Stephens*** at paragraphs 33-39, Sykes J discusses ***Hadmor***, and appears to have formed the view that the approach in ***Hadmor*** is too narrow to cover bail applications. It seems clear that Sykes J was of the view that the bases set out in ***Hadmor***, represented the minimum bases for interference, however he felt that, because the question of bail involves the liberty of the subject, there were additional grounds as discussed in ***Evans v Bartlam*** – see in particular paras 33-39 of ***Stephens***. I am in agreement with Sykes J. Lord Diplock stated at page 220 of ***Hadmor***:

> "An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the

> function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist…Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

[65] As discussed by Brooks JA in ***Gowdie***, particularly at paragraph [20], referring to ***Birkett v James***, an appellate court ought not to substitute its own discretion for that of the judge in the court below merely because it would have regarded the matter as tipped against the way that the judge decided the matter. In addition to the grounds set out in ***Hadmor***, the decision ought to be disturbed only where the judge has erred by exercising the discretion wrongly, or has acted on some wrong principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something he ought to take into account.

[66] I am of the view that, as stated by Brooks JA in ***Gowdie***, paragraph [23]:

> "…although section 3(5) of the Act states that nothing in the Act "shall preclude an application for bail on each occasion that a

> defendant appears before a Court in relation to the relevant offence", the decided cases suggest that fresh applications should not be made unless there is new material to be placed before the court. …. The starting position of any renewed application "must always be the finding of the position when the matter was last considered by the court" (per Donaldson LJ ***R v Nottingham Justices ex parte Davies*** [1980] 2 All ER 775).

[67] As held in ***Nottingham Justices***, at pages 778-779, the finding by one court of concurrent jurisdiction that it was satisfied of the circumstances set out in section 4(1)(a) of the Act, i.e. that there are substantial grounds for believing that the defendant, if released on bail would (i) fail to surrender to custody; (ii) commit an offence while on bail; or (iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person, is not a personal, intellectual conclusion by each judge. It is a finding of the court that those circumstances existed and is to be treated like every other finding of the court. It is res judicata or analogous thereto. The jurisdiction exercised is that of the court, and not any individual judge - ***Steve Ferguson*** (paragraph 19).

[68] It follows from that characterization, that on the next occasion when bail is considered, the court should treat, as an essential fact that at the time when the matter of bail was last considered, those circumstances set out in section 4(1)(a) did in fact exist. As stated by Desir J at paragraphs 16 and 17 of his decision in ***Steve Ferguson***:

> "16. A decision to refuse bail therefore, presupposed 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…...
>
> 17. A later Court was therefore, *bound to accept that finding as a fact*, otherwise it would be acting as an appellate court unless there was a material change of circumstances."

[69] Initially, the court can and must only investigate whether the situation has changed since then. This change can come about either because of a change in circumstances since the last unsuccessful bail application, or where it is an argument that could have been put on the previous occasion, but for whatever reason, was not. The new circumstances can include an argument based on the imposition of a new set of conditions that might have been imposed on the earlier occasion, but were not imposed or contemplated - see ***Blackstone's Criminal Practice*** and ***R(B) v Brent Youth Court*** , cited by Mrs Neita-Robertson.

[70] In my judgment, after bail has been refused on the basis that the court is satisfied of the existence of the circumstances set out in section 4(1)(a) of the Act, the same court or another court of concurrent jurisdiction, faced with a new bail application must first satisfy itself that there are new circumstances relevant to the question of bail before it can do otherwise than to refuse another bail application- see ***Slough Justices, ex parte Duncan***. The court should enquire of counsel whether there is any new material to be advanced-see paragraph [23] of ***Gowdie***. If the court is satisfied that there are new circumstances, it should identify clearly what those new

circumstances are. The new circumstances must be such as to relate to the issue of bail and the applicant's entitlement thereto.

[71] Counsel has a duty to frankly advise the court whether there are indeed any new circumstances. In addition, it seems to me that once the reasons of the previous judge are available, they should be made available and be examined by the court considering whether and how to deal with a renewed bail application. This should be made available since courts of concurrent jurisdiction are involved, on the relevant court's file in relation to the relevant matter (see the discussion by Desir J at paragraphs 56-62). I share the view expressed by Desir J at paragraph 13 of ***Steve Ferguson***, that it is not only good practice, but should be a requirement that the applicant inform the court of any earlier applications for bail made to either the Supreme Court or the Resident Magistrates Courts in the same proceedings. As Desir J stated:

> "The duty….is not merely that of the State or prosecutorial entity but also that of the applicant himself and is consistent with his obligation to approach [the] Courts with clean hands and in good faith."

[72] I agree with the discussion in the case of ***Steve Ferguson***, particularly paragraph 6 where Desir J distilled the issues involved in the renewed bail application before him as follows:

> "(a) The first is whether there has been any "change in circumstances" since the applicants 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?

(b) If so, whether such change in circumstances or new conditions are relevant to the issue of the applicants' entitlement to bail?

(c) The third issue-which will only arise for this Court's consideration if the threshold of the first two issues is crossed-is the ultimate question of whether, in the circumstances the applicants should now be admitted to bail?"

[73] The changes or new circumstances can only result in the judge hearing the renewed application disturbing the first court's finding of the section 4(1)(a) conditions if the circumstances impact upon the applicant's eligibility for bail in a positive way, meaning, in such a way as to improve his eligibility - see paragraph 50 of ***Steve Ferguson***.

[74] It is only if the court finds that there is new material and that it is such as to improve the applicant's eligibility for bail that the third issue arises as to whether it is in all of the circumstances, considering both the old and new material, just to now admit the applicant to bail. It is then that the court is cloaked with the jurisdiction to entertain a renewed application for bail.

[75] As regards the matters that the court is able to consider, in my judgment it seems sensible and rational that the court must consider both the old and the new matters. I am of the view that the meaning contended for by the Crown, which is that the learned magistrate should have considered only the new material, is not correct. I agree with the logic advanced by the learned authors of ***Blackstone's Criminal***

Practice, cited by Mrs Neita-Robertson, where at paragraph D 7.49 (e) it is argued that:

> "….to consider only the new consideration in isolation from the other arguments for bail would be an artificial exercise, and that the identifying of a new consideration relevant to bail should entitle the accused to make a further full bail application in which both the fresh and the old arguments may be relied upon."

[76] I would also refer to paragraph D.48 of the ***Blackstone's Criminal Practice***, and note that it is there stated:

> "The Law Commission Paper, and *the Human Rights Act 1998* …, contains guidance aiming to ensure that the provisions relating to a change in circumstances are applied in a way that is compatible with the ECHR. This guidance states (at paras. 12.23 and 13.33) that courts should be willing, at regular intervals of 28 days, to consider arguments that the passage of time constitutes, in the particular case before the court, a change in circumstance so as to require full argument. If the court finds that the passage of time does amount to a relevant changed circumstance , or that there are other circumstances which may be relevant to the need to detain the accused that have changed or come to notice since the last fully argued bail hearing, then a full bail application should follow in which all the arguments, old and new, could be put forward and taken into account." (underlining emphasis provided)

[77] I now turn to a consideration of the learned Resident Magistrate's reasons. The learned Resident Magistrate commenced her reasons on what I consider a promising note. She stated in the first paragraph: "The first issue is whether there is new material which would cause the court to consider the bail applications." In my judgment, the learned Resident Magistrate did identify the new material or change in

circumstances since Mr. Adams had last engaged the court on the issue of bail. In the second, third and fourth paragraphs of her reasons, the learned Resident Magistrate stated:

> "On the 23rd of June 2014, these matters came before this court at which time they were set for preliminary enquiry. The defence indicated that they were ready to proceed. The [C]rown made an application for an adjournment and that the matters be put on the mention list on the basis that among other things the files were incomplete and an application was pending for the grant of Fiats. The adjournment was granted whereupon the defence indicated that they would wish to make applications for bail. That date was set for the 30th June 2014.
>
> Implicit in its application, it is the [C]rown that has indicated that new material will form part of its case. Since that adjournment new material including ballistic certificate and transcripts of voice recordings have now been disclosed to the defence. The [C]rown has further submitted that the learned Director of Public Prosecutions having reviewed the files has requested certain additional documents. These additional documents have been supplied and the [C]rown is awaiting the learned Director's re-evaluation of the file and her response to an application for entering of nolle prosequis and preferring voluntary bill of indictment. The additional documents were disclosed to the defence and now form part of this application. In the light of the adjournment there is the need to re-evaluate the time likely to elapse before the cases come to trial. The defendants/applicants have been in custody since March, 2014.
>
> Counsel for the [C]rown indicated that the [C]rown is relying on assertions made by Mr. Collis Brown…."

[78] However, applying the principles discussed above to this case, it seems clear to me that the learned Resident Magistrate did not start from the premise (as she ought to have), that, at the time when the bail application was last considered, there had

been a finding that section 4(1)(a) circumstances exist. In other words, although the learned Resident Magistrate correctly examined the question of whether there had been any change in circumstances, nowhere in her reasons do I see any demonstration of an awareness that she was bound to accept as a finding of fact that there were substantial grounds for believing that the conditions set out in section 4(1)(a) would occur. At this time, the written reasons of the learned Senior Resident Magistrate ought to have been available to the learned Resident Magistrate. Her Honour Miss Ellis has not once referred to the decision of the learned Senior Resident Magistrate Miss Pusey. It would appear that the learned Resident Magistrate failed to appreciate that the learned Senior Resident Magistrate's findings on the matters of satisfactory grounds for belief were binding or res judicata, and in that regard, she has unfortunately fallen into grave error. If she started on the wrong premise in these circumstances it seems to me that the learned Resident Magistrate's whole approach would have been wrong, and could not thereafter be redeemed or remedied.

[79] It is also not up to the court hearing the renewed application for bail to revisit or conjecture on matters already decided at the previous hearing. In my judgment, the learned Resident Magistrate in this case acted upon a wholly wrong principle when she sought to dissect the account of the security officer in the Adiff Washington case since there was no new material relating to the security officer's observations. In so doing, she really was, as Mr Small argued, in effect revising the findings of the learned Senior Resident Magistrate, and the findings on appeal by Brown J. At the time when the learned Senior Resident Magistrate made her finding that based on the allegations it

was not unlikely that witnesses would be intimidated and put in fear, she had had for consideration the Crown's case in relation to the Adiff Washington murder and the evidence of the security officer. She had also had before her the argument, which she appears to have impliedly accepted, from the prosecution, that the act of shooting Adiff Washington was itself an act of interference, indeed the elimination of a witness/complainant in a case of shooting with intent. Additionally, section 4(1)(a)(iii) of the Act simply required that there be substantial grounds for <u>believing</u> that the defendant, if released on bail <u>would</u> interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or anyone else. It does seem to me that where the learned Resident Magistrate said that there was an "absence of any allegations of direct interference with any witnesses in the matter", she applied the wrong test. As argued by Mr Small, she appears to have applied a higher standard than is required under the Act. The learned Resident Magistrate appears to have considered the matter as if completely unbound or untrammeled by any finding that the learned Senior Resident Magistrate had made in regard to a reasonable apprehension of interference with witnesses.

[80] The next issue is whether the learned Resident Magistrate identified whether such circumstances or new conditions were relevant to the issue of Mr Adams entitlement to bail. I agree with Mr Small that the learned Resident Magistrate was required to determine whether the new material operated in favour of or against the grant of bail. This is because, the learned Resident Magistrate ought to have started from the premise that factors relevant to the learned Senior Resident Magistrate's

entitlement to refuse bail, i.e. the factors in section 4(1)(a) did indeed exist. In this regard, I wholeheartedly endorse and agree with the following analysis by Desir J in ***Steve Ferguson***, at paragraph 59, which is to the effect that the court hearing the renewed application should only investigate "whether **that situation** has changed since then. In other words, whether there are any changes, either in the form of new considerations or changes or circumstances-which alter the circumstances upon which [the judge] based his decision, and in such a way as to improve the applicants' entitlement to or eligibility for bail."

[81] In my view, the learned Resident Magistrate unfortunately did not clearly determine whether these changes in circumstances or considerations altered the circumstances upon which the learned Senior Magistrate based her decision in such a way as to improve Mr Adams' eligibility for bail, whether sufficiently or at all. What the learned Resident Magistrate seems to have done is simply to have moved straight from an identification of the new material or considerations to a full rehearing of the bail application. At most, she seems to have determined that the new materials did not strengthen the Crown's case, but she does not seem to have specifically addressed her mind to the question of whether the new materials actually favoured the grant of bail. In my view, that is not the correct approach.

[82] However, even if I am wrong on that, and that she did conclude that the materials strengthened the case for bail, it seems to me that the learned Resident Magistrate took a very curious view and approach as to the effect of the new

materials, or some of them. In relation to the audiotape of the conversation and transcript, the learned Resident Magistrate merely stated the following in the fifth and sixth paragraphs of her reasons:

> "I have considered the submissions made by the [C]rown that the voice recordings indicate that during the exchange the speaker identified as the Applicant Kevin Adams spoke of incidents in which he actively participated in extra-judicial killings. The defence pointed out that in same voice recording Kevin Adams recounted incidents in which he is said to have spoiled the operation (page 3 lines 21-23) where he says, "problem lies now more than ever so we nah go do certain things weh we did do. We could do that again?" He further stated, at page 5 Lines 8-10, "Me seh look here a family dem, madda, me neva even think the madda did deh deh, sista, girlfriend, father and whateva. Memba sehe we have INDECOM fi ansa to. It is this context [sic] that Collis Brown says " Mr. Bailey she you….up the operation when you show dem the right thing (page 5 lines 6-7). Page 7 lines 16-18 and lines 20-22.
>
> The defence has indicated that in those same recordings the defendant indicates that he has distanced himself from that practice. In the penultimate line on page 11 Kevin Adams states, " me cyan kill no man in front dem family so." And again at page 12 lines 8-9." (underlining emphasis mine)

[83] It is not altogether clear precisely what the learned Resident Magistrate has concluded with regard to the audiotape and transcript. However, it appears to me that she has impliedly concluded that this material is in favour of the grant of bail, as opposed to simply concluding that it does not strengthen the Crown's case. I have listened to the audiotape that was provided to the learned Resident Magistrate and I have read the transcript. In my view, such a finding by the learned Resident Magistrate is, with all due respect, most peculiar. I hesitate to say so, but, in the

language of the cases, it seems aberrant. It is not reasonable for the learned Resident Magistrate to have arrived at a conclusion that in these recordings Mr Adams has distanced himself from the practice of extra-judicial killings. I agree with the submission of Mr Small that the ordinary meaning to the contents (and, to my mind, also the tone of this conversation), it means that Mr Adams admits that he commits extra-judicial killings and that he receives orders from senior members of the Jamaica Constabulary Force. I agree with Indecom that all that Mr Adams is recorded as there saying is that he could not afford to kill the man in the presence of the members of the man's family as this was an event certain to result in charges being brought by INDECOM.

[84] As regards particular C of ground one, in the fourth paragraph of her written reasons, the learned Resident Magistrate had this to say about the transcript of a caution interview of Collis Brown on 10 August 2013:

> "Counsel for the Crown indicated that the [C]rown is relying on assertions made by Mr. Collis Brown. However, Mr. Collis Brown has not given a statement in the matters for which the defendants/Applicants are charged. Further, there was no indication that the prosecution intends to collect a witness statement from Mr. Collis Brown who himself has been charged with similar offences and who is said to have assisted in the investigation against these defendants. <u>The court is therefore unable to rely on these assertions as support for the submission that the applicant Kevin Adams was a member of a team of police invoved in extra judicial killings.</u>" (underlining emphasis mine)

[85] In my judgment, the learned Resident Magistrate can reasonably be said, as Mrs Neita-Robertson argued, to have merely been indicating that she was unable to attach the same weight to it as was urged by Indecom. However, it would seem that her stance in that regard was unreasonable since this was material that could support an objection to bail. She appears to have rejected this information out of hand, whatever her reason for so doing. This issue was a crucial one as the Crown had been relying on information that Mr Adams is a participant in a criminal enterprise involving murder and that this enterprise included interference with, and killing of witnesses. However, perhaps even more importantly, this was not new material that was relevant to a renewed bail application, in the sense that it could not have improved Mr Adams situation with regard to eligibility for bail.

[86] At the fifteenth paragraph of her written submissions, the learned Resident Magistrate had this rather stark, and if I may say so, puzzling, statement to make:

> "It is my considered view that the cases against each and all of the defendants are not of the best quality. In particular, the identification evidence is of a poor quality."

[87] In my judgment, it is unfortunate that the learned Resident Magistrate would have chosen to go down that particular path since it is obvious, that with the exception of the Adiff Washington case, the issue of identification will not be an issue that the defence would seek to join with the Crown. Indeed, the live issue would be self-defence. It therefore seems wrong to classify the Crown's cases as resting on

identification evidence of a poor quality. In addition, in the Adiff Washington case, the Crown seems not to be relying upon visual identification; it is relying upon scientific and circumstantial evidence. In my view, this was not an appropriate manner in which to approach the question of the renewed application, particularly having regard to the previous findings of the learned Senior Resident Magistrate and of Brown J. The learned Senior Resident Magistrate is recorded as indeed saying that "The crown's allegations are very serious".

[88] Another aspect of this matter requiring discussion is that the mere passage of time is not necessarily a relevant change in circumstance. I cannot help but yet again record my agreement with the analysis of Desir J in ***Steve Ferguson*** where at paragraph 33 he stated:

> "33. I am bound to say however, that time and the mere effluxion of it is not, without more a change in circumstances…..So that, the suggestion that the mere passage of some six (6) months since the applicants were incarcerated is somehow in itself grounds for revisiting the issue of their entitlement to bail or that it, by some curious formulae, is sufficient to invoke this Court's jurisdiction to entertain a renewed bail application-is in my judgment ill-founded."

[89] In my judgment, the learned Resident Magistrate, wrongly found that the adjournment of the matter for the Crown to have the files reviewed by the learned DPP was a basis for allowing a renewed application. In my judgment, viewed contextually, proportionately and relative to other cases and the length of time taken up to a similar stage, as stated by Mr Small in his submissions the exercise of ultimately obtaining a voluntary bill of indictment is designed to reduce the amount of time before trial.

Therefore, although an adjournment was occasioned for the matter to be considered by the learned DPP, this time would not constitute a disadvantage to Mr Adams since, ultimately there was a chance that the overall time before trial could be greatly reduced. This is particularly so having regard to the fact that Mr Adams has been charged with four murders and would otherwise therefore have to undergo four preliminary enquiries. Additionally, the time referred to in the learned Resident Magistrate's Reasons, i.e., between 14 March 2014, when Mr Adams was taken into custody, and the date of the renewed bail application on 30 June 2014 was not necessarily a relevant change in circumstance. As stated by McCoy J in the 2002 Hong Kong case of ***HKS AR v Siu Yat Leung*** [2002] 2HKLRD 147, paragraph 16, referred to at paragraph 26 of ***Steve Ferguson***, in discussing the common law and certain statutory rules concerning material changes in relevant circumstances:

> " ….This test ensures that access to the Court is not a revolving door. A serious issue of judicial resources arises. Deserving cases may be needlessly postponed by repeated and legally frivolous applications by others for bail. The test is ' a sensible' and necessary adjunct to a coherent legal system, which would otherwise be prey to a proliferation of speculative bail applications on issues already decided: ***R v Ng Yiu Fai*** [1992] 2 HKCLR 122 at p 125."(underlining emphasis provided)

[90] All told, therefore, I am of the view that the learned Resident Magistrate fell into error in not starting her consideration with the finding of the learned Senior Resident Magistrate that the factors set out in her written reasons and referred to in section 4(1)(a) of the Act existed. She also fell into error in failing to examine whether the new considerations or new material were such as to improve Mr Adams' eligibility

for bail. Alternatively, if she did do so, she wrongly concluded on the material before her that the new material impacted the question of bail favourably for Mr Adams.

[91] It follows from what I have said that in the case, the first two issues were not resolved in favour of Mr Adams. Therefore, the entitlement to consider the whole of the material both old and new had not arisen. However, even if I am wrong on that, and in fact there were changes in circumstances and new material relevant to the issue of Mr Adams' entitlement to bail, in the sense that they improved Mr Adams' eligibility for bail, assuming that the threshold of those first two issues were crossed, the ultimate question would be whether, in the circumstances Mr Adams should now have been admitted to bail. In my view, the only reasonable answer to that question, on all of the material, old and new, would have been resoundingly in the negative. I agree with the Crown that the learned Resident Magistrate does not appear to have sufficiently appreciated and weighed the strength and multiplicity of the four counts of murder with which Mr Adams was charged. There were signs that unfortunately, in the context of dealing with the several bail applications all at once, there was, as Mr Small argued, a failure to take an individualized approach as it concerns the strength of the cases against Mr Adams.

[92] There are a number of other matters that could have been examined and which were submitted upon. However, I think that the foregoing has been more than ample to demonstrate that the learned Resident Magistrate fell afoul of the relevant legal principles that should govern a renewed bail application. As I stated to counsel when I

gave my decision, I do not consider this a simple matter. I therefore have some amount of sympathy for the learned Resident Magistrate and the many multi-faceted matters that she was called upon to consider in a short space of time, in relation to several accused persons. She, in my view, unfortunately misunderstood the relevant principles of law and the evidence, and gave weight to some matters which she ought not to have taken into account, while in other instances, she failed to attach weight to matters that ought to have entered into her consideration. It was in these circumstances that I formed the view that the appeal should be allowed and made the orders set out at paragraph [2] above.

[93] I also take the opportunity to remind, that whilst an accused is not precluded from making an application for bail each time he appears before the court in relation to an offence, access to the court should not be used "as a revolving door". Counsel has a duty to the court not to make a renewed bail application unless there is genuinely new and material relevant information-see also ***Gowdie***, paragraph [31]. Courts whilst having a paramount duty to be fair to each and every accused person, and ensuring that his constitutional rights are secured, also have a duty to manage the scarce resources of the courts so as to allow time to be well spent on matters properly requiring consideration. We must strive for the right balance.