IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2014 HCV 02406

BETWEEN	**LEAFORD GORDON**	**CLAIMANT**
	DAMON ROBINSON	
AND	**DIRECTOR OF PUBLIC PROSECUTIONS**	**DEFENDANT**

CLAIM 2014 HCV O2588

BETWEEN	**ROMAINE DE LA HAYE**	**CLAIMANT**
AND	**DIRECTOR OF PUBLIC PROSECUTIONS**	**DEFENDANT**

Applications for Bail - whether Attorneys entitled to swear Affidavits – whether INDECOM Fiat lawful – Bail Act – Whether substantial grounds to refuse bail.

K. Churchhill Neita Q.C., Valrie Neita Robertson, and Andrew Wildes for Messrs. Gordon and Robinson.

Dwight Reece for Mr. De La Haye.

Ann-Marie Fertuado Richards representing the Respondent pursuant to a Fiat granted to INDECOM by the Director of Public Prosecutions.

Kamar Henry Anderson of the Office of the Director of Public Prosecutions and Courtney Foster and Francois Knight legal officers of INDECOM present.

Heard: **10th June, 2014 in Chambers.**
Reasons delivered on the 4th July, 2014 in Open Court.

BATTS, J.

[1] On the 10th June 2014 these jointly considered applications for bail were heard. I made the following orders at that time:

a. Bail granted in the amount of J$1.5 million with one or two sureties.
b. All trial documents including green cards if any are to be surrendered.
c. Curfew ordered between the hours of 8:00pm to 6:00am for 7 days per week.
d. Each applicant is to report to the Area 3 Divisional H.Q. in Mandeville on Monday, Wednesdays and Saturdays between 7:00am to 7:00pm or until further Order.
e. The applicants are restrained from communicating whether directly or indirectly with the following Crown witnesses namely: Christa Johnson and Howard Lowe.

I promised then to put my reasons in writing at a later date. This Judgment is the fulfillment of that promise. The delay in its delivery to counsel is consequent on the pressure of work on our over-extended secretarial staff.

[2] I am grateful to Mrs. Valerie Neita Robertson, Mr. Dwight Reece and Mrs. Ann Marie Fertuado for the clear comprehensive and concise manner in which their submissions were delivered.

[3] It was common ground between the parties that each application for bail was by way of an appeal against the decision of the Learned Resident Magistrate to refuse bail. The fact that it is an appeal by way of rehearing rather than a review, means that the court is entitled to substitute its view of the evidence for that of the learned Resident Magistrate. I am not limited to a consideration of errors of law or jurisdiction which may have been made by the learned Resident Magistrate. The exercise of the Resident Magistrate's discretion is not to be lightly overturned and is to be accorded great respect. See per Sykes J in ***Stephens v DPP (2006) HCV 0520 dated 23rd January 2007.***

[4] I remind myself that the relevant provisions of the Bail Act reflect the Constitutional right not to be punished except after due process of law. Hence the existence of a presumption of innocence. See the decision of the Full Court

in ***Adrian Nation et al v 2010 HCV 5201*** delivered on the 15th July, 2011. With regard to the application of the Bail Act it is appropriate to adopt the words of the Honourable Mr. Justice Brooks Justice of Appeal in ***Gowdie v. r. (2012) JMCA Crim 56***:

> ***1. It is an international principle that the right to personal liberty, although not absolute is nonetheless a right which is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention." (Hurnam – para. 16)***
>
> ***2. The court should "begin with the high constitutional norm of liberty and therefore been in favour of granting bail' (i.e. restoring the constitutional norm) (Stephens para 25).***
>
> ***3. It should then consider the allegations against the accused. It should not 'undertake an over-elaborate dissection of the evidence. (Hurnam para 25).***
>
> ***4. It should then 'consider whether there are grounds for refusing bail (Stephens – para. 25). The grounds to be considered include:***
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> ***(i) the risk of the Defendant absconding bail***
> ***(ii) The risk of the Defendant interfering with the course of justice***
> ***(iii) preventing crime***
> ***(iv) preserving public Order***
> ***(v) The necessity of detention to protect the Defendant (Brooks's para. 19)***
>
> ***"In this context the court may receive information which would not normally be receivable at trial, including hearsay evidence. This information could concern previous convictions and unsavory associations in practices of the accused person (See section 4(2) of the Act). In re Moles (1981) Crim LR 170 is authority for stating that the "strict rules of evidence were inherently inappropriate in a court concerned to decide whether there were substantial grounds for believing something, such as a court considering an***

application for bail. Further evidence in this area may be gleaned from the judgment of Chilwell J in Hubbard v ***Police (1986) 2 NZLR 738*** ….

5. The court should then consider, as is required by Section 4 (1) (A) of the Act, 'whether the grounds for refusing bail are substantial (Stephens paragraph 25).

6. *Thereafter, if it finds that there are substantial grounds for refusing bail, the court would consider whether imposing conditions can adequately manage the risks that may arise and how effective those conditions (would) be" (Stephens – paragraph 25)"*

[5] At the commencement of the hearing Counsel for the Respondent took a point in limine. This was that as both Mrs. Valerie Neita Robertson and Mr. Dwight Reese had sworn affidavits in support of the application; they ought not to be allowed to make submissions on their client's behalf. No authority was cited in support. I dismissed the point. Although it is a well recognized rule of practice, that the affiant ought not to appear as Counsel, I hold that applications for bail represent a *sui generis* situation. The court cannot ignore the fact that such applications are by their nature situations calling for urgency. Further as the client is in custody the logistics of having him or her swear to an affidavit can be challenging. Also it not uncommonly happens that his counsel being present on his behalf is able to state what transpired at the application for bail. Although the practice of Counsel appearing swearing affidavits is not to be encouraged in an appropriate case it can and ought to be excused.

[6] In the matter at bar Ms Fertuado candidly admitted that no issue was taken with the facts sworn and there would be no challenge by way of cross examination. In those circumstances I saw no need to deprive the litigant of the counsel of their choice in this matter. The Counsel who swore affidavits were granted permission to represent the litigant.

[7] Mrs. Valerie Neita Robertson commenced her submissions with a jurisdictional issue. She submitted that Section 289 of the Judicature (Resident Magistrates Court) Act on a true construction precludes any other agency but the Director of Public Prosecutions (DPP) from conducting the Prosecution. This is so, submitted counsel, because that agency is established in the Constitution and hence has protections and immunities which enable it to carry out its functions impartially and independently. It is, she submitted, wrong for the investigator and the instigator of a prosecution to also be the person or body actively prosecuting the matter. This is because of the danger of bias and a conflict of interest. This, submitted counsel, became apparent in the hearing before the learned Resident Magistrate at which inflammatory and unconnected matters were raised by Mr. Terrence Williams prosecuting counsel who was also head of the investigating agency.

[8] As attractively presented as were the submissions, I did not agree and hence did not call on Ms. Fertuado to respond. The Director of Public Prosecutions (DPP) was represented before me and affirmed to this court that a fiat had been granted to INDECOM for the prosecution of the matter. Furthermore the DPP consented to INDECOM being its representative at the time this application for bail came before me. The Judicature (Resident Magistrates Court) Act was passed prior to the Constitution of 1962. That statute must therefore be read so as to conform to the Constitution. Section 289 on which Mrs. Valrie Neita Robertson relied, applies:

> "*except in cases where a barrister, advocate or solicitor appears on behalf of the prosecution and cases in which the Director of Public Prosecutions or someone deputed by him conducts the prosecution."*

It is clear that the office of the DPP by the fiat has 'deputed' INDECOM to conduct the prosecution. Even in the absence of this exception, the constitutionally allowed body has inherently, the authority to delegate active

prosecution of any criminal matter. The case of murder against these applicants will not be prosecuted in the Resident Magistrate's court. Therefore, even if Section 289 means that only the Clerk of the Court (or the DPP) can prosecute matters there, it would have absolutely no impact on the representation in matters before this Supreme Court.

[9] I hold also that INDECOM is a body established by a specific statute and one enacted after the Judicature (Resident Magistrates Court) Act. Parliament, as it has been held elsewhere, has endowed that body with authority to investigate and prosecute: The DPP's constitutional role is not inconsistent with that. I ask myself the question, if a litigant in person lays a complaint, let us say for rape, and for some reason no representative of the DPP appears in court; Is a court then to say that the prosecution cannot proceed? I think not. I can think of no reason in law or practice why a virtual complainant could not proceed to prosecute her cause, or why the investigating officer should not be allowed to marshall evidence. INDECOM is in a similar position.

[10] There is in my view no breach of a constitutional right nor any inconsistency with the powers of the DPP for the investigator to marshall evidence in a case he has investigated. This is particularly so when the DPP consents. I therefore hold that INDECOM was entitled to represent the Respondent In the application for bail before me as well as before the learned Resident Magistrate.

[11] As regards my reasons for deciding to grant bail these may be shortly stated. I bear in mind the gravity of the offence charged. Murder is perhaps the most serious offence. However, the rights of these police officers are not to be reduced or made different from the rights granted by our Constitution to the ordinary citizen. It would be .wrong to refuse bail based on prejudice, conjecture or reputation connected to or deriving from the fact that these men are members of the Jamaica Constabulary Force. I looked at the circumstances with respect

to these three individuals and the evidence, information and material before me in that context.

[12] I also remind myself that there is a presumption of innocence. This is necessarily implied in the right to a fair trial. It is a constitutional right. That presumption means that the subjects' right to liberty must not be withheld or taken away save by way of punishment or where the court makes an order for the restriction of liberty. The Bail Act indicates the circumstances in which the constitutional right may be curtailed. It must be read in that context. The right to bail stated in the Act represents a restatement of the Constitutional right to presumed innocence and to enjoy one's liberty except where one has been convicted and punished or it is necessary to restrict that liberty in the public interest.

[13] On the evidence, information and circumstances placed before me there is no substantial reason to refuse bail. In the first place the case of murder against these men is not a particularly strong one on paper. The Crown's case is supported by a single eyewitness. She was walking with the deceased at night in a wooded dark area. She was walking ahead of the deceased using her cellular phone to light the way. She heard the deceased say something about why goats were out and then she heard gunshots. She ran away. Save to say the deceased was carrying bags in his hands and on his head and that she had never seen him with a firearm, she can do no more to negative an allegation of self defence. She was not in a position to see whether he pulled a firearm from his waist, trousers or elsewhere prior to the shooting.

[14] Nor is the absence of gunpowder residue on the hands of the deceased sufficient to negative self defence. This is because a person on whom a firearm is drawn need not wait for a shot to be fired before, if he honesty apprehends danger to himself, proceeding to act in his own self defence or the defence of others.

[15] It is true these are matters for a jury at trial, not for me, and nothing I say in this judgment is to be taken as determinative one way or the other as to how the evidence will or should be viewed. At this juncture I am merely considering the strength of the case against these 3 applicants and whether it is such as to motivate a court to consider depriving them of their right to liberty.

[16] I consider also that the prosecution has in its possession statements averring that the deceased or his cronies had fired upon the applicants.. They produced a weapon which they allege was recovered from the deceased but which had apparently not been fired on the night. They say others were with him who fired and escaped in the darkness. Tangential support for the applicants is found in the deceased's antecedents. He had been on the run for 7 years with respect to a charge of murder. This fact the sole witness as to fact supports. That witness also says she continued her sexual relationship with the deceased because she was afraid he would harm her family. The applicants also point to a statement by the deceased's nephew, given in relation to other criminal proceedings, that the deceased possessed a firearm and was believed to have killed his own brother.

[17] These matters may or may not be relevant at the trial of these applicants. However on an application for bail and considering the probabilities that is, whether it is more or less likely that the deceased on that night had a fireman and pulled it at the police, the information is relevant.

[18] I do not therefore find that the information available and the evidence in support of the charges presently laid against these applicants for bail are such as to motivate a court to take away their liberty. I hasten to point out that the learned Resident Magistrate did not have and was not privy to some of the material mentioned in Para 16 above. In these circumstances the risk of the Applicants absconding bail cannot be said to be very high.

[19] Counsel for the Respondent also prayed in aid the danger of witness interference and the fact (as she described it) that the applicants were part of a "common design", to kill several persons. She declined to adopt as part of her lexicon "rogue cops" which the learned Resident Magistrate had adverted to in her reasons. The evidence of this "common design" is to be found in a series of interviews with another policeman. That person, Cons. Collis Brown, is as I understand it, charged for some other murder. In the course of questioning he "blew the whistle" so to speak on several of his colleagues including the 3 applicants for bail.

[20] Constable Collis Brown stated

(Ex. HC2):

"Q. But was that a shooting you had been told by Mr. Bailey to go and do

A. Yes …….

Q. And this was you and who

A. myself and Cons. De la Haye"…….

[21] Save as aforesaid there is no other reference in the extracts of Collis Brown's statement exhibited, to an illegal shooting at which Mr. Collis Brown was present. He does report on other shootings about which he was told. He also speaks of photographs which were sent to him. I will return to the matter of the photographs later.

[22] Of the 3 applicants only Cons. De. la Haye is directly implicated by Mr. Collis Brown in an extra judicial killing. Mr. Collis Brown does say he was part of a group of police officers who did those things. He names all the applicants as being part of that group. He is however only witness to one such extra judicial killing in which himself and Mr. De la Haye participated.

[23] The question I ask myself is whether, when considering bail I should cause the fact that there is information or evidence related to an offence for which the

applicants have not been charged, to cause me to refuse bail. Furthermore, where the evidence against the accused is not so very strong in the offence for which he is charged, should bail be refused because of the evidence of something else for which he is not charged? It seems to me that, the answer must be in the negative. I will not therefore use these allegations about Mr. De la Haye in relation to an unconnected incident for which he has not been charged to support the refusal of bail.

[24] Similarly, with respect to the allegation of a 'common design'. These applicants have not been charged with conspiracy, common design or any such offence. The allegations are based on the statement of a police officer but much of what he has said is matter reported to him by others. I do not find that is so strong as to justify the removal of the liberty of the subject. Any risk of flight because of the gravity of the allegations and the source of the information, can be controlled by appropriate conditions appended to the grant of bail.

[25] Finally the Respondent relies on the fact that photographs of the deceased, in the case for which the applicants are charged, were sent to Mr. Collis Brown. He says also that photos of the gun recovered were sent to his phone. The Respondent relies on the sending of the photographs as demonstrative of the fact that the applicants were boasting of their guilt. The photos were accompanied by the texted words, "Two more down."

[26] I again am not prejudging the case nor in any way intending to second guess the decision of a jury. The only point I make now is that by itself or even together with the other evidence presented, the sending of these photographs and the words attached are not such as to cause me to regard the case against the applicants as particularly strong. Nowadays, the posting of images by phone is a common activity. It may be unprofessional but it is not so unusual as to cause me, without more, to draw some conspiratorial inference. Indeed insofar as a

photo of the recovered gun is also allegedly sent it certainly weakens the effort to negative self defence.

[27] There was an effort by the Respondent to raise the possibility of witness interference and intimidation. It was submitted that these were police officers and hence they would have the facility to do so. Reliance was placed upon the circumstances in which the mother and brother of the deceased were shot as well as the shooting of one Mr. Adiff Washington at the May Pen Hospital. Upon closer inspection it became manifest that neither of these shootings can at this time be connected to the applicants. In the shooting involving the deceased's relatives newspaper reports (6 May 2014) indicate it was the deceased's cronies who did it as they were in search of a firearm. In the other the shooters were unidentified. The persons shot have no known connection to the case in respect of which these applicants are being charged. I therefore respectfully differ from the learned Resident Magistrate and do not find sufficient or indeed any evidence that witness interference or intimidation occurred or is likely to occur. However, out of deference to the possibility I did make a restraining order and impose curfews.

[28] It is for the reasons stated above that bail was offered on certain conditions.

David Batts
Puisne Judge