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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M.121 OF 2002

IN THE MATTER of An Application

For Bail (*Ex Parte* Francis Young)

Regina vs. FRANCIS YOUNG

Mr. Ernest Smith and Ms. Nesta-Claire Smith for the Applicant.

Ms. Tanya Lobban, Crown Counsel, for the Respondent

HEARD: 7th, and 11<sup>th</sup> October, 2002

**BROOKS J:**

The Summons before the Court is headed "Summons for Bail" and in it the Applicant, the accused man, Francis Young, asks "all parties concerned (to) attend upon the Judge in Chambers ...on an application on behalf of Francis Young and/or Appeal from the decision of the Learning (sic) Resident Magistrate of the Parish of Saint James refusing the Accused/Applicant's Application for Bail."

The less said about the facts of the incident giving rise to the charges against the accused man at this stage is perhaps the better. Suffice it to say that on the one hand there is evidence (by way of a statement) from a constable that he saw the accused firing a gun in the direction of three men, who had no weapons in their hands. One of those men died on the spot and it is for his death that the accused is charged. On the other hand there is also evidence by statements of

other persons that other firearms were present at the time of the incident (although there is no eyewitness as to any of them being fired) one of which was in the hands of one of the said three men. Significantly also, there is forensic evidence which indicates that a bullet said to be taken from the body of the dead man, is said not to have been fired from the accused man's licensed firearm, which firearm the police did not recover until some time after the incident.

Section 10 of the Bail Act speaks to appeals from the decision of a Resident Magistrate who refuses bail to an accused who is not represented by Counsel. It is to be read in conjunction with Section 9, and they may both be conveniently quoted here:

"9. Where a Resident Magistrate's Court refuses to grant bail to a defendant who is not represented by counsel, the Court shall inform him of the right of appeal conferred by section 10.

"10. A defendant to whom section 9 applies may appeal to a Judge in Chambers."

Although there is no provision in the Act which specifically gives a right to an accused man who is represented by Counsel to appeal against such a decision, both Sections 8 and 11 of the Act recognize a right to apply to a Judge in Chambers. Section 8 requires the Resident Magistrate's Court which refuses bail in criminal proceedings or imposes conditions in granting such bail to give

reasons for refusing bail or imposing such conditions, "to enable the defendant to make an application to a Judge in Chambers. Section 11(1) gives a Judge in Chambers to authority to "grant or refuse bail or vary the conditions."

What however is the jurisdiction of the Judge in Chambers? Is it one of review or one of appeal by way of rehearing? Is the Judge in Chambers entitled to substitute his own discretion for that of the Resident Magistrate? Since the Bail Act is relatively new and is silent on the issue, it is appropriate to look at the principles laid down at common law which govern circumstances such as these.

The grant of bail has its origin in the inherent jurisdiction of the Supreme Court to control its own procedure. Where an application is made to a Judge in Chambers subsequent to a refusal by a Resident Magistrate, the position at common law is that for the applicant to succeed he must show (a) that the Magistrate erred in principle in considering the application (b) that special circumstances as shown on the facts were not considered by the Magistrate or (c) that special circumstances have arisen since the refusal which ought to be favourably considered. Crown Counsel in her submission put it this way: " the Court is concerned with whether the learned Resident Magistrate took into consideration what was relevant in her decision to refuse bail, having regard to Section 4 (2) of the (Bail) Act"

In complying with the provisions of Section 8 of the Bail Act and Section 5 of the regulations made thereunder, the learned Resident Magistrate has produced to the accused a record of her reasons for refusing to admit him to bail. It is presently before the Court. As I understand it, I am not at this stage permitted to substitute what would be my exercise of the discretion granted to the Court for that of the Learned Resident Magistrate's even if I were to have arrived at a different conclusion, once I find that she has assessed all the relevant issues. I now set out her reasons as given:

**"Reason for decision:** because of the gravity of the offence and the weight of the allegations against the accused. In addition the accused may be further charged for another murder there is eye witness evidence, that the accused was the only person seen firing shots in direction of deceased and other man who went overboard. In addition it was some time after the incident when the boat had returned to shore that the accused hand (sic) over a firearm. Firearm not taken from him on boat."

The reasons given by the Learned Resident Magistrate have referred to the seriousness of the offence. Mr. Smith in my view correctly submits that the seriousness of an offence cannot be viewed in a vacuum, but must depend on the weight of the evidence in support of the charges. The Learned Resident Magistrate however did not stop there, she went on to assess the weight of the evidence that is available. She obviously has taken into account the evidence of the police officer Cons. Anderson, as to what he observed the accused man

doing and what was the condition of the deceased and the other two men with him at the time. I find that it is not unreasonable to place greater reliance on the observations of a trained individual than on those of persons who saw no direct action of the nature explained by the police officer, but speak only to some circumstances which may have explanations either in favour of or against the accused man's case. The nature of the allegations affect the all important issue of whether the accused man will present himself at a trial.

I also find that the learned Resident Magistrate correctly took into account the fact that there may be another death arising out of the incident and combining that fact with the manner in which the accused's firearm was handled between the time of the incident and when it was eventually handed over to the police (which, there is evidence, required the police to obtain a search warrant before it was produced) I find that she not unreasonably would have concluded that there is some risk of an interference with an investigation as to the second possible death.

The forensic evidence is indeed a troubling aspect in the case, but I am of the view that the Learned Resident Magistrate must have been addressed, on the issue, by Defence Counsel. The absence of a complete chain in respect of the forensic evidence leaves the issue in some uncertainty, and it is not unreasonable for the Learned Resident Magistrate to have placed the greater weight on the eyewitness evidence of Constable Anderson.

I take into account Mr. Smith's urging as to the fixed address of the accused, his antecedents and the fact that he is a businessman with an established operation. Again, these must have been urged on the Learned Resident Magistrate who preferred to ensure the accused's presence at the trial based on her assessment of the evidence of Constable Anderson.

In the circumstances the application is refused and the Summons dated 2<sup>nd</sup> October 2002, is dismissed.