In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
2018 No: 9

BETWEEN:

THE QUEEN

And

WILLIAM FRANKLYN SMITH

REASONS FOR REFUSAL OF BAIL

Date of Application:	Tuesday 5 September 2019
Date of Refusal on Bail:	Tuesday 5 September 2019
Date of Reasons:	Tuesday 1 October 2019
Counsel for the Crown:	Ms. Maria Sofianos on behalf of the DPP
Counsel for the Accused:	Ms. Elizabeth Christopher of Christopher's

Guiding legal principles for Bail Pending Sentence and Bail Pending Appeal – Bail Application by convicted offender for offences of Unlawful Carnal Knowledge and Sexual Exploitation of a Young Person - Pending Report under Section 329E of the Criminal Code - Reasons for Refusal of Bail - Bail Act 2005 (Section 6 , Schedule 1)

RULING of S. Subair Williams J

Introduction

1. The Defendant was convicted after trial by the jury on the following counts (each of which concerning the same Complainant):

   (i) Count 1:
   Attempted Unlawful Carnal Knowledge of a Girl under the Age of 14 contrary to section 180(2) of the Criminal Code;

   (ii) Count 2:
   Unlawful Carnal Knowledge of a Girl under the Age of 14 contrary to section 180(1) of the Criminal Code;

   (iii) Count 3:
   Sexual Exploitation of (a) Young Person by a Person in a Position of Trust contrary to section 182B (1)(a) of the Criminal Code; and

   (iv) Count 4:
   Sexual Exploitation of (a) Young Person by a Person in a Position of Trust contrary to section 182B (1)(a) of the Criminal Code;

2. Upon conviction, the Defendant was remanded into custody and his sentence hearing remains pending. By a Notice of Appeal dated 8 July 2019 he seeks to have his convictions quashed by the Court of Appeal.

3. In the interim period, his Counsel filed two bail summonses, both of which are the subject of this ruling:

   (i) Bail Summons filed and dated on 28 August 2019 (bail pending appeal); and

   (ii) Bail Summons filed on 3 September 2019 and dated by the Acting Registrar on 4 September 2019 (bail pending sentence)

4. On 5 September 2019 both bail applications were heard before me as the trial judge was not available. At the conclusion of oral submissions made by both sides, I refused bail altogether and informed Counsel that I would provide written reasons. These are those reasons.

Background of Court Appearances:

5. Commencing on 18 June 2019 the Defendant was tried by jury and subsequently convicted on all counts charged on 26 June 2019. The trial judge was Mr. Acting Justice Craig Attridge.

6. Preparatory to the pending sentence proceedings, Attridge AJ made an Order on 26 June 2019 in the following terms:

    1. *The Defendant shall be remanded into the Custody of the Commissioner of Prisons for a period not exceeding 60 days, so that a mental health assessment can be conducted and a report provided to the Court pursuant to section 329E of the Criminal Code Act 1907.*

    2. *This matter will be mentioned on Monday, 5th August 2019 at 10:00 a.m.*

7. I shall hereinafter refer to this Order as "the 329E Order".

8. On 5 August 2019 this matter was mentioned before Ms. Justice Charles-Etta Simmons during the monthly arraignment session. Ms. Susan Mulligan appeared, holding for Ms. Elizabeth Christopher, and complained that no apparent action had been taken in furtherance of the 329E Order. She said that Mr. Smith had not been not received a visit from any professional person in furtherance of the 329E Order since 26 June 2019 when he was first remanded into custody.

9. Ms. Mulligan reminded the Court of the provision at section 329E(1) where the Court, before imposing sentence, '*shall…remand the offender for a period not exceeding 60 days to the custody of the Commissioner of Prisons*.' (I will refer to this as 'the 60day period').

10. So not to set a return date to a day beyond the 60day period, Simmons J fixed the matter to be mentioned on 22 August 2019. No other orders or directions were made on 5 August 2019. However, the learned judge did inform the Defendant that all the Court would liaise with the Department of Corrections in aid of having the report completed.

11. On 22 August 2019 the matter was heard by Simmons J. Mr. Alan Richards appeared on behalf of the Crown and Ms. Christopher appeared for the Defendant. Ms. Christopher complained that it was only earlier that same week that MAWI[1] first made contact with the Court to obtain information about the Defendant in furtherance of the s.329E Order.

[1] Mid-Atlantic Wellness Institute (Mental healthcare facility administered by the Bermuda Hospitals Board)

12. Simmons J confirmed that on 13 August 2019 personnel from MAWI wrote to the Supreme Court Registry requesting Court transcripts; a summary of the evidence; any health records on the Court file and any other relevant Court documents. The Court directed for a Registry staff member to provide the requested information. In so doing, the Court was advised by its associate that a MAWI representative was expected to collect this information from the Court file on the following day.

13. At the 22 August hearing Ms. Christopher advised the Court that she would be making an application for bail pending appeal. Mr. Richards stated his concern that the matter should be listed in the first instance before the trial judge. Simmons J opined that Attridge AJ would be available to sit again as an acting judge for a period commencing 24 August. Simmons J also informed Counsel that the matter would be administratively listed during the week of 26 August.

14. It is not apparent from the Court record why the matter was not listed for sentence during the week of 26 August. Curiously, a production order signed on behalf of the Registrar on 22 August called for the Defendant to be produced again before the Court on Wednesday 11 September 2019.

15. Having filed the two bail summonses on 28 August and 3 September, Ms. Christopher appeared before me on 3 September 2019 in the monthly arraignment session. Ms Sofianos appeared for the Crown. I set the bail applications to be heard before me on 5 September and informed Counsel that I would make inquiries through the Acting Registrar to ascertain the status of the pending report.

16. On 4 September the Acting Registrar received (by email forward from the Acting Commissioner of Corrections) the following email from Dr. Emcee Chekwas of the Department of Corrections:

    Good Day Acting Commissioner Downie,

    We were waiting for collateral information from the Court to assist with preparing the psychological report. I received this information by email on Monday 26 August last. I am scheduled to review the documents on Saturday 07 September, Assess the client on Monday 09 September and have the completed report ready by Friday 13 September 2019. This is the quickest schedule available.

    Emcee

17. I read aloud the above message to Counsel during the 5 September hearing of the bail applications and Ms. Christopher relayed her doubts as to whether the proposed timeline was realistic based on her previous experience with the timeframe for preparation of like reports by Dr. Henagulph in other cases.

Bail Applications before the Court:

Summary of Application for Bail Pending Sentence

18. Ms. Christopher's bedrock submission was that bail pending sentence is 'as of right' under the Bail Act 2005 ("the Bail Act"). She referred to Schedule 1 of the Bail Act which outlines the exceptions to the general right to bail and submitted that none of the listed exceptions apply to a Defendant who is on bail pending sentence.

19. Ms. Christopher invited the Court to apply a narrow construction of paragraph 6 which reads: *The defendant need not be granted bail if he is in custody in pursuance of the sentence of a court*. Counsel contended that this provision would only apply to a Defendant who was seeking bail while already serving a custodial sentence imposed by the Court in respect of another matter.

20. Ms. Christopher also sought to distance her Client from paragraph 9 which reads: *Where his case is adjourned for inquiries or a report, the defendant need not be granted bail if it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody.*

21. Defence Counsel, pre-empting any invitation from the Crown for the Court to exercise its discretion in having regard to the factors enumerated under paragraph 11, submitted that paragraph 11 had no application as Mr. Smith did not fall under paragraph 3 or 4 to which it refers.

Summary of Application for Bail Pending Appeal

22. Ms. Christopher contrasted the principles underlying bail pending appeal from bail pending sentence on the notion that a statutory right to bail only arose in respect of the latter. She placed before the Court Mr. Smith's Notice of Appeal filed on 8 July and described the grounds of appeal as substantial and likely to succeed.

23. In surmising her grounds of appeal, she informed the Court that the 12 year old Complainant in this matter was questioned by the trial judge in discharge of the Court's obligation to

determine whether she should be permitted to give sworn evidence. Ms. Christopher complained that despite the Complainant's inability to answer nearly every question posed, the learned judge still ruled that she was to give sworn evidence.

24. The jury direction which followed is also the subject of the grounds of appeal. Ms. Christopher explained that the trial judge, without adequately canvassing his direction with Counsel beforehand, imported a novel direction based on UK law which would not likely be upheld on appeal. She also criticized the trial judge for his selection on the direction applicable to a 'very young child' which she submitted was only appropriate for a child between the ages of 3 and 4. In her protest, Ms. Christopher argued that the trial judge was plainly wrong.

25. The other main area for reproach on appeal on Ms. Christopher's grounds was in relation to the admission of evidence of the Complainant's diagnosis of a sexually transmitted disease, notwithstanding the Appellant's negative diagnosis (albeit that she accepted that evidence showed that the diagnosis is not often seen in male persons). Ms. Christopher attacked the admission of this evidence as prejudicial and of no probative value. Added to that, Ms. Christopher was scathing in her criticism of the expert witness' lack of previous experience and her inability to opine on the issues in question.

26. In support of her application, Ms. Christopher referred the Court to a Singapore 1972 publication in the Malaya Law Review which provided a case study on *Ralph v Public Prosecutor [1972] 1 M.L.J. 242*. In the opening paragraph of the article it states:

"*In Singapore, the matter of bail pending appeal has rarely gone on appeal because the appellate courts have rarely and reluctantly intervened and disturbed an exercise of discretion on the part of the trial court. So, the High Court has had little or no opportunity to pronounce its decision on the matter and hence there is very little by way of authoritative statement of the law on the subject. The predicament is also shared in other jurisdictions*…"

27. Ms. Christopher also invited the Court to highlight the following passages at pages 306-307:

"*Johore v. R (1907) 11 S.S.L.R. 36 the first reported decision on the subject of post-trial bail under our law, and R. v. Lim Soh Chwee & Anor (Cr. App. (Singapore) No. 8 of 1911 (reported in R. Braddell, Common Gaming Houses, Appendix C, at p.178.) another early case, both decided by Fisher J., were initially considered by Winslow J. Without reference to the judgment in these cases, his Lordship adopted the view expressed by Whyatt C.J. in Goh Beow Yam v. R. (1956) 22 M.L.J. 251 that Fisher J. took the somewhat extreme view that bail should be granted in almost every case unless there was strong reason to suppose the appellant would abscond. This, it is submitted was a misunderstanding of Fisher J's*

judgment. On the facts before him Fisher J was expressing concern over the miscarriage of justice that would have resulted if the appellants had been left languishing in jail pending the determination of their appeal. His observations were rather as to the mode of exercising the discretion in the matter of bail pending appeal. In fact, Fisher J was of the view that "if an appeal was manifestly frivolous or if reasonable security could not be given to ensure that the accused will not run away, bail might be rightly refused". In the latter case of Lim Soh Chwee, Fisher J went further and held that, as there was a right of appeal by law, bail ought not to be refused in any "ordinary case of appeal" unless there were strong reasons to suppose that the granting of bail was likely to enable the convicted person to abscond. Apart from employing the same criterion of probability of absconding to determine both pre-trial and post-trial liberty, Fisher J. was suggesting that bail even for a person convicted of an offence was the rule and refusal of bail the exception, at least in "ordinary cases". In R. v Tan Tee (1948) 14 M.L.J. 153, Sir Murray Aynsley C.J., in a short judgment that implicitly espoused the reasoning of Fisher J. in the earlier cases, allowed bail pending appeal observing that it was the practice to allow bail to a convicted person unless there were reasons for not allowing it. These decisions seem to suggest that applications for bail pending appeal should generally be allowed and that there must be grounds for refusing bail.

To this policy and practice of the courts in the early days, two later cases, Re Kwan Wah Yip (1954) 20 M.L.J. 146. and Goh Beow Yam v. R. (1956) 22 M.L.J. 251 stand in direct contrast. In the former case, Spencer Wilkinson J. cited with approval the observations of Wilson J. in Doraisamy v. P.P. K.L. Criminal Application, No. 2 of 1954 (unreported) that a stay of execution should not be granted unless there were special reasons for doing so, and that the mere fact that a notice of appeal has been given or that the accused believes he has good grounds for appeal, does not constitute sufficient grounds for releasing an applicant on bail pending appeal. Being substantially in agreement with the views of Wilson J., Spencer Wilkinson J further went on to outline some considerations which subordinate courts should follow in granting or refusing bail. In Goh Beow Yam's case, Whyatt C.J. approved and followed "the lucid and persuasive judgement of Mr. Justice Spenser Wilkinson…, but added that the considerations set out by the latter should not be regarded as an exhaustive list. In the instant case, Winslow J. agreed with and followed these views on bail pending appeal. He has thus added support to the policy of not granting bail in post-trial cases unless there are "special reasons" for allowing bail- a policy which is in conflict with the earlier policy that bail was not to be refused in "ordinary cases" unless there were strong reasons for such refusal."

28. At page 308:

"*…Therefore it seems clear that Spenser Wilkinson J. did not intend to make a radical departure from the earlier policy and practice with regard to post-trial bail. While the*

earlier view, as expressed by Fisher J. was that bail pending appeal should generally be allowed and that there must be grounds for refusing bail. Spenser Wilkinson J. stressed that post-trial bail is discretionary and not automatic as well as even a superficial reading of Fisher J.'s views would not have led one to conclude. But later Judges, among them Winslow J in the instant case, have interpreted his observations to mean that bail should always be refused unless there were "special reasons" for granting it. This misunderstanding has led to a departure in the policy and practice with regard to post-trial bail and hence the conflict of authority between the earlier and later cases.

The training and experience of our Judges in the law and practice of English courts has once again consciously or unconsciously led them into accepting and adopting the prevalent practice in England. In England, bail applications to the Court of Criminal Appeal are granted only in "exceptional circumstances" (footnote: Halsbury's Laws of England, 3rd Ed., Vol. 10, at p. 526). There, it means that the higher the tribunal the accused approaches for bail pending appeal, the lower the chances of obtaining bail… The considerations applicable to the grant of bail pending appeal under the structure and arrangements of the Code are different, and the "exceptional circumstances" test propounded in English decisions has been held inapplicable in the local context. Murray Aynsley C.J. in R v Tan Tee (1948) 14 M.L.J. 153 refused to follow the English authorities on the matter and observed that the appeal was against the decision of a Magistrate and that the bail application was made to the High Court and not the Court of Criminal Appeal. A similar view was taken by Spenser Wilkinson J. in Re Kwan Wah Yip (1954) 20 M.L.J. 146. Despite his attempts to clarify and circumscribe the interpretation of "special reasons" applicable to bail pending appeal, the "exceptional circumstances" test applied in English cases has crept into our law and has resulted in the practice of not granting bail unless there are "special reasons" for granting it.

An appellant does not enjoy the presumption of innocence as does an accused awaiting trial. Entirely different considerations arise as regards his application for post-trial liberty. The presumption of innocence and all attendant and kindred considerations are no longer applicable. But then, the great fear by both the police and prosecution that an accused would tamper with witnesses or hamper investigations is also no longer present. Whether pre-trial or post-trial, the main consideration in the refusal of bail continues to be the risk of flight by the accused or appellant. Conviction and the probability of pending punishment may increase the probability of absconding….

…

Though the presumption of innocence is no longer present, it is a fundamental rule of our system of justice that until the conviction is confirmed by the appellate court, a convicted

person who has appeal should be regarded as innocent. Though an appellant has no absolute right to be free pending appeal, he does have a right to have his conviction reviewed under the Code. Until finally adjudged guilty by the court of last resort there must be a natural reluctance to compel anyone to undergo punishment, and the imposition of actual punishment should be avoided pending disposal of the appeal. But the administration of criminal justice requires that the duly convicted guilty be promptly punished and public policy requires that society is entitled to protection from convicted criminals. In consonance with our notions of justice, in all circumstances of the particular case, the desire not to imprison a man until finally found guilty nonetheless outweighs the disadvantages of allowing him to be at large. Thence, the considerations regulating bail pending appeal should aim at achieving a resolution of these conflicting goals."

29. Ms. Christopher readily accepted that the publication containing the above extracts was a journal rather than a Court decision which might be of more persuasion. However, she implored the Court to find that the matters opined were of assistance save for the points supporting a presumption of innocence after conviction which she said was questionable.

30. In her closing points, Ms. Christopher reminded the Court that the Appellant was on bail throughout the trial without any occurrence of any failure to surrender or other breach. She added that while he was not a first offender, he only had one previous conviction for actual bodily harm which was entered when Mr. Smith was 16 years of age or thereabouts (his current age being 26 years). Ms. Christopher advocated that the Appellant is a hard-working man who supports his family and is not to be considered as someone who would likely reoffend given that the convictions concern offence committed in 2017 without any subsequent allegation of criminal conduct since which. She said that the Appellant has no contact with the Complainant and would be willing to undergo and conditions which the Court may see fit to impose.

Objections to Bail:

31. Crown Counsel, Ms. Sofianos, commenced by ardently defending Dr. Chekwas' competence and ability to prepare the report commissioned and to state a timeline for its readiness. She further confirmed the Crown's willingness to proceed to sentence as soon thereafter in accordance with the Court calendar availability.

32. Ms. Sofianos, although expressing that the jury direction in contention was a first of its kind in this jurisdiction, defended the soundness of the summation and addressed me summarily on the reasons why the conviction would be upheld on appeal. Ms. Sofianos also read out *verbatim* a sample of the direction given by the trial judge on how the Complainant's evidence was to be treated.

33. In addressing the Crown's expert evidence on the sexually transmitted disease (STD), Ms. Sofianos informed the Court that the jury heard evidence that the STD in question can and does go undetected and untreated in male persons.

34. The Crown further impressed on the Court that an immediate custodial sentence was likely and that the Crown would be seeking a minimum of 5 years imprisonment.

35. In summary, Ms. Sofianos conceded to Ms. Christopher's submission that a statutory right to bail arose in the case of bail pending sentence but urged the Court to refuse bail in exercise of a residual discretion on the grounds that the Defendant was facing an immediate custodial sentence.

The Law on Bail

<u>The Law on Bail Pending Sentence where Case is Adjourned for Pre-Sentence Reports:</u>

36. Section 6 of the Bail Act 2005 ("the Bail Act") outlines the general right to bail: "*A person to whom this section applies shall be granted bail except as provided in Schedule 1*."

37. Schedule 1 only concerns offences punishable by imprisonment. Paragraph 1 states: "*Where the offence or one of the offences of which the defendant is accused or convicted in the proceedings is punishable with imprisonment, the following provisions of this Part of this schedule apply*."

38. Save for instances where it would be impracticable to complete the inquiries or make the report without keeping the Defendant in custody, the general right to bail is extended to convicted persons waiting on pre-sentence reports. Section 6(4) reads: "*This section also applies to a person who has been convicted of an offence and whose case is adjourned by the court for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence*." Section 6(6) reads: "*In Schedule 1 "the defendant" means a person to whom this section applies and any reference to a defendant whose case is adjourned for inquiries or a report is a reference to a person to whom this section applies by virtue of subsection (4).*

39. An express exception to the right to bail is contained in paragraph 9 of Schedule 1 where it reads:

Exception applicable only to defendant whose case is adjourned for inquiries or a report

9. Where his case is adjourned for inquiries or a report, the defendant need not be granted bail if it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody.

40. Briefly turning away from the Bail Act, regard must also be given to the legal position on remands under section 329E(1) of the Criminal Code which provides:

Remand of offender for assessment
329E (1) Where an offender is convicted of a serious personal injury offence, the court shall, before sentence is imposed on the offender, remand the offender for a period not exceeding 60 days to the custody of the Commissioner of Prisons.

(2) The Commissioner of Prisons shall cause an assessment to be conducted by a qualified professional to determine if the offender constitutes a threat to the life, safety or physical or mental well-being of any other person on the basis of evidence establishing—

(a) in the case of a sex offender, that—

(i) the offender, by his conduct in any sexual matter, including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses; and

(ii) there is a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control such impulses; or

(b) in any other case, that—

(i) the offender has demonstrated a pattern of repetitive behaviour, of which the offence for which he has been convicted forms a part, showing a failure to restrain his behaviour and a likelihood of his causing death or injury to other persons or inflicting severe psychological damage on other persons, through failure in the future to restrain his behaviour; or

(ii) the offender has demonstrated behaviour of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.

(3) The person charged with the conduct of an assessment under subsection (2) shall report his findings and recommendations for sentence to the court.

(4) The court, if on receipt of the report under subsection (3) it is satisfied that—

(a) it would be appropriate to impose a sentence of three years or more for the offence for which the offender has been convicted; and

(b) there is a substantial risk the offender will reoffend;

shall—

(c) impose a sentence for the offence for which the offender has been convicted, which sentence shall be imprisonment for not less than three years; and

(d) order the offender to be supervised in the community for such period not exceeding ten years as may be specified in the order and subject to such

conditions as are so specified, and such order may specify a condition that the offender be enrolled in the Mental Health Treatment Programme under section 68A(7).

(5) The court shall not make an order under subsection (4)(d) if the offender has been sentenced to life imprisonment.

(6) If the court is not satisfied of the matters referred to in subsection (4)(a) and (b), it shall impose any sentence it could otherwise impose for the offence for which the offender has been convicted.

(7) Nothing in this section shall be construed to derogate from section 71E (which relates to dangerous offenders).

[Section 329E added by 2000:23 s.2 effective 29 October 2001; subsection (4)(d) amended by 2016 : 30 s. 5 effective 15 August 2016]

41. In *Justin Parsons v Attorney General et al [2018] SC (Bda) 63 Civ (10 August 2018)* a constitutional challenge was made under section 5(1) of the Bermuda Constitution (protection from arbitrary arrest or detention) in respect of the mandatory remand provision under section 329E(1). I held at paragraphs 36-39:

36. Both the statutory and common law principles of bail pending sentence require the Court to principally consider whether the convicted offender will likely face a custodial sentence.

37. In applying the bail pending sentence principles, the Court would have to first form an opinion on the likelihood of an immediate custodial sentence. In the context of an assessment under section 329E(1), its operation is tied to s. 329E(4) in that the Court must be satisfied, before making a Supervision Order, that it would be appropriate to impose a sentence of three years or more and that there is a substantial risk of reoffending.

38. There is no doubt in my mind that a Court would be able to properly assess upon conviction whether the offence and offender concerned is appropriately facing a prison sentence of 3 years or more. However, in my judgment the question as to whether there is a substantial risk of offending may not always be answered without expert psychological or psychiatric reports.

39. Clearly, the Court must retain a discretion under section 329E in deciding whether to remand an offender convicted of a personal injury offence. Such discretionary powers should be exercised on the primary basis as to whether the Court is satisfied the offender would appropriately face an immediate custodial sentence of 3 years or more. The Court

needn't go further than that. It would only be in the most exceptional cases that an offender is permitted to bypass the section 329E remand in the face of the Court's opinion that such an offender will appropriately serve at least a 3 year prison term.

42. At paragraphs 42-43 I concluded:

42. However, the Plaintiff is entitled to the redress prayed in its Originating Summons only to the extent that this Court declares that section 329E(1) contravenes Schedule 2, section 5 of the Constitution which safeguards an individual's right against arbitrary arrest and detention.

43. Going forward, section 329E(1) shall be construed so to read:

*329E (1) Where an offender is convicted of a serious personal injury offence, the court ~~shall~~, **may** before sentence is imposed on the offender, remand the offender for a period not exceeding 60 days to the custody of the Commissioner of Prisons.*

43. Notwithstanding, it is certain that Parliament, in passing section 329E of the Criminal Code, anticipated that a person convicted for a serious personal injury offence would be remanded in custody pending the preparation of an assessment by a qualified professional. More so, the Legislature enacted under section 329E(4) that where such an offender is facing three or more years imprisonment, that a period of supervision in the community would also be necessary, subject to any specified conditions (which might include enrollment in the Mental Health Treatment Programme).

44. Section 329E reports are commissioned to determine whether the offender constitutes a threat to the life, safety or physical or mental well-being of any other person on the basis of evidence. The assessment is intended to establish whether the sex offender[2] concerned has shown a failure to control his sexual impulses and whether there is a likelihood of that offender causing injury, pain or other evil to other persons through failure in the future to control such impulses.

The Law on Bail Pending Sentence where Immediate Custodial Sentence is Pending

45. As is the case in other jurisdictions, there is no real plenitude of reported rulings expounding on the legal principles of bail. In an article written by Law Lecturer of Kuruksheira University, Mr. Sudesh Kumar Sharma, and published in the Journal of the Indian Law Institute (Vol. 22, No.3 (July-September 1980), pp. 351-370 the remarks of Krishna Iyer, J in *Gudikanti Narasimhulu v. Public Prosecutor, A.I.R. 1978 S.C. 429* were recited as follows:

[2] Section 329E(2)(b) applies to offenders other than sex offenders

"*…the subject of bail belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process*."

46. While the provisions in the Bail Act provide easy access to the statutory principles of bail, the surviving common law principle that bail will presumptively be refused when the convicted offender is facing an immediate custodial sentence is less visible 'on the books'. Notwithstanding, this principle is well-known, if not trite.

47. In my earlier ruling in *R v Chae Foggo [2017] SC (Bda) 66 Crim (31 July 2017)* (to which neither Counsel in this matter referred) I considered the position on bail pending sentence and refused bail on the primary basis that an immediate custodial sentence was likely. At paragraph 32 I stated:

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

48. In *R v Chae Foggo* the Defendant was on bail throughout the proceedings until the date of his conviction on 31 July 2017 when his bail was revoked. Pre-sentence reports were ordered and his sentence hearing was likely to occur and did in fact proceed some two months after the bail hearing on 9 October 2017. The key factor relied on in refusing bail in *R v Chae Foggo* was that the sentence would likely be an immediate custodial sentence.

49. It is admittedly dubious whether the reasoning behind my refusal to bail in *R v Chae Foggo* ought to have been left to an exercise of statutory construction. It is of greater certainty that the real source of the Court's power and continued practice of refusing bail pending sentence in a case where the Defendant is undoubtedly facing an immediate custodial sentence, is in the Court's inherent jurisdiction to import the common law into a statutory gap.

50. Of course, in exercising its inherent jurisdiction, the Court must tread carefully so not to rupture Parliament's legislative sovereignty. The import of the common law will only be proper where Parliament unintentionally left a lacuna.

51. Did Parliament intend for convicted persons to enjoy a general right to bail where the pending sentence concerns an immediate custodial term which outweighs the period between the bail hearing and the sentence hearing? It did not.

52. Part IV of the Criminal Code contains the purpose and principles of sentencing. Section 53 states 'the fundamental purpose for sentencing is to promote respect for the law and to maintain a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives-

(a) to protect the community;
(b) to reinforce community-held values by denouncing unlawful conduct;
(c) to deter the offender and other persons from committing offences;
(d) to separate offenders from society, where necessary;
(e) to assist in rehabilitating offenders;
(f) to provide reparation from harm done to victims;
(g) to promote a sense of responsibility in offenders by acknowledgment of the harm done to victims and to the community

53. Section 54 requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

54. In the considering the question of bail pending sentence where the sentence is bound to be an immediate custodial sentence close attention should be paid to the principles settled under section 55. As a starting point, a sentence of imprisonment may only be properly imposed after consideration is given to all other non-custodial sanctions. This means that when the Court forms the provisional view that a custodial sentence will be imposed, it is an obvious reality that no other sentence would be appropriate.

55. Section 55(2) sets out the various factors to which the Court must first have regard before imposing a custodial sentence. Amongst those factors, the Court must look at, *inter alia*, the nature and seriousness of the offence, including any physical or emotional harm done to the victim and the extent to which the offender is to blame. The Court must also consider any injury caused by the offender and the need for the community to be protected from the offender. Another consideration to be given is to the prevalence of the offence and the importance of imposing a sentence that will deter others from committing the same or a similar offence.

56. Parliament envisaged that custodial sentences would be reserved for serious offences and circumstances where no alternative sentence would suffice. These provisions point to Parliament's predilection for immediate custodial sentences to be treated seriously and for offenders facing them to be dealt with accordingly.

57. So, why then does the Bail Act appear to accord a general right of bail for an offender waiting on pre-sentence reports? The answer is perhaps quite simple. Adjournments for pre-sentence reports are not ordinarily appropriate for offenders who are facing an immediate custodial sentence. Section 61 compels the Court to conduct proceedings as soon 'as is practicable after an offender has been found guilty' in order to determine the appropriate sentence to be imposed. (See the judgment of the Court of Appeal in ***R v Morris and Morris [2017] Bda LR 128*** where the trial judge was criticized for the delay which lapsed between the date of conviction and the sentence hearing. In ***R v Morris and Morris*** Simmons J ordered pre-sentence reports on the basis that it was unclear to the Court at pre-sentence stage whether an immediate custodial sentence would be appropriate).

58. The Court of Appeal has long discouraged the use of pre-sentence reports (Social Inquiry Reports in particular) in cases where it is obvious to the Court that only an immediate custodial sentence will be imposed. Generally, pre-sentence reports will be ordered by the Court in cases where a probation order or other community based sentence is in contemplation. This may be in combination with a custodial sentence or fine under section 70 of the Criminal Code. It is, therefore, unsurprising that a general right to bail (as opposed to an absolute right to bail) is extended under the Bail Act to convicted persons waiting on pre-sentence reports.

59. The Bail Act did not displace the longstanding jurisprudence of this Court where bail pending sentence is refused on the basis that an immediate custodial sentence will likely be imposed. It then follows that this common law approach must be sourced by the Court's inherent jurisdiction.

60. Prior to the passing of the Bail Act, common law principles prevailed on the Court's exercise of its discretionary power whether or not to grant bail. The leading authority most often cited for guidance as to the exercise of that discretionary power was ***Paul Joaquin and Matilda Johnston, Civil Appeal No. 15 of 1981, Court of Appeal of Bermuda*** and the Court's exercise of its inherent jurisdiction was commonplace in bail proceedings. (See Meerabux J in ***Peter Giles (Police Inspector) v Andrew Hall [2001] Bda LR 36***)

61. In ***Minister of Health et al v M Seaman [2018] SC (Bda) 62 Civ (31 July 2018)*** I closely examined the meaning of the Court's inherent jurisdiction following the observations of the learned Chief Justice, Mr. Ian Kawaley (as he then was) in ***Re Celestial Nutrifoods [2017] Bda LR 11***. Kawaley CJ exposed the roots of the Supreme Court's inherent jurisdiction, buried in sections 12 and 18 of the Supreme Court Act 1905 ("the 1905 Act").

62. Section 12 states:

Jurisdiction of Supreme Court
12 (1) The Supreme Court shall be a Superior Court of Record, and, in addition to any other jurisdictions conferred by this or any other Act or Act of the Parliament of the United Kingdom, shall, subject as in this Act mentioned, possess and exercise the jurisdiction which, at the commencement of this Act [6 June 1905], was vested in, or capable of being exercised by, the Governor as Ordinary relative to the grant of probate of wills and letters of administration of the personal estate of persons deceased and by all or any of the following courts, that is to say—

(a) the Court of General Assize;
(b) the Court of Chancery;
(c) the Court of Exchequer;
(d) the Court of Probate;
(e) the Court of Ordinary;
(f) the Court of Bankruptcy.

(2) The jurisdiction transferred to the Supreme Court by virtue of this Act shall include the jurisdiction which, at the commencement of this Act [6 June 1905], was vested in, or capable of being exercised by, all or any one or more of the Judges of the aforementioned courts, respectively, sitting in court or chambers, when acting as Judges or a Judge in pursuance of any Act, law or custom, and all powers given to any such court, or to any such Judges or Judge, by any Act or Act of the Parliament of the United Kingdom, and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdictions so transferred.

63. Section 18 states:

Concurrent administration of law and equity
18 In every civil cause or matter which is pending in the Supreme Court law and equity shall be administered concurrently; and the Court, in the exercise of the jurisdiction vested in it by virtue of this Act, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as seems just, all such remedies or relief whatsoever, whether interlocutory or final, as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim or defence properly brought forward by them respectively, or which appears in such cause or matter, so that as far as possible all matters in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter the rules of equity shall prevail.
[Section 18 amended by 2009:28 s.3 effective 7 July 2009]

64. Of particular relevance, in *Minister of Health et al v M Seaman [2018]* I relied on the elucidatory remarks of Sedley LJ sitting in the English Court of Appeal on how the Court's inherent jurisdiction should be conservatively used to insert common law principles into an

unintended lacuna in an Act of Parliament. At paragraph 50 (mid-paragraph) I recited the following passage by Sedley LJ in *Re F (Adult: Court's Jurisdiction) [2000] 3 W.L.R. 1740*[5] *(at 1756 F-1757H; 1758E-G)*:

"*The legal power to bring this about by declaration was confirmed by the decision of the House of Lords in In re F (mental patient: sterilisation) [1990] 2 AC 1 that the common law of necessity would in appropriate cases permit otherwise tortious interferences with the personal integrity of the mentally incapacitated. In the Court of Appeal Lord Donaldson MR had said :*

'…the common law is the great safety net which lies behind all statute law and is capable of filling gaps left by that law, if and in so far as those gaps have to be filled in the interests of society as a whole. This process of using the common law to fill gaps is one of the most important duties of the judges.'

I do not accept Mr Gordon's submission that necessity is limited to medical and similar emergencies. Lord Goff in R v Bournewood Mental Health Trust, ex parte L [1999] AC 458 , 490, having cited early cases on the permissibility of detention of those who were a danger to themselves or to others, said:

'*The concept of necessity has its role to play in all branches of our law of obligations — in contract ..., in tort ... in restitution ... and in our criminal law. It is therefore a concept of great importance*.'

The Law on Bail Pending Appeal

65. I now turn to the relevant legal principles which concern bail pending appeal.

66. The Bail Act does not govern the law relevant to applications for bail pending appeal from the Supreme Court's original jurisdiction. Section 6 of the Bail Act expressly applies to Magistrates Court and Supreme Court proceedings without any reference to proceedings in the Court of Appeal.

67. Section 20(1)(b) of the Court of Appeal Act 1964 applies once a notice of appeal against conviction or a notice of leave to appeal has been filed in accordance with section 18(1). This provision empowers a judge of the Supreme Court, on the application of the appellant, to release the appellant from custody pending the abandonment or determination of his/her appeal. The determination of bail is purely an exercise of discretion.

68. In England, bail pending appeal is procedurally governed by the Criminal Procedure Rules and the power for the Crown Court to grant bail pending appeal from the Magistrates' Court is under section 81 of the Senior Courts Act 1981, subject to section 25 of the Criminal Justice and Public Order Act 1994 (CJPO) which states:

No bail for defendants charged with or convicted of homicide or rape after previous conviction of such offences.

(1)A person who in any proceedings has been charged with or convicted of an offence to which this section applies in circumstances to which it applies shall be granted bail in those proceedings only if the court …is of the opinion that there are exceptional circumstances which justify it.

(2)This section applies, subject to subsection (3) below, to the following offences, that is to say—

(a)murder;

(b)attempted murder;

(c)manslaughter;

(d)rape under the law of Scotland ...;

(e)an offence under section 1 of the Sexual Offences Act 1956 (rape);

(f)an offence under section 1 of the Sexual Offences Act 2003 (rape);

(g)an offence under section 2 of that Act (assault by penetration);

(h)an offence under section 4 of that Act (causing a person to engage in sexual activity without consent), where the activity caused involved penetration within subsection (4)(a) to (d) of that section;

(i)an offence under section 5 of that Act (rape of a child under 13);

(j)an offence under section 6 of that Act (assault of a child under 13 by penetration);

(k)an offence under section 8 of that Act (causing or inciting a child under 13 to engage in sexual activity), where an activity involving penetration within subsection (3)(a) to (d) of that section was caused;

(l)an offence under section 30 of that Act (sexual activity with a person with a mental disorder impeding choice), where the touching involved penetration within subsection (3)(a) to (d) of that section;

(m)an offence under section 31 of that Act (causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity), where an activity involving penetration within subsection (3)(a) to (d) of that section was caused;

(ma)an offence under Article 5 of the Sexual Offences (Northern Ireland) Order 2008 (rape);

(mb)an offence under Article 6 of that Order (assault by penetration);

(mc)an offence under Article 8 of that Order (causing a person to engage in sexual activity without consent) where the activity caused involved penetration within paragraph (4)(a) to (d) of that Article;

(md)an offence under Article 12 of that Order (rape of a child under 13);

(me)an offence under Article 13 of that Order (assault of a child under 13 by penetration);

(mf)an offence under Article 15 of that Order (causing or inciting a child under 13 to engage in sexual activity) where an activity involving penetration within paragraph (2)(a) to (d) of that Article was caused;

(mg)an offence under Article 43 of that Order (sexual activity with a person with a mental disorder impeding choice) where the touching involved penetration within paragraph (3)(a) to (d) of that Article;

*(mh)an offence under Article 44 of that Order (causing or inciting a person, with a mental disorder impeding choice, to engage in sexual activity) where an activity involving penetration within paragraph (3)(a) to (d) of that Article was caused;**]***

(n)an attempt to commit an offence within any of paragraphs (d) to (mh).

69. In England the Court must find exceptional circumstances to justify granting bail charged or convicted for any of the above listed offences. By stark contrast, under the Bail Act in Bermuda, only murder and firearm related offences are listed in the Schedule 1 single-paragraph exceptions to the right to bail. Paragraph 2 openly begs for an updated review from our Legislature so that it is also rendered consistent with the list of serious personal injury offences applicable to section 329E of the Criminal Code. Notably, the references to the sexual offences under section 25 of the CJPO were mostly imported by amendments imported by the Sexual Offences Act 2003 and the Sexual Offences (Northern Ireland Consequential Amendments) Order 2008 (S.I.2008/1779).

70. In any case, the power to grant bail in England is a discretionary power, as is the case under Bermuda law.

71. Para 7-041 of Taylor on Appeals (2000 Edition) states:

The Court of Appeal is cautious in its approach to deciding whether to grant bail pending appeal. The test appears to be whether there are "exceptional circumstances, which would drive the Court to the conclusion that justice can only be done by granting of bail?" Bail is

thus likely to be granted where (i) it appears prima facie that the appeal is likely to succeed (Wise 1992) 17 Cr. App. R. 17; Barry (No. 2) [1991] 2 ALL E.R. 789 at 790) or (ii) the sentence is likely to have been substantially or completely served by time the appeal is heard (Neville [1971] Crim. L.R. 589). Bail will not be granted simply because the single judge granted leave (Watton (1979) 68 Cr. App R. 293, at 297, CA.) However, delays which are not caused by the appellant may result in his release on bail (For example, Landy (1981) 72 Cr. App. R. 237 (unreported on this point: October 2, 1979) Campbell July 16, 1981, CA (Need to get lengthy transcript for trial). Both quoted in Pattendon, p.112.)

72. I would add this. It is difficult to envisage a case where a judge exercising the jurisdiction of a single justice of appeal under section 3(3) of the Court of Appeal Act 1964 finds *prima facie* that the appeal is likely to succeed without also forming the view that it is *obvious* that the appeal would succeed. I say this to preserve the Court's necessary conservative approach in finding whether there is a likelihood of success.

73. In the end, I agree that there must be exceptional circumstances to justify releasing an Appellant on bail pending appeal where an immediate custodial sentence outweighing the remand period is likely.

74. See also *Glen Brangman v Raynor (Police Sergeant) 2013 Bda LR 23* per Kawaley CJ.

Analysis and Reasons for Refusal of Bail

Analysis and Reasons for Refusal of Bail Pending Sentence:

75. At the bail hearing on 5 September, I contemplated that the Defendant's sentence proceedings would be listed and heard prior to the end of the month. The Court was advised by Dr. Emcee Chekwas that the assessment report associated with the section 329E Order was scheduled to be completed by 13 September Accordingly, I was considering a very short timeframe for the interim period leading up to sentence and found that it would be impracticable for Dr. Checkwas, an employee of the Department of Corrections, to complete his inquiries and the pending report within the narrow timeframe envisaged without keeping the Defendant in custody.

76. I also had regard to section 329E which calls for the Court to form a provisional view on whether the Defendant would likely serve 3 or more years in prison. Whether the answer is in the affirmative, the Court will in all likelihood remand the offender into custody (see *Justin Parsons v Attorney General et al [2018] SC (Bda) 63 Civ (10 August 2018)*).

77. Unsurprisingly, the Crown advised that it will be seeking at least five years immediate imprisonment. I have kept in my mind the principles and purpose of sentencing found in Part IV of the Criminal Code. The maximum sentence on indictment for the offence of sexual exploitation of a young person by a person in a position of trust under section 182B of the Criminal Code is 25 years imprisonment. Unlawful carnal knowledge of a girl under 14 years under section 180(1) also carries a maximum penalty of 25 years. An offender convicted of an attempt to commit a section 180(1) unlawful carnal knowledge offence is liable to serve up to 15 years imprisonment. On my assessment, an immediate term of imprisonment of at least 3 years is inevitable. As an aside, I refer to the 60-day period under section 329E. The Court's discretionary power to impose a remand under section 329E cannot be made to expire after a fixed duration. The decision whether to remand and the duration of the remand itself is ultimately a matter for the Court's discretion (*Parsons v Attorney General et al*)

78. Section 329E is also in place to facilitate the production of an expert opinion to assist the Court in determining whether the offender constitutes a threat to the life, safety or physical or mental well-being of any other person. The scheme is also designed to establish whether the sex offender concerned has shown a failure to control his sexual impulses and whether there is a likelihood of that offender causing injury, pain or other evil to other persons through failure in the future to control such impulses. Given the nature of the material for the assessment, it would be extremely rare and exceptional for a Court to opine that 3 years or more in prison is likely but that the offender is still suitable for release on bail.

79. It has most often been the practice of the Bermuda Courts to refuse bail to a convicted offender who awaits sentence for an offence likely to be punished by an immediate custodial sentence. This is subject to few exceptions (eg. delay in listing the sentence hearing or perhaps exceptional and extreme personal hardship). Parliament could not have intended for convicted persons facing an immediate custodial sentence to have a general right to bail pending sentence. Therefore, the Court's power to continue with its longstanding approach in refusing bail pending sentence where imprisonment is lingering around the corner remains in place. This power is sourced by the Court's inherent jurisdiction to import common law principles as a safety net to mend and refill the gaps left in the statute law, in the interest of the community at large.

80. For these reasons, I refused bail pending sentence.

Analysis and Reasons for Refusal of Bail Pending Appeal:

81. The determination of bail pending appeal is purely discretionary and falls to the governance of the Court of Appeal Act 1964.

82. While Ms. Christopher forcefully advanced the pleaded grounds of appeal, I was left unable to positively find that there is a *prima facie* likelihood of ultimate success on appeal, notwithstanding the novelty of the jury direction given and some of the impressive points made by Ms. Christopher.

83. I also took into consideration the limited timeframe between conviction and the bail hearing and between the bail hearing and the appeal fixture which is due to be heard in November 2019. This was coupled with my assessment that the Appellant is facing a minimum of 3 years imprisonment.

84. I did not find the line of Singapore cases to be of any real persuasive guidance, although portions of the publication placed before the Court raised points for consideration and clarification. I reject any submission made in the article which is suggestive that a presumption of innocence outlives a conviction. Section 6(2)(a) of the Bermuda Constitution Order 1968 provides that every person who is charged with a criminal offence '*shall be presumed to be innocent until he is proved or has pleaded guilty*'. The presumption is not extended to include the upholding of a conviction on appeal.

85. Having considered the supporting affidavit evidence filed and the factors stated herein, I found that there were no exceptional circumstances to justify the Appellant's release on bail pending appeal.

Conclusion

86. For the reasons outlined herein, I refused the applications for bail pending sentence and bail pending appeal.

Dated this 1st day of October 2019

HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT