[2026] JMCA Crim 16

JAMAICA

IN THE COURT OF APPEAL

BAIL APPEAL NO COA2025BA00009

KEVONNE REID v R

John Clarke for the appellant

Miss Afryea Cox for the Crown

3, 4, 11 February and 15 June 2026

Criminal law – Appeal from bail decision in Supreme Court – Refusal of application to be readmitted to bail – Whether judge properly exercised discretion to refuse application – Objection by prosecution to bail – Substantive and procedural fairness in bail hearings – Requirements for reliance on hearsay evidence when refusing bail – Bail Act, 2023

IN CHAMBERS

MCDONALD-BISHOP P

[1] This appeal challenges the decision of Graham-Allen J ('the learned judge') made in the Supreme Court on 8 December 2025, refusing the appellant's application to be readmitted to bail pending trial in the Circuit Court Division of the Gun Court in Kingston ('the Home Circuit Court') on charges of murder and illegal possession of a firearm.

[2] On 11 February 2026, after hearing submissions from counsel, the court made these orders:

> "1. The appeal from the decision of Graham-Allen J made on 8 December 2025, refusing to readmit the appellant, Kevonne Reid, to bail, is allowed.
>
> 2. The order refusing the readmission of the appellant to bail is set aside.
>
> 3. The application for bail is granted with the following conditions:

(i) The appellant is granted bail in the sum of $850,000.00 with one or two sureties, or to post a cash bond in the said sum of $850,000.00.

(ii) The appellant is to report to the Mountain View Police Station or the police station nearest to his current place of residence, three times per week, on Mondays, Wednesdays and Saturdays, between the hours of 8:00 am and 6:00 pm.

(iii) A curfew order is imposed for the appellant to be at his place of residence between the hours of 9:00 pm and 6:00 am daily.

(iv) The order imposed, as a previous bail condition, for the appellant to surrender all travel documents to the Supreme Court and for a stop order to be in effect, stands.

(v) The appellant is not to contact or interfere with any of the prosecution's witnesses, either directly or indirectly, by any medium."

[3] I promised then to set out my reasons for the decision in writing later. I do so now in fulfilment of that promise.

Background and procedural history

[4] The Crown alleges that on 5 November 2019, at approximately 6:30 pm, the appellant shot and killed a woman on East Queen Street in the parish of Kingston. The incident occurred in the presence of the deceased woman's minor children. The main prosecution witness is a minor, known by the pseudonym "Damian Reid". He provided the only significant statement on 5 December 2019, claiming to have seen a man he called "Teardrops" shoot the deceased. He stated that he identified the appellant with the help of multiple direct light sources and that the appellant had teardrop tattoos at the corners of both eyes. He described the man he identified as the appellant, but did not reveal any details about his prior knowledge of the appellant.

[5] The arresting officer stated that on 28 August 2020, he was travelling in the corporate area in an unmarked police vehicle, accompanied by other police personnel, when he saw the appellant on a motorcycle. He pursued the appellant, apprehended and

arrested him. After the arrest, he cautioned the appellant, who replied, "a no me kill di woman mi boss".

[6] On 31 July 2020, an identification parade was conducted, during which the main witness identified the appellant. No other witness identified the appellant as the attacker.

[7] The appellant initially appeared before the Corporate Area Parish Court for committal proceedings, during which he was granted bail on 23 November 2020 in the following terms:

> "Bail is offered in the sum of $700,000 with 1 – 2 sureties on the following conditions:
>
> 1. To report to the Mountain View Police Station every Monday, Wednesday, Friday, Saturday & Sunday between 8 am – 6 pm
>
> 2. Surrender all travel documents, stop order imposed
>
> 3. Curfew order made 9 pm – 6 am
>
> 4. Not to interfere with any witnesses in the matter."

[8] His bail conditions were subsequently varied by a Judge of the Parish Court on 18 January 2021, to reduce the number of days he was required to report to the police station from five to three.

[9] Following those proceedings in the Corporate Area Parish Court, the appellant made his first appearance in the Home Circuit Court on 6 December 2021. He remained on bail until 14 July 2023, when the court revoked his bail after being informed that he had been charged with other offences for appearance in the High Court Division of the Gun Court in Kingston. There was no report that he had breached any of the bail conditions imposed on him.

[10] The appellant was granted bail on these subsequent charges but remained in custody due to the prior bail revocation. The prosecution eventually entered a formal

order of no evidence on the later charges, resulting in the appellant's acquittal. Following this acquittal, the appellant applied to the Home Circuit Court for readmission to bail.

Opposition by the prosecution

[11] The prosecution was given an opportunity to respond to the appellant's bail application. The Crown filed and served its response in objection raising several concerns, which were: (a) the likelihood that the appellant might fail to surrender to custody; (b) the seriousness of the allegations against him; (c) the likelihood of interference with Crown witnesses; (d) the prevalence of the alleged offence with which he is charged; (e) his antecedents and association; (f) the strength of the Crown's case; and (g) the use of a firearm in commission of the offence.

[12] One of the matters raised by the Crown in its written submissions, to which the learned judge gave significant attention, was an allegation by the Crown that the appellant had interfered with a witness. The allegation was made in these terms at para. 41:

> "Based on communication with the Investigation Officer, the [appellant] has strategically contacted the witness before the last court. This has resulted in a breakdown of the communication with the witness. This may also result in this witness influencing the other witnesses regarding their cooperation in the matter. The accused's contacting one of the witnesses may affect the prosecution of the matter."

[13] The learned judge was not provided with any further information concerning the alleged interference, including the name of the witness, or the date, mode or frequency of the alleged contact between the appellant and the witness.

The appellant's reply

[14] With leave of the court, the appellant replied to the Crown's submissions by way of an affidavit, challenging the grounds on which the Crown sought to justify his continued detention. He denied the Crown's allegations against him and its assertions that he was a flight risk, had interfered with witnesses, and was likely to do so again.

[15] He explicitly challenged the prosecution to substantiate and prove the allegations of interference with witnesses levelled against him. He contended that he sought "a fair opportunity to meet the allegation", either by disclosure of the source material relied on by the Crown or by the production of a written statement from the investigating officer, from whom the information was said to have been received. He maintained that the allegation had been "merely foisted upon the court in para 41 of the Crown's filed submissions" and had never previously been placed before the court from 2020 until the bail hearing.

[16] He also highlighted the fact that prior to the revocation, he had been out on bail for almost three years without incident, that he had previously been considered a fit and proper candidate for bail, and that for the entire period he was on bail, he "strictly adhered to all bail conditions imposed by both the parish court and the Circuit Court".

The learned judge's decision

[17] The appellant's bail application was determined on paper. On 8 December 2025, the learned judge declined to readmit him to bail. In her written reasons for decision, she explicitly indicated that in reaching her decision, she weighed several factors, including the risk of the appellant absconding, the possibility of further offending while on bail, and the potential for interference with witnesses. The learned judge also took into account the nature and gravity of the alleged offence, the extent to which public order might be endangered should the appellant be released, the prevalence of the offence, the appellant's history of compliance with previous bail conditions, and the strength of the evidence against him tending to show he committed the offence.

[18] The learned judge also indicated that she had considered the importance of personal liberty as a constitutional right, the presumption of innocence, the statutory entitlement to bail and that the onus was on the Crown to justify the deprivation of liberty as the party seeking to deny the appellant his right to liberty. She stated that she was mindful that "sufficient cause" must be shown for continuous detention. Her pivotal consideration was whether there were substantial grounds to believe that the appellant

would abscond, interfere with witnesses or commit further offences. In making that determination, she considered several matters, including the dicta of Brooks JA (as he then was) in **Huey Gowdie v R** [2012] JMCA Crim 56 ('**Gowdie**') at para. [21] that the court must lean in favour of granting bail and should only refuse it where clear risks exist. She acknowledged Brooks JA's cautionary instructions that, even then, the court should assess whether those risks can be managed through appropriate conditions. She also quite rightly recognised that bail should not be withheld merely as a punishment.

[19] Following the learned judge's refusal to readmit the appellant to bail, the case was scheduled for a plea and case management hearing on 10 March 2026.

The appeal

[20] Aggrieved by the learned judge's decision, the appellant sought to invoke the jurisdiction of this court by way of a document entitled "Notice of Application for Review of Supreme Court Judge's Decision About Bail" filed on 18 December 2025 and supported by an affidavit filed on the same date. The commencement of the appeal by way of notice of application with an affidavit in support was ruled inappropriate, although the court considered it proper to exercise its jurisdiction to hear the appeal, despite the breach.

[21] This is an outline of the primary reasons for that decision. There is no provision in the Bail Act 2023 ('the Act') that specifies the manner in which a defendant should bring an appeal against a bail decision. Section 12(3) of the Bail Act provides that a prosecutor's appeal against the grant of bail should, inter alia, be made by notice of appeal in the form set out in the Fourth Schedule. There is no similar provision regarding a defendant's appeal. Section 12(1) of the Act, however, provides that a defendant may appeal a bail decision "in accordance with any applicable rules of court".

[22] The Court of Appeal Rules, 2002 ('CAR'), which are the generally applicable rules of court for bringing appeals to the Court of Appeal, make no specific provision for a defendant's appeal against a bail decision. The rules under section 3 of the CAR regulate appeals in criminal proceedings and prescribe the forms to be utilised to initiate those

appeals. However, those rules specifically concern appeals against conviction and sentence and do not purport to apply to appeals from bail decisions made prior to conviction and sentence. As a consequence, the general rules under section 1 of the CAR are applicable.

[23] The general provision under rule 1.9 applies. That rule states:

> "**How to appeal**
>
> 1.9 Except for appeals under section 256 of the Judicature (Parish Courts) Act, an appeal is made by filing a notice of appeal at the registry of the court and takes effect on the day that it is received at the registry."

[24] Rule 1.10 then sets out what the notice of appeal should contain, including any findings of fact and law challenged, and the grounds of appeal.

[25] Given the foregoing rules and guided by the approach taken by the Privy Council in **Powell v Spence** [2021] UKPC 5, I permitted the notice of application to stand as the notice of appeal, as: (i) it contained the grounds of appeal and other material facts required for a valid notice of appeal pursuant to rule 1.10; (ii) counsel for the Crown did not object to this course; and (iii) there was no prejudice to the Crown in responding to the appeal. In the circumstances, therefore, the grant of permission was in keeping with the overriding objective to deal with the case justly, as set out in the CAR.

[26] The supporting affidavit did not receive the same treatment as the notice of application, as it lacked the legal basis to initiate the appeal process. Mr Clarke, counsel for the appellant, in seeking leave to withdraw the affidavit from consideration, acknowledged that the correct procedure was not followed and correctly admitted that the affidavit was procedurally flawed. He was permitted to withdraw the affidavit, thereby obviating the need for the court to strike it out.

The issues for determination

[27] The appellant cited six grounds of appeal. However, after a preliminary enquiry with counsel for the appellant, it was evident that the central question raised by the appellant was whether the learned judge erred in exercising her discretion by refusing to readmit the appellant to bail. Resolution of that broad question turns on the following interrelated issues as distilled from the grounds of appeal:

(i) Whether the learned judge erred in relying on an unsubstantiated assertion of interference with witnesses.

(ii) Whether the learned judge erred in finding that the appellant presented a flight risk based on one single event and without having regard to his bail history.

(iii) Whether the learned judge failed to consider whether strict bail conditions could have mitigated the risk of absconding, rather than remanding the appellant.

(iv) Whether the learned judge placed undue weight on the strength of the evidence without proper regard to factors favourable to the appellant.

The submissions in summary

[28] For the appellant, Mr Clarke contended that those objections were not established by evidence of sufficient cogency, particularly the allegation of witness interference, which was said to rest on unsubstantiated hearsay. It was further submitted that the appellant's antecedent compliance with bail conditions over an extended period demonstrated that he would surrender to custody when required and that any perceived risk of his failing to surrender to custody could properly be addressed by the imposition of stringent conditions rather than by continued detention. According to counsel, the learned judge failed to take into account relevant factors, took into account irrelevant

factors and failed to assign them appropriate weight. There was thus no sufficient cause or substantial ground for the appellant's continued detention.

[29] Miss Afryea Cox submitted on behalf of the Crown that the appellant ought not to be readmitted to bail, having regard to the risk that he would fail to surrender to custody, the likelihood of interference with Crown witnesses, the gravity and prevalence of the offences charged, the alleged use of a firearm in the commission of the offence, and the strength of the Crown's case against him.

The applicable law

[30] A person detained in custody while awaiting trial is entitled to bail. That entitlement is established by a compendium of provisions set out in Chapter III of the Constitution, the Charter of Fundamental Rights and Freedoms ('the Charter'). The foundations of that entitlement are the constitutional rights to life, liberty and the security of the person and the right not to be deprived thereof except in the execution of a sentence of the court (section 13(3)(a)), the right to liberty (section 14(1)) and the right to due process (section 16).

[31] Specifically, under section 14(4), there is an express right to be released on bail pending the determination of the criminal process. Section 14(4) states:

> "(4) Any person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions unless sufficient cause is shown for keeping him in custody."

[32] Whereas section 14(3) speaks to the imposition of conditions on an accused person's release from custody. It provides:

> "(3) Any person who is arrested or detained shall be entitled to be tried within a reasonable time and—
>
> (a) shall be—
>
> (i) brought forthwith or as soon as is reasonable practicable before an officer authorised by law, or a court; and

> (ii) released either unconditionally or upon reasonable conditions to secure his attendance at the trial or at any other stage of the proceedings…".

[33] The Act embodies the constitutional entitlement to bail (see, for example, section 4) and establishes the framework for determining whether sufficient cause has been shown to justify a defendant's detention. The Act distinguishes between the factors relevant when bail is considered in respect of offences not punishable by imprisonment (section 6(2)(a)) and those which are punishable by imprisonment (section 6(2)(b)). The considerations relevant to the former category will not be discussed, as the offence of murder, with which the appellant is charged, carries a mandatory custodial sentence.

[34] Consistent with the constitutional entitlement to bail under section 14(4) of the Charter, section 6(2)(b) of the Act provides that bail "shall" be granted in respect of offences punishable with imprisonment unless there is "sufficient cause" for holding the defendant in custody. The aspects of the section relevant to these proceedings are reproduced:

> "(b) if the offence is punishable with imprisonment, the deciding official shall grant bail to the defendant unless satisfied that there is sufficient cause for holding the defendant in custody having regard to any of the following matters—
>
> (i) the deciding official is satisfied that there are grounds for believing that the defendant, if released on bail, would—
>
> (A) fail to surrender to custody;
>
> (B) commit an offence while on bail; or
>
> (C) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;
>
> …
>
> (v) the defendant is charged with an offence alleged to have been committed while the defendant is released on bail;…".

[35] Section 6(3) establishes a broader, non-exhaustive list of factors the court should examine when considering whether sufficient cause for refusing bail has been established. The factors include the nature and seriousness of the offence (section 6(3)(b)), the likelihood that the defendant will commit an offence while released on bail (section 6(3)(c)), the defendant's character, antecedents, associations and community ties (section 6(3)(e)), the defendant's record with regard to the fulfilment of previous bail conditions (section 6(3)(f)) and evidence that a firearm was used to commit the offence (section 6(3)(j)(i)).

[36] Section 8 of the Act then empowers the court, upon granting bail, to impose such conditions as appear necessary to secure the defendant's surrender to custody in order to address any risks identified by the court, including the risk of absconding, further offending, interference with witnesses, or obstruction of justice.

[37] Under section 12(1)(b) of the Act, a defendant who is aggrieved by a bail decision made by a judge of the Supreme Court may appeal to a judge of the Court of Appeal in chambers. On an appeal, the judge in chambers may affirm the Supreme Court's decision, or grant or refuse bail to the defendant, revoke the grant of bail to the defendant, impose conditions on the grant of bail to the defendant, or vary or remove any condition of bail imposed on the defendant and impose conditions (see sections 12(7) and 12(8)).

[38] The Act does not state the guiding principles to be taken into account when treating with an appeal from a bail decision made in the court below. Therefore, it is deemed necessary to establish the standard of review that guided my deliberations in keeping with the request of counsel for the appellant.

The standard of review

[39] Appeals to this court are by way of rehearing (see rule 1.16 of the CAR). In **Phillip Stephens v The Director of Public Prosecutions** (unreported), Supreme Court, Jamaica, Claim No 05020 of 2006, judgment delivered 23 January 2007 ('**Stephens**'), at paras. 33 – 39 of the judgment, Sykes J (as he then was) conducted an admirably

thorough enquiry into the appropriate standard of review in bail appellate proceedings, by reviewing earlier authorities. Having considered the authoritative pronouncements of Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and another** [1983] 1 AC 191 ('**Hadmor**'), on the one hand, and Viscount Simon in **Evans v Bartlam** [1937] AC 473 and **Charles Osenton & Co v Johnston** [1942] AC 130, on the other, he opined that **Hadmor** represented the minimum bases for interference. He, however, preferred the approach and viewpoints of Viscount Simon in **Evans v Bartlam** and **Charles Osenton v Johnston** because, according to him, "they strike the appropriate balance".

[40] In coming to that conclusion, Sykes J concentrated on whether it was appropriate to limit the review in bail proceedings to the **Hadmor** standard. At para. 39, he referenced Lord Fraser's statement in **G v G** [1985] 1 WLR 647 at 652, that an appellate court should only intervene once it is demonstrated that the first instance judge "has exceeded the generous ambit within which a reasonable disagreement is possible". Sykes J then recognised, in that context, that "when one is dealing with a discretion there is indeed latitude for disagreement and for that reason appeals against the exercise of a discretion do not readily succeed".

[41] Later, in **Gowdie**, Brooks JA stated that an appeal from a bail decision made by a lower court is analogous to an appeal against a lower court judge's exercise of discretion. Citing the cases of **Birkett v James** [1977] 2 All ER 801 at page 804, and **Stephens**, Brooks JA explained the standard of review for bail appeals in these terms:

> "[20] I respectfully agree with Sykes J, that the correct interpretation of the Act is that the exercise before the judge of the Supreme Court is to be conducted as an appeal. I would only add as a recommendation as to approach, the words of caution set out by Lord Diplock in Birkett v James … 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 [lower court judge] 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 there 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] Following the guidance of Brooks JA in **Gowdie**, Mangatal JA (Ag) in **The Director of Public Prosecutions v Kevin Adams** [2014] JMCA Crim 38 ('**Adams**'), reconsidered the issue of reviewing the exercise of discretion by a judge of the lower courts in bail cases. She first had regard to the well-established and frequently cited principles in **Hadmor** regarding the exercise of judicial discretion by a judge of first instance. Having also had the benefit of the discourse of Sykes J (as he then was) in **Stephens** at paras. 33 – 39 and Brooks JA, in **Gowdie**, she stated at para. [65] of the judgment:

> "[65]... 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."

[43] Like Brooks JA in **Gowdie** and Mangatal JA (Ag) in **Adams**, I, too, endorse the judicial wisdom in Sykes J's reasoning in **Stephens** that a restrictive standard of review applicable to civil proceedings may not be entirely appropriate in bail appeals. The statement of principle distilled from Sykes J's pronouncement in **Stephens**, which has

been approved by this court, is that, although a bail decision involving the exercise of discretion is not to be disturbed lightly on appeal, the scope of review is not so narrow as to confine intervention only to cases of error of law, misunderstanding of the evidence, or the emergence of new material. In matters concerning personal liberty, such a restrictive approach is inappropriate. The constitutional and statutory framework recognises liberty as the norm and detention as the exception. Accordingly, even where the lower court has identified the correct legal principles and considered the relevant factors, appellate intervention may be warranted if the judge failed to ascribe weight to a material consideration or gave weight to an immaterial consideration, such that a proper evaluation would necessarily have led to a different conclusion.

[44] Therefore, the wider blended perspective outlined in **Stephens**, **Gowdie**, and **Adams** appears to be the most suitable and relevant standard of review for bail appeals in this court, with **Hadmor** establishing the minimum standard for interference.

[45] Because the appellant's complaints on the appeal involved, in some part, a criticism of the relative weight the learned judge ascribed to the factors before her, I must, for completeness, refer to the decision of **Ming Siu Hung and others v J F Ming and another** [2021] UKPC 1, in which the Privy Council explained at para. 28(iii) of its judgment that challenges to the weight ascribed by a judge to factors relevant to the exercise of a discretion are "not within the scope of appellate review". Rather, "[m]atters of weight when exercising a discretion are for the judge, provided that his assessment of weight is not irrational".

[46] It was with this combined standard of review in mind that the appeal was considered, alongside the parties' opposing contentions and the applicable law. I began my examination of the appeal by addressing the first issue, namely, the allegation of witness interference.

Issue (i): whether the learned judge erred in relying on an unsubstantiated assertion of interference with witnesses

[47] On the issue of witness interference, the learned judge found:

> "4. Further, the Crown in their submissions have indicated that they have been informed that the accused has been in contact with the witness very recently which has resulted in a breakdown of the communication with the witness. This continued communication between the witness and the accused may affect the prosecution of this matter. The Court is of the view that if granted bail, there is a likely chance of the accused obstructing the course of justice by communicating and employing more efforts to interfere with the witnesses in any attempt to damage the crown's case against him."

[48] Before this court, the thrust of the appellant's complaint was that the learned judge erred in refusing bail based on interference with witnesses when the Crown had placed before her no substantial material capable of proving that allegation. It was further contended that, in treating that allegation as established, the learned judge failed to give proper weight to the absence of supporting evidence.

[49] The Crown's position was that the learned judge acted within her discretion in taking the allegation into account and that the risks posed by the appellant justified the refusal of bail. Her submissions, in summary, rested on four principal pillars.

i) It was open to the learned judge to consider reports of interference with witnesses under sections 6(3)(i)(ii) and 6(3)(l) of the Act.

ii) It is established that, in the context of a bail application, the court may receive information that would not ordinarily be admissible at trial, including hearsay evidence.

iii) The appellant's contention that the allegation was unsubstantiated is unfounded, as counsel for the Crown in the court below had been informed on multiple occasions by the investigating officer of the alleged interference, and efforts had been made to reduce that information to writing. Although the

witness was reported to have become unavailable to provide a formal statement, the investigating officer confirmed that the appellant had contacted the witness via WhatsApp.

iv) Witness intimidation is a reality in Jamaica, including threats to witnesses and, in some cases, violence against them or their relatives. The Crown's case relies heavily on the availability of its only eyewitness, who had given a statement under a pseudonym out of fear for his safety.

Discussion and findings

[50] In deciding whether the learned judge erred, I initially reviewed the material the Crown presented, which alleged witness interference. The Crown's allegation was contained in written submissions filed in objection to the application for bail. The conduct attributed to the appellant was relayed to the court by counsel, seemingly based on information from the investigating officer. However, no evidence or other written material from the investigating officer was obtained to verify the witness's alleged claim, despite the Crown being ordered to obtain a statement from the witness for the next court date, scheduled for the bail hearing on 8 January 2025. Up to the time the appeal was heard, no satisfactory explanation in writing had been provided for the failure of the witness to furnish a statement.

[51] The learned judge was therefore left with nothing more than what Mr Clarke aptly described as "double hearsay", a hearsay statement from counsel for the Crown complaining of witness interference based on communication with the investigating officer. The circumstances raised two subsidiary issues: first, whether counsel's hearsay statement was admissible; and second, whether it had sufficient probative value to justify the refusal of bail.

[52] To address those subsidiary issues, I examined the law that establishes the need for evidentiary material in support of an objection to bail, as well as the legal principles governing the quality of the material required for the court to uphold such an objection.

The applicable legal principles

[53] The essential starting point is the concomitant constitutional and statutory requirements surrounding the grant and refusal of bail. As earlier stated, both the Constitution and the Act provide that bail should be granted unless "sufficient cause" is shown for refusing bail. Therefore, the liberty of a defendant is the default position, and the burden is on the Crown to satisfy the court that detention should continue.

[54] The requirement that the cause shown in objection to bail should be "sufficient" naturally implies that there should be some demonstration by the Crown of the facts which support the basis of its objection, which is evaluated by the judge, before bail is granted or refused. Logically, that is the only way the court can determine whether the cause has been shown to warrant the denial of a defendant's constitutional rights to liberty and bail. Thus, an objection to bail, without any supporting circumstances or evidentiary material, cannot give rise to "sufficient cause" which justifies the refusal of bail. Therefore, there is a constitutional and statutory basis for concluding that the Crown must present some form of material to the court in support of an objection to bail, and the court is required to assess that material before it can properly conclude that sufficient cause has been shown.

[55] The decision of Brooks JA in **Gowdie** exemplifies this approach. At para. [29] of that case, the learned Judge of Appeal held that the Resident Magistrate erred when she inferred the possibility that the defendant would interfere with the witnesses on the basis that "there was [no] evidence concerning the probability of that occurrence". Although **Gowdie** was decided under the Bail Act, 2000, and not the 2023 Act, the reasoning is entirely compatible with the wording of the 2023 Act and the overarching entitlement to bail established by section 14(3) of the Charter, which was in force at the time that appeal was decided.

[56] **Gowdie** further explains, and counsel on both sides in this appeal accept, that material which may not be admissible at trial, including hearsay evidence, may be

admitted in bail proceedings because the rules of evidence do not strictly apply. At para. [21] Brooks JA explained:

> "[21]… In this context, the court may receive information which would not normally be receivable at a trial, including hearsay evidence. This information could concern previous convictions and unsavoury associations or practices of the accused person (see section 4 (2) of the Act). **In re Moles** [1981] Crim. L.R. 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]'."

[57] On the authority of **Gowdie**, it is therefore established that a judge is not required to insist on sworn written or oral testimony before ruling on an objection to bail.

[58] Brooks JA's pronouncements in **Gowdie** concerning the admissibility of hearsay evidence did not address other relevant factors to be considered when the admissibility of the material before the court is being assessed, or the probative value of hearsay evidence received at a bail hearing. More particularly, the case does not address the weight, if any, a judge is entitled to ascribe to hearsay evidence, or the quality of such evidence that might justifiably lead to a denial or revocation of bail, which is the essence of the appellant's complaint in relation to the learned judge's conclusion on the issue of witness interference. There did not appear to be any case from this court which addresses those related points. I accordingly sought guidance from persuasive decisions from England, Ireland, and the Commonwealth of the Bahamas on the subject, which were discovered by the court and shared with counsel for the parties.

[59] A thorough review of the authorities consulted makes clear that the form and quality of the material presented to the court, particularly when bail is being withheld or revoked, directly affect the legality and substantive fairness of the decision. Furthermore, a defendant is entitled to certain minimum standards of procedural fairness when an objection is made to the grant of bail. The failure to adhere to the established standards

of substantive and procedural fairness will render a judge's decision on bail liable to be set aside. The salient reasoning of the main authorities relied upon will be provided.

[60] In **R (on the application of Vickers) v West London Magistrates' Court** [2003] EWHC 1809 (Admin) ('**Vickers v West London MC**'), the issue was whether bail should be refused due to a breach of a bail condition. The court clarified that this involves a two-stage process. First, the judge must establish whether a breach actually occurred; if not, the individual remains entitled to bail under the same conditions. If there was a breach, the judge must then decide whether to readmit the defendant to bail or to remand them in custody. During the first stage, the judge must act fairly, meaning the defendant should be given an opportunity to respond to the allegation. If the breach is denied, the judge must consider the evidence from both the police officer and the defendant before reaching a decision.

[61] In that context, procedural fairness required that the appellant be informed of the allegation and, as far as reasonably practicable, its source; be given an opportunity to respond; and, where adverse material was given as oral testimony, be allowed to test adverse material through cross-examination, if he chose to do so. Substantive fairness demanded a careful and fair assessment of the material before the court denied bail.

[62] That insistence on fairness is reflected in the Bahamian Court of Appeal decision in **Bartholomew Pinder v The Queen** (unreported), Commonwealth of the Bahamas, Court of Appeal, SCCrApp No 94 of 2020, judgment delivered 11 February 2021 ('**Bartholomew Pinder**') where Sir Michael Barnett P observed at para. 36 that, although hearsay is admissible in bail proceedings, it should not ordinarily be relied on where direct evidence is readily available. At para. 38, he concluded that parties in bail applications should be circumspect in their use of hearsay, and judges should be slow to attach significant weight to it where first-hand evidence could have been produced but was not, and no explanation given. The learned President had endorsed what he referred to as the "cautionary observations" of Hardiman J in **The People (at the suit of the**

Director of Public Prosecutions) v Tristan McLoughlin [2009] IESC 65 ('**DPP v McLoughlin**').

[63] In **DPP v McLoughlin**, the Director of Public Prosecutions ('DPP') opposed bail on the basis of witness intimidation, as reported by the police. None of the witnesses in respect of whom the report of interference was made was available to substantiate the police evidence. The applicant objected to the admissibility of the hearsay evidence. The bail judge considered the evidence *de bene esse,* and the police witnesses were cross-examined. One officer, in particular, gave evidence that she would fear witness interference if the applicant were granted bail. The hearsay evidence was admitted, and bail was denied on that basis. On appeal, it was contended on behalf of the applicant that, *inter alia*, the judge erred in law in permitting the DPP to adduce hearsay evidence and in attaching undue weight to it. The applicant also contended that, even if the evidence were admissible, it was not of such a compelling nature as to establish, on the balance of probabilities, that he should have been refused bail. The DPP, in response, submitted that the judge was entitled to refuse bail on the basis of the evidence adduced, that he had considered the totality of the evidence in so doing, and that he did not err in law.

[64] The Supreme Court of Ireland allowed the appeal, finding the evidence unsatisfactory. The court held, among other things, that hearsay evidence might be admissible in bail applications in exceptional and rare circumstances when a specific, recognised ground for its admission had been properly established by ordinary evidence. An applicant for bail has a *prima facie* right to have adverse evidence presented orally by its maker and not simply by a person who heard it said, so that it may be tested by cross-examination. Hearsay may not be admitted as a general substitute for ordinarily admissible evidence. When hearsay is received, the court should be satisfied that there is a good reason why *viva voce* evidence may not be adduced and that all reasonable steps have been taken to procure the evidence in the usual form (per Hardiman J at para. [55]). Accordingly, while hearsay may be received in bail proceedings, it remains subject

to strict judicial control and must be kept within proper bounds. Little weight should ordinarily be attached to it where no satisfactory explanation is given for the absence of direct evidence.

[65] At paras. [57] – [58] of the judgment, Hardiman J further referenced earlier authority on what the State must prove to successfully oppose bail. He approved the dicta of Walsh J in **The People (Attorney General) v O'Callaghan** [1966] IR 501 at page 517, which was later cited in **The People (Director of Public Prosecutions) v McGinley** [1998] 2 IR 408 ('**DPP v McGinley**') at page 413. I have summarised some key propositions from these cases as follows:

i) The court may consider objections from the prosecuting authorities or police when deciding bail.

ii) An objection alone is not a valid ground to refuse bail; refusing bail solely because an authority object would violate constitutional guarantees of personal liberty (see **The State v Purcell** [1926] IR 207).

iii) Any objection must be tied to a legally recognised ground on which bail may properly be refused.

iv) Objections cannot be made "*in vacuo*"; they must be supported by sufficient evidence to allow the court to reach a probability-based conclusion.

v) Objections must be open to challenge or questioning by the accused or counsel.

vi) Neither the opposing authority's belief, nor another person's belief, is enough; the court must be satisfied for itself that the objection is sufficient to reach the required conclusion of probability.

[66] According to Hardiman J (at para. [59] of the judgment), those propositions establish two central points: first, that the prosecution must establish its objection to bail as a matter of probability; and secondly, that the evidence relied on in support of the

objection must possess sufficient cogency to satisfy the court itself that the objection has been made out as a probability.

[67] I was also guided significantly by some useful principles enunciated in **R (on the application of the Director of Public Prosecutions) v Havering Magistrates' Court, R (on the application of McKeown) v Wirral Borough Magistrates' Court** [2001] 3 All ER 997 ('**DPP v Havering Magistrates' Court**'). In that case, defendants on bail were arrested for absconding or breaching bail conditions. The question for determination was whether they should be remanded in custody following the breach. The subsidiary question arose as to whether breach of bail condition had to be proved by oral or other admissible evidence and to a criminal standard of proof. To the extent that the instant appeal concerns a defendant who was on bail but remanded upon alleged re-offending (for which he was acquitted) and against whom allegations were made that amounted to breach of bail condition, this case proved quite useful.

[68] The immediately relevant principles derived from the court's reasoning are as follows:

i) Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention'), which is similar to sections 13(3)(a) and 14 of the Charter, guarantees the right to liberty and is directly relevant to bail proceedings, including cases where breach of bail conditions is being considered.

ii) Article 6(3) of the Convention, similar to section 16(6) of the Charter, has no direct relevance to proceedings considering the grant of bail or breach of bail conditions. That article guarantees a person charged with a criminal offence certain facilities, including the right to examine, or have examined at his trial, witnesses against him, and to obtain the attendance and examination of witnesses on his behalf. Bail proceedings do not involve determining a criminal charge against the defendant. Therefore, oral evidence is not mandated; a

written statement from a witness alleging a breach of a bail condition or explaining why bail should not be granted would suffice as admissible material for consideration.

iii) Article 5 of the Convention does not require that the underlying facts relevant to the detention be proved to the criminal standard of proof. Nor would the provision be breached merely by reliance on material other than evidence which would be admissible at a criminal trial.

iv) The judge is required by law to form an honest and rational opinion on the material before the court. In doing so, the judge must take proper account of the quality of that material, which ranges from mere assertion, of little or no probative effect, to documentary proof, and must ensure that the defendant has a full and fair opportunity to comment on and answer it.

v) Where a witness gives oral testimony, the defendant must be allowed to cross-examine, and the defendant may himself give oral evidence.

[69] The foregoing cases arose in different statutory contexts. As a natural consequence, the cases demonstrate, in varied language, the need for careful scrutiny of a judge's admission of and reliance on hearsay at a bail hearing. A close reading of the cases, however, reveals several common principles which provide a framework for addressing the issue. These principles have been distilled, calibrated and adapted bearing in mind the constitutional and statutory context in Jamaica, specifically the need to respect the constitutional rights to liberty and bail. I have also taken into account the practical realities and exigencies of administering the criminal justice system in Jamaica. The principles are:

(1) The requirement for sufficient cause to be shown is constitutionally and statutorily entrenched and mandates the provision of some evidentiary material which is capable of causing the judge to reasonably conclude that

bail should be refused (section 14(4) of the Charter and section 4 of the Act).

(2) The court is not permitted to refuse bail solely on the basis of the prosecution's or the police's beliefs, fears, or suspicions. Thus, the mere assertion of an objection by the prosecution, with no supporting material, whether in the form of a written statement, affidavit, oral or documentary evidence, or otherwise, cannot sustain an objection to bail. It would be wrong in principle for the constitutional right to bail to be easily overcome by mere assertions, without more (**Gowdie** at para. [29] and **DPP v McLoughlin** at paras. [22], [58], [59], [61] and [62]).

(3) Ultimately, at a bail hearing, the judge is required to form an honest and rational opinion on all the material before the court as to whether sufficient cause for refusing bail has been shown (**DPP v Havering Magistrates' Court** at paras. 39 and 41 and **Vickers v West London MC** at para. 18).

(4) The requirement for evidentiary material to sustain an objection to bail is not an invitation to embark upon a detailed examination of the strength of the prosecution's case, which is impermissible (**Gowdie** at para. [21]). The evidentiary material required is to substantiate the objection to bail, not the underlying charges.

(5) There is no requirement for sworn evidence because a bail hearing is not a criminal trial, and the strict rules of evidence do not strictly apply. This means that hearsay (and other material not admissible at trial) is receivable in bail proceedings to ground an objection to bail, provided it is relevant to establishing a recognised ground for refusing bail (**DPP v Havering Magistrates' Court** at paras. 36, 40 and 41, **Gowdie** at paras. [16] and [21] and **DPP v McLoughlin** at paras. [16] and [51]).

(6) Material presented to oppose bail can range from mere assertions, which are unlikely to have any probative value, to documentary evidence, which generally carries more weight. As a result, the material supporting an objection to bail, with varying degrees of probative force, may include, for example, a written statement to the police, an oral statement by the police in court, documentary proof, or sworn oral or affidavit evidence (**DPP v Havering Magistrates' Court** at para. 41 and **Vickers v West London MC** at para. 14).

(7) The judge must take proper account of the contents and quality of any material placed before it in objection to bail to determine what weight, if any, should be attached to it (**DPP v Havering Magistrates' Court** at para. 41, **DPP v McLoughlin** at para. [25] and **Vickers v West London MC** at para. 14).

(8) The contents of any material before the judge in support of an objection to bail are a relevant factor in determining the weight to be ascribed to the material. The material must be sufficiently particularised and cogent to establish a recognised ground for refusing bail, and thereby warranting interference with the defendant's constitutional rights to liberty and bail (**DPP v McLoughlin** at para. [59]).

(9) Given the high importance of the constitutional rights to liberty and bail, direct evidence and documentary proof should ordinarily be preferred in support of an objection and accorded more weight than unsupported hearsay assertions (**Gowdie** at para. [11], **DPP v McLoughlin** at para. [46] and **Bartholomew Pinder** at paras. 36 and 38).

(10) Although hearsay is often relied on and permitted due to the exigencies of criminal practice, particularly at the interlocutory stage, its reception and use must be carefully policed by the court so as to preserve the substantive and

procedural fairness of the proceedings. The judge must recognise its intrinsic nature and bear in mind the fact that it has not been subject to cross-examination (**DPP v Havering Magistrates' Court** at para. 41, **Vickers v West London MC** at para. 14, **DPP v McLoughlin** at paras. [41], [46], [49] and [52]).

(11) The weight to be ascribed to hearsay will depend, among other things, on:

(i) whether first-hand evidence (being the best available evidence) could readily have been produced but was not.

(ii) whether there was a good reason why the maker of the statement (or other direct evidence) was not produced.

(iii) whether the party relying on hearsay took reasonable steps to obtain evidence in the usual form.

(iv) If there is no satisfactory explanation for the absence of first-hand evidence, a judge should be slow to rely solely on bare, unsubstantiated hearsay assertions as a basis for refusing bail.

(**DPP v McLoughlin** at paras. [16], [55], [60] – [62], **Bartholomew Pinder** at para. 38 and **DPP v Havering Magistrates' Court** at para. 41)

(12) Procedural fairness requires that the defendant be informed of the substance of the adverse material and, so far as reasonably practicable, of its source, and be afforded a full and fair opportunity to comment on, answer and challenge it before bail is refused on that basis (**DPP v Havering Magistrates' Court** at para. 41, **Vickers v West London MC** at para. 14 and **DPP v McLoughlin** at paras. [41] and [46]).

[70] I adopt the principles drawn from the authorities cited above as sound statements of the law applicable to the issue in this case. In broad terms, they confirm that, although hearsay may be received in bail proceedings, its admissibility alone cannot justify a refusal of bail, especially where the allegation relied on amounts to a breach of bail conditions. The controlling considerations remain procedural and substantive fairness. Accordingly, where first-hand evidence could readily have been obtained, reliance on hearsay has the potential to imperil the fairness of the process and is to be closely policed, given the high constitutional value attached to the right to liberty. Against that background, the authorities have also established that bail hearings are serious and must be conducted fairly. This requirement includes both procedural and substantive fairness.

[71] Against the background of these principles, I examined the two subsidiary issues which arose for consideration under issue (i): the admissibility of the Crown's statement; and the probative value of the Crown's statement.

Admissibility

[72] Applying the principles, the hearsay nature of an allegation by the prosecution or police is not, alone, sufficient to warrant its exclusion from consideration at a bail hearing. Therefore, the fact that the Crown's statement as to witness interference did not come by way of direct evidence does not render it inadmissible.

[73] To the contrary, the learned judge was entitled to receive and consider the Crown's hearsay allegation of witness interference because it was relevant to determining whether there was sufficient cause to refuse to readmit the appellant to bail. In particular, the hearsay statement would have been directly relevant to assessing whether there are grounds for believing that the appellant would "interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person" (see section 6(2)(b)(i)(C)). The Crown's allegation would not have been barred merely by virtue of its nature as hearsay, having satisfied the threshold of admissibility, namely, relevance to the matters in issue.

[74] The remaining question was whether the learned judge erred in relying on the hearsay statement as a basis for denying bail. This involved an assessment of the probative value of the statement in light of its contents and quality as evidentiary material.

The probative value of the Crown's statement to justify the refusal of bail

[75] In line with the principles outlined above, given that the allegation of witness interference also effectively constituted a breach of one of the appellant's bail conditions, the need for a fair consideration of the application and the Crown's objection was of utmost importance. The learned judge was required, when forming her opinion, to properly consider the material she was asked to adjudicate on in order to arrive at an honest and rational conclusion. The material in this case was merely an assertion put forward through counsel's submissions. This placed it at the lower end of the spectrum, which, according to the authorities, is unlikely to hold much probative weight.

[76] Therefore, in assessing the probative value of these hearsay assertions, the learned judge had to keep in mind the evidentiary quality of the material being relied on as showing sufficient cause to withhold bail and the potential consequences for the appellant, namely the risk of losing his liberty within the context of the presumption of innocence. This procedural task required of the learned judge was to ensure that the appellant had a full and fair opportunity to comment on and answer the material before the court.

[77] That having been said, I found the Crown's reliance on the double hearsay assertions made in written submissions entirely unsatisfactory, and the learned judge's acceptance of them difficult to justify as a matter of law. Three points are crucial to this conclusion. First, the allegation was that the appellant contacted the witness via WhatsApp, yet no message or other direct record of that communication was produced, despite such material typically being easily accessible. Second, although the court allowed the Crown time to obtain written evidence of the allegation, none was provided, nor was any satisfactory explanation offered for this failure. The material before the learned judge, therefore, remained, at best, unsupported second-hand hearsay, presented

despite a court directive for a statement from the witness that was not fulfilled. Thirdly, the allegation was serious. Interference with witnesses is not only a statutory consideration relevant to bail, but, as in this case, may constitute a breach of an explicit bail condition.

[78] Under these circumstances, the material relied upon to detain the appellant must be sufficiently cogent, as the court must, to properly refuse bail, be satisfied that there was indeed a violation of the statutory requirements for the grant of bail or a breach of the bail condition to justify the appellant's continued detention. Regrettably, the Crown's assertion in its written submissions concerning the alleged witness interference did not meet this standard. The Crown's statement had no particulars of the alleged interference with the witness. There was no information before the court to confirm that contact was made by the appellant with the witness, the date of that contact, the contents of any messages that were sent, or the phone number which would have been attributed to the appellant from which the messages emanated. It was a bare assertion, lacking in the relevant material particulars necessary for a judge to reasonably ascribe weight to it as a basis for refusing bail.

[79] As foreshadowed by the authorities cited above, the best evidence in these circumstances would have been direct evidence from the witness or, at the very least, material from the investigating officer reduced to an acceptable evidential form. However, this was not forthcoming, notwithstanding the opportunity given by the court for a statement to be produced by the Crown.

[80] As Hardiman J observed in **DPP v McLoughlin** at para. [44], adopting the dictum of Keane J in **DPP v McGinley**, before hearsay is used to deny bail, the court should identify and consider a specific reason for the absence of the maker of the statement. No such reason appeared on the record beyond counsel for the Crown's submissions that the witness was not available to provide a statement. No evidence or material was provided as to the steps taken to procure the statement, by whom and for how long. In those circumstances, the unsworn, second-hand assertion contained in counsel's submissions

was an altogether inadequate basis on which to rely to displace the appellant's constitutional entitlement to bail.

[81] Miss Cox strongly contended that the court must stay vigilant to protect the integrity of the criminal process and that the seriousness of witness intimidation in this jurisdiction cannot be overstated. However, while that is accepted, such vigilance must not undermine the appellant's right to a fair outcome of his bail application. As **Vickers v West London MC** and **DPP v McLoughlin** have established, allegations of this nature must allow for fair response and fair challenge; in that regard, the requirements for safeguards such as disclosure and, where appropriate, cross-examination may become particularly significant.

[82] Mr Clarke further submitted that the Crown had neither expressly raised obstruction of justice nor squarely alleged any effort by the appellant to contact witnesses beyond the impugned assertion that he communicated with the main witness. On that basis, counsel contended that the inference drawn by the learned judge that he was likely to obstruct justice was unwarranted. In support, he relied on **DPP v Mulvey** [2014] IESC 18, at paras. [32] – [43], which, he submitted, answered the point raised in the learned judge's findings.

[83] I accepted the submission of Mr Clarke that there was no sufficient factual foundation for a finding that the appellant was likely to obstruct justice through interference with other witnesses. The conclusion that there was a likely obstruction of justice found no adequate support in the Crown's statement before the learned judge. That material was not only evidentially weak but also speculative. Therefore, the weight to be attached to the Crown's assertion regarding other witnesses, apart from the purported eyewitness, should have been nugatory.

[84] Accordingly, while the learned judge was entitled to consider the risk of interference with witnesses and the possibility of obstruction of justice, the weight attached to bare, unsubstantiated hearsay, in the absence of direct evidence which ought

reasonably to have been available and which the court had directed should be obtained, was, with respect, misplaced. The authorities not only counsel caution; they make plain that reliance on hearsay, wherever possible, should be an exception, not the norm.

[85] Having regard to all the evidence presented by the appellant and the lack of equally cogent evidence from the Crown against the background of the applicable legal principles and standard of review, I was compelled to conclude that the learned judge's reliance on the Crown's unsubstantiated assertions by way of submissions was erroneous. The quality of the material was insufficient to establish any fact of interference with witnesses, any likelihood of such interference, or any genuine risk of obstruction of justice. There was, regrettably, substantive unfairness.

[86] Furthermore, in my view, the process did not afford the appellant the full measure of procedural fairness required for a just determination of whether bail should be refused on this basis. Fairness required, at a minimum, disclosure of the material particulars of the alleged interference with the Crown's witness and, so far as reasonably practicable, the incriminating material from its primary source - the witness said to have been contacted. In the witness's absence, at the very least, the investigating officer should have provided cogent evidence or other material of what he reported to counsel and of the steps he took, if any, to secure a witness report. This would have been necessary, having regard to the nature and significance of the allegation. Fairness also required a genuine opportunity for counsel for the appellant to test the allegation, if so instructed, by questioning the maker of the allegation or, at the very least, the investigating officer on whose report the Crown relied.

[87] Those procedural safeguards assumed particular importance in circumstances where the appellant had been on bail for years without any previous complaint of interference with witnesses, and the allegation arose while he was in police custody.

Conclusion on issue (i)

[88] The learned judge was entitled, in principle, to take the allegation into account notwithstanding its hearsay character. However, the lack of particulars, the manner in which the allegation was presented (in counsel's submissions), and the failure to produce direct evidence of the report after a reasonable opportunity was given to the Crown to do so, militated against attaching any weight to the allegation. Having regard to the guidance afforded by the authorities, the learned judge was required not merely to receive the allegation, but to confront the implications of its evidential quality and weakness before treating it as a sufficient basis for refusing bail. With respect, the record does not demonstrate that this evaluative analysis was applied to the material.

[89] Accordingly, any conclusion that there was sufficient cause, based on interference with witnesses and likely obstruction of justice, to justify the appellant's continued detention could not reasonably be regarded as an honest and rational finding on the nature and quality of the material before the learned judge. Appellate intervention was deemed justified on the varying bases advanced on behalf of the appellant in relation to issue (i).

Issue (ii): whether the learned judge erred in finding the appellant a flight risk

[90] The learned judge, in so far as is immediately relevant to the issue under review, expressly indicated in the record of reasons for her decision that it is likely that the appellant would not surrender to custody if released on bail. At para. 7 sub-para. 3 of her reasoning, she noted that, in arriving at that conclusion, she took into account that he was charged with a serious offence, was apprehended on 28 August 2020, "but not without briefly evading the police and had to be stopped by them". She concluded: "The court is of the view that if [the appellant] is granted bail, he would not show up for his trial". The learned judge, therefore, opined that the appellant was a flight risk based on the seriousness of the offence and given the circumstances of his apprehension in 2020 as detailed by the Crown.

[91] The Crown's allegations were that when the appellant was apprehended for the charge of murder on 28 August 2020, he tried to evade the police while riding a motorcycle. The contention of Miss Cox on behalf of the Crown during the appeal hearing was that this subsequent conduct of the appellant, as evidence of flight, may furnish evidence of guilt. Reliance was placed on Halsbury's Laws of England, Volume 27 (2012), para. 453.

[92] The appellant disputed the Crown's account of his arrest. He argued, firstly, that he was not apprehended on the date claimed by the Crown and accepted by the learned judge, as he had been in custody since around 28 July 2020. Therefore, the date given by the police was either incorrect or "blatant misinformation" intended to mislead the court. Secondly, he did not try to evade the police; and in any case, the information the Crown relied upon regarding his arrest in 2020 was "stale", as the incident would have happened before he was granted bail almost three years earlier.

[93] In considering the issue of whether the appellant presented as a flight risk so as not to be readmitted to bail, I first note that the Crown had failed to clarify the issues raised by the appellant or to address the factual points of dispute regarding the date and circumstances of his apprehension. This continued until the end of the appeal hearing. Despite the glaring inconsistency in the Crown's case regarding when the identification parade was held (in July) and the appellant's apprehension (in August), the learned judge relied on the Crown's version without a resolution of that basic conflict in the Crown's case. This, however, was not fatal to her decision, as it was clear that the date given for the apprehension was an error. Therefore, the failure of the Crown and learned judge to resolve that conflict was not used against the Crown in the appeal.

[94] What is of greater significance is that I accepted Mr Clarke's arguments for the appellant that the weight given to the circumstances surrounding the appellant's apprehension was unreasonable in light of his previous response to bail, which ought to have been considered and which, on the learned judge's own reasoning, she "must consider" (para. 6 of the reasons for decision). However, there was no demonstration

that she had regard to his bail history and previous response to bail when considering the likelihood of his absconding.

[95] Even accepting, as true, that the appellant had evaded the police and that he was arrested on the date stated by the police (which, as already noted, appeared to be wrong), the circumstances surrounding his arrest were present as a factor going to the issue of bail at the time he was granted bail nearly three years earlier. The seriousness of the offence was evident from the very outset, when bail was granted and remained unchanged. Clearly, the existence of those factors did not justify a refusal of bail, in the view of the court that granted him bail, which had set conditions to mitigate the risk of his absconding.

[96] More significantly, after the appellant was admitted to bail and began attending the Home Circuit Court for trial, there was no reported attempt on his part to abscond, nor any breach of the conditions set to ensure his attendance. This was not a case involving an initial bail application, but one concerning readmission to bail. In that context, the appellant's prior bail history and demonstrated response to bail were clearly important considerations that required careful evaluation alongside the Crown's reliance on the historic allegation that he had attempted to evade the police five years earlier. By then, the record showed that he had previously been granted bail and had not failed to surrender to custody when required. The Parish Court also reduced the frequency he should report to the police from daily to three days per week. Viewed in that light, his proven compliance with bail over a long period, being the more recent and stronger consideration, should have carried greater weight than the earlier allegation that he had attempted to evade the police at the time of his arrest. Properly balanced, these matters relating to his surrender to custody while on bail would have tipped the balance in favour of his readmission to bail.

[97] The record also would have shown that, up to the time he was arrested for the later Gun Court charges, he was reporting to the police in compliance with his bail conditions. So even if he had reoffended as the Crown alleged, he never failed to

surrender to custody, and the police were able to arrest him at the police station. In any event, following those additional charges, he was again granted bail in the Gun Court but could not proceed on bail because he was remanded on the murder charge. Notably too, by the time of the proceedings before the learned judge, he had been acquitted of the Gun Court charges. Therefore, at the time of the bail application, he was not charged for any other offence that would justifiably point to a risk of reoffending.

[98] In the circumstances, having regard to the length of time the appellant remained on bail (almost three years) and his consistent record of reporting to the police and surrendering to the custody of the court when required over that period, I am not satisfied that any new material was presented to the learned judge to demonstrate a change of circumstances that would, on a balance of probabilities, undermine the likelihood of his surrender to custody. That conclusion is reinforced by the absence of any allegation or report of witness interference during the period he remained on bail. The learned judge also acknowledged that the seriousness of the offence alone was not enough to justify a denial of bail. Therefore, based on her reasoning, if she had removed the circumstances of the apprehension from consideration, she would have only had the seriousness of the offence to refuse bail. Therefore, given her recognition that this factor alone would not have been sufficient to refuse his readmission to bail, it ought not to have stood as a significant factor militating against bail.

[99] In my view, the learned judge's conclusion that the appellant presented a flight risk discloses an error in the exercise of her discretion, in the light of the applicable standard of review as accepted. In particular, she gave determinative weight to matters that, standing alone, could not rationally sustain the inference drawn. At the same time, she failed to give proper, or any sufficient, weight to plainly relevant countervailing considerations, most notably the appellant's demonstrated compliance with bail conditions over an extended period, his consistent reporting to the police, and the absence of any evidence that he had ever failed to surrender to custody when required.

[100] In those circumstances, the finding that the appellant presented a flight risk was reached upon an improper weighing of the relevant material and, therefore, constituted an error of principle and irrationality justifying appellate intervention. Accordingly, the appellant succeeded in his arguments on this issue.

Issue (iii): whether the learned judge failed to consider whether strict bail conditions could have mitigated the risks of absconding instead of remanding the appellant

[101] Closely connected to the issue of flight risk and witness interference is the appellant's complaint that the learned judge, having identified those risks, did not demonstrate that she had gone on to consider whether they could be adequately managed by the imposition of appropriate conditions rather than by continued detention.

[102] In my view, that complaint is well-founded. As already indicated, sections 14(1) and (4) of the Charter secure to a person charged with a criminal offence the right to bail on reasonable conditions, save where sufficient cause is shown for detention. Flowing from this constitutional imperative, section 4 of the Act establishes the starting point of the enquiry by conferring a general entitlement to bail. That entitlement is, however, qualified by the statutory considerations identified in section 6, which require the court to determine whether sufficient cause exists for withholding bail, having regard to the matters delineated therein. Section 8 then empowers the court to impose such conditions as appear necessary to secure the defendant's surrender to custody and to address the risks identified in the case.

[103] Read together, the foregoing provisions make it plain that detention is not the default consequence of risk; rather, the court must consider whether the perceived risk may sufficiently be managed by reasonable conditions short of remand.

[104] It follows that the constitutional enquiry is not at an end once a risk is identified under the Act. The court must go further and determine whether the perceived risk can be sufficiently controlled by conditions short of remand. That approach is entirely consistent with the guidance of Brooks JA in **Gowdie**, which the learned judge herself

correctly cited, namely, that the court must lean in favour of bail and refuse it only where clear risks are shown and, even then, must consider whether those risks may be managed by suitable conditions.

[105] The difficulty in the present case is that, although the learned judge properly directed herself to that principle, the record does not reveal that she gave it practical effect. There is no indication that she examined whether the appellant's existing conditions, or more stringent variants of them, would have sufficed to address the concerns she identified. That omission was of particular significance in circumstances where the appellant had already been on bail for an extended period, subject to reporting requirements, curfew restrictions, the surrender of travel documents, and a non-interference order, without any demonstrated failure to surrender to custody when required. In those circumstances, the question whether the risks perceived by the learned judge could have been adequately mitigated by reinforced conditions, rather than by outright detention, plainly called for careful and anxious consideration.

[106] The learned judge's failure to undertake that enquiry, or at least to demonstrate that it was undertaken, was material. It meant that the decision to refuse bail proceeded on an incomplete assessment of the options available to the court and, therefore, on an erroneous exercise of discretion. In the language of the applicable standards of review derived from the relevant authorities, the learned judge failed to give sufficient weight to a plainly relevant consideration bearing directly on whether sufficient cause had, in fact, been shown for the appellant's continued detention. In those circumstances and having regard to the findings that there was insufficient evidence to ground a claim of witness interference as a breach of his bail conditions, I found the appellant's complaint justifiable and meritorious. Appellate intervention was therefore viewed as warranted on this basis.

Issue (iv): whether the learned judge placed undue weight on the strength of the evidence without proper regard to factors favourable to the appellant

[107] In my view, the learned judge was plainly entitled and indeed required by section 6(3)(g) of the Act to have regard to the strength of the evidence said to implicate the

appellant. The fact that the Crown had consistently relied on that consideration throughout the proceedings did not, however, render it dispositive, nor did it relieve the court of the obligation to assess it in conjunction with the other matters bearing on the statutory enquiry. The difficulty is that the record suggests that the strength of the prosecution's case came to assume a weight that was out of proportion to other considerations of obvious significance in the appellant's favour, including his antecedent compliance with bail conditions over an extended period, his demonstrated surrender to custody when required, the absence of cogent proof of interference with witnesses, and the availability of conditions capable of addressing any residual risk.

[108] There was no indication that the Crown's case had become stronger with more incriminating evidence against the appellant since he was granted bail. On the contrary, it was the appellant who sought to bolster his case by presenting an alibi statement. Therefore, the only case that appeared to have improved, on the face of it, by the time of the application, was the case of the appellant.

[109] The learned judge, to her credit, considered the witness statement of the appellant's proposed alibi witness, but concluded that the appellant was identified by the Crown's main witness and therefore she gave no weight to the proposed defence witness. The alleged identification of the appellant, even if strong, was not, however, a change or a material change in circumstances that would have outweighed the many factors in the appellant's favour.

[110] One of the key questions for consideration was whether the appellant would surrender to custody to face his trial when required, given the alleged strength of the Crown's case. In my view, he had already demonstrated this, as he never failed to surrender to custody for approximately three years, despite the strength of the Crown's case. It appears to me, then, that a ruling in favour of the appellant would have been appropriate if all relevant factors had been properly weighed.

[111] In those circumstances, the criticism is not that the learned judge took into account the strength of the evidence against the appellant, but rather that she did not sufficiently balance that consideration against countervailing factors of clear relevance to the question whether sufficient cause had been shown for the appellant's continued detention. That imbalance, in my respectful view, constituted an error in the exercise of her discretion of the kind contemplated by the authorities governing appellate review. In effect, she failed to accord sufficient weight to matters plainly material to the evaluative, honest, and rational judgment the law required, especially in the context of an application for readmission to bail.

[112] Again, for all the preceding reasons, I concluded that there was merit in the appellant's ground of appeal concerning the judge's assessment of the strength of the Crown's case vis-à-vis the factors favourable to the appellant that justified appellate intervention. The appellant also succeeded on this issue.

Conclusion

Whether the judge erred in the exercise of her discretion

[113] Drawing together the salient aspects of my conclusions on each issue emanating from the principal grounds of appeal, I was ultimately persuaded that the learned judge's refusal to readmit the appellant to bail could not stand. The allegation of interference with witnesses, which was central to the Crown's objection, and the learned judge's finding of likely obstruction of justice, were based on material lacking the necessary evidential quality and cogency to justify the weight attributed to it. The conclusion that the appellant posed a flight risk did not adequately consider his previous compliance with bail conditions and his demonstrated surrender to custody when required. Furthermore, there was no clear consideration of whether any perceived risk could have been effectively managed through reinforced bail conditions rather than continued detention. Finally, the strength of the prosecution's case, though an important factor, appeared to carry more weight in the evaluation of the learned judge than the countervailing factors in favour of the appellant's readmission to bail.

[114] In the final analysis, the learned judge's decision, although demonstrating a correct understanding of the applicable principles, regrettably revealed an error in her application of them to the case. There was also a failure to give proper weight to relevant matters while giving undue weight to irrelevant ones. Regrettably, too, there was also an incomplete assessment and application of the statutory and constitutional considerations required by section 14 of the Charter and the Act, which recognise the appellant's basic right to liberty. The appeal succeeded on all four issues.

Disposition

Should the appellant be readmitted to bail?

[115] Having established that the learned judge erred in exercising her discretion, resulting in a successful appeal, it was therefore my duty to decide whether the appellant should be admitted to bail. After weighing and assessing all the factors and considerations outlined in sections 6(2)(b) and 6(3) of the Act against the arguments, evidence, and relevant constitutional provisions and common law principles, I was convinced that there were no substantial grounds to deny the appellant readmission to bail. In light of this, I was satisfied that this was an appropriate case to exercise my powers under section 12 of the Act to readmit the appellant to bail, subject to conditions similar to those previously imposed.

[116] It was primarily for these reasons detailed above that I decided to allow the appeal, set aside the order refusing to readmit the appellant to bail, and admit the appellant to bail on the conditions imposed by this court as detailed at para. [2] above.