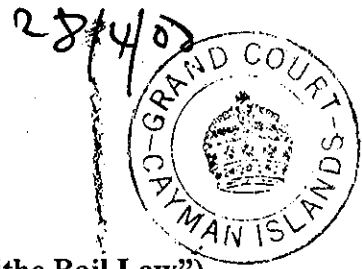


IN THE GRAND COURT OF THE CAYMAN ISLANDS
IND. NO. 46/06



IN THE MATTER OF THE BAIL LAW (2007 REVISION) ("the Bail Law")

AND

IN THE MATTER OF APPLICATIONS FOR BAIL BY DANIEL ASHTON
WHORMS AND NORMAN ALLEN CLARKE

REGINA

V

DANIEL ASHTON WHORMS
And
NORMAN ALLEN CLARKE

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CJ
APRIL 23 2008

APPEARANCES: Mr. Nicholas Dixey for both applicants
Ms. Nicola Moore for the Crown

RULING

1. On these applications the question has arisen what is the meaning and effect of Section 17(2) of the Bail Law which was introduced by way of amendment by Laws 18 of 2005. Section 17 provides:

*"17(1) Subject to subsection (2), a person is entitled to bail under this Part if he has been –
(a) accused of an offence but not convicted of the offence;*

- (b) *convicted of an offence and the case has been adjourned by the court to enable inquiries or a report to be made to assist the court to deal with him for the offence; or*
 - (c) *convicted of an offence under the Misuse of Drugs Law (200 Revision) and is appearing or has been brought before a court under section 54 or 57 of that law.*
- (2) *A person accused or convicted of any of the following offences is not entitled to bail –*
- (a) *murder;*
 - (b) *manslaughter;*
 - (c) *rape, or any offence of a sexual nature against a person punishable by imprisonment for four years or more;*
 - (d) *arson*
 - (e) *wounding or causing grievous bodily harm;*
 - (f) *wounding or inflicting grievous bodily harm;*
 - (g) *burglary;*
 - (h) *robbery;*
 - (i) *extortion;*
 - (j) *kidnapping;*
 - (k) *abduction;*
 - (l) *wrongful confinement;*
 - (m) *bomb hoax;*
 - (n) *aiding a prisoner to escape;*
 - (o) *any offence against the Firearms Law (2006 Revision) punishable by imprisonment for four years or more;*
 - (p) *any offence against the misuse of Drugs Law (2000 Revision) (other than the offence of consuming);*
 - (q) *any offence against the Terrorism Law, 2003, punishable by imprisonment for four years or more;*
 - (r) *conspiracy to commit any of the offences listed in paragraphs (a) to (q); and*
 - (s) *any attempt to commit any of the offences listed in paragraphs (a) to (q).*

2. Section 18 is also important for the present purposes of construction. It provides:

“A Court or police officer shall grant bail to a person who is entitled to bail under this Part unless –

- (a) *the court or police officer is satisfied the person, if released on bail would -
 - (i) fail to surrender to custody;
 - (ii) commit an offence while on bail; or
 - (iii) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or another person.*
- (b) *the court or police officer is satisfied the person should remain in custody for his protection or welfare; or*
- (c) *in the case of a person referred to in section 17(b), it appears to this court that it would be impracticable to complete the inquiries or make the report without keeping the person in custody."*

3. The specific issue for construction here is what is now meant by the Law where it provides in section 17(2), that a person accused or convicted for any of the offences enumerated in that subsection "is not entitled to bail".
4. The present applicants are accused of offences of unlawful possession of firearms under the Firearms Law and which are offences caught by subsection 17(2)(o) of the Law as shown above. They are to be regarded as persons who are not entitled to bail.
5. While the Law does not define entitlement; obviously, different treatment is to be accorded to a defendant who is "entitled to bail" (subsection 17(1)) than that to be accorded to a defendant who is "not entitled to bail" (subsection 17(2)).
6. Some guidance as to that difference in treatment is afforded by section 18, which makes it mandatory that bail is granted to a person who is entitled under subsection 17(1); unless the disqualifying conditions, which are there set out in section 18, are found to apply.

7. Thus, section 18 connotes a presumptive entitlement to bail which can be overridden by the Court being satisfied about the existence of the disqualifying conditions. Section 18 also implies an onus upon the prosecution to satisfy the Court that those disqualifying conditions exist.
8. When subsection 17(1) is juxtaposed and contrasted with the express disentitlement in subsection 17(2); it seems that the intent of the legislation is to deny a presumption of entitlement to bail in respect of the offences listed in that latter subsection.
9. This is the construction of subsection 17(2) that readily occurred to my mind and that with which both Ms. Moore and Mr. Dixey agreed; except that Mr. Dixey sought to emphasise that the denial of a presumptive entitlement did not mean that the onus shifted to a defendant to satisfy the Court that bail should be granted. And that this must be so even in cases involving any of the listed offences.
10. For a number of reasons which I seek to explain, I agree that that is the proper construction of the Law, but I must acknowledge that the matter is not without its difficulties.
11. The most notable such is the Long Title to the amending law – Law 18 of 2005 – which introduced subsection 17(2) in its present form. That title reads “A LAW TO AMEND THE BAIL LAW, (1997 REVISION) TO CREATE A CATEGORY OF NON-BAILABLE OFFENCES, AND FOR INCIDENTAL AND CONNECTED PURPOSES.” (emphasis supplied)
12. The word “NON-BAILABLE” would impart to the expression “not entitled” a meaning different from that construed above, such that it would suggest that bail

shall not be granted. Thus, a complete prohibition against the grant of bail for listed offences.

13. That construction would, however, bring about a drastic change to the Law from its status prior to the amendment. Then there was generally a presumption in favour of the grant of bail for all offences, expressed in terms exactly like those in subsection 17(1) of the Law as it now stands.
14. Thus, the legislative history is that the changes introduced by Law 18 of 2005 were entirely contained in subsection 17(2) which, for the first time, introduced that category of listed offences for which there is to be no entitlement to bail.
15. Had the Legislature intended to introduce so drastic a change as to prohibit entirely the grant of bail for the listed offences – it could have, in the body of the legislation, instead of using the expression “not entitled”, have used the less equivocal expression, “not eligible”. Nor, given the penal nature of the Law, could the Legislature in my view, have intended to leave its true meaning carrying such a drastic and far-reaching consequences, to be discerned only from the Long Title.
16. It is well known that a Long Title may not be regarded, by itself, as a definitive guide to interpretation. While it may be *“the plainest of all guides to the general objectives of a statute, it will not always help as to particular provisions”*, per Lord Simon in *Black Clawson International Ltd. v Papicrweske Waldhof-Aschaffent AG* [1975] AC 591 at 647; and see generally *Bennion on Statutory Interpretation* 4th Ed. 620-623.

17. Reading into the Law a complete prohibition on the grant of bail for listed offences, would also give it a meaning which would run afoul of the Islands' obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms Article 5(3); which provides:

“Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article [i.e.: “for the purpose of bring him before the competent legal authority on reasonable suspicion of having committed an offence”] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

18. Clearly, any provision that would deny an offender the entitlement to release pending trial where he has not been tried “within a reasonable time”; would be contrary to those provisions of Article 5(3). And, whether that reasonable time has passed can only be determined as a function of the “exercise of judicial power” along with the determination of other relevant issues; as contemplated also by Article 5(3).
19. In the absence of a clear legislative intent to reverse the entitlement to be considered for bail; it is now also fairly well settled that legislation ought to be construed as intended to honour treaty obligations and to respect fundamental rights.
20. Such fundamental rights, including the entitlement to judicial consideration for the grant of bail pending trial are also recognised as being of long-standing antiquity through the Bill of Rights of 1685 and the common law presumption of innocence.

21. The obligations arising from international Conventions even where not yet incorporated into domestic law may also serve as a guide to the assessment of the reasonableness or otherwise of administrative decisions purportedly taken in the exercise of legislative authority. Such, for present purposes, would be a decision to arrest and detain an accused person.
22. The principle is that while the Courts may not purport to give effect to unincorporated treaty obligations, if to do so would involve an affront to domestic legislation to the contrary; the treaty obligations may nonetheless serve as a guide to the interpretation of domestic legislation in the event of doubt as to its meaning. The treaty obligations though not yet incorporated into domestic legislation, serve as a guide to construction because by its accession to those obligations, the State promises duly to observe them. Thus, in the absence of provision in domestic legislation which clearly expresses an intention not to do so, domestic legislation will be construed as intended to observe the treaty obligations.
23. The case law in this jurisdiction can now, encouragingly, be regarded as settled on these principles. See, for instance, Grant v J.A. Cumber Primary School 1999 CILR 307, 338 (upheld on appeal on this point at 2001 CILR 78, 85) and Allan Garfield Ebanks v The Queen CICA 29 of 2006, judgment delivered on 3rd December 2007 pp17-20.
24. I should make it clear that the foregoing construction taken of subsection 17(2) as preserving the judicial discretion on bail is one primarily taken by reference to the legislative intent having regard to the actual wording of the Law itself and of its

legislative history. The obligations under the Convention I regard and apply as a guide pointing to that same construction, notwithstanding the implications of the Long Title. Appropriately in my view, this is a construction which avoids having to apply the Law as running contrary to the fundamental rights of the individual as identified above and as the Islands are obligated to the observance of the same rights under the Convention.

25. My conclusion on this aspect therefore, is that subsection 17(2) is to be construed as doing no more than removing the presumptive entitlement to bail which existed for all offences including the listed offences, prior to its introduction. Nor, therefore, not to be construed as infringing upon the judicial discretion to consider whether or not bail should be granted, and to do so by having regard to all the circumstances of any given case, including those involving allegations of offences listed under subsection 17(2).
26. The preservation of that discretion is also specifically a matter upon which the European Court for Human Rights has pronounced as being necessary for a State to comply with Article 5(3) of the Convention.
27. *In Caballero v The United Kingdom* 2000 EHRR 643 the central issue was whether the absolute ban on the grant of bail to defendants coming within certain categories of offences as defined by section 25 of the Criminal Justice and Public Order Act 1976 (as it then was) was a ban which violated Article 5(3) of the Convention.
28. In concluding that it did (a matter conceded by the U.K. Government) the ECHR went on to explain that Article 5(3) required that there is "*judicial control of*

interference by the executive with an individual's right to liberty" and that a judge:

"must examine all the facts arguing for and against the existence of a genuine requirement for public interest justifying with due regard to the presumption of innocence, a departure from the rule of respect for the accused's liberty, and...have the power to order an accused's release."

See also to similar effect *SBC v United Kingdom* (2001) 34 EHRR 619.

29. Being legally obliged to take heed of these pronouncements (the Convention being incorporated into domestic law there by the Human Rights Act 1988) the United Kingdom Government amended section 25 to remove the ban. It was replaced by a provision which required the showing of exceptional circumstances before bail could be granted to a defendant who was charged with or convicted by an offence of murder, manslaughter or rape and who had been convicted before for such an offence.
30. The construction of this amending provision itself also came before the House of Lords in *R(O) v Crown Court at Harrow* [2006] 3 WLR. There the Crown argued that it should be construed by giving it its natural meaning thereby placing a burden on the defendant, and by making the grant of bail conditional upon the judge being "satisfied" by the defendant of the existence of "exceptional circumstances".
31. The House of Lords did not agree, holding instead that while the amended section 25 was to be read as placing an evidential burden upon a defendant to whom the section applied, to adduce material showing the existence of exceptional circumstances to justify the grant of bail; it could not be read without offending

Article 5(3) of the Convention, as placing a legal burden upon him to justify the grant of bail.

32. Given that in this jurisdiction we do not have in the Law, a requirement of the showing of exceptional circumstances, nor a further defined category of egregious offences such as may be identified by reference to previous convictions; our legislation points even more clearly in my view, away from any construction which would reverse the legal burden of proof by placing it on a defendant.
33. I go further therefore, to explain my acceptance of Mr. Dixey's other submission; that while subsection 17(2) serves to remove the presumption of entitlement to bail, for listed offences (without infringing upon the judicial discretion) it does not place a positive burden upon a defendant to satisfy the Court that he should be admitted to bail.
34. I emphasise that any such reversal of the burden would itself be contrary to Article 5(3) of the Convention which, by harkening to the presumption of innocence; speaks to the positive entitlement to be released pending trial, if trial does not take place within a reasonable time. The burden may not therefore be reversed by placing it upon a defendant without infringing upon that principle and upon the presumption of innocence itself. If a person is presumed innocent until proven guilty, he cannot be required to prove that there should be no infringement upon his liberty while his guilt is yet to be established.
35. Moreover, and finally on this point, as there is nothing about subsection 17(2) that expressly mandates the reversal of the burden or interference with the

fundamental right of the presumption of innocence, there is strong judicial dicta remonstrating against such a construction.

36. As the ECHR observed in *Iljkov v Bulgaria* (Application No. 33977) (unreported) 26 July 2001 at paras. 84-85:

“84 ...where the law provides for a presumption in respect of factors relevant to the grounds for continued detention...the existence of the concrete facts outweighing the rule of respect for individual liberty must be nevertheless convincingly demonstrated.

“85 Moreover, the court considers that it was incumbent on the authorities to establish those relevant facts. Shifting the burden of proof to the detained person in such matters is tantamount to overturning the rule of Article 5 of the Conventions, a provision which makes detention an exceptional departure from the right of liberty and one that is only permissible in exhaustively enumerated and strictly defined cases.”

37. Accordingly, subsection 17(2), in revoking in respect of the listed offences, the former express entitlement to bail which the Law provided for all offences; may not be construed as at once also reversing the burden of proof so as to impose upon a detained person a legal requirement that he must establish justification for the grant of bail.

38. And even if one acknowledges, as I think it properly can be, that purely as a matter of the exercise of judicial discretion, bail should be granted only in exceptional circumstances to persons who are charged with and who have

previous convictions for offences listed in subsection 17(2); that would still not imply any reversal of the burden of proof. Even in such cases, as in all other cases, what would be required on the basis of the case law would be the exercise of judicial discretion having regard to all the relevant circumstances, including the rights of the individual detained; but being especially mindful of the public interests to be protected against the risk of further re-offending. Several of the factors to be taken into consideration in such cases are identified in section 19 of the Law.

39. With the foregoing principles in mind, I may now turn to consider the present applications or bail.

DAVID WHORMS

40. Whorms is in custody awaiting trial for, among other offences, unlawful possession of a firearm.
41. He was arrested in the Cayman Kai area in a car in the company of two others, one of whom, Dixon, is said to be all too well known to the police as a repeat offender having many previous convictions for serious offences.
42. The loaded firearm was found beneath the driver's seat which was occupied by Whorms.
43. Later, on forensic examination, the firearm was found to bear his DNA.
44. A rucksack containing binoculars, rope, change of clothing, duct tape and socks was found in the car suggesting that the three men – who were many miles away from their places of residence in West Bay – were involved in some kind of criminal enterprise in the Cayman Kai area.

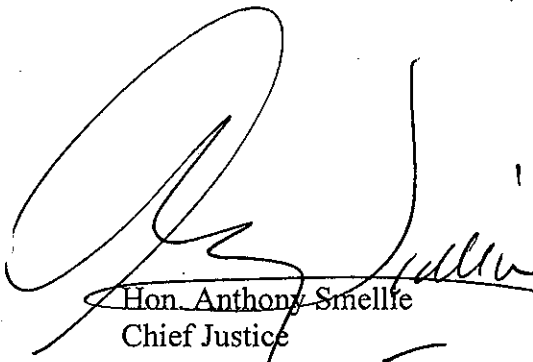
45. The Crown objects to bail on several grounds: the seriousness of the firearm offence (carrying a likely sentence of between 7 to 10 years); the defendant's antecedents; his association shown here with bad company involved in some criminal enterprise and pointing to a likelihood of re-offending if on bail; the perceived risk that he is unlikely to turn up for trial and the apparent strength of the Crown's case against him.
46. Mr. Dixey on the other hand points to the fact that the defendant is a Caymanian with established family ties here (including a wife and child) suggesting that he is unlikely to abscond. He submits that appropriate conditions, such as curfew, may be imposed to remove the risk of re-offending.
47. He cites what he describes as a number of other cases in which those defendants awaiting trial on firearms offences were granted bail and for some of which there were eventual acquittals despite the presence of their DNA being found on the firearms in question.
48. His client would be willing to submit to whatever reasonable conditions the Court wished to impose including the observance of a curfew.
49. I am most troubled by the seriousness of the alleged offence for which there is strong evidence and the apparent risk that the defendant might commit further offences if granted bail. On the other hand, I am concerned that a defendant should not be at risk of having spent significant time in prison lest at the end of the day he turns out to be not guilty of the offence. The defendant's trial is now however, set for 15 July 2008, less than three months away. That, to my mind, is an insufficiently long period of time to suggest that the risk of the defendant's re-

firearm offences as shown by his antecedents. The concern is that he will likely re-offend if released on bail.

58. After weighing all the factors, on balance I too am concerned about the likelihood of re-offending and of the risk to be imposed upon the public whenever a propensity for firearm offences is shown to be involved.

59. Despite the suggested weaknesses in the Crown's case, the trial date being less than two months away, I conclude that the balance comes down in favour of the public interests and that this defendant also should await his trial in custody.

60. This application is also refused.



Hon. Anthony Smellie
Chief Justice



April 28 2008