In The Supreme Court of Bermuda

CRIMINAL JURISDICTION
Case No. 34 of 2018

BETWEEN:

THE QUEEN

-and-

CAHLII SMITH

Before: **The Hon. Justice Juan P. Wolffe, Puisne Judge**

Appearances: Mr. Adley Duncan for the Prosecution
Ms. Elizabeth Christopher for the Defendant

Date of Hearing: 12th July 2023
Date of Ruling: 17th July 2023
Date of Reasons: 24th July 2023

RULING
(Reasons)

Application for bail pending sentence – Defendant convicted of blackmail, making child pornography, distributing child pornography, and accessing child pornography

WOLFFE J:

1. On the 4th July 2023 the Defendant was convicted by a Jury of blackmail contrary to section 355 of the Criminal Code Act 1907 (the "Criminal Code")(two counts); making child

pornography contrary to section 182F(1) of the Criminal Code (three counts); distributing child pornography contrary to section 182F(2) of the Criminal Code (one count); and, accessing child pornography contrary to section 182H(1) of the Criminal Code (one count).

2. On the day of conviction the trial judge ordered a Social Inquiry Report ("SIR") and the matter was fixed for mention to the 1st September 2023 presumably to set a sentencing date. The trial judge remanded the Defendant into custody.

3. By way of a summons filed on the 7th July 2023 the Defendant, through his Counsel Ms. Elizabeth Christopher, made an application for bail pending sentence pursuant to section 6 of the Bail Act 2005 ("BA"). On the 17th July 2023 I ruled that the Defendant's bail application should be dismissed and set out herein are my reasons for doing so.

Decision

4. Ms. Christopher's and Mr. Adley Duncan's submissions were respectively rooted in section 6 of the BA as read with Schedule 1 of the BA. Under the heading "General right to bail of accused persons and others" section 6 of the BA provides that:

> *"6 (1) A person to whom this section applies shall be granted bail except as provided in Schedule 1.*
>
> *(2) This section applies to a person who is accused of an offence when –*
>
> *(a) he appears or is brought before the Magistrates Court or the Supreme Court in the course of or in connection with proceedings for the offence; or*
> *(b) he applies to a court for bail or for a variation of the conditions of bail in connection with the proceedings.*
>
> *(3) Subsection (2) does not apply as respects proceedings on or after a person's conviction of the offence or proceedings against a fugitive offender for the offence.*
>
> *(4) This section also applies to a person who has been convicted of an offence and whose case is adjourned by the court for the purpose of enabling*

inquiries or a report to be made to assist the court in dealing with him for the offence.

(5) Schedule 1 also has effect as respects conditions of bail for a person to whom this section applies.

(6) In Schedule 1 "the defendant" means a person to whom this section applies and any reference to a defendant whose case is adjourned for inquiries or a report is a reference to a person to whom this section applies by virtue of subsection (4).

(7) In taking any decisions required by Part 1 or Part II of Schedule 1, the considerations to which the court is to have regard include, as far as relevant, any misuse of controlled drugs by the defendant.

(8) In subsection (7) "controlled drugs" and "misuse" have the same meaning as in the Misuse of Drugs Act 1972."

5. In conjunction, Schedule 1 of the BA stipulates that:

"PERSONS ENTITLED TO BAIL: SUPPLEMENTARY PROVISIONS

PART I

DEFENDANTS ACCUSED OR CONVICTED OF IMPRISONABLE OFFENCES

Defendants to whom Part I applies

1. Where the offence or one of the offences of which the defendant is accused or convicted in the proceedings is punishable with imprisonment, the following provisions of this Part of this Schedule apply.

Exceptions to right to bail

2. The defendant need not be granted bail if the offence is murder.

3. The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would –

(a) fail to surrender to custody; or
(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.

4. The defendant need not be granted bail if –

(a) the offence is an indictable offence or an offence triable either way; and

(b) it appears to the court that he was on bail in criminal proceedings on the date of the offence.

5. The defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a young person, for his own welfare.

6. The defendant need not be granted bail if he is in custody in pursuance of the sentence of a court.

7. The defendant need not be granted bail where the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this Part of this Schedule for want of time since the institution of the proceedings against him.

8. The defendant need not be granted bail if, having been released on bail in or in connection with the proceedings for the offence, he has been arrested in pursuance of section 10.

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

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

Restriction of conditions of bail

10. (1) Subject to subparagraph (3), where the defendant is granted bail, no conditions shall be imposed under subsections (3) to (6) (except subsection (4)(d) of section 4) unless it appears to the court that it is necessary to do so for the purpose of preventing the occurrence of any of the events mentioned in paragraph 3 of this Part.

(2) No condition shall be imposed under section 4(4)(d) unless it appears to be necessary to do so for the purpose of enabling inquiries or a report to be made.

(3) Subparagraphs (1) and (2) also apply on any application to the court to vary the conditions of bail or to impose conditions in respect of bail which has been granted unconditionally.

(4) The restriction imposed by subparagraph (2) shall not apply to the conditions required to be imposed under section 4(5).

Decisions under paragraph 3 or 4

11. In taking the decisions required by paragraph 3 or 4 of this Part, the court shall have regard to such of the following considerations as appear to it to be relevant, that is to say –

(a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it);
(b) the character, antecedents, associations and community ties of the defendant;
(c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings;
(d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted,

as well as to any others which appear to be relevant."

6. The manner in which both section 6 and Schedule 1 of the BA should be applied when applications for bail pending sentence are being determined by the Court was comprehensively addressed by Justice Shade Subair Williams in the authority of *The Queen v. William Franklyn Smith, Case No. 9 of 2018 (1st October 2019)*.[1] Subair Williams J also ruled on applications for bail pending appeal but I shall not direct my mind to such an application as it is not before me.[2]

7. The defendant in *Smith* was convicted by a jury for two offences of unlawful carnal knowledge of a girl under the age of 14 years contrary to section 180(2) of the Criminal Code, and two offences of sexual exploitation of a young person whilst in a position of trust contrary to section 182B(1) of the Criminal Code. To assist the Court with sentencing the defendant the Court ordered an assessment under section 329E of the Criminal Code and for this purpose he was remanded into custody for 60 days so that the assessment may be carried out.[3] The prosecution indicated to the Court that they would be seeking at least 5 years imprisonment.

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1 The Appellant in *Smith* appealed his conviction to the Court of Appeal but the bail pending sentence issue which was decided by Subair Williams J was not a ground of appeal.

2 I do however comment on this in the concluding paragraph of this Ruling.

3 An assessment under section 329E of the Criminal Code is done *"to determine whether the offender constitutes a threat to the life, safety or physical or mental well-being of any other person"*. In her ruling in *Smith*, Subair Williams J addressed whether section 329E of the Criminal Code offended a person's constitutional protection from arbitrary arrest or detention which is enshrined in the Bermuda Constitution.

8. The similarities between the circumstances of this case and those of *Smith* are striking. Specifically, like the defendant in *Smith*, the Defendant in this case:

- Has been convicted of multiple serious offences of a sexual nature and which involve children.

- Is awaiting the production of a report, in particular a SIR.

- Is likely to receive an immediate custodial sentence.

9. Mr. Duncan informed the Court that the maximum sentence for the most serious of the offences for which the Defendant has been convicted is 14 years imprisonment and that the Prosecution will be seeking a lengthy immediate custodial sentence. Ms. Christopher however implores that it is not a foregone conclusion that the Defendant will receive an immediate custodial sentence. Ms. Christopher is correct and it is not for me to telegraph or predict what sentence the trial judge will impose. However, given the seriousness and number of offences for which the Defendant was convicted, as well as the unanimity of the Jury's verdicts, it is more likely than not that he will receive an immediate custodial sentence

10. Turning back to *Smith*, Ms. Christopher was the attorney of record for the defendant in *Smith* and so she is well aware of the arguments that were advanced by her and prosecuting counsel (who was not Mr. Duncan), as well as any *obiter dicta* made by Subair Williams in Court or any *ratio decidendi* reached in her written ruling. Indeed, it appears that Ms. Christopher essentially made the same or very similar arguments before me that she made before Subair Williams J. Indication of this can be found in the following paragraphs of Subair Williams J's decision:

> *"18. Ms. Christopher's bedrock submission was that bail pending sentence is 'as of right' under the Bail Act 2005 ("the Bail Act"). She referred to Schedule 1 of the Bail Act which outlines the exceptions to the general right to bail*

and submitted that none of the listed exceptions apply to a Defendant who is on bail pending sentence.

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

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

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

11. In her ruling in Smith, Subair Williams J referenced the case of R v. Chae Foggo [2017] SC (Bda) Crim (31 July 2017) which also involved an application for bail pending sentence and which Subair Williams J also rendered a decision. She made the following comments about Foggo:

"47. *In my earlier ruling in R v Chae Foggo [2017] SC (Bda) 66 Crim (31 July 2017) (to which neither Counsel in this matter referred) I considered the position on bail pending sentence and refused bail on the primary basis that an immediate custodial sentence was likely. At paragraph 32 I stated: However, the Courts have a long history of interpreting these provisions to generally exclude Defendants convicted on offences punishable by imprisonment from a general right to bail. In my view, a Defendant becomes even further removed from the prospect of bail where an immediate custodial sentence is likely.*

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

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[4] Page 5 of Smith.

> *49. It is admittedly dubious whether the reasoning behind my refusal to bail in R v Chae Foggo ought to have been left to an exercise of statutory construction. It is of greater certainty that the real source of the Court's power and continued practice of refusing bail pending sentence in a case where the Defendant is undoubtedly facing an immediate custodial sentence, is in the Court's inherent jurisdiction to import the common law into a statutory gap.*
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> *50. Of course, in exercising its inherent jurisdiction, the Court must tread carefully so not to rupture Parliament's legislative sovereignty. The import of the common law will only be proper where Parliament unintentionally left a lacuna.*
>
> *51. Did Parliament intend for convicted persons to enjoy a general right to bail where the pending sentence concerns an immediate custodial term which outweighs the period between the bail hearing and the sentence hearing? It did not."*[5]

12. Posing the question "So, why does the Bail Act appear to accord a general right of bail for an offender awaiting on pre-sentence reports?" Subair Williams J answers it in this way:

> *"57. So, why then does the Bail Act appear to accord a general right of bail for an offender waiting on pre-sentence reports? The answer is perhaps quite simple. Adjournments for presentence reports are not ordinarily appropriate for offenders who are facing an immediate custodial sentence. Section 61 compels the Court to conduct proceedings as soon 'as is practicable after an offender has been found guilty' in order to determine the appropriate sentence to be imposed. (See the judgment of the Court of Appeal in R v Morris and Morris [2017] Bda LR 128 where the trial judge was criticized for the delay which lapsed between the date of conviction and the sentence hearing. In R v Morris and Morris Simmons J ordered pre-sentence reports on the basis that it was unclear to the Court at pre-sentence stage whether an immediate custodial sentence would be appropriate).*
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> *58. The Court of Appeal has long discouraged the use of pre-sentence reports (Social Inquiry Reports in particular) in cases where it is obvious to the Court that only an immediate custodial sentence will be imposed. Generally, pre-sentence reports will be ordered by the Court in cases where a probation order or other community based sentence is in contemplation. This may be in combination with a custodial sentence or fine under section 70 of the Criminal Code. It is, therefore, unsurprising that a general right*

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[5] Page 14 of *Smith*.

to bail (as opposed to an absolute right to bail) is extended under the Bail Act to convicted persons waiting on presentence reports.

59. The Bail Act did not displace the longstanding jurisprudence of this Court where bail pending sentence is refused on the basis that an immediate custodial sentence will likely be imposed. It then follows that this common law approach must be sourced by the Court's inherent jurisdiction."[6]

13. Being guided by her above reasoning (and of course others) Subair Williams J concluded on page 22 of *Smith* that:

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

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

14. The crystallization of Subair Williams J's decision in *Smith* is that:

(a) There is a general right to bail for defendants who have been convicted of offences but that the granting of such bail is less likely where the defendant is facing an immediate custodial sentence.

I would add that this point is even more so solidified where the defendant is likely to receive a "lengthy" period of incarceration i.e. 3 years or more.

(b) Parliament did not intend for convicted persons to enjoy a general right to bail where the eventual sentence would be an immediate custodial term which would

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[6] Page 16 of *Smith*.

outweigh the interim period between the bail hearing and the eventual sentencing hearing.

(c) Because adjournments for pre-sentence reports are not ordinarily appropriate for those facing immediate custodial sentences the general right to bail is confined to persons who are awaiting reports (such as a SIR or a section 329E report) but are not facing an immediate custodial sentence.

In this regard, Subair Williams J pointed to the longstanding discouragement by the Bermuda Court of Appeal for the sentencing Court to order SIRs where it is obvious that only an immediate custodial sentence will be imposed (i.e. not a community based sentence).

(d) The BA does not displace the Court's jurisprudence and practice to refuse bail pending sentence where it is likely that an immediate custodial sentence will be imposed, and, nor does this jurisprudence and practice of the Courts "rupture Parliament's legislative sovereignty".[7]

15. It is probably not lost on anyone reading this Ruling that I have extensively quoted large swaths of Subair Williams J's decision. I consciously did so because I fully agree and adopt her reasoning and the conclusions which she reached. Particularly, her interpretation and application of section 6 and Schedule 1 of the BA when the Court is determining applications for bail pending sentence.

16. Ms. Christopher repeatedly attempted to persuade me that because I hold a co-equal jurisdiction to Subair Williams J that I could, and indeed should, go behind Subair Williams J's words in *Smith* when considering the Defendant's application for bail pending sentence. At times Ms. Christopher's submissions actually took on the appearance of an appeal being made against Subair Williams J's decision. I decline Ms. Christopher's invitation not because I may or may not be bound by Subair Williams J's decision in *Smith* but because

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[7] Paragraph 50 of *Smith*.

her decision makes eminent sense as it relates to the case-at-bar. Parliament could not have intended nor even contemplated that any person convicted of any offence, no matter the severity and/or multiplicity of the offences (even if committed by a first time offender), has a right to bail pending sentence and therefore should in the first instance be granted bail. Any such parliamentary intention would be tantamount to the legislature acting irresponsibly and dangerously, and such intention would be wholly inconsistent with the purposes of section 53 of the Criminal Code: to protect the community; reinforce community-held values by denouncing unlawful conduct; to deter offenders and others from committing offences; to separate offenders from society; and, to promote a sense of responsibility in offenders by acknowledging the harm done to victims and to the community.

17. Ms. Christopher also submitted that the words of section 6 and Schedule 1 of the BA are clear and that the Court should not look behind them. If Ms. Christopher is correct (which respectfully she is not) then this would mean that persons convicted of the most heinous of crimes such as murder, serious sexual assault, importation or possession of large quantities of drugs, or the theft of considerable sums of money should be granted bail whilst they are awaiting sentencing. This could not have been within the thought pattern of the individual and/or collective minds of members of Parliament when they enacted section 6 and Schedule 1 of the BA.

18. Ms. Christopher also sought to persuade me that the opening paragraphs of 2 to 8 of Schedule 1 of the BA, which primarily deal with circumstances under which an accused or convicted person need not be granted bail (in other words exceptions to the right to bail), is a "closed box" (her words). Therefore, Ms. Christopher submits, that since none of them aptly apply to the Defendant in this case then he should be granted bail pending sentence. Ms. Christopher's submission is flawed on at least two fronts.

19. Firstly, paragraphs 2 to 8 cannot be and should not be read in a vacuum (which is what Ms. Christopher has done). Paragraph 11 of Schedule 1 expressly states that when considering whether there are substantial grounds for believing that an accused or convicted person will

surrender to custody, commit an offence, interfere with witnesses, or obstruct the course of justice (paragraph 3 of Schedule 1) that the Court should also have regard to:

> *"(a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it);*
> *(b) the character, antecedents, associations and community ties of the defendant;*
> *(c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings;*
> *(d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted,*
>
> *as well as to any others which appear to be relevant.*" [my underline]

20. The fact that the Defendant has been convicted of serious imprisonable offences involving children and is facing a lengthy immediate custodial sentence heightens the risk that he will fail to surrender to custody, interfere with witnesses or obstruct the course of justice (in anticipation of a retrial after a successful appeal). The bottom line is that prior to conviction there is much less motivation on an accused person to not surrender to custody, or to commit further offences whilst on bail, or to interfere with witnesses, or to obstruct the course of justice. Therefore, probably because of the presumption of innocence and the rather heavy burden on the Prosecution to prove its case beyond a reasonable doubt, that substantial grounds for believing that an accused person will breach any conditions of bail may not be readily present prior to conviction. However, upon conviction the person is no longer an "accused" person who is cloaked with innocence. Immediately upon the pronouncement of guilt by the jury foreperson he/she becomes a "convicted" person who has had their day in Court by way of a fully ventilated trial in which prosecution witnesses were challenged by defence but still came up to proof. In the case at bar, the Jury reached unanimous guilty verdicts on 5 of the counts on the Indictment and a majority verdict on 2 of them. This speaks to the solid strength of the Prosecution's case.

21. Additionally, and probably most importantly, the very real possibility of being imprisoned for a significant period of time hovering over a person's head also changes the landscape from when the person was simply accused of committing a crime.

22. So whereas prior to conviction there may not have been the presence of substantial grounds for believing that an accused person will not comply with bail, even where the accused person had fully complied with bail prior to conviction, such substantial grounds are brought to the fore after there is a conviction and when there is a likelihood of an immediate custodial sentence being imposed. As Mr. Duncan correctly said, the longer the sentence the less likely an accused person will surrender to it.

23. I therefore find that by virtue of the fact that the Defendant has been convicted of very serious offences and that he is likely to serve a lengthy period of imprisonment that there are now substantial grounds for me to believe that if granted bail that he will fail to surrender to custody, interfere with witnesses and/or obstruct justice.

24. Secondly, Ms. Christopher's submissions do not sufficiently factor in the import of paragraph 6 of Schedule 1 of the BA which states that a defendant need not be granted bail if he *"is in custody in pursuance of the sentence of a court"*. It is not sustainable to advance an argument that paragraph 6 only applies to individuals who have already been sentenced and are awaiting the outcome of an appeal against conviction and/or sentence. The words "in pursuance of the sentence of a court" must also be read to capture those, like the Defendant, who are awaiting sentence. This is consistent with the earlier referenced findings of Subair Williams J in *Smith* that a person who is convicted of an offence has a general right to bail but that if he is facing an immediate custodial sentence then bail is unlikely to be granted.

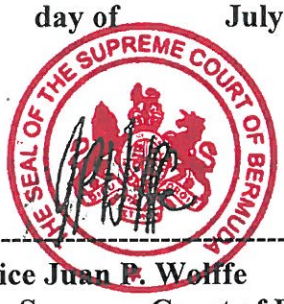
Conclusion

25. In consideration of the above paragraphs I confirm my decision of the 17th July 2023 to dismiss the Defendant's application for bail pending sentence.

26. I would be remiss if I did not make one final comment. During her submissions Ms. Christopher was at pains to tell me that this application was a "bail pending sentence"

application and not a "bail pending appeal" application. Whilst she did not outright say that the Defendant will in the future be making a bail pending appeal application the allusion that she floated was that she will likely be making one. I will simply say this to that. On pages 18 to 21 of *Smith* Subair Williams J also addressed the relevant legal principles in respect of bail pending appeal applications before going on to refuse such bail for the defendant on page 23 of her ruling. If indeed the Defendant in this case eventually decides to make an application for bail pending appeal then the words of Subair Williams J may prove to be instructive.

Dated the 24th day of July , 2023



The Hon. Mr. Justice Juan P. Wolffe
Puisne Judge of the Supreme Court of Bermuda