**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Civil Appeal No. 3 of 2017**

**BETWEEN:**

**PEDRO DERAY ELLIS**
**aka PEDRO DEROY ELLIS** **Appellant**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS** **Respondent**

**Before: The Hon. Andrew D. Burgess, The Hon. Kaye C. Goodridge, Justices of Appeal and The Hon. Margaret A. Reifer, Justice of Appeal (Acting)**

**2018: March 7**

**2019: March 7**

**Mr. Larry Smith, Ms. Shanna Goddard and Mr. Fabian Walthrus for the Appellant**
**Mr. Oliver Thomas for the Respondent**

**DECISION**

**BURGESS JA:**

**INTRODUCTION**

[1] This is an appeal against the decision of **Weekes J**, delivered on 13 February 2017, in which she denied the application of the appellant, Mr. Pedro Deray Ellis, also known as Pedro Deroy Ellis, for bail based on the submissions made by the respondent, the Director of Public Prosecutions. At the time of the hearing of the appellant's bail application before **Weekes J**, there had been no trial of the matter.

[2] In this appeal, the appellant seeks an order that the decision of **Weekes J** be set aside and that he be granted bail. The appellant also seeks an order that the respondent pay the costs of the appeal and the High Court application.

**THE BACKGROUND**

[3] On 8 May 2013, the appellant was charged with two offences which arose out of the same incident, namely, the murder of Antonio Charleston Omar Harewood and criminal damage. He was remanded to her Majesty's Prison at Dodds, St. Philip.

[4] On 4 February 2014, the appellant applied in person for bail for the first time. This application was denied.

[5] After a series of delays and adjournments, the appellant retained Mr. Larry Smith, attorney-at-law, to act as his legal counsel. On

2 December 2016, the appellant again applied for bail and filed an affidavit in support of his application.

[6] In his affidavit, the appellant deposed that he was 38 years old. He also deposed that he had previously been convicted of manslaughter after pleading guilty to that offence in 1998, that he was imprisoned on that conviction and that he was released from prison on 26 May 2006. At the time of his conviction, the appellant was 20 years old.

[7] The appellant stated that while he was incarcerated, he had acquired the skill of baking and had spent time reflecting on "the way that he was living his life". He also stated that, during this time and after his release from prison, he built strong family and community ties and became an upstanding citizen.

[8] According to the appellant, after his release, he rekindled his relationship with his girlfriend in 2007, got married to her in 2011 and became the stepfather to his wife's two children. One year later he became the father to their son of the marriage.

[9] The appellant stated that he was given a house by his father which he converted into a 4 bedroom, 2 bathroom house. The appellant also stated that he owned and operated a bakery and sports bar, called

Fixies Enterprises Bakery and Snackette, from his home and that his wife assisted him in running the business.

[10] After his release from prison in 2006 until 2013 when he was charged with murder, the appellant was never charged with any offences. The murder offence, according to the appellant, was as a result of him acting in self-defence. The appellant swore in his affidavit that the deceased attacked him with a knife and that during the struggle the deceased was fatally wounded with his, the deceased's, own knife. The appellant stated that there is evidence that he, the appellant, was also injured during the struggle.

[11] The appellant averred that his family suffered financial and emotional difficulties as a result of him being remanded while awaiting trial on this matter. He claimed that he cooperated fully with the police and that there are persons who are willing to act on his behalf as sureties. Moreover, the appellant urged the court to take the above considerations into account in assessing his application for bail.

[12] On 5 May 2015, two years after he had been charged, **Gibson CJ** gave consent for the preferment of a voluntary bill of indictment for murder against the appellant.

[13] On 14 December 2016, **Weekes J** heard the appellant's application for bail. At the hearing, the appellant was represented by Mr. Larry Smith.

[14] On 13 February 2017, **Weekes J** delivered her decision in which she denied the appellant's application for bail on the basis of the submissions of the prosecution. It is that decision which the appellant has challenged in this appeal.

**THE APPEAL**

[15] The appellant filed a notice of appeal accompanied by a certificate of urgency on 2 March 2017. The basis upon which the notice of appeal was certified as urgent was that **Weekes J's** denial of the appellant's application contravened his entitlement to bail under the **Bail Act, Cap. 122A (Cap. 122A)** and infringed his fundamental right to liberty under the **Constitution**.

[16] By letter dated 7 March 2017, the Registrar of the Supreme Court wrote to Mr. Smith advising him that the certificate of urgency should be supported by affidavit.

[17] On 8 August 2017, the appellant filed an affidavit in support of the certificate of urgency.

[18] On 1 November 2017, Mr. Smith wrote to the Deputy Registrar of the Court of Appeal, Ms. Shanna Codrington, indicating that he had filed an affidavit in support of the certificate of urgency notwithstanding that he had been unable to find the legal requirement for such an affidavit. He also inquired as to the date for the hearing of the appeal.

[19] By letter dated 15 November 2017, Ms. Codrington informed Mr. Smith that the Registrar was still awaiting the reasons for decision from **Weekes J**.

[20] On 19 January 2018, the appellant filed an amended notice of appeal and on 1 February 2018, the appellant filed a re-amended notice of appeal after obtaining leave to do so in both instances.

[21] The re-amended notice of appeal was made "pursuant to **Section 11(a)** and/or **13(3)(b)** of the Constitution of Barbados and/or **Section 52(1)** and/or **Section 54(1)(g)**, of the **Supreme Court of Judicature Act, Chapter 117A,** of the Laws of Barbados and/or under the inherent jurisdiction of the Court…"

[22] The grounds were set out in the appellant's re-amended notice of appeal as follows:

> "(a) Weekes, J erred as a matter of mixed fact and law in failing to give any or any sufficient weight to the evidence of the Appellant regarding him being a fit

candidate for bail set out in the Appellant's affidavit sworn on the 2nd day of December, 2016 in support of his application for bail filed on the 2nd day of December, 2016 particularly in the circumstance where the Respondent provided no evidence in support of its objection to bail;

(a) Weekes, J erred in law by solely relying on the oral submissions of the Respondent as her basis for denying bail and/or failed to give any or any sufficient weight to submissions of counsel for the Appellant;

(b) Weekes, J erred in law by failing to give any adequate reasons for her decision to deny the Appellant's application for bail;

(c) Weekes, J erred in law by failing to have regard and/or to give due consideration to the import of ***Sections 11(a)*** and/or ***13(3)(b) of the Constitution of Barbados*** upon the Appellant's right to bail provided by the provisions of the ***Bail Act, Chapter 122A*** of the Laws of Barbados;

(d) Weekes, J erred in law by failing to give due consideration to the provision of ***Section 4 (1) of the Bail Act, Chapter 122A*** of the Laws of Barbados; and/or

(e) Weekes, J erred in law in the exercise of her discretion pursuant to ***Sections 5(1) and/or 5(2) of the Bail Act, Chapter 122A*** of the Laws of Barbados by failing to give due consideration to the statutory exceptions and/or relevant factors to which these provisions refer which arose on the evidence of the Appellant."

## COURT'S ANALYSIS AND CONCLUSIONS

### Issues in the Appeal

[23] The grounds of appeal and the written and oral submissions of counsel on both sides in this appeal are predicated on the premise that the refusal of **Weekes J** to grant bail to the appellant was made in pursuance of the discretion which resides in her under **section 5 (1)** of **Cap. 122A**. In this regard, two principal issues have been raised in this appeal for our determination. The first is whether this Court has jurisdiction to hear appeals against bail decisions of a High Court judge ("the jurisdiction issue"). The second is, assuming that this Court has jurisdiction, whether it should interfere with the exercise by **Weekes J** of her **section 5 (1)** discretion. ("the exercise of discretion issue").

[24] A subsidiary issue is raised by the appellant as to costs.

[25] We consider these three issues seriatim hereafter.

### *THE JURISDICTION ISSUE*

[26] Much of the argument addressed to us centred on the jurisdiction issue. Of this, Mr. Smith contended vigorously that there are at least three legal sources of appellate jurisdiction in bail appeals in this Court. These are (i) under **section 11 (a)** and **section 13 (3) (b)** of the

C**onstitution**; (ii) under **section 52 (1)** and/or **section 54 (1) (g)**, of **Cap. 117A (Cap. 117A)**; and (iii) under this Court's inherent jurisdiction.

[27] We consider first Mr. Smith's argument on jurisdiction under the **Constitution**.

[28] **Section 11 (a)** of the **Constitution** provides:

> "Whereas every person in Barbados is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-
>
> (a) life, liberty and security of the person".

[29] **Section 13 (3) (b)** provides:

> "Any person who is arrested or detained -
>
> (a) ……
>
> (b) upon reasonable suspicion of his having committed or being about to commit a criminal offence,
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> and who is not released, shall be brought before a court as soon as is reasonably practicable; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings which may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular

> such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

[30] Mr. Smith's argument is that these provisions demonstrate unmistakably that bail is embraced as a fundamental human rights principle in our **Constitution**. Given this constitutional recognition of bail as a fundamental right deserving of special protection, Mr. Smith continued, this Court "ought to infer that a jurisdiction exists in dealing with the issue simply because a bail application deals with the issue of the fundamental right of the subject."

[31] In our judgment, the express provisions of the **Constitution** foreclose on any inference of jurisdiction on the basis claimed by Mr. Smith. True, **section 13 (3) (b)** of our **Constitution** preserves bail as a fundamental human rights value. However, **section 24** of the **Constitution** makes it plain that vindication of the **section 13 (3) (b)** right to bail is by way of application to the High Court. **Section 24 (1)** provides as follows:

> "Subject to the provisions of subsection (6), if any person alleges that any of the provisions of sections 12 to 23 has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully

> available, that person (or that other person) may apply to the High Court for redress."

[32] **Section 24 (1)** must be read with **section 24 (2)**. That subsection expressly vests jurisdiction in the High Court to hear and determine applications under **section (24) (1)** and to make such orders and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the individual's fundamental rights and freedoms protected by the **Constitution**.

[33] It is only where the High Court judge has made a decision on a violation of a constitutionally protected fundamental right under **section 24 (1)** of the **Constitution** that this Court can have appellate jurisdiction. This is because **section 87** of the **Constitution** vests jurisdiction in this Court to hear appeals from final decisions of the High Court made under **section 24** of the **Constitution**. We would add that **section 55** of **Cap. 117A** repeats **section 87** by providing as follows:

> "An appeal to the Court of Appeal lies as of right from any decision of the High Court that is given in exercise of the jurisdiction conferred on the High Court by section 24 of the Constitution."

It is not in the terrain of doubt, therefore, that this Court's appellate jurisdiction in respect of contravention of rights, such as bail,

protected under the **Constitution** is restricted to fundamental rights decisions of the High Court made in applications under **section 24** of the **Constitution**.

[34] Admittedly, a bail application is made in pursuit of enjoying the constitutional right protected in **section 13 (3)(b)** of the **Constitution**. However, a bail application *per se* does not pretend to be assertive of **section 13 (3) (b)** constitutional redress and is not, and we dare say cannot be, made under **section 24** of the **Constitution**. As such, a decision of a High Court judge to refuse a bail application is never made under **section 24** of the **Constitution**. The logical conclusion of the foregoing is, therefore, that it is legally impossible to invoke this Court's appellate jurisdiction pursuant to **section 87** of the **Constitution** or **section 55** of **Cap. 117A** in respect of a High Court decision to refuse a bail application.

[35] We conclude here by underlining that this Court's only jurisdiction in respect of High Court decisions involving contravention of the fundamental rights provisions in the **Constitution** is that expressly conferred under **section 87** and repeated in **section 55** of **Cap. 117A**. Accordingly, we reject Mr. Smith's argument that this Court has an

appellate jurisdiction lurking "in the contemplation of the **Constitution**".

[36] We therefore turn to Mr. Smith's submission that this Court has jurisdiction under **section 52** and/or **section 54 (1) (g)** of **Cap. 117A**.

[37] As regards this submission, we would observe that it is universally accepted that **section 52** of **Cap. 117A**, and in particular **section 52 (1)**, is the starting point in determining this Court's general jurisdiction. **Section 52 (1)** states as follows:

> "Except as otherwise provided in this or any other enactment, the Court of Appeal has jurisdiction to hear and determine, in accordance with the rules of court, appeals from any judgment or order of the High Court or a judge thereof."

We feel bound to digress here to note that s**ection 54,** including **section 54 (1) (g)** which was specifically invoked by the appellant, addresses the need for leave to appeal once jurisdiction is established under **section 52 (1)**.

[38] Returning to **section 52 (1)**, that subsection, on its express words, confers on this Court a general jurisdiction to "hear and determine…appeals from any judgment or order of the High Court or a judge thereof." However, this general jurisdiction is circumscribed by the proviso: "Except as otherwise provided in this or any other

enactment". That proviso means that, in determining this Court's jurisdiction in any particular matter, it is necessary to ascertain whether **Cap. 117A** or any other enactment expressly, or by necessary implication, restricts the **section 52 (1)** general appellate jurisdiction.

[39] So, are there any provisions in **Cap. 117A** or any other enactment which restrict appeals from a judge's bail decision?

[40] One argument before us was that **section 52 (2) (c)** of **Cap. 117A** along with **section 56** of that Act operate indirectly to limit the general jurisdiction of this Court to hear appeals in respect of a High Court bail decision. The argument ran that **section 52 (2) (c)** limits the general jurisdiction by providing, in so far as is relevant here, that this Court may exercise "such other jurisdiction as is conferred by this Act or by the *Criminal Appeal Act*" (**Cap. 113A**). The argument continued that a similar limitation is to be found in **section 56** of **Cap. 117A** which expressly provides that "the *Criminal Appeal Act* applies for the purposes of appeals to the Court of Appeal against conviction before or sentences passed by, the High Court in the exercise of its criminal jurisdiction".

[41] It was suggested in this argument that a necessary implication of **section 52 (2) (c)** and **section 56** is that criminal appeals to this Court

are limited to appeals against "conviction and sentence". Since bail is inextricably associated with the commission or suspected commission of some criminal offence, a bail appeal, it was contended, *ipso jure* falls under the operational ambit of **Cap. 113A** and consequently is only appealable if it concerns a "conviction" or a "sentence". The argument concludes that, since a bail decision by a High Court judge is demonstrably not a "conviction" or a "sentence" it is not appealable.

[42] We agree with Mr. Smith that that argument must fail for two reasons. The first is that **section 52 (2) (c)** of **Cap. 117A** on its express words is not intended to limit this Court's general jurisdiction under **section 52 (1)** of that Act. On the contrary, **section 52 (2) (c)** expands this Court's general jurisdiction to include "such other jurisdiction as is conferred by this Act or by the *Criminal Appeal Act*".

[43] The second reason is that, even though bail is by its nature and purpose collateral to the commission, or suspicion of commission, of a criminal offence, it does not involve any criminal prosecution *per se* and so does not fall within the ambit of **Cap. 113A**. The right to a reasonable bail is an ancient right which was recognised in *Blackstone's Commentaries on the Laws of England, Book the Fourth,*

*ch. 22, Of Commitment and Bail*. It was introduced into our law as a result of the operation of colonial constitutional law principles but today the fundamental touchstone is **section 13(3)(b)** of the **Constitution** and **Cap. 122A** legislated in furtherance of that provision. These legal sources make it plain that the right to bail is a right of a constitutional nature which is collateral to a criminal offence but which is separate and distinct from that criminal offence.

[44] It is clear then that a decision on a bail application does not fall within the ambit of operation of **Cap. 113A**. So that, to the extent that that Act limits **section 52 (1)** of **Cap. 117A** to "convictions" and "sentences", it is irrelevant to High Court decisions on bail applications.

[45] Counsel for the respondent, Mr. Thomas sought to deploy another argument against decisions on bail falling within the general appellate jurisdiction in **section 52 (1)**. The bane of this argument, namely, that **Cap. 122A** ousted the **section 52 (1)** general appellate jurisdiction, was alleged to be based on a proper construction of **Cap. 122A**. Mr. Thomas' essential argument was that **section 9** of **Cap. 122A** makes express provision for "appeals" to the High Court from a bail refusal by a magistrate but makes no similar provision for appeals

from the High Court to this Court. This absence of any similar provision, Mr. Thomas' argument continues, is a clear statutory indication of Parliament's intention that there is to be no appeal to this Court in respect of bail refusals by a High Court judge made in pursuance of that judge's discretion in **section 5** of **Cap. 122A**.

[46] We find this argument unpersuasive.

[47] In the first place, **section 9** of **Cap. 122A** does not give any right of appeal from a magistrate's decision to the High Court. It gives a right to "apply" to the High Court for bail in specified circumstances. The particular wording of the section is as follows:

> "9. (1) Where a magistrate withholds bail from a defendant who is not represented by an attorney-at-law, the magistrate shall,
> (a) if he is committing the defendant for trial to the High Court;
> (b) if he issues a certificate under subsection (2); or
> (c) in any other case, inform him that he may apply to the High Court to be granted bail."

[48] Secondly, even assuming *arguendo* that **section 9** could be interpreted as conferring appellate jurisdiction on the High Court, Mr. Thomas' argument would still lack persuasion. After all, the High Court has no general appellate jurisdiction. Thus, such a jurisdiction would have to be specifically conferred where it was intended that it should so have. On the other hand, this Court has general appellate jurisdiction for

which makes it otiose to confer such jurisdiction on it. The absence of a provision conferring appellate jurisdiction in **Cap. 122A** therefore cannot be regarded as any statutory indication that this Court does not have jurisdiction in appeals against bail decisions.

[49] In light of the foregoing, this Court has jurisdiction to hear appeals against a bail application decision of a High Court judge under its **section 52 (1)** general jurisdiction. There is no doubt that such a "decision" is a "decision" as defined by **section 2** of **Cap. 117A** and therefore is a "decision" within the contemplation of **section 52 (1)** of **Cap. 117A**. Accordingly, we agree with Mr. Smith that this Court has jurisdiction to hear the appeal from **Weekes J's** decision to refuse bail to the appellant. This conclusion makes it unnecessary to consider an inherent appellate jurisdiction argument especially in light of this Court's decision in **Oscar Maloney v Commissioner of Police Magisterial Application No. 6 of 2014** in which **Goodridge JA** stated that any inherent jurisdiction of this Court only arises when jurisdiction is established by express statutory authority.

***THE EXERCISE OF DISCRETION ISSUE***

[50] We now turn to our consideration of the second issue, namely, whether this Court should interfere with **Weekes J**'s exercise of

discretion in refusing to grant bail to the appellant. In approaching this question, we remind ourselves of the oft repeated principle which must guide this Court, as an appellate court, in interfering with the discretion exercised by a trial judge. It is that this Court should interfere only if it finds that the judge acted on a misunderstanding or misapplication of either the law or the evidence in the exercise of his or her discretion.

[51] So, did **Weekes J** act on a misunderstanding or misapplication of either the law or the evidence in refusing the bail application of the appellant?

[52] **Section 4 (1)** of **Cap. 122A** enacts that: "Subject to this Act, a defendant shall be entitled to bail." As we have already intimated, the provision in **section 4 (1)** echoes the constitutional entitlement to bail contained in **section 13 (3) (b)** of the **Constitution**. That entitlement is subject, pursuant to **section 11** of the **Constitution**, to "respect for the rights and freedoms of others and for the public interest". It is also subject to the stipulation in **section 13 (3) (b)** of the **Constitution** itself to "such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial".

Inspired by these constitutional provisions, **Cap. 122A** contains

conditions designed to protect the public interest and to ensure attendance at trial. In our judgment, this explains why **section 4 (1)** of **Cap. 122A**, on its express wording, subjects the entitlement to bail to other provisions of that Act.

[53] **Section 5** is a provision to which the **section 4 (1)** entitlement to bail is subject. **Section 5** provides, in so far as is relevant to this case, as follows:

> "(1) Where a defendant is accused or convicted of an offence that is punishable with imprisonment, the court may refuse an application for bail if
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> (a) 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
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> (i) fail to surrender to custody,
>
> (ii) commit an offence, or
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> (iii) interfere with witnesses;
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> (b) the court is satisfied that the defendant should be kept in custody
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> (a) for his own protection;
>
> (b) for the protection of the community…
>
> (2) In the exercise of its discretion under subsection (1), the court shall have regard to any relevant factor including the following:

> (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;
> (d) the strength of the evidence of his having committed the offence or having defaulted, except where the defendant's case is adjourned for inquiries or a report; and …"

[54] This section gives the court a discretion to refuse an application for bail of a defendant who is accused or convicted of an offence punishable by imprisonment. This discretion is not at large but is strictly circumscribed by the conditions set out in that section. We consider it important to reiterate that this circumscription is reflective of the commanding heights bail occupies in our country's unswerving commitment to fundamental human rights principles and to the rule of law.

[55] Given the nature and purpose of bail, any exercise by a judge of his or her discretion to refuse bail must be based on a diligent examination of the evidence before him or her in light of the conditions set out in **section 5**. It is only where the judge, after such an examination, finds that one or more of the conditions set out in **section 5** is, or are,

satisfied that he or she may refuse a bail application. In any case, the judge must give his or her reasons to the defendant for refusing the bail application.

[56] In the case before us, the record does not show that **Weekes J** based her refusal to admit the appellant to bail on a scrupulous examination of the evidence before her in light of the conditions in **section 5**. The judge claimed to base her decision to refuse the bail application on the submissions of counsel for the prosecution. That was patently not enough in law.

[57] Given the foregoing, we are satisfied that the judge's exercise of discretion to refuse bail to the appellant was based on an error or misunderstanding of law. Accordingly, this Court must set aside the exercise of **Weekes J's** discretion and exercise an independent discretion of its own.

***RESOLVING THE INSTANT CASE***

[58] Based on the facts of this case, we are of the view that the appellant could only be denied bail if the conditions stipulated in **section 5 (1) (a)** or **5 (1) (b)** were satisfied. So, can the appellant be refused bail under either of these subsections?

[59] To begin, **section 5 (1) (a)**. Here, we can find no evidence to support a conclusion that the appellant would fail to surrender to custody, commit an offence, or interfere with witnesses. This being the case, the appellant cannot be denied bail on the conditions in **section 5 (1) (a)**. If, therefore, he is to be denied bail it must be under **section 5 (1) (b)**.

[60] And so, **section 5 (1) (b)**. In our judgment, as there is no evidence in this case that the appellant needs to be kept in custody for his own protection pursuant to **section 5 (1) (b) (a)**, consideration of whether the appellant should be denied bail can only proceed under **section 5 (1) (b) (b)**. As seen in **para [53]** above, this subsection allows denial of bail "for the protection of the community". In exercising our discretion under this subsection, however, **section 5 (2)** mandates that regard must be had to the factors listed in that subsection. Four of the five factors listed are relevant to this case.

[61] The first such factor is "the nature and seriousness of the offence or default, and the probable method of dealing with the defendant for it". As regards this, the evidence is that the appellant is charged with the offence of murder. This is a most serious crime, which carries a

penalty of death. However, we take note that the appellant intends to advance the complete defence of self-defence.

[62] The second factor listed in **section 5 (2)** is "the character, antecedents, associations and community ties of the defendant". The evidence here is that the appellant was married for approximately 11 years and is the father of three children. He has a fixed place of abode. The appellant appears to have strong ties to his community and also owns a business, which is attached to his home. He has a previous conviction for manslaughter. He pleaded guilty to that offence and served a sentence of 8 years in prison.

[63] The third factor is "the defendant's record as respects the fulfilment of his obligations under previous grants of bail". Here, there is no evidence that the appellant was ever granted bail and so there is no basis for taking this factor into account one way or the other.

[64] The fourth factor is "the strength of the evidence of his having committed the offence". The evidence is that the appellant admits to the killing. This is the strongest evidence that can be made against him. However, as we earlier stated, the appellant contends that he has an absolute defence for committing this offence. The strength of the evidence supporting this defence is unknown to this Court.

[65] Having due regard to the relevant factors listed in **section 5 (2)** and the evidence as we have just reviewed it, we are of the view that the appellant should be refused bail in this case. The offence for which the appellant is charged is very serious and the penalty for that offence severe. But, in our judgment, **section 5 (2)** does not intend this consideration to be conclusive. It requires more. In our view, the correct approach to the factors in **section 5 (2)** is fully captured in a statement of the Privy Council in **Hurnam v The State 2005 UKPC 49** at **para 15.** It was stated there that:

> "The seriousness of the offence and the severity of the penalty likely to be imposed on conviction may well…provide grounds for refusing bail, but they do not do so of themselves, without more: they are factors relevant to the judgment whether, in all the circumstances, it is necessary to deprive the applicant of his liberty."

[66] What is the something "more", in the context of "the protection of the community", which has led us to our conclusion? It is also the strength of the evidence that the appellant has committed the killing: he has admitted to it, albeit he claims to have done so in self defence; and it is that the appellant has a previous conviction for manslaughter.

[67] In our judgment, these considerations weigh very heavily in favour of refusing bail to the appellant. It must be that the public has every

right to expect to be protected from persons who repeat offences involving the taking of human life. Of course, the appellant has a right to remain at liberty and not to be deprived of his liberty, unless or until he is convicted of the present crime with which he is charged. But, he admitted to manslaughter in 1998 and has admitted to the killing in the present case.

[68] In light of these facts, we would exercise the **section 5** discretion and refuse the appellant's application for bail.

**Costs**

[69] The appellant has claimed costs in this appeal and in the court below. As a general rule, this Court does not award costs in cases like the one before us. This appeal has raised for the first time before this Court an issue of undeniable public interest, namely, the right to appeal a decision of a High Court judge to refuse a bail application under **Cap. 122A**. We have been struck by the industry and courage of counsel for the appellant in pursuing this appeal, which has presented this Court with the opportunity to clarify the law in respect of bail during a time of growing public concern and discussion.

[70] In this appeal, although counsel for the appellant was successful in his arguments that **Weekes J** failed to give any adequate reasons for her

decision to deny the appellant's application for bail, he was however unsuccessful in persuading this Court that it should exercise its discretion to grant bail to the appellant.

[71] In the circumstances, this Court awards the sum of $5,000.00 to the appellant.

**Disposal**

[72] It is therefore ordered:

1. The decision of the High Court is set aside.
2. The application for bail is refused.
3. The respondent shall pay to the appellant costs in the sum of $5,000.00 on or before 28th June 2019.

Justice of Appeal

Justice of Appeal Justice of Appeal (Ag.)