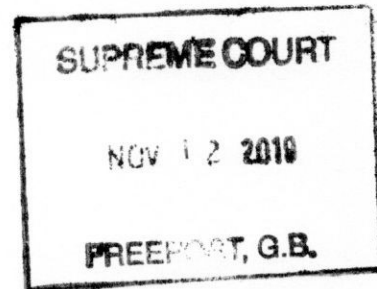


**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Criminal Division**

2016/CRI/bal/FP/00143



BETWEEN

MARCO SMITH

Applicant

AND

THE ATTORNEY GENERAL

Respondent

DECISION

Before: The Honourable Mrs. Justice Petra Hanna-Adderley

Appearances: Mr. Wendell A. Smith for the Applicant
Mrs. Erica Kemp for the Respondent

Background

- 1) The Applicant is a Bahamian male citizen. He is 32 years old having been born on December 12, 1986. He relies on his Affidavit filed herein on August 13, 2019 as follows.

Statement of Facts

- 2) The Applicant is charged with one count of Attempted Murder.
- 3) The Applicant was remanded to the Bahamas Department of Corrections on May 28, 2019.
- 4) The Applicant asserts his innocence.
- 5) That at the time of his arrest he was a self-employed carpenter.
- 6) That he is domiciled in the Bahamas having lived in The Bahamas all of his life. He has strong ties to the community, namely, his mother and several family members.
- 7) The Applicant has never been convicted of any similar offence.
- 8) The Applicant pointed out what he sees as the inherent weakness of the Crown's case. That based on the facts of this case and medical evidence the charge should have been

Causing Grievous Harm and not Attempted Murder. That no credible forensic evidence has been adduced or will be adduced at trial.

- 9) That Applicant stated that the issue of bail is to ensure his attendance on any adjourned date in this matter. That the Attorney General has not produced any evidence to satisfy the Court that he would commit an offence whilst on bail, that he would interfere with any of the witnesses in this matter, that he will abscond or that it is in the interest of his own safety that he be remanded.
- 10) That his trial date is likely to be in 2022 and would constitute an unreasonable and inordinate delay in that that date would make the time which would have elapsed from the time of his arrest to the date fixed for trial 3 years. He asked the Court to admit him to bail with reasonable conditions.

Submissions

Applicant

- 11) Mr. Wendell Smith Counsel for the Applicant submitted that the Applicant and the Virtual Complainant started to argue on the date in question. That the Applicant called the Virtual Complainant a "sissy" and the Virtual Complainant threatened and provoked the Applicant reminding him that he had almost killed him 3 years ago. That the Applicant left and returned with his brother and a knife. His brother had 2 cutlasses. The Virtual Complainant states that the Applicant and his brother chased him and used the weapons to inflict wounds about his body.
- 12) Mr. Smith submitted that Mr. Oquendo Burrows Rolle states that both the Virtual Complainant and the Applicant had been consuming a lot of alcohol and other persons on the scene removed the Applicant from the scene. While he and the Virtual Complainant were walking away they encountered the Applicant who pulled out a knife and attempted to stab the Virtual Complainant.
- 13) Mr. Smith submitted that Mr. Charles Glen saw the Applicant and the Virtual Complainant drinking several alcoholic drinks. He heard the Virtual Complainant tell the Applicant "**Bui you forget I juck you up with that big butcher knife and had you in the hospital for 6 weeks, you is a cunny and you aint gat no balls , my balls bigger that your balls.**" That a fight almost ensued but the Applicant was led away by his cousin. A few minutes later the Virtual Complainant walked in the direction of the Applicant where the incident took place.

14) Mr. Smith submitted that the proper test for whether the Applicant should get bail is whether it is probable that he will appear to take his trial if put on bail. Further whether the facility of having reporting conditions, and/or a monitoring device are sufficient safeguards to prevent any attempt at absconding.

15) Mr. Smith further submitted that in his Record of Interview the Applicant admitted to drinking several alcoholic beverages with the Virtual Complainant and to bringing him something to eat. That the Virtual Complainant started carrying on and that he said "**I should kill you when I juck you up before.**" That he retrieved a knife from home due to the comments of the Virtual Complainant, however he did not go looking for him. That the Virtual Complainant came looking for him and that after an exchange of words the Applicant drew a knife and the Virtual Complainant ran. That he encouraged the Virtual Complaint to leave the area when he fell and as he tried to kick the Virtual Complainant he stabbed him in the foot. That the Applicant used the knife and cutlass to defend himself and to get away. That the Police made a note of his injury which is consistent with his Record of Interview.

16) Mr. Smith referred the Court to the Applicant's constitutional rights to liberty as enunciated in the case of **Hurnam v The State (2005) UKPC 49** where Lord Bingham of Cornhill stated inter alia; "**The interest of the individual is of course to remain at liberty, unless or until he is convicted of a crime sufficiently serious to justify depriving him of his liberty. Any loss of liberty before that time, particularly if he is acquitted or never tried, will inevitably prejudice him and, in many cases, his livelihood and family. But the community has a countervailing interest, in seeking to ensure that the course of justice is not thwarted by the flight of the suspect or defendant or perverted by his interference with witnesses or evidence, and that he does not take advantage of the inevitable delay before trial to commit further offences**".

A blanket statement by the Crown that the Applicant is likely to commit an offence if put on bail is not enough. The onus is on Crown to satisfy the Court by way of information that the Applicant will interfere with witnesses. There are multiple conditions that the Court can impose so that the Applicant does not come into contact with the Virtual Complainant.

17) Mr. Smith submitted that the Applicant is presumed innocent of the charge and he referred

the Court to Article 20 (2) (a) of the Constitution of The Bahamas which provides that the Applicant is presumed innocent until proven guilty.

- 18) That his travel documents can be confiscated and that the Applicant does not have the means to abscond.
- 19) That the Applicant has previous convictions but that they are not of a violent nature. There is no basis for believing that the Applicant will commit further offences if released on Bail. He has not shown a propensity towards committing violence.
- 20) Mr. Smith referred the Court to the case of **A. G. v Bradley Ferguson** where Osadebay JA said page 61 of the Judgment: **"It seems to me that the learned judge erred in relying on his assessment of the probative value of the evidence against the respondent to grant him bail. That is for the jury at the trial. As stated by Coleridge J. in Barronet's case earlier—the defendant is not detained because of his guilt but because there are sufficient probable grounds for the charge against him, so as to make it proper that he should be tried and because the detention is necessary to ensure his appearance at trial."** Mr. Smith argued that this will come down to who the jury will believe considering the issues of self-defence and provocation. This is not the usual case of for example retaliation for drugs. The Applicant is not a violent person. A VBI has not been served on him yet. There are systemic issues. The trial could be in 2021 or 2022. To be on remand for such a long period of time will prejudice the Applicant's livelihood.
- 21) That the Applicant has taken some responsibility for the incident and he intends to come to Court to defend the charge.

Respondent

22) Mrs. Erica Kemp, Counsel for the Respondent submits that the Applicant should not be granted bail for the following reasons:

- (1) The Respondent relies on the Affidavit of WCpl 2700 Miriam McDonald filed herein on August 15, 2019 where she states, in part, that the Virtual Complainant Renaldo Fulford, and the Applicant and were drinking alcohol together when an argument between the Virtual Complainant and the Applicant ensued. The Applicant left the area and returned with a knife. The Virtual Complainant tried to run but the Applicant stabbed him about the body. The Virtual Complainant received injuries to the body from the stabbing. That

the incident was witnessed by Mr. Oquendo Burrows Rolle and Mr. Charles Glen who gave the Police Statements. The Applicant refused to participate in an identification parade. He admits to having had an argument with the Virtual Complainant and having returned to where the Virtual Complainant was and to carrying a knife and a cutlass. The Virtual Complainant stabbed him in the foot.

(2) Officer McDonald stated that the Applicant had antecedents, namely, Disorderly behavior (2009); 2 counts of shop-breaking (2014) and one count of sacrilege (2014).

(3) The Medical Report states that the Virtual Complainant suffered multiple wounds to the right forearm, right hand, left hand, left flank (just below the left ribs) and a fracture of the right ulna. That these wounds were serious but not life threatening.

23) Mrs. Kemp submitted that the evidence is strong against the Applicant. Mr. Burrows Rolle, who was at the scene, saw the Applicant with a "flip knife" which was used to stab the Virtual Complainant who was left with injuries that were deemed serious. In his Record of Interview the Applicant states that he was hurt by the comments that the Virtual Complainant made to him. That he walked home and got his knife and cutlass and came back to scene. That speaks to his intention. The Applicant said "I was mad. Then I draw out my" He actually ran after the Virtual Complainant. With respect to the issue of self-defence, the Virtual Complainant was running away.

24) Mrs. Kemp argued that based on the seriousness of the charge, the nature of the evidence, the account of the eye witnesses, the clear and cogent evidence of the Witnesses, the Applicant will interfere with the witnesses. What the Co-Accused says is not evidence. Mr. Jones's evidence must stand on its own. Mr. Smith may abscond. Going to another county is absconding. She further submitted that a person who goes to retrieve a knife speaks to violence. He has previous convictions. The Court would want to protect the community from persons like the Applicant. The nature of the charge and the evidence is strong. He poses a threat to witnesses. He knows them and he may interfere with them.

25) There is no unreasonable delay in this matter.

Analysis and conclusions

The Law

26) The onus is upon the Crown to satisfy the Court that the applicant ought not to be granted bail and that the standard is on a balance of probabilities.

27) Articles 19(3) and 20(1) and (2) of the Constitution of the Bahamas guarantee the presumption of innocence and the general right to liberty to the individual.

28) Section 4, Part A of the Bail (Amendment) Act 2011:

"In considering whether to grant bail to a defendant, the court shall have regard to the following factors—

(a) whether there are substantial grounds for believing that the defendant, if released on bail, would-

(i) fail to surrender to custody or appear at his trial;

(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 any other person;

(b) whether the defendant should be kept in custody for his own protection or, where he is a child or young person, for his own welfare;

(c) whether he is in custody in pursuance of the sentence of a Court or any authority acting under the Defence Act;

(d) whether there is sufficient information for the purpose of taking the decisions required by this Part or otherwise by this Act;

(e) whether having been released on bail in or in connection with the proceedings for the offence, he is arrested pursuant to section 12;

(f) whether having been released on bail previously, he is charged subsequently either with an offence similar to that in respect of which he was so released or with an offence which is punishable by a term of imprisonment exceeding one year;

(g) the nature and seriousness of the offence and the nature and strength of the evidence against the defendant."

29) The Court has to consider the character and antecedents of an Applicant. The Applicant has antecedents of a non-violent nature and no matters pending.

30) The presumption of innocence is enshrined in the Constitution of the Bahamas. A bail application is essentially an assessment between the competing interests of the Applicant and the community. The facts and circumstances of each case is different and needs an individual assessment.


31) In considering all the circumstances relevant to this hearing I find that the Respondent has satisfied me that this Applicant ought not to be granted bail pending his trial for the following reasons:

- (i) Attempted Murder is a serious offence but one for which bail can be but is rarely granted.
- (ii) It is clear from this evidence that the Applicant was the aggressor in the incident. The words uttered by the Virtual Complainant were provocative but after they were uttered the Applicant left the place where the Virtual Complainant was, went home to retrieve a knife and the assistance of his brother, and between them armed with 2 cutlasses, returned to the scene and launched an attack on the Virtual Complainant. The Virtual Complainant stated that the Applicant stabbed him the back with the knife and this is borne out by the medical report. At the point when the Virtual Complainant stabbed the Applicant in his foot the Virtual Complainant was on the ground defending himself. In his Record of Interview the Applicant states that he stabbed the Virtual Complainant with the knife and that he hit him several times with the cutlass.
- (iii) While evidence must be vetted at trial and not in a bail application the Court should satisfy itself that the Police had probable cause to charge the Applicant. I am satisfied that the Police had such probable cause. Mr. Burrows Rolle stated that the Applicant kept trying to "juck" the Virtual Complainant with the knife and that he did "stab him several times" in his back while the Co-accused was "chapping him with a cutlass".
- (iv) Because of the nature and seriousness of the offence and the cogency of the evidence the Applicant will know that if he is convicted he is likely to receive a long sentence and he may be tempted to abscond, but there is no evidence before the Court to suggest that he might abscond. Nor is there any evidence before the Court that he will interfere with the witness. The fact that he knows the Virtual Complainant and the other witnesses is not sufficient.
- (v) There has been no unreasonable delay thus far.
- (vi) There is no evidence before the Court that there is a real likelihood that he will commit an offence if put on bail again.
- (vii) It does not appear that the Applicant should be remanded in custody for his own protection.

Disposition

32) In weighing all of the competing considerations of the presumption of innocence with the need to protect the public order and public safety, the Court is of the view that in the circumstances presently existing the need for public order and public safety is of the highest importance. The charge is serious in nature and the prima facie evidence is strong. Given the nature of the offence and that the description of the vicious attack on the Virtual Complainant by the Applicant and another speak to a wanton disregard for human life, I am compelled to conclude that the safety of the public dictates that Bail be and is refused at this time.

This: 8th day of November, 2019


Petra M. Hanna-Adderley
Justice