**COMMONWEALTH OF THE BAHAMAS** **CRI/BAIL/FR/00139/2016**

**THE SUPREME COURT**

**Criminal Side**

**BETWEEN**

**DOYLE A. MACKEY**

**Applicant**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**Respondent**

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| **Appearances:** | **Mr. Carlson Shurland on behalf of the Applicant** |
| | **Mrs. Erica Kemp on behalf of the DPP** |
| **Before:** | **The Honourable Justice Mr. Andrew Forbes** |
| **Hearing Date:** | **2nd September, 2021** |

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## DECISION

1. The Applicant filed a Summons and Affidavit in Support on the 9th August 2021. The Respondent filed the Affidavit of Officer Anastasia Rolle on the 1st September, 2021 opposing the grant of bail. The Court heard legal arguments and indicated it would provide a written decision and does so now.

2. The Applicant was convicted in a trial which occurred on the 9th May 2019 before Madam Senior Justice Gray Evans on three (3) counts of Attempted Murder and was sentenced to thirty-five (35) years on each count to run concurrently on the 6th November 2019. The Applicant appealed both the

conviction and sentence and the Court of Appeal ruled that the conviction and sentence were quashed and ordered a new trial. The Respondent's case which was outlined before the Supreme Court was that sometime around the 2nd November, 2016 the Applicant had travelled from Nassau to Freeport, Grand Bahama to aid other individuals with accessing dangerous drugs. That at some point on the 3rd November, 2016 the Applicant was alleged to have been involved in a shooting in which two (2) individuals were killed and another two (2) individuals were shot at and one (1) was struck to the face. The Applicant was apprehended at the airport and later interviewed and admitted that he was at the scene but indicated that he was shot at and returned fire, but denied the killing of the two (2) individuals. The jury did not return a verdict on the Murder charges but convicted the Applicant of the Attempted Murder charges.

*3.* The Applicant in his Affidavit avers that he was previously convicted of possession of an unlicensed firearm and ammunition in 1992 and that he is a fit and proper candidate for bail. On behalf of the Respondent, Officer Rolle in his Affidavit avers that the Applicant was charged with two (2) counts of Murder and three (3) counts of Attempted Murder and was convicted of the three (3) counts of Attempted Murder as the jury rendered a non-verdict on the two (2) counts of murder. That the Applicant was sentenced to thirty-five (35) years and that the Court of Appeal quashed the conviction and sentence and ordered a retrial, which the DPP has directed be reheard before March 2022. Further that the Applicant is charged with serious offenses and the release of the Applicant would be detrimental to the protection and safety of the pubic which is paramount. Officer Rolle further avers to the Applicant's antecedents which were exhibited to his Affidavit and states that there has been no unreasonable delay. The Respondent relied upon the Court of Appeal decision in **Steffon Davis v. Director of Public Prosecution**[1] which involved a case where a defendant was charged with Murder and two (2) counts of Attempted Murder and was arraigned before the Supreme Court. He applied for bail and was denied. He then appealed that decision and the Court of Appeal overruled the decision of the Supreme Court and directed that the defendant be granted bail. One of the arguments offered in the Supreme Court by the

[1] SCCApp.108 of 2020

Prosecution which found favor was that the defendant was a danger to the public. As a reason for denying bail the Judge accepted the Prosecution's position and advanced that rationale in making the decision to deny bail. However the Court of Appeal noted at paragraph 27 of its decision that :

***"One of the reasons the Judge gave for the refusal of bail to the appellant was that it was in the public's interest; and that: "The release of the applicant on bail would in my view be detrimental to the protection and safety of the public which is paramount". The appellant argued that there was nothing before the Judge to even suggest a basis for this conclusion. I agree. The respondent was obligated to provide some evidence to support a finding that the release of the appellant on bail would somehow result in possible breaches of the peace. In the absence of such evidence, the Judge could not properly find that to be the case."***[2]

4. As in the Davis case above, the Respondent has not provided any evidence as to their assertions that the Applicant would be a danger to the public. The Court of Appeal in **Jevon Seymour v. Director of Public Prosecutions**[3] cited at paragraph 63 JA, John (writing for a differently constituted Board) the decision in **Jonathan Armbrister v. The Attorney General**[4] whereby he stated:

***"17. It must however, be borne in mind that the onus is upon the Crown to satisfy the Court that the person ought not to be granted bail. In acknowledging that the strict rules of evidence are inherently inappropriate in deciding the issue whether bail should be refused, we sound the warning that a naked statement from the Prosecutor that "the witnesses are known to the appellant and so he is likely to interfere with them" without more, is unfair to the accused person and cannot stand alone."***[5]

5. The Respondent in support exhibited the antecedents of the Applicant for the charges of Possession of an Unlicensed Firearm and Possession of Ammunition

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[2] supra
[3] SCCrApp. No 115 of 2019
[4] SCCrApp. No. 145 of 2011
[5] supra

in which the Applicant was convicted on the 2nd November, 1992. The sentence for which was a fine of two thousand dollars ($2,000.00) or six (6) months custodial sentence referencing the firearm charge and was cautioned referencing the ammunition charge. The Court notes that these are serious offences. Given that the current charges also involve the use of a firearm and that there has been a substantial number of violent offences occurring with the use of firearms. The Court notes however that there has been no additional offences committed by the Applicant between 1992 and 2016, some twenty four (24) years. Further the Respondent has not indicated that there are any other matters pending against the Applicant.

6. The Applicant was arrested in 2016 and remained in custody from 2016 to his trial in 2019 where he was convicted and only in July 2021 was the conviction and sentence quashed, however the Applicant remains in custody at this time. The Respondent argues that there is no unreasonable delay as the Applicant was only in custody for two years and 4 months after his conviction in May 2019. However, there is a failure to account for the Applicant's pre-trial detention which occurred in November 2016 and he remained in custody until his trial in May 2019, totaling three years. Counsel for the Applicant also submits that the Applicant cannot receive a fair trial within a reasonable time. He cites the Supreme Court of the United States decision of **Barker v. Wingo**.[6] However, I find that his argument appears to be in bad faith as the Applicant was tried and convicted. The proposed trial is scheduled to occur in 2022. Counsel for the Applicant suggests that proposed trial date is impractical given that other matters are pending or unfair as other matters will likely be displaced should this matter move ahead of those other matters.

7. Firstly, while the Court appreciates Counsel for the Applicant's concern regarding the Court's diary, it is important to note that the Court is aware of its schedule and sets dates accordingly. Secondly matters ordered for retrial by the Court of Appeal always require urgency and so it is conceivable that the trial could occur in March 2022.

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[6] (1972) 407 U.S. 514

8. Lastly, the Court notes that the directions of the DPP was certainly an internal one and again not an attempt to dictate the Court's calendar.

9. The Court also notes that the Respondent has not made the argument that the Applicant would fail to attend for his trial and when questioned on this omission the Counsel for the Respondent acknowledged that they were not making that argument but solely that the Applicant would be "detrimental to the protection and safety of the public which is paramount."[7] The Court of Appeal has in many cases cited the principles to be applied in bail applications with and one of the most recent being, **Dennis Mather v. Director of Public Prosecutions**[8] where the President of Court of Appeal, Justice Barnett at paragraphs 14 to 19 highlights the principles when considering bail. These principles are:

***"Before entering into the grounds of appeal it may be helpful to say a few words about bail in general. Lord Bingham of Cornhill, opened his judgment in Hurnam v The State (Mauritius) [2005] UKPC 49 with the following observation: "1. In Mauritius, as elsewhere, the courts are routinely called upon to consider whether an unconvicted suspect or defendant should be released on bail, subject to conditions, pending his trial. Such decisions very often raise questions of importance both to the individual suspect or defendant and to the community as a whole. 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 his 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. In this appeal the Board considers the principles which should guide the courts of Mauritius in exercising their discretion to grant or withhold bail. He goes on at paragraph 4 to speak about "the tension which may exist between the***

[7] Affidavit of Officer Anastasia Rolle paragraph 9
[8] SCCrApp. No. 96 of 2020

*rights of the individual, viewed in isolation, and the wider interests of the community as a whole". 8 Allen, P, in Richard Hepburn and the Attorney General SCCr. App. No 276 of 2014, echoed Lord Bingham's "tension" imagery at paragraph 5. The main consideration for a court in a bail application is whether the applicant would appear for his trial. In Attorney General v. Bradley Ferguson, et al SCCrApp. No.'s 57, 106, 108, 116 of 2008, Osadebay, JA observed as follows: "As stated by Coleridge J in Barronet's case cited earlier the defendant is not detained in custody 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." In Jonathan Armbrister v The Attorney General SCCrApp. No.145 of 2011, John, JA said as follows: "12. It has been established for centuries in England that the proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial, and that bail is not to be withheld merely as punishment. The courts have also evolved, over the years, a number of considerations to be taken into account in making the decision, such as the nature of the charge and of the evidence available in support thereof, the likely sanction in case of conviction, the accused's record, if any and the likelihood of interference with witnesses." The seriousness of the offence with which the applicant is charged is not of itself a ground for the refusal of bail. It is but a factor to be taken into consideration along with other factors that may arise in a particular application. Hall, J in The Commissioner of Police v Beneby [1995] BHS J. No. 17 stated: "20. ... I am surprised that Mrs. Christie objected to bail before the Magistrate on the basic ground that the offence of which the accused are charged is "serious". That never was and is not now, without more, sufficient reason for the denial of bail notwithstanding the frequency with which prosecutors chant it ritualistically or use it as a pro forma objection to bail. Most offenses before our courts nowadays are serious, and if this were a ground for the refusal of bail, the overwhelming majority of persons before the Court would be remanded in custody until trial." 9 With this starting point in mind we may now turn to consider the appeal."*

10. The other issues for consideration is whether these offences are serious and whether there is cogent evidence implicating the respondent. The First Schedule, Part A of the Bail (Amendment) Act, 2011 The Bail Act states:

**"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 purposes of taking the decisions required by this Part or otherwise by this Act; (c) 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."[9]**

11. The Court also notes that the Respondent has not raised any issue save for the argument that the Applicant is detrimental to the public's safety. Considering this the Court must evaluate whether the other issues are applicable. In this case whether there is cogent evidence against the Applicant. The Court accepts that the Applicant was convicted on the evidence presented before a twelve (12) person jury, however given the decision of the Court of Appeal in this matter the Court would have considered the cogency of the evidence afresh. The evidence presented was that the Applicant shot at two (2) individuals and killed two (2) additional individuals. The Applicant denies killing anyone and acknowledged in a statement that he shot at individuals who were shooting at

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[9] Bail Act No. 34 of 2011 First Schedule Part A.

him. Thus raising a defence of self defence as defined by the Penal Code.[10] As neither the Applicant nor Respondent presented anything by way of evidence, the Court could not offer an opinion.

12. Therefore, the question before the Court is whether the Applicant is a danger to society and as such bail ought to be denied? In the opinion of this Court there is insufficient evidence to make a real case that he is detrimental to society. The Applicant was convicted twenty four (24) years ago for Firearm Possession that has not been connected to the current offences. It is also noted that there were no criminal convictions against the Applicant between 1992 and the Applicant's arrest in 2016. The Court is therefore satisfied that there is nothing presented that supports the Respondent's characterization. The Court of Appeal has affirmed that the question as to whether the Applicant will return for trial is central and this argument neither was there any evidence before the Court by the Respondent that the Applicant would not return for the trial.

13. Finally, the Court takes into consideration what appropriate conditions would sufficiently ensure that the Applicant attends Court when required.

14. Given the above, the Court will exercise its discretion and grant bail to the Applicant in the following terms and conditions:

    (a) Bail will be granted in the Amount of $30,000.00 with 1 or 2 sureties
    (b) The Applicant is to be outfitted with electronic monitoring device and placed on curfew of Weekdays (9pm to 5am) and Weekends (10pm to 5am).
    (c) Applicant is required to report to nearest Police Station to his current address that being East Street South Police Station Nassau, Bahamas each Monday, Wednesday & Friday by 7pm at the latest.
    (d) The Applicant must not engage in direct or indirect attempts or contact with any of the Prosecution witnesses.

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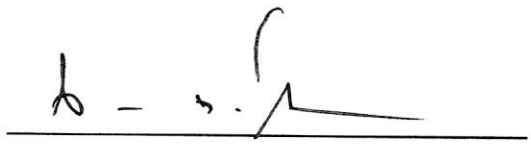
[10] Section 98 et. Seq. Chapter 84 the Statute Laws of the Commonwealth of The Bahamas.

(e) Applicant is to secure his travel documents with the Court.

(f) Parties are at liberty to reapply.

Given this 27th day of September, 2021



Andrew Forbes
Justice of Supreme Court