COMMONWEALTH OF THE BAHAMAS CASE NO. CRI/BAIL/FP/00018/2022

IN THE SUPREME COURT

Criminal Side

BETWEEN

ALEX BARR

Applicant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: The Honorable Mr. Justice Andrew Forbes

Appearances: Attorneys Mrs. S. Cooper-Rolle & Mr. E. Darling c/o Director of Public Prosecutions

Attorney Mr. Stanley Rolle c/o Alex Barr

Hearing Date: 13th June 2023

RULING

Forbes. J.

1. The Applicant has filed an application seeking consideration of the court as to the question of bail and in support of this application the Applicant Counsel filed a Summons to admit to bail on the 11th April 2023 and his Affidavit in Support was filed on the 11th April 2023 in which the Applicant avers that he was a self-employed Construction worker as well as a diver and fisherman. That he was arrested on 12th May 2022 and charged with Harboring a Fugitive and Possession of Dangerous Drugs. That at trial the Harboring a fugitive charges were dropped and the Drugs charge was further adjourned to the 28th September 2022. That on the 20th May 2022 he was charged with Murder remanded on the charges by Magistrate Charlton Smith. That I was to be served my Voluntary Bill of Indictment (VBI) on 12th July 2022, but it was not ready I was again to be served with my Voluntary Bill of Indictment on the 28th September 2022 again it was not ready at date of this hearing I have not been served my VBI. The Applicant further avers that he has been in custody since May 2022. That he is innocent of the charges. That the Applicant avers that he has no pending matters. That he never participated in an identification parade but believes that the Police utilized a Photo array. That he provided his blood voluntarily. The Applicant avers that he has a previous conviction for a Possession of an Unlicensed Firearm in 2017 in which he was convicted and sentenced to 3 and Half years in Bahamas Department of Corrections (BDOCS). The Applicant asserts he resides in Red Bays Andros and that has no intention to interfere with witnesses and is not a fight risk and is a fit and proper person for bail and has no previous convictions.

2. The Respondent filed and affidavit in response dated 30th May 2023 and sworn by Woman Corporal 771 Anastasia Rolle who avers that she is the Liaison Officer of the Director of Public Prosecutions and that the Applicant was charged on 20th May 2022 with the Offence of Murder. That the Applicant was arraigned before Magistrate Charlton Smith and was not required to enter a plea. Bail was denied and the Applicant remanded that a copy of the charge sheet is exhibited. That there is an eyewitness Mr. Cecil McPhee who identifies the Applicant as the

individual who causes the unlawful death of Javon Pinder, a copy of his statement is exhibited hereto. That the Applicant has antecedents which was exhibited hereto. That the Applicant is a not a fit and proper person for bail. That there has not been no unreasonable delay. The conviction related to Possession of Unlicensed firearm which occurred in November 2017 which the Applicant was convicted and sentenced to forty two months and fined three thousand dollars ($3000.00) and in default a further two(2) years at BDOCS.

SUBMISSIONS

5. The Applicant's Counsel has argued that notwithstanding the allegations, the Applicant has denied the allegations and maintains his innocence. Applicants Counsel notes that in fact his client was served his VBI and the Trial is scheduled for 2025.Counsel notes that the primary consideration of the Court is whether the Applicant will attend his trial. In support Counsel cites the decision of ***Quiento Carey a.k.a Cyber v. The Director of Public Prosecutions [2020] 1 BHS.J No. 93*** where at paragraph 8 the Applicant's Attorney notes that the Court said, *"Every person who is charged with a criminal offence (a) shall be presumed to be innocent until he is proved or has plead guilty." He further cited the Court of Appeal* decision of ***Dennis Mather and Director of Public Prosecutions SCCrApp. No. 96 of 2020***. Noting the comments of President of Appeal Barnett where he said as follows: *"This Court has on many occasions stated that "bail may only be denied if the State is able to demonstrate that there are substantial grounds for believing that the applicant would not surrender to custody or appear for trial."* Counsel also notes the comments by Justice of Appeal Osadebay in Bradley Ferguson etal v. The Attorney General SCCrApp. No. 57,106,108 & 116 of 2008 where he said the following: *"The first is In re Barronet and Allain 1 El and Bl 2, 118 ER 338 where Coleridge J, said: "...I do not think that an accused party is 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 insure his appearance at the trial."* Counsel for the Applicant further cited the decision of **Jonathan Armbrister v. The Attorney General SCCrApp. No. 145 of 2011,** and the comments of Justice of Appeal John where he said as follows*: "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"*. Counsel also noted the

comments of Hall J (as he then was) in the case of Commissioner of Police v. Beneby [1995] BHS.J No. 17.The court notes that while at principle hearing date the Court invited parties to forward submissions. The court notes it received submissions from the Applicants Counsel some two (2) clear days ahead of intended Ruling. However the Court, never received any submissions from the Respondent who elected to stand on the Affidavit in Response filed on the 30th May 2023. In examining that Affidavit it points to a witness who purports to identify the Applicant via a photo array. And indicated that he observed the Applicant as the man who shot the deceased. Clearly there will be significant challenges mounted against this witness and his identification and substantial questions asked as to why it was done via photo array given the comments of the Privy Council in **Maxo Tido v. The Attorney General [2011] UKPC 16** where at paragraph 17 the Court said: *"Dock identifications are not, of themselves and automatically, inadmissible. In Aurelio Pop v The Queen [2003] UKPC 40 the Board held that, even in the absence of a prior identification parade, a dock identification was admissible evidence, although, when admitted, it gave rise to significant requirements as to the directions that should be given to the jury to deal with the possible frailties of such evidence – see paras 9 et seq. In particular, the Board considered in that case that the failure to adhere to what was the normal practice in Belize of holding an identification parade should have led the judge to warn the jury of the dangers of identification without a parade. Delivering the advice of the Board, Lord Rodger of Earlsferry said at para 9: "[The judge] should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care: R v Graham [1994] Crim LR 212 and Williams (Noel) v The Queen [1997] 1 WLR 548."* The Court also notes the Court of Appeal comments in the headnote of **Rolin Alexis v. Regina SCCrApp. & CAIS NO. 121 of 2020,** *"This is a case which turned on the quality of the identification evidence and ground one of the proposed appeal attacks the learned judge's handling of the evidence relative to that evidence. The identification evidence led in this case was of good quality save for the mistake made by the police in showing the photo gallery to Bernard Dorsett and the failure of the trial judge to properly address the same. It was therefore incumbent on the trial judge to advise the jury that in the absence of the ability to reconcile the difference, they had to*

choose to reject the identification evidence or that of the EMD System. It is not clear that this direction was ever given to the jury and there is a possibility that if given it would have led to an acquittal of the applicant. In these circumstances I have a lurking doubt as to the safety of the convictions."

6. Thus taking the above comments it will be difficult to explain why a photo array was taken as oppose to the identification parade. And if the implication by the Applicant is that he participated in an identification parade with negative results there ought to be evidence in possession of the Director of Public Prosecution which has been turned over as part of the discovery process. However notwithstanding that issue taking the Respondents case at its highest it does not provide any evidence that the Applicant will not attend for his trial. Furthermore the evidence provided is scant and underwhelming and truly did not assist this court in arriving at the decision it was tasked with.

LAW

7. The Court must now consider the rational for the denial of bail to the Applicant and consider whether he will refuse or fail to surrender for trial. Additionally it appears that the Respondent arguments are that the Applicant's antecedents that he has pending matters and that the evidence adduced is cogent and powerful should be grounds to deny the Applicant bail. The Applicant faces charges involving murder, an offence that has been included in Part C of the First Schedule of the Bail Act Part C states, inter alia as follows:- ***"PART C (Section 4(3)) Kidnapping — section 282, Ch. 84; Conspiracy to commit Kidnapping — sections 282 and 89(1), Ch. 84; Murder — section 291, Ch. 84; Conspiracy to commit Murder — sections 291 and 89(1), Ch. 84; Abetment to Murder — sections 86 and 307, Ch. 84; Armed Robbery — section 339(2), Ch. 84; Conspiracy to commit Armed Robbery — sections 339(2) and 89(1), Ch. 84; Abetment to Armed Robbery — sections 86 and 339, Ch. 84; Treason — section 389, Ch. 84; Conspiracy to commit Treason — sections 389 and 89(1), Ch. 84."***

8. Section 4(2) and (3) of Bail (Amendment) Act, 2011 permits the grant bail to those charged with a Part C offence***"(2) Notwithstanding any other provision of this Act or any other law, any person charged with an offence mentioned in Part C of the First, 'schedule, shall not be: granted bail unless the Supreme Court or the Court of Appeal is satisfied that the person charged - - (a) has not been tried***

within a reasonable time; (b) is unlikely to be tried within a reasonable ti1nc; or (c) should be granted bail having regard to all the relevant factors including those specified in Part A of the First Schedule and subsection (2B), .r .. And where the cour1 makes an order for the release, on bail, of that person it shall include in the record a written statement giving the reasons for the order of the release on bail. (2A) For the purpose of subsection (2) (a) and (b) --- (a) without limiting the extent of a reasonable time, a period of three years from the date of the arrest or detention of the person charged shall be deemed to be a reasonable time; (b) delay which is occasioned by the act or conduct of the accused is to be excluded from any calculation of what is considered a reasonable time. (2B) For the purpose of subsection (2) (c), in deciding whether or not to grant bail to a person charged with an offence mentioned in Part C of the First Schedule, the character or antecedents of the person charged, the need to protect the safety of the public or public order and, where appropriate, the need to protect the safety of the victim or victims of the alleged offence, are to be primary considerations. (3) Notwithstanding any other enactment, an application for bail by a person who has been convicted and sentenced to a term of imprisonment in respect of any offence mentioned in Part D of the First Schedule shall lie to the Supreme Court or the Court of Appeal. (JA) Notwithstanding section 3 or any other law, the Magistrates Court shall not have jurisdiction for the grant of bail in respect of any person charged with an offence mentioned in Part C or Part D of the First Schedule. in addition to Part A Judges hearing a bail application for a Part C 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."; offence must exercise their discretion to issues such as character and antecedents, the need to protect the safety of the public or public order and also to consider the need to protect the safety of victim of the alleged offence or for his own protection as well the nature and seriousness of the offence and the nature and strength of the evidence against the defendant."

ANALYSIS AND DISCUSSION

9. There has been multiple decision by the Court of Appeal of recent vintage and not so recent which has established what criteria a Court ought to consider when the issue of bail is being reviewed. In the Court of Appeal decision of ***Dennis Mather and the Director of Public Prosecution SCCrApp 96 of 2020*** the Court cited a number of cases as the starting point. *"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."*

10. Thus the question would the Applicant surrender for trial? The Respondent offers no evidence to suggest that he would not in fact the Affidavit is totally devoid of any suggestion that the Applicant might not surrender for trial. They however focused on the Applicant's Antecedent which were referenced

earlier and was possession of an Unlicensed Firearm. The Court notes there was not a charge for Possession of ammunition which may imply that the firearm was unloaded. In the case of **Stephon Davis v. The Director of Public Prosecutions SCCrApp. No. 108 of 2020,** Justice of Appeal Isaacs commenting on the antecedents of Vagrancy in Davis case said at paragraph 28: - *" The antecedents of an applicant for bail is an important factor to be taken into account by a court considering the application. This record may provide a barometer for the likelihood of the applicant to commit other offences while on bail. Although a court is obliged to have regard to the antecedents of an applicant for bail, little weight should be given to offences that are as trivial as vagrancy. That offence is committed merely by being found to have contravened section 3 of the Vagrancy Act. It is essentially a victimless crime and may be committed by persons who are merely in a penurious state."* Although in this case the antecedent related to Possession of a firearm, the Applicant has served time for this offense. Although it's a possible barometer, its weight should not be overwhelming against the Applicant noting no further convictions since that one in 2017 nor any arising prior. The other factor referred in the Respondent's Affidavit is that that there has been no delay. What is interesting is that the Applicant hasn't raised the issue of Delay however the Court refers to the comments of Justice of Appeal Evans (Ag) (as he then was) in the Case of **Duran Neely v. The Attorney General SCCrApp. No. 29 of 2018** where at paragraph 17 he said: *"17. It should be noted that Section 4 of the Bail Act does not provide the authorities with a blanket right to detain an accused person for three years. In each case the Court must consider what has been called the tension between the right of the accused to his freedom and the need to protect society. The three year period is in my view for the protection of the accused and not a trump card for the Crown. As I understand the law when an accused person makes an application for bail the Court must consider the matters set out in Section 4(2) (a), (b) and (c). This means that if the evidence shows that the accused has not been tried within a reasonable time or cannot be tried in a reasonable time he can be admitted to bail as per (a) and (b). In those circumstances where there has not been unreasonable delay the Court must consider the matters set out in (c). If after a consideration of those matters the Court is of the view that bail should be granted the accused may be granted bail."* Final issue raised was the serious of the offense and the cogency of the evidence. The evidence in this case is not as stout as it could be anticipated. Yes there is an eyewitness, there will be questions aligning with the directions required

in **Turnbull and another v Regina (1977) QB 224.** It noted also that no other evidence was led by the Prosecution. The Court continues to point out to the Crown the multiple comments made by the Court of Appeal and will seek to point out again that they cannot seek to hold evidence close to the bosom and ask this Court to deny bail as in Mather's case the Court pointed to comments made by President of Appeal Dame Allen (as she then was) at paragraph 24 where she said: *"In Vasyli v. The Attorney General [2015] 1 BHS J. No. 86, Allen, P stated at paragraph 12 of her judgment: "12. On a true construction of section 4 (2) and paragraph (a) (i) of Part A of the Bail Act, and notwithstanding the 2014 Amendment, I am still of the view that bail may only be denied if the State is able to demonstrate that there are substantial grounds for believing that the applicant would not surrender to custody or appear for trial. In assessing whether there are substantial grounds for such belief, the court shall also have regard to the nature and seriousness of the offence and the nature and strength of the evidence against an applicant as prescribed in paragraph (g) of Part A." [Emphasis added]"* In this regard this court will noted the statement of the Court of Appeal in **Davis case** where in the headnote the court said as follows: - *"No substantial grounds have been disclosed in this case to support a conclusion that the appellant would abscond and not appear for trial. As stated in Hurnam "the seriousness of the crime alleged and the severity of the sentence faced are not, without more, compelling grounds for inferring a risk of flight ..." it follows that there must be shown, substantial grounds for believing that the applicant would not surrender to custody or appear for trial. There is no evidence to suggest that the appellant would not appear for his trial. The Judge is required to consider whether there are conditions that may be imposed that would, as far as possible, ensure that the appellant appear for his trial. It is only the severity of the charge and the inference of flight in the instance where no form of bail condition could mitigate or minimize that flight that can support the Judge's refusal of bail."*

11. As stated in Davis there is no evidence before this Court that the Applicant will refuse to surrender. So as to ensure this the Court is prepared to consider stringent conditions. The Court regards the use of the Electronic Monitoring Device (EMD) along with curfew conditions as robust. The Court also considers the reporting requires as potentially able to secure that the Applicant attends Court and ensures no further violations of criminal statutes.

DISPOSITION

a. The Court will accede to the Applicants bail application and excise its discretion and grant bail in the Sum of thirty Thousand Dollars ($30,000.00) with 1 or 3 sureties,

b. The Applicant to be outfitted with an Electronic monitoring device and must comply with all conditions established related to the wearing and maintenance of device. The Court will impose as further condition of the device the Applicant is to be placed on curfew on weekdays by 9pm to 5am and weekends by 10pm to 5am

c. The Applicant is to have no direct or indirect contact with any witness involved with this case.

d. The Applicant is required to report to nearest Police Station to his registered address whether Andros, Nicholls Town Police Station each Monday & Friday by 6pm at the latest.

Parties are liberty to reapply.

Parties aggrieved may appeal to the Court of Appeal.

Dated the 11th July, 2023

Andrew Forbes
Justice of the Supreme Court