COMMONWEALTH OF THE BAHAMAS CASE NO. CRI/BAIL/FP/00016/2011

IN THE SUPREME COURT

Criminal Side

BETWEEN

DONOVAN COLLIE

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. O. Johnson c/o Donovan Collie
Hearing Date:	13th June 2023

RULING

Forbes. J.

BACKGROUND

1. The Applicant has filed an application on the 8th May 2023 seeking consideration of the court as to the question of bail and in support of this application the Applicant has filed an Affidavit on the 16th May 2023 in which the Applicant avers that he was remanded on the charges of Attempted Murder and Possession of a firearm with intent by means thereof to endanger life (4 Counts). That he has close community ties that he supports and assist his mother with utilities. That he is the father of three young children ages 4, 2 and 1. That as their father he is responsible for financial assistance. That he has a prior conviction for Armed Robbery, Possession of Dangerous Drugs, Causing harm and disorderly Behavior. That he has always complied with the terms of any bail previously granted, nor has he interfered with any witnesses and nor will he commit and further offences while on bail.

2. The respondent filed an affidavit in response dated 25th May 2023 and sworn by Sargent 2169 Prescott Pinder who avers that he is the Liaison Officer of the Director of Public Prosecutions and that the Applicant was charged on 30th December 2021 with Offences of Murder and Attempted Murder. That the Applicant was arraigned before Magistrate Laquay Laing the charge sheet was exhibited thereto. Bail was denied and the Applicant remanded. That the Applicant is a person of bad character. That the Applicant confessed a record of interview that he fired a shot from a handgun after Jody. The Record of Interview is likewise exhibited. That five witnesses assert that they are aware of the Applicant was the person who brandished a firearm. Their statements were exhibited. That the Applicant was likewise charged and arraigned before Magistrate Laing on the 10th March 2023 along with another for being in Possession of an Unlicensed firearm, Possession of Ammunition and Causing damage. Magistrate Laing granted the Applicant bail. That the trial was scheduled to commence on the 12th June 2023. That the Applicant has antecedents which were exhibited thereto. The convictions related to Possession of Dangerous Drugs with intent to supply where the Applicant was convicted and sentenced on two (2) separate occasions first in December 2011

and was to serve one (1) year at BDOCS and again in December 2020 in which he was fined One Thousand Two Hundred and Fifty Dollars ($1,250.00) on each count or one (1) year in default. The Applicant was also convicted and sentenced for causing harm on four (4) separate occasions first being September 2005 where he was given a conditional discharge, to perform 30 hours of community service and in default one(1) year at BDOCS. The second incident occurred when convicted in the Supreme Court for Armed Robbery and Causing Harm and was sentenced to twelve years (12) at BDCOS this occurring in July 2012. The third incident was November 2012 where he was sentenced for six (6) months to BDOCS. It is likely given that the Applicant was to be serving twelve (12) years he elected to address outstanding matters. Although that is mere speculation on the Court's part as there is no direct evidence which supports that speculation. The final incident occurred in July 2021 where the Applicant was ordered to pay Nine Hundred Dollars ($900.00) in compensation.

SUBMISSIONS

5. The Applicant's Counsel has argued that notwithstanding the allegations, the Applicant has denied the allegations and maintains his innocence. Counsel for the Applicant further contends that the Applicant has conducted himself in a peaceful and non-confrontational manner, inclusive of his arrest and incarceration. He further argues that there is evidence to suggest that the Applicant is not a serious threat to society. In support Counsel cites the Court of Appeal decisions of **Mendez and Ayo v. The Attorney General SCCrApp & CAIS 93 & 99 of 2010** and **Duran Neely v. The Attorney General SCCrApp. No. 29 of 2018.** It is observed that Counsel for the Applicant failed to provide citations for either case and only laid over the Neely case. Nonetheless the Court is fully familiar with both authorities cited. Counsel for the Applicant paid specific reference to paragraphs 17 and 22 of the Neely case and the Comments of Justice of Appeal Evans where he noted the following: ***"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……" & ***"The authorities point, in my view, to a position that the primary purpose of the detention of an accused who is charged with an offence is to ensure his attendance at his trial. In the case of Attorney General v. Bradley Ferguson et al SCCrApp. No.'s 57, 106, 108, 116 of 2008 Osadebay JA observed as follows: - 11 "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." It is accepted that in construing the Bail Act the Court can also take into consideration matters such as whether there is good reason to believe the accused would, if released, interfere with witnesses or that the detention is necessary for his own protection……"*** The essence of Counsel for the Applicant argument is that the Applicant is a fit and proper person for bail and should not be denied bail.

6. The Respondents submission boiled downed and amounts to that, given the antecedents of the Applicant, the Applicant is a danger to the general community and also cite paragraph 19 of the **Duran Neely case** which states as follows: ***"I am aware that it is not the purpose of a bail hearing to determine the guilt or innocence of an accused. However, in a case where the appellant's submission is primarily that the case against him was very weak and not at all cogent as was asserted by the respondent, it is important that a court hearing the application review the evidence available at the hearing. It is a well-accepted principle that the serious nature of a charge and the cogency of the evidence is a material consideration when determining the proper exercise of the discretion to grant bail….."*** The Crown further argued there are no conditions which would mitigate against the Applicant's conduct. Counsel for the Crown also sought to rely upon the comments of Former President of the Court of Appeal in the case of **Cordero McDonald V. The Attorney General SCCrApp No. 195 of 2016** Where Dame Allen said the following at paragraph 34:***"As this Court has said on many occasions, it is***

not the duty of a judge considering a bail application to decide disputed facts or law. Indeed, it is not expected that on such an application a judge will conduct a forensic examination of the evidence. The judge must simply decide whether the evidence raises a reasonable suspicion of the commission of the offences by the appellant, such as to justify the deprivation of his liberty by arrest, charge, and detention. Having done that he must then consider the relevant factors and determine whether he ought to grant him bail.....” The substance of the Respondents submissions are that the Applicant is of such a bad character and has allegedly committed such heinous acts he ought not to be granted bail. The Court of Appeal in ***Davis*** cited ***Vasyli v. The Attorney General (2015) 1 BHS.J. No 86*** where Allen P said: - ***"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]***

7. 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. The question as to whether there been any delay? This issue was not raised either by the Applicant or the Crown. The Court does note that the Applicant was arrested in March 2023, applied for bail in May 2023 and had a substantive hearing in June 2023. The question of delay does not therefore arise. The Court does take note of the comments made by Justice of Appeal Evans in **Neely Case,** where he said the following at paragraph 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..."

8. 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."***

LAW

9. The Court must now consider the rational for the denial of bail to the Applicant and consider whether the Applicant 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 Attempted murder as well as offences related to Possession of a firearm with intent by means thereof to Endanger life, 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."***

10. Section 4(2) and (3) of Bail (Amendment) Act, 2011 permits to 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 time; 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 court 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."***

ANYALSIS & DISCUSSION

11. Thus the question whether the Applicant would surrender for trial? The Respondent offers no evidence to suggest that the Applicant would not in fact surrender. The Affidavit is totally devoid of any evidence that the Applicant might not surrender for trial. They however focused on the Applicant's Antecedents which were referenced earlier. And the only one which might give the court pause is the conviction in 2012 conviction and sentence for Armed Robbery. Here the Applicant engaged in violence against the person. Although it is noted that this incident occurred in 2012. The Crown also focuses on the fact that given the

previous incidents the Applicant is a threat to the society. It might be inferred that given the antecedents and given the very cogent evidence and the statement against interest made by the Applicant. There are certain cautions to observe. Firstly the statement may very well be challenged pursuant to section 20 of the Evidence Act Chapter 65 of the Statute Laws of the Bahamas which reads accordingly: ***"(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any fact in issue in the proceedings and is not excluded by the court in pursuance of this section. (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession — (a) was or may have been obtained by oppression of the person who made it; or (b) is rendered unreliable by reason of anything said or done or omitted to be said or done in the circumstances existing at the time, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid. (3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2). (4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence of any facts discovered as a result of the confession and of so much of the confession as relates thereto. (5) In this Act — "confession" includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise; "oppression" includes torture, inhuman or degrading treatment, and the use of threat of violence (whether or not amounting to torture)."*** It very well maybe that that statement is challenged as to its admissibility. Although it might be challenged there are admissions in which the Applicant admits to producing a firearm and firing a single shot while in the company of two (2) females in a gas station. The Court takes notes of the comments of the Court of Appeal in **The Attorney General v. Bradley Ferguson etal 57, 106,108,116 of 2008** and particular paragraph 35 which reads in part as follows: ***"That is not to suggest that every judge must embark on a minute examination of the evidence against an accused on a bail application. That would not be proper (see Hurnam). But whereas here***

no evidence is adduced linking the respondents to the crimes charged at a hearing where that issue is live, it seems to me that in order to give the accused the full measure of his rights under article 19 of the constitution there is an obligation to release him immediately, and leave it to the court hearing the case preliminarily or otherwise to decide whether in fact there is evidence to support the charge. In Hurnam release on bail was thought proper in circumstances where the evidence against the accused was comprised of accomplice evidence and had to be approached with caution. The court thought the presumption of innocence in those circumstances operated to justify immediate release pending trial."

12. In this case there are strong eyewitnesses to the shooting such as the gas station attendant, and some other witnesses albeit with flaws, but those are issues for a jury to determine. There is also the admission made by the Applicant subject to its challenge, so unlike **Ferguson's case** there is strong and very cogent evidence. The second issue is the statements of the particular witnesses. In the case of Mithu Smith he reports interceding in an altercation between the Applicant and the Virtual Complainant it was being alleged that the Virtual Complainant was reportly observed with the girlfriend of the Applicant. That according to the witness he organized a sit down where the Virtual Complainant who was to be compensated for injuries allegedly inflicted by the Applicant with a certain amount of Marijuana. According to the witnesses he was later contacted by the Virtual Complainant advising that the Applicant had come through with his commitment. Although the commitment was only partial and that the Applicant then allegedly fired upon them when according to Mr. Smith's account when he was in the company of Germareico Gardiner, Shamar Moss and Shaquille Williams. That he along with the others would have headed to the Police Station to report the incident where they met the Applicant. That the Applicant and Germareico Gardiner then got into a Physical altercation resulting in them all be arrested.

13. Again, both the Applicant and the Respondent have referred to pending matters but the Respondent has not presented the relevant evidence for the Court to consider. The Court is aware that the Applicant was granted bail by the Magistrate for the Offences of Possession of an unlicensed firearm, Possession of ammunition and causing damage. It is understood that the trial was pending at the time of the bail hearing, however it is unclear as to the current status. The Court takes note of the comments of the Court of Appeal in **Stephon Davis v. The Director**

of Public Prosecutions SCCrApp No. 108 of 2021 Noting in particular the statements made in the headnote by the President of Appeal Sir Michael Barnett and Justice of Appeal Evans where they comment as follows: ***"per Evans, JA: A judge hearing a bail application cannot simply refuse an application for bail merely on the fact that the new offence is alleged to have been committed while the defendant was already on bail for a similar offence. There is a requirement for the judge to assess the evidence on which the crown intends to rely on the hearing of the new charge. We must recognize that every individual charged before the Court is presumed innocent until proven guilty. We walk a tight rope of having to protect the interest of society and the constitutional rights of individuals brought before the Courts. This system only works if all stakeholders do their part. As such the Crown is not at liberty to hold information to its bosom and not provide the Courts with sufficient information to make proper decisions; nor are they permitted to deprive individuals of their liberty based only on suspicion of involvement in criminal activity..... per Barnett, P: This court has on more than one occasion repeated the principle that bail should not be denied as a punishment for a crime for which a person has not yet been convicted. This principle applies even when the crime is alleged to have been committed whilst a person was on bail. The burden is on those opposing the grant of bail to should why there are good reasons to deny bail to a person charged with an offence."*** The final issue raised was the serious of the offense and the cogency of the evidence. In this regard this court will note the statement of the Court of Appeal in **Davis case (supra)** 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."***

14. As stated in **Davis case (supra)** there is no evidence before this Court that the Applicant will refuse to surrender. There is however very strong and cogent evidence, thus the question is whether there are conditions which will ensure that this Applicant does not engage in any further violent actions. It is further noted from the statement of the Applicant that he knew Shaquille Williams aka 'Jody' from jail. As previously stated the offence of Attempted Murder is a serious offence, one that carries a possible penalty of life imprisonment. The seriousness of such may give cause for any defendant to abscond if released on bail. The Court's role as stated above is not as a fact-finder or a seeker of the truth at this stage. However, the Court must weigh the Applicant's presumption of innocence and right to liberty against the public's safety and order.

15. The allegations as stated above against the Applicant are serious, more so there is no evidence before the Court that the witnesses who implicate him have recanted their statement or their statements have changed dramatically from when they were first given. Additionally, I have found that the prima facie evidence against the Applicant is strong. Further, the alleged actions of the Applicant on that night i.e. shooting a gun in a commercial area within the location of gasoline which is highly flammable and potentially explosive. The Court thus has reason to believe that the Applicant has a wanton disregard for human life. The question is whether the Applicant can be compliant should he be granted bail the Court is prepared to consider whether stringent condition if imposed would prevent any further incidents. Those conditions to be considered whether the imposition of electronic monitoring devices (EMD) or curfew conditions would suffice. In the view of the Court given what clearly is a reckless and if the evidence of Mr. Smith can even reasonably to be believed, suggest that the Applicant engages in multiple criminal activities and is and ongoing danger to this community. After spending twelve (12) years in prison for Armed Robbery, namely stealing of property without consent of the owner in an aggravated manner while armed with and Offensive Instrument has not had a sobering disposition. Multiple convictions for not simple Possession of dangerous drugs which imply drug addiction but rather for Possession with the intent to supply. And here again if Mr. Smith's statement is to be believed the Applicant supplied drugs to 'Jody' to compensate 'Jody' for a previous attack which had resulted in 'Jody' being severely injured. This being a knife attack according to

Mr. Smith perpetrated by the Applicant which went unreported. This Court finds that the measures permitted are unlikely to restrain this Applicant. This Court reminds itself of the comments made by the Court of Appeal in **Tyreke Mallory v Director of Public Prosecutions SCCrApp. No 142 of 2021** Justice of Appeal Evans noted as follows at paragraph 25: ***"In my view, having regard to his antecedents and the fact that he was arrested for the current offence while on bail there is a reasonable basis to perceive him as a threat to society. Further, the evidence, in my view, raises a reasonable suspicion of the commission of the offences by the appellant, such as to justify the deprivation of his liberty by arrest, charge, and detention pending trial..."***

DISPOSITION

16. Therefore, in weighing the presumption of innocence given to the Applicant with the need to protect the public order and the public safety the Court is of the opinion that the need for public safety and public order is of highest importance and in the present circumstances cannot be ignored. In the circumstances the court will not accede to this Application for bail.

17. The Applicant can reapply should circumstances permit.

18. Parties aggrieved may appeal to the Court of Appeal.

Dated the 27th June, 2023

Andrew Forbes
Justice of the Supreme Court