COMMONWEALTH OF THE BAHAMAS CASE NO. CRI/BAIL/FP/00063/2016

IN THE SUPREME COURT

Criminal Side

BETWEEN

GARTH EWING JR.

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. Carlson Shurland KC c/o Garth Ewing
Hearing Date:	11th July 2023

RULING

Forbes. J.

1. The Applicant initially self-filed an application seeking consideration of the court as to the question of bail. Thereafter a Summons and Affidavit in support of this application was filed by Applicant Counsel on the 6th June 2023 and 26th June 2023 respectively. The Applicant avers that he was born on the 27th June 1990 on the Island of Grand Bahama and that he was charged with two (2) counts of Attempted Murder and arraigned before Magistrate Laing on the 5th June 2023. That he was not required to enter a plea and was denied bail. He further avers that he was remanded to Bahamas Department of Corrections (BDOCS). The Applicant further avers that he has no matters pending. That he was previously convicted before Deputy Chief Magistrate Ferguson for Disorderly Behavior which he was fined twenty five ($25.00) or one (1) week of imprisonment. He exhibits his antecedents. He further states he was arrested in Miami Florida USA in March 2022 on charges of Conspiracy to distribute a detectable amount of cocaine in which he pleaded guilty and was sentenced to fifty nine (59) days imprisonment and a further one(1) year of supervised released. That he avers that although unemployed if released he will be reengaged by Clear Blue Maritime Agency Limited. Exhibited thereto was a recommendation letter. There after the Affidavit contained several legal submissions apparently conveyed by his Counsel in relation to the law as well as to the state of the evidence. The Court will address this at a later time in this decision.

2. The Respondent filed an affidavit in response dated 30th June 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 the 5th June 2023 with two (2) counts of the Offence of Attempted Murder. That the Applicant was arraigned before Magistrate Laquay Laing and was not required to enter a plea. Bail was denied and the Applicant remanded that a copy of the charge sheet is exhibited. Sargent Pinder notes that the allegations is said to have occurred

in September 2020. That there is an eyewitness Mr. Martin Pinder who identifies the Applicant as the individual who fired several shots in his direction causing a wound to his right thigh. His statement is exhibited also the statement of Mr. Austin Augustine who also is said to have identified the Applicant as the individual who wounded Mr. Pinder and Mr. Sands. That the Applicant has antecedents which was exhibited hereto. That the Applicant is a not a fit and proper person for bail. That the Applicant is said to left the Bahamas sometime in September 2020. That a wanted poster was created on the 2nd October 2020 and that this poster was circulated via the National Broadcasting Network (ZNS) and via several social media post. That these documents were also exhibited. Sargent Pinder further avers that on 22nd March 2020 the Royal Bahamas Police Force received certain information that the Applicant was in custody in Miami Florida, in the United States of America and was to be deported to the Bahamas. A copy of the Deportation Order was duly exhibited. That the Applicant is believed to be a flight risk. That given the Applicant pass behavior he may likely abscond.

SUBMISSIONS

3. The Applicant's Counsel has argued that notwithstanding the allegations, the Applicant has denied the allegations and maintains his innocence. Applicants Counsel as oppose to filing an independent Skelton arguments or submissions incorporates them into the Affidavit of the Applicant. Where the Applicant is said to be made aware of the legal Authorities of **Hurman v. The State (Mauritius) [2005] UKPC 49** which was adopted in the Court of Appeal in the case of **Commissioner of Police v. Beneby [1995] BHS J. No.17** a case authored by Justice Hall (as he then was), and where he said as follows: *"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."* The Applicant again refers to the case of **R v. Galbraith (1981) EWCA,** and the Court notes no page indicated. The Applicant notes that because the case heavily relies upon identification evidence that his Counsel advises him that the judge would consider **R. v. Turnbull [1977] QB 244** The Applicant is further advised by his Counsel that the Court would consider the case of **Hubbard v. Police (1986) 2 NZLR 738** where according to the Applicant

again, the case discusses the two test the court ought to apply. The Apply continues that his Attorney advises him that the Attorney General will advance the argument he went to the United States and was apprehended. And that The Attorney General cannot produce any evidence that he attended the United States to avoid apprehension for the purported charges. Again the Court notes that this is an executed affidavit of the Applicant, however he refers to authorities and makes legal arguments. He further refers to the case of **Toni Sweeting and the Commissioner of Police Court of Appeal Action No. 13 of 2013**, where the Court Appeal denied Bail because the Attorney General was able to provide evidence that Ms. Sweeting was intended to abscond to Jamaica. The Applicant then refers to provisions of the Bail Act. The Applicant then asserts that he has a minor child which he is financially responsible for. That the Applicant notes he is a member of Final Hour Pentecostal Church Gerald Smith and includes as exhibits letters from the Pastor also includes a letter from the biological mother of his minor child. That the Applicant then asserts that his Attorney has advised him that time awaiting trial will be detrimental on his health. That further he is advised that the Court calendar is fixed into the latter part of 2026. The Applicant then cites Article 19(1) (3) of the constitution which references as person being entitled to a bail should his trial not be heard within a reasonable time. The Applicant again on advice from his Attorney cites Article 20 (1) which requires a fair hearing within a reasonable time by an independent and impartial court. That the Applicant again on the advice of Counsel cites **Barker v. Wingo 407 U.S. 514** specifically page 9 therein. The Court will not repeat the quotation, because it begs the question is this an affidavit or submission. The Applicant then cites the Bail Amendment Act 2011 sections 2A(2)(a) which deal with the issue of a reasonable time for a person to remain in custody awaiting trial should be no more than three (3) years. The Applicant then alleges that his Constitutional rights have been violated and cites Article 28 of the Constitution. Again the court notes that this is an Affidavit executed by the Applicant. The Applicant then asserts that upon being advised by his Attorney that the conditions as the Bahamas Department of Correctional Services are inhumane and unsanitary and again refers to Article 17(1) which indicate that no person ought to be subject to torture or to inhuman degrading treatment or punishment. The Applicant notes that the Bahamas Department of Corrections conditions are inhumane and that they lack proper sanitation. That he sleeps on the floor. That the Applicant refers to the case of **Marco Oliver and the Commissioner of the Department of**

Corrections and the DPP Supreme Court Action No, 2020/PUB/con in which the Applicant refers the Court to paragraphs 12 & 13 and notes that the case is exhibited. That the Applicant again upon advice of his Attorney references an Article published in The Tribune titled "INSIGHT BEHIND THE WALLS " where a former inmate detailed his previous incarceration. This article was also exhibited. That the Applicant again on advice from his Attorney speaks about an Insider report addressing Mr. Sam Bankman-Fried and the conditions at Bahamian Prison. Again the Applicant indicates on advice from his Counsel notes that the Bahamas Correctional Services has received international notoriety. Citing the Barbados Today in an article Titles Reginal-Bahamas Prison not fit for humanity" This article was exhibited. The Applicant again indicates on advice from his Attorney a Report was published titled the Human Rights report The Bahamas 2022 this report was exhibited. The Applicant on the advice of his Attorney purports to give an analysis of the Prosecution witnesses and suggest he was not at the alleged incident as alleged. The Applicant then seeks to highlight the law as advised by his Attorney and cites the case of **Stephon Davis v. The Director of Public Prosecutions Action No. 108 of 2021.** Also the case of **Ricardo Stubbs and the Director of Public Prosecutions Action No. 2021/cri/bail/0081** the case of **Shamar Rolle and Department of Public Prosecutions Action No. 2021/cri/bail/No.00180** and the case of **Donna Vasyli and the Attorney General SCCrApp. & CAIS No. 81 of 2015.** These cases were cited and relied upon to demonstrate that the Court can set bail conditions. That the Applicant then purports to recommend conditions of his bail.

4. The Respondent in its skeletal arguments filed on the 30th June 2023, notes that the Applicant is charged with two (2) Counts of Attempted Murder and noted that the question for consideration was whether the Applicant was fit and proper person for bail. The Respondent cited the Bail Act specifically Part C of the Schedule as well as Part A of the Schedule as outlining the issues for consideration.

5. The Respondent suggest that the recent judgments of the Court of Appeal note that the test to be applied is whether the Applicant would appear for trial. It is the respondent's opinion that the Applicant would not appear for trial. The Respondent notes the serious nature of the offences. The Respondent then cites the Court of first instant Judgement of **Stephon Godfrey Davis 2014/cri/bail/00069** and the comments made by Justice McKay at paragraph 17 thereof. It would be noted that this decision was overturned by the Court of Appeal and the Court will speak to

that later in this Judgement. The Respondent then cites **Jeremiah Andrews v The Director of Public Prosecutions SCCrApp. No. 163 of 2019** an specifically paragraph 30 where the Court said as follows: *"These authorities all confirm therefore that the seriousness of the offence, coupled with the strength of the evidence and the likely penalty which is likely to be imposed upon conviction, have always been, and continue to be important considerations in determining whether bail should be granted or not. However, these factors may give rise to an inference that the defendant may abscond. That inference can be weakened by the consideration of other relevant factors disclosed in the evidence. E.g. the applicant's resources, family connections, employment status, good character and absence of antecedents."*

6. The Respondent cited also the case of **Bradley Ferguson SCCr. Bail Application No. 106,108 and 116 of 2008** at paragraph 23 where the Court said as follows: "*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....."*

7. The Respondent then cited **Jiles Jackson SCCrApp. No. 132 of 2021** and noted the comments made by the court at paragraphs 21, 25, where the comments of the Court said: *"The Judge took into consideration the concern that the appellant was a flight risk: paragraph 20; and then went on to say at paragraphs 23 and 24: "23. It is incumbent upon this Court to consider conditions which would deter and discourage an accused from absconding or minimize the risks involved with the granting of bail. The only other prudent condition which was not imposed was that of an electronic monitoring device: however, the Court is not of the view that this additional bail condition will aid in ensuring the attendance of the Applicant at Court. This Court cannot take the risk in granting bail to someone who in the past has proven that he will not be compliant..... However, as noted by John, JA at paragraph 12 in Jonathan Armbrister v The Attorney General SCCrApp. No. 145 of 2011: "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 a 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. This principle has received recognition in the case of Noordally v Attorney General and another (Mollan, C.J.) [1987] LRC [599]." "*

LAW

8. 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 and the fact that he absconded prior to being arrested and the likelihood he is a flight risk and that the evidence adduced is cogent and powerful should be grounds to deny the Applicant bail. The Applicant faces charges involving two Counts of Attempted 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."***

9. 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 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

10. The Court notes that while at the initial hearing the Court invited parties to forward submissions. The court notes it has not received submissions from the Applicants Counsel although there are submissions masquerading as an Affidavit. The Court notes that these are criminal proceedings, that being said, the rules governing Affidavits and their content are well known and apply to all divisions within the Judiciary. In fact Rule 30 of the Civil Procedure Rule 2023(CPR) is illustrative of this, see Rule 30.3: *"30.3 Contents of affidavits. (1) The general rule is that an*

affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge. (2) An affidavit may contain statements of information and belief — (a) if any of these Rules so allows; and (b) if the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates — (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and (ii) the source of any matters of information and belief. (3) The Court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit. (4) An affidavit containing any alteration may not be used in evidence unless all such alterations have been initialed both by the deponent and the person before whom the affidavit is sworn."

11. Hence much of what is contained in the Affidavit/ Submissions are irrelevant to the intended Application itself. It is unclear whether the Applicant is making a Constitutional Application or offering commentary as to the conditions of the Bahamas Department of Corrections and its relevance as to whether he is a fit and proper person for bail. The Applicant references being arrested in the United States for possession of drugs and suggestion that the Attorney General cannot prove that he went to the United States to avoid apprehension. The Applicant suggest that his trip was previously planned.

12. The court finds that disingenuous given the documentary evidence adduced by the Respondent in which the United States Officials say that the Applicant's port of entry is unknown and his time of entry is unknown. That begs the question, how did the Applicant enter the United States of America without being processed by a Border Control Agent. Again the Affidavit/ Submissions appear to be implying that that information was unknown in advance and hence there is no evidence, what the Applicant fails to appreciate is that the Court can draw a reasonable inference from the fact the documents of the Respondent indicate that the Applicant entered another country without going through the legal process of entry and that in of itself raises the possibility that the Applicant might be a flight risk.

13. The Court received Skeletal Arguments on behalf of the Respondent. It must be commented on that these arguments failed to properly cite the authorities being relied upon, as in one instance the Respondent seeks to rely upon a case authority which has been overruled by a higher Court. That issue was also prevalent in the Affidavit masquerading as submissions. The Court is perplexed as how must it address legal issues when it does not get fulsome assistance from the parties. Laypersons without legal training the Court can understand, but legal Practioners,

nothing more need be said. The Applicant challenges the veracity and acuity of the alleged eyewitnesses those are issues best left for trial and the providence of the jury. See the following comments made by the Court of Appeal in **The Attorney General v. Bradley Ferguson, Kermit Evans, and Stephon Stubbs & Kenton Deon Knowles SCCrApp. 57,106,108 &115 of 2008**, where the Court at paragraph 35 the following: *"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...."*

14. In examining that Affidavit in response it points to witnesses who purport to identify the Applicant via a photo array and indicated that they observed the Applicant as the man who shot the victims on the night in question. Clearly there will be significant challenges mounted against these 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 that 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."*

15. There have also 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."*

16. Thus the question would the Applicant surrender for trial? The Respondent offers some evidence to suggest that Applicant might not in fact surrender. The Affidavit presents an inference that the Applicant evaded the Authorities when he was being sought regarding the allegations arising from this current application. Although as noted the Applicant suggest that there is no evidence of this whatsoever. It is noted however an exhibited letter dated September 2020 from an Officer Rahming who reports that after receiving certain information he prepared a wanted poster bearing the likeness of the Applicant. That this image was then played on the National Television Stations (ZNS) & Our News Bahamas and further online. Also exhibited was correspondence dated the 18th April 2023 to the Commissioner of Police indicating that the Applicant was being deported from the United States of America to the Bahamas. In further correspondence dated 22nd March 2023 from US. Immigration and Customs Enforcement to the Bahamas Consulate General Miami at paragraph 2 suggested that the Applicant "entered the United States at Unknown on Unknown without inspection". (Emphasis added). There were multiple supporting documents which appear to suggest that the Applicant was arrested in the US for Possession of Drugs and sentenced and deported thereafter also an admission made by the Applicant himself. The Respondent also focused on the Applicant's Antecedent which were referenced earlier in which the Applicant merely referenced a Disorderly behavior conviction. The Applicant didn't reference an Assault matter which occurred in July 2011, or the Grievous Harm matter occurring in June 2011 nor the Causing Harm matter which occurred in March 2013. It is noted that the Applicant was awarded a conditional discharge on these matters and save for the grievous harm these matters are misdemeanors, the point being they were omitted from the Applicant's Affidavit/Submissions. 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 Causing Harm, Grievous Harm, Assault and Disorderly Behavior the Applicant was given a conditional discharge and no evidence was presented that he violated the conditions. Although it's a possible barometer, its weight should not be overwhelming against the Applicant noting no further convictions since that one in 2020 in this jurisdiction. There is the admitted offence which the Applicant indicated occurred in 2023 and which occurred in the United States of America. The other factor referred in the Applicant's Affidavit/submission is that that there is the likelihood for delays. What is interesting is that neither the Applicant nor Respondent indicated to this Court whether the Applicant has been served his Voluntary Bill of Indictment (VBI) and whether he has been arraigned before the Judge in the Supreme Court or whether he has received his trial date. However the Applicant in his Affidavit/ submission references 2026 for a possible trial.

17. The Respondent does not raise the issue of delay whatsoever. The Court notes that the Offence is alleged to have occurred sometime in September 2020, The Applicant was apprehended in the United States and deported to the Bahamas in April 2023. The implication is that any delay may be a direct result of the Applicant failing to remain with the jurisdiction. 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 seriousness of the offense and the cogency of the evidence. The evidence in this case although not as stout as it could be anticipated. There

are eyewitnesses, there will undoubtedly be questions aligning with the directions required in **Turnbull and another v Regina (1977) QB 224.** It noted also that no other evidence which was led by the Prosecution although there is an inference as to possible surveillance footage retrieved by Officer Rahming. There is however sufficient 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 claims not to know the persons nor was he present. 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.

18. The Court notes that in the Affidavit/submissions the Applicant makes reference to several provisions of the Constitution of the Commonwealth of the Bahamas, and it was unclear the intent citing Articles 17, 19(1) (30, 20(1) & 28. It was not certain whether the Applicant was alleging a breach of his constitutional rights as per these Articles or was simply making reference. The Court references the comments of Lord Diplock in the Privy Council case of **Harrikisson v. The Attorney General of Trinidad & Tobago [1979]3 WLR 63** *"The notion that whenever there is a failure by an organ of Government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right of fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedure for invoking judicial control of administrative action. In an originating application the High Court under section 6(1) the main allegation that a human right or fundamental freedom of the Applicant has been or is likely to be contravened is not of itself sufficient to entitle the Applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the court solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for an unlawful administrative action which involves no contravention of any human right or fundamental freedom."*

19. The Applicant also appears in the Affidavit/submissions to be offering commentary as to the conditions of the Prison facilities. Although it is somewhat unusual rather than the Applicant who is presently incarcerated at the Bahamas Department of Corrections speaking to his actual conditions. There is an attempt to reference other reports or secondary accounts as to what the conditions are applicable in the Prison by exhibiting Articles from Newspapers dated 2021, 2022 and 2019 and a United Nations Report dated 2022. The Court will refer the parties to the Privy Council case of John Higgs and David Mitchell v. The Minister of National Security and (others) (1999) UKPC 55 specifically paragraph 36 where Lord Hoffman for the Majority said as follows: "*Their Lordships wish to make it clear that they in no way condone lengthy pre-trial delays or uncivilized prison conditions. They are unacceptable. But they differ sharply from the case of delay in execution because whereas a prisoner cannot be expected to put an end to his uncertainty by demanding his own execution, both pre-trial delay and prison conditions are the subject of other legal remedies. In Fisher No. 1 (at pp. 680-681) Lord Goff of Chieveley drew attention to the remedies open to a prisoner who had been held in custody for an excessive period before trial. He can apply to have the prosecution dismissed as an abuse of process; he may apply under Article 19(3) for an order that unless tried speedily he should be released on bail and he can invoke his constitutional right under Article 20(1) to be tried within a reasonable time. Likewise in the case of prison conditions, the prisoner may apply for injunctive relief. The decision in Conjwayo v. Minister of Justice, Legal and Parliamentary Affairs 1992 (2) S.A. 56, to which their Lordships have already referred, is a striking example of the grant of such relief to prisoners under sentence of death.*" Now clearly **Higgs Case** dealt with the inhumane issue of the death penalty and not the issue of the Prison conditions it is striking that this Applicant has sought to level indirectly the issue of the conditions at the prison a part of his application for bail but couched in constitutional overtones. Certainly the Bail Act is more than sufficient to address the issue of pretrial detention and what terms ought to apply if the Court exercise its discretion to grant bail. The Court again reminds the parties of the comments of Lord Diplock cited above ask that they be guided accordingly.

20. The allegations as stated above against the Applicant are serious, more so there is no evidence before the Court that the witnesses who have implicate him have recanted their statement or their statements have not changed dramatically from when they were first given. Additionally, I have found that the prima facie evidence against the Applicant is reasonably strong. 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."*

21. As stated above notwithstanding the factual matrix contained in the **Davis case** there is some reasonable evidence before this Court that the Applicant might 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 requirements as another potential tool to secure that the Applicant attends Court and ensures no further violations of criminal statutes. There are some concerns whether these measures will sufficiently ensure that this Applicant appears for his trial. The Court takes note of these comments made by President of the Court of Appeal Dame Anita Allen (as she then was) in **Cordero McDonald v. The Attorney General SCCrApp. No.195 of 2016** the following was said: *"38.The further question for the learned judge was whether there are conditions which can be imposed which would reasonably ensure the appellant's presence at his trial; the safety and protection of the public; and the safety of victims. Suffice it to say that the appellant was already on bail for*

another offence, he was required to have two sureties; to report to the Elizabeth Estates Police Station every Monday, Wednesday and Saturday before 6 pm; and was fitted with an electronic bracelet monitoring his whereabouts. The only other conditions which could reasonably be considered are a curfew, and the surrender of his passport."

22. The Court will note that no evidence was presented that this Applicant has broken any previous conditions of bail. The Court is of the view that very strict measures can be imposed to fully ensure that this Applicant does not violate his obligations to attend Court.

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 2 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: and

d. The Applicant is required to report to nearest Police Station to his registered address in Grand Bahama each Monday & Friday by 6pm at the latest; and

e. The Applicant is required to surrender all travel documents to the Court. All travel outside of the Jurisdiction requires the prior approval of the Court;

Parties are liberty to reapply.

Parties aggrieved may appeal to the Court of Appeal.

Justice of the Supreme Court.

Dated the 20th June, 2023

Andrew Forbes
Justice of the Supreme Court