**COMMONWEALTH OF THE BAHAMAS CRI/bal/205/2023**

**In The Supreme Court**

**Criminal Side**

**B E T W E E N**

**DELANO KELLY**

***Applicant***

**Vs**

**DIRECTOR OF PUBLIC PROSECUTIONS**

***Respondent***

**Before: The Honourable Mr. Justice Gregory Hilton**

**Appearances: Stanley Rolle for the Applicant**

**Shenika Carey for the Respondent**

**Hearing Date: 12th & 26th October, 2023**

**BAIL DECISION**

Hilton, J.

1. The Applicant is charged with Murder and two (2) counts of Attempted Murder alleged to have occurred on 7th September, 2023. He was remanded to the Bahamas Department of Corrections on 15th September, 2023 and presently there is no date set for his trial.

2. The Applicant is a twenty-eight (28) year old Bahamian previously employed as an air-conditioning technician with prior convictions for Housebreaking and Stealing in 2017 and Deceit of a Public Officer in 2023 and was on bail prior to his arrest for Possession of a Firearm with Intent of Endanger Life and Possession of Dangerous Drugs.

3. The Applicant maintains his innocence and says he is not a flight risk and will not interfere with witnesses.

4. The Applicant submits that the evidence against him is weak and that he poses no threat to society and based on the presumption of innocence and his right to liberty he should be granted bail.

5. The Respondent submits that the Applicant should not be granted bail. That the evidence against him is strong and cogent and given the severe penalty the Applicant will face, if he is convicted, he may fail to appear for his trial if he is granted bail.

6. The Respondent also submitted that the Applicant (due to his antecedents) is a danger to society and in the interest of public safety and order he should not be granted bail.

7. In determing what is the appropriated decision in this application the Court has reviewed the relevant provisions of the Constitution and relevant sections of the Bail Act and case authorities.

8. In the present application the Applicant is charged with serious offence of Murder. Although serious this offence is still bailable. The strength of the evidence is relevant to whether the Accused would appear for his trial in the sense that one who knows that there is good chance of acquittal is less likely to abscond than one who anticipated conviction given the severity of sentence attached to the offence of Murder.

9. However, it is accepted that the seriousness of the offence is not an independent ground for refusing bail. The right to personal liberty is an important constitutional right and an Accused (who is presumed innocent) should remained at liberty unless it is necessary to refuse bail in order to serve one of the ends or which detention before trial is permissible.

Each case is individual and need an individual assessment.

10. The Respondent submits that there is strong and cogent evidence against the Applicant. That an eye-witness identified the Applicant as the shooter of both the Murder and Attempted Murder victims.

11. The Applicant maintains his innocence and avers that the identification of him as the shooter is mistaken.

12. It is not the function of the Judge in bail applications to determine contested evidential issues and I do not do so in this case. However, I find that the Witness Statements gave the Respondent sufficient grounds to charge the Applicant.

**Statutory Framework for grant / refusal of Bail**

13. With respect to the exercise of the discretion whether to grant or refuse bail, **Section 4 (2) (C) of the Bail Act (as amended)** sets out what should be considered. It states:-

“**4 (2) Notwithstanding any other provisions of the Act or any other Law, any person charged with a Part C offence shall not be granted bail unless the Supreme Court or the Court of Appeal is satisfied that the person charged:**

**a) ………………………………………**

**b) ………………………………………**

**c) Should be granted bail having regard to all relevant factors, including those specified in Part A of the First Schedule and the primary considerations set out in subsection (2B).**

14. **Part A of the First Schedule (insofar as relevant to this application) provides**

**PART A**

**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 whilst on bail;**

**(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) …………………………………………..**

**d) …………………………………………..**

**e) ……………………………………………...**

**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 released or with an offence which is punishable by a term of imprisonment exceeding one year; and**

**g) The nature and seriousness of the offence and the nature and strength of the evidence against the defendant;**

15. In expounding upon what is necessary for the Court to be provided with to properly exercise its discretion in relation to paragraph **(a) *Justice Crane – Scott J.A. at para: 65 of Seymour v. D.P.P. SCCr App No. 115 of 2019 stated:***

**“65. It is obvious from the above paragraph that the evidence which the crown placed before the learned judge in an effort to discharge its burden of satisfying the court that the appellant should not be granted bail was woefully deficient. Paragraph (a) of the First Schedule to the Bail Act places an evidential burden on the crown to adduce evidence (i.e. substantial grounds) which is capable of supporting a belief that the applicant for bail “would”, if released on bail, fail to surrender to custody or appear at his trial; commit an offence while on bail; or interfere with witnesses or otherwise obstruct the course of justice. The Crown’s burden is only discharged by the production of such evidence.”**

16. In this application nothing has been produced by the Respondent to cause the Court to believe that the Applicant will interfere with witnesses or obstruct the course of justice if granted bail; And but for the nature and seriousness of the offence and the evidence in support of it nothing else has been put forward to suggest that the Applicant will not appear for his trial

17. This Court is also constrained to have regard to the ***“primary considerations”*** in **Section 4 (2B)** of the character and antecedents of the Applicant and the need to protect the safety of the public and public order.

**Section 4 (2B) states:**

**“(2B). For the purposes 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 and antecedents of the person charged the need to protect the safety of the public or the 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.”**

18. In this regard I have found the decision of the Bahamas Court of Appeal in the case *of* ***Richard Hepburn and The Attorney General SCCr. App. No. 276 of 2014*** very instructive. President of the Court Dame Allen delivering the majority decision had this to say in paragraphs 5- 11.

**“5. Bail is increasingly becoming the most vexing, controversial and complex issue confronting free societies in every part of the world. It highlights the tension between two important but competing interests: the need of the society to be protected from persons alleged to have committed a crime; and the fundamental constitutional canons, which secure freedom from arbitrary arrest and detention and serve as the bulwark against punishment before conviction.**

**6. Indeed, the recognition of the tension between these competing interests is reflected in the following passage from the Privy Council’s decision in *Hurnam v The State [2006] 3 LRC 370*. At page 374 of the judgement Lord Bingham said inter alia:**

**“…..the courts are routinely called upon to consider whether an unconvicted suspect or defendant shall be released on bail, subject to conditions, pending his trial. Such decisions very often raise questions of importance both to the individual suspect or defendant and to the community as a whole. The interests of the individual is, of course, to remain at liberty unless or until he is convicted of a crime sufficiently serious to deprive him of his liberty. Any loss of liberty before that time, particularly if he is acquitted or never tried, will prejudice him and, in many case, his livelihood and his family. But the community has a countervailing interests, in seeking to ensure that the course of justice is not thwarted by the flight of the suspect or defendant or perverted by his interference with witnesses or evidence and that he does not take advantage of the inevitable delay before trial to commit further offences….”**

**7. The objective of detaining an accused person is to secure his appearance for his trial and to ensure he is available to be punished if found guilty. Indeed, if a person’s presence at trial can be reasonably ensured otherwise than by his detention, it would be unjust and unfair to deprive him of his liberty.**

**8. Moreover, even if a person’s appearance could not be so ensured, he is entitled to be released either unconditionally or on reasonable conditions if he is not put to his trial within a reasonable time, or if it is unlikely that he will be so tried.**

**9. Accordingly, bail is the right of a person charged with a criminal offence to be released from custody on his undertaking to appear for his trial at a specified time, and to comply with any conditions that the court may think fit to impose.**

**10. The relevant law on bail is found in articles 19 (3), 20 (2) (a) and 28 of the Constitution, and in Sections 3, and 4 of the Bail Act 1994, as amended (“the Act”). It is immediately apparent from reading of those provisions that distinct rights to bail are given, namely, a general right to an unconvicted person to be released on bail unless there is sufficient reason (Part A of the Schedule) not to grant it; and the absolute right of such a person to be released on bail if his constitutional time guarantee is breached or is likely to be breached.**

**11. The general right to bail clearly requires judges on such an application, to conduct a realistic assessment of the right of the accused to remain at liberty and the public’s interests as indicated by the grounds prescribed in Part A for denying bail. Ineluctably, in some circumstances, the presumption of innocence and the right of an accused to remain at liberty, must give way to accommodate that interests.”**

19. The Respondent has raised the issue that the Applicant is a danger to society and may commit further offences if he is granted bail. They submit that his recent previous convictions (one for a similar offence) support their view that in the interest of public safety and order the Applicant should not be granted bail.

20. As earlier detailed, Section 4(2B) of the Bail Act enjoins the Court to consider the character and antecedents of the Applicant and outline that the need to protect the safety of the public and public order are to be primary considerations.

21. In the present state of circumstance in the Bahamas (and New Providence in particular) there is an unacceptable high rate of the offences of Murder and Attempted Murder (particularly with the use of firearm) as well as a growing culture of vigilantism. This is indicative of a breakdown in public order and a consequential depreciation in public safety.

22. Taking into consideration the potential for violent retaliation (many persons granted bail for this type of offence are themselves victims of Murder) and the Applicant’s antecedents I am of the view that the need to protect the safety of the public and public order is paramount with respect to this application.

23. I find that there are no conditions that can be imposed to ameliorate the danger of this Applicant committing further offences or himself being a victim if he is granted bail.

24. **Bail is DENIED.**

**Dated this 2nd day of November A.D. 2023**

**Gregory Hilton**

**Justice of the Supreme Court**