

IN THE SUPREME COURT

Criminal Division

Between

BRIAN GRAY

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: The Honourable Madam Justice Guillimina Archer-Minns
Appearances: Mr. Nathan Smith for the Applicant
Ms. Davina Pinder for the Respondent
Hearing Date: 13 December 2023

RULING

Criminal Law – Bail – The Constitution – Bail Act, Chapter 103 (as amended) – Application for Bail – Attempted Murder contrary to section 292 of the Penal Code, Chapter 84 (as amended) – Possession of an unlicensed firearm contrary to section 5A of the Firearms Act, Chapter 213 (as amended) – Possession of ammunition contrary to section 9(2)(a) of the Firearms Act, Chapter 213 (as amended) – Whether the applicant is a fit and proper candidate for the granting of bail – Application for Bail dismissed – Not a proper case for Bail

INTRODUCTION

1. The Applicant is a 31-year-old Bahamian male, who being concerned with two males, is charged with the following offences:-
 - i. three (3) counts of Attempted Murder contrary to section 292 of the Penal Code, Chapter 84 of the Statute Laws of the Commonwealth of The Bahamas;
 - ii. four (4) counts of Possession of an unlicensed firearm contrary to section 5A of the Firearms Act, Chapter 213 of the Statute Laws of the Commonwealth of The Bahamas; and
 - iii. two (2) counts of Possession of Ammunition contrary to section 9(2)(a) of the Firearms Act, Chapter 213 of the Statute Laws of the Commonwealth of The Bahamas.

2. The Applicant was arraigned before Acting Chief Magistrate Roberto Reckley on 2 November 2023 and was not required to enter a plea. The Applicant's matter was adjourned to 4 April 2024 for the service of a Voluntary Bill of Indictment and he was remanded to The Bahamas Department of Corrections. It is alleged that the Applicant, being concerned together, on 27 October 2023 while at New Providence, did the following:-
 - i. by means of unlawful harm did unlawfully and intentionally attempt to cause the death of Jessie McQueen;
 - ii. by means of unlawful harm did unlawfully and intentionally attempt to cause the death of Meko Major;
 - iii. by means of unlawful harm did unlawfully and intentionally attempt to cause the death of Detective Corporal 3569 Kendrick Brown;
 - iv. was found in possession of a firearm to wit a black and purple .9mm SCCY pistol serial number 509238, not being the holder of a special license in the prescribed form from the Licensing Authority authorizing him to possess the same;
 - v. was found in possession of a firearm to wit a black .9mm pistol serial number ACL472799, not being the holder of a special license in the prescribed form from the Licensing Authority authorizing him to possess the same;
 - vi. was found in possession of a firearm to wit a black and silver .9mm Kahr pistol serial number EH6507, not being the holder of a special license in the prescribed form from the Licensing Authority authorizing him to possess the same;
 - vii. was found in possession of a firearm to wit a black assault rifle serial number erased, not being the holder of a special license in the prescribed form from the Licensing Authority authorizing him to possess the same;
 - viii. was found in possession of eleven (11) .9mm live rounds of ammunition not having a certificate in force at the time; and
 - ix. was found in the possession of six (6) .9mm live rounds of ammunition not having a certificate in force at the time.
3. The Applicant made this application by way of a Summons filed on 7 November 2023. The application was supported by an Affidavit sworn by the Applicant and also filed on 7 November 2023.
4. The Respondent opposed the application by way of an Affidavit-In-Response sworn by Xandrell Bain, Counsel and Attorney-at-Law employed with the Respondent's Office, filed on 11 December 2023.
5. I have read the Affidavits of the Applicant and Respondent and have heard the submissions.
6. The Applicant applied for bail on the following grounds, that:-
 - i. he is a citizen of the Commonwealth of The Bahamas;
 - ii. he is innocent of the said charges. He knows nothing about attempting to murder anyone or having possession of any unlicensed firearms or ammunition;
 - iii. he is the father to two (2) children;
 - iv. he is a landscaper employed with Aircraft Maintenance at Bahamasair;
 - v. he is a hardworking man and a provider for his family;
 - vi. his detention puts his family in further hardship to support himself and deal with his incarceration;

- vii. he is eager to be with, help, and support his family in these difficult times; and
 - viii. he is not a flight risk and if granted bail shall appear before the Court for his trial.
7. The Respondent opposed the application on the following grounds, that:-
- i. the aforementioned offences involved the use of firearms and are offences of a serious nature;
 - ii. the offences of Attempted Murder, for which the Applicant is currently charged are of a serious nature and falls under Part C (section 4(3)) of the Bail Act, Chapter 103 (as amended)
 - iii. there is sufficient and cogent evidence to support the charges aforementioned against the Applicant for which he is applying for bail;
 - iv. considering the nature and seriousness of the offences, the nature and strength of the evidence, and the character and antecedents form of the Applicant, the Applicant's application for bail should be denied;
 - v. in addition to the public's safety, the Applicant should be kept in custody for his own safety, and protection due to the retaliatory atmosphere of these types of offences and their surrounding circumstances;
 - vi. the Court should take judicial notice of the prevalence of gun violence in the country and the number of persons admitted to bail, who are subsequently killed while on bail;
 - vii. there is nothing peculiar about the Applicant's circumstances that would suggest that his continued detention is unjustified; and
 - viii. the Applicant is not a fit and proper candidate for bail at this time.

ISSUE

8. The issue that the Court must decide is: whether the Applicant is a fit and proper candidate for bail?

LAW AND DISCUSSION

9. Bail refers to the right of a person charged with a criminal offence to be released from custody subject to his undertaking to appear for his trial at the requisite time and comply with any condition that the Court may think fit and just to impose.
10. The granting or refusal of bail is a judicial function exercised by the Court. It is the Court that is seized with the ultimate discretion of deciding whether a person charged with a criminal offence ought to be granted or refused bail. Notwithstanding, Parliament has provided a set of general guidelines the Court may consider when deciding whether to grant or refuse bail: **The Attorney General v Bradley Ferguson, Kermit Evans, Stephen Stubbs and Kenton Deon Knowles Appeals Nos. 57, 106, 108, 116 of 2008 (A.G. v Bradley Ferguson)**
11. In determining the appropriate decision in this application, the Court reviewed the various provisions of the Constitution of The Bahamas, Bail Act (as amended), and recent authorities.
12. **Article 20 of the Constitution** affords every person charged with a criminal offence the presumption of innocence until he or she is found guilty or pleads to his or her guilt. It provides –
- “20. (2) Every person who is charged with a criminal offence –
(a) shall be presumed to be innocent until he is proved or has plead guilty.”

13. **Article 19(1) and (3) of the Constitution** affords every person the right to personal liberty save for certain circumstances in which his or her liberty may be lawfully deprived. These provisions read as follows –

“19. (1) **No person shall be deprived of his personal liberty save as may be authorized by law** in any of the following cases –

(a) ...

(b) ...

(c) ...

(d) **upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;**

(e) ...

(f) ...

(g) ...

...

(3) **Any person who is arrested or detained in such case as mentioned in subparagraph 1(c) or (d) of this Article and who is not released shall be brought without undue delay before a court; and if any person arrested or detained in such case as is mentioned in the said subparagraph 1(d) is not tried within a reasonable time he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon reasonable conditions as are reasonably necessary to ensure that he appears at a later date for trial or proceedings preliminary to trial.**”

(Emphasis added)

14. With respect to the Court’s discretion in granting or refusing bail for an accused person in criminal proceedings who is charged with a Part C offence, for which Attempted Murder is included, **section 4 (2) (2A) and (2B) of the Bail Act, Chapter 103 (as amended)** sets out the factors that should be considered. It states as follows:-

“4(2) **Notwithstanding any other provisions of the 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; or

(b) ...

(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), 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 purposes of subsection (2) (a) ...**

(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 have 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 to be a reasonable time.**

(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 order and where appropriate, the need to protect the safety of the victim or victims of the alleged offence, are to be primary consideration.**”

(Emphasis added)

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

“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) ...
 - (iii) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other witness ;
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) the nature and seriousness of the offence and the nature and strength of the evidence against the defendant...”

16. The Court is cognizant that the primary objective of detaining an accused person is to ensure his attendance at trial. If the accused person’s attendance at trial can be reasonably ensured otherwise than by his detention, he should be permitted to bail. Bail is not to be withheld as a punishment.

17. The Court of Appeal in **Jeremiah Andrews v The Director of Public Prosecutions SCCrApp No. 163 of 2019** provided guidance on the operation of the Bail Act (as amended) having regard to its provisions and the principles derived therefrom in recent authorities. Evans JA at paragraph 11 stated as follows:-

“11. When an accused person makes an application for bail in relation to a Part C Offence the Court must consider the matters set out in Section 4(2) (a) and (c). This means that if the evidence shows that the accused has not been tried within a reasonable time he can be admitted to bail (as per (a)). In those circumstances where there has not been unreasonable delay the Court must consider the matters set out in (c) i.e., “all the relevant factors”, including those in Part A of the First Schedule and the “primary considerations” in Section 4 (2B). If after a consideration of those matters the Court is of the view that bail should be granted the accused may be granted bail.”

18. In bail applications, the onus rests on the Respondent, having regard to the Applicant’s rights to the presumption of innocence and liberty as afforded by the Constitution, to satisfy the Court that he ought not be granted bail. The Respondent discharges this onus by the production of evidence. Naked statements or bare assertions would not suffice. The law requires nothing more and nothing less: **Johnathan Ambrister v The Attorney General SCCrApp No.145 of 2011**

19. In **Jeremiah Andrews (supra)**, Evans JA at paragraph 26 opined as follows –

“In order to properly assist the Court, parties are required to provide evidence which will allow the Court to determine whether the factors set out in Part A of the First Schedule to the Bail Act s.4(2B) exists. We note that all too often the affidavits supplied by the Crown make bare assertions that there is a belief that if the Applicant is granted bail he will not appear for trial; will interfere with witnesses or will commit other crimes. These assertions are meaningless unless supported by some evidence.”

20. The Court is a court of law and not a court of speculation. The Court is only moved by evidence. The Court cannot act upon mere allegations, speculations,

or assertions. Furthermore, the Court cannot resort to a fact-finding mission of its own. The Court requires before it evidence in order to act. The rule of law demands nothing more and nothing less: **Stephon Davis v The Director of Public Prosecutions SCCrApp No. 108 of 2021**

Tried within a reasonable time

21. As aforementioned, the Applicant's matter was adjourned to 4 April 2024 for the service of a Voluntary Bill of Indictment. The Applicant did not assert that he would not be tried within a reasonable time nor did the Respondent indicate that the Applicant would not be tried within a reasonable time. The Court, having regard to the circumstances and taking judicial notice of its calendar, is satisfied at this time that the Applicant will be tried within a reasonable time.

Seriousness of the offence and likelihood of absconding

22. Historically, the Courts have firmly held that the seriousness of the offence, though an important consideration, is not a free-standing ground for the refusal of a bail application. The seriousness of the offence factor is coupled with several other factors, namely, the strength of the evidence, the penalty likely to be imposed upon conviction, and the likelihood of the accused person absconding before trial. To this regard, reliance is placed on the dicta of Evan JA in **Jeremiah Andrews (supra)**. His Lordship at paragraph 30 opined –

“30. 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 consideration of other relevant factors disclosed in evidence. E.g. the applicant's resources, family connections, employment status, good character and absence of antecedents.”

23. The Applicant is charged with three (3) counts of Attempted Murder, four (4) counts of Possession of an unlicensed firearm, and two (2) counts of Possession of ammunition. Such offences are serious in nature, particularly, having regard to the magnitude and gravity of the offences and the alleged victims. One of the alleged victims is a member of the armed forces, who is sworn to protect and serve. The Court takes judicial notice of the prevalence of criminal activity in The Bahamas which involves the use of unlawful firearms. There has been a proliferation of homicides and attempted murder involving firearms. Notably, The Bahamas and wider Caribbean region have seemingly become the susceptible trade route for the trafficking of illegal firearms. The Court further takes judicial notice of the number of persons admitted to bail who are subsequently killed while on bail. Notwithstanding the seriousness of the charges to which the Applicant has been charged and the surrounding circumstances, the aforementioned offences areailable offences. The pre-trial detention of accused persons charged with serious offences cannot be perceived as the solution to crime. A more concerted effort is needed to address crime and get to the root of it. Bail is not to be withheld as a punishment. To use the judicial system in such a manner would be an affront to the fundamental rights of presumption of innocence and personal liberty afforded to persons

under the Constitution. The Constitution is subject to no man but all men, the judiciary alike, are subject to the Constitution. Furthermore, such misuse of the judicial system would amount to a blatant disregard for the primary consideration for bail, which is to ensure the attendance of the accused at trial.

24. In the present application, no evidence has been adduced by the Respondent that the Applicant is a flight risk. The Applicant, in his Affidavit, prayed that he is not a flight risk and that should he be granted bail by the Court he would appear before the Court for his trial. However, it may be reasonably inferred that provided the seriousness of the offences for which the Applicant is charged, and the penalty likely to be imposed upon conviction, the Applicant may be tempted to abscond before trial. The Applicant is charged with a litany of serious offences. If the Applicant is convicted, he may likely receive a lengthy custodial sentence.

25. Lord Bingham of Cornhill in the Board decision of **Hurnam v The State (Mauritius) [2005] UKPC 49** at paragraph 15 stated –

“15. It is obvious that a person charged with a serious offence, facing a severe penalty if convicted, may well have a powerful incentive to abscond or interfere with witnesses likely to give evidence against him, and this risk will often be particularly great in drug cases. Where there are reasonable grounds to infer that the grant of bail may lead to such a result, which cannot be effectively eliminated by the imposition of appropriate conditions, they will afford good grounds for refusing bail.”

26. The Court, having regard to the circumstances of this case, is satisfied that the inference that the Applicant is likely to abscond if granted bail may be weakened. The Applicant has sufficient ties to the community, *inter alia*, he is the father of two children and is gainfully employed as a landscaper employed with Aircraft Maintenance at the national flag carrier, Bahamasair. In fact, the inference may also be weakened by other factors, which will be discussed below. In the alternative, the Court is satisfied that there are sufficient conditions available to the Court to ensure the Applicant’s attendance at trial. In this regard, the Court relies on the dicta of Barnett P in the Court of Appeal decision of **Shaquille Culmer v Regina SCCrApp & CAIS No. 98 of 2020**, wherein it was stated –

“Given that there is no evidence that the applicant is not likely to appear for trial and given the fact that on previous bail granted that he did, in fact, appear for trial, we are satisfied that the reasoning of the judge cannot be sustained and that this is a proper circumstance in which bail ought to be granted. This is particularly so as there has been no trial date fixed for the hearing of this matter and it is unclear when such a trial is likely to occur. We are satisfied that conditions can be imposed which can ensure that the appellant appears at trial and limit whatever other risks that may exist which may warrant against the grant of bail.”

27. The conditions usually employed by the Court include reporting, electronic monitoring device (EMD), curfew, etc.

Strength and Cogency of the Evidence

28. The Applicant maintains his innocence and denies his involvement in the offences for which he is charged. On the other hand, the Respondent advanced that the evidence against the Applicant is sufficient and cogent to support the charges against the Applicant for which he is applying for bail. The Respondent

exhibited to its Affidavit witness statements from two of the virtual complainants, particularly, Meko Major and Jessie McQueen, and two police reports from Sargent 2852 Symonette and Police Constable 3894 Mott. Whether inadvertent or otherwise, the Respondent did not exhibit the Witness Statement of Detective Corporal 3569 Kendrick Brown. From a cursory glance of the evidence presented by the Respondent, the Applicant has never been identified. The evidence turns on the Applicant's physical characteristics, namely: height, hair type, and/or the apparel (white T-shirt) allegedly worn by the Applicant on the date in question. Furthermore, the Applicant was arrested on the same day of the incident approximately thirty minutes later in the vicinity of the area and hiding on the roof of a nearby residence. The Court makes no finding on the probative value of the evidence. The Court is reminded of its role in bail applications. In this regard, the Court relies on the dicta of Allen P, at paragraph 34, in the Court of Appeal decision of **Codero McDonald v The Attorney General SCCrApp No. 195 of 2016**, which states as follows –

“34. 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.”

Character and antecedents

29. The Respondent further advanced that in addition to the attempted murder of civilian witnesses, an attempt was made on the life of Detective Corporal 3569 Kendrick Brown with the use of firearms. Detective Corporal Brown made himself known as a police officer whereby the Applicant along with others were told to “stop and drop their weapons” but gunshots were fired in response. And, in addition to ensuring the public's safety, the Applicant should be kept in custody for his own safety and protection due to the retaliatory atmosphere of these types of offences and their surrounding circumstances. Also, considering the nature and seriousness of the offences, the nature and strength of the evidence, and the character and antecedent form of the Applicant, the Applicant's application for bail should be denied. The Respondent exhibited the Applicant's Criminal Records Antecedent Form to support this assertion.
30. With reference to the Applicant's character and antecedents, the Court relies on the Court of Appeal decision of **Lorenzo Wilson v The Director of Public Prosecutions SCCrApp No. 29 of 2020** where that Court at paragraphs 19-21 stated as follows –
 - “19. As to the antecedents, it is not required to show that the appellant lives a habitual life of crime before taking his antecedent into account.
 20. In this case, the appellant is 24 years old and has already been convicted of a criminal offence which was serious enough to serve 18 months imprisonment. That offence involved an unlicensed firearm and this offence also involves a firearm which was alleged to be used indiscriminately against members of the public on a public street.
 21. In our view, it was not unreasonable for the judge to have found that the appellant was a danger and not a fit person to be granted bail.”
31. The Court further relies on the Court of Appeal decision of **Tyreke Mallory v The Director of Public Prosecutions SCCrApp No. 142 of 2021**. In that case, the appellant had multiple previous convictions and was on bail for armed

robbery when he was charged with the offence of murder. Evan JA at paragraphs 24-25 stated as follows –

“24. In these circumstances this issue goes beyond whether the appellant will appear for his trial but turns on whether he is a threat to society. The learned judge’s decision when read as a whole is based on his view articulated in paragraph 33 as follows:

“33. 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.”

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.”

32. The Applicant admitted to having no previous convictions. However, from a cursory glance of the Applicant’s Criminal Record Antecedent Form, the Applicant was convicted of Possession of dangerous drugs with intent to supply. On 2 November 2023, the Applicant was fined \$500.00 or three months in prison in connection to the aforementioned offence. On 17 November 2023, the Magistrate presiding in Magistrate Court No. #4 issued a warrant of arrest for the Applicant concerning the aforementioned offence. The Court is not certain whether the Magistrate ordered a timeframe for the aforementioned fine to be paid. Notwithstanding, the warrant of arrest should not have been issued. The Applicant was given an alternative sentence. If the fine was not paid, the Applicant would have commenced the sentence imposed as he was already in custody for the offences in the present application. The Court admonishes officials at The Bahamas Department of Corrections that when accused persons are in custody and have other pending matters and/or Court dates, said officials should endeavour to ensure that such accused persons are brought before the Court. However, it is also incumbent on accused persons to inform the officials at The Bahamas Department of Corrections of their pending matters and/or Court dates.
33. The Court is not certain whether the non-disclosure of the previous conviction was an inadvertent slip on the Applicant’s part. Nonetheless, the Court is not satisfied that the Applicant should be kept in custody for public safety and his own safety and protection due to the retaliatory atmosphere of these types of offences and their surrounding circumstances. This is notwithstanding, the Applicant’s previous conviction for a serious offence, namely, Possession of dangerous drugs with the intent to supply (which is not of a similar nature) and he is not of good character. The Respondent did not produce evidence to support such assertions. The Court wishes to make it abundantly clear to the Respondent that judicial notice of such surrounding circumstances and bare and/or naked assertions will not be sufficient to warrant an accused person’s pre-trial detention as bail cases turn on their own merits. The Court acts upon evidence and not mere speculation.
34. The Court is mindful of the dicta enunciated by Evan JA in **Stephon Davis (supra)**, at paragraph 26, which states as follows –

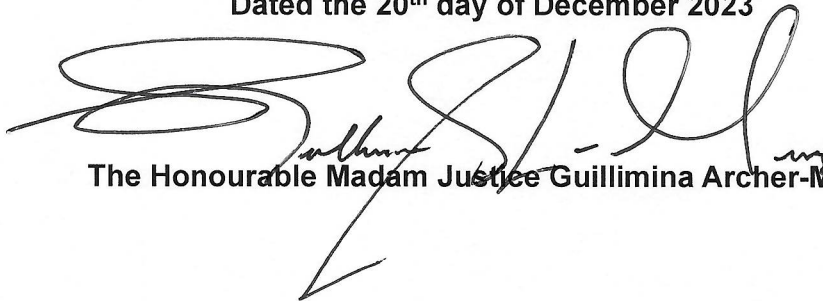
“26. We are not unaware of the serious nature of the crime for which the applicant has been charged and the prevalence of such offences within this country. We are also aware

that this charge has been laid after this Court has previously granted bail to the applicant for a similar offence. However, our Country being founded on the principle of the rule of law 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.”

CONCLUSION

35. Notwithstanding the Court findings and the Respondent not adducing any evidence to support that the Applicant should be kept in custody for public safety, his own safety, and protection, the Court is satisfied that this is not a proper case for bail at this time.
36. On 2 November 2023, the Applicant was fined \$500.00 or three months in prison for the Possession of dangerous drugs with the intent to supply. Unless it can be shown that the imposed fine was paid or that the alternative sentence imposed has expired, the Applicant’s application for bail is premature and consequently is dismissed. Should the circumstances change in the interim, the Applicant is at liberty to reapply to the Court for bail.

Dated the 20th day of December 2023



The Honourable Madam Justice Guillimina Archer-Minns