COMMONWEALTH OF THE BAHAMAS **CASE NO. 2020/CRI/BAIL/FP/00055**

IN THE SUPREME COURT

Criminal Division

B E T W E E N

KYAS DUNCOMBE

Applicant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: The Honorable Mr. Justice Andrew Forbes

Appearances: Mrs. Ashley Carroll & Mr. Sean Smith c/o Director of Public Prosecutions

Mr. Parkco Deal c/o Kyas Duncombe

Hearing Date: 9th October, 2024

RULING ON BAIL

FORBES, J

BACKGROUND

[1.] The Court heard the application, rendered its decision and indicated the intention to provide the written reasons; does so now. The Applicant Counsel filed an application seeking consideration of the Court as to the question of bail on the 12th September 2024. The Applicant in his Affidavit filed on the 12th September 2024, indicated he resides on the Island of Jamaica and Bailey Town, Bimini. The Court is relatively certain that the Islands of Jamaica and Bimini are two distinct territories located in completely different geographic locations. Clearly Counsel for the Applicant meant that the Applicant was a resident of Bailey Town, Bimini one of the Islands of the Commonwealth of the Bahamas and not the Island and Country of Jamaica. He ought to be very cautious in the material being placed before the Court as it may have adverse implications. Nonetheless, the Applicant notes he is currently on remand for Murder contrary to section. 291(b) of the Penal Code. He indicated that he is scheduled to appear in Magistrate's Court No. 2 Magistrate Charlton Smith for the service of his Voluntary Bill of Indictment on the 22nd July 2024 and again on the 17th September 2024 and that he was not served. He further avers he has no pending matters. He also stated that he is prepared to comply with any and/or all conditions should bail be granted and that he is innocent of these charges. That he has two (2) minor children for whom he is sole breadwinner. The Applicant Counsel also laid over submissions which the Court will refer to later.

[2.] The Respondent filed an Affidavit in Opposition on 8th October 2024 and sworn by Corporal 3913 Harris Cash, he avers that the Applicant was arraigned before Magistrate Smith on the 3rd April 2024 charged with Murder. That the Applicant has now been arraigned before the Supreme Court on the 8th October 2024. Officer Harris further avers that there were several eyewitnesses who observed the incident and the statements of those witnesses were so exhibited namely; D/Constable 4527 Arrien McDonald, D/Inspector Livingston Bevans Jr. and Damien Sherman. Officer Harris further avers that the Applicant has a history of illusive behavior and notes

that in May 2017 the Applicant was arrested in the United States of America attempting to smuggle drugs.

[3.] Corporal Harris Cash further avers, that the Applicant was previously arrested, charged with murder and arraigned before Magistrate Debbye Ferguson. Further, on the 26th April 2023 a warrant was issued for the Applicant's failure to appear. Officer Harris further avers that the Applicant has antecedents which included being sentenced for assaulting a Police Officer and resisting arrest. That antecedent was duly exhibited.

[4.] Corporal Harris Cash avers further that the Applicant is not a fit and proper person for bail and that the evidence is cogent.

SUBMISSIONS

[5.] The Applicant was represented by Counsel Mr. Parkco Deal who provided written arguments which were laid over to the Court. Counsel for the Defendant asserts that the Applicant is presumed innocent until proven guilty and that the burden rest upon those seeking to take away the right of an accused person's liberty. He refers to the dicta of *Isaacs JA* in **Seymour v. DPP** SCCrApp. No. 115 of 2019. Counsel also refers to the case of **Hubbard v. Police**. Counsel failed to reference the citation or the principles articulated within the case. Also, Counsel referred to often cited case of **Hurnam v. The State** [2006] 3LRC370 and *Lord Bingham* comments at paragraph 374.

[6.] Counsel asserts that the Applicant ought to be granted bail as he is a Bahamian who is gainfully employed. That he, notwithstanding his pending matters, is presumed innocent. Counsel for the Applicant contents that the Crown's Affidavit merely appear to be relying upon the seriousness of the Offence and the nature and strength of the evidence. He asserts that no person actually observed the Applicant shoot the deceased but merely observed the Applicant perusing the deceased through the crowd with a firearm and firing at the deceased. Counsel then refers the Court to the case of **R v. Turnbull** [1977] QB 224 and argues that eyewitnesses' evidence is unreliable. He further suggest that the trial is the stage where the evidence ought to be tested and not at the stage of the bail hearing citing *Dame Anita Allen* then President of the Court of Appeal in **Cordero McDonald v. The Attorney General**. It should again be noted that Counsel for the Applicant again failed to provide any citation. Counsel suggests that the arrest in the United States

of America has no weight on the current application and is not of similar nature. Counsel also asserts that in the previous Murder matter there was a misunderstanding regarding the Applicant's appearance; however, the matter was subsequently withdrawn. That the Applicant has no intention of absconding and intends to appear at his pretrial hearings. That the Crown has failed to establish that Applicant will or has the propensity to abscond. Counsel cites the case of **Vasyli v. The Attorney General** for the principle the concern of the Court should be whether the person will appear. Here again, Counsel fails to provide the citation. He further contends that the Applicant is the sole provider for the two minor children and that he is gainfully employed. Counsel for the Applicant asserts that the evidence is weak and that the Applicant is a fit and proper person for bail.

[7.] The DPP emailed its arguments. Mrs. Carroll noted the serious nature of the allegations against the Applicant and whether there are any conditions this Court can impose that will restrain this Applicant from committing additional crimes. The DPP refers the Court to the comments made by the *Justice of Appeal Evans* in **Stephon Davis v. the Director of Public Prosecutions** SCCrApp. No.108 of 2021 and the comments made particularly at paragraph 25. Also, the comments made by *Justice of Appeal Jones* in **Davis** case at paragraph 19. Mrs. Carroll also cites the dicta in **Donovan Collie v. Director of Public Prosecution** SCCrApp. No. 132. Counsel for the DPP submits that the Applicant is an unfit person for bail. That the Court is mandated to consider the nature and seriousness of the Offence and the strength of the evidence. Counsel for the Crown asserts that Murder is a serious offence. That the nature of the evidence raises more than reasonable suspicion. It is asserted that the Applicant if released on bail will commit further offenses. And that the safety of the public must be a primary consideration. Counsel for the Crown suggest that the Applicant has failed to attend Court in the past and whether there are not any conditions which the Court may impose which will restrain this Applicant. Counsel for the Crown in their arguments refers to the Affidavit of Prescott Pinder certainly Counsel was mistaken and meant Harris Cash.

THE LAW

[8.] The Court must now consider the rationale for the denial of bail to the Applicant and consider whether he will refuse or fail to surrender for trial.

[9.] Section 4 (1) of the Bail Act provides:-

"(1) Notwithstanding any other enactment, where any person is charged with an offence mentioned in Part B of the First Schedule, the Court shall order that that person shall be detained in custody for the purpose of being dealt with according to law, unless the Court is of the opinion that his detention is not justified, in which case, the Court may make an order for the release, on bail, of that person and shall include in the record a statement giving the reasons for the order of release on bail: Provided that, where a person has been charged with an offence mentioned in Part B of the First Schedule after having been previously convicted of an offence mentioned in that Part, and his imprisonment on that conviction ceased within the last five years, then the Court shall order that that person shall be detained in custody.

[10.] Sections 4(2) and (3) of the Bail (Amendment) Act, 2011 provides:-

(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), 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) ---

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; 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. (3A) 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.

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; Attempted Murder – section 292, 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. Possession of Firearm designed to discharge explosive matter section 30(1)(a), Ch. 213; Possession of Automatic Weapons - section (30)(l)(b), Ch. 213; Possession of Firearm or Ammunition with intent to endanger life or cause serious injury to property - section 33, Ch. 213; Possession of Firearm with intent to commit an indictable offence section 34(1), Ch. 213; Possession of Dangerous Drugs with intent to supply - section 22, Ch 228; Any offence under any of the following sections of the Sexual Offences Act, Ch. 99: 6 (rape), 10 (sexual intercourse with a person under fourteen years), 12 (sexual intercourse with a person suffering from a mental disorder), 13 (incest) and 14 (sexual intercourse with a dependent);

DISCUSSION/ANALYSIS

[11.] It appears that the Respondent's arguments are that the Applicant has a very serious matter, the said matter being to a similar matter for which bail was given by this Court and that the Applicant had failed to appear and as a consequence a warrant of Arrest was issued. Counsel disingenuously failed to mention that the warrant was subsequently cancelled and the matter withdrawn. Crown also contends that the evidence adduced is cogent and powerful and for the aforementioned reasons are good grounds to deny the Applicant bail.

[12.] The Applicant faces a charge of Murder contrary to section 291(b) of the Penal Code which reads as follows: ***"291. (1) Notwithstanding any other law to the contrary— (b) every person convicted of murder to whom paragraph (a) does not apply— (i) shall be sentenced to imprisonment for life;....."***

[13.] Sections 4(2) and (3) of the Bail (Amendment) Act, 2011 permits the grant of bail to those charged with a Part C offence (as stated in paragraph 9 above). Additionally, a Judge hearing an application for the grant or denial of bail for an applicant charged with a Part C offence shall have regard to the following factors as found in Part A of the Bail (Amendment) Act, 2011:-

> "***(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;***
>
> ***(b) whether he is in custody in pursuance of the sentence of a Court or any authority acting under the Defence Act;***
>
> ***(c) whether there is sufficient information for the purposes of taking the decisions required by this Part or otherwise by this Act;***
>
> ***(d) whether having been released on bail in or in connection with the proceedings for the offence, he is arrested pursuant to section 12;***
>
> ***(e) 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;***
>
> ***(f) the nature and seriousness of the offence and the nature and strength of the evidence against the defendant.";***

[14.] Thus, the question is would this Applicant surrender for trial? The Respondent offered no evidence to suggest that he would not have, in fact, appeared and the Affidavit is totally devoid of any suggestion that the Applicant might not surrender for trial. They, however, focused on the Applicant being a safety concern to the community and the evidence against the Applicant being very strong and cogent.

[15.] The Court takes note of the comments of the Court of Appeal in **Cordero McDonald v. The Attorney General** SCCrApp. No. 195 of 2016 where, then, *President of Appeal Dame Anita Allen* said as follows:

> ***"18. As noted in Richard Hepburn v The Attorney General SCCrApp. 276 of 2014, there is a constitutional right to bail afforded by articles 19(3) and 20(2) (a) of the Constitution; and in as much as the right pursuant to article 19(3) is not triggered since there is no element of unreasonable delay in this case, consequently this application is grounded in the provisions of article 20(2) (a).***
> ***19. In that regard, the appellant is presumed innocent and has a right to bail, unless after a realistic assessment by the judge of the matters prescribed above, the appellant's right to remain at liberty is defeated by the public's interest 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 other offences…" 8 (per Lord Bingham in Hurnam v The State [2006] 3 LRC 370, at 374).***
> ***20. The balancing of the applicant's right to the presumption of innocence and that of the public to be protected are reflected in the above-mentioned factors recognized and prescribed by the Bail Act as matters to be weighed against the grant of bail, and, in so far as they are relevant to the particular application for bail, they must, as previously noted, be assessed by the judge before exercising the discretion. Indeed, section 2B prescribes that in relation to Part C offences: '…the character or antecedents of the person charged, the need to protect 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.'"***
>
> [Emphasis added].

[16.] Also, the comments of *Justice of Appeal Evans,* although cited by Counsel for the Applicant, its importance is essential and he said as follows:

> ***"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….."***

[17.] This Court also takes note of the comments made by then *Justice of Appeal Longley* in **The Attorney General of the Commonwealth of The Bahamas v. Bradley Ferguson, Kermit**

Evans, Stephon Stubbs, and Kenton Deon Knowles SCCrApp. No.57,106,108 & 116, and in particular paragraph 35 where he said 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…."***

[18.] The above view was later echoed by *Acting Justice of Appeal Evans (as he then was)* in **Duran Neely v. The Attorney General** SCCrApp. No. 29 of 2018:

> ***"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…."***

[19.] The Court notes the assertions made by Counsel for the Applicant that the Court ought not look at the evidence that in the opinion of the Court would directly contrary to its function. It notes it is not accessing the credibility or the weight of the evidence but rather whether it is sufficiently cogent. In this regard the Court reviewed the statements of D/Constable 4527 McDonald who indicated that on the night of 27th March 2020 he and Inspector Bevans were at a Bar located on Kings Highway in the area of Flowers Number House when he observed the Applicant whom he knew and another male he later identified. That he observed that Applicant who he states was some 20 yards in front of him holding a firearm and pointed in the direction of the deceased. That he observed as the deceased attempt to make good his escape when the Applicant proceeded after him through a crowd of people and he again heard what appeared to be gunshots. He arrived at the scene and observed a deceased male laying on the ground with what appeared to be a gunshot wound.

[20.] According to the statement of Inspector Bevans, he observed the Applicant running after the deceased that the Applicant gave chase. He then observed the Applicant pointing a firearm and discharge the firearm. That he shouted "Stop police," but the Applicant made good his escape. That he observed the deceased laying on the ground with what appeared to be a laceration to the forehead. And the final statement was given by a non-Police Officer who indicated that he was at

the establishment and he observed a fighting occurring that he was later asked to view a photo lineup where he indicated that he observe the Applicant firing shots at an individual he knew as "Pollo". He was asked to circle the photo of the person he observing firing the shots and he circled the Applicant.

[21.] Counsel for the Applicant contends that these eyewitnesses and their respective evidence is unreliable. That it is not a fully accurate representation. Should the matter proceed to the jury, the Court is required to give a warning regarding eyewitness evidence and the circumstances that the witnesses observed the incident as well as other criteria, the weight of that evidence and the credibility of those witnesses is entirely a matter for the Jury at trial and one which at this stage the Court cannot access.

[22.] Counsel for the Applicant appears to concede that the Applicant was observed running with a gun but nobody observed him fire it at the deceased. Here again, that would be a matter for the jury as to a reasonable inference being drawn. However, both Officers McDonald & Bevans indicated they observed the Applicant firing at the deceased. The Crown's reliance on an event which occurred in the United States of America would have been helpful had the Crown provided the outcome. Clearly it presents a troubling picture that according to the incident report and the Affidavit of US Immigration and Custom Enforcement Officer Victor Lopez in which he references arresting the Applicant and another individual for suspicion of knowingly and willingly conspiring to possess with intent to distribute marijuana while on board a vessel in the jurisdiction of the United States. According to Officer Lopez, the Applicant and the other individual attempted to escape, were apprehended, the vessel was searched and the suspected drugs were recovered. The Applicant and the other individual were subsequently charged before the Southern District Court of Florida on the 12th May 2017. Unfortunately, again the Crown failed to provide a full picture. The Applicant for his part sworn an Affidavit that he had no antecedents or pending matters in this Jurisdiction. That present a wholly incomplete picture if the Applicant knew he had a previous matter in another jurisdiction. The Applicant wholly omitted that he had previous convictions. The Court review of those previous convictions one (1) offence in 2014 for Causing Harm where he was granted a conditional discharge and community service, one (1) offense in 2015 for Stealing where he was ordered to complete community service and compensate the virtual complainant and the final matter occurring in 2021 for Assaulting a Police Officer and Resisting Arrest again he was ordered to compensate the virtual complainant and perform community

services. The Offenses in of themselves appear to be misdemeanor offenses and are not of similar nature of the current offense.

[23.] The question as to whether the Applicant would abscond, the Respondent offers no evidence that he would not they appear to suggest that if he is released on bail he would likely reoffend and he has failed to attend Court when required. The evidence adduced does not support any of those assertions and the Court is reminded by The Court of Appeal in **Jonathan Armbrister v The Attorney General SCCrApp. No. 145 of 2011 a**nd the comments of then *Justice of Appeal John* at paragraph 17 where he cautioned Prosecutors against mere assertions without evidence. So I remind Counsel for the Crown evidence must be the bulwark of the case not bare assertions.

[24.] The Court is satisfied that the evidence adduced is indeed cogent and reasonably strong and its credibility is and weight are matters for a jury, this Court as a matter of finding accepts that the evidence adduce is reasonable. The issue whether there are conditions which can be imposed by this Court which would ensure that the Applicant attends Court when required and does not engage in any further violation or creates concerns for public safety. The two factors which this Court notes are that the Applicant intends to relocate to the Island of Bimini whose proximity to the United States provides great temptation, this coupled with the 2017 incident although not fully clarified suggest that the Applicant can navigate a vessel and enter the United States quite easily. And the second factor is if the evidence of the eyewitnesses are to be considered and they have not recanted the Applicant was running through a crowd of persons with a potentially loaded firearm and was observed, again if the witnesses' evidence is to be accepted, firing at another individual. The possibly that a random individual could have been struck by a bullet was remarkable in of itself. Given this, the Court is uncertain that Electronic Monitoring Device, curfew or reporting requirements sufficiently ensures that the Applicant remains compliant with the terms of any bail. And one final factor, although not addressed by either the Crown or the Applicant, it would be noted that all the relevant witnesses to this incident are residences of the Island of Bimini and the Applicant intends to return to the Island if released upon bail. In the opinion of the Court it would be naive to think it would not have a possible chilling effect on the witnesses. The Court is not ascribing any intention on the Applicant to interfere; however, the Island is relatively small as is most of these Island communities and for the Applicant to return would certainly create some concerns in the minds of many and to assume otherwise is acting as an ostrich and burying ones

head in the sand. The Court also notes that the trial of this Applicant is scheduled for next year and certainly the question of delay would not arise.

DISPOSITION

[25.] This Court given the above circumstances will deny the application for bail for the current offense. The Applicant is invited to reapply should circumstances change.

[26.] Parties aggrieved may appeal to the Court of Appeal.

Dated the 29th October, 2024

Andrew Forbes
Justice of the Supreme Court