

IN THE SUPREME COURT

Criminal Division

Between

EMILIO DEPASS

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

**Before:** The Honourable Madam Justice Guillimina Archer-Minns  
**Appearances:** Ms. Cassie Bethell for the Applicant  
Ms. Jacqueline Burrows for the Respondent  
**Hearing Date:** 28 February 2024

**RULING**

**Criminal Law – Bail – The Constitution – Bail Act, Chapter 103 (as amended) – Application for bail – Armed Robbery contrary to section 339(2) of the Penal Code, Chapter 84 (as amended) – Possession of an Unlicensed Firearm contrary to section 5(1)(b) 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) – Possession of Dangerous Drugs with an Intent to Supply contrary to section 22(1) of the Dangerous Drugs Act, Chapter 228 – Whether the Applicant is a fit and proper candidate for the admission of bail – Application for bail denied – Applicant not a fit and proper candidate for the admission of bail**

**INTRODUCTION**

1. Emilio Depass, the Applicant herein, is a 25-year-old Bahamian male who being concerned with another is charged with Armed Robbery, *inter alia*, Possession of an Unlicensed Firearm, and Possession of Ammunition, said offences being contrary to various Statute Laws of the Commonwealth of The Bahamas. The said offences are alleged to have occurred on 14 December 2023.
2. The Applicant was subsequently charged with Possession of Dangerous Drugs with an Intent to Supply, said offence being contrary to section 22(1) of the Dangerous Drugs Act, Chapter 228 of the Statute Law of the Commonwealth of The Bahamas. The said offence is alleged to have occurred on 17 December 2023.

3. On 21 December 2023, the Applicant was arraigned in Magistrate Courts No.9 and No.15 before Acting Chief Magistrate Roberto Reckley and Magistrate Lennox Coleby, respectively, pertaining to the said offences. The Applicant was remanded to The Bahamas Department of Corrections.
4. The Applicant moved the Court relative to this application for bail by way of Summons and Affidavit-In-Support sworn by himself, both filed on 3 January 2024.
5. The Respondent opposed this application for bail by way of an Affidavit-In-Response sworn by Ms. Vashti Bridgewater, Assistant Counsel employed with the Respondent's Office, filed on 28 February 2024.
6. The Court has read the Affidavits of the Applicant and the Respondent and has heard the submissions made by the respective Counsel.

### **THE APPLICANT'S AFFIDAVIT EVIDENCE**

7. The Applicant in his Affidavit averred, that:-
  - i. he was born on 21 December 1998 in the Commonwealth of The Bahamas and is 25 years of age;
  - ii. he was arraigned in Magistrate Court No. 9 before Acting Chief Magistrate Roberto Reckley and No. 15 before Lennox Coleby on 21 December 2023;
  - iii. he pleaded not guilty and will be defending these charges at trial;
  - iv. he respectfully requests that the Court admit him to bail pending further court appearances;
  - v. he does have a previous conviction for stealing before the Court(s) in the Commonwealth of The Bahamas;
  - vi. he do not have any pending matter(s) before the Court(s) in the Commonwealth of The Bahamas;
  - vii. should the Court admit him to bail, he will have accommodations prior to his incarceration, he was employed as a Radiator Technician in the field of welding, New Providence, The Bahamas;
  - viii. he respectfully requests that the Court admit him to bail for the following other reasons, that:-
    - a. he will be disadvantaged in his ability to adequately prepare his defence if he is further remanded;
    - b. he will be disadvantaged in his ability to support himself and assist his family;
  - x. if he is granted bail, he will comply with all rules and regulations set out by the Court;
  - xi. he is a fit and proper candidate for bail; and
  - xii. the contents of this Affidavit are true and correct to the best of his knowledge, information, and belief.

### **THE RESPONDENT'S AFFIDAVIT EVIDENCE**

8. The Respondent in its Affidavit averred, that:-
  - i. the evidence in these matters is cogent and compelling and the offences are profoundly serious ones;

- ii. the Virtual Complainant identified the Applicant, Emilio Depass, in a twelve-man photographic lineup, as one of the males who robbed him at gunpoint of a purple iPhone 14 Plus, white iPhone 14 Plus, and \$410.00 in cash;
- iii. officers while on patrol in the Nassau Village area and while executing a search on a vehicle with two male occupants inside, the driver of the vehicle being the Applicant, Emilio Depass, found a .9mm firearm containing two live rounds of ammunition and a clear plastic bag which contained small packages of suspected marijuana in the groin area of the Applicant, Emilio Depass;
- iv. the Respondent verily believes that given the nature and circumstances of the offences, the Applicant is likely to commit further offences should he be granted bail;
- v. the Respondent verily believes that given the nature and circumstances of the evidence, there is a need to protect the safety of the witnesses, and the public and public order;
- vi. there is nothing peculiar about the Applicant's circumstances that would suggest his continued detention is unjustified;
- vii. the Applicant admits at paragraph 4 in his Affidavit that he was arraigned on his charges on the 21<sup>st</sup> day of December 2023. Therefore, there has been no unreasonable delay regarding this matter;
- viii. the Applicant is not a fit and proper candidate for bail at this time;
- ix. in the circumstances the Respondent requests that the Court in exercising its discretion not to admit the Applicant to bail; and
- x. the contents of this Affidavit are true to the best of its knowledge information and belief.

#### **ISSUE**

9. The issue that the Court must determine is whether the Applicant is a fit and proper candidate for the admission of bail?

#### **LAW AND ANALYSIS**

10. The grant or refusal of bail is governed by the Constitution, Bail Act (as amended), and judicial authorities. This notwithstanding, the Court, as the superior court of record, has been seized and continues to be seized with the inherent power to grant bail to persons charged with a criminal offence (even the most serious criminal offences) from time in memoriam. 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.
11. In determining this application for bail, the Court reviewed the relevant provisions of the Constitution, Bail Act (as amended), and judicial authorities.
12. Bail, now more than ever, continues to be a complex and controversial issue involving the exercise of the Court's discretion. In recent times, the issue surrounding bail has become the subject of much public debate and criticism.
13. In **Richard Hepburn v The Attorney General SCCrApp & CAIS No. 176 of 2014**, Allen P at paragraphs 5, 10 and 11 pronounced –

- “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.
- ...
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 a reading of those provisions that two distinct rights to bail are given, namely, a general right to an un-convicted 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 a judge on such an application to conduct a realistic assessment of the right of the accused to remain at liberty and the public’s interest 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 interest.”
14. The Court, in deciding applications for bail, must undoubtedly perform the difficult balancing exercise, having on the one hand to balance the fundamental rights and freedoms of the accused person and on the other hand to protect society at large from the criminal element.
15. It is now so trite law and the grundnorm of any free democratic and constitutional society who have an abiding respect for the basic fundamental rights and freedoms of persons, even those persons accused of committing criminal offences, that individuals are presumed innocent until they are proven guilty and ought not to be deprived of their personal liberty without just cause. In The Bahamas, said fundamental rights and freedoms are outlined in **Articles 20(2)(a) and 19 (1) and (3) of the Constitution**. These provisions need not to be reproduced or repeated herein.
16. The Applicant is charged with several offences listed in **Part C of the First Schedule of the Bail Act (as amended)**. The Court, in determining this application, gives length and breadth to **section 4(2)(2A) and 2(B) of the Bail Act (as amended)**. These provisions provide –
- “4(2) Notwithstanding any other provisions of the 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)

17. **Part A of the First Schedule** (insofar as relevant to this application for bail) outlines factors the Court must consider in applications for bail. **Part A of the First Schedule** states –

“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) ...
  - (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 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...”

18. The Court, in denying bail, must have substantial grounds to believe that an accused person, if admitted to bail, will abscond, interfere with potential witnesses, commit further offences while on bail, or otherwise pervert the course of justice.

19. The burden is therefore on the Respondent, having regard to the Applicant's fundamental rights to the presumption of innocence and personal liberty afforded by the Constitution, to satisfy the Court that he ought not to be admitted to bail. In order for the Respondent to discharge this burden, evidence must be produced to support their opposition to the admission of bail. Far too often and despite numerous judicial authorities warning otherwise, the Respondent supply affidavits containing bare and/or naked assertions and beg the Court's indulgence to take judicial notice of the prevailing crime problem in the Bahamian society and the retaliatory atmosphere relative to accused persons who are subsequently admitted on bail. Such ritualistic practice is unacceptable and cannot stand. Otherwise, a dangerous precedent would be set.

20. In **Stephon Davis v The Director of Public Prosecutions SCCrApp No. 108 of 2021**, Evans JA at paragraph 26 pronounced –

“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.”

21. In **Jeremiah Andrews v The Director of Public Prosecutions SCCrApp No. 163 of 2019**, 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 section 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.”

(Emphasis added)

**Tried within a reasonable time**

22. The Applicant’s application for bail is made prior to him being served with his Voluntary Bill of Indictment (“VBI”), *inter alia*, prior to him being officially arraigned before the Court, and prior to his trial date being fixed. Consequently, the issue of whether or not the Applicant would be tried within a reasonable time is not before the Court.

23. Notwithstanding, the Applicant did not advance in his Affidavit that he would not be tried within a reasonable time and the Respondent, in its Affidavit at paragraph 12, advanced that there has been no unreasonable delay in this matter. The Court, having regard to the prevailing circumstances of trials in the Supreme Court being set some years ahead (even with the addition of additional criminal courts) and the absence of evidence to the contrary, is satisfied at this time that the Applicant will be tried within a reasonable time.

**Seriousness of the offence and likelihood of absconding**

24. The seriousness of the offence for which the accused person stands charged has always been and continues to be an important factor for the Court’s consideration in determining whether to grant or refuse bail. However, the seriousness of the offence is not a stand-alone factor; though naturally in cases of serious offences, the seriousness of the offence should invariably weigh against the grant of bail. The seriousness of the offence factor is now coupled with additional 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. In **Jeremiah Andrews (supra)**, Evans JA at paragraph 30 pronounced –

“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.”

25. As aforementioned, the Applicant is charged with Armed Robbery, *inter alia*, Possession of an Unlicensed Firearm, Possession of Ammunition, and Possession of Dangerous Drugs with an Intent to Supply. These offences, save for the Possession of Dangerous Drugs with an Intent to Supply offence, are profoundly serious ones. They involve the use of a firearm or firearm apparatus. The wider Caribbean region, more importantly, The Bahamas has faced a proliferation of illegal firearms. These illegal firearms have no doubt contributed to a heightened level of criminality in the Bahamian society wherein the use of a firearm is the weapon of choice, therefore posing a serious threat to public safety and public order and having grave implications on the economic and social fabric of The Bahamas.

26. Notwithstanding, these offences are still bailable offences given the law as it currently stands. Bail ought not to be withheld as a punishment mechanism against accused persons, as these persons have not yet been convicted of committing the criminal offences for which they stand charged. Each application for bail is individual and needs an individual assessment.

27. In the present application for bail, no evidence was advanced by the Respondent that the Applicant is deemed a flight risk. The Applicant, in his Affidavit, requested to be admitted to bail pending his further court appearances. It follows therefore that the Applicant charged with these serious offences and liable to a lengthy prison sentence if convicted thereof has a powerful incentive to abscond.

28. 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.”

29. The Court, having regard to the circumstances, is not of the view that the inference of flight before trial inferred on the Applicant may be weakened by his Bahamian citizenship status, employment status as a Radiator Technician in the field of welding, or his bare or naked assertions that his continued incarceration will disadvantage his ability to adequately prepare his defence or ability to support himself and his family.

### **Strength and cogency of the evidence**

30. The Court's limited role in applications for bail has been adeptly propounded upon in **Codero McDonald v The Attorney General SCCrApp No. 195 of 2016**, wherein Allen P at paragraph 34 enunciated –

“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.”

31. The Applicant denies his involvement in the offences, maintains his innocence, and indicates a willingness to defend the charges at his trial. The Respondent, in its Affidavit, advanced that the evidence against the Applicant is cogent and compelling. The Respondent seeks to rely on the statement of the Virtual Complainant who subsequently identified the Applicant, in a twelve-man photographic lineup, as one of the males who robbed him at gunpoint of a purple iPhone 14 Plus, white iPhone 14 Plus, and \$410.00 in cash. The Virtual Complainant's statement states that he was lured into an unknown area where he was subsequently robbed at gunpoint. It is further advanced and/or alleged that the entire ordeal was caught on the Virtual Complainant's vehicle's dash camera (Van Top Duel Dash Cam).

32. The Respondent further seeks to rely on the statement of Corporal 3761 Musgrove which indicates that police, while on patrol in the Nassau Village and having received information from the Electronic Monitoring Unit in reference to a male suspect wanted by the Armed Robbery Section c/o CID, came across a vehicle with two male occupants inside. The occupants were ordered outside of the vehicle and police proceeded to execute a search of the vehicle. Thereafter, police proceeded to search the occupants. While searching the driver of the vehicle, police discovered, in his groin area, a black magazine with two (2) .9mm live rounds of ammunition and a clear plastic bag containing twenty-two (22) small packages of suspected marijuana. The driver of the vehicle gave his name as Emilio Depass and the passenger of the vehicle gave his name as David Higgs.

33. The evidence, in the Court's view, raises a reasonable suspicion of the Applicant's involvement in the alleged offences. The intended evidence is undoubtedly cogent and compelling.

### **Interference with the safety of witnesses**

34. The Respondent, in its Affidavit, advanced that the Applicant should remain in custody for the safety of witnesses. The Respondent presented no evidence before the Court that the Applicant, if admitted to bail, would interfere with the safety of witnesses. Notwithstanding, the Court, having regard to the seriousness of the offences, *inter alia*, the penalty likely to be imposed on the



Applicant if he is convicted of said offences and the nature and circumstances of the evidence, is satisfied that it may be reasonably inferred that the Applicant likewise has a powerful incentive to interfere with the safety of witnesses in his case, particularly, the Virtual Complainant. The said inference cannot be weakened. This is particularly true given the growing level of vigilantism and retaliatory atmosphere in the Bahamian society.

### **Character and antecedent**

35. In **Lorenzo Wilson v The Director of Public Prosecutions SCCrApp No. 29 of 2020**, Barnett P at paragraph 19 stated –

“19. As to antecedents, it is not required to show that the appellant has lived a habitual life of crime before taking his antecedents into account.”

36. In **Jevon Seymour v The Director of Public Prosecutions SCCrApp No. 115 of 2019**, the Court of Appeal provided examples that would lead the Court to conclude that an accused person applying for bail may be a danger to public safety or public order. Writing for that Court, Crane-Scott JA at paragraph 68 stated –

“68. If the appellant was in fact a threat to public safety or public order; or if there was evidence of specific threats which had been made against witnesses, Perry McHardy’s Affidavit should have included the necessary evidence of his propensity for violence for the judge’s consideration. **Such evidence might have included for example, any prior convictions (if any) for similar offences; or evidence of pending charges for violent or firearm offences; or again evidence, for instance, of any known or suspected gang affiliation.** No such evidence was placed before the learned judge and the absence of such evidence, stood in stark contrast with the evidence which the appellant had placed before the judge of good character, strong family and community ties and the fact that he had a long and unblemished record of service within the RBDF.”

**(Emphasis added)**

37. The Respondent opposed the present application for bail on the ground that it verily believes given the nature and circumstances of the evidence, there is a need to protect the safety of witnesses and public order and public safety. Attached to the Respondent’s Affidavit is the Applicant’s Criminal Record Antecedent Form. It is to be noted that the Applicant’s Criminal Record Antecedent Form discloses that the Applicant has two previous convictions, namely, Stealing and Receiving and Violation of Curfew. The Applicant was sentenced to thirty (30) days in prison for the former conviction and fined \$250.00 or seven (7) days in prison for the latter conviction. The said convictions occurred on 17 June 2021.

38. Apart from the present offences, the Applicant has no pending charges. Notwithstanding, the Applicant appears as a person who has previous convictions, one of which is for a crime of dishonesty, and sentenced to thirty (30) days in prison therefor. The Applicant for the purposes of the law, cannot assert that he is of good character. The Applicant is now charged before the Court for allegedly committing a further crime of dishonesty. However, this time,

said offence is much graver than the previous offence and now involves the use of an offensive weapon to wit a firearm. The evidence in relation to said charge is cogent and compelling.

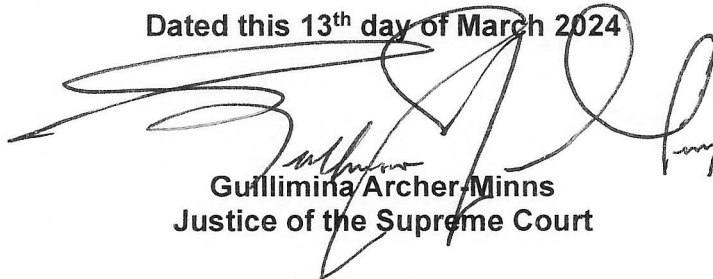
39. Consequently, the Court is of the view that the present application for bail goes beyond whether the Applicant would appear for trial but turns to whether he is a threat to public safety and public order and/or would interfere with the safety of witnesses in this case. Taking all this into consideration, the Court is satisfied that the Applicant is an individual whom it can reasonably be inferred would interfere with the safety of the witnesses in his case, particularly the Virtual Complainant, and is a threat to public safety and public order.

40. Further, the Court is not satisfied that there are any effective conditions, at this time, that could be imposed by the Court to assuage its concern that the Applicant would interfere with the safety of witnesses in his case, particularly the Virtual Complainant and is a threat to public safety and public order. The safety of the witnesses, public safety, and public order are paramount and in these circumstances cannot be ignored.

### **CONCLUSION**

41. In these circumstances and having regard to the foregoing, the Court is satisfied that the Applicant is not a fit and proper candidate for the admission of bail at this time. The application for bail is hereby denied. Should the Applicant's circumstances change in the interim, he is at liberty to reapply to the Court for admission to bail.

**Dated this 13<sup>th</sup> day of March 2024**

A large, stylized handwritten signature in black ink, consisting of several loops and flourishes, positioned over the typed name and title.

**Gullimira Archer-Minns  
Justice of the Supreme Court**