

IN THE SUPREME COURT

Criminal Division

Between

EULAN MCKINNEY

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: The Honourable Madam Justice Guillimina Archer-Minns
Appearances: Mr. Eulan McKinney, *Pro se*
Ms. Janet Munnings for the Respondent
Hearing Date: 28th February 2024

RULING

Criminal Law – Bail – The Constitution – Bail Act, Chapter 103 (as amended) – Application for bail – Manslaughter contrary to section 293 of the Penal Code, Chapter 84 (as amended) – Whether the Applicant is a fit and proper candidate for the admission of bail – Application for bail granted – Conditions imposed

INTRODUCTION

1. Eulan McKinney, the Applicant herein to these proceedings, is a 49-year-old Bahamian male who, being concerned with others, stands charged with seventeen (17) counts of Manslaughter contrary to section 293 of the Penal Code, Chapter 84 of the Statute Law of the Commonwealth of The Bahamas (as amended), which said offences are alleged to have occurred on 24 July 2022.
2. The Applicant subsequently appeared before Chief Magistrate Joyann Ferguson-Pratt (as she then was) in the Magistrate's Court on 29 July 2022 relative to the said offences. The matter was adjourned and the Applicant was remanded to The Bahamas Department of Corrections pending the presentation of his Voluntary Bill of Indictment ("VBI").

3. The Applicant was arraigned before The Honourable Mr. Senior Justice Bernard Turner (as he then was) on 9 June 2023 where he pleaded not guilty to the said offences. The matter was then assigned to this Court to preside over the trial.
4. The Applicant appeared before the Court on 14 June 2023 to receive a fixed trial date. The Applicant was given a fixed trial date of 18 January 2027.
5. The Applicant made the present application for bail via The Bahamas Department of Corrections Bail Request Form dated 16 January 2024.
6. The Respondent opposed the present application by way of an Affidavit-In-Response sworn by Sgt. 235 Allan Ferguson, a Police Officer attached to the Court Liaison Section at the Respondent's Office, filed on 28 February 2024.
7. The Court has read the Applicant's Bail Request Form and the Respondent's Affidavit-In-Response and has heard the submissions made by the respective parties.

THE APPLICANT'S SUBMISSIONS

8. The Applicant appeared *pro se* and submitted *inter alia*, that:-
 - i. he pleaded not guilty to the said offences and intends to defend himself against the said charges at trial;
 - ii. if he is granted bail, he would have reasonable accommodations with his brother in Sandy Point, Abaco, The Bahamas;
 - iii. he has previous convictions but said convictions are not of a similar nature to the said offences for which he is presently charged;
 - iv. if he is granted bail, he will comply with the rules and regulations set out by the Court; and
 - v. he is a fit and proper candidate for the admission of bail.

THE RESPONDENT'S AFFIDAVIT EVIDENCE

9. The Affidavit of Sgt. 235 Allan Ferguson stated, that:-
 - i. the Applicant has a fixed trial date set for 18 January 2027;
 - ii. the Applicant has previous convictions for which he served custodial sentences and therefore is not of good character;
 - iii. the evidence is sufficient and cogent in this matter to support the charges being made against the Applicant. The witness, Carleen Coakley, gave a statement to police that the person she knows as "Doly" was working on a boat in her yard on Friday 22 July 2022 and he was also present when the boat was moved from her yard by Wreckley's Tow Company. The witness identified the Applicant from a twelve-man lineup as the male whom she knows as "Doly" who fixed the boat and was on the boat when it was being towed out of her yard;
 - iv. the evidence is further strengthened by the witness, Cleavens Degazon, who gave a statement to police that a slim rasta male was responsible for sitting persons on the boat. He further stated that on Sunday 23 July 2022, twenty minutes after the boat ride, the boat started to take on water, and persons panicked, causing the boat to

- overturn. The witness subsequently identified the Applicant from a twelve-man photo lineup as the second male who was telling persons where to sit on the boat;
- v. the witness, Johny Senuscat, who was also a passenger on the boat also gave a statement to police that a rasta male was the person directing people where to sit on the boat. The witness subsequently identified the Applicant as the male responsible for directing persons where to sit on the boat;
 - vi. the witness, Josue Dorival, would have also given a statement to police where he positively identified the Applicant as one of the persons who took him along with others on the boat;
 - vii. on Tuesday 26 July 2022 at 3:00 pm, while at the Detention Center located at Golden Isles Road, the witness, Rosemane Metellus, who was also a passenger on the boat, identified the Applicant from a twelve-man lineup as the male who was upstairs by the next guy. She further stated that the male came down next to her and moved the battery from near where she was sitting. As a result, the boat took on water;
 - viii. presently there has not been any unreasonable delay as the Applicant was arrested on 2 September 2022 and he is expected to be presented with his Voluntary Bill of Indictment on 27 February 2023;
 - ix. the Applicant is a flight risk not having a fixed address;
 - x. the nature of the offence is serious and the interest of the public ought to be considered; and
 - xi. the Applicant for the above reasons is not a fit and proper candidate to be considered for the grant of bail and in the circumstances should not be admitted to bail.

ISSUE

10. The issue for the Court to determine is whether the Applicant is a fit and proper candidate for the admission of bail.

LAW AND ANALYSIS

11. The grant or refusal of bail is governed by the Constitution of the Commonwealth of The Bahamas ("the Constitution"), Bail Act (as amended), and judicial authorities. The Court, for the determination of the present application for bail, has considered the relevant law.
12. The Court, in its consideration of bail applications, must be satisfied that the ends of justice are not thwarted by the Applicant's flight to avoid trial or perverted by his potential interference with witnesses or his propensity to commit further offences (whether of a similar nature or otherwise) if he is admitted to bail. Bail is not to be withheld as a punishment. An accused person should not be kept in custody as a mechanism of securing his attendance at trial or any proceedings preliminary thereto. This is particularly true where the accused person's attendance at trial or any proceedings preliminary thereto could reasonably be ensured by other means.
13. The burden is therefore on the Respondent, having regard to the Applicant's fundamental rights and freedoms to the presumption of innocence and personal

liberty afforded by the Constitution, to satisfy the Court that the Applicant ought not to be admitted to bail. This burden is discharged by the production of evidence. Naked or bare assertions without more will not suffice. The Court shall not resort to a fact-finding mission of its own. The rule of law demands nothing more and nothing less: **Johnathan Ambrister v The Attorney General SCCrApp No. 145 of 2011 and Jeremiah Andrews v The Director of Public Prosecutions SCCrApp No. 163 of 2019.**

14. It is now settled law that every person in The Bahamas (even a person charged with the most heinous criminal offences) is afforded, under the Constitution, inherent fundamental rights and freedoms, particularly as, to the presumption of innocence until they are proven guilty or pleads guilty and ought not to be deprived of their personal liberty without just cause. These constitutional provisions need not be reproduced or repeated herein: **Articles 20(2)(a) and 19(1) and (3) of the Constitution.**
15. The Applicant stands charged with seventeen (17) counts of Manslaughter, an offence listed in **Part C of the First Schedule of the Bail Act (as amended). Section 4(2)(2A) and (2B) of the Bail Act (as amended)** permits the grant of bail to accused persons charged with Part C offences wherein it provides –
- “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.**

Part A (First Schedule)

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...”

(Emphasis added)

Tried within a reasonable time

16. The Applicant has a fixed trial date of 18 January 2027. The Applicant did not assert that he would not be tried within a reasonable time. The Respondent, on the other hand, asserted that there has been no unreasonable delay in the matter.
17. What amounts to a reasonable time varies on a case-by-case basis and requires an individual assessment. This is particularly true given the heightened level of criminal activity in The Bahamas and the corresponding time that it would take to get an accused person to trial. Trials in the Supreme Court are being set some years ahead (even with the addition of additional criminal courts). This is the reality of the current state of affairs of the justice system in the country.
18. Parliament has fixed by statute three years to be deemed a reasonable time: **Section 4(2A)(a) of the Bail Act (as amended)**.
19. In **Duran Neely v The Attorney General SCCrApp No.29 of 2018**, Evans JA (Actg.) at paragraph 17 stated –

“17. It should be noted that section 4 of the Bail Act does not provide the authorities with a blanket right to detain an accused person for three years. In each case the Court must consider what has been called the tension between the right of the accused to his freedom and the need to protect society. The three-year period is in my view for the protection of the accused and not a trump card for the Crown. As I understand the law when an accused person makes an application for bail the Court must consider the matters set out in Section 4(2)(a), (b), and (c). This means if the evidence shows that the accused has not been tried within a reasonable time or cannot be tried in a reasonable time he can be admitted to bail as per (a) and (b). In those circumstances where there has not been unreasonable delay the Court must consider the matters set out (c). If after a consideration of those matters the Court is of a view that bail should be granted the accused may be granted bail.”

20. It is to be noted that since that decision, **section 4(2)(b) of the Bail Act (as amended)** has been repealed. The consideration for the Court is now whether the accused has been tried within a reasonable time and not whether the accused person is likely to be tried within a reasonable time. The time begins to run from the date of the accused person's arrest or detention.
21. The Court, having regard to the fact that the Applicant was arrested and charged in relation to the present offences in July 2022 and his trial is fixed for 18 January 2027, is satisfied that there is a strong likelihood that the Applicant will not be tried within the reasonable timeframe as provided for by the Bail Act (as amended). The Applicant has been incarcerated for over a year now and his trial is not projected to commence until some two (2) years, nine (9) months, and thirty (30) days from now.

Seriousness of the offence and likelihood of absconding

22. It is now trite law that the seriousness of the offence is not a stand-alone factor for the Court's consideration of bail. Though, in cases of serious offences such as murder, the seriousness of the offence factor ought to invariably weigh in the scale against the accused person being admitted to bail: **Johnathan Ambrister (supra)**.
23. 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.”
24. As aforementioned, the Applicant stands charged with seventeen (17) counts of Manslaughter. Manslaughter is invariably a serious offence. The ordeal from which these offences arise is most troubling. It involves a day of mass casualty for The Bahamas. Haitian migrants were en route to being smuggled into the United States of America when the vessel carrying them capsized killing 17 individuals and injuring others. Among those that perished that day were men, women, children, and a foetus in utero. This ordeal attracted much media attention and outcry locally and internationally. This ordeal also confronts two social issues that continue to plague the Bahamian society; the first being illegal migration and the second being the most vulnerable in society being preyed upon.
25. Notwithstanding, the said offences are still bailable given the law as it currently stands. 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.

26. In the present application for bail, the Respondent advanced that the Applicant is a flight risk not having a fixed address. The Applicant, on the other hand, submitted that he would have reasonable accommodations with his brother in Sandy Point, Abaco, The Bahamas. The Applicant further submits that if granted bail, he would comply with all the rules and regulations set out by the Court. The Court is satisfied that the Applicant at this time is not deemed a flight risk. The latter conclusion is provided that the Applicant's submissions to the Court are indeed truthful. In any event, the Court is satisfied that there are effective conditions available to the Court to ameliorate any concern and/or inference of the Applicant being a flight risk. However, should the Court be minded to admit the Applicant to bail, if his living accommodations are to change at any point, he would have to inform the Court of such change immediately or as soon as reasonably practicable.

Strength and cogency of the evidence

27. 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.”

28. The Applicant denies his involvement in the said offences, maintains his innocence, and indicates a willingness to defend the said charges at trial. The Respondent, on the other hand, seeks to rely on the statements of various witnesses who identified the Applicant as the male who was working on the vessel or relocated the vessel that was used in the ordeal, *inter alia*, provided the passengers on the vessel with seating instructions and moved the battery from the vessel and as a result the vessel took on water. All the witnesses relied upon by the Respondent subsequently identified the Applicant in a twelve-man photo lineup.

29. The evidence presented by the Respondent for the purposes of this application, in the Court's view, is tenuous, weak, and tacitly non-existent. The evidence may reasonably link the Applicant to some other criminal offence but certainly not the offences for which he stands charged.

Interference with witnesses

30. The Respondent did not advance that the Applicant, if admitted to bail, would interfere with the safety of witnesses or otherwise thwart the course of justice. However, it may be inferred that the Applicant facing serious charges in which

he is liable to some of the harshest penalties known to the law, if he is convicted, has a powerful incentive to interfere with the safety of witnesses.

31. 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.”

32. The Court, having regard to its findings on the strength and cogency of the evidence or lack thereof and the absence of any evidence to the contrary, is satisfied that the inference that the Applicant, if admitted to bail would interfere with witnesses, is weakened.

Character and antecedent

33. 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.”

34. 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.”

35. In **Stephon Godfrey Davis v The Director of Public Prosecutions SCCrApp No. 108 of 2020**, Isaacs JA at paragraph 28 stated –

“28. The antecedents of an applicant for bail is an important factor to be taken into account by a court considering the application. This record may provide a

barometer for the likelihood of the applicant to commit other offences while on bail. Although a court is obliged to have regard to the antecedents of an applicant for bail, little weight should be given to offences that are trivial ...”

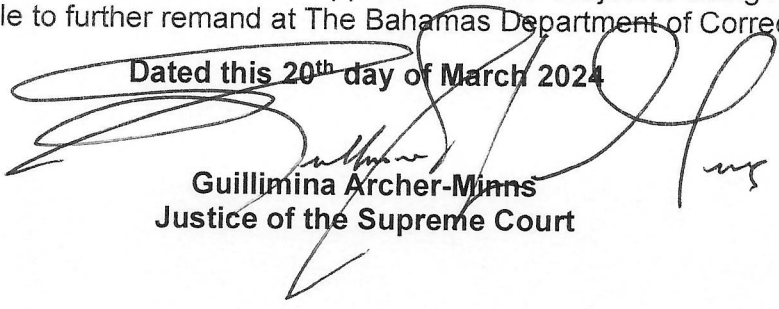
36. The Respondent opposed the present application for bail on the ground that the nature of the offences is serious and the interest of the public ought to be considered. The Respondent also advanced that the Applicant has previous convictions for which he served custodial sentences and is therefore not of good character.
37. Attached to the Affidavit of Timothy Bailey is the Applicant’s Criminal Record Antecedent Form. From a cursory glance of the Applicant’s Criminal Record Antecedent Form, the Applicant has convictions for crimes of dishonesty for which he has served custodial sentences. The Applicant, for the purposes of the law, cannot assert that he is a man of good character. Apart from the offences, the subject of the present application for bail, the Applicant has no pending matters before the Court(s) in the Commonwealth of The Bahamas. Given the Court’s findings on the strength and cogency of the evidence or lack thereof and the Applicant’s convictions not being of a similar nature to the offences for which he is presently before the Court, the Court is not satisfied that the Applicant poses a threat to the public or public order or that the Applicant would commit further offences (whether of a similar nature or otherwise) if he is admitted to bail. In any event, the Court is of the view that there are any number of conditions that can be imposed to minimize any risk involved with the grant of bail.

CONCLUSION

38. The Court, having regard to the foregoing reasons, is satisfied that the Applicant is a fit and proper candidate for the admission of bail at this time. The Court, in the exercise of its discretion, accedes to the present application for bail. It is not fair or just to the Applicant for the Court to keep him in custody until his fixed trial date. The application for bail is hereby granted. The Applicant is admitted to bail subject to the following conditions, that:-
- i. bail is to be fixed in the amount of \$25,000.00 with one or two suretors to be approved by the Registrar of the Supreme Court;
 - ii. the Applicant is to report to the nearest police station in Sandy Point, Abaco, The Bahamas every Monday, Wednesday, and Saturday on or before 6:00 pm;
 - iii. the Applicant is to surrender his passport and/or all travel documents to the Registrar of the Supreme Court;
 - iv. the Applicant is to be outfitted with an Electronic Monitoring Device and comply with all conditions thereto;
 - v. the Applicant is to appear to the Court on each and every adjourned date until the completion of the matter;
 - vi. the Applicant is to remain on the island of Abaco and is to travel to the island of New Providence for trial and/or court appearances relative thereto and any other travel will require prior approval by the Court; and
 - vii. should the Applicant’s living accommodations change at any point, he is to inform the Registrar of the Supreme Court immediately or as soon as reasonably practicable of such change.

Breach of any of these conditions, the Applicant's bail is subject to being revoked and render him liable to further remand at The Bahamas Department of Corrections.

Dated this 20th day of March 2024

A large, stylized handwritten signature in black ink, written over the date and name. The signature is highly cursive and loops around the text.

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