COMMONWEALTH OF THE BAHAMAS
In The Supreme Court
Criminal Division
No. CRI/BAIL/00665/2018

BETWEEN

JOEL STRACHAN

AND

THE COMMISSIONER OF POLICE

Before:	Her Ladyship, The Honourable Madam Justice Guillimina Archer-Minns
Appearances:	Mr. David Cash fpr Applicant Mr. Patrick Sweeting for the Respondent
Hearing Date:	27 May 2020

RULING-BAIL

Archer-Minns J

1. On 20 June 2018, Joel Strachan (the '**Applicant**') made his initial appearance before the Magistrate's Court and was detained. He was charged with the murder of Michael Johnson, contrary to section 291(1) (b) of the Penal Code, Chapter 84. At the time when Mr. Strachan was arrested and detained, he was 17 years old. He made an application for bail to the Supreme Court via Summons, filed on 13 March 2020 at the age of 18.

2. As per the affidavit of the Applicant, made in support of his application for bail, he has been remanded to the Bahamas Department of Correctional Services since his appearance on 20 June 2018. He asserts therein that he is not a flight risk, and that he will not interfere with any witnesses or otherwise undermine the course of justice.

3. Counsel for the Respondent objected to the granting of bail which was supported by an affidavit of ASP Nathan Mackey, asserting *inter alia,* that the Applicant should be kept in custody for his own protection as he is suspected of being involved in gang related activities which pose a threat to both his personal safety and that of the public. The affidavit advances that there is strong and cogent evidence implicating the Applicant as one of the persons responsible for the death of Michael Johnson.

4. During the bail hearing, counsel for the Applicant contended that the Respondent has not proceeded with the matter in a timely manner considering that the Applicant's back up trial date which was scheduled for 8 April 2019 has since expired and it is unlikely that the matter will proceed on its fixed trial date of 19 October 2020.

   Counsel for the Applicant further advanced that the only evidence against Mr. Strachan was from an anonymous witness and the court should also give consideration to the fact that the Applicant has no previous convictions.

5. In support of its objection Counsel for the Respondent further contended *that* given the fact the anonymous witness has identified the Applicant in a 12-man photo line-up is strong and cogent evidence against the Applicant. Further, the offence of murder with which the Applicant is charged, is a serious one.

6. Upon review of the affidavits and considering the oral submissions of counsel for the Applicant and Respondent, the court has determined that the Applicant has satisfied the court in all of the circumstances of this case,that he is a fit and proper candidate for admission to bail. The reasons for the exercise of the discretion in favour of the Applicant are given below.

Applicable Law

7. As mentioned, the Applicant was charged and detained at the age of 17 and therefore ought to have been protected by virtue of the provisions of the Child Protection Act.

The Constitution

8. In our Democratic society, where we are bound by the supreme law of our land, our Constitution, the Applicant (who has been charged with an offence) enjoys the presumption of innocence and has a right to apply for bail. Section 20 (2) (a) of the Constitution states: "**Every person who is charged with a criminal offence – (a) shall be presumed to be innocent until he is proved or has pleaded guilty**." Article 19(3) of The Constitution entitles the Applicant to a fair trial within a reasonable time and in the event that this cannot ensue, the Applicant must be granted bail unconditionally or subject to reasonable conditions.

The Bail Act (1994)

9. Although the granting of bail is a discretion exercised by the courts, the Bail Act gives guidance on factors that should be considered in cases where Part C offences are before the court. Sections 4(2), 4(2A) and 4(2B) of the Act provide as follows:

(2) Notwithstanding any other provisions 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)

(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 a written statement giving reasons for the order of the release on bail.

(2A) For the purpose of subsection (2)(a) and (b)-

(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 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 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 victim or victims of the alleged offence, are to be primary considerations

10. Part A of the Bail Act states as follows:

In considering whether to grant bail to a defendant, the court shall have regard to the following factors-

(a) whether there are substantial grounds for believing that the defendant, if released on bail, would-

(i) fail to surrender to custody or appear at his trial;

(ii) commit an offence 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;

(c) whether he is in custody in pursuance of the sentence of a court or any authority acting under the Defence Act;

(d) whether there is sufficient information for the purpose of taking the decisions required by this Part or otherwise by this Act;

(e) whether having been released on bail in or in connection with the proceedings for the offence, he is arrested pursuant to section 12;

(f) whether having been released on bail previously, he is charged subsequently either with an offence similar to that in respect of which he was so released or with an offence which is punishable by a term of imprisonment exceeding one year;

(g) the nature and seriousness of the offence and the nature and strength of the evidence against the defendant.

Discussion and Reasoning

The Child Protection Act Considerations- Welfare

11. In accordance with the case of R.B *(a juvenile) v. Attorney General SCCrimApp No. 205 of 2015* (paragraph 56 of the Judgment delivered by The Hon. Madam Justice Crane-Scott, JA) it is

critical that the child's welfare is of paramount consideration and thus outweighs the considerations of the Bail Act. Justice Crane-Scott stated:

> **"I pause here to note that while regard must be had to the considerations detailed in section 4(2B) of the Bail Act, in my view, these considerations do not trump the guiding principle described in section 3(1) of the Child Protection Act; an Act which precedes the Bail Act (as amended) and is specific to the rights afforded children. Indeed, using the words of the respective provisions, the considerations detailed in section 4(2B), of the Bail Act, are primary considerations while the principle referred to in section 3(1), of the Child Protection Act, is, in the scheme of things, the paramount consideration."**

12. The Applicant was bought firstly before the Magistrate's court however, the Magistrate's court does not have the jurisdiction to grant bail for murder, the issue had to be entertained in the Supreme Court. Since no application for bail had been made by the Applicant at the time of his appearance and initial detention the provisions of The Child Protection Act were not considered.

The Bail Act

Trial Within a Reasonable Time

13. The Applicant is now an adult and therefore the relevant provisions of The Bail Act must be considered. In accordance with the referenced Act and Article 19(3) of the Constitution, if someone is charged with an offence who cannot be tried within a reasonable time, they should receive bail. However, if they can be tried within a reasonable time, the court should move on to give consideration to sections 4(2B), 4(2C) and Part A of the Act in order to make a determination as to whether an applicant is a fit and proper candidate for admission to bail. *Duran Neely v The Attorney General Appeals No. 29 of 2018*).

14. In the instant case, the Applicant was arraigned on the 14 September 2018 in the Supreme Court and a trial date has been set for 19 October 2020. The statutory 'reasonable time' that has been indicated by the Bail Act is three years, therefore, the trial date set for this matter would be considered within a reasonable time. Consideration was therefore given to the relevant factors outlined in Sections 4(2B) and part A of the referenced Act.

Character / Antecedents

15. The character or antecedent of the person charged is a primary consideration. The Applicant has no previous convictions, a factor which must be considered in his favour. However, this factor alone does not automatically result in the release of a person on bail.

Failure to surrender to custody or appear at trial

16. Part A of the Bail Act invites the court to consider whether there are substantial grounds for believing that, if released on bail the defendant would fail to surrender to custody, appear at his trial or interfere with witnesses.

17. It is an established practice concerning bail applications that the appropriate test for granting bail is whether or not a court is of the view that the applicant will or will not appear for trial *Jeremiah Andrews v The Director of Public Prosecutions [1937] 2 All ER 552)*.

18. In his affidavit, the Applicant avers that he is anxiously awaiting trial. Further, he has provided an address of residence in the event that he is granted bail. Counsel for the Respondent has not provided the court with any evidence that the Applicant would interfere with witnesses or fail to attend for his trial.

19. Whilst, the court take note that the offence for which the Applicant is charged, is a serious one and that in itself may cause the Applicant to have a desire to abscond, the court in accordance with the case of *Jeremiah Andrews* considered conditions which may be suitable in order to minimize any risks involved with granting bail and to ensure the attendance of the Applicant on each and every adjourned hearing.

Interfere with witnesses

20. The Board in *Hurnam v State of Mauritius [2005] UKPC 49* stated at paragraph 15 of the judgement:

> **"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 drugs 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."**

21. Undoubtedly, the offence is serious, therefore the Applicant may have a desire to interfere with the witnesses. The Applicant has, in his affidavit stated that he will not interfere with witnesses. Additionally, the eyewitness in this case is anonymous and there is nothing before the court to give any indication that the Applicant knows who the witness is in order to have the opportunity to interfere. More importantly, there is no evidence, before the court exemplifying that there is a risk of this occurring.

22. The court do not believe that there are reasonable grounds based on what was presented before it to infer that the Applicant will abscond or interfere with witnesses.

Being kept in custody for protection

23. Counsel for the Respondent has submitted to the court that the Applicant should be kept on remand for his own safety. An anonymous witness statement was submitted which suggests that the Applicant is involved in suspected gang violence. He was said to have been involved in the exchange surrounding the stabbing of a young man who may have belonged to a particular rival gang. This incident was said to have occurred a few days before the shooting of the deceased, Michael Johnson.

24. In *Mario Brown v The Director of Public Prosecutions CRI/BAL/00133,* the Court of Appeal upheld the Supreme Court Judge's decision not to grant bail on the basis that the applicant was a known gang member. In order to prove that the applicant in that case was a gang member, a senior and respected police officer testified of the same. The applicant therein was said to be a high-level street enforcer and drug trafficker.

Further, in *Jevon Seymour v The Director of public prosecutions* at paragraph 69:

> "**Again, if the Crown had evidence of any credible threats which had been made against the appellant requiring him to be kept in custody for his own protection, such evidence ought also to have been placed before the judge in the Crown's affidavit opposing bail. In my view, without more, a mere recommendation by Perry McHardy that the appellant be kept in custody for his own safety and welfare (even in the face of the prevailing high rate of murders and the growing culture of vigilantism in the society) could not amount to evidence which the judge was entitled to take into account in denying the appellant bail.**"

Consideration having been given to the aforementioned cases, the court is not satisfied that the evidence provided by the Respondent is sufficient to reasonably infer if the Applicant was to be given bail, his safety would be in jeopardy.

25. Notably, Counsel for the Respondent also asserted as per the affidavit of ASP Nathan Mackey, that the suspected gang activity described in paragraph 30 is evidence that the Applicant will be a threat to public safety and public order. In Jevon *Seymour* at paragraph 68 it states:

> "**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 the 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 his good character, strong family and community ties and the fact that he had a long and unblemished record of service within the BDF.**"

26. Although, there was some suspected gang activity presented before this court in evidence, the court do not believe that it is sufficient that the Applicant being seen around a suspected gang related incident in and of itself support the assertion of the Respondent that the Applicant is a threat to public safety.

The Nature and Seriousness of the Offence and Strength of the Evidence

27. The court accept that the offence of Murder is a serious one; but that it is also a bailable offence in accordance with the Bail Act. In *COP v. Benjamin Beneby et al No 22/1995,*

> "**...Mrs Christie objected to bail before the Magistrate on the basic ground that the offence of (sic) the accused are charged is "serious". That never was and is not now, without more, sufficient reason for the denial of bail notwithstanding the frequency with which prosecutors chant it ritualistically or use it as a pro forma objection to bail. Most offences before the courts nowadays are serious, and if this**

were a ground for the refusal of bail, the overwhelming majority of persons before the court would be remanded in custody until trial..."

Notwithstanding that, this case was not tried at the appellate level, in *Seymour* ante, Crane-Scott JA made reference to it. Noting, that though this is a serious offence before the court, it is not a reason on its own to deny bail.

28. Recognizing, that Bail hearings should not constitute mini trials (*Attorney General v. Bradley Ferguson et al SCCrApp Nos. 57, 106, 108, & 116 of 2008*), it is important that the court consider the strength of the evidence in accordance with the Bail Act. In Cordero McDonald v. The Attorney General SCCrApp No 195 of 2016, Allen P stated:

> "**The judge must simply decide whether the evidence raises a reasonable suspicion of the commission of the offences such as to justify the deprivation of 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**."

There is a reasonable suspicion on the evidence before the court as to the commission of the offences by the Applicant. This suspicion arises from an anonymous eyewitness statement indicating that the Applicant was seen firing shots at the deceased before he succumbed to the injuries. The eyewitness subsequently identified the Applicant in a 12-man-photo lineup.

Conclusion

29. The Applicant is now applying for bail as an adult. Had he applied for bail at the time of his initial appearance before the court, he probably would have been granted bail in accordance with the provisions of The Child Protection Act.

30. As an adult Applicant, consideration was given to the relevant provisions of The Bail Act. In connection therewith, the court so find that: (i) the Applicant will be tried in a reasonable period of time (ii) the Applicant has no previous convictions or pending matters. (iii) is not considered to be a flight risk nor(iv) will interfere with witness or otherwise pervert the course of justice. The court is

not of the view that he should be incarcerated for his own safety. The evidence that the Respondent submitted in this regard was not sufficiently convincing to support this assertion. Though the offence is serious, there is no evidence before the court that the Applicant will pervert the course of justice.

31. Finally, the court has also taken into consideration the current pandemic, due to the Coronavirus, and the fact that all criminal trials are suspended. All factors considered; and notwithstanding that the Applicant's trial date is swiftly approaching, it is unlikely that the Applicant's matter will successfully proceed to trial on the scheduled date. Moreover, the pathologist and forensic reports which are essential remain outstanding. Additionally, the witness whom the Crown intend to rely upon as an anonymous witness, the appropriate application is yet to be made.

33. The court therefore in exercise of its discretion will grant the Applicant bail on very stringent terms and conditions as follows:

(i) bail is granted to the Applicant in the sum of $ 25,000.00 with one (1) suretor;

(ii) the Applicant shall report to the Wulff Road Police Station every Monday, Wednesday and Saturday before 6:00 p.m. each day;

(iii) the Applicant is to be outfitted with an electronic monitoring device; and shall agree to be bound by the rules issued by the Electronic Monitoring Unit which govern the process, and;

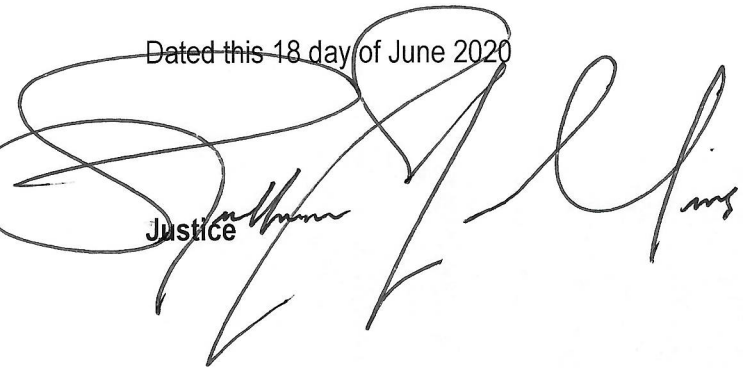
(iv) the Applicant shall be off the streets and at his residence #21 Williams Lane, between the hours of 7:30 pm and 6:00 a.m. each day; until the completion of the matter

(v) the Applicant shall surrender his Passport or any other travel Documents;

(vi) the Applicant is not to interfere with any prosecution witnesses nor anyone acting for or on his behalf

Breach of any of these conditions on credible and cogent evidence, Applicant's bail is subject to being revoked.

Dated this 18 day of June 2020



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