COMMONWEALTH OF THE BAHAMAS **CASE NO. CRI/BAIL/FP/00044/2024**

IN THE SUPREME COURT

Criminal Division

B E T W E E N

KENNY MITCHELL

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
	Mrs. Carla Scott-Clare c/o Kenny Mitchell
Hearing Date:	4th 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 24th September 2024. The Applicant in his Affidavit filed on the 24th September 2024, indicated he resides at No.5 Pinehurst Drive, Freeport, Grand Bahama. He notes he is currently on remand for Possession of an Automatic Weapon contrary to section 31(B), Possession of Unlicensed Firearm (Component Part) contrary to section 5(B) and Possession of Ammunition contrary to section 9(2) (A) two counts (2). He indicated he is scheduled to appear in Magistrate's Court No. 3 on the 25th February 2025. 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. The Applicant Counsel also laid over submissions which the Court will refer to later.

[2.] The Respondent filed an Affidavit in Opposition on 3rd October 2024 and sworn by Sergeant 2169 Prescott Pinder. He avers that the Applicant when arrested was discovered to be in possession of a firearm and ammunition and the arresting officer's report was exhibited. The Report of Police Constable 4281 Burrows notes that while on patrol on the 19th September 2024 and acting on information and armed with a search warrant, he and other officers proceeded to a Yellow Apartment Complex on Pinehurst Drive and the Applicant was observed and shown the search warrant and a search commenced. Constable 4281 Burrows indicates he walked through garage and into residence and observed a slim male with locs. That he searched the main bedroom where on a shelf in a closet was a black sock containing a firearm. A further search was conducted; also found in the closet was a shoe, which when searched, contained a baggy containing a magazine and ammunition. That the male and the Applicant were also searched with negative results, further cautioned and arrested.

[3.] Sergeant Pinder further avers, that the Applicant is the caretaker of the apartment complex where the prohibited items were allegedly found, according to the owner Ms. Annette Jones and her statement was exhibited thereto. Sergeant Pinder further indicates that the Applicant was already on bail for a similar incident where he was charged for Possession of Unlicensed Firearm and Possession of Ammunition (2 Counts). Again, the allegations are all the prohibited items were

found at the same apartment complex. The report of Detective Sargent 1849 Kendal Smith is exhibited in which he reports on the 10th February 2023 he and other officers acting on information and armed with a search warrant attended the Pinehurst Drive Apartment and again observed a number of men in the Apartment and after securing them commenced a search and beneath a table in the kitchen area a firearm and with five rounds of ammunition and further in the closet in a bedroom Two(2) pistol grip shotguns with five founds of shotgun shells. The males including the Applicant were arrested and charged with offences related to Possession of Unlicensed Firearms and Possession of Ammunition. Sergeant Pinder further avers that the Applicant's trial is to commence before Magistrate Charlton Smith on the 5th November 2024.

[4.] Sargent Pinder 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 Mrs. Scott Clare who provided written submissions which were laid over the morning of the hearing primarily due to the fact that Director of Public Prosecution emailed theirs the evening prior to the hearing along with their Affidavit in Response which the Court will address later. Counsel for the Applicant cited a number of Authorities and in particular the comments of *Madam Justice of Appeal Crane-Scott* in **Seymour v. DPP SCCrApp. No. 115 of 2019,** particularly paragraph 65, **Richard Hepburn and the Attorney General SCCrApp. No.276 of 2014** and the comments of then *President of Appeal Dame Anita Allen* at paragraphs 5 thru 11 and also, the often cited case of **Hurnam v. The State [2006] 3LRC370** and *Lord Bingham* comments at paragraph 374. 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. That the Applicant has been on bail for 19 Months and did not violate any conditions. That the Applicant has no antecedents and that the Applicant is the primary financial provider for his mother who requires medical care. Counsel for the Applicant asserts that the evidence is weak and that the Applicant is a fit and proper person for bail.

[6.] The DPP emailed its submissions as already mentioned by the Court. 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 given that his trial is scheduled to occur in February of 2025 he presumably ought to remain in pre-trial detention. Although not expressly stated clearly that's the implication. Further, that the Applicant continues to re-offend and that curfew nor Electronic Monitoring will deter the Applicant.

THE LAW

[7.] 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.

[8.] 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.***

[9.] 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 - -***
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> ***(a) has not been tried within a reasonable time;***
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> ***(b) is unlikely to be tried within a reasonable time; or***
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> ***(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.

DISCUSSION/ANALYSIS

[10.] It appears that the Respondent's submissions are that the Applicant has pending matters, the said matter being of a similar nature for which bail was given by this Court and that the evidence adduced is cogent and powerful and are grounds to deny the Applicant bail.

[11.] The Applicant faces a charge involving Possession of an Automatic Weapon contrary to section 30(1)(b) of the Firearms Act and Possession of Unlicensed Firearm (Component Parts) contrary to section 5 (b) of the Firearms Act and Possession of Ammunition contrary to section 9(2)(a) of the Firearms Act. These are offences that has been included in Part D of the First Schedule of the Bail Act and the Bail (Amendment) Act, 2011 which states as follows:

> "***Possession of prohibited weapons and ammunition — section 30, Ch. 213; Unlawful shortening of guns — section 36, Ch. 213; Any offence mentioned in the Third Schedule to the Criminal Procedure Code, Ch. 91. Unlawful possession of a revolver - section 5, Ch. 213; Unlawful possession of a firearm or ammunition - section 9, Ch. 213; Unlawful possession of a firearm or ammunition with an intent to supply - section 9A, Ch. 213; Unlawful possession of a gun - section 15, Ch. 213; Assault with a deadly or dangerous instrument or means - section 265(5), Ch. 84.***"

[12.] Sections 4(2) and (3) of the Bail (Amendment) Act, 2011 permits the grant of bail to those charged with a Part D offence (as stated in paragraph 10 above). Additionally, a Judge hearing an application for the grant or denial of bail for an applicant charged with a Part D 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 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.";

[13.] 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.

[14.] As stated by the Court in **Stephon Davis v the DPP (supra)** there is no evidence before this Court that the Applicant will refuse to surrender. However, as this Court has noted events have now moved beyond the abstract, as this Applicant was already on bail by this very Court with stringent conditions imposed. The current matter is set to commence sometime in February 2025 whereas the pending matter is set to commence on the 5th November 2024. The Court is therefore satisfied that the evidence is supportive of the fact that this Applicant appears to not be taking the process of the very conditions imposed by this Court seriously and does not seek to refrain from continual alleged criminal violations. The Court notes the comments made by the Court of Appeal

in **Riclaude Tassy and Director of Public Prosecution MCCrApp. No. 129 of 2022,** where the court said: **"A breach of bail conditions may give rise to criminal liability, as well as the risk of revocation of bail."**

[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).***
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> ***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).***
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> ***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.'"***
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> *[Emphasis added].*

[16.] The Court also is guided by the comments of, then, **President of Appeal Sir Michael Barnett** in **Stephon Davis** ***supra*** and taking his comments from the head note he said as follows:

> ***"This court has on more than one occasion repeated the principle that bail should not be denied as a punishment for a crime for which a person has not yet been convicted. This principle applies even when the crime is alleged to have been committed whilst a person was on bail. The burden***

is on those opposing the grant of bail to show why there are good reasons to deny bail to a person charged with an offence…."

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.] The Court notes that the Applicant failed to accurately address the fact that he had pending matters and failing to be honest can be detrimental to the consideration required by this Court. Counsel for the Applicant sought to explain that it was an oversight by her Office and not a deliberate attempt by the Applicant. The Court will accept that explanation but in future invite Counsel to be mindful of the documents they are putting before the Court. The Crown for its part has appeared to be recalcitrant in its obligations notably in this matter the Applicant Counsel filed this matter on the 24th September 2024 and it was served on the Respondent on the 26th September 2024 and yet as of the 1st October 2024 the Respondent still requested additional time and only file any documents in opposition on the 3rd October 2024. Director of Public Prosecutions produced a scant Affidavit that does not fully support nor demonstrate sufficient evidence to restrain this Applicant's liberty. The Director of Public Prosecution's failure to recognize that the liberty of an individual requires urgency and not this lassie-faire approach.

[18.] The evidence of the current matter suggest that the officers acting on information and armed with a search warrant went to the Pinehurst Drive Apartment Complex and while searching discovered a firearm and ammunition. Additionally, they also discovered an occupant and another male at the residence. The items were discovered in a closet secreted away in socks and a black baggy hidden inside a shoe. These items were certainly not in plain and open view. The Court

notes the Court of Appeal decision in **Liston Perpall, Renardo Perpall & Desmond Higgs v, The Commissioner of Police MCCrApp. No & CAIS 109, 110 & 243 of 2013** and the comments taken from the headnote articulating the general principal to be determined in the current case. *President of Appeal Dame Allen* said as follows:

> ***"Possession exits when a person is in physical control or custody of a thing and has the knowledge that he has that thing in his control or custody. Therefore, knowledge of custody or control is an essential element which must be proven before the offence of possession can be established..."***

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...."***

DISPOSITION

[19.] This Court given the circumstances will grant the application for bail for the current offense. Moreover, the Court notes that the Applicant was already on bail and while on bail cogent evidence has been presented that this Applicant has wantonly violated the terms of his bail, by allegedly committed another offence. This Court is fully aware of the comments *Justice of Appeal Evans* and of the *President Sir Michael Barnett* of the Court of Appeal in **Stephon Davis case (supra).** Those comments bare repeating and are 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."... : "This court has on more than***

one occasion repeated the principle that bail should not be denied as a punishment for a crime for which a person has not yet been convicted. This principle applies even when the crime is alleged to have been committed whilst a person was on bail. The burden is on those opposing the grant of bail to show why there are good reasons to deny bail to a person charged with an offence."

Therefore, the bare assertion by the Crown that the Applicant has allegedly committed an offence or an offence of the same nature is not enough for the Court to deny bail. The Court having considered the circumstances of this case and the evidence presented will accede to the Application; however, will put additional conditions to ensure there are no further violations.

[20.] Bail will be granted in the sum of Nine Thousand Nine Hundred Dollars (($9,900.00) with one (1) or two (2) sureties.

(a) Applicant is to be outfitted with an Electronic Monitoring device and comply with all the conditions thereto.

(b) That the Applicant will report to the Central Police Station (Freeport, Grand Bahama) each Wednesday & Friday by 7pm at the latest.

(c) Applicant is not to affiliate with his co-accused with respect to either of the matters or contact any of the Prosecution witnesses directly or indirectly whatsoever. Any violation may result in possible revocation.

(d) Applicant is to surrender all travel documents and apply should the Applicant require to travel.

(e) Parties are at liberty to reapply.

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

Dated the 8th October, 2024

Andrew Forbes
Justice of the Supreme Court