

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
CRIMINAL LAW DIVISION
2019/CRI/bail/00436**

BETWEEN

APOLONIA MCLEAN-SMITH

Applicant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: The Hon. Justice Neil Brathwaite

Appearances: Ms. Cassie Bethel for the Applicant
Mr. Timothy Bailey for the Respondent

Hearing Date: 11th September A.D. 2024

Ruling Date: 15th October A.D. 2024

RULING ON BAIL

- [1.] The Applicant stands charged with the three counts of Trafficking in Persons, as well as one count of Overstaying, and seeks bail after having been arraigned in the Magistrate's Court on 22nd July 2024. She states that she is a thirty-five year old Jamaican citizen, and in the affidavit in support of her bail application she states that she has no previous convictions. She further states that she has four children, one of whom is seven months old, and that she is seven weeks pregnant. The Applicant avers that she is a fit and proper candidate for bail, and will be disadvantaged in her ability to adequately prepare her defence and support her family if refused bail. She further indicates that she is not a flight risk, and that she voluntarily surrendered to the police once she became aware that she was being sought.
- [2.] In seeking to oppose the application, the Respondent filed the affidavit of Carmen Brown, Counsel in the Office of the Director of Public Prosecutions, in which it is noted that the Applicant has twice been convicted in the Magistrate's Court for Trafficking in Persons. It is further stated that warrants of apprehension have twice been issued for the Applicant for failure to attend court. The Crown also avers that the evidence is cogent, and exhibit

the statement of the complainant, who indicates that she came to this country and was collected by the Applicant and the Applicant's husband, and that she was taken to an apartment building, her money was taken, and she was told that she owed the Applicant \$500.00. She further states that she was required to have sex with men for money, was prevented from leaving the apartment without an escort, and that she was required to pay \$300.00 per week towards the cost of her ticket. The complainant identified the Applicant.

[3.] On behalf of the Applicant it is submitted that there is no evidence to suggest that she is not a flight risk, and that the warrants which were issued for her arrest were for civil matters, and were subsequently cancelled. It was emphasized, and not disputed, that the Applicant turned herself in with respect to the instant matter. While it was accepted that the Applicant has a previous conviction for a similar offence, it was noted that that was ten years ago. Counsel further submitted that there was no evidence that the Applicant would interfere with witnesses, and submitted that the Applicant is a fit and proper candidate for bail.

[4.] In response, counsel for the Respondent submits that the Applicant has a history of exploiting vulnerable persons, raising the likelihood of reoffending. It was also contended that the Applicant might flee, as she is a Jamaican citizen, and therefore has ties to another country. Counsel finally submitted that the pregnancy of the Applicant was not an issue, as the Bahamas Department of Corrections was capable of providing care for a pregnant person. It was therefore submitted that the Applicant is not a fit and proper candidate for bail.

LAW AND ANALYSIS

[5.] The tensions surrounding an application for bail have been considered in many cases. In **Richard Hepburn and The Attorney General SCCr. App. No 276 of 2014**, Justice of Appeal Allen opined that:

“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 crime; and the fundamental constitutional canons, which secure freedom from arbitrary arrest and detention and serve as the bulwark against punishment before conviction.

6. Indeed, the recognition of the tension between these competing interests is reflected in the following passage from the Privy Council's decision in *Hurnam The State* [2006] LRC 370. At page 374 of the judgment Lord Bingham said *inter alia*:

“...the courts are routinely called upon to consider whether an unconvicted suspect or defendant shall be released on bail, subject to conditions, pending his trial. Such decisions very often raise

questions of importance both to the individual suspect or defendant and to the community as whole. The interests of the individual is, of course, to remain at liberty unless or until he is convicted of crime sufficiently serious to deprive him of his liberty". Any loss of liberty before that time, particularly if he is acquitted or never tried, will prejudice him and, in many cases, his livelihood and his family. But the community has countervailing interests, 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 further offences..."

[6.] At paragraph 11 she further noted that

"The general right to bail clearly requires judges on such an application, to conduct realistic assessment of the right of the accused to remain at liberty and the public's interests 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."

[7.] The presumption of innocence is enshrined in Article 20(2)(a) of the Constitution of The Bahamas which 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".

[8.] Furthermore, Article 19(1) provides as follows:

"19. (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases-

- (a) in execution of the sentence or order of a court, whether established for The Bahamas or some other country, in respect of a criminal offence of which he has been convicted or in consequence of his unfitness to plead to a criminal charge or in execution of the order of a court on the grounds of his contempt of that court or of another court or tribunal;**
- (b) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed upon him by law;**
- (c) for the purpose of bringing him before a court in execution of the order of a court;**
- (d) upon reasonable suspicion of his having committed, or of being about to commit, a criminal offence;**
- (e) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare;**
- (f) for the purpose of preventing the spread of an infectious or contagious disease or in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;**
- (g) for the purpose of preventing the unlawful entry of that**

person into The Bahamas or for the purpose of effecting the expulsion, extradition or other lawful removal from The Bahamas of that person or the taking of proceedings relating thereto; and, without prejudice to the generality of the foregoing, a law may, for the purposes of this subparagraph, provide that a person who is not a citizen of The Bahamas may be deprived of his liberty to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within The Bahamas or prohibiting him from being within such an area.

(2)...

(3) Any person who is arrested or detained in such a case as is mentioned in subparagraph (1)(c) or (d) of this Article and who is not released shall be brought without undue delay before a court; and if any person arrested or detained in such a case as is mentioned in the said subparagraph (1)(d) is not tried within a reasonable time he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial”.

[9.] The relevant provisions of the Bail Act Chapter 103 read as follows:

“4. (2) Notwithstanding any other provision of this Act or any other law, any person charged with an offence mentioned in Part C of the First Schedule, shall not be granted bail unless the Supreme Court or the Court of Appeal is satisfied that the person charged

(a) has not been tried within a reasonable time;

(b)...

(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 be 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 considerations.”

9. The factors referred to in Part A are:

“PART A

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.”;

[10.] In an application for bail pursuant to section 4(2)(c), the court is therefore required to consider the relevant factors set out in Part A of the First Schedule, as well as the provisions of section 2B.

[11.] In considering those factors, I note that the Applicant is charged with a serious offence, involving the exploitation of a vulnerable person, which attracts a maximum penalty of life imprisonment.

[12.] In the Court of Appeal decision of *Jonathan Armbrister v The Attorney General SCCrApp. No 45 of 2011*, it was stated that:

“The seriousness of the offence, with which the accused is charged and the penalty which it is likely to entail upon conviction, has always been, and continues to be an important consideration in determining whether bail should be granted or not. Naturally, in cases of murder and other serious offences, the seriousness of the offence should invariably weigh heavily in the scale against the grant of bail”.

[13.] I note also paragraph 30 of *Jeremiah Andrews vs. The Director of Public Prosecutions SCCrApp No. 163 of 2019* where it states:

“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 the consideration of other relevant factors disclosed in the evidence. eg the applicant's resources, family connections..

[14.] While no direct evidence has been provided that the Applicant will not appear for her trial, the Applicant is charged with offences which attract a maximum penalty of life imprisonment, which certainly raises the issue of the likelihood of not appearing for trial.

[15.] That likelihood must be contrasted with the nature of the evidence against the Applicant. In *Cordero McDonald v. The Attorney General SCCrApp. No. 195 of 2016*, Allen P., at *paragraph 34* stated,

“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.”

[16.] In considering the cogency of the evidence, I note the following statement from the Court of Appeal in *Stephon Davis v DPP SCCrApp. No. 20 of 2023*:

In our view "strong and cogent evidence" is not the critical factor on a bail application. The judge is only required to evaluate whether the witness statements show a case that is plausible on its face. To put it another way, there must be some evidence before the court capable of establishing the guilt of the appellant. In essence, the test is prima facie evidence, comparable to what is required at the end of the prosecution's case in a criminal trial. We can find a useful summary of the strength of the evidence required at the end of the prosecution's case in the headnote to the Privy Council's decision in *Ellis Taibo [1996] 48 WIR 74*:

"On a submission of no case to answer, the criterion to be applied by the trial judge is whether there is material on which a jury could, without irrationality, be satisfied of guilt; if there is, the judge is required to allow the trial to proceed."

[17.] In considering what has been placed before me, I am satisfied that the evidence is cogent, as the Applicant has been identified by the complainant as the person who collected her at the airport, took her money, placed her in premises to have sex for money,

and kept portions of her earnings. These facts, coupled with the possible penalty, all raise a concern that the Applicant will not appear for her trial.

CONCLUSION

[18.] In considering the question of bail, the court is required to conduct a balancing exercise between the Applicant's right to liberty, and the need to protect the public. In conducting that exercise, I am concerned with the likelihood of reoffending, and I accept that the charges in this case are extremely serious, and the evidence is sufficiently cogent, so that there is a risk of flight. I note also that the Applicant is also charged with Overstaying, and therefore allegedly has no legal status in this country, which exacerbates the risk of flight. However, those facts must be contrasted with fact that the Applicant has minor children who are Bahamian citizens, one of whom she is reportedly still breastfeeding, and she is again pregnant. I am satisfied that those facts are sufficient to cause the balance to lie in favor of the grant of bail, and that conditions can be put in place to ameliorate the risk of flight.

[19.] In the circumstances of this case, bail is granted in the amount of \$15,000.00 with one or two sureties. The Applicant is to surrender her passport to the Registrar of the Supreme Court, and is to be fitted with an Electronic Monitoring Device, and to observe a curfew between the hours of 9pm and 6am every day. The Applicant is required to report to the Elizabeth Estates Police Station every Monday and Thursday before 6pm. The Applicant is not to interfere with the witnesses either personally or through an agent. Any breach of these conditions will render the Applicant liable to remand.

Dated this 15th day of October A.D., 2024



Neil Brathwaite
Justice