

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
CRIMINAL LAW DIVISION
2024/CRI/bail/00153**

BETWEEN

YEWILL SOTO MORETA

Applicant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: The Hon. Justice Neil Brathwaite

Appearances: Mr. Geoffrey Farquharson for the Applicant
Ms. Shaneka Carey, Ms. Kara Butler-Wight, Ms. Xandrell Bain for the Respondent

Hearing Date: 9th October A.D. 2024

Ruling Date: 30th October A.D. 2024

RULING ON BAIL

[1.]The Applicant in this matter seek bail on one count of Possession of an Unlicensed Firearm and two counts of Possession of Ammunition, on which he was arraigned before the Magistrate's Court in July 2024. He has no previous convictions or other pending matters, and had previously been admitted to bail on conditions, and an application to vary those conditions, to remove an Electronic Monitoring Device had been refused. That decision was appealed, but prior to the hearing of that appeal, the Applicant alleges that he was arrested at the instance of the magistrate and again brought before the Magistrate's Court on 26th September 2024, where his bail was revoked as the magistrate indicated that there were concerns with the identity documents of the Applicant. He therefore seeks bail afresh.

[2.]In seeking to oppose the application, the Respondent filed the affidavit of Brent McNeil, Counsel in the Office of the Director of Public Prosecutions, to which is exhibited a number of reports, and documents. With respect to the evidence against the Applicant, it

is alleged that the Applicant was arrested following a routine traffic stop during which a 9mm pistol and 10 live rounds were discovered. The Applicant's home was then searched, and a further 20 rounds of 223 ammunition were reportedly found.

[3.]The affidavit further states that a condition of the bail granted to the Applicant by the learned Magistrate on 1st July 2024 was that he surrender all travel documents to the court, and that a Dominican Republic Passport and a Certificate of Naturalization purportedly issued by the Bahamas Department of Immigration were duly surrendered. However, the Respondent alleges that on 31st July 2024 the Applicant presented a Bahamian passport to the Supreme Court in the course of the application to remove the EMD. The affidavit in response exhibits a report from a Chief Immigration Officer which states that the Certificate of Identity presented by the Applicant is fraudulent, as a certificate bearing that number was actually issued to a Haitian female, and that the Bahamian passport was obtained using that fraudulent Certificate of Identity.

[4.]On behalf of the Applicant, counsel took issue with a number of matters, including the revocation of bail by the learned Magistrate, suggesting that this application was essentially an appeal of the Magistrate's decision to revoke bail. It was submitted that the Magistrate erred by investigating the matter and convicting the Applicant without trial. Counsel further submits that having regard to the presumption of innocence, the default position is that the Applicant is entitled to bail, and that there is nothing before the court on which the court should be satisfied that bail should be refused, as there was no evidence that the Applicant was a flight risk or would interfere with witnesses or otherwise undermine the system of justice.

[5.]The Applicant relies on the authority of *Dennis Mather v DPP SCCrApp 96 of 2022* at paragraph 20 with respect to the proper considerations for the court in considering the grant of bail, as well as the reference at paragraph 26 of that decision to *Jeremiah Andrews SCCrApp No. 163 of 2019* in support of the contention that there must be real evidence before the court that the Applicant is a flight risk, or will interfere with witnesses or obstruct the course of justice, before a refusal of bail would be justified. Counsel further suggested that if the Applicant had intended to flee he could have done so while on bail, with or without an EMD, and that the Applicant instead signed in when required to do so. It was submitted that the actions of the Applicant do not support an inference of a risk of flight.

[6.] Finally, counsel submits that any decision to refuse bail must be rational, and that even if there is evidence to support the risk of flight, interference with witnesses, or interference with justice, the court would still be required to consider whether conditions could be imposed to mitigate the risks. In the instant case, as it is submitted that there is no evidence of any risk, the Applicant should be released on bail without conditions.

[7.] In response, counsel for the Respondent relied on the contents of the affidavit in response, and submitted that the offences are serious and the evidence cogent. Counsel further suggested that the Applicant had been in breach of his bail conditions by being in possession of the Bahamian passport after having been granted bail, as he was required to surrender all travel documents. To the rejoinder that the Applicant did not obtain that document until after his release on bail, the Respondent submits that in those circumstances the conditions of bail required the Applicant to surrender that document whenever it was obtained, which he failed to do.

[8.] The Respondent further submits that the Applicant has no status in the Bahamas, as the evidence is that the Applicant had been granted a work permit which was cancelled, and that no application had been made for the Certificate of Registration which he used to obtain a passport. Counsel emphasized that the Applicant obtained bail, then obtained a passport based on fraudulent documents, and that sought to have the EMD removed. It was submitted that this evidence from which it can be inferred that the Applicant was preparing to flee. It was therefore submitted that the Applicant is a significant flight risk, which is bolstered by the likelihood of a custodial sentence if the Applicant is convicted, and that that no conditions could be imposed to ensure the attendance at trial of a person who has already taken such steps. The court is therefore urged to refuse bail.

LAW AND ANALYSIS

[9.] 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..."

[10.] 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."

[11.] 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".

[12.] 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”.

[13.] 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.”;

[14.] 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.

[15.] In considering those factors, I note that the Applicant is charged with a serious firearms offences which are all too prevalent in this society. With respect to the seriousness of the offence, I am mindful that this is not a free-standing ground for the refusal of a bail application, yet it is an important factor that I must consider in determining whether the accused is likely to appear for trial.

[16.] 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”.

[17.] 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..”

[18.] While no direct evidence has been provided that the Applicant will not appear for his trial, the Applicant is charged with serious offences which, in considering the possible penalty which would follow a conviction, raises the issue of the likelihood of not appearing for trial.

[19.] 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.”

[20.] 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.”

[21.] In considering what has been placed before me, I note that the affidavit in response states that the vehicle driven by the Applicant was searched, and a weapon and ammunition reportedly found, as well as more ammunition of a different caliber in his home. That evidence in my view rises to the level of a prima facie case as is required in *Stephon Davis* decision above.

[22.] In this matter, the major concern is the question of the likelihood of the Applicant appearing for his trial. The Applicant says that if he had wanted to abscond he would have, as he was on bail for this matter prior to that bail being revoked. The Respondent says that the Applicant poses a serious flight risk, given the failure to surrender the passport once obtained, and the manner of the obtaining of that passport, and the sequence of events leading to the application to remove the ankle monitor. The Applicant further suggests that there is no evidence to support an inference of a risk of flight. With respect, I disagree. The ties of an applicant to the community are always a relevant factor in considering the likelihood that a person on bail will appear for his trial. The stronger the ties, the greater the likelihood that a person will appear for trial. In the instant case, there is no evidence that the Applicant has any real ties to this community, having come to this country just over one year ago on a work permit that was cancelled before expiration.

[23.] While I bear in mind the presumption of innocence, and the fact that the Applicant has not been charged with any offences relating to the obtaining of the Certificate of Identity and passport, I am extremely concerned that there is prima facie evidence before the court of fraudulent activity. Such activity deeply undermines the credibility of the Applicant, as that activity leads to an inference of serious dishonesty. I also accept the

submission that the passport should have been surrendered once obtained pursuant to the conditions which were placed on the grant of bail. That evidence also, in my view, is sufficient to support an inference that the Applicant will not appear for his trial.

CONCLUSION

[24.] In considering whether conditions could be imposed to ensure the attendance of the Applicant at trial, I am mindful of the usual conditions which include reporting, electronic monitoring device (“EMD”), and curfew. However, those conditions do not serve to deter a person who truly does not intend to appear for his trial. In my view, the only way in this particular case to ensure the Applicant is present for his trial is to remand him in custody.

[25.] In the circumstances and having regard to the foregoing reasons I find that the Applicant is not a fit and proper candidate to be admitted to bail. Bail is therefore denied.

Dated this 30th day of October A.D., 2024



**Neil Brathwaite
Justice**

