IN THE COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
CRIMINAL LAW DIVISION
2023/CRI/bail/00178

BETWEEN

BRAHEEM CHARLTON

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: **7th December A.D. 2023**

Ruling Date: **24th February A.D. 2025**

RULING ON BAIL

[1.] The Applicant seeks bail on charges of Murder (2 Counts), Attempted Murder (4 Counts), and Armed Robbery. The application is supported by an affidavit filed 9th November 2023, in which the Applicant avers that he was arraigned on or about the 20th August 2021, that he has a previous conviction, and that prior to his incarceration he was employed in landscaping. He suggests that if not granted bail he will be disadvantaged in his ability to prepare his defence, and in his ability to support himself and his two children.

[2.] In seeking to oppose the application, the Respondent proffered the affidavit of Davina Pinder, to which are exhibited a number of reports. From those reports, it can be gleaned that the Applicant is alleged to have robbed Dennis Nottage of a vehicle on 11th July 2021, and to have emerged from that vehicle to shoot two persons on 9th August 2021,

one of whom died, and to have emerged from that vehicle to shot four persons on14th August 2021, one of whom died. The Applicant has been identified in each of the shooting incidents. Trial dates that had been fixed to commence on 1st April 2024, and 30th September 2024, did not proceed. Trials are now fixed for May 2025, July 2025, and January 2026.

[3.] The Respondent also notes that the Applicant has the following convictions:

1. Stealing 27th January 2014
2. Possession of Dangerous Drugs 24th November 2016

[4.] Counsel on behalf of the Applicant relies on the constitutional presumption of innocence, as well as the Applicant's averment that he will not abscond or commit further offences while on bail. It was noted that the Applicant voluntarily surrendered to the police, and is therefore not a flight risk. Counsel further notes that the Applicant has now been on remand since August 2021, and that the failure of the trials to proceed on the fixed dates was through no fault of the Applicant. It is therefore submitted that the Applicant has now been detained for an unreasonable length of time, which fact should result in bail being granted.

[5.] In response, the Respondent submits that the evidence is cogent and compelling, that the Applicant has been identified by witnesses in each incident, and that there is a serious concern that the Applicant poses a threat to public safety. Counsel further referred the court to the case of Kyle Farrington v DPP SCCrApp. No. 80 of 2019 at paragraphs 141-146 in which an applicant for bail had been detained for more than three years.

LAW AND ANALYSIS

[6.] 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".***

[7.] 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".

[8.] 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.";

[9.] In an application for bail pursuant to section 4(2)(c), the court is required to consider the relevant factors set out in Part A.

[10.] 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.

[11.] 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".***

[12.] 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..***

[13.] While no direct evidence has been provided that the Applicant will not appear for his trial, the Applicant is charged with murder and attempted murder which, in considering the possible penalty which would follow a conviction, raises the issue of the likelihood of not appearing for trial. That likelihood is exacerbated in this instance as the Applicant faces not one, but two separate charges of Murder, and a total of four charges of Attempted Murder.

[14.] 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."***

[15.] 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 [11996] 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."

[16.] In my view, the evidence in this case is extremely cogent, as the Applicant has been identified by separate witnesses in the separate incidents. Of even more importance is the nature of the incidents. The Applicant is alleged on strong evidence to have shot a number of persons with a high powered weapon, and to have done so from a vehicle which had been stolen during another incident also involving the use of a firearm. The Applicant in this matter has been denied bail on several occasions. I accept that each application must be considered afresh, and having done so, I remain satisfied that there is a reasonable basis to conclude that the Applicant would re-offend if released on bail, and also that there is a serious concern for public safety, which is a primary factor in considering the grant of bail. I also remain satisfied, considering the nature of the allegations, the cogency

of the evidence, and the likely penalty which would follow conviction, that it would be safe on the facts to draw an inference that the Applicant would interfere with witnesses.

[17.] The tensions inherent in a bail application between the right to liberty and the need to protect the public requires the court to conduct a balancing exercise. In the instant case, while I am satisfied that the Applicant will reoffend, and that there is a need to protect the public and the witnesses, I am concerned in this case that the Applicant has been in custody since August 2021, and is not likely to be tried until May 2025, which is well over the three year period delineated in the Bail Act, section 4 (2A) of which reads as follows:

[18.] "(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 to be a reasonable time;"

[19.] At paragraph 17 of the Duran Neely decision cited above, the learned Evans J said the following:

"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."

[20.] I note that the section specifically does not limit the extent of a reasonable time, so that it is entirely possible for a period of more than three years to be considered reasonable, depending on the particular circumstances of the case. I also note that the provisions of the Bail Act reads "has not been tried within a reasonable time", and not "is unlikely to be tried within a reasonable time". This is the same form of words used in Article 19 (3) of The Constitution and, in my view, do not require the court to look prospectively at whether a person will be detained for an unreasonable period of time, but whether an unreasonable period of time has already passed.

[21.] At paragraph 141 of the Kyle Farrington decision cited above, the learned Evans J (as he then was) said the following:

"141. It has to be remembered that the applicant's complaint is that he should not be kept in custody while there has been an unreasonable delay. That is a live issue which the court must treat with. There is no one remedy. Severance is one whereby bail is the other. The learned judge purported to penalize him for choosing to ask for bail rather than

severance. In my view that was wrong. It was open to the applicant to decide that the application for bail afforded him the best relief in the circumstances. There are obvious difficulties with an application for severance as it necessarily requires the court system to conduct two separate trials with the attendant financial and personnel difficulties which ensue.

142. In my view, the applicant's continued detention can only be justified if the Court is satisfied that there is in this case a need to protect society which is greater than his right to freedom as a person presumed to be innocent of the crime alleged. In my view Article 19(3) comes closer to making the grant of bail mandatory in these circumstances rather than Section 4 of the Bail Act as contended by Mr. Munroe. That provision as noted earlier states that where an accused person: "…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".

143. The use of the word shall emphasizes the serious nature of the requirement set out in the provision. The only consideration which causes me to find that it is not a mandatory requirement that bail be granted is the need to impose reasonable conditions. I have doubts as to whether the framers of the Constitution in promulgating Article 19(3) intended that an accused person should be released where he posed a clear danger to society and that no conditions could be imposed which could ensure his attendance at trial or ameliorate the concerns as to the public safety."

CONCLUSION

[22.] 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. In my view those conditions might suffice if the only concern was the likelihood of absconding. However, those conditions would not serve to prevent any re-offending or interference with witnesses, or to protect the public order.

[23.] I am therefore unable to conclude at this time, as opined by the learned Evans J, that release of the Applicant on bail at this time would be just, having regard to my concerns with respect to public safety and the witnesses. I am further moved by the fact that a trial of the Applicant is expected to commence in just three months. I therefore

deny bail at this time, but indicate that bail will be granted if the trial expected to commence in May 2025 does not in fact commence, through no fault of the Applicant as it would not be just to keep the Applicant detained any further prior to trial. Should the trial not commence, the parties are required to return to this court for appropriate conditions to be attached to the grant of bail.

Dated this 24th day of February A.D., 2025

Neil Brathwaite
Justice