IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

CRIMINAL LAW DIVISION

2003/CRI/bail/00089

BETWEEN

RAPHAEL NEYMOUR

Applicant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:	**The Hon. Justice Neil Brathwaite**
Appearances:	**Mr. Dion Smith for the Applicant** **Mr. Timothy Bailey for the Respondent**
Hearing Date:	**21st January A.D. 2025**
Ruling Date:	**12th February A.D. 2025**

RULING ON BAIL

[1.] The Applicant seeks bail, and also to have his matters transferred to another magistrate pursuant to section 51 of the Criminal Procedure Code Chapter 91. The Applicant seeks bail on charges of Possession of an Unlicensed Firearm and Possession of Ammunition which is alleged to have been committed in October 2024, and which is being tried before Magistrate Lennox Coleby. At the time of that offence, the Applicant was on bail on another charge of Possession of an Unlicensed Firearm and Possession of Ammunition, which had allegedly been committed on 28th March 2024, and which was also to be tried before Magistrate Coleby. An application to have the matters transferred was made before the Chief Magistrate in November 2024, and a decision was expected to be delivered on 10th December 2024. The decision was not delivered, and a request for a further adjournment to await that decision was refused, and the trial commenced. The

result of the commencement of the trial is that the learned Chief Magistrate no longer has jurisdiction to transfer the matter, which the Applicant says also demonstrates bias, a circumstance which has led to the present application. The basis for the application to transfer is that in 2010 the learned Magistrate, while engaged as a prosecutor in the Office of the Attorney General, appeared in a bail application and objected to bail being granted to the Applicant. In an affidavit is support of the present applications, the affiant has exhibited a story from the Nassau Guardian dated 26th August 2010, in which the learned then prosecutor submitted that the Applicant was a flight risk who had taken the police on a car chase after being accidentally released from custody.

[2.] In support of the application for bail, it is averred that the Applicant was shot multiple times in the parking lot of the Magistrate's Court Complex while on bail for the first offence, and is still under doctor's care, with two bullets still lodged in his body. The Applicant uses crutches to walk, and complains of difficulties eating, sleeping, maintaining his personal hygiene, and in receiving the therapy he requires. It was further indicated that the Applicant contacted the Monitoring Center on 16th October 2024 to indicate that his battery was dying, and that he had no power at his address in Bimini due to the passage of Hurricane Milton. Further, the Applicant indicates that he traveled to New Providence on 18th October 2004 for medical treatment, and forgot the charger in Bimini. He was arrested later that same day. He maintains his innocence, and promises to abide by any conditions if granted bail.

[3.] In seeking to oppose these applications, the Respondent proffered the affidavit of Tanisha Forbes, Counsel in the Office of the Director of Public Prosecutions, to which are exhibited a number of reports. That affidavit indicates that on 28th March 2024 the Applicant was the sole occupant of a vehicle which was stopped during a road check. The Applicant is alleged to have run away, but was caught, and a black bag in his possession was searched and found to contain a loaded .40 pistol. This resulted in the first charge, for which the Applicant was granted bail.

[4.] The affidavit in response further indicates that on 16th October an Electronic Monitoring Device attached to the Applicant gave a Low Battery Alert. The Applicant was contacted, and stated that he had no electricity at his residence on Bimini, and would attempt to have the device charged at a police station. The device was not charged, resulting in the situation escalating and the device going into sleep mode with loss of communication. Further alerts were received, but the Applicant could not be contacted. On18th October 2024 officers executed a search warrant at a residence occupied by the Applicant and one other person at Tropical Gardens, Nassau, as the Applicant had apparently travelled to Nassau from Bimini while the device was not charged. During that search a loaded 9mm

pistol was found secreted in an air conditioning unit. This resulted in the second charge, as well as charges for Bail Violations.

[5.] The Respondent also notes that the Applicant has convictions for Armed Robbery in 2003, Possession of an Unlicensed Firearm in 2004, 2006, and 2011, Possession of Ammunition in 2004 and 2006, and Manslaughter in 2012. In addition to the firearms and ammunition charges, the pending charges include Assaulting a Police Officer, Resisting Arrest, Obscene Language, and Disorderly Behavior.

[6.] Counsel on behalf of the Applicant relies on the constitutional presumption of innocence, and the right to bail, and submits that there is no evidence to support any inference that the Applicant will not surrender for trial, as he has always tried to comply with his bail conditions, and only had difficulties due to a lack of power at his home in Bimini. Any suggestion that the Applicant could charge at the police station is refuted, as the Applicant could not walk to the station as he is on crutches. Counsel further submitted that the medical condition of the Applicant makes it counter-productive to keep the Applicant in custody for his own safety, and suggested that detention of the Applicant prevents him from receiving the medical care required. The court was therefore urged to release the Applicant on bail, as appropriate conditions could be imposed to ensure attendance at trial.

[7.] With respect to the application to transfer, counsel notes that the magistrate appeared as a prosecutor in a matter involving the Applicant, and submitted that this fact created the appearance of bias. That appearance of bias, it is suggested, is strengthened by the fact that the learned magistrate proceeded with the matter rather that adjourn to await the decision of the Chief Magistrate, rendering that decision moot, and despite being aware that to proceed in these circumstances would result in the Chief Magistrate having no jurisdiction to transfer the matter. Counsel relies on the authorities of **Porter v McGill [2002] 2 WLR 37** and Pinochet (No. 2), and submitted that the informed and objective observer would conclude that there was a real likelihood that the learned magistrate was biased against the Applicant.

[8.] In response, the Respondent submits that there is a likelihood that the Applicant will not appear for his trial, based on the possible penalties which would follow a conviction. The learned prosecutor further submitted that the Applicant is a threat to public safety, and that the Applicant's life is in danger, given the fact that the Applicant was shot numerous times in a public parking lot at the Magistrate's Court Complex. Counsel further submitted that the medical professionals at the Bahamas Department of Corrections are fully capable of caring for the Applicant, and submitted that bail should be denied.

[9.] In addressing the transfer application, counsel submitted that the learned magistrate had practiced as both a prosecutor and as defence counsel, with the result that the reasonable observer would presume that the magistrate could be fair. Further, it was noted that the involvement of the magistrate with the Applicant was almost fifteen years ago, and could have no bearing on present events. The court was therefore urged to deny the application to transfer.

DISCUSSION-BAIL

[10.] 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..."

[11.] 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."

[12.] 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".***

[13.] 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".

[14.] 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.";

[15.] 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.

[16.] In considering those factors, I note that the Applicant is charged with serious offences, involving firearms. With respect to the seriousness of these offences, 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.

[17.] 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".***

[18.] 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..

[19.] While no direct evidence has been provided that the Applicant will not appear for his trial, the Applicant is charged with multiple counts of possession of firearms and ammunition which, in considering the possible penalty which would follow a conviction, raises the issue of the likelihood of not appearing for trial.

[20.] 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."***

[21.] 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."

[22.] The affidavit in response states that the Applicant was allegedly arrested in physical possession of the first firearm, and was the occupier of a home in which the second

firearm was secreted. That evidence in my view rises to the level of a prima facie case as is required in Stephon Davis decision above. The evidence is therefore in my view cogent. However, having regard to the nature of these charges, the cogency of the evidence, and the likely penalty, is a sufficient basis to infer that the Applicant would not appear for trial.

[23.] While bearing in mind the presumption of innocence, I am more concerned that the Applicant was on bail at the time he was charged with the present offences, which is an important factor to be considered on an application for bail, as mentioned in Part A of the Bail Act, and that he has numerous previous convictions involving firearms and violence, which are also important factors to be considered pursuant to the Bail Act. In these circumstances, I am satisfied that there is a reasonable basis to conclude that the Applicant would re-offend if released on bail, which is a factor set out in Part A of the Bail Act to be considered by the court in determining whether bail should be granted. I am also concerned that there is a need to protect the public, having regard to the seeming propensity of the Applicant to be involved with firearms, and more importantly to the fact that the Applicant was the target of what can only be described as an assassination attempt. The location of that attack is in my view demonstrative of the strong desire of the attackers to harm the Applicant, at considerable risk to other members of the public, and in the vicinity of the halls of justice.

[24.] I have also considered the medical condition of the Applicant, and I am satisfied that he can be cared for at The Bahamas Department of Corrections, who are well able to coordinate with other public health professionals if medical intervention is required. I have also noted an exhibit to the affidavit in support which lists several exercises to be performed by the Applicant to assist in his rehabilitation, and see no reason why these could not be performed in BDOCs.

CONCLUSION-BAIL

[25.] 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, if the court could be satisfied that the Applicant would comply with conditions. I am not so satisfied, as the Applicant has admittedly travelled to New Providence without charging his device and without notifying relevant authorities, which he was not permitted to do by the conditions of his bail. I do not accept that a lack of power at Bimini could be blamed for the continued failure to charge, or that the Applicant could not get himself to the police station to charge

the device, as he somehow did manage to get himself to another island, and still did not charge the device. While again bearing in mind the presumption of innocence, I am not satisfied that the Applicant would comply with conditions if granted bail. Those conditions would therefore not serve to prevent any re-offending, or to protect the public order.

[26.] 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.

DISCUSSION-APPLICATION FOR TRANSFER

[27.] The application to transfer is made pursuant to section 51 of the Criminal Procedure Code Chapter 91, which reads as follows :

51. (1) Whenever it is made to appear to a judge of the Supreme Court that —
(a) a fair and impartial inquiry or trial cannot be had, or might not appear to be had, in any particular magistrate's court or before some particular magistrate; or.....
he may order that any particular case or class of case be transferred from a magistrate's court to any other magistrate's court.
(2) A judge may act under the provisions of this

[28.] This provision has been considered in this jurisdiction in the case of **Stephen Stubbs v Deputy Chief Magistrate Carolita Bethell** SCCrApp & CAIS No. 44 of 2011. In that case the Court of Appeal accepted the test to be applied as set out in Porter v McGill and said as follows:

17. The test of apparent bias was reformulated in Re Medicaments and Related Classes of Goods (2) [2001] 1WLR by Lord Phillips MR (as he then was) and approved in Porter v Magill [2002] 2 WLR 37 at 83H – 84 A. That test requires that the Court must first ascertain all of the circumstances which have a bearing on the suggestion that it was biased, and then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or danger, that the Court was biased. This is also the test in The Bahamas (see Stephen Stubbs v The Attorney General SCCrm App. No. 96 of 2009).

18. Lord Justice Sedley in Amjad and Others v Steadman-Byrne [2007] 1 WLR 2484 put it another way, he said:
"It is whether a fair-minded observer informed of all the relevant circumstances would have concluded that there was a real possibility that the judge was biased. Bias in the present context has to mean the premature formation of a conclusion adverse to one party."

[29.] An application pursuant to this section should be made by motion supported by an affidavit, and should state the grounds on which the application is made. No Notice of Motion has been filed in this case, and the application is merely referenced in the summons seeking to be admitted to bail. Nevertheless, no objection was taken to this manner of proceeding.

[30.] The basis of the application, as set out at paragraph 16 of the affidavit in support, is that there was an appearance of bias by the Magistrate presiding over both matters in Magistrate's Court 15, and that the Magistrate in Court 15 was formerly a prosecutor for the Department of Public Prosecutions and had appeared in a bail application as the prosecutor against the Defendant.

[31.] The facts relevant to this application have been set out above. In considering the question of whether the fact that both matters are before the same magistrate would leave to the appearance of bias, the fair minded and informed observer would also be aware that persons may be tried on multiple charges on the same docket before the same magistrate, with no intimation that such a circumstance would create an impression of bias. Indeed the fair minded and informed observer would also be presumed to know that tribunals of fact on trials in the Supreme Court are routinely reminded that each charge must be considered separately, and that a person cannot be found guilty of one offence merely because the tribunal of fact concludes that he is guilty of another offence. In this situation, where the learned magistrate is legally trained, as opposed to a lay person, a separate and independent consideration of each case, as would occur with each charge, would in my view be expected to occur without question. I therefore do not accept that this circumstance would cause an observer being aware of all of these factors to conclude that there is a real possibility that the learned magistrate would be biased.

[32.] Furthermore, in **Paul Joseph Howell v Millais [2007] EWCA Civ 720** the Court of Appeal of England and Wales said the following:

9. "The mere fact that a judge has decided a case adversely to a party or criticised the conduct of a party or his lawyers, will rarely if ever be a ground for recusal. However, a real danger of

bias might be thought to arise if there were personal friendship or animosity between the judge and a member of the public (see eg Locabail at [25]. The same would, I think, be true if there were personal animosity against a firm of solicitors or his partners."

[33.] Applying that dicta to the facts of this case, the mere fact that a magistrate hears more than one case involving the same defendant could not without more constitute a basis to conclude that there was a real possibility of bias. I also bear in mind that in this case there is no suggestion of personal animosity. Indeed, any such suggestion would in my view be contradicted by the fact that the very same magistrate from whom it is sought to transfer these cases, initially granted bail on the first matter to the Applicant, thereby exercising a discretion in favor of the Applicant. I therefore do not accept that this circumstance would cause an observer being aware of all of these factors to conclude that there is a real possibility that the learned magistrate would be biased.

[34.] In considering the issue of the previous appearance by the learned magistrate as a prosecutor in a bail application involving the Applicant, the fair minded observer would be aware that a prosecutor is a minister of justice, with no interest to serve in the proceedings.

[35.] In **Locabail UK Limited v Bayfield Properties Limited [2000] QB 451** the Court of Appeal at paragraph 25 said as follows:

"We cannot, however, conceive of circumstances in which an objection could be soundly based on.... previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him.....

The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

[36.] In the instant case, the complaint is that the learned Magistrate appeared in a matter almost fifteen years ago. Given the dicta in Locabail, it is my view that the fair minded and informed observer would not conclude that there was any possibility that the learned Magistrate would be biased against the Applicant. Nor am I able to conclude that the refusal to adjourn the matter, and the effect that refusal had on the jurisdiction of the Chief Magistrate to render a decision in the matter, means that the fair minded and informed observer, who is also presumed to not be unduly suspicious, would conclude that the learned Magistrate was biased, particularly in circumstances where previous adjournments had been granted, as is apparent from a letter from counsel for the Applicant to the learned Magistrate dated 11th December 2024 requesting a further adjournment as the decision of the learned Chief Magistrate had not been delivered the

day before. There was also no stay of the proceedings in place. While a different tribunal might have considered it more prudent to await the decision of the learned Chief Magistrate, a disagreement with the decision to proceed is not the same as saying that the decision must mean the learned Magistrate was biased, particularly when one considers that the first matter was before this Magistrate for several months with no application to transfer, and the main contention of the previous appearance of the learned Magistrate as a prosecutor would presumably have been known to the Applicant.

[37.] For the foregoing reasons, the application to have the matters transferred to another magistrate is refused.

Dated this 12th day of February A.D., 2025

Neil Brathwaite
Justice