

COMMONWEALTH OF THE BAHAMAS

In The Supreme Court

Criminal Division

CRI/BAIL/00205/2021

BETWEEN

MARVIN AUGUSTIN

a.k.a MARVIN AUGUSTINE

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: The Honourable Madam Justice Mrs. Jeanine Weech – Gomez

Appearances: Mr. Geoffrey Farquharson, for the Applicant

Ms. Tamica Gibson, for the Respondent

Hearing Date(s): 5 October 2022

RULING- BAIL

Weech-Gomez J

1. The Applicant, Marvin Augustin (a.k.a Marvin Augustine) hereinafter the “**Applicant**”, applies for bail in respect of the charge of Murder being concerned with another surrounding the events of the 6th August , 2022 and is alleged to have intentionally and unlawfully cause the death of Ayundo Louis a.k.a “Baby Souls”. The Applicant made this application for Bail via Summons and Affidavit filed the 26th September, 2022.

Applicant’s Submissions

2. Counsel for the Applicant relied on its aforementioned Affidavit and the main points included that :
 - a. The Applicant has a previous conviction for Stealing and a pending matter of Murder.
 - b. The Allegations in this matter are baseless with no evidence connecting the Applicant to the matter except the lies of a witness.
 - c. Due to wearing an ankle monitor (“electronic monitoring device or **EMD**”), the monitoring report will show the Applicant has an alibi and had officers taken time to request the monitoring report, charges would have never been brought.
 - d. The evidence against the Applicant is weak and tenuous.
 - e. There is no credible suggestion that the Applicant will reoffend, abscond, interfere with witnesses or with the administration of justice should Bail be granted.
3. On oral submissions Counsel for the Applicant provided that Bail should not be denied because the Applicant was charged while on Bail. Counsel further asserted that in relation to the Anonymous witness, there has been no formal application put forth to accept such a witness, this witness does not say how far they were from what they saw, they did not see who got shot and there is no nexus between the shot(s) fired and the deceased. Even if the facts from the anonymous witness are so, the Applicant had no active participation in the matter at hand as the witness places him in the car.
4. Counsel continued that the Director of Prosecution (“DPP”) is not aware of the portion of Maxwell Lane where the alleged incident is said to have taken place. The vehicle from the EMD tracing report was said to be traveling between 34 m.p.h. and never stopped. Counsel furthered that while there may be an argument that persons with EMD’s out on Bail are being killed, which is very serious , it must also be taken into account that those monitoring Defendants are also aware of their whereabouts and the information is not a secret. There is now protection provided by the powers that be.
5. Counsel concluded his submissions by stating that there is no immediate danger to the Applicant. The evidence against the Applicant is trifling and he will defend

the same successfully at trial. Counsel directed the Court to consider the case law from the Court of Appeal which covers all of the allegations against the Applicant and would decide in the Applicant's favor.

Respondent's Submissions

6. Counsel for the Respondent (the "DPP") objected to the granting of bail and relied on its Affidavit of Cashena Thompson, Attorney in the Office of the DPP, filed the 5th October, 2022 and asserted *inter alia*,
 - a. The evidence against the Applicant is cogent particularly through the evidence of an anonymous witness who is familiar with the Applicant from the area he resides and the EMD report which places the Applicant in the area of the incident at the time it occurred;
 - b. The Applicant was positively identified via a 12 man photo lineup by the Anonymous witness as the driver of the vehicle which the alleged shooter exited and re-entered after the alleged shooting;
 - c. Mr. Leon Bethell, Managing Director of Metro Security Solutions provided a report that tracks the Applicant in the vicinity at the time of the alleged Murder.
 - d. The Applicant's antecedents reflect a pending charge of Murder and prior conviction of Stealing.
 - e. The Applicant has shown he cannot comply with Bail conditions; having been granted Bail for Murder and now stands accused of another serious charge of Murder.
 - f. Prior conviction of Stealing coupled with pending matters of Murder indicates a propensity to reoffend if granted Bail.
 - g. There are no conditions which can be imposed to prevent the Applicant from committing further offences while on Bail. Even with an EMD being outfitted as a Bail condition this did not stop his presence before the Court again on another charge.
 - h. The nature of the evidence, the manner in which this offence was carried out, the Deceased being gunned down in a public street which placed the safety of the public at risk and even now that the Applicant's own identify has been made known, his own life at risk.
 - i. Judicial Notice should be taken to the number of persons admitted to Bail who are themselves murdered within weeks of their release.
 - j. Given the severity of the penalty of the offence, there is a great likelihood for the Applicant being convicted which provides within itself sufficient

incentive for the Applicant to abscond.

- k. There has been no unreasonable delay in the matter and there is nothing peculiar about the Applicant's circumstances that would suggest that his continued detention is unjustified or unfair at this time.
7. On oral submissions Counsel asserted that most of what the Applicant's Counsel has intimated will be vetted at trial. The witness anonymity application file was just recently received by the DPP's office and is being pursued. Where the Applicant's Counsel speaks to the exact place of the incident, he was not there when the incident took place and cannot speak in absolute. The Applicant was in a vehicle and Metro, the EMD monitoring company would need to be called to vet the details of the report.
 8. Counsel concluded by asking the Court to infer that if a gun was seen in an individual's hand immediately after gun shots were heard, it can be inferred that the shots came from that person.

The Law

The Constitution of The Bahamas provides that, "***Every person who is charged with a criminal offence – (a) shall be presumed to be innocent until he is proved or has pleaded guilty***" (Section 20 (2) (a)). Understanding this, the Applicant has a right to apply for Bail but this right is not automatic.

Under the **Bail Act (as amended) 1994 – 2020 ("The Act")**, there are factors provided that act as guidelines in assisting a Judge in utilizing their discretion to grant or deny Bail. These provisions can be found in Section 4(2) and the First Schedule to the Act which is detailed below.

Section 4

4 (2) Notwithstanding any other provisions 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) is unlikely to be tried within a reasonable time;

(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 a written statement giving reasons for the order of the release on bail.

(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 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 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.

The First Schedule

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.

(h) in the case of violence allegedly committed upon another by the Defendant, the Court's paramount consideration is the need to protect the alleged victim.

Discussion

9. In this instant case, the alleged events occurring on the 6th August, 2022, which is fairly recent is moving in the normal trajectory of such matters of being tried in

a reasonable amount of time and this fact at present is not affected. The other relevant factors considered by this Court via the guidance of the Bail Act include,

The character or antecedents of the person charged;

10. It is of note that the Applicant was convicted of Stealing in 2019 and served a one (1) year sentence. He was then charged with Murder in 2021 and now stands with the present Murder charge of 2022. While a charge is not a conviction, the Applicant is not a person of good character and this must be factored into this decision.

The need to protect the safety of the public or public order, the need to protect the safety of the victim or victims of the alleged offence;

11. This matter alleged to have occurred during the afternoon in the populated Rockcrusher community is nothing to take lightly as we know that bullets do not have eyes and we can look to examples this year where innocent civilians were found in the cross fire and died because of such crimes, and we agree that this issue goes beyond,

“whether the appellant will appear for his trial but turns on whether he is a threat to society and.....in weighing the presumption of innocence given to the Applicant with the need to protect the public order and the public safety the Court is of the opinion that the need for public safety and public order is of highest importance and in the present circumstances cannot be ignored” (**Tyreke Mallory v Director of Public Prosecutions 142 of 2021**).

12. The public's safety and public order must be considered and where evidence lends itself to show such a threat exists the Court must do what it can to ensure it does not persist weighed alongside other factors.

Substantial grounds for believing that if released on bail, the Applicant would (i) fail to surrender to custody or appear at his trial;

13. A conviction of Murder attaches a lengthy sentence and as detailed by the Respondent above presents a possibility for a Defendant to abscond or as case law provides, an Applicant, "who faces the severest penalty known to law may have a powerful incentive to abscond or interfere with witnesses" (**Hepburn and Hurnam v The State [2006] 3 LRC 370**). While a charge as stated is not a conviction, the likelihood of so presents a risk to an Applicant absconding and this argument asserted by the Respondent was considered.

Substantial grounds for believing that if released on bail, the Applicant would (ii) commit an offence while on bail;

14. As provided by the case of **Jeremiah Andrews v The Director of Public Prosecutions [1937] 2 All ER 552**, "bare assertions" by the Respondent are not sufficient and must be "supported by some evidence" to substantiate why Bail should not be granted and under this limb, the Respondent has provided that the

Applicant has shown he cannot comply with Bail conditions now being charged with another Murder, coupled with a prior conviction which presents a propensity to reoffend if granted Bail and even with an EMD being outfitted as a Bail condition did not stop the Applicant's presence before the Court on another similar charge. The Respondent also provided an EMD report which places the Applicant in the vicinity of the alleged crime. While a Bail hearing is not a "mini trial" (Attorney General v. Bradley Ferguson et al SCCrApp Nos. 57, 106, 108, & 116 of 2008), this evidence is quite substantial and there is concern that it is probable that the Applicant could reoffend if granted Bail again.

Whether the defendant should be kept in custody for his own protection;

15. There has not been much given to this point, but this Court is concerned by the number of Defendants who are granted Bail for similar charges and within weeks are killed themselves. While there has been no direct threat provided as to the Applicant's safety. Retaliatory killings have become a norm, particularly this year and there is concern in that regard to this Applicant.

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;

16. As intimated at point 13 above, the Applicant was granted Bail for a 2021 charge of Murder and now seeks Bail on the same serious charge and this is a factor the Bail Act prescribes to be considered and is also evidenced through case law where in Cordero McDonald v The Attorney-General SCCrApp. No. 195 of 2016, there was,

"an additional consideration to the seriousness of the offence [to]...the fact that the appellant was on bail when he was charged with the offence of attempted murder [and] the existence of these factors would support a finding of substantial grounds for believing that the applicant would fail to surrender to custody or appear at his trial; or commit an offence while on bail; or interfere with witnesses or otherwise obstruct the course of justice".

17. The same was echoed in Tyreke Mallory supra, where ,

"there is a reasonable basis for the Crown's allegation that the appellant is a threat having regard to the fact that the present offence was committed whilst he was on bail.... [also] having regard to his antecedentsFurther, the evidence, in my view, 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 pending trial."

The nature and seriousness of the offence and the nature and strength of the evidence against the defendant;

18. The nature and seriousness of an offence and the strength of the evidence are said to be “*material considerations when determining the proper exercise of the discretion to grant bail*” (**Jeremiah Andrews v The Director of Public Prosecutions SCCrApp No. 163 of 2019, para 24**) and it is no doubt that the offence of Murder is very serious but it is also bailable and not the sole reason to deny Bail, but 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” (**Jonathan Armbrister v Attorney General, SCCrApp No. 145 of 2011**).

19. What also bolsters the position on whether to grant or deny Bail is the nature and strength of the evidence provided by parties to assist the Court in making the most informed decision. In this matter we are provided by the statement of an anonymous witness who asserts knowing and being able to identify the Applicant, and positively does so, the time in which the events were alleged to have happen, particularly being during the afternoon which lends to better visuals of what allegedly transpired, an EMD report that places the Applicant in the vicinity of the incident, and the Applicant’s antecedents, while this is not a mini trial, this evidence does raise a reasonable suspicion of the commission of the offences by the Applicant such as to justify the deprivation of his liberty by arrest, charge, and detention alongside all of the aforementioned factors. This alongside the requisite Affidavits, oral submissions and supporting documents assists this Court in exercising its discretion in the manner decided below.

Conclusion

Having regard to the foregoing factors this Court is of the view that the Applicant should remain incarcerated at this time, consideration was also given to conditions which the Court may impose that would minimize the risks involved with the granting of bail and have found none that would suffice as a safeguard. Bail is therefore denied.

The Hon. Madam Justice Jeanine Weech – Gomez

Dated this 24th day of October 2022.