

**COMMONWEALTH OF THE BAHAMAS**

**In The Supreme Court**

**Criminal Division**

**CR/BAIL/2022**

BETWEEN

ORVILLE FORBES

**Applicant**

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

**Respondent**

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

Appearances: Mr. Orville Forbes, pro se

Ms. Tommel Roker, for the Respondent

Hearing Dates: 22 March, 2022; 30 March 2022; 5 April 2022.

***RULING- BAIL***

## **Weech- Gomez J**

1. Orville Forbes, the Applicant (the “**Applicant**”) to these proceedings has been charged with the Murder of Kevin McKenzie and is alleged to have intentionally and unlawfully cause his death on the 28<sup>th</sup> September, 2021, contrary to section 291(1) B of the Penal Code, Chapter 84. He is also charged concerned with another with Armed Robbery which is said to have occurred on the 7<sup>th</sup> November, 2021, the property of J.C.F Supermarket contrary to section 339 (2) of the Penal Code, Chapter 84. The Applicant made this application for Bail to the Supreme Court via the Electronic Kiosk at the Bahamas Department of Corrections (“**BDOCs**”) and appeared before my Court via Polycom video link from BDOCS.
2. The Applicant was conditionally discharged in September 2021 with two counts of Threats of Death. He is said to have no other matters pending. In his oral submissions he asserted that:
  - a. He is a young man who seeks to take care of his family, which includes his three step daughters and girlfriend with whom he intends to reside with. He contends that he is not a bad guy and wants the opportunity to be able to support his family;
  - b. He has no pending matters;
  - c. He has the means to find employment as he worked as an engineer on Paradise Island and now works as a body work mechanic and would not be idle;
  - d. He contends that he did not do these crimes as alleged and that with respect to the Murder count someone else has also been charged with the same;
  - e. He also avers having a “hit” on his head in the amount of some \$70,000.00 and being attacked at BDOCs Remand Center but now resides in safe custody by himself.
3. Counsel for the Respondent (the “**DPP**”) objected to the granting of bail supported by an Affidavit of Janessa Murray, Crown Prosecutor of the DPP, filed the 18<sup>th</sup> March, 2022 asserts *inter alia*,
  - a. The nature and seriousness of the crimes and the punishment attached thereto would be a good reason for absconding;
  - b. That the Applicant is likely if granted bail to reoffend.
  - c. The evidence in both matters are cogent and exhibited to its Affidavit are the Charge Sheet of the Applicant, the Royal Bahamas Police Force Criminal Records Antecedent Form concerning the Applicant and the incident report with respect to the threats of death matter to show the use of a weapon.

4. Upon returning to Court on the 30<sup>th</sup> March, 2022, after being directed to determine whether the Applicant's claims of a "hit" on him and attack at the Remand Center were accurate, the Respondent provided a letter from BDOCs dated the 28<sup>th</sup> March, 2022 and the 23<sup>rd</sup> March, 2022 by Doan Cleare, Commissioner of Corrections (Acting) and Neville Atwell, Corrections Corporal, Internal Affairs Unit ("IAU") respectively concerning the Applicant which detailed inter alia:
  - a. The Applicant was admitted to BDOCs on the 20<sup>th</sup> December, 2021 and was quarantined for 14 days. The Applicant did not complain or report any incident at this time and was thereafter transferred to the remand block and measures were put in place to ensure his safety.
  - b. Upon receipt of the information of the IAU, the Applicant relayed information of a "hit" on him when interviewed on the 23<sup>rd</sup> March, 2022.
  - c. The Applicant has been housed by himself since the day of admission.
  - d. The Applicant states he is not affiliated with any gangs but has enemies in all of the notorious gangs and is in fear for his life.
  - e. The Applicant advised of an inmate named "Blue" being the cousin of the murdered Kevin McKenzie and has purportedly put the contract on his life and puts him in fear of his life.
  - f. BDOCS avers that all of the necessary precautions have been exercised to ensure that the Applicant remains in safe custody while remanded and also mentions that the Applicant has stated that he has family and friends on the C-Block so that is the safest place for him to remain while in prison.
5. An adjournment was given to the 5<sup>th</sup> April, 2022 for the DPP to verify if there was another charged with the Murder of Mr. Kevin McKenzie. On their return confirmed that no one else was charged. The Applicant pleaded with the Court to have sympathy and grant him bail. The Respondent maintained its position that Bail ought not to be granted.
6. Upon review of the Affidavit and considering the oral submissions of the Applicant and Respondent, the court has determined that given the nature and the seriousness of the charges, the safety of the Applicant particularly via his own assertion of being targeted and contracted to be killed and an enemy of various notorious gangs and that of public safety, the Court is therefore of the view that it ought not to exercise its discretion to grant the Applicant bail at this time. The reasons for the exercise of the discretion against the Applicant are as follows:

### **Applicable Law**

#### ***The Constitution***

1. Section 20 (2) (a) of the Constitution states 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.”** The Applicant (who has been charged with the aforementioned offences) enjoys the presumption of innocence and has a right to apply for bail.

***The Bail Act (1994) (as amended) (the “Bail Act”)***

2. The granting of bail is a discretion exercised by the courts, the Bail Act gives guidance on factors that should be considered in cases where Part C offences are before the court. Sections 4(2), 4(2A) and 4(2B) of the Act provides as follows:

***(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.***

3. Part A of the Bail Act states as follows:

***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.*

## **Discussion and Reasoning**

### **The Bail Act**

#### ***Trial within a Reasonable Time***

4. In accordance with the Bail Act and Article 19(3) of the Constitution, if someone is charged with an offence who cannot be tried within a reasonable time, they should receive bail. However, if they can be tried within a reasonable time, the court should move on to give consideration to sections 4(2B), 4(2C) and Part A of the Act in order to make a determination as to whether an applicant is a fit and proper candidate for admission to bail (see *Duran Neely v The Attorney General Appeals No. 29 of 2018*).
5. In the instant case, the Applicant has recently been charged and to date, our information is that the Applicant has not been served with his Voluntary Bill of Indictment. Understanding this, we move to the others factors to determine if Bail is to be granted.

#### ***Previously granted bail and now charged with similar offences (Character/ Antecedents) /Commit an offence while on bail, public safety or public order***

6. The character or antecedent of the person charged is a primary consideration, but this factor alone does not automatically result in the release of a person on bail. As previously stated, the Applicant's two previous convictions have been spent and contends through his oral submissions that in these present matters he is innocent and had nothing to do with same and seeks to attend Court on all occasions to defend his case.

7. Understanding the same, the Court must also take into consideration public safety and takes note that it should not be assessed in a vacuum as in the case of *Duran Neely* and must sit alongside the character of the Applicant and other factors. The threats against the Applicant's life are of much concern but also of great concern are the lives of the public including that of his girlfriend and her daughters who will house the Applicant and the safety of the area and the people within the area with which they reside.

***Failure to surrender to custody or appear at trial***

8. Part A of the Bail Act invites the court to consider whether there are substantial grounds for believing that, if released on bail the defendant would fail to surrender to custody or appear at his trial or interfere with witnesses.
9. It is an established practice concerning bail applications that the appropriate test for granting bail is whether or not a court is of the view that the applicant will or will not appear for trial (see *Jeremiah Andrews v The Director of Public Prosecutions [1937] 2 All ER 552*).
10. In this instant matter, the Applicant swears that he will not abscond and that he has no intention of not appearing to his trial and seeks to show that he did not commit these crimes. However, there is grave concern that he will not appear at trial if granted bail as his own viva voce evidence is that there is a contract on his life for some \$70,000.00. If such a contract is followed through, this Defendant will not be present at trial. The current climate in March–April 2022 alone has seen on the daily, gang associated killings and retaliations.
11. The court has also taken in consideration the conditions in the case of *Jeremiah Andrews* but this is factored alongside the other factors which must also be considered when granting bail and not in isolation.

***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;***

12. As mentioned above, the Applicant's life through his own words is in danger and considering that persons accused of serious offences upon their release on bail, are in turn murdered themselves, at this juncture the applicant ought not to be released for his own protection. BDOCs continues to house the Applicant by himself for his safety also understanding the threats that have been made toward the Applicant.

***The Nature and Seriousness of the Offence and Nature and Strength of the Evidence***

13. It is no doubt that the offences of Murder and Armed Robbery are serious offences; but they are bailable offences and not the sole reason to deny bail.
14. Recognizing, that Bail hearings should not constitute mini trials (see Attorney General v. Bradley Ferguson et al SCCrApp Nos. 57, 106, 108, & 116 of 2008), it is also important that the court considers the strength of the evidence in accordance with the Bail Act. In Cordero McDonald v. The Attorney General SCCrApp No 195 of 2016, Allen P stated that:

***“The judge must simply decide whether the evidence raises a reasonable suspicion of the commission of the offences such as to justify the deprivation of 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. The Court has not been provided by the DPP through its Affidavit or oral submissions the evidence in this matter, only that it is said to be cogent and that the Applicant is likely reoffend but not supported with evidence which as provided by the case of *Jeremiah Andrews* is not sufficient. “Bare assertions” are not sufficient and must be “supported by some evidence”. For this reason this factor has not provided much bearing but is not looked to in isolation.

### **Conclusion**

16. The relevant provisions of The Bail Act having been considered, namely:
- i. the serious nature of the offences,
  - ii. the antecedent of the Applicant,
  - iii. the competing interest of the Applicant’s presumption of innocence and his right to his liberty and that of the right of public safety and security, particularly the safety of his girlfriend and her three daughters and the community with which they will reside,
  - iv. the safety of the applicant and ensuring his attendance at trial which has been threatened through an alleged contract of his life in the sum of some \$70,000.00,
  - v. the court also considering bail conditions that could be imposed.
17. The Court having given consideration to all of the aforementioned factors is of the view that the Applicant should remain in custody on remand at this time for his safety and public safety. Should there be any change in circumstances in the interim, the Applicant is at liberty to reapply.

**The Hon. Madam Justice Jeanine Weech – Gomez**

Dated this 13<sup>th</sup> day of April 2022.