

COMMONWEALTH OF THE BAHAMAS

In The Supreme Court

Criminal Division

CRI/BAIL/00021/2022

BETWEEN

COSINTINO GERVAIS

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

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

Appearances: Mr. Troy Kellman, for the Applicant

Ms. Royanne Forbes, for the Respondent

Hearing Date(s): 17 November, 2023.

RULING- BAIL

Weech – Gomez J

INTRODUCTION

1. The Applicant in this matter, Cosentino Gervais (D.O.B. 2nd February, 2004) (the “**Applicant**”) is charged in Voluntary Bill of Indictment (hereinafter, “VBI”) VBI 287/11/2022 with one (1) count of Armed Robbery said to have occurred on the 31st July, 2022, contrary to section 339(2) of the Penal Code, Chapter 84; and on the 18th March, 2022 with one (1) count of Armed Robbery, contrary to section 339(2) of the Penal Code, Chapter 84; in VBI 07/01/2023 with Attempted Murder contrary to section 292 of the Penal Code, Chapter 84, Attempted Armed Robbery contrary to section 83(2) and 339(2) of the Penal Code, Chapter 84, two (2) counts of Possession of Firearm with Intent to Endanger Life, contrary to section 33 of the Firearms Act, Chapter 213 said to have occurred on the 13th August, 2022 and in VBI 286/11/2022 with three (3) counts of Possession of a Firearm with intent to endanger life concerned with others contrary to section 33 of the Firearms Act, Chapter 213 said to have occurred on the 24th July, 2022
2. He was previously granted Bail in case # 1-21-077710 charged with another for the offences of Armed Robbery , Receiving, Possession of an Unlicensed Firearm and Possession of Ammunition said to have occurred on the 25th May, 2021. He now applies for Bail as it relates to the above-referenced offences and applied for Bail via Summons and Affidavit filed the 11th October, 2023. The Respondent replied thereto via its Affidavit filed the 31st October, 2023.

SUBMISSIONS

3. The Applicant’s Counsel relied on its Affidavit which highlighted that the Applicant is nineteen (19) years old and resides with his grandmother in the Whitaker Avenue area off Carmichael Road. As it related to VBI 286/11/2022 he is charged along with three (3) others, all of whom have denied his involvement in the alleged charges and highlighted the interview of his co-accused Mackey who speaks to three (3) of the co-accused including himself being in the vehicle and

that the Applicant was not there. He also stated in his interview that the firearm was his and how he came into possession of it.

4. As it related to VBI 287/11/2022 he is charged with another and asserts that the only evidence against him is that the of the Virtual Complainants (hereinafter “VC”) who are said to have identified him as one of the assailants who robbed them but they never saw him before and that according to their statement it was dark, lighting was poor and that the incident happened quickly. The Applicant denied being involved in this matter.
5. The Applicant continued that it has been his experience that having been charged with armed robbery before, authorities routinely pick them up when an armed robbery occurs in the Carmichael Road area with no credible information and for this reason does not believe the VC’s identified him to the highest standard. As it relates to VBI 07/01/2023 charged with same co-accused in 287/11/2022, the Applicant states that the VC’s evidence in this matter is also the only evidence implicating him in the form of the 12 man photo lineup. He also asserts that the VC is a police officer and that he was beaten by officers as a result. He again opines that the identification process was flawed and as a result of being known to the authorities. There is no other evidence linking the Applicant to the crime whether through fingerprints, forensic evidence, independent eye witnesses and the like. The Applicant continued that he was wearing an EMD during the time of this alleged ordeal and his EMD would not place him at this crime. The Applicant states that he did not have foil wrapped around his EMD as suggested by officer and believes this statement was added later as the VC *“claimed that when he got shot blood was entering his mouth frim his chest and his girlfriend claimed that when she took him to the hospital he was in and out of consciousness. Yet the investigating officer claimed that he interviewed him and took a statement from him the same night”*. The Applicant states that this is not plausible.
6. The Applicant rounded out submissions by stating that he has not been convicted for an offence of a similar nature but has two pending matters. He has been

remanded at the Bahamas Department of Corrections since the 18th August, 2022 with no fixed trial dates having been set in the matters. He maintains his innocence concerning these charges and will ensure he attends all court hearings and adjournments, remain in the jurisdiction and strictly comply with all bail conditions. He continued that he has never used foil or any electrical substance on his EMD and challenge the prosecution to show substantial grounds supported by proof that he is a flight risk. He is not employed and relies solely on his mother and grandmother. He does not have any savings or assets that would assist in absconding. He has no other nationalities or rights to reside in any other jurisdiction and has strong family ties to his community here in Nassau.

7. The Applicant also opined that it is very unlikely that his trials will be heard in the next 24 months which will take his incarceration beyond three (3) years. If granted Bail he will not interfere with prosecution witnesses, nor commit any offences while on Bail and appear before Court at his trial and other hearings associated with his trials.

8. On oral submissions Counsel asserted that the onus is on the Crown to show that there are substantial grounds not to grant Bail and that their Affidavit did not do that. Counsel then directed the Court to paragraph 66 of **Jevon Seymour** which states ,

“In the absence of evidence, merely listing the relevant factors and using expressions such as “may”; or “is likely to”; or “it is recommended” as was done in the McHardy affidavit, cannot discharge the Crown’s burden. We take this opportunity to stress once again what this Court (differently constituted) said in Armbrister, which is that that is not how the Crown’s burden on a bail application is discharged. Paragraph (a) of the First Schedule requires the production by the Crown of evidence capable of supporting a belief that the applicant for bail “would”, if released, abscond, commit new offences or interfere with witnesses. Ritualistic repetition of the Part A factors, in the absence of

evidence, is unfair to the accused person and comes nowhere close to discharging that burden”.

9. Counsel continued that the only evidence given is that of witness statements of police officers which is not sufficient for a substantial case to be made and while the Applicant does not expect a forensic examination of the evidence as in **Cordero McDonald**, he asserts that enough has not be given to deny Bail.
10. Counsel then brought the Court’s attention to paragraph four (4) of its Affidavit which highlights that the Applicant has been charged with three (3) others who all have denied his involvement in this matter and advised officers that the Applicant was never present, not in the vehicle and that his co-accused claimed possession of the firearm and confirmed that there was no other 4th person involved. It is also noted that while a firearm was found in the vehicle, one of his co-accused claimed ownership of same and also stated that the Applicant was not present.
11. Counsel reiterated that the only evidence against the Accused is that of the officers who are said to have pick him out from a 12 man photo lineup but failed to describe the person, asserting that at trial this evidence would be discredited. Counsel continued that the Court can impose suitable conditions to ensure attendance as was intimated in **Duran Neely, Armbrister and in the Randy Ferguson** matter.
12. Counsel reiterated that the wrapping of foil on the ankle monitor to disrupt the signal was not substantiated by the Crown, there was no report from Metro Security to confirm whether something shiny was the device or breach in signal. This was just an allegation asserts Counsel. The Applicant’s Counsel acknowledged that these are five (5) serious offences but that the evidence against the Applicant is weak and not cogent and that it is convenient by the crown to only provide evidence that the Applicant was picked up in a photo lineup in all of the matters. Counsel also reiterated that whenever something comes up,

the Applicant is the first to be picked up by police. The strength of the evidence against the Applicant lies only in the twelve (12) man lineup, which is a fatally flawed process opines Counsel and that an identification parade is more formal and idealistic.

13. Counsel concluded that notwithstanding the seriousness of the charges, the evidence as it relates to the Applicant is weak and that conditions can be imposed to ensure the Applicant's attendance at trial. Counsel concluded that one of the central tenets and considerations is for the trial to be heard in a reasonable time and to date, two (2) out of the five (5) matters have trial dates and three (3) are at case management stage and that being tried within a reasonable time and presumption of innocence must lay in favor to the Applicant.
14. The Respondent's Affidavit highlights firstly that the Applicant is charged with all of the above referenced alleged offences. The statements of co-accused Letario Mackey during his record of interview were taken out of context by the Applicant. All three (3) officers identified the Applicant as the fourth accused and gunman in the 24th July, 2022 matter. The Respondent also highlighted that the Applicant was on Bail and being monitored by an EMD when this alleged offence occurred and places him in the area during the date and time of the high speed chase. The Applicant also faces other charges of a similar serious nature. The Applicant has been charged in previous offences for possession of an unlicensed firearm and Armed Robbery illustrating a propensity and pattern of committing similar types of offences.
15. The Respondent's Affidavit continues that the Applicant was on Bail when charged with these subsequent offences which is in breach of the bail conditions given by Justice Gregory Hilton in March of 2022. The Affidavit concluded with asserting that there are no conditions that could be imposed to prevent the Applicant from reoffending whilst on Bail and for this reason the Applicant is not a fit and proper candidate for Bail.

16. On oral submissions, the Respondent asserted that the application for Bail is a balancing act that is a balance of appearing for trial or absconding. The Applicant was on Bail when charged and his antecedents reflect a propensity to commit similar offences. As it relates to the little evidence given as purported by the Applicant's Counsel, the Respondent drew the Court's attention to the report of Metro Security Solutions placing the Applicant in the same area of the offence. The Respondent reiterated that it relies on its Affidavit and that the Applicant is not a fit and proper candidate for Bail as he is not able to adhere to bail conditions and allegedly a part of a series of armed robberies.

17. The Applicant's Counsel in response to the Respondent relayed that that Metro Security report shows the Applicant moving at 37mph and up to 47mph which is not fast and could not be considered a high speed chase and at times the Applicant was at 0-1 mph. There was also no Metro Security personnel brought in to explain otherwise as it not a document of the Respondent. There were also no bullets found and that it could not be said that the Applicant violated any Bail conditions nor that the Applicant is a part of a string of robberies, none of this has been substantiated and that the Applicant should be seen as someone of good character as all of the matters on his antecedents are pending matters.

THE LAW & DISCUSSION

1. The Constitution of The Bahamas provides to all citizens charged with a criminal offence is a presumption of innocence given to all citizens and therefore the opportunity to apply for Bail, though not automatically granted. The **Bail Act** (as amended) provides guidelines which assists Judicial officers in their discretionary power. The relevant factors of the Act as it relates to this Applicant will be taken in turn and the Court's decision thereafter.
2. The first consideration is whether the matter will be **tried in a reasonable time**, with less than 3 years being reasonable. The earliest of matters for which this Applicant seeks Bail is from March, 2022 so does not currently meet the requisite

threshold. The second consideration is the **character or antecedents** of the Applicant. The Applicant's antecedents reflect no convictions, only pending matters, though this Court does note that they are of a serious nature and takes this into consideration alongside the presumption of the innocence and the other factors below. The next consideration is the **need to protect the safety of the public or public order**. It is no doubt that attempted murder, attempted armed robbery, these are all very serious offences and in this instance affected members of the public and should not be taken lightly.

3. The next considerations are whether there are any **substantial grounds for believing that the defendant if released on bail would commit an offence while on Bail and 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**. There is concern that in the space of two (2) years the Applicant stands charged with a plethora of offences, but this Court does appreciate that these are charges and the Applicant should be presumed innocent particularly in Bail applications where no evidence given connects the Applicant to the crime. Also of note is that the Applicant was on Bail when charged with these offences. He relays that he is constantly picked up by authorities when a crime occurs and maintains his innocence but it is a factor that must be considered nonetheless. This Court does note however that he has not breached any of his bail conditions.
4. As it relates to this matter, the final consideration of this Court is **the nature and seriousness of the offence and the nature and strength of the evidence**. As has been highlighted above, the Applicant is charged with several Part C offences which are deemed most serious and it is no secret that the current climate of our communities are being plagued by gun violence and senseless deaths. There is a balancing act of the preserving the presumption of the innocence alongside preserving and protecting our communities (***Stephon Davis v DPP SCCrApp No. 108 of 2021***).

5. As it relates to the nature and strength of the evidence, The Court notes that the only evidence provided by the Crown pertains to VBI 286/11/2022 and that no evidence has been provided as it related to the other VBIs. The Applicant details his responses to these VBI's in his Affidavit and as detailed in the submissions above. As it is stated in ***Duran Neely v The Attorney General SCCrAPP No. 29 of 2018***, "that a court hearing the application review[s] the evidence available at the hearing" and makes a determination based on the information provided and in this instance this Court has reviewed that which was submitted. It is also of note that the Respondent does not respond to the points in the Applicant's Affidavit and oral submissions as it relates to the other VBI's particularly as it relates to the evidence of Virtual Complainants, etc.
6. The record of interview of one of the co-accused Letario Mackey detailed Mr. Mackey being the owner of the weapon found by police and that he gained possession of such a weapon by finding it in bushes and also that the Applicant was not present with him and the others on the evening in question and that they did not shoot at police. However, the Crown does provide this Court with a report by Metro Security monitoring the date of the 24th July, 2022 detailing the following:
 - 1:01 am – Applicant located Bahamas Games Blvd, moving at 37mph.
 - 1:02 am – Applicant located Celery Drive, moving at 47mph.
 - 1:03 am – Applicant located Baillou Hill Road (showing Yellow Elder Primary School), moving at 1 mph.
 - 1:06 am - Applicant located Baillou Hill Road (showing several points of demarcation – see yellow dots), moving at 0 mph.
 - 1:16 am – Applicant located Baillou Hill Road (showing several points of demarcation – see yellow dots), moving at 1 mph.
 - 1:33 am - Applicant located University Commons (showing several points of demarcation – see yellow dots), moving at 4 mph.
 - 1: 52 am- Applicant located University Commons (showing several points of demarcation – see yellow dots), moving at 0 mph.
7. Officers Adderley, Hield and Forbes recount the date in question but the times given as detailed in the Crown's Affidavit does not coincide with the times on the Metro Report as to the Applicant's whereabouts, but the Applicant has been identified as being in the vicinity of those areas around the same time, though as

his Counsel intimated that the miles listed on the metro report could not coincide with someone being on a chase with the police going at 0 mph or 1mph.

8. While it is not the Court's role to enter into an *"impermissible degree into the evidence"* (***Dentawn Grant v DPP SCCrApp No. 59 of 2022***) with the co-accused Mackey, confirming the possession of the firearm being his own and that the co-accused state that the Applicant was not present along with limiting information, it cannot be said that this evidence *"raises a reasonable suspicion"* (***Cordero McDonald v The Attorney-General SCCrApp. No. 195 of 2016***) of the commission of the offence and cannot be said to be circumstantial.

Conclusion

9. At the outset, this Court was not minded to grant the Applicant bail due the breadth of the charges presented against him, but his Counsel has provided analysis that was not considered on the face of the application, so having reviewed submissions of Counsel, the Constitution, the Bail Act (as amended), requisite case law and evidence presented this Court is minded to grant Bail on the following conditions:
 - a) Bail in the sum of \$30,000.00 with three (3) Suretors;
 - b) Report to Carmichael Road Police Station on Monday, Wednesday, and Friday before 7 pm. until the trial is completed;
 - c) Be outfitted with an Electronic Monitoring Device and abide by the Rules governing same;
 - d) A curfew imposed from 7pm to 7am each day;
 - e) There is to be no contact or interference with any witnesses or parties in relations to any of the matters the Applicant is charged either by the Applicant or through his agent(s);
 - f) The Applicant must appear to Court on all adjourned dates and his trial;
 - g) The Applicant is to surrender all travel documents;

A breach of any of these conditions will result in the Applicant's bail being revoked.

Dated this 12th day of December, 2023.

The Hon. Madam Justice Jeanine Weech – Gomez.