

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

CRIMINAL DIVISION
No. CRI/BAL/00007/2024

MALIK OSWALD SMITH

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: Her Ladyship The Honourable Madam Justice Jeanine Weech-Gomez

Appearances: Ms. Cassie Bethell for the Applicant
Mr. Eul Johnson for the Respondent

Hearing Date: 27 February 2024

Murder — Bail - Constitutional rights – Nature and Seriousness of Offences –
Public Safety and Order – Strength of Evidence

BAIL RULING

Background

1. Malik Smith (“**Applicant**”) was charged with one (1) count of Murder (“**Offence**”) contrary to section 291 (b) of the Penal Code, Chapter 84 (“**Penal Code**”).
2. On 15 January 2024, the applicant filed a Summons and supporting affidavit (“**Applicant’s Affidavit**”) requesting bail.
3. The Respondent provided a Affidavit in Response.

Issue

4. The issue for this Court to consider is whether the applicant should be granted bail?

Evidence

Applicant's Evidence

5. The Applicant's Affidavit provides that: (i) the Applicant was born on 20 August 1996 in the Commonwealth of The Bahamas and is a Bahamian citizen; (ii) he was arraigned in Magistrates Court on 11 January 2024; (iii) he plead Not Guilty to the Offence; (iv) he has no pending matters before the courts of the Commonwealth of The Bahamas; (v) he has no prior convictions in the said Commonwealth; (vi) he will be disadvantaged in his ability to adequately prepare his defence if further remanded and he is disadvantaged in his ability to support his son, himself and his family; (vii) if the Applicant is granted bail, he will comply with all the conditions set out by this Court and (viii) he is a fit and proper candidate for bail.

Respondent's Evidence

6. The Respondent's Affidavit in Response ("**DPP Affidavit**") provides that: (i) the Respondent opposes the Applicant's bail application; (ii) the Offence is of a serious nature; (iii) there is nothing peculiar about the Applicant's situation which suggests his continued detention is unjustified; (iv) there is sufficient evidence to suggest that the Applicant committed the alleged offence (witness statements of an Anonymous witness and Sgt. 3949 Carlos Ingraham respectively are exhibited to the affidavit in support); and (v) there is a need to protect the safety of the public from the prevalence of murders epically involving the use of a firearms.

Law

7. The law of bail is well settled in The Bahamas. The Court must bear in mind one's presumption of innocence until his/her guilt is proven the need to protect the general public from crime and violence. A person's right to freedom and the presumption of innocence are enshrined in our Constitution. **Articles 19(1)(d), (3) and 20 of the Constitution of The Bahamas** provide:

"19 (1). No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases-

...

(d) upon reasonable suspicion of his having committed, or of being about to commit, a criminal offence;"

"19(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.

20. Every person who is charged with a criminal offence —

(a) shall be presumed to be innocent until he is proved or has pleaded guilty”

8. The power to grant bail is imbued upon the Court by virtue of **section 4 of the Bail Act, 1994 (“Act”)**. **Section 4(1) of the Act** which states:

“(1) Notwithstanding any other enactment, where any person is charged with an offence mentioned in Part B of the First Schedule, the Court shall order that that person shall be detained in custody for the purpose of being dealt with according to law, unless the Court is of the opinion that his detention is not justified, in which case, the Court may make an order for the release, on bail, of that person and shall include in the record a statement giving the reasons for the order of release on bail:

Provided that, where a person has been charged with an offence mentioned in Part B of the First Schedule after having been previously convicted of an offence mentioned in that Part, and his imprisonment on that conviction ceased within the last five years, then the Court shall order that that person shall be detained in custody.”

9. **Section 4(2) of the Bail (Amendment) Act, 2011** provides:

“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; or*~~

(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.....

(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...”

10. The First Schedule, Part A of the Act provides factors which a Court ought to consider in a bail application. It reads:

“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);

(d) whether there is sufficient information for the purpose of taking the decisions required by this Part or otherwise by this Act;

(e);

(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) the nature and seriousness of the offence and the nature and strength of the evidence against the defendant”

11. It is incumbent upon the Respondent to prove, through evidence, that the Applicant would likely fail to surrender to custody, appear at trial, commit an offence while on bail or interfere with witnesses or otherwise obstruct the course of justice. This was firmly expressed in the Bahamian Court of Appeal decision of **Jevon Seymour v Director of Public Prosecutions, No. 115 of 2019** (“**Jevon Seymour**”). There, the court made the following pronouncements:

“...Paragraph (a) of the First Schedule to the Bail Act places an evidential burden on the crown to adduce evidence (i.e. substantial grounds) which is capable of supporting a belief that the applicant for bail “would” if released on bail, fail to surrender to custody or appear at his trial; commit an offence while on bail; or interfere with witnesses or otherwise obstruct the course of justice. The Crown’s burden is only discharged by the production of such evidence.”

12. The significance of evidence provided by the Respondent was also highlighted in the case of **Jeremiah Andrews v The Director of Public Prosecutions Appeal No. 163 of 2019**, (“**Jeremiah Andrews**”) Evans JA expressed the following at paragraph 26:

“In order to properly assist the Court, parties are required to provide evidence which will allow the Court to determine whether the factors set out in Part A of the First Schedule to the Bail Act s 4 (2B) exist. We note that all too often the affidavits supplied by the Crown make bare assertions that there is a belief that if the Applicant is granted bail he will not appear for trial; will interfere with witnesses or will commit other crimes. These assertions are meaningless unless supported by some evidence.”

13. Though there must be evidence in a bail application, the Court wishes to highlight that the hearing of a bail application does not entitle the court to assess the strength or weakness of the evidence against the Applicant. This is a matter for the substantive trial. This was observed by Osadebey J at page 61 in the Court of Appeal decision of **Attorney General v Bradley Ferguson et al Appeal Nos. 57,106,108,166 of 2008** where he stated:

“It seems to me that the learned judge erred in relying on his assessment of the probative value of the evidence against the respondent to grant him bail. That is for the jury at trial. As stated by Coleridge J in Barronets case earlier- the defendant is not detained because of his guilt but because there are sufficient probable grounds for the charge against him, so as to make it proper that he should be tried and because the detention is necessary to ensure his appearance at trial...”

14. Also, in the Bahamian Court of Appeal decision of **Cordero McDonald v. The Attorney General SCCrApp No 195 of 2016** (“**McDonald**”), Allen P (as she then was) explained the extent to which a judge is to consider evidence at a bail application. There, the learned President opined:

“34. It is not the duty of a judge considering a bail application to decide disputed facts or law and 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 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. Lastly, I bear in mind that the need to protect society is a paramount consideration. This was expressly stated in the Court of Appeal decision **Dentawn Grant v The Director of Public Prosecutions SCCrApp No. 59 of 2022 at paragraph 42** where, the Court opined:

“I am also of the view that having regard to the material before the Court that this murder appears to have been in retaliation to a

previous attack on the Appellant. There is not only a risk of the Appellant's safety if granted bail, but also a risk to the public's safety. Any retaliation against the Appellant puts members of the public at risk who may be in the area where any attack on the Appellant may take place. In the present case, the material before the Court does not suggest that the victim Brianna Grant was the object of the retaliation but was shot because she was with the intended victim at the time.

DISCUSSION AND ANALYSIS

Whether the Applicant should be granted bail?

16. I will now apply the relevant principles to the application before me. The Applicant is charged with Murder, with no antecedents, nor any prior convictions. This suggests that he is of good character, as his counsel sought to advance during the application.
17. I do note, however the evidence provided in the aforementioned witness statements. I will not delve deeply into the evidence, however, the Anonymous witness provides that on 02 January 2024, he heard a loud sound after noticing the Applicant on a scooter. The Anonymous Witness stated that he knows the Applicant, but did not overtly say that he saw the Applicant murder anyone. Similarly, the photo identification merely places the Applicant in the area at the time of the murder. I will say no more on the matter.
18. In relation to the need to protect the public safety, this is indeed a paramount consideration. As of late, society has decried the government for allowing persons who are charged with murder to be on bail. Whereas I acknowledge this and the undeniable fear that society presently has, I must also bear in mind that the Applicant has no prior convictions nor any other antecedents for me to consider. Further, and more importantly he is entitled to the presumption of innocence and a right to freedom.
19. Conversely, I note that this is a very serious offence and, though the Applicant is deemed innocent until proven guilty, I am very aware of society's omnipresent fears and the ongoing trend of persons being murdered while on bail.
20. Though this was not discussed in the Respondent's Affidavit, I am also mindful of not only society's safety, but the Applicant's own safety. This is a consideration that the Court is permitted to bear in mind.
21. That being said, there is no evidence before the Court that the Applicant would be a threat to society. It is incumbent on the Respondent to provide cogent evidence that the Applicant would be a risk to public safety. I am not satisfied that this burden was discharged as the evidence provided merely places the Applicant at the scene where the alleged murder took place.

Conclusion

22. Having regard to all the circumstances I am prepared to accede to the application and grant bail to the applicant.
23. Bail is therefore granted in the sum of \$25,000.00 with two (2) suretors together with the following conditions:
 - 1) The Applicant is to be fitted with an Electronic Monitoring Device (“**EMD**”).
 - 2) The Applicant is to sign in at the Airport Police Station every Monday, Thursday and Saturday before 6pm.
 - 3) The Applicant nor his agents are to have any deliberate contact with the Prosecution’s witnesses in this matter.
24. Failure to comply with any of the above conditions may render the applicant’s bail being revoked.

Justice Jeanine Weech-Gomez

Dated this 05 day of March 2024