

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

CRIMINAL DIVISION
CRI/BAL/00392/2012

BETWEEN

SEAN HIGGS

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before: The Honourable Madam Justice Jeanine Weech-Gomez

Appearances: Mr. Stanley Rolle for the Applicant

Mr. Ashton Williams for the Respondent

Hearing Date: 02 July 2024

Bail Application – Murder - Attempted Murder - Possession of a Firearm with Intent to Endanger Life - Nature and Seriousness of Offence – Articles 19 and 20 of the Constitution of The Bahamas – Public Safety and Order - Presumption of Innocence – Strong and Cogent Evidence

RULING

WEECH-GOMEZ, J:

[1.] This is a bail application brought on behalf of Mr. Sean Higgs (“**Applicant**”).

Background

[2.] The Applicant was charged with: (i) one (1) count of Murder contrary to section 291(1)(b) of the Penal Code Chapter 84 (“**Penal Code**”) hereinafter referred to as “**Matter #1**”); (ii) Four (4) counts of Attempted Murder contrary to section 292 of the Penal Code; and (iii) Three (3) counts of Possession of a Firearm with Intent to Endanger Life contrary to section 33 of the Firearms Act, Chapter 213 (“**Offences**” hereinafter referred to as “**Matter #2**”).

[3.] The Applicant has made an application for bail with respect to Matters #1 and #2, which the Respondent objects.

Issue

[4.]The issue that the Court must determine is whether the Applicant ought to be granted bail?

Evidence

Applicant's Evidence

[5.]The Applicant's Affidavit provides that: (i) he is a twenty-nine (29) year old Bahamian citizen; (ii) he is seeking bail for offences which include: one (1) count of Murder; three (3) counts of Attempted Murder; and three (3) counts of Possession of a Firearm with Intent to Endanger Life; (iii) he was convicted of a Firearm related offence in 2017; (iv) he was on bail when the recent allegations were brought against him; (v) he maintains his innocence against the recent allegations (he states that there are exhibits - an affidavit of Stanley Rolle and a witness statement for the Respondent – "**Witness Statement**", however no such exhibits are attached). He states that the Witness Statement outlines how the witness came into police custody and how the police purportedly manipulated him into giving false statements against the Applicant; (vi) the Applicant is a hardworking young man, a father of two young children who depend on him in every aspect of their development and while he is in prison, his family suffers hardship; (vii) the Applicant is not a flight and has attended court each time he is told to attend. He further states that his passport has already been relinquished to the Supreme Court; (viii) he will not interfere with witnesses; (ix) life in prison is difficult and does not help him achieve future development; (x) there are sufficient conditions the Court can impose; and (xi) notwithstanding he is charged with one of the most serious of all criminal allegations to which he maintains his innocence and will vigorously defend, he requests the Court to admit him to bail in a reasonable sum (as his family is not a family of great means).

Respondent's Evidence

[6.]The Respondent filed an Affidavit in Response on 27 February 2023 which provides that: (i) the Applicant is charged with the Offences; (ii) the Offences involve the use of a firearm and are offences of a serious nature; (iii) the evidence is cogent. An anonymous witness also states that on 14 March 2021, while in the Englerston area, he noticed the Applicant with a firearm firing gunshots at an individual

(“**Complainant**”), injuring the individual while he rode away on a bicycle (the Voluntary Bill of Indictment and statements of the anonymous witness are attached to the affidavit); (iv) On 23 March 2021, an anonymous witness positively identified the Applicant as the man the witness saw running with a gun after hearing about five (5) gunshots (the identification statement of the anonymous witness and the 12 man photo line-up are exhibited to the affidavit); (v) the anonymous witness positively identified the Applicant on 21 March 2021 as the male the witness saw shoot the Complainant (the identification statement of the anonymous witness and the 12 man photo line-up are exhibited); and (vi) On 07 March 2021, around 11pm in the Homestead Street area, an anonymous witness observed as the Applicant raised his hands up with an object that looked like a gun pointed in the direction of a group of men and fired gunshots (the Voluntary Bill of Indictment for the matter along with the statement of the anonymous witness is exhibited).

[7.]The Respondent’s Affidavit further provides that: (i) on 24 March 2021, an anonymous witness positively identified the Applicant as the male the witness saw shooting at a group of males (the identification statement of the anonymous witness and the 12 man photo line-up is exhibited); (ii) prior to the Applicant’s incarceration, the Applicant has been convicted of Possession of an Unlicensed Firearm and Possession of Ammunition (the Applicant’s Antecedent Form is attached); (iii) that it appears the Applicant has elevated from Possession of a Firearm and Ammunition to use of a firearm in the commission of very serious offences; (iv) considering the nature and seriousness of the Offences, the strength of the evidence, the character and antecedent form of the Applicant, there is an overriding need to protect public safety and public order; (v) there is nothing peculiar about the Applicant’s circumstances that would suggest that his continued detention is unjustified; and (vi) the Applicant is not a fit and proper person for bail.

Law

[8.]The law on bail is settled. I must bear in mind and balance one’s presumption of innocence unless and until his/her guilt is proven (as enshrined in our Constitution) and the omnipresent need to protect the general public from crime and violence. The right to freedom and the presumption of innocence are preserved 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”

[9.]The Court derives its power to grant bail to an applicant from **section 4 of the Bail Act, Chapter 103 (“Act”)**. **Section 4(1) of the Act** 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.”

[10.] **Section 4(2) of the Bail (Amendment) Act, Chapter 103** 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...”

[11.] 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...”

[12.] I also wish to highlight that the onus is on the Respondent to prove, through cogent 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 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”

[13.] The Court also recognizes that a bail hearing is not the proper forum to assess the strength or weakness of the evidence against the Applicant. This was overtly stated 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.] 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 may consider evidence at a bail hearing. 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.

[Emphasis added]”

[15.] Public safety is of grave importance in our society. It is a material consideration in a bail application. The Court may also consider an applicant’s antecedents (if any). Similar pronouncements were made in the case of **Lorenzo Wilson v The Director of Public Prosecutions** SCCRApp No. 29 of 2020 (“**Wilson**”). At paragraphs 19 to 21 in relation to public safety and antecedents of the Applicant, the Court opined:

“19 As to the antecedents, it is not required to show that the appellant lives a habitual life of crime before taking his antecedents into account.

20 In this case, the appellant is 24 years old and has already been convicted of a criminal offence which was serious enough to serve 18 months imprisonment. That offence involved an unlicensed firearm and this offence also involves a firearm which was alleged to be used indiscriminately against members of the public on a public street.

21 In our view, it was not unreasonable for the judge to have found that the appellant was a danger and not a fit person to be granted bail.

[Emphasis added]”

[16.] In the Bahamian Court of Appeal decision of **Richard Hepburn v The Attorney General** SCCRAPP & CAIS 276 of 2014 Allen P, (as she then was) made the following observations:

“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 a 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 v The State* [2006] 3 L.R.C. 370. At page 374 of the judgment Lord Bingham said *inter alia*:*

“... the courts are routinely called upon to consider whether an un-convicted 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 a whole. The interest of the individual is, of course, to remain at liberty, unless or until he is convicted of a 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 inevitably prejudice him and, in many cases, his livelihood and his family. But the community has a countervailing interest, 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...”

*7 **The objective of detaining an accused person is to secure his appearance for his trial and to ensure he is available to be punished if found guilty.** Indeed, if a person's presence at trial can be reasonably ensured otherwise than by his detention, it would be unjust and unfair to deprive him of his liberty.*

8 Moreover, even if a person's appearance could not be so ensured, he is entitled to be released either unconditionally or on reasonable conditions if he is not put to his trial within a reasonable time, or if it is unlikely that he will be so tried.

9 Accordingly, bail is the right of a person charged with a criminal offence to be released from custody on his undertaking to appear for his trial at a specified time, and to comply with any conditions that the court may think fit to impose.

*10 The relevant law on bail is found in articles 19(3), 20(2)(a) and 28 of the Constitution, and in sections 3, and 4 of the Bail Act 1994, as amended (“the Act”). **It is immediately apparent from a reading of those provisions that two distinct rights to bail are given, namely, a general right to an un-convicted person to be released on bail unless there is sufficient reason (Part A of the Schedule) not to grant it; and the absolute right of such a person to be released on bail if his constitutional time guarantee is breached or is likely to be breached.***

11 The general right to bail clearly requires judges on such an application, to conduct a realistic assessment of the right of the accused to remain at liberty and the public's interest 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.

[Emphasis added]”

Discussion and Analysis

Whether the Applicant ought to be granted bail?

[17.] I shall now consider the bail application before me, while bearing in mind the aforementioned principles and evidence.

[18.] Whilst the Court has heard arguments and has considered the principles and the evidence, the Court wishes to state at the outset that notwithstanding that the arguments of both the Applicant and the Respondent sought to deal with offences with respect to Matters #1 and #2, as Mr. Justice Williams has carriage of Matter #1, it is this Court's considered opinion that any decision with respect to bail on that alleged offence ought properly be considered by him, given all the circumstances. Hence, any further discussion and decision on this application will be confined to Matter #2 only.

[19.] With respect to the nature and strength of the evidence, I shall consider same, while keeping in mind the sage words from Allen P in *McDonald*. I must be satisfied that the evidence before me: "*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 [the Judge] must then consider the relevant factors and determine whether he ought to grant him bail.*"

[20.] In relation to the evidence, an anonymous witness statement dated 07 March 2021 evidences that an anonymous witness saw the Applicant's face shortly before gunshots were heard. Specifically, the anonymous witness indicates that he/she saw the Applicant raise a handgun up and shoot in the direction of three persons in the area. Though it was 11pm at night, the anonymous witness says the street was well lit and he was able to see everything that transpired. The anonymous witness also positively identified the Applicant as the shooter from the night of the incident by way of a 12 man photo line-up.

[21.] Further, an anonymous witness' witness statement dated 18 March 2021 identified the Applicant as the person the witness saw shoot at an individual on a . . . He also confirms that it was 11am in the day. Furthermore, the anonymous witness positively identified him as the man he saw shooting at the individual by way of a 12 man photo line-up.

[22.] I find it curious that on more than one occasion there is evidence to suggest, by anonymous witnesses, who claim to have seen, the Applicant was holding a handgun and shortly thereafter heard gunshots. Additionally, save for the evidence of an anonymous witness, no other evidence has been led in relation to the identity of the accused. I therefore question the cogency of such evidence.

[23.] I now turn to the other factors for consideration. The Offences (Attempted Murder and Possession of a Firearm to Endanger Life) are both classified as Part C offences under the First Schedule of the Act. Accordingly, the following are primary considerations in this application: 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. I shall consider each in turn.

[24.] Turning now to the character and antecedents of the Applicant. Based on the Respondent's Affidavit, and by the Applicant's own admission, in 2017, he was convicted of Possession of an unlicensed firearm and was sentenced to three (3) years imprisonment. He was also convicted of Possession of Ammunition and was sentenced to one (1) year imprisonment in 2017. The Applicant is therefore no stranger to the criminal justice system. The Court takes judicial notice, based on the evidence, that the Applicant is now charged with offences not only similar in nature for which he was convicted, but such offences are more serious in nature, with penalties (if convicted) being far more severe than the four (4) years he has already been sentenced to.

[25.] In relation to public safety and order, this too is a pressing issue in our society today. Court's must be robust in keeping society safe and maintaining public order. Whereas the Applicant is clothed with a presumption of innocence by virtue of our Constitution, I must bear in mind that there is an equal need to preserve peace and safety in our community. I note from the evidence before me, the very nature of the alleged Offences and the Applicant's criminal history this suggests he may pose a threat to public safety and order. I question whether the Applicant's right under the Constitution to the presumption of innocence outweighs the risk to public safety and order. All factors in a bail application must be considered holistically.

[26.] Additionally, in a bail hearing, it is incumbent upon the Court to consider all the relevant factors when making a decision with respect to the application for bail. All factors in a bail application must be considered holistically.

[27.] In relation to whether or not the Applicant will fail to appear at trial, interfere with witnesses or otherwise obstruct the course of justice, there is no evidence that he is unlikely to appear at trial or interfere with witnesses. The Court is of the view that,

having regard to all the circumstances, the Court feels sure that certain conditions could be put in place to ensure that the Applicant appears for his trial.

[28.] I am, therefore, prepared to grant the Applicant bail.

CONCLUSION

[29.] Based on the aforementioned principles and the state of the evidence, bail is therefore, granted on the following conditions:

- (a) Bail is granted in the sum of \$30,000.00 with two suretors.
- (b) The Applicant is to be fitted with an Electronic Monitoring Device.
- (c) The Applicant is to report to the Carmichael Road Police Station every Tuesday, Thursday and Saturday before 6pm.
- (d) The Applicant is to surrender his travel documents to the Criminal Registry until conclusion of his trial or further order of the Court.

Dated this 8th day of August 2024

**Jeanine Weech-Gomez
Justice**