COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

CRIMINAL LAW DIVISION

2015/CRI/bail/00207/2015

BETWEEN

KERVON STEWART

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:	**The Hon. Madam Justice W. Renae McKay**
Appearances:	**Mr. David Cash for the Applicant** **Ms. Cassie Bethel for the Respondent**
Hearing Date:	**14th December, 2020**
Ruling Date:	**7th January, 2021**

RULING

Criminal – Bail – Applicant previously charged with Armed Robbery – Applicant charged with Attempted Murder and Murder while on bail for Armed Robbery – Whether Applicant has a propensity to commit offences while armed – Whether hearsay evidence is admissible on a bail application – Serious offences – Nature of offence serious – Whether the Director of Public Prosecutions discharged its burden – Section 4 Bail Act – Factors for consideration

1. The Applicant, Mr. Kervon Stewart **(the "Applicant")** made an application for the grant of bail by way of his Summons and Affidavit in support of application for bail both filed 1st December, 2020 **(the "Bail Application")**. The Respondent, the Director of Public Prosecutions **(the "Respondent")** objects to the application and has filed an Affidavit in Response deposed by Inspector Monique Turnquest which was filed on the 11th December, 2020 **("Affidavit in Response")** and an Affidavit of Inspector Garth Harris filed 10th December, 2020 **(the "Harris Affidavit")**.

2. By the Bail Application, the Applicant, a 22 year old citizen of The Bahamas, averred that he was charged and remanded for the offences of Murder contrary to section 291 (1) (b) of the Penal Code **("PC")** and 3 counts of Attempted Murder contrary to section 292 of the PC. He added that his arraignment took place on the 27th July 2020 and that his matter was adjourned for trial and for the presentation of a Voluntary Bill of Indictment on 26th November, 2020.

3. The Applicant further averred that he was not a flight risk, that he would not interfere with any witnesses or otherwise undermine the course of justice, that he had no previous convictions and that he had one pending matter that stemmed from an armed robbery that occurred in 2015. With respect to the current charges, he stated that he has not yet pleaded not guilty to the charges and that he intended to defend the charges at trial. The Applicant went on to say that prior to his arrest he was gainfully employed as a tiler.

4. He asserted that if he was granted bail, he would be able to reside at #237 Palmetto St. off of Market Street and that he was the father of a 6 month old daughter who relied on him for financial and emotional support. The Applicant concluded that he was a fit and proper candidate for bail.

5. The Respondent, by the Affidavit in Response, confirmed that the charges against the Applicant stemmed from an incident which occurred on Thursday, 16th July, 2020 and objected to the Bail Application for the reasons set out therein. The Respondent averred that there was strong and cogent evidence from a number of witnesses, two of whom were the virtual complainants in the Attempted Murder **(the "Virtual Complainants")**.

6. In that regard, the statement of Travis Stuart **(the "1st Virtual Complainant")** is exhibited. Stuart averred that he knew the Applicant as CJ and stated that on the afternoon of the 16th July, 2020, he was with his friend Lamar Wilchcombe and others at another friend Rashad Johnson's **("Rashad")** residence on Rosewood St., Pinewood, when he heard a number of loud sounds that incited fear in him and caused him to run.

7. He continued that he then heard additional sounds, which he recognized as gun shots and that he turned around towards the road and observed a black van parked directly in the front of Rashad's home. The 1st Virtual Complainant added that he observed a male sitting in the front right seat of the van with a hood over his head and holding a long firearm who he recognized to be CJ after having him under his observation for about 6 seconds.

8. The 1st Virtual Complainant continued that he had also observed another male, who was standing inside of the van, before he heard more gunshots and tires "screeching". He added that he then felt a burning sensation and saw blood, which resulted in him being transported to the hospital to receive medical

attention and he was informed by the attending doctor that he had received a laceration to his left forearm.

9. The 1st Virtual Complainant also identified the van in the parking lot of the Central Intelligence Division **("CID")** and identified CJ as number 7 on an identification parade, as one of the individuals who was responsible for shooting him and killing Rashad.

10. The Respondent also placed reliance on the statement of another virtual complainant, Lamar Wilchcombe **(the "2nd Virtual Complainant")** who said that he was present with the 1st Virtual Complainant and others on the 16th July, 2020 around 2:30 p.m. in the aforesaid area when he too heard loud noises which he recognized as gunshots. Afterwards, he looked up and saw a dark coloured Dodge Caravan parked in front of the residence which had two men inside, one of whom he knew from jail and hanging through his corner as CJ.

11. The 2nd Virtual Complainant continued that he, along with the other men, were running for their safety, when he felt a burning sensation to his right side and he realized that he had been shot. He said that CJ appeared to have an assault rifle and the other assailant had a handgun.

12. The 2nd Virtual Complainant stated that he was transported to the hospital and was informed by the attending medical doctor that he had received a penetrating injury to his right thigh. Moreover, he stated that the same said van attempted to knock him down a month prior to the incident.

13. The 2nd Virtual Complainant identified the black Dodge Caravan which he claimed carried the assailants and attempted to knock him down at CID and identified CJ on an identification parade as one of the persons who shot him and killed Rashad.

14. The Respondent further averred that the statement of D/Insp. Jamal Evans, the officer who conducted the identification parade, confirmed that the Applicant was pointed out during the aforesaid identification parade. He continued that the evidence of the Murder was gleaned from the Virtual Complainants who admitted to being present with the deceased when they were shot by the assailants.

15. The Respondent went on to say that the evidence against the Applicant was further strengthened by Carlyle Johnson **("Carlyle")** and Torrieano Cummings **("Torrieano"),** whereby Carlyle stated that on the 16th July 2020, he had received a call from the Applicant's co-accused, William Wong, who requested to borrow his black 2008 Dodge Caravan and retrieved the vehicle around 12:45 that day.

16. Additionally, Torrieano stated that on the 16th July 2020, sometime after 11:00 a.m., his friends William and the Applicant, pulled up in the aforesaid vehicle while he was in the area of Montel Heights by another friend, Alvin Morley.

17. The Respondent then asserted that there were various witnesses who were familiar with the Applicant as he was known to be a member of the Crack Nation gang **("Crack Nation")**. In that regard, another eye witness of the Murder and the Attempted Murder, Rashied Johnson gave information that there was an ongoing feud between The Dirty South gang and Crack Nation.

18. The Respondent then claimed that the Applicant's gang involvement was confirmed by a photograph on Facebook in which the Applicant formed the letter C with his hand. As a result, it was submitted that the Applicant should be kept in custody for his own safety in addition to the safety of the public.

19. It was also suggested that the Applicant should remain in custody for his own protection as he was recently the victim of a shooting on 22nd April 2019, as confirmed by the crew of IW-4 who reported that the shooting victim attempted to evade them but was subsequently caught and identified himself as the Applicant.

20. The Respondent then confirmed that the Applicant was previously charged with 4 counts of Armed Robbery, allegedly committed with a firearm in 2015 and that he was subsequently admitted to bail. They added that he was further charged with the current offences while he was on bail.

21. The Respondent concluded that the Applicant was charged with serious offences and that if he was convicted, he faced a lengthy penalty, which provided him with an incentive to abscond and prayed for the Court to deny the Bail Application.

22. By the Harris Affidavit, Inspector Garth Harris, an Administrative Inspector at the Central Intelligence Bureau of the Royal Bahamas Police Force **("The Bureau")** **("Insp. Harris")**, confirmed on behalf of the Respondent, that the Applicant was also known by his street alias CJ. Insp. Harris stated that since October 2018 the The Bureau has known of the Applicant and his involvement in gang activity. The Applicant, he said is associated with "SOULZ" which was an arm of Crack Nation; a splintered faction of the One Order gang.

23. Insp. Harris continued that since then, the Bureau has conducted enquiries with a view of establishing the Applicant's role, association, allegiance and any illegal gang associated activity. He then explained that the "SOULZ" faction of Crack Nation was responsible for Armed Robbery and Street Enforcers and that the Applicant was a midlevel Street Enforcer.

24. Insp. Harris stated that The Bureau had also established that the gang had international ties with drug supplier, Giovanni Roberts, a Bahamian based in Jamaica. He concluded that the Applicant was being housed in the I Block, which is the maximum security dormitory in the Bahamas Department of Corrections, where members of the One Order gang are housed.

25. Inspector Harris gave vive voce evidence at the hearing of the Bail Application. He told the Court that as the administrative inspector responsible for the criminal analysis of gangs and interdiction initiatives, he received a correspondence from the Respondent with respect to the Applicant. As a result, he conducted checks of the name provided by way of tracing in the bureaus indices and that after obtaining empirical data, he prepared the Harris Affidavit.

26. Insp. Harris confirmed that he was affiliated with the Bahamas Department of Correctional Services **("BDOCS")** as he was the police liaison therein, as Sergeant for 1 year and as an Inspector for 3 years and that he was responsible for intelligence coming in from BDOCS. He then explained that once a person arrived at intake there was an interview board who would question the intake, in order to help the members of the board understand how the person would fit into the prison population.

27. He continued that the individual would be asked questions such as what type of skill/s they had and in turn could be assigned to the kitchen or to other duties. He went on to say that it was also conducted to ascertain what housing would be proper housing for protection, as certain sections of BDOCS was set up for certain gang members and they would not put a gang member in an opposing gang member's area.

28. Insp. Harris then explained that "Da Dirty South" gang was previously a part of the "One Order" gang and that after in fighting, they broke off. He stated that The Bureau had been actively engaged in compiling information and intelligence gathered. Insp. Harris went on to say that the present climate of both gangs was tenuous which resulted in a lot of shootings and murders between both factions.

29. On cross examination, Insp. Harris confirmed that while he usually conducted extensive field work, no such work was conducted between July 2020 and the day of the hearing of the application with respect to the same. He explained that he would oversee the field officers who went out and collected intelligence from informants and that there were times that he would have to be present, depending on who the person was.

30. Counsel for the Applicant, Mr. Cash, made substantial submissions on the Applicant's behalf. He relied heavily on the recent decision of the Court of Appeal in **Dennis Mather v Director of Public Prosecutions 9 Dec 2020 CA Crim No. 96 of 2020 (unreported)**. Mr. Cash relied on the following paragraphs, which he contended discussed the considerations to be taken into account on a bail hearing. Beginning at paragraph 16 of the judgment, Isaacs JA stated as follows:

> **"16. The main consideration for a court in a bail application is whether the applicant would appear for his trial. In Attorney General**

v. Bradley Ferguson, et al SCCrApp. No.'s 57, 106, 108, 116 of 2008, Osadebay, JA observed as follows:

"As stated by Coleridge J in Barronet's case cited earlier the defendant is not detained in custody 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."

17. In Jonathan Armbrister v The Attorney General SCCrApp. No.145 of 2011, John, JA said as follows:

"12. It has been established for centuries in England that the proper test of whether bail should be granted or refused is whether it is probable that the defendant will appear to take his trial, and that bail is not to be withheld merely as punishment. The courts have also evolved, over the years, a number of considerations to be taken into account in making the decision, such as the nature of the charge and of the evidence available in support thereof, the likely sanction in case of conviction, the accused's record, if any and the likelihood of interference with witnesses."

18. The seriousness of the offence with which the applicant is charged is not of itself a ground for the refusal of bail. It is but a factor to be taken into consideration along with other factors that may arise in a particular application. Hall, J in The Commissioner of Police v Beneby [1995] BHS J. No. 17 stated:

"20. ... I am surprised that Mrs. Christie objected to bail before the Magistrate on the basic ground that the offence of which the accused are charged is "serious". That never was and is not now, without more, sufficient reason for the denial of bail notwithstanding the frequency with which prosecutors chant it ritualistically or use it as a pro forma objection to bail. Most offenses before our courts nowadays are serious, and if this were a ground for the refusal of bail, the overwhelming majority of persons before the Court would be remanded in custody until trial."

31. Mr. Cash submitted that bail was not meant to be withheld as punishment. He added that the evidence for the defence was just as valid as the evidence of the prosecution but in any event the evidence is something to be aired out before a jury. He further submitted that the evidence that ought to apply is whether the Applicant would not appear for trial or would somehow interfere with the course of justice by absconding.

32. He cited **Jonathon Armbrister v Director of Public Prosecutions 8th February 2012 CA Crim No. 145 of 2011 (unreported)** in support on his submission that the proper test to apply on a bail application was whether it was probable that the accused would fail to attend trial, despite the Respondent often believing that it is the accused who is to show that he/she is the proper candidate for bail.

33. In that regard, he asserted that while the Respondent's affidavit in objection to the application was lengthy, there was nothing to say that he would fail to surrender, interfere with witnesses or abscond. Mr. Cash admitted to the Applicant has a pending matter outstanding since 2015 for which he was granted bail but that he has no previous convictions.

34. Mr. Cash continued that it was almost 6 years since the Applicant had been charged for the pending matter with no conclusion for one offence and that if he were to be remanded, his matter would not have been completed by the prosecution before a court of justice in a reasonable time. He further continued that in any event, the Applicant was still presumed to be innocent until found guilty with respect to the present accusation made against him and the 2015 accusation, until he changed his plea to that of a guilty one.

35. Mr. Cash submitted that **Dennis Mather** (supra) addressed the issue to a specific degree at paragraphs 45 and 49 of the judgment which states as follows:

> **"Propensity to Commit Further Offences**
>
> **45. The Crown produced a Criminal Records Antecedent Form which showed that the appellant had been convicted of possession of an unlicensed shotgun and possession of ammunition in 2011; and of fighting in 2008. There were four matters listed as, "PENDING": Assault with a Deadly Weapon and Shop breaking that were alleged to have occurred in 2016, Murder in 2018 and Possession of a Firearm and of ammunition in 2019. The "Murder" listed referred to Kenneth's murder.**
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> **49. However, inasmuch as the appellant was able to produce certificates evidencing that he had been discharged on those offences, he was to be regarded in relation to those as "pure as the driven snow" thereafter. Thus, the Judge erred when she concluded that the fact that he had been charged with offences and placed on bail prior to his arrest for the present murder offence disclosed that "This behaviour may represent a possibility that the Applicant may commit an offence if he is given bail". The fact that a person has been charged with one offence while he stands accused of having committed an earlier offence cannot provide support for a conclusion that a propensity to commit offences has been disclosed should the person be admitted to bail particularly after the person has been discharged on the earlier offence."**

36. Mr. Cash submitted that the Applicant's presumption of innocence would have the same effect as being "pure as the driven snow" and that he should not be considered as someone to commit offences while on bail as he was not convicted of any offences.

37. In respect of the purported strength of the evidence against the Applicant, Mr. Cash contended that the statement from the Respondent's witnesses were not taken until the 21st July 2020. He continued that while he did not want to give credence to anything that was a mere allegation, a fundamental identification

component propounded in Turnbull was the length of time between the incident and the statement made.

38. Mr. Cash continued that while one of the witness' statement said that while he was shot in the arm, he gave the statement 5 days later claiming to have seen the Applicant for 6 seconds. This lapse in time Counsel said, was convenient and a good amount of time to think about and say that it was his enemy who had shot him. He acknowledged that they were issues for trial but that he thought it necessary to address during the Bail Application.

39. He again made reference to **Dennis Mather** as he submitted that the facts therein were similar to the present facts. In Dennis Mather, a witness gave a statement about an incident 6 days after it allegedly occurred. The witness had stated that the accused was someone he knew because of his affiliation with the accused's sister along with his involvement in a gang. The accused also had no convictions and there was no evidence that he would abscond.

40. Counsel addressed the photographic evidence relied on by the Respondent, which was exhibited to the Affidavit in Response at MT14. It is a photograph of a group of young men under tree, with the Applicant allegedly forming a gang symbol in the form of the letter C with his fingers. In that regard, he questioned on what evidential basis did the Respondent provide that it was a gang symbol.

41. Continuing, he added that he did not know if the Applicant was showing a measurement of something nor was there any evidence whether it was from police intelligence. He went on to query whether it was an offence to be involved in a gang.

42. With respect to the Respondent's assertion that the Applicant should remain in custody for his own protection, Mr. Cash stated that it did not seem to him that someone who got shot would evade the police and that saying that anyone who was the victim of a crime should be kept in custody, would disregard the freedom of movement protected by Article 19.

43. He continued that the Respondent had confused the issue and questioned whether it was saying that he would be kept in custody because of the shooting or because of the charges against him and whether the person alleged to have shot him was on bail or in prison and if it was the latter how would he be protected being kept for his own protection.

44. Mr. Cash submitted that with respect to the Harris Affidavit with the exception of paragraph 1, the contents were hearsay as someone else reported the information to him. In that regard, he argued that pursuant to the laws of evidence, the relevant paragraphs should be struck as there was an admission that it was hearsay and not direct knowledge of the affiant and that there were no exhibits to confirm the assertions made. He concluded that not because he was an Inspector

of the Royal Bahamas Police Force meant that one should give credence to him, in complete disregard to the rules of evidence.

45. In response, Counsel for the Respondent, Ms. Bethel, submitted that the appellate Court in **Attorney General v Bradley Ferguson et al 21 May 2009 CA Crim Nos. 57, 106, 108, 116 of 2008**, had already decided that hearsay evidence was admissible on a bail application. She then cited the appellate court's decision in **Mario Brown v. Director of Public Prosecutions 7 May 2020 CA Crim No. 37 of 2020**, which upheld the Hon. Madam Justice Cheryl Grant-Thompson's decision to deny bail after relying on the evidence provided by an intelligence officer.

46. Ms. Bethel further submitted that from **Mario Brown**, the court could take into consideration an accused's gang involvement and that the officer was not obliged to disclose sources of evidence, as the information was sensitive information and disclosure would undermine the entire process if an officer revealed the identity of one of its informants.

47. Additionally, Ms. Bethel submitted that even an actual witness may not be able to satisfy the evidential burden and that there was no reason to give Insp. Harris' evidence less weight because it was not firsthand knowledges. She further contended that the test of truth was when the jury had to assess the evidence and demeanor of witness and that the Bail Application was not the time to assess the evidence.

48. In reply, Mr. Cash argued that there was hearsay in **Mario Brown** and hearsay evidence in the instant case. He added that this was a democratic state and not a police state and in that regard the police did not have unfettered discretion to provide evidence. Mr. Cash further argued that Insp. Harris could not be cross examined if the information averred was not first hand as he was not the person who gathered the intelligence.

49. He relied on the appellate court's decision in **Damargio Whyms v Director of Public Prosecutions 6 Dec 2019 CA Crim No. 148 of 2019** where Crane-Scott JA, opined at paragraph 29 of the court's judgment that:

> **"29. A judge who is considering a bail application is mandated by paragraph (g) of Part A of the *First Schedule* to the Bail Act to have regard, *inter alia*, to "the nature and seriousness of the offence" and to "the nature and strength of the evidence against the defendant". However, as this Court has repeatedly stated, a bail application is not the forum for conducting a mini-trial and on a bail hearing, the judge is not required to decide contested issues of fact or law, nor conduct a forensic analysis of the evidence."**

50. He additionally relied on the appellate court's decision in **Jeremiah Andrews 6 Dec 2019 CA Crim No. 163 of 2019** which contended furthered the point made

in **Damargio Whyms**. He cited paragraph 22 of the judgment as set out by Evans JA as follows:

> **"22. The Court in considering an application for bail is required to consider inter alia, the nature and seriousness of the offence and the strength of the evidence against the defendant. (See paragraph (g) Part A of the First Schedule.) However, as has repeatedly been said a bail application is not a trial. A bail application is an informal inquiry and no strict rules of evidence are to be applied. (See Attorney General v. Ferguson.) A judge hearing such an application is not required to determine guilt or innocence. The judge must simply decide that the evidence raises a reasonable suspicion of the commission of the offence to justify his arrest and detention. In the case of Cordero Mcdonald Allen P. stated: It is not the duty of judge considering bail application to decide disputed facts or law it is not expected that on such an application judge will conduct forensic examination of the evidence. The judge must simply decide whether the evidence raises 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]**

51. Mr. Cash concluded that in satisfying the burden, the court ought to have regard to specific factors and not the evidence of the offence, but whether the Applicant would interfere with witnesses or show up for trial and that it was not a ritualistic chant but a requirement. He added that the Respondent did not discharge its burden.

The Law

52. The Court is granted the discretion to grant bail pursuant to s.4 of the **Bail Act** as amended by the **Bail (Amendment) Act, 2011 (the "Act")** which states:

> **"4. (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."**

Bail (Amendment) Act, 2011

> **"(2) Notwithstanding any other provision 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.

(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 to be 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) Notwithstanding any other enactment, an application for bail by a person who has been convicted and sentenced to a term of imprisonment in respect of any offence mentioned in Part D of the First Schedule shall lie to the Supreme Court or the Court of Appeal.

(3A) Notwithstanding section 3 or any other law, the Magistrates Court shall not have jurisdiction for the grant of bail in respect of any person charged with an offence mentioned in Part C or Part D of the First Schedule."

"4. Amendment to First Schedule of the principal Act.

The First Schedule to the principal Act is amended –

(a) **by the repeal of Part A and the substitution of the following —**

"PART A

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."

53. Based on the aforementioned provisions, the Court is required to consider the following factors, the character and antecedents of the applicant, the nature and seriousness of the offence and the strength of evidence against the accused, the safety of the accused or the safety of the public, whether the Applicant would interfere with the prosecution's witnesses and whether the Applicant would fail to surrender to custody or appear at trial.

54. A separate factor is whether the accused is likely to be tried within a reasonable time. This factor should not be considered in conjunction with the aforesaid factors and should only be considered when it is raised.

55. In accordance with the Act, I must now consider the factors in respect of the Applicant's case.

The character and antecedents of the Applicant

56. While the Applicant has no convictions, he does have a pending matter stemming from an incident that occurred in 2015 for which he was admitted to bail while waiting for his trial to commence. He was arrested and charged with the present offences while on bail. Accordingly, there can be no finding that the Applicant has a propensity to commit the offences of Murder and Attempted murder. I am, however mindful of Section 4(5) of the Bail Act which states that "the fact that an accused person has not been previously convicted of any offence, shall not ipso facto constitute a cause for releasing that accused person on bail".

The nature and seriousness of the offence and the strength of evidence against the Applicant

57. The Applicant is charged with Attempted Murder and Murder, which are both serious offences as they involved the attempt to take another's life and the taking of a life. The Respondent's evidence derived from the Virtual Complainants, who knew and saw the Applicant shooting at them, as well as Officers Harris and Evans in my mind, provide a sufficient link between the Applicant and the commission of the offence.

The safety of the Applicant or the safety of the public

58. The Respondent has submitted that the Applicant was previously shot in 2019, and, also that he is a midlevel street enforcer in a well-known gang which is embroiled in a feud with another gang. On that basis, they submit that he should be kept in custody for his own protection. On the other hand, the Applicant's Counsel submits that he very well may be in danger if he is kept in custody and

disputed, what he considered to be unverified evidence that the Applicant was in a gang.

59. As Counsel for the Respondent has pointed out, the Court of Appeal affirmed Grant-Thompson J's decision in **Mario Brown** in which she denied Brown's application for bail for his safety as well as the public's safety based on intelligence provided by an officer of the RBPF who gave evidence that Brown was a gang member. At paragraph 6 of her judgment, Grant-Thompson J. stated,

> **"6. This is a senior and respected officer of a specialist agency, who came to speak of police intelligence gathered in this regard. In my view, this goes beyond a mere assertion but appears based on sensitive and confidential police intelligence. I did not require the senior officer to reveal his sources on the record."**

60. By the oral judgement of the Court of Appeal in **Mario Brown**, Barnett P, affirming Grant-Thompson J's decision and dismissing Brown's appeal, held:

> **"We have considered both the written and oral submissions of both counsel for the appellant as well as counsel for the respondent and we have reviewed the judge's written decision whereby she sets out the reasons for which she exercised her discretion to refuse the appellant bail. We are satisfied that the judge did not take into account matters that she should not have taken into account nor did she not take into account matters that she ought to have taken into account. We are satisfied that it is not obvious that the decision is plainly wrong. In these circumstances, there is really no basis for us as an appellate court to set aside the exercise by the trial judge of her discretion to refuse bail to the appellant. For those reasons this appeal is dismissed."**

61. In **Mario Brown**, Grant-Thompson J accepted the Crown's evidence, from a member of The Bureau, that the accused was a high level street enforcer and drug trafficker in a well-known gang in New Providence. It was sufficient to show that the accused was a member of a gang.

Whether the Applicant would interfere with the prosecution's witnesses

62. There has been no evidence proffered that the Applicant would interfere with the Respondent's witnesses if he were admitted to bail.

Whether the Applicant would fail to surrender to custody or appear at trial

63. The Respondent asserted that because the Applicant is charged with a serious offence, he would face a lengthy penalty if convicted which provided him an

incentive to abscond. This assertion is considered a bare assertion and significant weight cannot be placed on this submission.

Discussion

64. I have considered all the evidence before me together with the submissions of Counsel. I have had regard to the case law relied upon by both sides including the recent decision of the Court of Appeal in the matter involving **Dennis Mather**.

65. The Respondent has satisfied me that the Applicant is a known gang member and the Respondent has also satisfied me that his affiliation with the gang is detrimental to the public safety and his safety as the evidence before me suggests that the incident of which he is accused resulted from his gang activity The Applicant is charged with serious offences and given the information before me I find that there may be some link between the Applicant and at least one of the complainants.

66. Additionally, the evidence before me shows that in 2019 an attempt was made on the Applicant's life. This attempt coupled with the Applicant's gang affiliation causes a concern that the Applicant ought to be kept in custody for his own protection.

67. Earlier I considered the decisions of **Mario Brown v The Director of Public Prosecutions,** in which Grant-Thompson J. denied the Applicant bail because of the Respondent's corroborated evidence that the Applicant was affiliated with a gang and had previous convictions for offences similar to the offence of which he was charged. In the instant case, and having regard to Section 4(5) of the Bail Act, while the Applicant in this instance has no previous convictions, I accept the evidence of Inspector Harris that he is a midlevel street enforcer in a well-known gang which is embroiled in a feud with another gang.

68. I have also accepted the two complainants' evidence that the altercation and gun fire was seen. The shooting is said to have occurred in the afternoon in a residential area. This shows a clear disregard for innocent bystanders who stand a chance of being injured or killed if caught in the crossfire of an ongoing gang feud. This brings to my attention the need to protect the public safety from the possibility of such actions reoccurring and the need to protect the Applicant's life until he can be afforded a fair hearing before a jury of his peers, as is his constitutional right.

69. As for the remaining factors, I was not satisfied that the Applicant would interfere with any of the Respondent's witnesses nor that he would be likely to abscond and fail to appear for his trial. I am cognizant that this is the main reason bail should

not be granted however, I am tasked with performing a balancing act to determine whether certain factors are or would not be in favor of the Applicant.

70. Having regard to the fact that this offence occurred on the 16th July, 2020 and was adjourned for the presentation of the Voluntary Bill of Indictment fixed for the 26th November, 2020, there is no dispute that the issue of delay does not arise in this application. The Respondent has satisfied me that the Applicant should be denied bail.

71. Therefore, in exercising my discretion under Section 4 (2) (c) having regard to the relevant factors, I find that the Applicant is not a fit and proper candidate for bail.

72. Accordingly, bail is denied for the following reasons:

    72.1. The Applicant is charged with Murder and attempted Murder which are serious offences.

    72.2 The evidence provided by the Respondent is corroborated and there is sufficient evidence which links the Applicant to the commission of the offences.

    72.3 I am satisfied that the Applicant is a member of a gang and there is sufficient evidence before me by the Respondent to suggest that the Applicant's involvement in the gang is detrimental to not only his safety but the public safety.

Dated this 7th day of January, 2021

Hon. Madam Justice W. Renae McKay