COMMONWEALTH OF THE BAHAMAS **2021**

IN THE SUPREME COURT **CRI/BAL/00004**

CRIMINAL DIVISION

BETWEEN

GODFREY GRAY

Applicant

V

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: **The Honourable Mrs. Justice Cheryl Grant-Thompson**

APPEARANCES: **Mr. Glendon Rolle for the Applicant**

Ms. Janet Munnings of the Office of the Director of Public Prosecutions for Respondent

HEARING DATES: **13th October 2021, 27th October 2021**

****

BAIL JUDGMENT

Bail - Bail Act - Application for Bail - Whether applicant is a fit and proper candidate for bail- Unlawful Sexual Intercourse-Applicant presently on Bail when re-arrested- Alleged re-offender

GRANT-THOMPSON, J

1. The Applicant, thirty-eight (38) year old Godfrey Gray is charged with the offence of Unlawful Sexual Intercourse (2 counts), contrary to section 11(1)(a) of the Sexual Offences Act, Chapter 99. The offence is alleged to have been committed on Thursday 4th March, 2021 and Sunday, 7th March, 2021.

2. The Applicant, according to his Criminal Records Antecedent Form dated 20th September, 2021 that was exhibited in the Affidavit of the Respondent has a previous conviction for Intention Libel and Misuse of the Telecommunication System. The Applicant also has a pending matter of Unlawful Sexual Intercourse in which he was granted bail on the 22nd January, 2021 which was less than three (3) months prior to the present allegation.

3. The Respondent objected to the grant of bail by Affidavit of Inspector Monique Turnquest citing, inter alia, that:

    a. The Respondent avers that the Applicant has previous convictions for Intentional Libel and misuse of Telecommunication System for which he was ordered to write a formal letter of apology and fined $500.00 or six (6) months in prison, respectively. Further, the Applicant has a pending matter for Unlawful Sexual Intercourse (3 counts) for which preparation of a Voluntary Bill of Indictment is pending;
    b. There is sufficient and cogent evidence to support the charge of Unlawful Sexual Intercourse (2 counts) having regard to the statement of the minor victim who outlined the course of events relative to this matter. Further there is the report of P/C 3890 Keron King who arrested the Defendant while in the area of the Smith's Motel #1 located on East Street, the report of D/C 3949 Carlos Ingraham where the Defendant admitted to having sex with the victim and finally the report of D/C 4034 Dario Stubbs who conducted the Record of Interview;

c. Due to the seriousness of the offence allegedly committed and the severity of the sentence that may be imposed with regards to such, this makes it more likely for the Applicant to abscond;
d. The Applicant committed this offence while on bail for a pending matter which suggest that he may have a propensity to commit another offence similar in nature if admitted to bail;
e. There is a need to protect the safety of the victim of this alleged offence and ensure that there is no interference with the witnesses; and
f. The Applicant for the above reasons is not a fit and proper candidate to be considered for the grant of bail and in the circumstances should not be admitted to bail.

4. According to the evidence before the Court, the Applicant was granted bail by my brother Justice Hilton on the 22nd January, 2021. According to the conditions imposed the Applicant was instructed not to have contact with the Complainant and other prosecution witnesses.

5. The grant of bail is a discretionary power however it must be exercised using objectivity. At this stage I am not concerned about whether or not the Applicant may be guilty for the offence he is alleged to have committed but rather whether or not he is a fit a proper candidate for bail.

6. Based on the evidence before me, the Applicant was arraigned in Magistrate's Court No. 9 on the 10th day of December, 2020 where he was charged on the charge of Unlawful Sexual Intercourse (3 counts), he applied for bail and the same was granted in January, 2021, and in March of 2021 he was re-arrested in relation to identical allegations involving the same minor victim. At the time of the arrest the Applicant along with the victim were in the vicinity of Smith's Motel. The Applicant in my view has blatantly disregarded a term and condition of the bail granted by my brother Justice Hilton less than two (2) months after bail was granted.

7. Having read the Affidavits, listened to the oral evidence, observed the demeanor of the witnesses and having considered the oral submissions of

Counsel for Applicant and Respondent, I find that the Respondent has satisfied me that the Applicant **ought not to be granted bail pending his trial.**

8. I therefore exercise my discretion **not to grant to the Applicant bail** for the following reasons:

    a. **The Applicant is likely be tried within the three (3) year period that Parliament has determined to be reasonable;**

    b. **The Applicant has not satisfied the court that he is of good character, due to his previous conviction for Intentional Libel and Misuse of Telecommunication Systems;**

    c. **There is strong cogent evidence which links to the Applicant to the alleged crime;**

    d. **The Applicant was granted bail in January 2021 and instructed not to come into contact with the victim, based on the evidence before the court this term has clearly been breached;**

    e. **The Court is concerned for the Health and Safety of the Public, the Applicant has displayed he has no problems disobeying the instructions of the Court and as such I do believe there are measures that can be put in place to ensure the safety of the Public at large; and**

    f. **I am not satisfied that if granted bail the Applicant would return for trial.**

THE APPLICABLE LAW

9. The Applicant is presumed to be innocent of the charges contained in the Indictment. In this regard Article 20(2)(a) of The Constitution of The Bahamas obtain and states:

> ***"20.(2) Every person who is charged with a criminal offence – (a) shall be presumed to be innocent until he is proved or has pleaded guilty."***

10. Furthermore, Article 19(1)(b) of the Constitution guarantees that no person shall be deprived of personal liberty, save upon reasonable suspicion of having committed… a criminal offence. Although personal liberty is guaranteed by the Constitution the law authorizes the taking away of that personal liberty upon reasonable suspicion of a person having committed a crime.

11. Parliament has set general standards for the court's consideration when deciding the issue of bail. By Article 19(3) of the Constitution, these standards are reasonable conditions to ensure the appearance of the person for trial, as was recognized by **Sawyer P. in Attorney General v Bradley Ferguson et al SCCr No. 57, 16, 108 and 116 of 2008**.

12. So far as is applicable in the instant case the Bail Act 2011 amendment provides:

> ***"3. Amendment of section 4 of the principal Act.***
>
> ***Subsections (2) and (3) of section 4 of the Bail Act are repealed and replaced as follows-***
>
> ***"(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.

(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 victim or victims of the alleged offence, are to be primary considerations.

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.

TRIAL WITHIN A REASONABLE TIME

13. The Applicant is entitled to a trial within a reasonable time. In this regard Article 19(3) of The Constitution of The Bahamas states:

> ***"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 reasonable necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."***

14. Furthermore, section 3(2)(A)(a) of the Bail (Amendment) Act 2011 (the Act) states:

> ***"2(A) 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;"***

15. In **Duran Neely v The Attorney General Appeals No. 29 of 2018**, Evans JA at paragraph 17 stated:

> ***"17. It should be noted that Section 4 of the Bail Act does not provide the authorities with a blanket right to detain an accused person for three years. In each case the Court must consider what has been called the tension between the right of the accused to his freedom and the need to protect society. The three year period is in my view for the protection of the accused and not a trump card for the Crown. As I understand the law when an accused person makes an application for bail the Court must consider the matters set out in Section 4(2)(a), (b) and (c). This means that if the evidence shows that the accused has***

not been tried within a reasonable time or cannot be tried in a reasonable time he can be admitted to bail as per (a) and (b). In those circumstances where there has not been unreasonable delay the Court must consider the matters set out in (c). If after a consideration of those matters the Court is of the view that bail should be granted the accused may be granted bail."

16. Section 4(2)(a) the Bail (Amendment) Act 2011 requires the judge to consider whether there has been such unreasonable delay as will warrant the applicant being admitted to bail because his fair trial rights are in jeopardy. The currect offence of Unlawful Sexual Intercourse (2 counts) for which the Applicant is charged allegedly occurred on the 4th and 7th March, 2021 respectively. The date for the trial of the Applicant has not yet been fixed however I am certain that the Applicant will have his trial prior to March 2024 which will place him within the three year time period accepted as being reasonable by Parliament.

17. Due to the period from the date of the arrest of the Applicant to the date of the Applicant's trial being within the three year period of detention stipulated by Parliament, I find that the Applicant will have a trial within a reasonable period of time.

18. As such, the considerations under section 4(2)(a) of the Bail (Amendment) Act 2011 which I am mandated to take into account in determining a Bail Application has failed as the Applicant's trial, barring there are no setbacks, will commence within three (3) years from the date of his arrest and detention.

19. The Court of Appeal in **Damargio Whyms v The Director of Public Prosecutions Appeals No. 148 of 2019**, at paragraphs 44 and 45 of the judgment stated:

"44. It is clear from an ordinary reading of the foregoing section that Parliament intended subsections 4(2)(a) and (c) respectively to operate as alternative routes to the grant of bail. That said, this does not mean that the section 4(2)(a) and (c) discretions may not each be engaged in the course of the same application. Whether both discretions are in play in any given

application will depend on the evidence before the judge and the basis on which the application is made. Where both sub-sections are engaged, the issues for the judge's consideration are clearly separate and distinct. As the section itself implies, section 4(2)(a) requires the judge to consider whether there has been such unreasonable delay as will warrant the applicant being admitted to bail because his fair trial rights are in jeopardy. Section 4(2)(c) on the other hand requires the judge to have regard to "all the relevant factors", none of which includes the issue of unreasonable delay."

"45. As we see it, the fact that there has been no unreasonable delay in the matter proceeding to trial can never be placed in the scales against an applicant for bail and weighed together with all the relevant factors to be taken into account when a judge is exercising the statutory discretion under section 4(2)(c) whether to admit an applicant to pre-trial bail for a Part C offence. If it were otherwise, an applicant for bail who is otherwise a suitable candidate for bail, might find himself wrongfully kept on remand simply because there has been no unreasonable delay in the progress of his matter to trial. This would be unfair to the applicant and clearly wrong. The two discretions are separate and distinct and should not be conflated. Depending on the evidence, they may both arise for consideration in the same application, but a "finding" that there has been no unreasonable delay ought never to be taken into account as "a relevant factor" when a judge is exercising his or her discretion under section 4(2)(c)."

LIKELIHOOD OF THE APPLICANT TO ABSCOND

20. I am of the belief that if granted bail, due to the severity of the charges, it is probable that the Applicant will abscond and not appear to face the charge of murder for which he is before the court.

21. There is no direct evidence before this Court which indicates that the Applicant will abscond and not appear for his trial. I do note however, the findings of the Privy Council in the case of ***Hurnam v The State (Privy Council Appeal No. 53 of 2004)(Hurnam)***. Lord Bingham of Cornhill, in delivering the Judgment of the Board said:

> ***"It is obvious that a person charged with a serious offence, facing a severe penalty if convicted, may well have an incentive to abscond or interfere with witnesses likely to give evidence."***

22. In **Jonathan Armbrister v The Attorney General** SCCrApp. No.145 of 2011 John, JA observed 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."***

23. In this regard, Unlawful Sexual Intercourse is a serious offence. Upon conviction, the Court may impose a lengthy term of imprisonment. It follows therefore that the Applicant facing this serious charge for which he is liable to a severe penalty, if convicted, may well in my view have an incentive to abscond and not appear for trial.

24. In **Cordero McDonald v. The Attorney General** SCCrApp No 195 of 2016, Allen P., explained the extent of the judge's task in relation to the evidence which is adduced before the court on a bail application. Allen P., explained:

> ***"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 mine]**

25. The evidence against the Applicant is inclusive of a witness statement from the alleged minor victim who was at the Smith's Motel along with the

Applicant at the time of his arrest. The arresting officer and Investigation officer also provided statements in which the Applicant has allegedly confessed to having sexual intercourse with the minor victim.

26. After my review of the evidence against the Applicant, I have concluded that it raises a reasonable suspicion of the commission of the offence such as to justify the deprivation of liberty by arrest, charge, and detention.

INTERFERE WITH WITNESSES OR OTHERWISE OBSTRUCT THE COURSE OF JUSTICE

27. While it is true that the Board did express the view that the seriousness of the offence and the severity of the penalty may be an incentive to interfere with witnesses, the Board in the case of ***Hurnam*** also expressed the view that there must be reasonable grounds to infer that there is a likelihood of interference with witnesses or obstruction of the course of justice. In this regard, Lord Bingham stated:

> ***"…Where there are reasonable grounds to infer that the grant of bail may lead to such a result, which cannot be effectively eliminated by the imposition of appropriate conditions, they will afford good grounds for refusing bail"***

28. There is some onus upon the Crown to satisfy the Court that the Applicant is likely to interfere with witnesses if bail is granted. In other words, the prosecution has the burden of providing the Court with sufficient information from which the Court can reasonably conclude that there is a likelihood of the Applicant interfering with witnesses.

29. The Court of Appeal in the case of **Jonathan Armbrister and The Attorney General SCCrApp No. 145 of 2011 (Jonathan Armbrister),** John JA at paragraph 11 stated:

> ***"11. A good starting point in reviewing the principles applicable where an appellant has been charged but not yet put on trial is the***

statement of Lord Bingham of Cornhill in Hurnam v The State (Supra) where he said at paragraph 1:

"In Mauritius, as elsewhere, the courts are routinely called upon to consider whether an unconvicted suspect or defendant should be released on bail, subject to conditions, pending 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 justify depriving 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"

30. There is some evidence before the court that the Applicant will interfere with witnesses if granted bail.

NATURE AND SERIOUSNESS OF THE OFFENCE

31. As indicated earlier, Unlawful Sexual Intercourse is a serious offence. In the event that the Applicant is convicted of this offence there is a possibility that the maximum sentences may be imposed. The Applicant may be sentenced to imprisonment for lengthy period of time. The seriousness of the offence and the severity of the punishment may be viewed as an incentive for the Applicant to abscond and not return for his trial in the event that he is released on bail.

32. I accept that the hearing of a bail application is not the appropriate place for assessing or determining the strength or weaknesses of the evidence that the prosecution proposes to present at trial. The Court of Appeal expressed this view in the case of **A.G. v Bradley Ferguson**. Osadebay JA said at page 61 of the Judgment:

> **"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 the trial. As stated by Coleridge J. in Barronet's 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" (emphasis provided).....**
> **…...The learned trial judge also took into consideration matters that he ought not to have taken into consideration by relying on his own assessment of the probative value of the evidence against the respondent."**

33. I am guided by the Judgment of the Court of Appeal and I therefore make no findings on the probative value of the witness statements laid before me. I accept that it is not the duty of a judge, during bail applications to decide disputes of evidence as was seen recently in ***Richard Hepburn v Attorney General*** **SCCRAPP & CAIS No. 276 of 2014**. I also accept that whether the evidence against the Applicant is strong or weak is yet to be determined.

34. As previously stated, I am of the view that it is probable that the Applicant will abscond and not return for his trial in the event that he is released on bail. I also take judicial notice of notorious facts such as the high rate of murder in the community and the growing culture of vigilantism.

35. In the case of **Jevon Seymour v The Director of Public Prosecution** SCCrApp No. 115 of 2019, Crane-Scott JA at paragraph 49 of Judgment stated:

> ***"49. As Lord Bingham pointed out at paragraph 16 of the Board's decision in Hurnam, while recognizing that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending, the European Court of Human Rights has consistently insisted that:***
>
> > ***'the seriousness of the crime alleged and the severity of the sentence faced are not, without more, compelling grounds for inferring a risk of flight.'***

50. We are satisfied that even if the learned judge found (as he could) that the Crown's evidence was "cogent" and was prepared to infer (as he did) that given the nature and seriousness of the offences and the likely penalty, that appellant might have a powerful incentive to abscond, that is not the end of the matter. Such a "finding" is not in itself a reason for denying an applicant bail. Accordingly, if the learned judge concluded that the appellant might be tempted to abscond, in the proper exercise of his discretion, he ought also to have proceeded to consider whether that risk could nonetheless be effectively eliminated by the imposition of appropriate conditions."

36. Furthermore, the discussion by Crane-Scott JA in the case of **Seymour** starting from paragraph 58 and ending at paragraph 61 is also noteworthy:

"58. On behalf of the Crown, Mr. Algernon Allen Jr., submitted that the judge exercised his discretion reasonably. He supported the judge's decision and reasons set out in the judge's Decision for refusing bail. There was no requirement, he said, for the judge to embark on a forensic examination of the evidence since the identification and recognition evidence and the question whether the Crown's eye-witnesses were mistaken as the appellant alleged, were issues which (as the judge correctly found) were matters to be vetted at the trial.

59. As to the judge's "finding" at paragraph 16(v) that bail should be denied because in "the circumstances of this Applicant and this application, the need for public order and public safety is paramount", Mr. Allen Jr. supported the judge's decision notwithstanding that there was no evidence that the eye-witnesses or the public at large needed to be protected from the appellant. He relied on dicta from a previous decision of this Court (differently constituted) in Dwayne Heastie (above) to support his submission that there was no need for the Crown to adduce formal evidence that an applicant for bail was a threat to public safety or public order as these were "primary considerations" identified in section 4(2B) of the Bail Act.

60. Mr. Allen Jr. further relied on Hurnam and submitted that it is permissible on a bail application for a judge (as this judge did at paragraph 15 of his Decision) to take judicial notice of notorious facts, such as the high rate of murder in the community and the growing culture of vigilantism indicative of a break down in public order and a depreciation in public safety in denying bail to the appellant and to have regard to the fact that at the time of the incident, the victims and witnesses were located at the residence of the Head of State of The Bahamas.

> ***61. With all due respect to Mr. Allen and to the learned judge, while a judge is doubtless entitled to take judicial notice of notorious facts such as the high rate of murder in the community and the growing culture of vigilantism, given the presumption of innocence and the appellant's hitherto good character, such factors could not be held against the accused man in the absence of evidence from the Crown which would make such factors relevant to the particular applicant before him. (Emphasis mine)***

37. Firstly, it must be expressed that I fully understand that finding that the offense of Unlawful Sexual Intercourse for which the Applicant is charged is of a serious nature is not in itself a reason for denying the application.

38. Additionally, I am aware that having concluded that the Applicant might be tempted to abscond, in the proper exercise of my discretion, I must also consider whether that risk could nonetheless be effectively eliminated by the imposition of appropriate conditions.

39. The distinction between the Appellant in the case of **Seymour** and the Applicant presently before the Court must also be observed. Mr. Seymour prior to his arrest and detention for the offence of murder had no prior convictions. On the other hand, the Applicant has a prior conviction of notwithstanding the offence is not serious in nature. Additionally the Appellant in the case of Seymour was not presently on bail at the time of his re-arrest. In this case before me, the Applicant was on bail and was instructed to stay away from the Complainant who happened to also be the alleged victim in this present matter.

40. In the circumstances I am also of the view that there is enough evidence for the Respondent to make an Application for the bail previously granted to the Applicant to be revoked. In the event that is done, in order for the Applicant to be released he would firstly need to have his bail that was previously granted re-instated followed by re-applying for bail in reference to these present allegations.

41. Furthermore, I am also of the view that the release of the Applicant on bail would be detrimental to the protection and safety of the public which is paramount.

42. I find that the only way it is certain that the Applicant would be present for his trial and that the public is safe is to remain in the custody of the state at the Bahamas Department of Correctional Services.

43. The Applicant is denied bail for the following reasons.

1. The Applicant's trial will be conducted in a reasonable time and therefore the consideration according to section 4(2)(a) of the Bail (Amendment) Act 2011 has not been satisfied in my view;

2. The Applicant's character is not a good one based on his previous convictions, therefore the primary consideration according to section 4(2B) of the Bail (Amendment) Act 2011 has not been satisfied in my view;

3. The Applicant if granted bail is likely to abscond due to the severity of the charges as well as the evidence against him raising a reasonable suspicion of the commission of the offense;

4. Notwithstanding the Applicant was on bail for a similar allegation when it is alleged he re-offended, the Applicant clearly breached a term of his bail when it was previously granted. The Order to not interfere with the Prosecution's witnesses is a serious one and the fact that this was breached by the Applicant in less than three (3) months after bail was granted was a major consideration in denying the Applicant bail; and

5. I am also concerned for the safety and the protection of the prosecution witnesses; I therefore also deny bail in the public interest. The release of the Applicant on bail would in my view be detrimental to the protection and safety of the public which is paramount.

Dated this 27th day of October A.D. 2021

Cheryl Grant-Thompson
Justice