COMMONWEALTH OF THE BAHAMAS

CASE NO. CRI/BAIL/FP/00131/2015

IN THE SUPREME COURT

Criminal Side

BETWEEN

SHAMAR MOSS

Applicant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:	**The Honorable Mr. Justice Andrew Forbes**
Appearances:	**Attorney Mrs. Erica Kemp c/o Director of Public Prosecutions**
Attorney Mr.	**Parkco Deal c/o Shemar Moss**
Hearing Date:	**11th October 2022**

RULING

Forbes. J.

INTRODUCTION

1. The Applicant has filed an application on the 28th July, 2022, seeking consideration of the Court as to the grant of bail and filed an Affidavit in Support dated the same. The Respondent opposes the application for the grant of bail.

BACKGROUND FACTS

2. It is alleged that sometime on Saturday, the 25th December 2021 while at Les Fountain Plaza, located on East Sunrise Highway, Freeport Grand Bahama.

The Applicant along with another, intentionally shot and killed Torry Henfield, the deceased and attempted to shoot and kill another.

The allegation arose from a single witness who alleged that he observed the Applicant fire a weapon in the direction of himself and the deceased.

The Applicant in his Affidavit avers that he was born on the 10th November, 2000 in Freeport; is twenty-one (21) years of age and is a Bahamian citizen.

He further avers that he was remanded on the charges of Murder, Contrary to Section 291 (1) (d) of the Penal Code and Attempted Murder Contrary to Section 292 of the Penal Code.

That he appeared before Deputy Chief Magistrate Debbye Ferguson on the 25th July 2022 to be served with his Voluntary Bill of Indictment ("VBI").

That there has been numerous delays (over five months) with him not being served with his VBI and each time he was scheduled to be brought down was due to circumstances beyond his control.

He continues that he has been advised by his Attorney and verily believes that the unforeseen delays that has delayed him from being served with his VBI will constitute to the possible delay of his trial.

That he has been in custody since the 26th December, 2021, and that he is innocent of all of the charges alleged against him.

As it relates to other pending charges, the Applicant avers that he is presently on bail for possession of an unlicensed firearm with intent to endanger life, a charge he states he is innocent of.

That the police only charged him for that offence, because he was unable to tell them who fired the said gun and that once that matter goes to trial, the evidence will show that he never held a firearm that night while at the premises connected with that allegation.

The Applicant asserts that he has no previous convictions; maintains that he will reside with his mother at her residence in Chesapeake, Lucaya, Freeport, Grand Bahama.

Prior to being detained, he was employed by his father's company JB's Auto, Freeport, Grand Bahama, as a mechanic and will return to the said employment if granted bail.

He continues that he believes two named individuals are willing and able to provide surety for him in regard to the said charges in a reasonable amount.

That he is currently the holder of a valid passport and is prepared to surrender the same and that he has no previous breaches of bail.

The Applicant asserts that the evidence the Crown intends to rely on to prove their case is very weak and tenuous at best; and states in part that the only witness that told the police that he saw the Applicant shooting a firearm at the place and time in question was also shot.

That he does not know the said witness and his evidence given to the police is built on pure falsification and speculation.

That he is presumed innocent until proven guilty, or plead guilty to any offence alleged against him.

In support of his application, the Applicant exhibited two Affidavits which appear to be alibi witnesses.

The Police Detention Record, evidence of what he alleges shows that at the time of his arrest, his hand was bandaged. The police statement from the alleged victim and photographs taken while at the Bahamas Department of Corrections of what he alleges is abuse by prison officers.

Further, that he has no intention of absconding, that he is the father of a five (5) year old son and a three (3) year old daughter who he is very attached to emotionally and their wellbeing is solely depended

on his financial income and that his children were in his sole custody prior to being detained, as their mother left them and move to Nassau.

Lastly, he avers that he is a good candidate for bail and request the Court admit him to bail, pending his further court appearances.

3. The Respondent filed an Affidavit in response on the 10th August, 2022 and sworn by Sergeant 2169 Prescott Pinder.

He avers that he is the Liaison Officer of the Director of Public Prosecutions;

That the Applicant was charged on the 30th December 2021 with the offences of Murder, Contrary to Section 291(1)(b) of the Penal Code and Attempted Murder, Contrary to Section 2929 of the Penal Code.

Further, that the Applicant was arraigned before Magistrate Debbye Ferguson.

That he was not required to enter a plea; that bail was denied and the Applicant was remanded to the Bahamas Department of Corrections.

Sergeant 2169 Pinder asserts that the Applicant is a person of bad character and exhibited a copy of the Applicant's antecedents, which include Possession of an Unlicensed Firearm and Possession of Ammunition, both which occurred in March 2019, which the Applicant was convicted and fined.

Additionally, convictions for fighting firstly in January 2021, where he was fined and another conviction for fighting in August, 2021, where he was sentenced to the Bahamas Department of Corrections for one (1) month, and the final matter which occurred in December 2021, for causing damage and the Applicant was ordered to compensate the Virtual Complaint.

Sergeant Pinder also avers that the Applicant confessed in an out of court statement that he is affiliated with gang members who are his "friends" (the said out of court statement is contained in the Record of Interview which is also exhibited to the Affidavit).

That two witnesses assert that they are aware of the Applicant being affiliated with gangs and their statements have also been exhibited.

That the Applicant has pending matters before the Court, namely two (2) counts of Possession of a Firearm with the Intent to Endanger Life, whereby, he was charged in April 2021; and one (1) count of Causing Harm, whereby he was charged in July, 2019 and the respective dockets for the said offences were also exhibited.

SUBMISSIONS

4. Counsel for the Applicant in his Written Submissions filed on the 13th September, 2022 has argued that, notwithstanding the allegations, the Applicant has denied the same and maintains his innocence.

In fact, Counsel for the Applicant suggested that the evidence of Mr. Hanna, (the sole witness of the said alleged offences and alleged victim) is dubious as the Applicant's hand at the alleged time of the offences had been in a white cast several days prior to the shooting and remained in the cast when he was arrested by the police, a fact he submits that is missing from the statement of Mr. Hanna casting doubt as to its accuracy.

He further suggests that the Affidavit of the Respondent has sought to label the Applicant negatively without a scintilla of evidence.

In support of the submissions, Counsel cites the New Zealand case of **Hubbard v Police (1986) 2 NZLR 738,** in which the Court noted that the test to be applied on bail, was whether the Applicant will appear for trial and whether the public interest is at risk.

Counsel then referred the Court to the provisions of the Bail Act and relied on the cases of **Hurnam v. The State (Mauritius) 2005UKPC 49** Cordero **McDonald v. Attorney General SCCRApp. No 195 of 2016** in support of his submissions. Counsel for the Applicant highlighted paragraph 34 of **Cordero McDonald v. Attorney General SCCRApp. No 195 of 2016,** where President of the Appeal Court Allen P, said:

> **"34. As this Court has said on many occasions, it is not the duty of a judge considering a bail application to decide disputed facts or law. Indeed, 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 by the appellant, such as to justify the deprivation of his 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."

5. Counsel for the Respondent did not provide the Court with Written Submissions however, during the said hearing, the oral submissions of the Respondent in summary amounted to that Applicant, is a person of bad character because of his previous convictions.

The unresolved matters before the court and finally that the offence is of such a heinous nature, that it is an affront to public safety.

In this regard the Respondent sought to rely on the case of ***Stephon Davis and Director of Public Prosecution SSCrApp. No 108 of 2020,*** where Davis was charged with, one (1) count of Murder and two (2) counts of Attempted Murder.

He appeared before a Judge of the Supreme Court and was denied bail on the basis that he was a threat to public safety.

The matter was appealed and the Court of Appeal in consideration of the reasons for the denial of bail given by the Judge in the lower court and the evidence provided by the Crown quashed the Judge's decision to refuse bail and granted Davis bail with conditions.

THE LAW

The Applicant faces charges involving murder, an offence that has been included in Part C of the First Schedule of the Bail Act Part C which states, inter alia:-

"PART C (Section 4(3)) Kidnapping — section 282, Ch. 84; Conspiracy to commit Kidnapping — sections 282 and 89(1), Ch. 84; Murder — section 291, Ch. 84; Conspiracy to commit Murder — sections 291 and 89(1), Ch. 84; Abetment to Murder — sections 86 and 307, Ch. 84; Armed Robbery — section 339(2), Ch. 84; Conspiracy to commit Armed Robbery — sections 339(2) and 89(1), Ch. 84; Abetment to Armed Robbery — sections 86 and 339, Ch. 84; Treason — section 389, Ch. 84; Conspiracy to commit Treason — sections 389 and 89(1), Ch. 84."

8. Section 4(2) and (3) of Bail (Amendment) Act, 2011 permits the grant bail to those charged with a Part C offence. Sections 4(2) and (3) state:-

> ***"(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 ti1nc; 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."***

In considering whether to grant bail to a defendant who has been charged with a Part C offence, the court shall have regard to the following factors (as found in Section 4 of the Bail (Amendment) Act 2011)—

(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 purposes 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.";

ANALYSIS

The Respondent has referred the Court to the case of Stephon Davis (above) in support of their opposition of the grant of bail.

However, the Justices of Appeal in their consideration of whether the learned Judge should have denied the Appellant bail referred to the case of Vasyli v. The Attorney General [2015] 1 BHS J. No. 86 and stated at paragraphs 18 and 19:-

"18. In **Vasyli v. The Attorney General [2015] 1 BHS J. No. 86, Allen, P** stated at paragraph 12 of her judgment:

"12. On a true construction of section 4 (2) and paragraph (a) (i) of Part A of the Bail Act, and notwithstanding the 2014 Amendment, I am still of the view that bail may only be denied if the State is able to demonstrate that there are substantial grounds for believing that the applicant would not surrender to custody or appear for trial.

In assessing whether there are substantial grounds for such belief, the court shall also have regard to the nature and seriousness of the offence and the nature and strength of the evidence against an applicant as

prescribed in paragraph (g) of Part A." [Emphasis added]

19. There was no evidence placed before the Judge by the respondent to controvert his averment that he would appear for his trial.

The only basis for the Judge's refusal to refuse the bail application in relation to this aspect of the case, namely, possibility of absconding, is the inference spoken to by Lord Bingham of Cornhill in Hurnam (Supra) where those charged with serious offences may be tempted to abscond to avoid their trials."

The substance of the Respondent's submissions are that the Applicant is of a bad character as he has antecedents and pending matters before the Court; that he has allegedly committed such heinous acts and that the evidence adduced is cogent and powerful and as such, he ought not to be granted bail.

The Court having read the Respondent's Affidavit evidence, notes that the Respondent has focused on the Applicant's antecedents which were referenced earlier in the paragraphs above.

These antecedents were Possession of a Firearm and Possession of Ammunition, which in the Court's view are concerning as they demonstrate the Applicant's propensity to possess weapons.

Further, the Applicant has been convicted for fighting and causing damage.

However, the only one reference in the Applicant's antecedent's report, which might give the Court some pause is the conviction in 2019 for Possession of Firearm and Possession of Ammunition.

The Court refers and considers the comments of Justice of Appeal, Mr. Jon Isaacs in the **Stephon Davis** case(supra), where he acknowledged at paragraph 28:-

> ***"28. The antecedents of an applicant for bail is an important factor to be taken into account by a court considering the application.***
>
> ***This record may provide a barometer for the likelihood of the applicant to commit other offences while on bail.***
>
> ***Although a court is obliged to have regard to the antecedents of an applicant for bail, little weight should be given to offences that are as trivial as vagrancy.***
>
> ***That offence is committed merely by being found to have contravened section 3 of the Vagrancy Act.***
>
> ***It is essentially a victimless crime and may be committed by persons who are merely in a penurious state."***

The Court also considers that the Applicant was previously granted bail for the offense of Possession of a Firearm with intent to Endanger Life, (2 Counts) Contrary to Section 33 of the Firearms Act, Chapter 212, and Causing Harm Contrary to Section 266, in which the Applicant is alleged to have intentionally and Unlawfully Cause Harm to Johnell Farrington.

However, the particulars and current status of these cases are unknown and the Respondent has not provided nor adduced any evidence as to the status of these matters.

As such, this Court cannot offer any further consideration on this issue.

The Court notes that there have been multiple decisions by the Court of Appeal, which have established what criteria a court ought to consider when the issue of bail is being reviewed.

In the Court of Appeal decision of **Dennis Mather and the Director of Public Prosecution SCCrApp 96 of 2020,** the Court of Appeal at paragraph 16 cited a number of cases as the starting point:-

> ***"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."***
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> *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."

Therefore, taking the Respondents case at its highest the Court is of the view that the Respondent has not provided to this Court any evidence that the Applicant will not attend for his trial.

In fact, the evidence that is before the Court implies but does not confirm that the Applicant is a member of a gang.

The statements of Ms. Henfield whereby she states that there is some gang related issues between "Jello" and Reynaldo does not specify or confirm who "Jello" is or may be, nor does she confirm the Applicant as being involved in any gang related activities .

Further, the police statement of Silas Leonardo William II, which was exhibited to the Affidavit of the Respondent states that, he observed the Defendant prior to the alleged offence, but he believes that the Applicant and another were responsible for the death of the deceased and continues that he knows the Applicant to be associated with a gang.

Additionally, there is the statement of Crawford Hanna, the alleged victim of the attempted murder offense who says, he observed the

Applicant pull up in a vehicle, pull a gun and started shooting in the direction of himself and the deceased.

The final issue raised by the Respondent was the seriousness of the offense and the cogency of the evidence.

In this regard, this Court considers the Court of Appeal in **Davis (supra)** where in the headnote, the Court of Appeal said as follows: -

> ***"No substantial grounds have been disclosed in this case to support a conclusion that the appellant would abscond and not appear for trial.***
>
> ***As stated in Hurnam "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 ..." it follows that there must be shown, substantial grounds for believing that the applicant would not surrender to custody or appear for trial.***
>
> ***There is no evidence to suggest that the appellant would not appear for his trial. The Judge is required to consider whether there are conditions that may be imposed that would, as far as possible, ensure that the appellant appear for his trial.***
>
> ***It is only the severity of the charge and the inference of flight in the instance where no form of bail condition could mitigate or minimize that flight that can support the Judge's refusal of bail."***

Also in ***Davis supra*** President of the Court of Appeal, Sir Michael Barnett noted in the headnote: -

> ***"This court has on more than one occasion repeated the principle that bail should not be denied as a punishment***

for a crime for which a person has not yet been convicted. This principle applies even when the crime is alleged to have been committed whilst a person was on bail. The burden is on those opposing the grant of bail to should why there are good reasons to deny bail to a person charged with an offence."

11. Further, Madam Justice of Appeal, Crane Scott in **Jevon Seymour v. D.P.P. SCCrApp No.115 of 2019**, stated at paragraph 65:

> **"It is obvious from the above paragraph that the evidence which the crown placed before the learned judge in an effort to discharge its burden of satisfying the court that the appellant should not be granted bail was woefully deficient.**
>
> **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."**

Therefore, having heard Counsel for the Applicant and Counsel for the Respondent, reviewed the respective affidavits filed, considered the authorities before the Court as stated above, the Court finds that there is no evidence that has been placed before it on behalf of the Respondent that the Applicant will refuse to surrender or abscond and as such to ensure his attendance for trial, the Court is prepared to impose stringent conditions.

DISPOSITION

The Court makes the following conditions:

a. The Court will accede to the Applicant's bail application and grant bail in the Sum of Thirty Thousand Dollars ($30,000.00) with one (1) or two (2) sureties;

b. The Applicant is to be outfitted with an Electronic Monitoring Device and must comply with all conditions established related to the wearing and maintenance of device.

The Court will impose as further condition of the device that the Applicant is to be placed on curfew on weekdays by 9 p.m. to 5 a.m. and weekends by 10 p.m. to 5 a.m.

c. The Applicant is to have no direct or indirect contact with any witness involved with this case, nor have any further contact with his co-Accused;

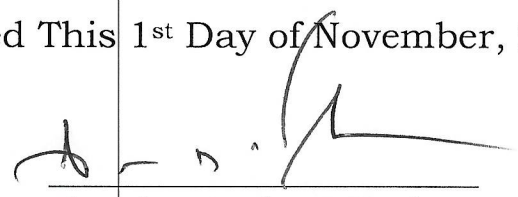
d. The Applicant is required to report to Central Police Station, Freeport, Grand Bahama each Monday & Friday by 6 p.m. at the latest; and

e. The Applicant is required to surrender all travel documents upon executing of bail bond.

f. Parties are liberty to reapply.

g. Parties aggrieved may appeal to the Court of Appeal.

Dated This 1st Day of November, 2022



Justice Andrew Forbes