

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT**

**CRIMINAL LAW DIVISION  
CRI/bail/218/2016**

**BETWEEN**

**CLARINGTON J. BOWLEG**

**Applicant**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**Respondent**

**Before: The Hon. Madam Justice Renae McKay**

**Appearances: Mr. Ian Cargill for the Applicant  
Mr. Patrick Sweeting for the Respondent**

**Hearing Date: 25<sup>th</sup> March, 2021**

**Ruling Date: 22<sup>nd</sup> April, 2021**

**BAIL**

**Criminal – Bail – Murder – Part C Offence – Section 4 Bail Act considerations – Applicant has previous convictions for charges not similar to the offence of Murder – Applicant has pending matters for charges not similar to the offence of Murder – Court required to perform balancing act**

1. This ruling concerns an application for bail by the Applicant, Mr. Clarington Bowleg (**the “Applicant”**). The Respondent, the Director of Public Prosecutions (**the “Respondent”**) objects to the bail application.
2. By his Summons and Affidavit in Support of Application for Bail filed the 16<sup>th</sup> February, 2021, the Applicant, a 29 year old Bahamian citizen, averred that he was remanded at the Bahamas Department of Correctional Services on a charge of Murder contrary to Section 291 (1) (b) of the Penal Code and that he intended to defend the charge at his trial.
3. The Applicant requested that he be admitted to bail pending any further court appearances, as he did not have any previous convictions and he did not have any pending matters. He averred that he would have accommodations in Harbour Island and that prior to his incarceration he was self-employed as a plumber on the said island.

4. The Applicant concluded that if he was not admitted to bail, he would be disadvantaged in his ability to adequately prepare his defence and support his child, himself and his family.
5. Counsel for the Applicant, Mr. Cargill contended that there was no rogue gallery attached. With respect to the statements of the anonymous witness, he noted that one was taken by Father I. Ranfurly Brown, therefore the witness could not be considered as anonymous as he was known to somebody. He continued that the two anonymous witnesses were persons of suspicion themselves. As a result, Mr. Cargill submitted that their statements were not reliable.
6. Mr. Cargill additionally submitted that it was his understanding that other individuals were circled and identified on the photo array, which the Court did not have the privilege of seeing. He went on to say that when individuals were arraigned with aliases, the normal procedure was for the acronym 'aka' to follow the individual's name. In the instant case, he questioned how the Court could be sure that 'Lil Man' was the person that the witnesses were referring to.
7. By its Affidavit in Response to Bail filed the 2<sup>nd</sup> March, 2021, the Respondent averred that there was cogent evidence against the Applicant based on the statement of two anonymous witnesses. The first anonymous witness ("AW1") claimed to be in the area of Barrack Street on Friday, 5<sup>th</sup> February, 2021, and saw "lil man" wearing all black clothing with a white tan. AW1 further claimed to see the Applicant walking across the street to the side of the church where a small shortcut/track road is located.
8. AW1 further stated that shortly thereafter, the deceased walked across the road towards AW1's back yard from when about five gunshots were heard. Afterwards, AW1 saw "lil man" running with a black gun in his hand and was able to identify him because the area was lit with streetlights and there was nothing block his view. The Respondent stated that AW1 then identified the Applicant as the fifth man in a twelve man lineup as the man who was seen running away from the scene of the shooting with a gun.
9. The Respondent also relied on the evidence of the second anonymous witness ("AW2") who claimed to be in the vicinity of Barrack Street on Friday, 5<sup>th</sup> February, 2021, and while there, saw the deceased through an alley. Shortly thereafter, "lil man" was seen by AW2 walking behind the deceased who wore all black with a white tam. AW2 then heard "lil man" shout for a "ten plate" and saw the deceased raise his hand before he was shot by "lil man".
10. AW2 also claimed to hear five shots and further claimed to be able to see "lil man" because the street lights were on and nothing obstructed his view. AW2 then identified the Applicant as the 4<sup>th</sup> person in a twelve man lineup as the man who had the handgun and shot the deceased.

11. The Respondent added that the offence is one of a serious nature, that the Applicant has two pending matters before the Magistrate Court and a number of previous convictions for other offences. The Respondent went on to say that there was no delay in the progression of the matter before the Court and that the Applicant was not a fit and proper person for the grant of bail.
12. Counsel for the Respondent, Mr. Sweeting, contended that a balancing act would have to be done when considering the rights of the public at large, the safety of the public at large as well as the witnesses concerned. With respect to the anonymous witnesses, Mr. Sweeting contended that the identity of the witnesses were unknown to him however, they intended to rely on their evidence or testimony. He added that the issues raised by Mr. Cargill were all issues to be determined at trial and not during the bail application.

### **The Law**

13. The Court is vested with the discretion to grant bail pursuant to s.4 of the Bail Act as amended by the Bail (Amendment) Act, 2011 (**the “Act”**).

**“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."

14. The Bail (Amendment) Act, 2014 amends the First Schedule to include an additional consideration,

**(h) in the case of violence allegedly committed upon another by the defendant, the court's paramount consideration is the need to protect the alleged victim."**

15. It follows that, the Court is required to consider the following factors when determining a bail application: the character and antecedents of the applicant, the nature and seriousness

of the offence and the strength of evidence against the Applicant, the safety of the Applicant 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 and the need to protect the alleged victim. A separate consideration is whether the Applicant is likely to be tried within a reasonable time.

#### **The character and antecedents of the Applicant**

16. The Applicant has several convictions and pending matters. From a review of the Applicant's 'Criminal Records Antecedent Form', the convictions nor the pending matters are of a similar nature to the offence of Murder. In further respect of the Applicant's pending matters, in addition to not being of a similar nature to the offence of Murder, they are only charges and until a trial has been held he is considered to be innocent.

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

17. The Applicant is charged with Murder which is a serious offence. The Respondent relies on the evidence of two anonymous witnesses; one of which claimed to see the Applicant shoot the deceased. A bail application is not to be treated as a trial. Therefore, I only need to be satisfied that there is sufficient evidence before me that links the Applicant to the commission of the offence. In the instant case, I am satisfied.

#### **The safety of the Applicant or the safety of the public**

18. The Respondent has made a blanket assertion that the safety of the public and the public right's should be considered. Without any further evidence on this submission, I cannot take this into consideration as a factor that would weigh against the Applicant. It is common that the burden of proof rests on the prosecution and that their burden is a great one. In the circumstances, I do not consider this to be a factor that would weigh against the Applicant being admitted to bail.

#### **Whether the Applicant would interfere with the prosecution's witnesses**

19. The Respondent has also made a blanket assertion on considering the rights of witnesses. Again, unless there is some evidence to support this assertion, I cannot consider this as a factor to weigh against the Applicant.

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

20. The Respondent has not made the argument that the Applicant would fail to surrender to custody or appear at trial. In that regard, this factor does not weigh against the Applicant.

### **Whether the Applicant is likely to be tried within a reasonable time**

21. The Applicant is set to be served with his Voluntary Bill of Indictment on the 30<sup>th</sup> April, 2021. To date, there has been no delay with the Applicant's arraignment. This factor however, involves the entire trial process. As at the date of this ruling, there is no evidence that there would be a delay in the commencement and determination of the Applicant's trial.

### **Discussion**

22. Along with the aforementioned considerations, the Court must take into consideration the Applicant's constitutional right not to be deprived of his liberty and the right to be deemed innocent until he is proven guilty. In that regard, the appellate Courts have created a high threshold for the prosecution to cross when it objects to an accused being granted bail. While the Applicant is required to apply for bail, the burden rests on the Respondent to prove why he should not be admitted to bail. The burden is a high one and cannot be discharged with bare assertions.
23. The Courts are therefore required to perform a balancing act when considering the statutory factors set out above. Due to the accused's constitutional rights and the fact that a bail hearing is not to be considered a trial, the main hurdle that the prosecution needs to clear is whether the accused would fail to surrender to custody or fail to appear for his trial.
24. In the Applicant's case, the Respondent has satisfied me that there is a sufficient link between the Applicant and the commission of the offence. While I am aware of the fact that the Applicant has previous convictions, they are not in relation to the present offence. While I am also aware of the fact that the Applicant has pending matters, the appellate court has made it adamantly clear that until the Applicant was found to be guilty of those charges, he is to be considered pure.
25. The Respondent has not been able to satisfy me that the safety of the Applicant or the safety of the public would be in danger if the Applicant is released on bail. Nor has the Respondent been able to satisfy me that the Applicant would interfere with any of the prosecution's witnesses. Additionally, there is no indication that the Applicant's trial will not be commenced within a reasonable time.
26. After considering the submissions and the evidence of both the Applicant and the Respondent, I find that the Applicant is a fit and proper candidate to be admitted to bail.
27. The Applicant is granted bail in the amount of \$30,000.00 with two suretors:
  - 27.1 The Applicant shall report to the Harbour Island Police Station every Monday, Wednesday, Friday and Saturday before 6:00 p.m.;
  - 27.2 The Applicant shall be fitted with an Electronic Monitoring Device:

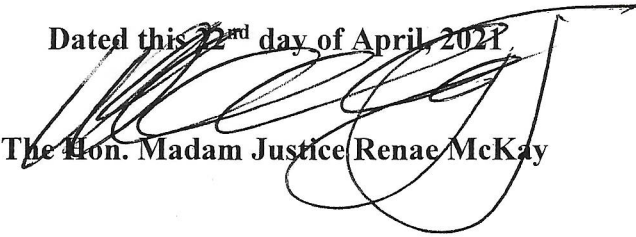
27.3 The Applicant shall surrender his travel documents;

27.4 A curfew shall be imposed on the Applicant between the hours of 9:00 p.m. and 6:00 a.m.;

27.5 The Applicant is prohibited from interfering with any of the prosecution's witnesses.

27.6 The Applicant is to surrender to custody on the Friday before the commencement of his trial herein.

Dated this 22<sup>nd</sup> day of April, 2021

  
The Hon. Madam Justice Renae McKay