

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT

CRIMINAL DIVISION  
2020/CRI/bail/00262

**KENDRICK BARNABUS LUNDY**

**Applicant**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS**

**Respondent**

**Before:** The Hon. Madam Justice W. Renae Mckay  
**Appearances:** Mr. Jomo Campbell for the Applicant  
Ms. Cassie Bethell for the Respondent  
**Hearing Dates:** 17<sup>th</sup> February, 2021  
**Ruling Date:** 25<sup>th</sup> March, 2021

**RULING**

1. This ruling concerns an application for bail made by the applicant, Mr. Kendrick Lundy (the “**Applicant**”) by way of his summons and Affidavit of Kendrick Lundy both filed 5<sup>th</sup> February, 2021 (“**Affidavit in Support**”). The Applicant was previously denied bail on the 20<sup>th</sup> August, 2020. This application however, is a fresh application.
2. The Applicant averred that subsequent to his previous bail application, he still had not received his Voluntary Bill of Indictment (“**VBI**”). He sought to rely on an unfiled Affidavit of Mr. Omar Jamal Beneby who alleged that contrary to his anonymous statement given to police, he did see the Applicant with a firearm.
3. The Applicant further averred that his previous admittance to being affiliated with a gang was as a result of the pain he was in, in addition to being under the influence of medication during that period. He explained that a day or two prior to being interviewed, he was discharged from the hospital after having surgery and that the officers questioning him were aware and kept insisting that he was a part of the ‘Mad Ass’ gang based on his area of residence.

4. The Applicant further explained that he had accepted the accusation, knowing it was not true in order to end the harassment. He added that when he was asked by Internal Affairs if the area he lived in was gang affiliated, he replied that the area was known as 'Mad Ass'.
5. The Applicant then stated that he maintained his innocence, that he had no previous convictions nor pending matters and that he was not a flight risk. He further stated that he would not interfere with any of the witnesses in the matter and that he did not pose any risk to the safety or security of Bahamian society. The Applicant concluded that he was prejudiced by his remand as he did not commit the offences for which he was charged and exclaimed that he would abide by all conditions stipulated if granted bail.
6. Conversely the Respondent, the Director of Public Prosecutions (**the "Respondent"**) objected to the Applicant's bail application. By the Affidavit of Assistant Superintendent of Police Nathan Mackey filed 18<sup>th</sup> February, 2021 (**the "Affidavit in Response"**) the Applicant made clear their intention to rely on their previous affidavits filed on the 29<sup>th</sup> June, 2020 and the 22<sup>nd</sup> July, 2020, in addition to the contents set out herein.
7. The Respondent confirmed that the Applicant had been served with his VBI dated the 15<sup>th</sup> February, 2021 on the 16<sup>th</sup> February, 2021 and added that the Applicant had signed the service sheet confirming receipt. They further averred that there was no prosecution witness by the name of Mr. Beneby and that they intended to rely on the Witness Anonymity Order filed on the 17<sup>th</sup> February, 2021. In that regard, the Respondent made no admission with respect to the information contained in the exhibited Affidavit of Beneby, so as not to breach the Order.
8. The Respondent further averred that the affidavit of Mr. Beneby was concerning and was consistent with an attempt at making efforts to reveal the identity of the alleged anonymous witness. They stated that they again relied on the evidence of Inspector Harris, which was independent of the Applicant's admission and spoke to the Applicant's involvement in/affiliation with an unlawful gang; namely the 'Mad Ass' gang, which evidences the Applicant's propensity for violence.
9. The Respondent maintained their contention that the Applicant was a threat to public safety and public order and that he would interfere with witnesses if released on bail. They additionally relied on the Applicant's admission to being shot on at least one occasion and on that note he should be kept in custody for his own protection. They concluded that the Applicant was not a fit and proper candidate for bail.

## **Submissions**

10. During the hearing of the Applicant's bail application, both Counsel for the Applicant and Respondent presented oral arguments on behalf of their clients.
11. Counsel for the Applicant, Mr. Campbell, submitted that the Applicant had no antecedents, that he was not a flight risk and that there was nothing before the Court that suggested that the Applicant was a threat to society. He additionally submitted that the injuries the Applicant received were not received as a result of this matter and that there was no indication that he would abscond.
12. Counsel for the Respondent, Ms. Bethell, reiterated her intention to rely on the previous affidavits filed. She relied on the Court of Appeal's decision in **Jevon Seymour v Director of Public Prosecutions SCCr App No. 115 of 2019** which held that if there was evidence that the accused was a threat to public safety or public order and if there was evidence of specific threats made against the witnesses, then it is to be included in affidavit evidence for the judge's consideration.
13. She added that such evidence might also include evidence of any prior convictions for similar offences or evidence of pending charges for violent or firearm offences or evidence of any known or suspected gang affiliation.
14. In response to the Applicant's claim that his confession to gang involvement resulted from the after effects of surgery, Ms. Bethell contended that when the previous application was ventilated, the Applicant was represented by competent counsel. She added that if that had been the Applicant's instructions then his counsel would have included that in his submissions at the time. Ms. Bethell continued that it was interesting that this information had only surfaced after he was refused bail.
15. She further submitted that a Mr. Beneby was not listed on the back of the Applicant's VBI and stated that there was cogent evidence against the Applicant. Ms. Bethell reminded the Court of the previous attempt made to take the Applicant's life and that the Applicant should not be admitted to bail.

### **Discussion and Ruling**

16. An accused is granted the opportunity to apply for bail pursuant to section 4 of the Bail Act, in addition to the constitutional protection not to be deprived of his liberty prior to being granted a fair hearing. Deriving from section 4 of the Bail Act, are several considerations that a presiding judge must consider when exercising the jurisdiction to grant bail. These considerations must be deliberated in conjunction with the accused's aforementioned constitutional rights.



17. The considerations are well known. The Court must consider whether there is sufficient evidence linking an accused to an offence, the character and antecedents of an accused, whether the accused would pose a threat to society or if there is a threat to his person and the nature and seriousness of the offence, whether the accused is a flight risk and would fail to surrender to his trial and whether the accused was likely to interfere with prosecution witnesses. A separate consideration is whether the accused is likely to be tried within a reasonable time.

18. As mandated, I now turn to examine the statutory considerations,

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

19. The Applicant is charged with the Murder of Angelo Lightbourne Jr., which allegedly occurred after an exchange of gun fire between the two on the 3<sup>rd</sup> June, 2020. The taking of another man's life is no doubt a serious offence.

20. The Applicant submits that the statement of the anonymous witness which directly linked him to the offence, has been retracted by the witness and has exhibited the unfiled affidavit of Mr. Beneby in that regard. Without making any finding to the effect, I find it necessary to remark that one of the conditions of bail is that an accused should not interfere with any of the prosecution's witnesses.

21. In **Dennis Mather v Director of Public Prosecutions SCCr App No. 96 of 2020**, Isaacs JA stated at paragraph 31,

**“The possibility that an applicant for bail may attempt to pervert or obstruct the course of justice by interfering with witnesses who are to give evidence for the Prosecution at his trial, that is, seeking to dissuade a witness from testifying, or by suborning perjury, is one of the more important factors a court must take into consideration in a bail application.**

22. Aside from Mr. Beneby's alleged retraction, the Applicant's cousin placed him in the area of the exchange of gun fire and shortly thereafter she stated that she saw him and that he told her that he had just been shot. He also requested the use of her vehicle to drive himself to the hospital. She could not however, confidently state that she saw the Applicant shoot the deceased.

23. While a bail application should not be disposed of as a trial, there has to be sufficient evidence before me to link the Applicant to the offence. The Applicant states that he was shot in a drive-by shooting. His cousin only states that she saw him at her home after

hearing what she perceived to be gun shots and that he told her he had just been shot. From this evidence, there is no doubt that there was a shooting.

24. The Respondent still seeks to rely on the evidence of its anonymous witness and compounds the witness's intention to give evidence by the witness anonymity order. Therefore, that evidence, which states that he witnessed the deceased and the Applicant engaged in a shootout, is still relied on by the Respondent. In that regard, there would be a sufficient link between the Applicant and the commission of the offence.

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

25. The Applicant has no pending matters nor does he have any previous convictions.
26. The Applicant contends that his prior admittance to being a member of the 'Mad Ass' gang was due to the after effects of surgery as he was in excruciating pain and was prescribed medication and which caused him to answer the officers questions in an attempt to stop the questioning. He claims that his surgery was as a result of being shot in the back during a drive by shooting that occurred on the 3<sup>rd</sup> June, 2020. Only 4 days later he was being questioned by police. In the circumstances it is reasonable to believe that the Applicant was in fact still recovering from surgery.
27. What bolsters this belief is the fact that on the 25<sup>th</sup> June, 2020, the Applicant had to return to the Princess Margaret Hospital to have staples removed from his stomach. Also at the time of his attendance, it was discovered that there were open wounds on his person. One open wound was underneath his arm where the doctor had inserted a tube for the surgery, the other open wound was on his back where the bullet entered his body and another open wound was close to his collarbone where his shoulder was broken.
28. A few weeks later, on the 9<sup>th</sup> July, 2020, the Court had to make a request for the Applicant to be provided with a bed and/or a mattress in addition to being supplied with his medication. I am therefore satisfied of the possibility that the Applicant's admission to his gang involvement could have been as a result of the poor physical state that he was in at the time of his questioning.

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

29. This is the most important consideration as it is paramount that the Applicant appears for his trial. The Respondent continues to rely on its submission that due to the possible lengthy sentence that will be imposed upon the Applicant if he is found guilty, there is incentive for him to abscond. However, because of the Applicant's right not to be deprived of his liberty prior to trial, there are conditions that can be imposed to ensure that he would appear for his trial.

30. These include the placement of an Electronic Monitoring Device on the Applicant, the imposition of a curfew on the Applicant, sign in conditions, the placement of the Applicant on house arrest and the mandatory surrender of the Applicant's passport and/or any other travel documents.

**Whether the Applicant should be kept in custody for his own protection or for the protection of the safety of the public**

31. Insp. Harris averred that the Applicant became known to the Central Intelligence Bureau since 2011 as being involved in gang activity and because of his particular association with the Mad Ass Gang.
32. As a result of the Applicant's association with the aforesaid gang, he was placed in cell E17 in the Bahamas Department of Corrections, which is an area designated for the Mad Ass Gang members after their affiliation has been confirmed.
33. Moreover, Insp. Harris averred that the death of the deceased transpired as a result of an ongoing gang feud between members of the Mad Ass gang.
34. In the recently decided appeal of **Mario Brown v. Director of Public Prosecutions 7 May 2020 CA Crim No. 37 of 2020**, the Court of Appeal affirmed Grant-Thompson J's decision to deny the accused bail based on the confirmation of his gang involvement by an intelligence officer.

**Whether the Applicant would interfere with the Respondent's witnesses**

35. The Respondent claims that the anonymous witness wished to remain as is and was granted a witness anonymity order to reflect that position. This was as a result of the anonymous witness claiming to be in fear of the Applicant because he is allegedly dangerous. There was no evidence to support the allegation.
36. The Respondent makes no admission that Mr. Beneby is the alleged witness and if in fact he is the anonymous witness, is prevented from doing so, in order to prevent there being any breaches of the witness anonymity. In that regard, I cannot safely consider that this is a factor that should weigh against my consideration of whether the Applicant should be granted bail.

**Ruling**

37. The Applicant has the right to apply for bail prior to the commencement and determination of his trial. He is always to be considered innocent until proven guilty and



must not be denied bail as punishment. Such finding would be considered premature and unconstitutional.

38. As required of me, I have performed a balancing act in order to determine whether the scales weighed in favor of the Applicant being granted or being denied bail. On the one hand I find that there is a sufficient link between the Applicant and the commission of the offence and that the evidence of Insp. Harris is sufficient to connect the Applicant to the involvement of the 'Mad Ass' gang.
39. On the other hand, I find that there is no evidence that the Applicant would interfere with any of the prosecution's witnesses, that he is not a flight risk and that he has no previous convictions and pending matters. I have additionally taken into consideration the Applicant's injury at the time of his arrest.
40. I am satisfied that stringent conditions can be imposed on the Applicant to ensure that he would surrender into custody and appear for his trial.
41. In consideration of the foregoing and all of the evidence before me, I accede to the Applicant's application for bail. Bail is therefore granted to the Applicant in the amount of \$30,000.00 with two (2) suretors. The Applicant is additionally subject to the following conditions:
  - 41.1. The Applicant shall report to the Quakoo Street Police Station every Monday, Wednesday, Friday and Saturday before 6:00 p.m.;
  - 41.2. The Applicant shall be fitted with an Electronic Monitoring Device;
  - 41.3. The Applicant shall surrender all travel documents, if any;
  - 41.4. The Applicant shall not interfere with any of the Respondent's prosecution witnesses;
  - 41.5. A curfew shall be imposed on the Applicant between the hours of 9:00 p.m. and 6:00 a.m.
  - 41.6. The Applicant shall surrender to custody on the Friday before the commencement of his trial.

**Dated this 25<sup>th</sup> day of March, 2021**

  
**Hon. Madam Justice W. Renae McKay**