COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Criminal Side

2020/CRI/bal/No. 00472

BETWEEN

ALCOTT CHARLTON FOX

Applicant

And

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE:	The Honourable Mr Senior Justice Bernard Turner
APPEARANCES:	Mr David Cash for the Applicant Ms T'shura Ambrose and Ms Cashena Thompson for the Respondent
HEARING DATE:	30 May 2023

RULING

TURNER SNR J

The applicant herein is applying for bail by way of a summons and an affidavit in support filed 4 May 2023, in respect of a charge of murder, which is alleged to have occurred on 10 November 2022 at Rolleville, Exuma.

2. His undated affidavit in support of the application for bail, reads, in part:

> **"1. I am the Applicant herein.**
>
> **2. I am a Bahamian citizen, born on 14th December, 1993.**
>
> **3. I am 29 years of age.**
>
> **4. I make this affidavit in support of an application for bail.**
>
> **5. I stand charged and remanded on the following offence:**
>
> **Murder: contrary to section 291(1)(b) of the Penal Code; Chapter 84.**
>
> **6. That the VBI was served in this matter on 17th April, 2023.**
>
> **7. That I was arraigned on 27th April, 2023 before Hon. Mr. Justice Bernard Turner where I pleaded not guilty.**
>
> **8. If granted bail I would reside in Marsh Harbour, Abaco.**
>
> **9. Prior to my arrest and remand, I was employed as a Bartender.**
>
> **10. That I am not a flight risk and will abide by my obligations to the court if granted bail.**
>
> **11. That I have previous convictions for stealing, fraud and simple possession of marijuana.**

12. That I have no pending matters

13. That the evidence against me is weak.

14. That I was not placed on an Identification Parade and the case for the prosecution includes anonymous witnesses.

15. That I have two young daughters who rely on me for financial and emotional support.

16. That I maintain my innocence against this allegation and I am eager to defend myself against this charge.

That the contents of this Affidavit are correct and true to the best of my information, knowledge and belief."

3. The Respondent filed an affidavit in reply on 29 March 2023, which reads, in part:

"...2. That this Affidavit is made in response to an Application for Bail file by the Attorneys for Applicant on 4th May, 2023.

3. That I have read the Application by the Applicant, save as hereinafter stated, no admissions are made regarding the assertions contained in the Application of the Applicant in this matter.

4. That with due consideration of the aforementioned it is proffered that the Applicant is not a fit and proper candidate for bail, because if released on bail, the evidence suggest that the Applicant may be the victim of retaliation.

5. That as averred in the statement of the anonymous witness the Applicant is known to him/her and that he/she was aware that the Applicant held the deceased responsible for the death of his

(the Applicant's) brother. Marked and Exhibited as "CB 1" is a copy of the Anonymous witness 1, statement.

6. That the Applicant is a part of a gang called the "dirty south order" and they are involved in an ongoing feud with persons affiliated with a gang in Kemp Road as indicated in the exhibit marked "C.8.1" above.

7. That the deceased was on bail for murder which occurred 16th February, 2018.

8. That with consideration of the above, it is proffered that should the Applicant be released on bail, the evidence suggest that he, himself may be the victim of retaliation.

9. That for his own protection and because of the present climate of retaliatory murders nationally, he should be kept in custody.

10. That the evidence against the Applicant is cogent, as, at the time of the offence, the Applicant was recognized by someone who knows him well and who also later identified him during the course of the Police Investigation which led to his arrest and being charged. Marked and Exhibited as "CB 2" is a copy of Anonymous witness 2 statement.

11. That the deceased before he died told the anonymous witness that the Applicant was responsible for shooting him.

12. That the Applicant has antecedents. Marked and Exhibited as "CB 6" are copies of the Applicant's Antecedents.

13. That the Applicant for the above reasons, is not a fit and proper candidate for Bail and in the circumstances, his Application for Bail should be refused.

14. That the contents of this Affidavit are true to the best of my knowledge, information and belief."

4. Having regard to the issues for a court to consider on an application for bail, section 4(2) of the Bail Act states:

> **"4. (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 ;**
>
> **(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),....."**

5. Sub-section 4(2B), reads:

> **"(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."**

6. Counsel for the applicant submitted that the question for the court was whether the applicant would appear to take his trial or otherwise interfere with the administration of justice. He submitted that the respondent did not assert or otherwise prove that the applicant would not appear to take his trial and that the statements of one of the anonymous witnesses was replete with hearsay and that those alleged hearsay statements should not be considered by the court in a bail application. Counsel cited the Court of Appeal's decision in **Jevon Seymour** in support of his submissions, specifically paragraph 66.

7. Further, he submitted that the alleged dying declaration made to this particular anonymous witness was not specific enough to be considered as cogent evidence.

8. Counsel for the respondent commended the contents of its affidavit in objection to bail and also referred the court to the Court of Appeal's decision in **Jevon Seymour** in respect of the issue as to the applicant's suspected involvement in gang activity, as alleged in one of the anonymous witness statements, specifically paragraph 68 of the decision.

9. The paragraphs cited read as follows (The Bahamas Court of Appeal, **Jevon Seymour v Director of Public Prosecutions, No. 115 of 2019**):

> **"66. In the absence of evidence, merely listing the relevant factors and using expressions such as "may"; or "is likely to"; or "it is recommended" as was done in the McHardy affidavit, cannot discharge the Crown's burden. We take this opportunity to stress once again what this Court (differently constituted) said in Armbrister, which is that that is not how the Crown's burden on a bail application is discharged. Paragraph (a) of the First Schedule**

requires the production by the Crown of evidence capable of supporting a belief that the applicant for bail "would", if released, abscond, commit new offences or interfere with witnesses. Ritualistic repetition of the Part A factors, in the absence of evidence, is unfair to the accused person and comes nowhere close to discharging that burden.

.....

"68. If the appellant was in fact a threat to public safety or public order; or if there was evidence of specific threats which had been made against the witnesses, Perry McHardy's affidavit should have included the necessary evidence of his propensity for violence for the judge's consideration. Such evidence might have included for example, any prior convictions (if any) for similar offences; or evidence of pending charges for violent or firearm offences; or again, *evidence for instance, of any known or suspected gang affiliation.* No such evidence was placed before the learned judge and the absence of such evidence, stood in stark contrast with the evidence which the appellant had placed before the judge of his good character, strong family and community ties and the fact that he had a long and unblemished record of service within the BDF." [Italicized emphasis added]

"

10. Paragraph 70 of the decision concludes a review of proper treatment of these issues by stating:

"70. Put somewhat differently and at the risk of being unduly repetitive, we are satisfied that given the presumption of innocence and the evidence of the appellant's good character and the absence of criminal antecedents, there was no evidential basis before the judge in relation to the appellant which is capable of supporting the judge's ultimate conclusion at paragraph 16(v) of his decision that: "in the circumstances of this Applicant and this application the need for public order and public safety is paramount". In the absence of evidence that the appellant posed a substantial threat to the Crown's witnesses or to public safety and public order, the judge's decision was unreasonable and clearly wrong."

11. What is apparent in this decision is that evidence capable of supporting a belief that the applicant would interfere with witnesses, or himself be at risk of physical harm if released, is required. According to the decision, suspected gang involvement (see the italicized words in paragraph 68) is permissible.

12. A bail application is not to determine whether a person is guilty of any offence, but to determine whether any sufficient basis has been established by the prosecution to the requisite standard that he should be remanded into custody to await his trial.

13. Despite the applicant's submissions, in respect of the statements being replete with hearsay, for the purposes of a bail application certain of the information contained in those statements can be considered. Those matters are not related to the cogency of the evidence; the respondent asserts that the issue of cogency is established by an asserted dying declaration

indicating that as the deceased lay dying, having been shot, he was asked what happened and who did it and he answered "Alcott". Further, a separate anonymous witness, having heard shots, immediately thereafter saw the applicant running with a gun in his hand towards the main road. Each of these witnesses identified the applicant from a photographic lineup. Without making any findings on same, that evidence can indeed be termed cogent.

14. That intended evidence points to the use of a firearm in a residential community on the Family Island of Exuma. It is asserted that the alleged victim was himself out on bail on a murder charge, a charge which accused him with the murder of the applicant's brother. Further, the deceased, according to the statements attached to the affidavit, indicated to others that he left New Providence to resettle in Exuma to try and start a new life. The statements also indicate that (according to the deceased), the applicant is involved in certain organized gang activity. For the purposes of a bail application, that information which informs whether there is a belief of involvement in gang activity is receivable.

15. Certainly no conclusions can be drawn on any such assertions, but the apparent circumstances of the instant matter the subject of this application, raises the specter of retaliatory killings. The deceased was charged with the murder of the applicant's brother and relocated to Exuma while on bail. The applicant, whom the deceased (albeit hearsay) statements assert was known to hang out in the Kemp Road area of New Providence, finds himself in the same small community of Rolleville which the deceased had retreated to, in order to get away from everyone. From the statements it can reasonably be concluded that this was a successful, planned hit on the deceased, even though he had taken steps to distance himself from New

Providence. Retaliatory killings raise the specter of further retaliatory killings, which, from the evidence in this matter, can extend to the smallest Family Island community. This raises the issue not only of the safety of the applicant, but also the safety of society.

16. The Court of Appeal of The Bahamas, in **Dentawn Grant v DPP (No. 59 of 2022)** stated:

> **"25. However, it cannot be gainsaid that the Judge was fully entitled to consider the safety of the Appellant as one of the factors for her to weigh in the scale pertaining to whether or not to grant the Appellant bail based on the strength of the material provided to her by the Respondent, namely, the Appellant's car had been shot at some days before the murders took place, an event the Appellant admitted occurred in his Record of Interview with the police.**
>
> **26. Part A of the First Schedule to the Bail Act states, inter alia as follows:**
>
> **"The Court shall deny bail to a defendant in any of the following circumstances — (b) where the Court is satisfied that the defendant should be kept in custody for his own protection or, where he is a child or young person, for his own welfare;"[Emphasis added]**
>
> **27. Once there is a basis for the Court to conclude that an accused person's life may be in danger if he is released on bail - and the attack days earlier on the Appellant provides such a basis the Court is obliged by the mandatory "shall", to deny bail to the**

Applicant. However, a caveat may be applicable here, to wit, if the Applicant is able to demonstrate to the Court that notwithstanding a finding that his life may be in danger if released on bail, he is able to minimise that risk either by relocation to another island or by remaining under house arrest, the Court ought to have regard to such conditions when deciding whether or not to grant bail.

28. In his submissions before us, Mr. Dorsett advised us that the Appellant was willing to relocate to another island if that was necessary to allay any fears that he may suffer the same fate as the alleged victims in his case. Unfortunately, this option was not placed before the Judge and canvassed in the court below; and the Judge cannot be faulted for not applying her mind to the efficacy of such a condition in the circumstances.

29. In the premises, the Judge's decision to deny bail to the Appellant on the ground that the Appellant's life may be in danger is explicable and cannot be said to be unreasonable because she has taken into account an irrelevant matter or failed to consider a relevant matter. She was entitled on that basis alone to deny him bail."

17. Further, the Learned President, in a concurring addition to the decision of the Court stated:

"42. I also agree with the disposition by Isaacs, JA, but would like to add a comment of my own. I am also of the view that having regard to the material before the Court that this murder appears to have been in retaliation to a previous attack on the Appellant.

There is not only a risk of the Appellant's safety if granted bail, but also a risk to the public's safety. Any retaliation against the Appellant puts members of the public at risk who may be in the area where any attack on the Appellant may take place. In the present case, the material before the Court does not suggest that the victim Brianna Grant was the object of the retaliation but was shot because she was with the intended victim at the time.

43. In the circumstances, I am satisfied that in addition to the safety of the Appellant, it is also in the interest of the safety of the public that the Appellant should be denied bail."

18. I find from all of the circumstances in respect of these allegations, and the circumstances of the applicant, and considering the provisions of the Bail Act, that the Respondent has placed sufficient information before the court as to cause me to conclude that there is a substantial risk that if released on bail, the applicant would not only interfere with the witnesses in this matter, and endanger public safety generally, but that he would himself be at risk, a risk which further endangers the safety of the public generally.

19. I have considered whether any conditions could be imposed which would prevent any witness interference, public endangerment and in particular keep the applicant safe. In relation to this issue, one of the means proposed by counsel for the appellant in **Grant** was that the "**Appellant was willing to relocate to another island if that was necessary to allay any fears that he may suffer the same fate as the alleged victims in his case**". In the instant matter however, it is noted from the asserted facts that the alleged victim in this matter tried that very thing, moving from New Providence to Rolleville, Exuma. That however proved ineffective as the

information provided in the statements suggest that he was hunted down, his residence identified, and subsequently assassinated. In the face of this stark fact, I do not consider that any condition could be imposed to allay the reasonable concerns about the safety of the applicant.

20. In these circumstances, I find that the Respondent has satisfied me that the Applicant ought to continue to be detained in custody.

21. His application for bail is therefore refused.

Dated this 9th day of June, A D 2023

Bernard S A Turner

Senior Justice