COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Criminal Side

2016/CRI/bal/No. 00412

BETWEEN

ERIC ARTHUR

Applicant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: The Honourable Mr Senior Justice Bernard Turner

APPEARANCES: Mr C Alexander Dorsette for the Applicant

Mr Basil Cumberbatch for the Respondent

HEARING DATES: 5 & 8 September 2022

RULING

1. By a written decision dated 8 August 2022, I had dismissed the present Applicant's previous application for bail. Two weeks after that dismissal, the applicant launched this present application, by a summons and affidavit filed on 24 August 2022.

2. In so far as the Court is aware, the applicant did not challenge that previous decision, instead, separate counsel from those who brought the previous application launched, on behalf of applicant, this application, as is his undoubted right, viz, **Richard Hepurn Jr. v Attorney-General (No. 2)** No. 135 of 2016, where it was stated:

> **"Every application for bail pending trial should be considered afresh. A judge considering the application should cast his mind to the usual considerations.... The judge must "... have regard to the previous finding on the application for bail, consider whether there is any new material relevant to the question of bail; and also consider whether there were existing circumstances at the time of the previous application which were not brought to the court's attention and [are] relevant to the grant of bail."**

3. Since present counsel seemed not to be aware of the previous decision, I adjourned the matter so that counsel could familiarize himself with that decision, since, as the decision cited indicates, the judge must have regard to the previous finding and consider whether any new material relevant to the question of bail is available.

4. The applicant is charged with the offences of conspiracy to commit attempted murder, contrary to section 89(1) and 292 of the Penal

Code, Ch 84 and attempted murder contrary to section 292(5) of the Penal Code. The offences are alleged to have been committed on 6 March 2022.

5. The respondent, the Director of Public Prosecutions, continued their previous opposition to bail and relied on the affidavit they had filed in the previous application, on 2 August 2022.

6. The requisite test for bail was laid out in the court's previous decision. The present affidavit, in relation to the question of new material, stated in paragraph eight of the affidavit:

> **"8. That the virtual complaint (sp) has no intention of prosecuting this matter and has provided the Director of Public Prosecution's office with an affidavit of withdrawal wherein he retracted his allegations against me. A copy of the affidavit is attached and marked as Exhibit 2."**

7. There is a striking parallel between this affidavit and the previous affidavit in support of the previous application for bail, in which there was also an affidavit by a witness to the allegations founding the present charges, in which that witness also purported to withdraw his allegations. In relation to this issue I observed the following in the previous decision:

> **"During the hearing, Counsel for the applicant also relied on a supplemental affidavit in support filed on 26 July 2022. The affidavit exhibits the affidavit of Franklyn Jerome Dean, a witness in this matter. The affidavit reads, in part:**

> **"... 2. That I made a complaint and a statement to the Police of The Royal Bahamas Police Force that it was Eric Arthur who made an attempted and conspiracy to commit murder.**
>
> **I did make a false statement against Mr. Eric Arthur.**
>
> **I do not wish to continue this action against Mr. Eric Arthur that is presently before the Supreme Court in the Commonwealth of The Bahamas.**
>
> **I am making this Statement of my own free will and that I was not forced or bribed or any promises to withdraw my statement against Mr. Eric Arthur that its of my own will."**

The affidavit of Franklyn Dean asserts that the affiant made a false report to the Royal Bahamas Police Force in respect of the applicant. This rather peculiar admission in affidavit form of the commission by the affiant of an offence himself directly contradicts his statement made to police regarding the incident in question and exhibited in the respondent's affidavit in response. This matter should be investigated."

8. In the instant application, the form of the pertinent affidavit purporting to withdraw the allegations is as follows:

> **"3. During the course of the investigation, I identified Mr. Eric Franklyn Arthur as the possible assailant and/or perpetrator in the aforesaid shooting incident leading to the subsequent**

arrest, charges being brought against and resultant detention of Mr. Arthur.

4. After some soul searching and careful assessment of the incident in question, I advised officers that I did not think that Mr. Arthur was the party responsible and/or the perpetrator of the aforesaid shooting incident and my ensuing injuries and that I am not interested in the prosecution of the charges against Mr. Arthur.

5. I make this Affidavit for the purpose of retracting any and all statement made and officially withdraw my complaint as I am not willing to testify against Mr. Arthur since I no longer believe him to be the party responsible and/or the perpetrator of the aforesaid shooting incident.

6. I have read and fully understand the contents of this Affidavit and I confirm that no fraud, force, violence or coercion of any kind whatsoever has been exercised against my person in the execution of this Affidavit. I am aware and fully understand that the execution of this Affidavit may result in the eventual dismissal of my complaint and/or charges against Mr. Eric Franklyn Arthur.

7. I am executing this affidavit knowingly, willingly and voluntarily of my own volition for whatever legal purpose this may serve."

9. The manner in which this affidavit came to be in the possession of the applicant is completely unexplained. As indicated in paragraph six

(ibid), it is merely attached to an affidavit of the applicant. In the previous application for bail, when the affidavit of another purported eyewitness was presented, that too was merely attached to a supplemental affidavit of the applicant, filed 26 July 2022 (helpfully with a copy of the voters card and national insurance card of the recanting affiant, to prove his identity). The pertinent portion of the applicant's affidavit at that time read:

> **"4. Attached is an Affidavit from Franklyn Jerome Dean, Date of Birth 9th October 1993, as "Exhibit E.A.1", Commonwealth of The Bahamas Voters Card in the name of Franklyn Jerome Dean Jr. as "Exhibit E.A.2 and The National Insurance Board Card No. 10624937 for Franklyn Jerome Dean as "Exhibit E.A.3".**

10. The Respondent described these affidavits themselves as evidence of witness tampering, a description contested by counsel for the applicant. On this issue, I note the statement contained in **Dennis Mather v Director of Public Prosecutions (No. 96 of 2020) Bahamas Court of Appeal, where Isaacs JA stated:**

> **"39. It is evident that the Judge found that the appellant had interfered with two of the Prosecution's witnesses. I have scoured the papers filed in the applications for bail made by the appellant but I have been unable to find any reference to his having interfered with two witnesses. There is only Inspector Turnquest's averment that the appellant, "... admitted that he had contact with the Applicant's (sic) mother (Loletha Heastie) who is a witness in this trial and that she allegedly told**

him "that she does not believe that I had anything to do with the said murder.". The other reference to witness interference by Inspector Turnquest was when she swore at paragraph 4 of her affidavit dated 12 December 2019 that the appellant had "also admitted to committing an offence contrary to section 4 of the Justice Protection (Amendment) Act, 2014". This "admission" could only relate to the "contact" the appellant had with Kenneth's mother since there was no other incident of witness contact or interference disclosed on the respondent's case.

40. As I understand the term "interference with a witness" it involves interference with a witness by unlawful means, such as violence, bribery, threats or improper pressure. It must be remembered that there is no property in a witness, to wit, just because the Prosecution has taken a statement from a witness and are likely to call them to give evidence does not prevent the Defence from taking a statement from the same witness. *However, an allegation of witness tampering or interference may be leveled against a person who seeks to speak to a witness who has already provided a statement for the Prosecution. This is particularly so where the witness changes their evidence.*"

(italics added)

From this analysis found in this decision, it would appear that the characterization of the filing of these affidavits as evidence of witness tampering is not inaccurate.

11. It is this aspect of this matter which is of greatest concern to this court, since in each of these two 'recanting' affidavits, the witness, who had each already provided the police with witness statements (which had been attached to an affidavit in opposition to bail previously), changed their evidence.

12. The presence of these two affidavits, one each filed in separate applications for bail by separate counsel on behalf of the applicant, are only explicable on the basis that there had to have been some form of contact between these witnesses and the applicant, for the affidavits to make their way to counsel for inclusion in these applications. Further, the language of each of the so called recanting affidavits show some legal knowledge, viz,. "..**I am executing this affidavit knowingly, willingly and voluntarily of my own volition for whatever legal purpose this may serve."**

13. In **Stephon Godfrey Davis v Director of Public Prosecutions (No. 108 of 2020) The Bahamas Court of Appeal,** in an appeal against the refusal of bail by a Judge of the Supreme Court, the Court of Appeal had this to say in relation to recanting affidavits in bail applications, under the rubric, The Appeal:

> **"Ground 6. - The learned judge erred in law by failing to address the issue of the recanting statement of the sole witness in the murder and two attempted murder charges.**
>
> **Ground 7. - The learned judge did not address the effect on the cogency of the evidence on the murder charge whereby two prosecution witnesses gave inconsistent statements as**

to who the driver of the vehicle was from which shots were fired."

32. These three grounds are considered together inasmuch as they may be addressed using the same logic and law. The question of the sufficiency of the Prosecution's evidence is a matter for a jury. This is not to say that a judge viewing the facts cannot form an impression about the strength of the Prosecution's case, for example, there is photographic or video evidence along with a tracking report obtained through an attached electronic monitoring device all of which showing that the accused person was at an entirely different location than where the offence is alleged to have happened, it would be perverse of a judge in those circumstances to view the case against that person as cogent .

33. However, where the case against the accused person is supported by statements of eyewitnesses or purported confessions that tend to suggest the applicant for bail may be involved in the offence charged, a judge may conclude that the evidence against the appellant is cogent.

34. Alleged inconsistencies in the evidence of witnesses and the recanting of statements and what weight may be attached to the evidence of such inconsistent or recanting witnesses are within the province of the jury; and does not call for an evaluation by the judge."

14. Guided by this decision, I am not required to evaluate the ultimate legal effect, if any, of these recanting affidavits, as that is within the province of the jury.

15. I am however required to consider the strength of the apparent evidence against the applicant in the instant matter. The respondent's previous affidavit opposing the application for the grant of bail exhibited the applicant's charge sheet, statements of the virtual complainant and an alleged eyewitness, together with the photo line-up used to identify the applicant, and a Voluntary Bill of Indictment of a pending matter.

16. Based on the information provided to the court previously, it cannot be said that the intended evidence against the applicant is non-existent or weak, indeed it could be said to be cogent and compelling.

17. The applicant has pending charges for the offences of rape and unlawful sexual intercourse. He has no previous convictions. In respect of the rape and unlawful sexual intercourse charges, the applicant was granted bail in 2018 and 2020 respectively.

18. A chronology of the applicant's pending matters history is as follows:

(i) when the offences which make up the subject matter of this application were allegedly committed, the applicant was on bail for the alleged unlawful sexual intercourse charge (2020).

(ii) At the time the unlawful sexual intercourse had been alleged, the applicant was on bail for the offence of rape (2018).

(iii) At the time the applicant was granted bail for the alleged rape, he had been granted bail in respect of the offences of stealing and receiving, in 2016.

19. Previously therefore, the applicant has been charged with an offence while on bail for another allegation. Given that each of the matters listed above are still pending, it would be incorrect to conclude that he has a propensity to commit offences while on bail as he has not been convicted for any of the offences.

20. Relative to the issue of an incentive to abscond, nothing was presented to demonstrate that the applicant has a propensity to do so. The affidavit in response filed on 1 April 2022 (from a previous application) is of note however. Paragraph 9 reads, in part:

"**...The applicant is charged with serious offences and if convicted faces a lengthy penalty, which the Respondents submits provides incentives to abscond. In addition, the Applicant has a long history of failing to appear to the Supreme Court for his matters, he was required to appear to each and every adjournment with respect to his previous bails, but has in the past failed to appear. A Bench Warrant issued in case no. 112/7/2020 is hereby attached, marked, and exhibited as "E.A.4"."**

21. Though this point was not addressed at the hearing by either Counsel for the applicant or respondent, it demonstrates the applicant has not always appeared for court on dates set while previously on bail.

22. Further, as indicated earlier, the presence of these so called recanting affidavits are themselves some evidence of witness interference.

23. As a result of these two concerns, I will consider whether such risks can be eliminated or minimized with the imposition of appropriate conditions.

24. During the hearing, Counsel for the applicant submitted that strenuous conditions could be imposed as a means to mitigate the risks of absconding or failing to appear for trial.

25. From the applicant's previous bail bond, conditions included:

a) reporting to the police station every Monday, Wednesday and Friday before 6:00 pm,
b) daily curfew between the hours of 7:00 pm to 6:00 am,
c) electronic monitoring,
d) an order to refrain from interfering with witnesses,
e) surrender of passport, and
f) an order that the breach of any such conditions would render the applicant liable to further remand.

26. The applicant has demonstrated an inability to abide by the conditions set by the court and in these circumstances, I find that an electronic monitoring device, nor sureties, nor reporting conditions, nor curfews have been effective in ensuring compliance with bail conditions, nor would they be effective in preventing the applicant from interfering with witnesses or

absconding and not appearing to take his trial or in committing other offences.

27. I do not believe that any other conditions can be imposed to mitigate such risks as most of the usual conditions have already been imposed.

28. In these circumstances, I find that the Respondent has satisfied me that the Applicant ought to continue to be detained in custody to await his trial dates, on the charges.

29. His application for bail is therefore refused.

30. The applicant is at liberty to appeal this ruling to the Court of Appeal should he disagree with its findings.

Dated this 15th day of September, A. D., 2022.

Bernard S A Turner

Senior Justice