COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Criminal Side

2019/CRI/bal/No. 00133

BETWEEN

MARIO BROWN

Applicant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: The Honourable Mr Senior Justice Bernard Turner

APPEARANCES: Mr Ian Cargill for the Applicant

Ms Abigail Farrington for the Respondent

HEARING DATES: 7, 14 & 21 November 2022

RULING

1. The Applicant is applying for bail for charges of Attempted Murder and Possession of a firearm with intent to endanger life, by a summons and affidavit in support, filed on 28 October 2022. The offences are alleged to have been committed on 4 September 2022.

2. The respondent, the Director of Public Prosecutions, opposes the application and filed an affidavit in response on 10 November 2022, together with a supplemental affidavit, on 14 November 2022.

3. The applicant's affidavit reads as follows:

> **1. "I am the Applicant in this matter.**
> **2. I was born on the 19th day of February, A.D., 1990 in the Commonwealth of the Bahamas and I am 32 years of age.**
> **3. I stand remanded on the following Charges:**
>
> **(a) ATTEMPTED MURDER: Contrary to Section 291 (1) B of the Penal Code Chapter 84.**
>
> **(b) POSSESSION OF A FIREARM WITH INTENT TO ENDANGER LIFE: Contrary to Section 33 of the Firearms Act. Chapter 213.**
>
> **There now shown and exhibited true copy of charge sheet as "Exhibit M.B.1"**
>
> **4. I was arraigned in Magistrate Court No. 4 on the 19th day of September, A.D., 2022, before Magistrate Mr. Shaka Seville. My next court date is set for the 28th October, 2022.**

5. I pleaded Not Guilty and will be defending these charges at trial. 6. Entered in my defence is an Affidavit from Richard Aldin Turnquest as "Exhibit M.B.2"

7. I respectfully request that this Honourable Court admit me to bail pending my further Court Appearances.

8. I do have a previous conviction before the court in the Commonwealth of The Bahamas.

9. I do have a pending matter before the court in the Commonweatth of The Bahamas.

10. Should this Honourable court admit me to bail, I will have accommodations at Baltic Avenue, New providence, Bahamas.

11. Prior to my incarceration I was employed in Water Sports, Larry Coco, New Providence, Bahamas.

12. I am a citizen of The Commonwealth of The Bahamas.

13. I respectfully request that this Honourable admit me to bail pending my further court appearances and for the following other reasons:

a. That I will be disadvantaged in my ability to adequately prepare my defence if I am further remanded.

c. I will be disadvantaged in my ability to support my three children, myself and assist my family members.

14. If I am granted Bail I will abide by all rules and regulations imposed by this Honourable Court.

15. I am a fit and proper candidate for Bail..."

4. What is expressed so innocuously in paragraph five of the affidavit as an affidavit in defence, is in fact an affidavit from the virtual complainant in respect of the charges of attempted murder and possession of a firearm with intent to endanger life.

5. That exhibited affidavit reads:

> **"I RICHARD ALDRIN TURNQUEST, Handyman of Leeward East, Twynam Heights on the Island of New Providence make oath and say as follows:**
>
> **1) On 4th September, 2022 there was an incident near Freddie's Barber shop, off Blue Hill Road. Shots were fired at me and police arrived on the scene.**
> **2) In the course of the police investigation, I was interviewed and was asked to participate in an I.D. parade. Certain pictures were presented to me, and I was asked to circle a photo and sign. I mistakenly circled a photo of a person who I now know to be Mario Brown.**
> **3) Mario Blown was not the person involved in the incident against me and I make this Affidavit for the purpose of stating that I wish to withdraw my statement with respect to the said identification.**
> **4) I make this Affidavit of my own free will and without undue influence of anyone.**
> **5) The contents of this Affidavit are correct and true.**
>
> **SWORN TO AT Nassau, The Bahamas this 23rd day of September A.D. 2022."**

6. The manner in which this affidavit came to be in the possession of the applicant's counsel for inclusion in an affidavit sworn by the applicant is completely unexplained. The affidavit itself is sworn within three weeks of the date of the alleged commission of the offence. Even more remarkably, it is sworn within a week of the purported photographic identification of the applicant by the purported witness and a mere four days after the applicant was actually charged with the said offences.

7. The affidavit of the respondent in opposition to the application refers to this so called 'affidavit in defence' as in fact evidence of witness tampering. The Respondent affidavit reads:

> **"....1. I am Counsel and Attorney-at-Law at the Office of The Director of Public Prosecutions and I am duly authorized to make this Affidavit on behalf of the Respondent from my own knowledge and from information received by me in my capacity aforesaid.**
>
> **2. That the purpose of this Affidavit-in-Response is to oppose the Applicant's Application for Bail.**
>
> **3. Save as hereinafter stated, no admissions are made regarding the assertions contained in the application on behalf of the Applicant in this matter.**
>
> **4. That the Applicant MARIO BROWN (Date of Birth: 19th February, 1990) is charged with one (1) count of Attempted Murder contrary to sections 292 of the Penal Code, Chapter 84 and one (1) count of Possession of a Firearm with Intent to Endanger Life contrary to section 33 of the Firearms Act,**

chapter 213, which is alleged to have been committed on Sunday, 4th september,2022.There is now produced and shown to me a copy of the charge sheet marked and exhibited as "S.D.-1".

5. That the aforementioned offences involved the use of a firearm and are offences of a serious nature.

6. That evidence in the matter is cogent. On Sunday, 4th September 2022, sometime after 2:00 p.m. the witness, Richard Turnquest was headed west onto Hospital Lane on his XZT125 Motor Bike. He recognized a male he knew only by his face, who was not wearing a mask. The male produced a chrome firearm and pointed it in his direction and soon he heard gunshots. In his attempt to avoid being shot Mr. Turnquest fell to the ground with the male continuing to fire gun shots in his direction. He was able to escape the male and hid behind a house. There is now produced and shown to me a copy of the statement of the complainant, Richard Turnquest marked and exhibited as "S.D.-2".

7. On Sunday, 4th September 2022, Richard Turnquest positively identified the Applicant as the man that he saw shooting at him with a chrome handgun. There is now produced and shown to me a copy of the identification statement and the 12 man photo lineup, marked and exhibited as S.D.-3, and S.D.-4 respectively.

8. That prior to the Applicant's incarceration for the present offences the Applicant has been convicted with violations of his bail conditions. There is now produced and shown to me a copy of the Antecedent form as S.D.-5.

9. That notwithstanding the purported Affidavit of withdrawal by the witness in the Applicant's present bail application, this is the second matter involving the Applicant in which witness has purportedly given a withdrawal statement. The Applicant has a pending matter for Murder, VBI No. 55/3/2019, in which the witness has purportedly given a withdrawal statement. There is now produced and shown to me a copy of the indictment marked and exhibited as "S.D. 6".

10. That there lies a high probability of witness tampering by the defendant and should be taken under consideration by this Honourable Court.

11. That there is nothing peculiar about the Applicant's circumstances that would suggest that his continued detention is unjustified.

12. That the Applicant is not a fit and proper candidate for bail at this time.

13. In the circumstances the Respondent requests that this Honourable Court in exercising its discretion not admit the Applicant to Bail.

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

8. On the issue of witness tampering and the effect, if any, of a so called recantation of a statement by a witness, I note the decision of The Court of Appeal 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 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)

9. In this matter, within a week of the witness giving a statement to the police identifying the applicant in these proceedings as the shooter, he purportedly changed his evidence to withdraw his statement that it was the applicant. That purported change is recorded in an affidavit which has made its way to the applicant's counsel for inclusion in this bail application. From the analysis in **Mather**, applied to this matter, that amounts to witness tampering.

10. Each case stands on its own facts, but the conclusion of apparent witness tampering is buttressed by the fact, as evidenced by a supplemental affidavit filed by the respondent, that in an earlier matter in which the applicant was charged with murder, there was again an affidavit from a witness apparently recanting his testimony. In two separate matters involving this applicant therefore, witnesses who had each already provided the police with witness statements, changed their evidence.

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

> **"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.*"

(italics added)

12. As stated in paragraph 34 of **Davis** (above), 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.

13. The factors to be considered in a bail application are found in section 4(2)(c) of the Bail Act, which reads:

"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),

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.

14. 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."

15. Finally, Part A states:

"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.

(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."

16. In respect of the issue of the potential for witness interference, as earlier stated, there is apparent witness tampering in the instant matter.

17. In the decision of The Bahamas Court of Appeal in **Cordero McDonald v The Attorney-General SCCrApp. No. 195 of 2016**, the Court stated:

> **"1. The appellant was charged in the Supreme Court on 18 July 2016 with two counts of attempted murder, and two counts of possession of a firearm with intent to endanger life allegedly committed on 26 June 2016.**
>
> **2. At the time of his arrest and charge, the appellant was on bail in respect of a pending charge of armed robbery; and as a condition of that bail, he was ordered 3 to wear an electronic monitor. Counsel noted that the appellant has no previous convictions."**

And then went on to indicate, at paragraph 21:

> **"21. Inexorably, attempted murder is considered a serious offence. The penalty for attempted murder is the same as for murder, except for the death penalty. In addition to the presence of that factor weighing against the grant of bail in this case, there is the other factor that the appellant was on bail when charged with an offence similar to that in respect of which he was already released on bail. The existence of these factors would support a finding of substantial grounds for believing that the applicant would fail to surrender to custody or appear at his trial; or commit an offence while on bail; or interfere with witnesses or otherwise obstruct the course of justice.**

> **22. Notwithstanding however, the presence of the aforementioned factors in this case, the nature of the evidence against the appellant is of utmost relevance, as it is in all cases, for it underpins the reasonableness of the suspicion of the commission of the offences by the appellant, and consequently, the basis for arrest and deprivation of his liberty in relation thereto."**

And finally, at paragraph 34:

> **"...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."**

18. As I am required to consider the strength of the apparent evidence against the applicant in the instant matter, I note that the respondent's affidavit opposing the application for the grant of bail exhibited the applicant's charge sheet, the aforementioned statement of the virtual complainant, together with the photo line-up used to identify the applicant, a pending VBI charging the applicant with murder and the applicant's antecedents.

19. 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.

20. As stated the applicant has a pending charge of murder before the Supreme Court. He also has a previous conviction for the relatively minor offence of disorderly behavior and the offence of Violation of Bail conditions, for which he was convicted in October 2022 and given a fine of $7500.00 or nine months, together with being placed on probation for eighteen months, or nine months for a breach of the terms of the probation.

21. The applicant therefore was charged with this offence while on bail for a murder allegation.

22. Relative to the issue of an incentive to abscond, nothing was presented to demonstrate that the applicant has a propensity to do so. As indicated however, the antecedent form attached to the affidavit in response indicates that the applicant has been convicted of bail violation offences.

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

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

25. 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.

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

a) reporting to the Central Police Station every Monday, Tuesday, Wednesday, Thursday and Friday before 6:00 pm,

b) daily curfew between the hours of 10:00 pm to 6:00 am,

c) Electronic Monitoring,

d) an order to refrain from interfering with witnesses,

e) an order that the breach of any such conditions would render the applicant liable to further remand.

27. In relation to the Electronic Monitoring, that requirement was lifted, upon an application by the applicant, in June of 2022.

28. Having regard to his conviction for violation of Bail conditions, 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.

29. 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.

30. 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.

31. His application for bail is therefore refused.

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

Dated this 28th day of November, A. D., 2022.

Bernard S A Turner

Senior Justice