COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Criminal Side

2021/CRI/bal/No. 00205

BETWEEN

MARVIN AUGUSTIN

Applicant

And

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: The Honourable Mr Senior Justice Bernard Turner

APPEARANCES: Mr Levan Johnson for the Applicant
Ms Skyler Deveaux for the Respondent

HEARING DATE: 13 February 2023

RULING

TURNER Snr J

The applicant herein is applying for bail, by way of a summons filed 4 January 2023, in respect of one count of murder, which is alleged to have occurred on 6 August 2022.

2. His pithy affidavit in support of the application for bail, reads as follows:

> "..
>
> **2. I was born on the 21st day of June, 1999, in the Commonwealth of the Bahamas and I am 23 years of age.**
>
> **3. I stand remanded on the following Charges:-**
>
> **(a) MURDER: Contrary to Section 29(1) (B) of the Penal Code, Chapter 84.**
>
> **There now shown and exhibited true copies of the charge sheet as "Exhibit M.A.1"**
>
> **4. I was arraigned in Magistrate court No. 11 on the 12th day of August A.D. 2022 before Magistrate Mrs. Subosula Swain. My matter was adjourned to the 19th January 2023**
>
> **5. I respectfully request that this Honourable Court admit me to bail pending my further Court Appearances.**
>
> **6. I do have a previous conviction before the court in the commonwealth of The Bahamas.**
>
> **7. I do have a pending matter before court in the commonwealth of The Bahamas**
>
> **8. Should this Honourable court admit me to bail, I will have accommodations at Dean Street, New Providence, Bahamas.**

1. I am Bahamian

2. I respectfully request that this Honourable Court admit me to bail pending my further Court Appearance 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 myself and assist my family.

13. I am a fit and proper candidate for Bail

.."

3. The Respondent objected to the application and filed an affidavit on 16th January 2023, which reads, in part:

"....

(4) The Applicant, along with his co-accused, is presently charged in respect of the offence of Murder, contrary to sections 291 (1)(b) of the Penal Code, Chapter 84, which is alleged to have been committed on 6th August, 2022.

(5) The Voluntary Bill of Indictment is scheduled to be presented in respect of this matter is scheduled to commence on the 30th January 2023 before Magistrate Court #11.

(6) The aforementioned offence involves the use of a firearm and is an offence of a serious nature.

(7) The Respondent verily believes that the evidence against the Applicant is cogent. Attached hereto and marked as "D.T. 1", "D.T. 2", "D.T.3" and "D.T. 4", respectively, are the statements of

an Anonymous Witness (2 statements), the 12- man photo gallery and a report from Metro Security Solutions in respect of this matter. Same indicates that the witness saw three (3) male occupants of a black coloured Nissan Note, one of whom he later identified as the Applicant, who was the driver of the vehicle. The witness, thereafter, observed one of the occupants of the vehicle in question shoot the deceased, and then flee the scene in the vehicle being driven by the Applicant, via Farrington Road. Further, the report from Metro Security Solutions, dated the 10th August, 2022, places the Applicant in the area in question and, at the time of the incident, demonstrates that same was leaving the area of Farrington Road at a high rate of speed.

(8) The Respondent verily believes that due to the nature of the offence and the cogency of the evidence against the Applicant, the Applicant has sufficient incentive to abscond, should this Court exercise its discretion and grant bail to the Applicant.

(9) The Applicant, presently, has a pending matter before the Courts in the Commonwealth of The Bahamas. Attached hereto and marked as "D.T 5" is the Indictment in respect of the matter of The Director of Public Prosecutions v Marvin Augustine & Romero Rolle; VBI No.: 190/8/2021, which is presently fixed for trial before His Lordship Jus. Hilton. The said trial is scheduled for the 30th September, 2024.

(10) The Applicant has a previous conviction for the offence of Stealing. Attached hereto and marked as "D.T 6" is a copy of the Applicant's Criminal Records Antecedent Form.

(11) The Respondent verily believes that the Applicant will commit further offences, should this Honourable Court exercise its discretion and grant bail to the Applicant, given that the prosecution witnesses in this matter are known to the Applicant.

(12) The Respondent verily believes that there has been no unreasonable delay.

(13) The Respondent verily believes that the Applicant should be kept in custody for his own safety.

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

4. The applicant had previously applied for bail in respect of this matter, which application was dismissed on 24th October 2022 by a written decision by Weech-Gomez J.

5. He is of course free to subsequently apply for bail, upon an unsuccessful application, as he has now done, by an affidavit sworn 28 December 2022, some two months after his previous application was dismissed.

6. As noted in paragraph 9 of the respondent's affidavit, the applicant had a pending charge at the time of this charge. That charge is also a charge of murder. What the application for bail did not say, was that the applicant had only been released on bail for that charge on 27th July 2022, and ten (10) days later was alleged to have committed this offence.

7. As noted, the applicant had a previous conviction for the offence of stealing, for which he was sentenced to one (1) year, on 20th December 2019.

8. Within a year of being released from BDOCS after serving his sentence, the applicant would have been charged with the alleged murder of Stervante Moss (which murder is alleged to have taken place on 14th June 2021). It is in relation to this allegation that the applicant was released on bail in July 2022.

9. 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),....."**

10. 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."

11. Counsel for the respondent submitted that having regard to the antecedents of the applicant, and the fact that the applicant was on bail for murder when charged with another alleged murder, that further beliefs adumbrated in paragraphs 8 to 14 of the respondent's affidavit are all reasonable and borne out by the evidence of his character and the attendant circumstances.

12. The way in which these issues are to be treated with are laid out in the decision of The Bahamas Court of Appeal in **Jevon Seymour v Director of Public Prosecutions, No. 115 of 2019**. Paragraph 66 of that decision states:

"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."

13. Paragraph 70 concludes the review of this issue 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."**

14. A bail application is not to determine where a person is guilty of any offence, but to determine whether an applicant ought to be placed on bail, or whether there is any sufficient basis made out to determine that he should be remanded into custody to await his trial.

15. I note that according to the antecedent form, the applicant has a criminal conviction for stealing. Whereas this conviction does not approach the seriousness of an allegation of murder, it does mean that the applicant cannot put forward his 'good character' as positive feature of his circumstances.

16. In addition, as indicated, the applicant also has another pending murder charge, for which he was on bail when charged with this offence.

17. The respondent asserted that the intended evidence was cogent, consisting of both an anonymous witness who is purported to have identified the applicant as being the driver of a vehicle from which a person exited, followed by gunshots and this same person running back to the car with a gun in his hand. The vehicle driven by the applicant is then said to have left the area.

18. As noted, the applicant was on bail for a charge of murder and a condition of his bail was that he was to be electronically monitored. Information from the monitoring center is also included as intended evidence against the applicant. That information places the applicant in the vicinity of the incident and could be said to be consistent with the anonymous witness information. Without making any findings on same, the evidence, can indeed be termed cogent and points to the use of a firearm in a public place.

19. This is what the court had stated in respect of an application for bail by the applicant in relation to the first murder allegation, shortly after he had been charged with that offence in 2021:

> **"4. From the statements attached to the affidavit, it is apparent that a part of the prosecution's case in this matter is that the alleged killing was in retaliation for an alleged shooting, by the deceased, of the applicant. Further, it is apparent the applicant both knows several of the critical witnesses in this matter, and where they live....**
>
> **9. Further what is disclosed as the intended evidence, indicates that there are patent concerns as to the safety of certain witnesses, who from the evidence are both known to the applicant and in one instance is an actual family member. The apparent**

circumstances also points to concerns as to the safety of the applicant himself, as it is clearly asserted that the motive for the alleged offences was retaliation, as indicated, for a prior attack on the applicant. Without drawing any conclusions as to whether it will happen, the court cannot close its eyes to the possibility of such a further attack, which is not removed by the death of the alleged assailant, but exacerbated."

20. These concerns, which are factors to be considered in the Bail Act, have now been addressed by the Court of Appeal of The Bahamas. In **Dentawn Grant v DPP (No. 59 of 2022)** the Court 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."

21. 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 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."

22. 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 there is also a substantial risk to the applicant himself.

23. It should be noted that the applicant had only been out on bail for ten days before being re-charged. It cannot be said that that risk has been reduced. Further, it is a notorious fact that the deceased in the instant matter was himself a murder accused, out on bail.

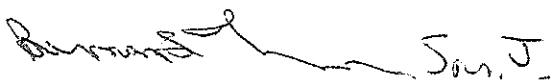
24. Having considered whether any conditions could be imposed which would prevent any witness interference, public endangerment and keep the applicant himself safe, I note that the applicant, while on bail for murder for less than two weeks, was arrested and charged on apparently credible information for another allegation of murder.

25. As noted, he was being electronically monitored, when he is alleged to have committed that offence. The information from the electronic monitoring device may well end up further implicating the applicant, or depending on that evidence, exonerating him, but what is clear is that the presence of the device did not prevent him from being apparently involved in this alleged offence. I do not see what other conditions could be imposed which would reduce these stated risks. Further, I consider that the applicant ought to be remanded into custody for his own safety, and also to protect the public generally from the risks of retaliatory attacks.

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

27. His application for bail is therefore refused.

Dated this 27th day of February, A D 2023



Bernard S A Turner
Senior Justice