COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCrApp. No. 210 of 2023

B E T W E E N

DENERO TISHON WHYMS

Appellant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Mr. Justice Evans, JA
The Honourable Mr. Justice Turner, JA

APPEARANCES: **Mrs. Ciji Smith-Curry, Counsel for the Appellant**

Mr. Uel Johnson, Counsel for the Respondent

DATES: **21 December 2023; 30 January 2024; 29 February 2024**

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Criminal appeal – Bail – Appeal against the refusal of bail - Whether the appellant should be kept in custody for his own safety – Whether the appellant should be kept in custody for the safety of the Prosecution's witnesses - Nature and strength of the evidence against the appellant - Sections 4, 5 and 6 of the Bail (Amendment) Act, 2011

The appellant was arrested on 11 September 2023 for a murder he is alleged to have committed on 10 September 2023. He filed an application for bail on 20 September 2023. That application was denied on 15 December 2023 on the basis that the court was of the view that: there has been no delay in the progression of the matter, he was not of good character, he was considered a flight risk and having regard to the amount of retaliatory killings the court was concerned for his safety and that of the general public who may become unintentional targets. The court was also of the view that there were no conditions which could be implemented to ensure the appellant would return for his trial. The appellant has appealed the learned judge's decision to deny him bail.

The appellant submits that the judge erred in denying his bail application for the following reasons: she failed to consider the presumption of innocence, the decision is unreasonable having regard to

the primary reasons the judge provided for denying bail and having regard to all the circumstances surrounding the appellant's case.

Held: appeal dismissed.

There is nothing disclosed in the Judge's decision or Counsel's submissions to suggest that the Judge failed to consider the appellant's presumption of innocence.

The gravamen of this appeal really turns on that aspect of the Judge's decision to deny bail on the ground of fear for the safety of the appellant should he be released on bail and her concern about the safety of the general public. There is also the issue of her finding that the appellant is not a person of good character based on his previous conviction for a long past dangerous drugs offence and the information provided by the Central Intelligence Bureau.

The safety of the defendant should he be admitted to bail should be a concern for a judge because the Bail Act mandates that a court must have regard to the issue of "whether the defendant should be kept in custody for his own protection." While this is a factor to be considered by a court it must not be regarded as allowing the State carte blanche to detain persons for unduly long periods of time. Courts must balance the peril faced by the individual against his right to be at liberty; and the possible threat that his release may pose to the safety of the general public and the good order of the society.

The Court is of the view that there are no conditions that it could impose to secure the appellant's safety and the safety of the Prosecution's witnesses in light of the evidence before the Court.

Birkett v. James [1978] AC 297 applied
Jevon Seymour v The Director of Public Prosecutions SCCrApp. No. 115 of 2019 considered

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J U D G M E N T

Judgment delivered by the Honourable Mr. Justice Isaacs, JA:

1. The appellant challenges the decision of Madam Senior Justice Cheryl Grant-Thompson ("the Judge") delivered on 15 December 2023 that denied his application for bail. In his Notice of Appeal, he seeks to have the Judge's decision set aside and for the Court to admit him to bail based on the following grounds:

"1 The Learned Judge erred by failing to consider the Appellant's presumption of innocence,

2 That the decision is unreasonable having regard to the primary reasons the Learned Judge gave for denying bail to the Appellant; and

3 The decision is unreasonable having regard to all the circumstances surrounding the Appellant's case and the fact that:

i. the Appellant merely faces allegations which are not equivalent to the commission of them;

ii. the Appellant has previous convictions which are dissimilar in nature;

iii. the Appellant has no other pending matters;

iv. there is no evidence before the Court to support any suggestions that any Prosecution witness is at risk if the Appellant is released on bail;

v. there is no evidence before the Court to support any suggestions that the Appellant's safety is at risk if released on bail;

vi. there is no evidence before the Court to support any suggestions that the Appellant is a flight risk,

vii. there is no evidence before the Court to support any suggestions that the Appellant would commit any offence if released on bail; and

viii. conditions do exist which could be imposed, even if stringent."

2. The appellant was charged with murder and arraigned in the Magistrate's Court on 15 September 2023. He was remanded into custody. On 20 September 2023, he applied to be admitted to bail but that application failed.

3. The Judge reduced her decision denying bail into a written judgment dated 15 December 2023, wherein she recounted the submissions of the parties, canvassed various authorities pertaining to bail applications and concluded at paragraph 34 as follows:

> **"34. The Applicant is denied bail for the following reasons:**
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> **a. The Court is of the view that there has been no delay in the progression of this matter. The offence which the Applicant allegedly committed occurred on the 10th of September, 2023. The Applicant was arrested on the 11th of September, 2023 and subsequently charged with the aforementioned offence. On the 15th of September, 2023, the Applicant was arraigned in Magistrate's Court Number 9 before Chief Magistrate Mr. Roberto Reckley and charged with one count of Murder. The Voluntary Bill of Indictment ("VBI") with respect to this matter is presently being prepared and the service date for the VBI is the 16th of November, 2023. On the 20th of September, 2023, the Applicant then filed his application for bail by way of Summons supported by Affidavit;**
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> **b. This Court is of the view that the Applicant is not a man of good character, which is serious concerns for this Court. The Applicant has one (1) previous criminal conviction (04/03/19) for the offence of Possession of Dangerous Drugs. In addition to this the Respondent has been reliably informed by the Central Intelligence Bureau of the Royal Bahamas Police Force that the Applicant is associated with the "GROVE HOT NIGGAS" in which he functions as a "Soldier" and "Shooter". Taking these factors into consideration this Court finds that the Applicant is not a man of good character;**
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> **c. The Court finds that the Applicant is a flight risk. The Court is not satisfied that if granted bail the Applicant would return for trial, due to the nature and seriousness of the offence in which the Applicant is charged with, coupled with the nature and seriousness of the offences that are currently pending against the Applicant;**
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> **d. The Court takes judicial notice of the retaliatory Killings in The Bahamas and is concerned for the safety**

of the Applicant. The Court therefore remands the Applicant for his own safety having regard to the current conditions which prevail in the country; and

e. The Court is of the view that there are no conditions that can be implemented to ensure the Applicants return for trial. The Court also remands the Applicant for the safety of the public who may be caught in the "cross-fire" if the Applicant is released on bail."

4. Before entering upon a consideration of the grounds of appeal I mention those statutory provisions which apply to this appeal include the following, taken from sections 4 through 6 of the Bail (Amendment) Act, 2011:

"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;

(b) Repealed

(c) should not 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 of a written statement giving reasons for the order of the release on bail.

(2A)…

(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 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.

(3)…

(3A)…

(4)…

(5)…

(6) At the hearing of an application for bail, it shall be the burden of the applicant to satisfy the court that bail should be granted.

…

FIRST SCHEDULE

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) <u>whether the defendant should be kept in custody for his own protection</u> 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 is so released or with an offence which is punishable by a term of imprisonment exceeding one year;

> **(g) <u>the nature and seriousness of the offence and the nature and strength of the evidence against the defendant</u>;**
>
> **(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." [Emphasis added]**

5. I also am alive to the oft quoted dicta of Lord Diplock in **Birkett v. James** [1978] AC 297 where he stated:

> **"…an appellate court ought not to substitute its own 'discretion' for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he has decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either (1) where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account; or (2)…in order to promote consistency in the exercise of their discretion by the judges as a whole where there appear, in closely comparable circumstances, to be two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations."**

GROUND ONE: The Learned Judge erred by failing to consider the Appellant's presumption of innocence

6. In her submissions in support of the appellant's appeal, the appellant's Counsel, Mrs. Ciji Smith-Curry, posits that the Judge failed to consider the appellant's presumption of innocence. I note that in paragraph 34(a) of her reasons for denying bail the Judge states: "**The offence which the Applicant <u>allegedly committed</u>**" from which I infer her recognition of the appellant's presumption of innocence. There is nothing disclosed in the Judge's decision or Counsel's submissions to suggest that the Judge failed to consider the appellant's presumption of innocence. Therefore, this ground fails.

GROUND TWO: That the decision is unreasonable having regard to the primary reasons the Learned Judge gave for denying bail to the Appellant.

GROUND THREE: The decision is unreasonable having regard to all the circumstances surrounding the Appellant's case the fact that …

7. Grounds 2 and 3 were conjoined and the points raised therein addressed as enumerated by the Judge in her paragraph 34. On the issue of whether there had been any unreasonable delay in the prosecution of the appellant's case, Mrs. Smith-Curry submits that this issue was not one for the Judge to consider since that was not a complaint raised by the appellant. Mrs. Smith-Curry adverted our attention to the Court's (differently constituted) decision in **Jevon Seymour v The Director of Public Prosecutions** SCCrApp. No.115 of 2019, where Madam Justice Crane-Scott, JA said at paragraph 55:

> **"55. In our view, the judge's "finding" that there was no unreasonable delay was not a relevant factor which a judge was required to take into account in the exercise of his discretion on an application for bail which was clearly made under section 4(2)(c) of the Act and did not also involve a complaint that the appellant had not been or would not be tried within a reasonable time so as to engage section 4(2)(a). By impermissibly "finding" there had been no unreasonable delay, the learned judge erroneously conflated the issues before him, had regard to an irrelevant consideration and in the overall exercise of his discretion under section 4(2)(c), took into account, in denying bail to the appellant, something which he ought not to have. In the circumstances, his ultimate decision to deny bail is flawed and once again, plainly wrong."**

8. However, in my view, this inclusion of the issue of unreasonable delay by the Judge was merely an indication that she had within her contemplation section 4(2)(a) of the Bail Act (indeed as she states in paragraph 12 of her ruling) and Article 19(3) of the Constitution. Although the Judge does cite no unreasonable delay as one of her reasons for the denial of bail to the appellant, there are another four reasons listed. In the circumstances, I do not consider this point as having any significant adverse impact upon the decision ultimately made by the Judge. For the sake of completeness, the respondent had raised the issue of unreasonable delay in their submissions before the Judge (see paragraph 3. c. of her ruling), hence the Judge's reference to that matter is entirely explicable.

9. The gravamen of this appeal really turns on that aspect of the Judge's decision to deny bail on the ground of fear for the safety of the appellant should he be released on bail and her concern about the safety of the general public. There is also the issue of her finding that the appellant is not a person of good character based on his previous conviction for a long past dangerous drugs

offence and the information provided by **"the Central Intelligence Bureau of the Royal Bahamas Police Force that the Applicant is associated with the "GROVE HOT NIGGAS"** in which he functions as a "Soldier" and "Shooter"." See b), d) and e) of paragraph 34 of the Judge's ruling.

10. In regard to the Judge's misgiving about the appellant's safety she stated at paragraph 30 of her ruling that she took judicial notice of apparent retaliatory killings and defendants who have been granted bail who have themselves become victims of homicide. The Judge referred to an affidavit filed in the case of **Tarrico Bowleg v Director of Public Prosecutions** that contained the averment that between 14 January 2022 and 17 December 2022, some twenty-two individuals outfitted with electronic monitoring devices ("EMDs") were murdered.

11. The Judge had also been asked by the respondent to take judicial notice of a list prepared by Chief Superintendent Michael Johnson in May 2023, of twelve individuals who were killed between 25 September 2017 to 6 March 2023, as "collateral damage", that is, they were not the intended targets.

12. Were those sufficient reasons for the Judge to deny bail? Those answers will have to await a case where the questions' resolutions are dispositive of the issue. In my view, there is no need to resort to an analysis of these issues when the solution lies in the evidence placed before the Judge and of which she had cognisance, to wit, the confrontation the intended appellant was alleged to have had with a witness in his case, Dion Scavella, in the cell at the Criminal Investigations Department. At paragraph 16 of the affidavit of Vashti Bridgewater the following appears:

> **"16. According to the statement of Dion Scavella, while he was in the cell at CID, he saw the officer bringing the Applicant in the cell. <u>As the Applicant got closer, he told him, how he could cut that scene and try to kill him and he knew him long time. That a verbal altercation ensued. As a result the officers carried the Applicant to another station.</u> This verbal altercation was noted in the report of D/C4012 Bethel."" [Emphasis added]**

13. Contrary to the contention contained in ground 3 iv of the appellant's grounds that "**there is no evidence before the Court to support any suggestions that any Prosecution witness is at risk if the Appellant is released on bail**", Ms. Bridgewater's averment discloses the evidence.

14. This then is evidence adduced by the respondent to demonstrate the appellant's propensity to violence as suggested by Crane-Scott, JA in **Jevon Seymour**, at paragraph 68 of her judgment:

> **"68. If the appellant was in fact a threat to public safety or public order; or <u>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</u>. 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." [Emphasis added]**

15. The safety of a defendant should he be admitted to bail should be a concern for a judge because Part A of section 2(B) of the Bail Act mandates that a court must have regard to the issue of "**whether the defendant should be kept in custody for his own protection**." While this is a factor to be considered by a court it must not be regarded as allowing the State carte blanche to detain persons for unduly long periods of time. Courts must balance the peril faced by the individual against his right to be at liberty; and the possible threat that his release may pose to the safety of the general public and the good order of the society.

16. For all of the above reasons, these grounds fail.

Conclusion

17. In my judgment, there is no condition that the Court could impose to secure the appellant's safety and the safety of the Prosecution's witnesses in light of the confrontation in the cell which, had it occurred in a more public setting, could have had a more deadly outcome, even if other factors favoured the appellant's release on bail. Further, electronic monitoring devices nor curfews are adequate measures to ensure his safety and that of the general public when regard is had to paragraphs 10 and 11 above, to wit, the number of persons slain while wearing EMDs and while being mere bystanders.

18. For the sake of completeness, I have considered the possibility of relocation by the appellant pending his trial, but I am mindful of at least one instance where the evidence suggested that notwithstanding the defendant on bail moving to a Family Island, he was hunted down and killed. Thus, I hold the view that relocation is not a viable option in this case.

19. Despite the very able advocacy of Mrs. Smith-Curry, I am satisfied that the decision of the Judge to deny bail for the appellant is sound and I will not disturb it. The Judge's decision is upheld for the reasons outlined in my judgment. The appeal is dismissed.

The Honourable Mr. Justice Isaacs, JA

20. I agree.

The Honourable Mr. Justice Evans, JA

21. I also agree.

The Honourable Mr. Justice Turner, JA