

COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCrApp. No. 121 of 2023

B E T W E E N

CORDERO McDONALD

Applicant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: **The Honourable Sir Michael Barnett, President, Kt**
The Honourable Mr. Justice Isaacs, JA
The Honourable Mr. Justice Smith, JA

APPEARANCES: **Mr. Geoffrey Farquharson, Counsel for the Appellant**
Mr. Timothy Bailey, Counsel for the Respondent

DATES: **17 October 2023; 30 January 2024**

Criminal Appeal –Bail Application – Bail Act - Appeal against the refusal of Bail

The Appellant was charged with Attempted Murder and Possession of Firearms and remanded into custody pending the trial. He made an application for bail in the Supreme Court. The Learned Judge, after hearing the application refused to give the applicant bail. The applicant has appealed pursuant to Section 8A (1) of the Bail Act, against that decision and seeks to have the order of the Learned Judge set aside and admitted to bail. He appeals the learned judge’s decision on numerous grounds, inter alia, that “the learned Judge misdirected herself when she found that the mere existence of an outstanding allegation against the Appellant was sufficient evidence, on its own, to justify the denial of bail. The learned Judge erred by failing to consider the nature and quality of the evidence supporting the allegations against the Appellant. The Learned Judge failed to consider or properly to consider what conditions could be imposed so as to minimize any perceived risk. The learned Judge failed to exercise her discretion judicially by failing or refusing to consider the issues required to be considered on an application for bail.”

After hearing the parties, the Court reserved its decision.

Held: the appeal is dismissed; the applicant will remain in custody.

The Judge’s reliance on the appellant’s outstanding case as a factor to be weighed in the scale of whether bail should be granted cannot be faulted.

The factors the Judge considered are the selfsame factors a court is required to consider when deliberating on an application for bail: **Cordero McDonald v Attorney General** SCCrApp. No. 195 of 2016. It is difficult to find that the Judge has somehow fallen into error in this regard.

There has been nothing disclosed to suggest that the Judge exercised her discretion wrongly by taking into account the wrong principles of law or took into account matters that she ought not to have taken into account or did not take into account matters that she should have taken into account or exercised her discretion in a manner that no reasonable judge could have exercised their discretion

Cordero McDonald v The Attorney General SCCrApp. No. 195 of 2016 considered

R v Gumbs 19 Cr. App. R 74 applied

Richard Hepburn v The Attorney General SCCrApp & CAIS No. 276 of 2014 considered

REASONS FOR DECISION

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

1. On 17 October 2023, we heard the submissions of Counsel and reserved our decision which we now render.
2. The appellant seeks to appeal the decision of Madam Justice Guillimina Archer-Minns (“the Judge”) made on 14 June 2023, wherein the Judge denied the appellant’s application for bail. By a notice filed on 16 June 2023, the appellant sets out the grounds upon which he relied as follows:

“1. The learned Judge misdirected herself when she found that the outstanding allegation against the Appellant was sufficient evidence, on its own, to justify the denial of bail on the ground that there was a real substantive risk that the Appellant might reoffend if admitted to bail.

- 2. The learned Judge misdirected herself when she found that the mere existence of an outstanding allegation against the Appellant was sufficient evidence, on its own, to justify the denial of bail.**
- 3. The learned Judge erred by failing to consider the nature and quality of the evidence supporting the allegations against the Appellant.**
- 4. The Learned Judge failed to consider or properly to consider what conditions could be imposed so as to minimize any perceived risk.**

5. **The learned Judge failed to exercise her discretion judicially by failing or refusing to consider the issues required to be considered on an application for bail.**
6. **The learned Judge erred in failing to admit the Appellant to bail when there was in fact produced no evidence whatsoever which suggested that he would abscond, interfere with any witness, commit further offences or otherwise interfere with the proper operation of the justice system.**
7. **That the overall conduct of the matter was such as would cause a disinterested observer to apprehend that the Learned Justice harboured a preference for the Crown and against the Appellant.**
8. **That the Appellant’s constitutional right to a speedy resolution of his application for bail was breached by the Learned Justice.”**

Brief background

3. At paragraph 1 of the Judge’s ruling she outlines the history of the appellant’s contact with the authorities hence I reproduce it here:

“1. The Applicant, Cordero McDonald (D.O.B. 28th September, 1992) (hereinafter referred to as the (“Applicant”)) has been charged with Attempted Murder being concerned with others contrary to section 292 of the Penal Code, Chapter 84, Possession of an Unlicensed Firearm contrary to section 5A of the Firearms Act, (3 counts) and Possession of Ammunition contrary to section 9(2)(a) of the Firearms Act, Chapter 213 (2 counts) relative to alleged events of 24 March, 2023 concerning the Virtual Complainant, Theo Williams. The Applicant was previously granted bail by the Court of Appeal in July of 2018 for Attempted Murder (2 counts) and Possession of a Firearm with Intent to Endanger Life and was again granted bail in June 2021. The Applicant has now made application for admission to bail via Summons and Affidavit filed on 13 April, 2023 for the aforementioned charges and the Respondent filed its Affidavit in Response dated 3 May, 2023 in opposition thereto.”

4. The appellant’s position was that he has not been convicted of any offence, he has adhered to his bail conditions and he had an alibi supported by witnesses as to his presence other than the place where the offences were committed. He also submitted that the evidence against him was inherently weak based as it is on what may be described as a fleeting glance in difficult circumstances. He assured the judge that he would abide by whatever conditions the court may impose for the grant of bail.

5. At paragraph 4 of her ruling, the Judge outlined the respondent's case against the appellant and their reasons why he should not be granted bail:

“4. The Respondent’s Affidavit provides inter alia that: (i) the Applicant has a series of pending matters including Attempted Murder and Possession of a Firearm with Intent to Endanger Life with a set trial date of 6 November, 2023; (ii) in relation to the subject charges, the evidence is cogent and reliance placed on the evidence of Police Sargent 3358 Alcott Forbes who witnessed the incident and followed the assailants thereafter allowing him to observe the license plate number of the vehicle, clothing description and the driver of the vehicle who is known to him from the area as the Applicant in this matter; (i) Sargent Forbes also identified the Applicant via a 12 man photo lineup and same exhibited (iv) the offences for which the Applicant is before the court involved the use of a firearm and are of a serious nature and there is a concern for public safety; (v) the severity of the penalty for such offences upon conviction provides a sufficient incentive for the Applicant to abscond and commit other offences while on bail; (vi) the Applicant has demonstrated through his conduct that there are no conditions that can be imposed to prevent the Applicant from reoffending and (vii) there is nothing peculiar about the Applicant’s circumstances that would suggest that his continued detention is unjustified nor has there been any unreasonable delay in the prosecution of the matter.”

6. 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) (deleted)

(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 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) whether the person should be kept in custody for his own protection or, where he is a child or young person, for his 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) the nature and seriousness of the offence and the nature and strength of the evidence against the appellant;

(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."

7. I begin with the observations of Lord Hewart, LCJ in **R v Gumbs** 19 Cr. App. R 74 pertaining to the function of an appellate court when considering an appeal against the exercise of a discretion by a lower court:

"Two principles from time to time have been mentioned in this Court, and in some cases they may have to be considered together. One is that this Court never interferes with the discretion of the Court below merely on the ground that this Court might have passed a somewhat different sentence; for this Court to revise a sentence there must be some error in principle."

8. Adderley, JA said in **Richard Hepburn v The Attorney General** SCCrApp & CAIS No. 276 of 2014, at paragraphs 42, the question for the Court was not whether the members of the Court would have granted bail to the applicant had they heard the bail application, but whether the judge exercised his discretion judicially. He continued at paragraph 43:

"If there was no error of law and the judge exercised his discretion reasonably within the allowable parameters, it is not the function of an appellate court, and it would be wrong in principle to set aside the decision of the judge below simply because we would have come to a different decision."

9. See also paragraph 12 of the Court's decision in **Cordero McDonald v The Attorney General** SCCrApp. No. 195 of 2016.

Ground 1 - The learned Judge misdirected herself when she found that the outstanding allegation against the Appellant was sufficient evidence, on its own, to justify the denial of

bail on the ground that there was a real substantive risk that the Appellant might reoffend if admitted to bail.

10. The appellant complains that the Judge **“misdirected herself when she found that the outstanding allegation against the Appellant was sufficient evidence, on its own, to justify the denial of bail”**.
11. Part A of the First Schedule to the Act states, inter alia, as follows:

“(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;”

12. In the premises, the Judge’s reliance on the appellant’s outstanding case as a factor to be weighed in the scale of whether bail should be granted cannot be faulted. This ground is without merit.

Ground 3 - The learned Judge erred by failing to consider the nature and quality of the evidence supporting the allegations against the Appellant

13. The appellant submitted that the purported identification of the appellant by Sargent 3358 Alcott Forbes is a classic “Turnbull” type of identification, to wit, fleeting glance at night under difficult circumstances.
14. Police Sargent 3358 Alcott Forbes is alleged to have witnessed the incident and followed the assailants thereafter allowing him to observe the license plate number of the vehicle, clothing description and the driver of the vehicle who was known to him from the area as the appellant. Moreover, Sargent Forbes also identified the appellant while viewing a twelve man photographic lineup.
15. At paragraph 13 of her ruling, the Judge stated:

“13. The Court during its deliberation also had regard to the evidence which was adduced before it upon which the Respondent intends to rely at trial particularly the evidence of Sargent 3358 Alcott Forbes. On the evidence adduced, the Court is of the view that the same raises a reasonable suspicion of the commission of the offences by the Applicant such as to justify the deprivation of his liberty by arrest, charge and detention as enunciated in McDonald 2017 supra.”

16. It is by now trite law that a judge is not expected to weigh up evidence that may be adduced in a trial during a bail hearing. Allen, P said at paragraph 34 of **Cordero McDonald** (supra):

“34. As this Court has said on many occasions, 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.”

17. This ground is without merit and, as a consequence, is dismissed.

Ground 4 - The Learned Judge failed to consider or properly to consider what conditions could be imposed so as to minimize any perceived risk

18. At paragraph 14 of her ruling the Judge stated:

“14. Also considered were conditions that could be imposed that would minimize the risks involved should bail be granted. The Court took note that bail conditions inclusive of reporting conditions and the outfitting of an electronic monitoring device were previously imposed upon the Applicant this notwithstanding, the Applicant has found himself charged with similar offences. Therefore, the court is of the view that there are no conditions which can effectively be imposed that would minimize the risk involved with the likelihood of the Applicant committing other offences”

19. As the above comments of the Judge demonstrates, that is, she **“took note that bail conditions inclusive of reporting conditions and the outfitting of an electronic monitoring device were previously imposed upon the Applicant this notwithstanding, the Applicant has found himself charged with similar offences”**, she did consider the option of conditions that could be imposed; and she concluded that they would be ineffective. Thus, there is no merit in this ground.

Ground 5 - The learned Judge failed to exercise her discretion judicially by failing or refusing to consider the issues required to be considered on an application for bail

20. This ground complains that the Judge **“failed to exercise her discretion judicially”**.

21. At paragraphs 15 and 16 of her ruling the Judge said:

“15. The Constitution of The Bahamas and the relevant provisions of the Bail Act having been considered together with the Affidavits of both counsel and their respective submissions, this Court so finds that unreasonable delay is not an issue in this matter and therefore gave consideration to the following factors:

i. The strength of the evidence against the Applicant;

- ii. Pending matters concerning the Applicant;
- iii. The competing interest of the Applicant as to his presumption of innocence and right to his liberty with the rights of the public, its safety and security;
- iv. The applicant previously being granted bail and now charged with similar offences;
- v. the seriousness of the offences charged and; (sic)
- vi. bail conditions which could be imposed to minimize the risks involved with granting bail.

16. The Applicant was initially denied bail but was subsequently granted bail by the Court of Appeal for offences of Attempted Murder and Possession of an Unlicensed Firearm with Intent to Endanger Life. The Applicant finds himself before the court once again charged with like offences all of which are serious offences involving the use of a firearm which more often than not result in dangerous harm and in certain circumstances, death. The Court is of the view that there is sufficient evidence as to the Applicant's involvement in the offences for which he has been charged and whilst on bail for like offense. If granted bail, it is the Court's further view that the Applicant would likely commit other offences and pose a heightened risk to public safety and security as well as potential prosecution witnesses.

All aforementioned factors having been considered, the Court will not exercise its discretion to grant the Applicant bail at this time. Bail is denied.

Should there be any change in circumstances in the interim, the Applicant is at liberty to reapply.”

22. The factors the Judge considered are the selfsame factors a court is required to consider when deliberating on an application for bail: **Cordero McDonald v Attorney General SCCrApp. No. 195 of 2016.** It is difficult to find that the Judge has somehow fallen into error in this regard; and we do not so find. This ground is meritless.

Ground 7 - That the overall conduct of the matter was such as would cause a disinterested observer to apprehend that the Learned Justice harboured a preference for the Crown and against the Appellant.

Ground 8 - That the Appellant’s constitutional right to a speedy resolution of his application for bail was breached by the Learned Justice.”

23. The appellant proffered these two grounds for our consideration but inexplicably failed to advance any submissions that would cause us to address them with any degree of cogency. Thus, they are approached together.
24. In his written submissions, Counsel for the appellant identified the “Issues” that were to engage the Court’s attention. They were as follows:
1. **Did the Judge fall into error when she found that the allegations of prior criminal behaviour disclosed in the pending charges suggested that the appellant had a propensity to commit criminal offences; and did these pending charges suggested that he would interfere with the Crown's witnesses?**
 2. **Was a purported identification made as a result of a fleeting glance, in the dark under difficult circumstances amount to cogent evidence?**
 3. **Was there any sufficient evidence before the Learned Judge to justify her conclusion that there were no conditions which could be imposed so as to minimize the risk of Absconding, reoffending or interfering with witnesses or the justice system?**
25. In the premises, there has been nothing shown to support these two grounds; and accordingly, both are dismissed as lacking in merit.

Conclusion

26. For the reasons stated above, there has been nothing disclosed to suggest that the Judge exercised her discretion wrongly by taking into account the wrong principles of law or took into account matters that she ought not to have taken into account or did not take into account matters that she should have taken into account or exercised her discretion in a manner that no reasonable judge could have exercised their discretion.
27. Thus, the appeal against the Judge’s refusal of the grant of bail is dismissed.

The Honourable Mr. Justice Isaacs, JA

The Honourable Sir Michael Barnett, P

The Honourable Mr. Justice Smith, JA