REPORTABLE

CASE NO.: CC 38/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JULIUS DAUSAB
APPLICANT

and

THE STATE
RESPONDENT

CORAM: **NAMANDJE AJ**

Heard on: 16 September 2010

Delivered on: 20 September 2010

JUDGMENT: BAIL APPLICATION

NAMANDJE, AJ.: [1] In any democratic society with a Constitutional Bill of Rights such as ours, the right to personal liberty and freedom counts amongst the most fundamental human rights. Such rights can only be curtailed in terms of the law to the extent that such curtailment conforms to the Constitutional principles.[1] The limitation

1 Article 7 and Article 22 of the Namibian Constitution.

provisions should be and are interpreted restrictively so that the essential content of the entrenched right, such as the right to personal liberty, is not negated. Our memories, as a nation that emerged from a repressive colonial rule twenty years ago, are still fresh that the right to liberty was carelessly negated and in fact devalued.

[2] The above notwithstanding, it remains constitutionally accepted that those who may be accused, in terms of the law, of committing crimes and detained pending their trials, may only win their freedom back prior to the conclusion of the criminal proceedings if their release does not prejudice the administration of justice in general.[2]

[3] Due to the fundamental nature and importance of the right to personal liberty and freedom, any Court confronted with a question whether or not to release an accused person on bail pending his/her trial should, irrespective of the perceived seriousness of the criminal charges faced, approach such a question fully conscious of the fact that persons accused of committing criminal offences are constitutionally presumed innocent until proven guilty, and that bail pending trial may only be refused if after a proper assessment of all facts the Court is of the opinion that the release of the accused shall be prejudicial to the administration of justice, and no bail condition would be sufficient and appropriate to address the feared prejudice to the administration of justice if the accused were to be released.[3]

[4] Because of the revulsion of the Namibian people at our brutal past – the era when hundreds of Namibians had to endure, in many cases, prolonged pre-trial detentions where they were subjected to harsh conditions that were invariably

2 That they are not likely to abscond, they would not pose a danger to society, they would not interfere with the police investigation and witnesses. These are not *numerus clausus*.

3 See: S v Branco (1) SACR 531 at 533 A to B and at 537 A to C; S v Acheson 1991 NR 1.

associated with detention[4] – the right to personal liberty, and the presumption of innocence until proven guilty according to law are now subjects of a constitutional emphasis and protection.[5] It must however be remembered that the ever-increasing number of violent crimes in our country and the growing number of offenders committing further offences while on bail, or suspects evading justice, may be partly a product of failure on the part of the law enforcement agencies to carry out their duties effectively and, at times due to Courts giving less consideration to the needs of the administration of justice and the public interest when dealing with all aspects of serious offences. It is therefore imperative that there should be, at all times during a bail application, a meaningful and active inquiry as to whether the release of the accused would be against the interests of the public and the administration of justice or not.

[5] The people of Namibia, guided by their Constitution, continuously organise themselves as a society in a way to achieve and maintain peace, security, law and order. Democracy and the desired socio-economic development, we should all know, would only thrive and be attained respectively if crime is effectively detected, prevented and investigated. And those who are accused of committing crimes are prosecuted. The Prosecutor-General is vested with the power to prosecute in the name of the Republic of Namibia.[6] She performs a public duty for and on behalf of the people of Namibia.[7] The public therefore has a sovereign and sacred interest in the properly functioning and effective criminal justice system. It would feel let down when the prosecution of suspected criminal offenders fails to meet its legitimate expectations and aspirations, in

4 *Inter alia* loss of liberty and freedom, boredom, loss of self-esteem, loss of opportunities, loss of employment, overcrowded detention cells. See S v Vilakazi & Others 2000(1) SACR 140 (W). Although the conditions associated with detention in our country may have improved in many respects after Independence, detention remains the harshest pre-trial mode of securing attendance of the accused in Court.

5 See: Article 5 of the Namibian Constitution.

6 See: Article 88(2)(b) of the Namibian Constitution.

7 See: S v Nassar 1994 NR 233 (HC) at 247 C – D.

particular but not limited to when criminal suspects evade justice or commit further offences after being released on bail. The frustration with which the public would respond to the criminal justice system, i.e. perceived not to be responsive to public legitimate needs, may lead to an unintended abdication of the responsibility to run the criminal administration system from those who are constitutionally responsible to the members of the public themselves such as in the form of vigilante groups. When that happens, the unlawfulness of such is patent and the consequences that flow from that are usually unpleasant. This is usually because vigilante groups, although created with good intentions, unless properly regulated are not subject discipline of the police force and not subject political and administrative oversight. That in itself would undermine both the Constitution and the integrity of the criminal justice system.[8] Any Court hearing a bail application especially where the relevant offences are alleged to be serious and committed in brutal and violent circumstances should therefore carefully and fairly consider the question of the ever-present direct or collateral risk if an accused is released notwithstanding circumstances that warrant his remand in custody pending trial. Central to the role of the Judiciary is the protection of the integrity of the criminal justice system. When suspects evade justice following their release on bail, an injustice is done to the law-abiding citizens in general, and to those who are directly affected by crimes.

[6] I have referred to the above Constitutional principles and factors to demonstrate that while the right to personal liberty is fundamental and important, on the other hand, it is in the public interest that when the Prosecutor-General carries out her prosecutorial function, her efforts in that regard are not stifled, *inter alia*, by the release of the accused in circumstances where such a release jeopardises the chances of achieving an effective and delay-free progress of the criminal proceedings against the accused or

8 See: S v Hena & Another 2006 (2) SACR 33 at 41 – 43.

where such a release makes a further prosecution an impossibility.[9]

[7] It is with the above competing interests[10] in mind that I will consider whether the bail application brought by the accused in this matter should be granted or not.

BACKGROUND

[8] On 4 June 2009 at a certain farming unit at Ovitoto, Otjozondjupa Region, two women – a mother and daughter – were, the State alleges, shot dead. The youngest deceased was a girlfriend of the accused.

[9] Following the death of the two deceased the accused was arrested on his way from Ovitoto to Otjiwarongo. He was charged with murder of the two deceased, and was further charged in terms of the Arms and Ammunition Act, Act 33 of 1996.[11] He made his first appearance in the Okahandja Magistrates Court on 5 June 2009. His case was subsequently remanded on a number of occasions for further investigation until it was transferred to this Court after the Prosecutor-General directed that he be arraigned in this Court. The matter has now been postponed for plea and trial to a date during July 2011. This bail application is thus being heard fifteen months after the arrest and detention of the accused and about ten months before his trial commences.

THE ACCUSED'S PERSONAL CIRCUMSTANCES

[10] The accused is a single 41-years old male. He is a Namibian national. Prior to

9 *Inter alia* where the accused person absconds from justice or commits suicide after his release.

10 The right to liberty and freedom *vis-a-vis* the need to avoid a release of the accused where such a release jeopardises the administration of justice.

11 Contravention of sections 2 and 33 thereof.

his detention he worked as a truck driver. He had small-scale businesses, namely a cash loan, a welding business and butchery. He did not give sufficient and useful details on the above businesses. He testified that such businesses are currently not operational due to his incarceration.

[11] He testified in evidence in-chief that he has nine children. However, under cross-examination he only listed seven children as opposed to the nine children he alleged he has in evidence in-chief. This contradiction was not clarified in re-examination. The children, according to the accused are currently being taken care of by acquaintances and friends. The youngest child is four years old while the eldest is twenty years old.

[12] The accused wants to be released to take care of his children, to take charge of his businesses and to look after his livestock. He has two houses,[12] two vehicles, and some livestock with an estimated value of about N$240,000.00. His monthly work salary before his arrest was an amount of N$5,000.00. He does not have family members beyond the Namibian borders. His passport expired during 2008. Before 2008, in the course of his work he used to travel out of the country.

[13] The accused testified that he has a previous conviction of driving under the influence of liquor.[13] He did not disclose the fact that he has a pending case on a charge of theft. How serious the pending case is, remains unknown to this Court as the nature and value of the goods alleged to have been stolen were not disclosed. It was the accused's duty to prove on a balance of probabilities that the pending case should play a

12 No proof of ownership was produced. This is important in view of the fact that the accused testified that such houses may be used as some form of security if released.

13 This previous conviction, in my opinion, plays a limited role in determining whether or not bail should be granted in this matter.

minimal role when I determine whether or not to grant him bail. He failed in this regard.[14]

THE STATE'S EVIDENCE

[14] At the outset of the hearing of the State's case a number of documents were, by agreement, handed in as exhibits. Among the documents accepted as evidence was the State pre-trial memorandum in which a number of questions were posed to the accused for purposes of curtailing issues at the trial, and to which the accused has since responded. Significantly, the accused has admitted having been found in possession of a firearm at the time of his arrest, and which firearm has since been positively identified as having fired the spent cartridges found at the scene of the crime. The accused further admitted in his responses, albeit with some qualifications, to have stated to one Adriaan Louw that "*I shot dead my girlfriend and her mother*". The *post mortem* reports relating to the two deceased were also handed in, as well as the photo and sketch plans of the scene of the crime. An affidavit in terms of section 212 (4)(a) and (8) of the Criminal Procedure Act[15] deposed to by one William Onesmus Nambahu employed by the State was also handed in by agreement. Nambahu is a forensic analyst with experience in, *inter alia*, ballistic analysis. On the basis of his affidavit the firearm found with the accused was positively linked to the spent cartridges alleged to have been found at the scene of the crime.

[15] At the beginning of the hearing the State disclosed its grounds of objection to the release of the accused as:

14 Although in some jurisdictions accused persons are statutorily obligated to disclose a pending case, I am of the opinion that fairness and justice in our jurisdiction, at the stage of a bail application, demand disclosure by the accused of both previous convictions and pending cases. See *Criminal Procedure Handbook*, Bekker *et al*, 8th ed., para 9-3, page 160.

15 Act 51 of 1977 as amended.

i) the fear that the accused is likely to abscond if released;

that if released the accused is likely to commit further offences; and
that it will be against the interest of the administration of justice if bail is granted to the accused.

[16] The State called Warrant Officer Reinhardt Maletzky, an experienced police officer, having worked as a police officer for over twenty-two years.

[17] In short, Warrant Officer Maletzky testified that on 4 June 2009 he was summoned to the scene of the crime together with other officers and found the bodies of the two deceased. At the scene he collected evidence linking the accused to the shooting and killing of the two deceased. He made arrangements with other police officers in Otjiwarongo to be on the lookout for the accused who was alleged to be on his way to Otjiwarongo from the crime scene. The accused person was later arrested by one Inspector Karuxab of the Otjiwarongo police. In the presence of the witness at a later stage spent cartridges were found in the vehicle driven by the accused. A firearm was found in possession of the accused. Blood-stained blankets were found in the vehicle. Further, blood stains were found on the accused's trousers and in his car.

[18] He further testified that he obtained a statement from one witness who is a former work colleague of the accused[16], to the effect that the accused had informed him that he shot and killed the two deceased.[17] On the basis of the investigation he carried out and the exhibits obtained from the scene of the crime and items found in the accused's vehicle, Warrant Officer Maletzky contended that the State has a strong case. He further alleged that the two deceased persons were shot and killed in a brutal manner. He expressed his fear that if the accused were to be released there is a possibility that he would abscond. He referred to the ease with which a person can cross the Namibian borders.[18] He further testified that given the violent manner in which the offences were committed he fears that the accused will commit further offences. He testified that the accused has a theft case pending and has a previous conviction of driving under the influence of liquor. He emphasised the fact that the accused on his way from Ovitoto, where the offences were committed, to Otjiwarongo drove past a

16 Adriaan Louw.

17 This is admitted by the accused person in his responses to the State pre-trial memorandum.

18 This, in my opinion, is a bare and loose allegation which the Court must not, in general, regard as a main and useful consideration. There must be some facts on the basis of which it may be found that the accused is likely to take advantage of the border situation to abscond.

number of police stations before being arrested about 30 to 40 kilometres to Otjiwarongo. He criticises the conduct of the accused in that respect. He stated that if the accused had nothing to do with the murder of the two persons, in view of his admission to have been present at the place and time of shooting, one would have expected him to at least alert the police of the death of his girlfriend and her mother. The accused's actions in that respect, in Warrant Officer Maletzky's opinion, were not of an innocent person.

[19] He further testified that it will be in the interest of the public if the accused is remanded in custody pending his trial. In this regard he pointed out that members of the concerned community where the offences were committed organised themselves and publicly demonstrated their anger and shock at the Magistrates Court where the accused made his Court appearance. The community, the witness testified, handed a petition to the concerned Magistrate. I must be quick to point out that a public demonstration against a particular accused person on its own is not necessarily indicative of the fact that it would be in the interests of the public for the accused person to remain in custody pending his trial. Further, given the common staffing situation at a number of Magistrates Courts in our country where in most cases Magistrates Courts are run by one Magistrate, the practice of handing petitions to judicial officers who may end up sitting on the cases of the concerned accused persons, in some cases to hear bail applications or to conduct preliminary trial steps such as taking of a section 119[19] plea should be discouraged, if not completely jettisoned. Petitions in such situations can fairly be handed to the prosecutors who represent the public and the State's interests in criminal proceedings. Judicial officers are expected to be impartial when they hear cases. If the public petitions are relevant such can and must be produced by the State in Court in terms of the rules of evidence.

19 Of the Criminal Procedure Act, as amended.

DISCUSSION

[20] In a bail application the fact that the accused bears the onus to prove on a balance of probabilities that his release will not be prejudicial to the administration of justice does not mean that the State is relieved of a duty to lead evidence in support of its objection to the release of the accused on bail.[20] Both parties during the bail application are under obligation to place sufficient factual materials before Court to assist it in balancing the two competing interests and arriving at a decision fair and just to both the accused and the State.[21]

[21] There are no rigid procedural or substantive rules to the effect that in a bail application, in particular where a serious offence is alleged to have been committed, the accused has a more difficult duty of convincing the Court to grant bail and the State is less burdened with a duty in supporting its grounds of objection to bail. Both parties in a bail application, in the interests of justice, must at all times work towards placing sufficient information that is available to them before the Court. If the parties take their responsibility of addressing relevant factors at the bail hearing lightly, Courts of law may end up giving bail in cases where, should the parties have properly carried out their duties, bail would never have been granted; while in some cases bail may end up being refused when, if sufficient information was placed before the Court, it may have been granted with or without conditions.

[22] *In casu*, if one has regard to the documents handed up as exhibits and in particular the photo plan, it is clear that the two deceased met their respective deaths in the most brutal circumstances. Indeed the shooting of the two deceased, it appears to me, was committed with beastly cruelty and distressing savagery.

[23] That being the case, it follows that the charges faced by the accused are serious. While it may be correct that the accused is not compelled to address the merits during the bail application hearing, depending on the circumstances of a particular case and the

20 See: S v Branco *supra* at 531, para H – I.

21 See: Charlotte Helena Botha v The State, unreported, case number CA 70/95, judgment delivered on 20 October 1995 at p. 28 – 31.

evidence proffered on the merits by the State, a decision by the accused person not to address the merits may turn out to be fatal.[22] I recognise, however, that there may be cases where the accused, understandably for strategic reasons or on account of an inherent risk if he were to enter into the merits at that stage or for some other good reasons, may justifiably be entitled not to address the merits during the bail application.[23] While this Court respects the choice of the accused in this matter to exercise his right to remain silent, I found no cogent and justifiable reasons for him opting to remain silent in the circumstances of this case. His silence, for reasons to follow below and the conclusion I will make, is likened to a spectacular own goal.

WAS IT PROVED ON A BALANCE OF PROBABILITIES THAT THE ADMINISTRATION OF JUSTICE WOULD NOT BE PREJUDICED BY THE RELEASE OF THE ACCUSED PERSON PENDING HIS TRIAL?

[24] I am of the opinion that the approach followed by a Court seized with a bail application in exercising its discretion to grant or refuse bail remains the same even after the amendment that was introduced to the Criminal Procedure Act,[24] save that the Courts have now been given a more active role and a slightly wider discretion when conducting the inquiry into whether the release of the accused on bail will be against the public interest and the administration of justice or not. The inquiry involves the making of a value-ridden assessment of all the facts relating to the traditional factors attendant to bail applications. However, as pointed out above, such factors are not *numerus*

22 See: Charlotte Helena Botha *supra* at p. 32, third paragraph thereof

23 Some of the reasons could be the complex nature of the charges at the early stage of the criminal proceedings, bail application being heard at an early stage in a complex matter where the accused is of less sophistication and has not yet received a legal counsel. The list is not exhaustive. On the other hand, where investigation is complete and the accused person has received copies of the police docket content and has had a reasonable time to prepare, one would expect him to be able to at least address the merits although not to the extent required during the trial

24 The amendment to Act 51 of 1977 introduced by section 3 of Act 5 of 1991, which makes it possible for the Court to refuse bail even if it is satisfied that the accused may not abscond in cases where the accused is in custody in respect of an offence referred to in Part IV of Schedule 2 on the basis of the public interest or the administration of justice.

clausus. The discretion of the Court is therefore exercised in the way as stated by this Court in S v Pineiro 1992 (1) SACR 577 (Nm) at 580 C to D where the Court cited the passage from Du Toit *et al* in *Commentary on the Criminal Procedure Act*, and in his notes to s. 60 thereof at 9 – 8 B which reads as follows:

> "*In the exercise of its discretion to grant or refuse bail, the court does in principle address only one all-embracing issue: will the interest of justice be prejudiced if the accused is granted bail? And in this context it must be borne in mind that if an accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced. Four subsidiary questions arise. If released on bail, will the accused stand his trial? Will he interfere with State witnesses or the police investigation? Will he commit further crimes? Will his release be prejudicial to the administration of law and order and the security of the State? At the same time the Court should determine whether any objection to release on bail cannot suitably be met by appropriate conditions pertaining to release on bail* ..."

[25] Except for the allegations that the accused, faced with very serious offences[25], may be induced to abscond because of the likelihood of a very harsh punishment if convicted, the State presented no other good evidence that the accused is likely to abscond. This Court, nevertheless, still has serious doubts whether the accused person will stand his trial if released. This is in view of the very serious charges he is facing coupled with the fact that on the basis of evidence presented by the State in this bail application he indeed has a strong case to answer. Further, the accused's credibility as witness was somewhat tainted, in particular because of his evidence relating to the number of children he has. It appears to me that the accused attempted

25 Two counts of murder, and two charges in terms of the Arms and Ammunition Act.

to exaggerate the number of his children. The attempt to exaggerate the number of his children was, it appears, made to somehow solicit sympathy from this Court and sway it to grant bail. He further failed to disclose his pending theft case. The cumulative effect of the above is that the accused has not won the confidence of this Court that he is likely to stand his trial if released on bail.

[26] The accused person did not testify on the merits of the charges and did not disclose his defence. He refused to answer State counsel's questions on the merits. In view of the unchallenged State evidence which makes out a strong case it becomes difficult to answer the question whether, if released, the accused is likely to commit further offences or not. The accused's silence on the merits when he has already been provided with the content of the police docket, and his palpable failure to disclose the basis of his defence did not assist him. Consequently the Court did not, in any measure, get the assurance that it is safe to free the accused without the risk of endangering the public. What could have prompted the violent shooting of the two deceased? Was it caused by intoxication? Was it because the accused was unlawfully attacked and then acted in self-defence? Was it because of some psychiatric condition that caused the pulling of the trigger with such fatal consequences? If the Court does not know the motive for the killing of the two people, how safely can it release the silent accused who did not dispute at this stage the strong and incriminating evidence against him and did not disclose his defence? This Court is asking the aforesaid rhetoric questions to demonstrate the difficulties it has in making a proper inquiry whether the release of the accused shall endanger the public or not. The difficulty in this respect is borne out by the failure of the accused to address the merits. It would be an open risk for the Court, in a bail application of an accused facing a serious offence such as the killing of two persons committed in a violent and brutal manner, to release the accused without a question whether the accused will be a danger to society having been properly addressed to the satisfaction of the court. Such risk cannot be a subject of a second guess.

[27] Having found that it has not been proved that the accused is likely to stand his trial, or that he will not be a danger to society, it follows that it will not be in the interest of the public and the administration of justice for the accused to be released pending his trial. The accused's claim to the right of presumption of innocence until proven guilty, while real and legitimate, is significantly weakened by the fact that the strong and incriminating evidence presented by the State was not disputed and the accused's defence was not disclosed during his bail application.[26]

26 See: Abraham Brown v The State, unreported case number I58/2003, judgment delivered by the High Court on 28 April 2004; see further: S v Du Plessis 1992 NR 74 (HC) at 82 – 85.

[28] I have given consideration to the possibility of releasing the accused person subject to appropriate conditions, however, given the risk that he may be a danger to society if released, I found no appropriate conditions which would safely and sufficiently allay the Court's fear in that respect. Accordingly, in the result I make the following order:

1. The accused's bail application is refused.

The accused is remanded in custody pending his trial.

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NAMANDJE, AJ.

ON BEHALF OF THE ACCUSED:	MR G. NEVES
INSTRUCTED BY:	NEVES LEGAL PRACTITIONERS
ON BEHALF OF THE STATE:	MR J. EIXAB
INSTRUCTED BY:	OFFICE OF THE PROSECUTOR-GENERAL