REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 15/2013

In the matter between:

JOHANNA LUKAS **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Lukas v State* (CC 15/2013) [2013] NAHCMD 334 (13 November 2013)

Coram: PARKER AJ
Heard: **4 – 5 November 2013**
Delivered: **5 November 2013**
Reasons: **13 November 2013**

Flynote: Bail – Application for – Balancing Act – Presumption of innocence of the applicant and his or her right to personal liberty against interests of society – Factors considered in determination of application – Real risk that the applicant will interfere with witnesses – Seriousness of the crimes and severity of sentences that would be imposed on accused if convicted.

Summary: Bail – Application for – Balancing Act – Presumption of innocence of the applicant and his or her right to personal liberty against interests of society – Factors considered in determination of application – Real risk that the applicant will interfere with witnesses – Seriousness of the crimes and severity of sentences that

would be imposed on accused if convicted – Accused refused bail in court below – Accused brought fresh application in the court having been refused bail in lower court – The real risk that applicant will interfere with child girl witnesses who are also the complainants contributed heavily in refusal of bail by lower court – Court was satisfied the State has in the court established the existence of the real risk that the applicant will interfere with witnesses – The only new factor in the court is applicant now nursing a two-month old baby – Court was satisfied that the applicant and her baby are being cared for humanly in the Walvis Bay prisons – Court also found that the State was prepared to keep the applicant's two other young children in a safe place – Consequently, application was dismissed.

JUDGMENT

PARKER AJ:

[1] The applicant (accused 1) and accused 2 (not before this court in the present proceedings) have been arraigned before the court in a criminal matter. The applicant faces a total of 11 counts, that is, five counts of trafficking in persons in terms of the Prevention of Organized Crime Act 29 of 2004, five counts of rape in terms of Combating of Rape Act 8 of 2000 and one count of soliciting or enticing a child to the commission of a sexual act or an indecent or immoral act in terms of the Combating of Immoral Practices Act 14 of 1980 (as amended).

[2] The legal practitioners who had represented the applicant in previous proceedings withdrew as her legal practitioners of record. The court, therefore, asked the applicant if she would want the matter postponed to enable her to seek legal representation. Her response was that she would represent herself. As will become apparent shortly, it is important to note that before the lower court the applicant and accused 2 applied for bail but the learned magistrate refused the application.

[3] In her address to the court the applicant sought to place certain facts before the court which Ms Nyoni, counsel for the State, disputed. For that reason it became

necessary to put the applicant in the witness box for her to place the facts in evidence so that those facts could be tested by cross-examination. By a parity of reasoning, the State witnesses also testified on oath and their evidence was tested in cross-examination.

[4] On the evidence I make the following factual findings. Apart from a two-month old baby the applicant has two other children, namely, a one-year old child and a three-year old child. The fathers of the children are unemployed and he is not able to look after the children. Additionally, the applicant desires to be admitted to bail so that she could return to her employment. Ms Nyoni submitted that all these grounds were placed before the lower court. The only ground which is new in the present application is that she now has a two-month old baby and the applicant does not think it is safe to be held with her in custody awaiting her trial.

[5] I reiterate the finding that all the grounds which the applicant now places before this court were placed before the learned magistrate, apart from that concerning the two-month old baby, and yet the learned magistrate refused her application for bail. The most important factor that carried great weight in the mind of the learned magistrate is the real risk that the applicant will interfere with State witnesses. There is nothing that the applicant placed before this court in the present proceedings which would persuade this court that she will not interfere with the State witnesses. In this regard the following factual findings are relevant and weighty. Two of the complainants are child girls, that is a 13-year old girl and a 14-year old girl, and one of them is the applicant's cousin, and they are State witnesses. The applicant and the witnesses live in the same small location and know each other very well. The evidence of State witness Margareth Richter, a Social Worker, who dealt with this case, which I accept as possibly true, is that the 14-year old child girl informed her that she was scared of the applicant and that she feared the applicant would harm her.

[6] For these reasons, I am satisfied that the State has established that there is a real risk that the applicant will interfere with the State witnesses, two of whom are child girls and they are also the complainants, if the court admitted her to bail. On this conclusion alone the application for bail should fail.

[7] But that is not the end of the matter. What about the fact that the applicant now has a two-month old baby? As to this; on the evidence, I make the following factual findings. I accept the evidence of Ms Platt, offender counsellor at the Walvis Bay prisons. It is as follows. Unlike other trial-awaiting persons in custody, the applicant and her baby are not held in a police holding cell. They are held in the Walvis Bay prisons where there are, and have been, nursing mothers in the applicant's situation. The applicant occupies a single cell with the baby only. She has ample supply from the prison authorities of milk and diapers for the baby and toiletries for her and her baby. Additionally, the family members of the applicant are free to bring to her clothing items and food (if she chooses not to eat the prison food). There are adequate medical services available to her and her baby. She is at liberty to use flexicard to enable her to make phone calls to the outside without relying on the prison's phone. She can have regular visitations from her family members. She is at liberty to make known to her sector prison officials any needs she may have as a nursing mother, and the internal social workers would adequately attend to her needs.

[8] Moreover, the social workers of the Ministry of Gender and Child Welfare are ready to assist in moving the applicant's one-year old and three-year old children to a place of safety while she is in custody and care for them at State expense if she sought such assistance.

[9] In all this I have not overlooked the applicant's testimony that her complaints have not always received the attention they deserve; of course, she did not put these to Ms Platt for Ms Platt to answer. In any case, Ms Platt had testified that in future the applicant should endeavour to complain to her sector officials who would get in touch with her; failing which the applicant should get in touch with Ms Platt directly as to her concerns and complains, and Ms Platt would deal with them. I have no good reason to doubt the sincerity of Ms Platt's undertaking.

[10] I am alive to the proposition that in a bail application the court ought to strike a balance between the presumption of innocence of the applicant (the accused) and her right to personal liberty on the one hand and interests of society on the other. In this regard, there are considerations of public policy to keep the applicant (accused) in custody awaiting his or her trial in circumstances where there is the real risk that

the applicant will – not may – interfere with witnesses and thereby undermine due administration of criminal justice. (See *Kavepukua Tjondu v The State* Case No. CA 30/2009 (HC) (Unreported).)

[11] This factor should also always be taken into account when considering a bail application, that is, the seriousness of the offence that the applicant is facing and the severity of the punishment that would follow on conviction. In the instant case, the applicant is facing 11 very serious offences; and what is more, the complainants are child girls, apart from the 18-year old girl. As Ms Nyoni submitted, what stares in the face of the applicant is a severe prison sentence, if convicted. In my opinion, such reality is reasonably likely to influence her to want to interfere with witnesses. A great concern that any reasonable court will have in a case as the present is the fact that the applicant is nursing a two-month old baby. But in the instant case, I am satisfied that the applicant and the baby are being cared for humanly as much as possible by the Walvis Bay prison authorities and the social workers; and her one-year old and three-year old children will also be cared for if she sought assistance, as aforesaid.

[12] For these reasons, I hold that it is in the interest of administration of justice that the accused be retained in custody pending her trial. Thus, after hearing the application, I made the following order:

(a) The bail application is dismissed, and the court refuses to admit the applicant to bail.

(b) Reasons shall be delivered to the applicant and the State not later than 30 November 2013.

The aforegoing are my reasons for so ordering in para (a).

C Parker

Acting Judge

APPEARANCES

APPLICANT :	In person
RESPONDENT:	I Nyoni Of Prosecutor-General, Windhoek