

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Bail Ruling

CASE NO. CC19/2017

In the matter between:

DAVID SHEKUNDJA

APPLICANT

v

THE STATE

RESPONDENT

Neutral citation: *Shekundja v S* (CC19/2017) [2018] NAHCMD 374 (22 November 2018)

Coram: VELIKOSHI AJ

Heard: 9, 16 & 21 November 2018

Delivered: 22 November 2018

Flynote: Criminal Procedure – Bail – Applicant charged with serious offences – Applicant has a duty to prove on a balance of probability – Unsatisfactory explanation the delay to apply for bail timeously - The nature and seriousness of the charges preferred against the applicant weighed against the granting of bail – State has provided enough evidence to contradict the applicant’s alibi – Strength of the state’s case – Applicant to show on a balance of probability that the charges against him are non-existent or that he will eventually be acquitted on the charges – Interest of the

public and the administration of justice to retain the applicant in custody while awaiting trial.

Summary: This is a bail application by the applicant asking the court to be released on bail pending his trial. The applicant was charged with one count of murder, attempted murder, contravening section 18(2)(a) of the Riotous Assemblies Act, 17 of 1956 conspiracy to commit housebreaking with the intent to rob and / or robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977, housebreaking with the intent to rob and robbery with aggravating circumstances as defined on section 1 of Act 51 of 1977, contravening section 2 read with section 1, 8, 38 and 39 of the arms and ammunition act 7 of 1996 possession of a firearm without a licence, contravening section 33 read with section 1, 8, 38 and 39 of the Arms and Ammunition Act 7 of 1996 possession of ammunition.

The state is opposing the granting of bail and the release of the applicant on the grounds that; the applicant is likely to abscond because there is a strong prima facie case against him, that he will interfere with state witnesses, that there is a real risk that the applicant will commit similar offences because of his past clashes with the law and that it would neither be in the interest of the administration of justice nor that of the public to grant bail to the applicant.

Held that almost all the offences preferred against the accused are listed in Part IV of Schedule 2 of the Criminal Procedure Act as amended.

Held that the applicant's propensity to commit similar offences can only be inferred from his previous convictions and from the cases that are pending before a court of law. *Held further* that no adverse effect can be drawn from matters that were withdrawn.

Held that the state bears the onus to satisfy the court that there are sufficient grounds or information under oath before court to assist the court in deciding whether bail should be granted.

Held that state has provided enough evidence to convincingly contradict the applicant's alibi. *Held further* that the applicant has failed to convince this court on a balance of

probabilities that he would not abscond from his trial if granted bail. *Held that* the applicant has failed to show that the case against him is non-existent or that he will eventually be acquitted on the charges. *Held finally* that the applicant's application for bail pending his trial is dismissed.

ORDER

1. The applicant's application for bail pending trial be and is hereby dismissed.
 2. The applicant is remanded in custody pending trial.
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BAIL RULING

VELIKOSHI AJ:

[1] This is an application for bail. The applicant, a Namibian male aged 38 years is one of the five accused persons that were arrested, detained in custody and indicted on allegations of murder, attempted murder, conspiracy to commit housebreaking with intent to rob and/or robbery in contravention of s 18(2)(a) of the Riotous Assemblies Act,¹ housebreaking with intent to rob and robbery with aggravating circumstances and possession of ammunition and of a firearm without a licence in contravention of ss 1, 8, 38 and 39 of the Arms and Ammunition Act.² Following his remand in custody, the applicant was indicted for trial in the High Court. His trial was first set to be heard from 12 -16 November 2018 but was later postponed to 13-16 August 2019 for plea and trial.

¹ Act 17 of 1956.

² Act 7 of 1996.

The Charges

[2] According to the indictment, the offences except for the offence of conspiracy to commit housebreaking with intent to rob and robbery which is said to have been committed in Ondangwa, are said to have been committed on 16-17 June 2016 in the coastal town of Walvis Bay. The applicant, together with the other co-accused, allegedly broke into the house of the now deceased Hans Jorg Moller and his wife Carol-Ann Moller and robbed them of several of their properties listed in annexure A of the indictment. On a charge of murder and attempted murder it is alleged that they shot and killed Hans Jorg Moller and attempted to murder his wife Carol-Ann Moller by hitting/beatng her with fists and with several other objects namely a screw driver, a piece of iron and tyre lever, before tying her hands and feet with shoe laces. It is further alleged that the applicant committed the robbery under aggravating circumstances by the use and involvement of an unlicensed firearm – a pistol, possession of ammunition, a screw driver, knife and tyre lever.

Evidence in support of the Bail Application

[3] The applicant has now approached this court, seeking his admission to bail, protesting that he is a good candidate for bail because there is no evidence linking him to the offences which he admits are serious. He insists that he will not abscond if granted bail and will not commit further offences. He argued that the state's case against him is weak and therefore there is no incentive for him to abscond. He claims that he does not know anything about the current offences preferred against him. He said that he will plead not guilty to all the charges. His defence is that of an *abili*, he denies that he was in Walvis Bay on the dates the alleged offences were committed. Although he initially denied that he has never been arrested on any other offence other than on 'traffic tickets' in the past, he reluctantly conceded that he was arrested on seven separate cases of robbery with aggravating circumstances and housebreaking with intent to rob and robbery in 2012. He just did not wish to talk about them for the reason that they are old and not pending because they were all withdrawn against him.

[4] In support of his application to be released on bail, it was also testified that the applicant is a father of five minor children and owns a shack in Greenwell Matongo location in Windhoek valued at about N\$120 000. He is self-employed, and operates two tuck shops one at his house which has now closed and another in the informal settlement of Havana. He said that his business, his livestock and children are suffering due to his incarceration. He has neither a valid travelling document nor the means of establishing himself anywhere outside the jurisdiction of this court. In any event, in exchange for his liberty he is prepared to obey any conditions for his release on bail.

[5] The applicant called one Ms. Elizabeth Efraim who is his girlfriend in support of his defence of an *alibi*. She confirmed that on the stated dates of 16-17 June 2016, the applicant has not at any point left their common home in Greenwell Matongo location let alone the city of Windhoek. The applicant argued further that, the state's case against him is weak, and that he is a victim of a mistaken identity with one Papa Jonas who was apparently at one point also a wanted person by the police in connection with the investigations of the offences committed against the Moller family. The argument that he is a victim of mistaken identity cannot hold because in this case, the police had interests in several other people some of whom are still at large. Therefore the police interest in Papa Jonas or some other persons has nothing to do with the identity of the applicant and the manner in which he was linked to the alleged offences.

Evidence in opposition of the Bail Application

[6] The application is strongly opposed by the State on the grounds that the applicant is likely to abscond because there is a strong *prima facie* case against him; that he will interfere with state witnesses because one of the applicant's co-accused had threatened to kill the complainant by slitting her throat; that there is a real risk that the applicant will commit similar offences because of his past clashes with the law being that he was arrested on seven cases of robbery with aggravating circumstances and

housebreaking with intent to rob and robbery; and that it would neither be in the interest of the administration of justice nor that of the public to grant bail to the applicant.

[7] The investigating officer, Ms. Helena Ashikoto testified on behalf of the State. She confirmed that the applicant had seven cases that were all provisionally withdrawn against him. She said that the accused was indeed arrested in Windhoek, just like one of his co-accused, Panduleni Gotlieb who was arrested in Omuthiya in the northern part of Namibia.

[8] Her evidence is to the effect that there is evidence to show that the applicant was in Walvis Bay on the 16-17 June 2016. That evidence would come from a State witness one Selma Simon who would testify that the applicant and some of his co-accused were at her house in Walvis Bay for dinner or lunch on the 16 June 2016. The applicant is also linked to the alleged offences because of an identification parade that was held in which the victim Ms. Moller identified him as one of her assailants. Furthermore, it is her evidence that the print out from MTC of the applicant's cellphone records showed that whilst in Walvis Bay the applicant used a different number other than the one he had provided to the arresting officer. It is also her testimony that the applicant was also implicated by his co-accused in several ways. She said that had the applicant raised his *alibi* with the police, they would have investigated it. Thus there is evidence to displace the applicant's *alibi*. Her opinion is that it would not be in the interests of the public to grant the applicant bail because this case has attracted widespread public condemnation and outrage. She also testified that the victim lives in fear because strange people, sometimes in vehicles, had been to her house gate and this promoted her to request police protection via the office of the Prosecutor-General.

The Applicable Principles

[9] The discretion to grant bail and determine the amount rests in the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As a fundamental consideration is the interests of justice, the court will lean in favour of the

liberty of the applicant and grant bail where possible. It is a cardinal principle of our law and a constitutional one for that matter,³ that an accused person is presumed innocent until proven guilty or otherwise at the end of his or her trial. For that reason pre-trial incarceration is always undesirable. However, in a bail application the accused has an opportunity to be released pending the finalisation of his trial if he or she shows on a balance of probabilities and to the satisfaction of the court, that he or she will stand trial if admitted to bail or that the administration of justice will not be jeopardised if he is released on bail. The other relevant factors to be considered are the nature and seriousness of the charges, the relative strength of the state's case against the applicant on the merits of the charges and therefore the probability of convictions.

[10] The duty of the court in a bail application is to assess the *prima facie* strength of the state's case against the bail applicant as opposed to making a provisional finding on the guilt or otherwise of such an applicant. Bail proceedings should thus not be viewed as rehearsals for trials. The making of credibility findings of witnesses on the merits of the case against the applicant and/or witnesses is thus left to the trial court which is better placed to assess such witnesses. I found it important to stress this point because when Mr. Siyomunji cross-examined the investigating officer, he attacked the credibility of the witnesses from whom statements under oath were obtained notwithstanding the fact that they were not called as witnesses in this bail proceeding. He literally sought to cross-examine the witnesses *in absentia*. Bail proceedings should never be propelled into trials where the guilt of the applicant is determined and the onus of proof elevated to proof beyond reasonable doubt and shifted to the state.

[11] In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the applicant. To do this, one must consider the gravity of the charges because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In *S v Nichas*⁴ it was observed that if there is a likelihood of heavy sentences being

³ Article of 12(1) (d) of Namibian Constitution.

⁴ 1977 (1) SA 257 (C).

imposed the accused will be tempted to abscond. Similar sentiments were stated in *S v Hudson*⁵ in the following terms:

‘The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country.’

[12] In other words, the possibility of both a conviction and the resultant severe sentence enhances any possible inducement to the applicant to flee.

[13] The concept of the ‘the interest of the public or the administration of justice’ was incorporated into our law by the legislature through s 3 of the Criminal Procedure Amendment Act⁶ which amended s 61 of the Criminal Procedure Act⁷ which provides that:

‘If an accused who is in custody in respect of any offence referred to in Part IV of Schedule 2 applies under section 60 to be released on bail in respect of such offence, the court may, notwithstanding that it is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police investigation, refuse the application for bail if in the opinion of the court, after such inquiry as it deems necessary, it is in the interest of the public or the administration of justice that the accused be retained in custody pending his trial or her trial’.

[14] In considering the concept of the interest of the public or the administration of justice the High Court in *Charlotte Helena Botha v The State*⁸ stated that:

‘In such instances the letting out on bail of a person who is accused of a callous and brutal murder, or a person who continues to commit crimes, creates the perception that the public at large is at the mercy of such criminals and that neither the police nor the courts can effectively protect them. Considerations such as the public interest may, if there is proper evidence before the court, lead to the refusal of bail even where the possibility of abscondment or interference may be remote’.

⁵ 1980 (4) SA 145 (D) at p. 146.

⁶ Act 5 of 1991.

⁷ Act 51 of 1977 herein the CPA.

⁸ Unreported judgment of the High court of Namibia CA 70/1995 delivered on 20.10.1995 by O’Linn J and Hannah J p. 22.

[15] It has been long settled in our law that public interest may, in appropriate circumstances, demand that where there is a strong *prima facie* case of murder against the applicant such person may not be released on bail because of the potential threat to the other members of the society.⁹ Put differently, bail may be refused if there is strong *prima facie* evidence to suggest that the applicant has committed the type of a serious crime which if released on bail, may on reasonable grounds be perceived as a potential threat not only by the members of the public generally, but also by the victims or survivors of his or her alleged crimes. Similarly, the applicant's admission to bail may be denied if his release on bail will create a legitimate fear in the minds of the victims that such crimes may be repeated against them even if there is no proof that that would be the case.¹⁰ Almost all the offences preferred against the applicant are listed in Part IV of Schedule 2 of the Criminal Procedure Act¹¹ as amended.

[16] The State's counsel invited this court to look into the applicant's history of past clashes with the law by bringing in the seven cases the applicant was arrested on and charged with in 2012. Counsel for the applicant argued and emphasized that the applicant does not have any other pending cases against him because the 2012 cases were withdrawn against him. The last case was withdrawn in 2015. This much has been confirmed by the State and I agree that that observation is quite interesting because the position has all along been that fairness and justice dictates from an applicant in bail proceedings to disclose information pertaining to pending cases and previous convictions.¹² On the other hand the state bears the onus to satisfy the court and to ensure that there is sufficient information under oath before the court to assist the court in deciding whether bail should be granted. Mr. Olivier on behalf of the State argued that the fact that applicant was arrested on seven cases in the past, is relevant because it goes to the character of the applicant. He argued further that even without a previous conviction or pending cases, the applicant's arrest on seven similar cases in the past should matter because the applicant is not an angel he has professed he is. He

⁹ See *Paul Edward Doyle v The state* an unreported judgment of the High Court of Namibia CA 08/1996 delivered by Mtambanengwe J on 29 March 1996.

¹⁰ See *Charlotte Helena Botha v The state* supra p.22.

¹¹ Act 51 of 1977.

¹² See *De Klerk v S* (CC06/2016) [2017] NAHCMD 67 (09 March 2017). Also see *Julius Dausab v The State* No CC 38/2009 delivered on 20.09.2010.

also argued that the fact that the cases were withdrawn should not really matter because the cases could be placed back on the roll at any time. I have requested the State to substantiate their arguments with authorities where the character of the applicant was determined by previous arrests and withdrawn cases. The State was not able to provide any authority and I found none.

[17] In bail applications, being *sui generis* inquiries that they are, there is nothing that prevents the State from adducing evidence of the applicant's past clashes with the law on more or less similar offences. The state is obliged to place before court sufficient and relevant information to assist the court in determining whether or not bail should be granted. It is after all the duty of the court to decide the weight and relevance if any to be accorded to whatever information was adduced by both the applicant and the State.

[18] It is true that in terms of s 6(a) of the CPA a charge withdrawn before the accused could plead to the same may be reinstated insofar as the accused is not entitled to a verdict of not guilty. In such circumstances, the fact of the matter is that, as at the date of the bail application, the applicant had no other pending cases against him. The State's opposition to this application was however not confined to the applicant's propensity of committing similar offences alone, even though he was indeed arrested and charged for similar offences. It may be important to reiterate that an applicant may be denied bail on his or her first offences even if his criminal record is clear but this depends on the circumstances of each case.

[19] When the seven cases were put to the applicant in cross-examination he firstly denied that he was arrested for any other offence other than the 'traffic tickets' which are mainly associated with the contravention of the provisions of the Road Traffic and Transportation Act.¹³ And then he pleaded forgetfulness that he could not remember them. When he was pressed further, he simply said he did not want to talk about them because they were old matters. Instead of pleading ignorance, it was the applicant's duty to show why little or no weight should be given to his history of clashes with the law. Such an attitude could lead to an adverse finding concerning the sincerity of the applicant in bringing this application.

¹³ Act 12 of 1999 as amended.

[20] On the whole, I have considered all the available evidence concerning the previous arrest and charges against the applicant. Although I can safely say that those previous matters were an attempt by the State to show that the applicant has a propensity to commit serious crimes such as those he now faces in this matter, I find myself unable to be swayed in favour of such an argument for the reasons that the applicant propensity to commit similar offences can only be inferred from his previous convictions and from cases that are pending before a court of law. The argument that the charges withdrawn could at any time be placed back on the roll cannot hold. If that could be done and if ever there is anything for the applicant to answer, why has the State not reinstated the seven cases against the applicant in more than three years since the last case was withdrawn? Quite clearly, no adverse effect can be drawn from matters that were withdrawn. I therefore proceed to consider other factors such as apparent in the evidence adduced herein.

[21] The applicant claimed that due to his pre-trial incarceration since June 2016, some of his children have dropped out of school and that his businesses have suffered for example one of the tuck-shops he used to operate has closed down. He also claimed that because he has not cultivated his field in the northern part of Namibia for the past two years, the traditional authority would re-allocate it to someone else. It should be noted that this is the applicant's first attempt to bring an application for bail since his arrest in 2016. Laxity on the part of the applicant in bringing this bail application more than two years later after his arrest is not consistent with the wishes and desires of a man with enormous business and family responsibilities that he now claims he is. The explanation he gave for the delay in bringing the bail application is that he could not raise the finances immediately. The applicant had a State funded lawyer appointed by the Directorate of Legal Aid who was appointed already in 2016. He could have instructed him to lodge a formal bail application earlier. By bringing this application on a Friday 9 November 2018, when his trial was set to start the next Monday 12 November 2018 brings into doubt his real intention and the genuineness of his undertaking that he will stand trial if released on bail.

[22] As far as the current pending charges are concerned, the applicant himself has admitted that they are of a very serious nature. Thus heavy custodial sentences are likely to fall on the accused in the event that he is convicted. There exist a *prima facie* case against the applicant in the form of identification parade, cellphone records and witness statements linking him to the crimes. The State has provided enough evidence to convincingly contradict the applicant's *alibi*. That being the case, the applicant has failed to show on a balance of probabilities that the case against him is non-existent or that he will eventually be acquitted on the charges.

[23] In view of the number of charges, the heartless manner in which they were committed and the self-evident seriousness of the offences coupled with the strong *prima facie* case linking him to the commission of the alleged offences, neither the interests of the public nor that of the administration of justice would permit the applicant's admission on bail. In the premises the following orders are made:

1. The applicant's application for bail pending trial be and is hereby dismissed.
2. The applicant is remanded in custody pending trial.

I.T.O.N VELIKOSHI

Acting Judge

APPEARANCES:

APPLICANT:

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Siyomunji Law Chambers, Windhoek

STATE:

M Olivier

Office of the Prosecutor-General, Windhoek