

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON BAIL APPLICATION

Case No: CC 13/2018

In the matter between:

GABRIEL TULINANE DAVID

APPELLANT

v

THE STATE

RESPONDENT

Neutral Citation: *David vs S* (CC 13/2018) [2019] NAHCMD 111 (2 April 2019)

CORAM: MILLER AJ

Heard: 01 APRIL 2019

Delivered: 02 APRIL 2019

Reasons: 17 APRIL 2019

Flynote: Criminal Procedure – Bail – Applicant bearing onus on preponderance of probability to show why he should be released on bail – Circumstances surrounding the seriousness of the offences charged, the circumstances of the appellants as well as public interests weighed – Public interest and seriousness of the offences charged carry more weight than the circumstances personal to the accused – *Onus* – Applicant bearing *onus* on preponderance of probability to show why he should be released on bail – Applicant failing to discharge onus.

ORDER

- a) The application for bail is refused.
 - b) The accused will remain in custody until 1 July 2019 when his trial will commence.
-

RULING

MILLER AJ

[1] I have before me an application by the appellant to be released on bail pending his trial. I heard the evidence of the accused as well as that of the Head of the Gender-Based Violence Unit of the Namibian Police, Chief Inspector Olivier. I also had the benefit of argument from counsel for the accused as well as counsel for the state.

[2] The accused was arrested on various charges on the 27th of February 2017 and has been in custody ever since. This is the first application for bail brought on behalf of the accused and his trial is scheduled to start in the High Court on the 1st of July 2019, which is three months from now. The accused is charged with various offences, the first being a count of murder. It is the allegation of the State that the accused had the intention to and killed his five year old daughter and in addition, the accused is charged with various offences under the Criminal Procedure Act 51 of 1977, read with the

provisions of the Domestic Violence Act 4 of 2003. This relates to the alleged assault of his partner, Thomas Kornelia, as well charges of theft of cell phones and malicious damage to property also in relation to the charges.

[3] The accused is a Namibian citizen although, according to the evidence, he was born in Angola. I accept the evidence of the accused that at the time of his birth, his parents were in exile and that he returned to Namibia with his parents shortly after independence in 1990, and that he has remained in Namibia ever since.

[4] He gives his place of address as Oshungu village in the Omusati region in the north of the country. It is however apparent that he does not reside there. He spent the time prior to the arrest as a resident of Windhoek where he stayed for some time at the Suiderhof Military Base, since he was employed as a soldier of the Namibian Defence Force. It is also apparent that he does not always stay at the military base. At the time of his arrest, for instance, he was no longer at the base, having absconded without leave. He does not seem to have any other fixed abode in Windhoek and stays at various residential residences from time to time.

[5] The accused also has a previous conviction for malicious damage to property in circumstances similar to the offences he faces in respect of the charges against him at present. In that regard, I am referring to the charges of theft, malicious damage to property. He was convicted of a similar offence and sentenced to a thousand Namibia dollars (N\$1000) or six months imprisonment for that offence. In fact, he served six months imprisonment that was imposed by the Learned Magistrate.

[6] As far as the offences themselves are concerned, they are by their nature serious. The first count is one of murder in respect of his five year old child which is a serious offence. The allegation is that he killed the deceased by drowning her. The evidence against the accused is mainly circumstantial supported by extra curial statements made by the accused at the time of his arrest.

[7] There are records from the cell phone of the complainant in the other counts which contained short messages that the accused allegedly had forwarded to the complainant. The complainant evidently is the mother of the deceased in count 1. For instance, the evidence against the accused which the State intends to call is to the effect the accused had sent short messages to the complainant telling her that the deceased was dead, because of either her stubbornness or their joined stubbornness depending on the crypt language used in the short message. The accused denies that he had killed the deceased. His version is that he had left the deceased at the side of the dam, that is Goreangab Dam, while he crossed over the dam on a pipe to take some (inaudible) to the other side of the dam.

[8] His evidence is that when he returned to where the deceased was, she was missing. He continued to search for her and he could not find her. The search apparently took him several days, yet he never solicited the support of the Namibian Police or anybody else to assist in the search or for that matter, report that the deceased was missing, neither to the Namibian Police or any other person.

[9] The first question to be considered is whether there is a risk that the accused will abscond. Much was made in this regard, the fact that the accused was born in Angola and that factor in itself does not in my view carry much weight in the circumstances of the case. I bear in mind, however, that there is always the possibility that the accused may decide not to stand his trial while still remaining in Namibia. If he wants to abscond, then he does not have to go to Angola to do so or for that matter any other country.

[10] As regards to the seriousness of the offence faced by the accused, I reiterate that the offences are serious and this court will be naïve not to take into account that cases of gender-based violence are serious in their nature and are prevalent in Namibia. It is indeed so that the public has a significant interest that persons accused of committing such crimes stand their trial and do not abscond. In this regard, the public interest is a weighty consideration.

[11] The evidence before me establishes that the State seems to have a prima facie case against the accused. All relevant considerations, although they are at tension with one another, should be taken into account and by taking those into account, it does not always follow that the opposing considerations carry the same weight.

[12] In my view, the public interest and the gravity of the offences will carry more weight in the circumstances than circumstances personal to the accused. The onus remains on the accused to satisfy the court that he should be released on bail and in my view, that onus was not discharged.

[13] My conclusion is that the application for bail should be refused.

[14] I therefore make the following order:

- a) The application for bail is refused.
- b) The accused will remain in custody until 1 July 2019 when his trial will commence.

MILLER
ACTING JUDGE

APPEARANCES:

APPELLANT:

Mr SIYOMUNJI
Instructed by Directorate: Legal Aid,
Windhoek

RESPONDENT:

Ms. NDLOVU
Office of the Prosecutor-General,
Windhoek