

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK
JUDGMENT

CASE NO: CC 19/2017

In the matter between:

MALAKIA SHIWEDA

APPLICANT

and

THE STATE

RESPONDENT

Neutral Citation: *Shiweda v S* (CC 19/2017) [2019] NAHCMD 191 (14 June 2019)

CORAM: CLAASEN, AJ

Heard: 29 May 2019 and 31 May 2019

Delivered: 14 June 2019

Reasons Delivered: 17 June 2019

Flynote: Criminal Procedure — Granting of bail —charged with murder and attempted murder and robbery under the doctrine of common purpose- Serious

offences – s 60 of the Criminal Procedure Act 51 of 1977 as amended subject to s 61 of the same Act – court given wider powers - Applicant bearing *onus* on preponderance of probability to show why he should be released on bail – Applicant failing to discharge onus. Court finding that it is not in the interest of the public or the administration of justice that the accused be released on bail.

Summary: The applicant and four others are charged with murder, attempted murder, conspiracy to commit housebreaking with the intent to rob and/or robbery with aggravating circumstances, housebreaking with the intent to rob and robbery with aggravating circumstances, possession of a firearm without a license and possession of ammunition.

ORDER

- a) The application for bail is refused.
- b) The accused will remain in custody until his appearance in the High Court on 13 August 2019.

JUDGMENT

CLAASEN, AJ

[1] The applicant, a 32 year old Namibian male, approached this court for bail after being in custody for a period of almost 3 years, since his arrest 23 June 2016.

[2] The State opposes the application on the grounds that it is not in the public interest or the administration of justice, that there is a risk of absconding and potential or actual interference with State witnesses.

[3] The applicant and four others are charged with murder, attempted murder, conspiracy to commit housebreaking with the intent to rob and/or robbery with aggravating circumstances, housebreaking with the intent to rob and robbery with aggravating circumstances, possession of a firearm without a license and possession of ammunition.

[4] The averments in the indictment sheet is that on the night of the 16th to the 17th of June 2016 the perpetrators broke into a house in Walvisbay, shot one male person, severely assaulted his wife and robbed them of several valuable items.

[5] The applicant testified that he hails from Okalongo in the Omusati region. He indicated that he owns immovable property, a shack which also functions as a bar in a certain G713 Omulyombabi Street, Ombili, in Windhoek and that the property is registered in his name at the Municipality. He was working as a mechanic and is the father to three minor children aged, 16 years, 12 years and 8 years respectively.

[6] In respect of the charge allegations, the applicant denies having any knowledge of the attack at the house in Walvisbay or that he was present at the said premises at the material time.

[7] The applicant's warning statement was admitted by consent and marked exhibit 'A', subject to a few corrections made by the applicant. The material parts of the evidence as confirmed under cross-examination by counsel for the State indicated that the applicant travelled with three of the co-accused from Windhoek to Walvisbay during the early morning hours of 16 June 2016 in an Opel Corsa motor vehicle which belonged to accused 4. During the course of the day in Walvisbay, accused 1 joined them, and they had a meal at a certain house. Later in the afternoon a certain Corolla vehicle with no number plates came to the place where they were. Two young boys disembarked from the Corolla and joined accused 1, accused 2, accused 3 and accused 4 in conversation outside the vehicle, whereas the applicant remained in the Opel Corsa.

[8] The explanation offered by the applicant as to his non-participation in respect of the charges he face was that he remained at a certain bar, whereas his co-accused and the young boys left. At approximately 23h00 the applicant received a telephone call from accused 4 requesting to collect the group in town, and he drove to town. On his arrival he saw the same Corolla vehicle and heard accused 4 calling him. Thereafter accused 1, accused 2, accused 3 and accused 4 jumped into the vehicle and instructed him to drive. He noticed that accused 1 had a black backpack and accused 2 had a laptop bag. Thereafter, they drove from Walvisbay towards Windhoek. When accused 1 disembarked at Okahandja. The applicant noticed a black pistol that fell on the car's bonnet as accused 1 put a backpack on his shoulder.

[9] Detective Sergeant Helena Ashikoto, the investigating officer in the matter, testified in opposition to the granting of bail. She narrated the events as recorded in the witness statement of the wife to the deceased. Her testimony was that a group of assailants entered the victim's house, demanded money whilst assaulting her, shot her husband, and tied her up before fleeing with some valuables.

[10] In relation to the denial by the applicant to have been part of the assailants, the Detective Sergeant testified that the victim's witness statement indicated that she can identify the applicant, and cellphone printouts show that there was telephonic contact between the accused 4 and accused 5 during the material times. Furthermore she narrated that accused 1 was arrested the next day at a road block at Oshivelo in the Oshikoto Region, in northern Namibia, and items belonging to the victims were found in his possession.

[11] The court heard through her testimony that the deceased was known locally and internationally as he was the former owner of a certain restaurant 'Joe's Beerhouse' and had a boat cruise business, in addition to being a pilot. The detective gave further testimony that members of the community in Walvisbay held demonstrations against the granting of bail to the accused.

[12] Counsel for the applicant Mr Ipumbu raised the absence of an identification parade in respect of his client as a deficiency. He furthermore indicated that the complainant should have testified in the bail hearing regarding the averment that she is able to identify the applicant as one of the assailants at the scene. In addition to that Mr Ipumbu contended that the State had not proven all the elements of the doctrine of common purpose as his client did not have knowledge of the events.

[13] The points raised by Mr Ipumbu are reserved for the trial court. All the State needs to do is to show on a balance of probabilities that, based on the evidence in its possession, it is capable of proving the accused's guilt.¹ In the present instance, by way of evidence given by the investigating officer, the State established a direct link between the applicant and his co-accused.

[14] The above position was approved by Liebenberg J in the case of *De Klerk v S*² where he stated that:

'In bail proceedings the State is not obliged to prove its case against the accused, all it needs to do is to show on a balance of probabilities that the evidence in its possession, usually in the form of witness statements and other documentary evidence, will prove the guilt of the accused.'

[15] The onus is on the applicant to satisfy the court on a balance of probabilities that he is entitled in the circumstance to be granted bail.

[16] In respect of the ground of interference, there is no evidence from the State linking the applicant to the threats extended to some of the State witnesses.

[17] In respect of the question whether it will be in the public interest or the administration of justice, there are several factors militating against it.

¹ *S v Yugin* 2005 NR 196 (HC) at 200.

² (CC 06-2016) [2017] NAHCMD] 67 (09 March 2017).

[18] The charges fall under Part IV of schedule 2 of the Criminal Procedure Act 51 of 1977. In terms of the amendment, bail may be refused, if in the opinion of the court, it is in the interest of the public or the administration of justice that the accused be detained pending his trial notwithstanding the fact that the court is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with witnesses or the police investigation.

[19] I am satisfied that the State has shown on a balance of probabilities that the evidence intended for the trial, as detailed above will prove the applicant's involvement in the commission of the offenses. He was the driver of the vehicle wherein four out of the five accused persons travelled to Walvisbay the preceding night. On his own account, he is the person that was contacted by accused 4 to drive the group out of Walvisbay in the early morning hours of 17 June 2016.

[20] The alleged offenses appear to have been a pre-planned and callous robbery and murder. The allegations are that the victim was brutally assaulted and tied up whilst watching her husband being shot. The investigating officer testified that the State is in possession of evidence that the victim and another state witness received threats. It was not disputed that members of the community in Walvisbay have expressed their views against the granting of bail in this matter. The witnesses and the public will not feel safe with an accused in this matter being given bail and thus it is not in the public interest to grant bail.

[21] Though the applicant contends he is no flight risk given that he did not abscond after the 19th of June 2016 when he was released by Chief Inspector Amakali, I however agree with State counsel that the position is now different than at the time of his arrest. The trial date is two months away and the State has 56 witnesses. The offenses are of serious nature, the kind that will result in lengthy imprisonment upon conviction, which brings about a real possibility that the accused will abscond. It will cause prejudice to the State if one of the accused persons abscond at this stage and it is thus not in the

administration of justice to grant bail. In *S v Yugin and Others*³ Hannah J made the following observations in respect of the court having to consider bail:

'In a bail application the Court has to consider a number of factors. Some militate towards bail being granted, some militate against. One such factor is whether the accused, if granted bail, will stand his trial or whether there is a real possibility that he will abscond. If there is such a possibility no one can properly criticize a Court which, in the exercise of its discretion, refuses bail. In determining this question a Court will have regard to various matters. The seriousness of the charge which the accused faces is one, but not, as has been judicially pointed out, in itself. I will come to that shortly. The relevance of the seriousness of the offence charged lies in the sentence which will probably follow upon a conviction. If the probable sentence is one of a substantial period of imprisonment, then there is obviously a greater incentive for the accused to avoid standing trial than if the probable sentence is an affordable fine.'

[22] In the premises on the totality of the evidence presented I am of the opinion that it will not be in the interest of the public or the administration of justice to release the applicant on bail.

[23] I therefore make the following order:

- a. The application for bail is refused.
- b. The accused will remain in custody until August 13 August 2019 when his trial is to commence.

C CLAASEN, AJ

APPEARANCES:

For the Applicant: T IPUMBU

³ 2005 NR 196 (HC).

of Titus Ipumbu Law Chambers, Windhoek.

For the Respondent:

M OLIVIER

of The Office of The Prosecutor-General, Windhoek.