



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case No.: CC 27/2019

JULIUS FREDERICK ARDNT

APPLICANT

v

THE STATE

RESPONDENT

Neutral citation: Ardnt v S (CC 27/2019) [2020] NAHCMD 299 (17 July 2020)

Coram: CLAASEN, J

Heard: 9-11 March 2020, 19 May 2020, 29 June 2020, 3 July 2020

Delivered: 16 July 2020

Reasons: 17 July 2020

Flynote: Criminal Procedure – Bail application – Applicant to show on balance of probabilities why he should be released on bail – Section 61 of Criminal Procedure Act applicable – State presented strong prima facie evidence against applicant - Court finds not in interest of administration of public or administration of justice to grant bail.

ORDER

- a) The application for bail is refused.
 - b) The applicant is remanded in custody at the Trial Awaiting Section, Windhoek Correctional Facility.
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RULING IN BAIL APPLICATION

Introduction

[1] During the late night hours of 1 February 2018 or the early morning hours of 2 February 2018 assailants broke into the farmhouse of a couple aged 78 and 80 years and stole cash and other items. For a second time, between the late night hours of 2 February 2018 and the early morning hours of 3 February 3 2018 the same couple were brutally assaulted, robbed of their property which includes a motor-vehicle, the wife was raped, alternatively her lifeless body was violated and both husband and wife were murdered. These are the essence of the charges as alleged by the State in the indictment.

[2] Three persons were arrested on the charges several hours later on 3 February 2018. About a year later, one of the accused persons Mr Johannes Christiaans was granted bail in the District Court of Keetmanshoop.

[3] During the course of 2019 the matter was transferred to the High Court for trial purposes. It was during this phase that the applicant and co-accused, Mr Afrikaner approached this court for bail. The applicant was represented by Mr Mbaeva and Mr Afrikaner was represented by Mr Kauari. Mr Afrikaner however abandoned his pursuit for bail during a court appearance on 19 May 2020 and the application continued with the first applicant.

[4] The matter was unable to proceed on several occasions due to the absence of the applicant's legal representative and thereafter on account of the COVID-19 pandemic which brought about travel restrictions for one of the witnesses.

[5] The respondent advanced the grounds of their objection to bail as:

- (i) that if bail is granted there is a risk that the applicant will commit further crimes;
- (ii) that if bail is granted there is a risk of absconding and
- (iii) that it will not be in the public interest or in the administration of justice for the applicant to be granted bail.

Applicant's Evidence

[6] The applicant is a single, 42 year old Namibian citizen that attended school up to grade 8. He is skilled in the trades of plumbing and welding and performed casual jobs from where which he generated an income and maintained his children. One week before his arrest he commenced work at a certain farm called Safari Noord.

[7] He is the father of 3 children aged 21, 17 and 7 years respectively. The youngest child resides with her aunt in Swakopmund and the older children are with their respective grandparents. The applicant has 4 brothers and 3 sisters who resides in Koës and has no relatives outside the borders of Namibia.

[8] As far as assets are concerned, the applicant owns two houses in Koës, one that he built and one that he inherited from his father. The collective value of the houses is N\$ 19 000. He also testified that he owns 15 goats valued at N\$ 7500 and 2 horses valued at N\$ 3000.

[9] The applicant advanced the reasons for the bail application to transfer the house that he inherited from his father into his name, to sell some of his livestock and to divide the remainder of livestock amongst his children.

[10] He declared himself amenable to be granted bail in the amount of N\$ 5000 subject to conditions that the court may impose. He testified that he intends to raise the funds by selling some of his livestock and one of the houses.

[11] In respect of the contention that the community was opposed to the granting of bail, the applicant stated that he was not aware of that, but that he knew that there were community members in court.

[12] During cross-examination he stated that he had a passport which he obtained to travel with a former employer, a certain Mr Piet Blaauw to go to Mosselbay in South Africa. He was employed there from 10 December 1994 until 23 January 1995 as a gardener and also varnished wood. His passport has since expired.

[13] During cross-examination the prosecutor elicited responses from the applicant as to the evidence in the docket that points to the applicant's involvement in the commission of the offenses, such as his shoe prints that were found on the scene, his bloody clothes and that the deceased's vehicle and rifle that was found in his possession. The applicant denied these allegations.

[14] It was also put to the applicant that he made a confession before a magistrate, but he averred that it was not done voluntarily and did not sign all the pages. He also denied that he admitted to the Police that he strangled the wife.

Respondent's Evidence

[15] The investigating officer, Detective Warrant Officer Kavazuea Andries Katjipuka was called to testify. The gist of his testimony was that the shoe prints that were found on the scene matched with that of the shoes that the applicant wore when he was arrested. He testified that the applicant was found in possession of the particular Toyota pickup vehicle and rifle which were identified by the son of the deceased couple as

property that belonged to his parents. The applicant upon arrest wore bloody clothes and blood stains were observed in the particular vehicle.

[16] He testified that the docket contain statements in respect of the recovery of some of the stolen items and a statement from a witness who wanted to go to Gobabis and the applicant offered him a lift. According to him the applicant was arrested in the Omaheke Region, which in his opinion is indicative of a possibility that the applicant will abscond as it is close to the Botswana border.

[17] He further testified that the community members of Koës had drawn up petitions against the granting of bail. He testified that at each court appearance the court was filled to capacity by community members. The petitions form part of the evidence tendered during the bail hearing of accused two in the District Court, which record was also admitted in the application before this court.

[18] With regards to the blood stains that was sent for forensic analysis, it was put to the witness that the results reveals that it was human blood as opposed to animal blood. The witness answered in the affirmative and further stated that the DNA results are awaited.

[19] Mr Mbaeva put it to the investigating officer that the Adidas slip-on sandal prints that were referred to could have been worn by anyone in Namibia. The witness however held his ground that they belonged to the applicant and that he was found wearing such sandals upon being arrested.

Discussion

[20] It is trite that in a bail application the onus lies on the applicant to satisfy the court on a balance of probabilities that he is entitled to be released on bail. I thus move on to consider that.

[21] As far as previous clashes with the law are concerned, the applicant was not frank with the court. He volunteered information only in respect of two convictions, a charge of housebreaking with the intent to steal and theft and a charge of possession of cannabis. According to him he received a sentence of two years imprisonment for both the counts. During cross-examination and only once the documentary evidence was presented to him did the applicant admit to additional convictions in 2005 on a charge of housebreaking with the intent to steal and theft of a motor vehicle. The counts were taken together for sentencing and a partially suspended sentence was imposed to the effect that the applicant had to serve 6 years imprisonment. Such a lengthy term of imprisonment, in my opinion, is not something that will just slip one's mind.

[22] In *De Klerk v State*¹ the honourable judge Liebenberg stated at para 8 that:

'The accused bore the onus to have shown on a balance of probabilities why his previous conviction (for purposes of the bail application) should be given little weight instead of hiding it from the court.'

Thus the applicant's approach to be frugal with the truth about his brushes with the law negatively affects the bona fides of this application.

[23] I move to the issue of the likelihood that the applicant will stand trial or the likelihood that he will abscond. At this point in time the applicant does not have a valid travel document but it must also be said that an expired passport does not present an unsurmountable challenge. He has strong family ties in Namibia, and assets in the amount of approximately N\$ 30 000.

[24] An aspect that has a bearing on this issue is that a discrepancy came forth during cross-examination as regards to the correct residential address of the applicant. The applicant testified that his properties were located on Erf no. 12 and Erf no. 196 at Plaatjiesheuwel, Koës. The prosecutor however put it to the applicant that he gave another address i.e. Erf no. 110 Plaatjiesheuwel to the police at the time of arrest. The

¹ (CC 06-2016) [2017] NAHCMD 67 (09 March 2017).

applicant denied that he gave Erf 110 to the police. When pressed further he conceded that it was his girlfriend's residential address and that it was merely due to miscommunication that it was listed as his address.

[25] Also of relevance is the information that the applicant travelled 300 km from the scene, and left the other accused behind. The state was in possession of a witness statement by a person that attested that he was offered a lift from Aranos to Gobabis by the applicant. The argument by the investigating officer was that the town of Gobabis is situated close to the border between Namibia and Botswana, and that it supports their belief that the applicant was likely to cross into Botswana. The applicant denied the allegation that he was at Gobabis or even knows where Gobabis is located. The prosecutor pertinently put it to the applicant that there is a real risk of him absconding, to which the applicant answered that he has no comment.

[26] The applicant acknowledged that the charges that he faced were serious and stated that he intends to plead not guilty. In *S v Yugin*² it was pointed out that:

'The relevance of the seriousness of the offense 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.'

[27] The follow up question relates to the likelihood of conviction which in turn depends on the apparent strength of the state's case. It is apparent that the applicant intends to dispute the admissibility of the confession and that he told the police that he strangled the wife. That notwithstanding and despite his denial during the bail hearing that he was found in possession of some of the stolen items including the deceased persons' motor vehicle, his response to a question on whether he was found in possession of the said vehicle was affirmative in the pre-trial memorandum.

² 2005 NR 196 HC.

[28] The investigating officer furthermore pointed to witness statements that confirms that the applicant was seen with the vehicle and that the stolen property were recovered. The investigating officer also testified that the applicant upon being arrested was found with sandals that resembles the prints that were found on the scene. Though Mr Mbaeva neutralized that evidence by pointing out how common Adidas sandals are, the applicant's final answer on whether the shoe print belonged to him was that he had no comment. This is hardly satisfactory.

[29] I am satisfied that the state has a prima facie strong case against the applicant. That give rise to a likelihood of conviction and a lengthy imprisonment which can induce the applicant to evade trial. If I consider these factors with the applicant's less than honest approach referred to earlier, in my view, there is a real likelihood that the applicant may evade his trial.

[30] Furthermore the court is also enjoined by section 61³ to refuse bail in respect of certain offenses if in the opinion of the court it is in the public interest 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. The said provision applies to the charges in this matter.

[31] The record of the bail proceedings of the District Court contains petitions that were admitted in the bail application of Mr Christiaan. The gist of the petition was that the community of Koës objects to the granting of bail in this matter. The applicant contended that he was not aware of the petitions but he acknowledged that there were community members who attended the court. His explanation that he thought the people just wanted to listen to court proceedings does not diminish the 322 signatures in the petitions. These signatures attest to the sentiments expressed by the 322 members of the small rural community and the larger farming community of the Karas Region where these heinous crimes were perpetuated.

³ Criminal Procedure Act 51 of 1977 as amended.

[32] It also has to be considered that the matter is at the high court for trial and the state has 67 witnesses to call. Should one of the accused persons abscond it will severely prejudice the state's case and thus will not be in the interest of the administration of justice.

[33] A matter that is relevant to the case at hand is that of *S v Joseph Gariseb and another*⁴ and I endorse what was stated by that court at para 15:

'...it seems to me that the State is correct in its submission that it would not be in the interest of the public that they should be released on bail. They are strongly implicated in two crimes of violence, namely murder and robbery. Their victim was an elderly and vulnerable person who was brutally assaulted. It seems that the deceased would have been easy to overcome without resorting to such extreme violence...The two accused appears to be dangerous. I do not think that the public will feel safe with the 2 accused roaming free. They are entitled to look to the court for protection against persons accused of violent crimes which are planned and executed against their victims, presumably for their valuables, especially where the case against them is strong. In such circumstances the interests of the accused in remaining free until proven guilty must take a backseat.'

[34] A final observation has to be made about Mr Mbaeva's argument that the applicant must be granted bail just because his co-accused Mr Christiaan was granted bail. This is a farfetched notion. That much was clear from what was stated in *Wembondinga v S*⁵ at para 17:

'It would be disaster, if our courts were to accept that if one accused is admitted to bail, the co-accused are by that fact automatically entitled to bail. In Namibia, there is no right to bail, however there is a right to apply for bail and such application is subject to the court's discretion. The court has a discretion to grant bail or not and such discretion may result in different conclusions in respect of different accused persons, depending on the circumstances peculiar to each.'

⁴ CC 16 /2020 at para 15.

⁵ CA 27/20170 [2017] NAHCMD 202 (28 July 2017).

[35] Cumulatively considered, I find that on the evidence put forth the state has presented a prima facie strong case against the applicant and should the applicant be convicted this will attract a lengthy imprisonment term against the applicant. Therefore it will not be in the interest of the public nor in the administration of justice to grant bail.

[36] In the result:

- a) The application for bail is refused.
- b) The applicant is remanded in custody at the Trial Awaiting Section, Windhoek Correctional Facility.

CM Claasen
Judge

APPEARANCES:

APPELLANT:

Practitioners

Mr T Mbaeva
Mbaeva & Associates Legal

Windhoek

RESPONDENT:

General

Mr C Lutibezi
Of the Office of the Prosecutor-

Windhoek