REPUBLIC OF NAMIBIA

CASE NO. CC16/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

and

JOSEPH GAVIN GARISEB **1st Accused**

DEON GAROEB **2nd Accused**

CORAM: **VAN NIEKERK, J**

Heard: 20, 26 October 2010

Delivered: 3 November 2010

JUDGMENT : BAIL APPLICATION VAN NIEKERK, J: [1] The two accused stood trial before the late MANYARARA, AJ during 2008 and 2009 on charges of murder and housebreaking with intent to rob and robbery with aggravating circumstances under Case No. CC42/07. According to the summary of substantial facts annexed to the indictment the accused travelled from Windhoek to Okahandja late during the afternoon of Saturday, 14 September 2002. They went to the residence of the deceased who was a 79 year old retired silver- and goldsmith. They entered the residence by cutting some barbed wire and by breaking open a window to open a

door giving access to his residence. Inside they also broke open a door to give them access to the deceased's workshop. The allegations are that at some stage the accused allegedly hit the deceased several times on the body and head with a wheel spanner and/or a firearm and/or (an)other unknown blunt object(s). They also fired shots in his direction and/or pointed a firearm at him. He died on the scene as a result of haemorrhagic shock caused by the assault. The State alleges that the accused acted with common purpose at all material times. According to the indictment the accused stole a pistol, a video recorder, seven gold rings, a wrist watch, cash money, keys and clothes from the deceased.

[2] The State called several witnesses. During the trial certain documents were admitted in evidence. These include statements made by each of the accused, as well as notes and photos of pointings out which place both of them at the scene. In these documents they each place the blame for the murder on the other. During the trial, however, the accused pleaded not guilty and denied any involvement in the crimes or being at the scene. On 26 October 2009 the accused closed their cases without testifying and the matter was postponed to 23 February 2010 for judgment. Unfortunately the learned trial judge became ill and the matter was postponed several times for the judgment to be delivered. As he regrettably passed away on 28 May 2010, judgment was never delivered. On 21 June 2010 it was ordered that the trial starts *de novo* under Case No. 16/2010. The matter was in due course postponed for trial during the period 27 June 2011 to 26 July 2011. The accused have now applied to be released on bail. Although they were allocated counsel on the instructions of the Directorate of Legal Aid for purposes of trial, they appeared in person during the bail application.

[3] Mr *Konga* on behalf of the State opposes the application essentially on three grounds: (i) the State fears that the accused will abscond and not stand their trial; (ii) the State, relying on section 61 of the Criminal Procedure Act, 51 of 1977,

submits that it is in the interest of the public or the administration of justice that the accused remain in custody pending their trial; and (iii) in respect of the first accused, the State submits that there is a likelihood that he will commit further crimes while being released on bail.

[4] The accused each testified in support of their respective applications and each called a witness. The State presented the evidence of the investigating officer, Detective Warrant Officer Maletzky. The Court called the secretary of the late trial judge to testify about certain exhibits handed in during the trial and about which the accused claimed to have no knowledge.

[5] Accused no. 1 is a 28 year old Namibian citizen who hails from Windhoek. He used to reside with his parents. His father has passed away, but his mother is still alive and resides at a fixed address in Okahandja Park. This will also be the accused's address should he be released. He has two small children who are about 10 and 9 years old who are living with their mother. According to the accused he was arrested for the crimes in this case on 22 September 2002. Det. W/O Maletzky testified that he was arrested on 8 October 2002. Whichever is the correct date, the accused has been in custody ever since awaiting trial in this matter. It is common cause that he is not a first offender. On 25 June 1997 he was convicted and sentenced at Windhoek on a charge of housebreaking with intent to steal and theft of office and electrical goods to the value of N$45 398. He was sentenced to 12 months imprisonment conditionally suspended for 3 years. On 25 November 2002 he was convicted at Okahandja of the crime of housebreaking with intent to commit a crime unknown to the State and sentenced to 3 years imprisonment. Although the third conviction was not proved during his testimony, the accused volunteered the evidence that he is also serving a sentence of 5 years imprisonment for the crime of housebreaking. The two sentences mentioned ran consecutively. He testified that he was eligible for a remission in sentence and for parole, but because of the fact that he is in custody awaiting trial in the current matter, he could not be released. As I

understand it, he will have served the total of 8 years imprisonment during November 2010.

[6] He testified that he improved his schooling while serving his sentences and that he would like to work and also study further if he is released. He is confident of finding employment. At the time of his arrest he used to work with his late father for N$400 per month, assisting in mechanical and building work. He offered to pay N$500 bail from his own money held in a savings account.

[7] Accused no. 2 is also a Namibian citizen of 28 years. He used to reside at Okapuka Lodge. He has also been in custody awaiting trial since 2002. He was raised by his younger brother's father, Mr Josef Herman Brand. This gentleman also used to visit him in prison, but lately has become ill. Accused no. 2 wishes to be released from custody because of the long delay in finalising the trial and to take care of his uncle. Mr Brand also testified and confirmed that he has a fixed address in Okahandja Park, where, as I understand it, the accused will also reside. The accused's only child passed away while he was being detained. He was unemployed at the time of his arrest and supported by his mother who used to live in Brakwater. He also offers N$500 bail money which will be paid by a fellow inmate.

[8] According to Det. W/O Maletzky he was summoned to attend the scene of the murder, housebreaking and robbery on 15 September 2002 at Okahandja. He found the deceased lying on his stomach on the floor in his home, where there evidently had been a break-in. He was covered in blood and it was clear that he had multiple serious injuries. The accused were arrested

on 8 October 2002.

[9] It is trite that the burden is on the accused to satisfy the Court on a balance of probabilities that they should be admitted to bail *(S v Sibanyone and another,* Case No. CA 56/93, unreported judgment of this Court delivered on 21/12/1993).

[10] I shall first consider the third ground on which the State opposes the granting of bail to accused no1. On the basis of his three previous convictions, Mr *Konga* submitted that the first accused has a propensity to commit crimes, especially housebreaking with the intent to steal or some other crime, and that, should he be released, he is likely to continue to commit such or other crimes while he is on bail. Counsel may very well be right, but I can also not ignore the evidence of the accused, who denied counsel's suggestion and stated that he has been rehabilitated during the eight years that he has been serving his sentences for those crimes he committed. He stated that he has been on a rehabilitation programme and that he has also furthered his studies. He stated that he was very young when he committed those crimes, which is indeed so, and that he has now matured. He says he has repented. The State did not present any contrary evidence of unlawful or poor behaviour by the accused while in prison. Weighing up the pros and cons on this aspect, I am not inclined to find that the State has shown that there is indeed a real likelihood of further crimes being committed.

[11] I shall now proceed to consider whether the two accused pose a flight risk. Both accused repeatedly mentioned that they were confident of being acquitted in the current case and promised to stand their trial if released. They also offered to report regularly to the police authorities should the court impose such conditions. The two accused acknowledged that the charges against them are serious and that they most likely face a long period of imprisonment should they be convicted. However, they begged the Court to trust them and to be released.

[12] In this regard it is useful to have regard to what was stated in S v *Hudson* 1980 (4) SA 145 (D) at 148E:

> "Where an accused applies for bail and confirms on oath that he has no intention of absconding due weight has of course to be given to this statement on oath. However, since an accused who does have such an

> intention is hardly likely to admit it, implicit reliance cannot be placed on the mere say-so of the accused. The court should examine the circumstances."

The same approach was taken by this Court in *Shephard Khowa and two others v The State* (Unreported judgment delivered on 19 September 1994, at p5). See also S *v du Plessis and another* 1992 NR 74 HC at 87H.

[13] Examining, then, the circumstances in the matter before me, relevant factors are the strength of the State's case, the likelihood of a conviction and the likely sentences to be imposed. As was stated in *S v Yugin* 2005 NR 196 HC at 200A-G:

> "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 criticise 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.
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> As I have said, the seriousness of the offence charged and the type of sentence it will probably attract are not of themselves determining factors. The next factor to be considered is the likelihood of conviction on such a charge. In considering this factor the Court must perform a balancing act. It must balance in the scales the evidence adduced by an accused, which will usually be a denial of guilt, against the strength or apparent strength of the case which the prosecution says it will present at the trial. The result of this balancing act will play an important part in determining whether an accused may or may not decide to be a fugitive from justice, rather than stand his trial.
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> The bail application is not, of course, the trial itself. It is not the occasion when the prosecution has to prove the guilt of the accused. What it has to do

> is to demonstrate, through credible evidence, the strength or apparent strength of its case. This it will usually do through the mouth of the investigating officer, and that is what happened in the present case."

[13] In the matter before me, the Court has the advantage not only of the views of the investigating officer under oath, but also of some of the views of the late trial judge. In addition to this the accused now know more precisely the strength of the State case as they have already gone through the trial up to the close of their cases. Det W/O Maletzky's view is that the State has a strong case against the accused, which he fears may very well motivate them to abscond should they be released. In support of this view he mentioned that the accused were properly warned before they made their respective statements and pointed out various places at the scene of crime. Although the accused disputed this evidence, it is clear from the list of exhibits drawn up during the trial (Exh "G"), that these documents were admitted in evidence during the trial. The trial judge delivered a judgment after a trial within a trial in which he held on 19 November 2008 that all warning statements and pointings out by the accused and signed by the parties were admissible. As I mentioned in para. [2] *supra,* although the accused blame each other for the deceased's death, the evidence places both accused at the scene of the crime. In the statements they admit that they broke in and that they stole certain items. Det. W/O Maletzky also testified that the accused directed him to the house of a certain State witness, Haimbodi, where they had sold the gold rings and the video recorder. These items were still in Haimbodi's possession and were seized by the police. On the basis of all this evidence I agree that the State case certainly appears to be strong and that there appears to be a strong likelihood that the accused will be convicted. In this event, lengthy imprisonment is likely to be imposed, especially in the case of accused no. 1 in the light of his previous

convictions.

[14] Both accused emphasised that they are Namibian citizens with no passports. They also appear to have little means. They posed the question of where they could flee to, as they could not travel outside the borders of

Namibia. It may, of course pose some problems to the accused to flee to another country, but it is not in itself unlikely. The borders of Namibia are easy to cross at unregulated points. It would also be quite possible for the accused to simply lie low within the borders of the country and not attend their trial. There is also the possibility that one of them might abscond, which may impact negatively on the State's chances to prove its case against the other. Considering all the various factors I am of the view that the accused have not shown on a balance of probabilities that they will not abscond. In fact, there is a real possibility that they may not stand their trial.

[15] Even if I were wrong in coming to this conclusion, 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. Furthermore, the indications are that they knew who and what their victim was and targeted him, as they travelled all the way from Windhoek to Okahandja and appeared to have gone specifically to that house. The two accused appear to be dangerous. I do not think that the public will feel safe with the two accused roaming free. They are entitled to look to the courts 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 (See *Charlotte Helena Botha v The State* High Court Case No. CA 70/95, unreported judgment delivered on 20/10/1995 at 22-24).

[16] I realize that the delay in finalizing the trial due to the unfortunate circumstances of the trial judge's passing away must be difficult for the accused to face. Just when they were about to hear the verdict on several occasions, they had to face the prospect of another postponement. When it became clear that there will be a trial *de novo,* another long postponement until June 2011 became necessary. The Court takes due note of the fact that 8 years is a long time to sit in custody awaiting trial. In the case of accused no. 1 most of the time coincided with his serving two sentences, but in the case of accused no. 2, the hardship is more, as he has no record. It may be some consolation that, should they eventually be convicted, the period spent awaiting trial should reduce the period of their sentences. Should they be acquitted, this time spent in jail will obviously have prejudiced them a great deal. However, as has been said above, the Court must perform a balancing act between the factors for and against granting bail. For the reasons already stated I am not prepared to release the accused on bail and refuse their application.

VAN NIEKERK, J

Appearance for the parties

For the accused:	In person
For the State:	Mr B S Konga
	Office of the Prosecutor-General