



CASE NO.: CC

01/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between

GABRIEL UAZEUA

APPLICANT

versus

THE STATE

RESPONDENT

CORAM: SIBOLEKA, J

Heard on: 2010 November 11, 12

Delivered on: 2010 November 12

JUDGMENT: BAIL APPLICATION

SIBOLEKA J:

[1] On the 11th of November 2010 the accused appeared before this Court on a request to be admitted to bail pending a criminal trial matter against him and two others in this Court. He was represented by Ms. Hamutenya and Ms. Ndlovu appeared for the State. After listening to the evidence lead in this regard and submissions from both counsel, I declined the application and stated that the reasons therefore would follow latter. These are the reasons.

[2] The 33 year old applicant is accused no. 3 on the criminal matter case no. CC 01/2010. He gave evidence to the fact that there is no *prima facie* case against him. He has three children, the mother of the two passed away. They now reside with the applicant's mother at Omaruru. The third child is staying with his mother, who is also not working. The applicant is not permanently employed, but was doing casual work such as building houses, craals and debushing border areas of farms. He wants to be released on bail so that he can continue to work and support his mother and children. He has no family relations outside Namibia, no passport, and was never outside Namibia. He is able to afford bail in the amount of N\$5000,00 and promises to stand his trial. According to the applicant, accused no. 1 who has since escaped, caused his arrest by telling the police it was him who hatched out the plan to rob at Farm Parry where a couple was murdered. The applicant testified that it was not the case. Ms.

Hamutenya also argued that reporting and other related conditions may be attached to bail, if the same is granted to her client.

[3] During his evidence the applicant appeared not to know where he resides. He initially testified that he resides in Greenwell in Windhoek, the side of Kwasa Kwasa at Erf no. 2626. According to the applicant this is his brother in law's house. Later he testified that the residential number Erf 2626 he initially provided to the Court was not correct, he added that he was in fact residing at Erf 2652, at his brother in law's house in Greenwell Matongo.

[4] According to the applicant the police arrested him on the 8th of August 2009 at Farm Onawa Sport where he was busy building houses.

[5] Ms. Ndlovu called the investigating officer, Raphael Litota, who testified that he had spent 20 years in the police service, and was stationed at Swakopmund. This police officer testified that the applicant, according to witness statements he had obtained, broke into the house of a certain Denis Regionald Lang and robbed him of his .38 special Taurus Brasil revolver, serial no. KH 474081, a Siemens telephone, a gold wrist watch, a ladies gold watch, a wallet, and a gold necklace with diamonds. It is on the basis hereof that the applicant is charged in count no. 6 of this matter with: Housebreaking with intent

to rob and robbery with aggravating circumstances as defined in Section 1 of Act 51/77, before this Court.

[6] According to the investigation officer there is evidence by witnesses to the fact that the applicant gave the revolver he robbed from Denis Regionald Lang to accused no. 1 who together with accused no. 2 murdered a couple (a man and his wife) at Farm Parry. The police officer testified that once the applicant is released on bail, it will be difficult to trace him, because he has no fixed residential address or employment.

[7] The above was also the argument of the State Counsel, Ms. Ndlovu, who stated that the accused, faced a serious offence and once released he may easily abscond.

[8] In my view, the interests of society to see persons accused of crimes being tried in Courts of law will be undermined if the applicant is released on bail. The conditions of reporting at a particular police station during certain times will not bear fruit, because the applicant has no fixed residential address or employment where he could be traced in case he absconds. From the applicant's own evidence he goes where ever there is some casual work for him to do in order to support himself and his family.

[9] According to the investigation officer, it was the information he obtained from the applicant that enabled him to recover the revolver from accused no. 1 and came to know the murderers of the couple at Farm Parry. From this Courts indictment, the three accused are facing the following charges:

- Murder: 2 counts;
- Contravening Section 18(2)(a) of the riotous assemblies Act 17 of 1956 - Conspiracy to commit robbery with aggravating circumstances as defined in Section 1 of Act 51/77;
- Housebreaking with intent to rob and robbery with aggravating circumstances as defined in Section 1 of Act 51 of 1977;
- Housebreaking with intent to steal and theft;
- Housebreaking with intent to rob and robbery with aggravating circumstances as defined in Section 1 of Act 51 of 1977;
- Contravening Section 2 read with Sections 1, 8, 10, 38 and 39 of Act 7 of 1996 - Possession of firearms without a licence;
- Contravening Section 33 read with Sections 1, 8, 10, 38 and 39 of Act 7 of 1996 - Possession of ammunition.

[10] At Farm Parry where the man and his wife were murdered the following items were stolen:

- One .308 Bruno rifle serial no. 752 503846;
- One .22 short Cecado revolver serial no. 15369;
- One briefcase and a black bag, as well as an unknown amount of meat.

[11] I am persuaded by the reasoning of the Court in *S v Smith and Another* 1969(4) SA 175 NPD at 177 H where Harcourt, J, stated that:

“In dealing with an application of this nature, it is necessary to strike a balance, as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of Justice. I refer, in acknowledgement of those words, to the judgment of Diemont, J, in the case of *S v Mhlawi and Others* 1963(3) SA 795 (C) at p.796. The presumption of innocence operates in favour of the applicant even where it is said that there is a strong *prima facie* case against him, but if there are indications that the proper administration of Justice and the safeguarding thereof may be defeated or frustrated if he is allowed on bail, the Court would be fully justified in refusing to allow him on bail.” my own underlining.

[12] In this matter the evidence of the investigator shows *prima facie* that the robbing of the revolver by the applicant which was used in the

subsequent killing and robbing of a couple at Farm Parry constitutes a serious crime.

[13] In my view, the following factors are important and cannot be ignored:

- It is clear from the applicant's own evidence that he does not have a fixed residential address or employment;
- He faces *prima facie* serious offences and if convicted there is a likelihood of a severe sentence;
- The offences in this case are *prima facie* very serious;
- The applicant testified that he worked for the murdered couple for two years;
- The applicant does not have a place of his own;
- According to the applicant's own testimony he goes and stays away at any place where he finds some work to do, and he does so for as long as such work requires. This would obviously make it difficult for the police to know where to find him at a given time;
- The applicant testified that accused no. 1 told the police that it was him (the applicant) who gave accused no. 1 the idea to go and rob the farm where the couple was murdered. This assertion appears likely possible given the

fact that the applicant testified that he worked at the murdered couples farm for two years;

- Reacting to a question by the State counsel, Ms. Ndlovu, regarding his residence the applicant testified that he did not have a problem in telling the Court where he stayed, and he confirmed that he indeed stayed at Erf 2626, the side of Kwasa Kwasa, Greenwell, Windhoek. The following day the applicant said the above address was not correct, and that he in fact stayed at Erf. 2652 in Greenwell, Matongo.
- The investigating officer testified about the presence of witness statements relating to the involvement of the applicant in these crimes, and he confirmed that there was indeed a case against him;
- It is obvious that the applicant is facing serious crimes for which if convicted a goal term sentence is likely to be imposed. This situation in itself could easily influence him to stay away and avoid the trial of the matter.
- The mere assertion by the applicant that he will not abscond cannot carry much weight when viewed against the aforesaid factors and realities (See also *S v du Plessis and Another* 1992 NR 74).

[14] In the circumstances, I was satisfied that it will not be in the interests of the public and the administration of Justice to allow the applicant to be released on bail.

SIBOLEKA, J

COUNSEL ON BEHALF OF THE APPLICANT: MS.

HAMUTENYA

INSTRUCTED BY: LEGAL

AID

COUNSEL ON BEHALF OF THE RESPONDENT: ADV.

NDLOVU

INSTRUCTED BY: THE OFFICE OF

THE

**PROSECUTOR-
GENERAL**