



**CASE NO.: CC 9/2011**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between:

**JOHN FRANS MATHEUS TJAPA  
APPLICANT**

**and**

**THE STATE  
RESPONDENT**

**CORAM: SHIVUTE, J**

Heard on: 2011 June 23

Delivered on: 2011 July 13

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**RULING ON BAIL APPLICATION**

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**SHIVUTE, J:**[1] Applicant is arraigned in the High Court for trial on an indictment containing the following charges:

- a. Robbery with aggravating circumstances;
- b. Three counts of attempted murder;

- c. Contravening section 2 read with section 1, 8, 10, 38 and 39 of Act 7 of 1996, – Possession of a firearm without a license;
- d. Contravening section 33 read with sections 1, 8, 10, 38 and 39 of Act 7 of 1996 – Unlawful possession of ammunition, and
- e. Contravening section 38 (1) (1) read with sections 1, 8 and 39 of Act of 1996, Act 7 of 1996 – Negligent handling of a firearm.

[2] The applicant is represented by Mr Wessels on the instructions of the Directorate of Legal Aid while Ms Verhoef appears for the State.

[3] The applicant was arrested during 2008. He appeared in the Magistrate's Court several times pending the decision of the Prosecutor General. On 18 May 2010 he applied for a formal bail application and bail was refused on 28 May 2010. The applicant has now applied for bail on the contended ground that there were new facts, these allegedly being that the applicant's son had passed on during July 2010 and that the applicant would propose a bail amount with bail conditions to be attached.

[4] Ms Verhoef opposed the application for bail on the basis that the applicant did not advance new facts, because on 13 December 2010 when he appeared in the Magistrate's Court, he had applied for bail on the ground that his son had passed away. The magistrate had evidently considered this fact and had declined to grant bail to the applicant.

Counsel for the State further argued that since the death of the applicant's son was already brought to the attention of the Court that refused to grant

him bail, this is not a new fact and the application should not be entertained. Concerning the second ground that the accused was offering to pay bail in the amount of N\$3000.00 with conditions attached and the promise to attend his trial these, according to counsel, also did not amount to new facts. Counsel for the respondent continued to argue that it was obvious in any given case that if a court grants bail an amount would have to be set and if necessary conditions may be attached. She further argued that it appeared that the applicant wanted this Court to review the matter and urged the Court not to entertain the review application as there were no new facts.

[5] Counsel for the applicant argued that as far as the proceedings of 13 December 2010 were concerned, those proceedings could not be considered as constituting a formal bail application. The initial ruling refusing bail was given by another magistrate and the magistrate who refused bail on 13 December 2010 had no knowledge of the previous proceedings. It was submitted that the magistrate who presided over the proceedings of 13 December 2010 should have referred the matter to the magistrate who heard the initial bail application. It was argued further that the magistrate who heard the bail application on 13 December 2010 was supposed to explain to the applicant to apply for formal bail application.

[6] I was not referred to authority and I could not find any which states that if an accused had applied for bail before another magistrate where it was refused and if he comes before a different magistrate with an application for bail, such application should be referred to the original magistrate who

had refused bail in the earlier proceedings. Nor was I referred to any authority that says that the second magistrate in those circumstances should have advised the accused to reapply for formal bail application.

[7] There is nothing in the Criminal Procedure Act, 1977 which states that an accused can only apply for formal bail application. In fact, the accused can apply for bail from the dock or his legal representative can do so on his behalf from the Bar.

[8] It was further submitted by counsel for the applicant that it would be fair if the applicant was allowed to testify in order to place his alleged new facts on the record. After having considered the arguments placed before me by both counsel, I deemed it fair and to be in the interests of justice to hear the applicant's evidence in order for me to be placed in a better position to determine whether the accused indeed had new facts or not.

[9] The applicant, Matheus Frans Tjapa, testified that he was informed by his relative that his son had passed away on 4 July 2010. By then he was already refused bail during May 2010. Upon hearing his son's death he was quite naturally devastated, because he was the only child with whom he had a good relationship. Also, the deceased was looking after his 40 head of cattle at a communal farm in Kahenge area in the Kavango Region. Apart from that, the deceased was managing his father's shop. Since his son's death, the applicant's property was in disarray. The applicant further testified that he was able to pay bail in the amount of N\$5000.00 and he

undertook to stay in Windhoek at Ombili residential area. He also offered to report himself on daily basis to the police.

[10] The applicant was asked in cross-examination whether he had previous convictions which he confirmed and a list of previous convictions ranging from 1975 to 1994 was produced. It can be observed that the applicant has previous convictions including three counts of robbery with aggravating circumstances whereby he was sentenced to imprisonment ranging from 15 to 18 years' imprisonment during 1992. The applicant further confirmed through cross-examination that he was released on parole on 6 February 2008 and that whilst on parole he was arrested on 21 February 2008 in connection with housebreaking with intent to steal and theft. He further confirmed that at the time of his arrest he was shot on the foot when he was coming from the side of Woermann & Brock Supermarket where the offences mentioned in paragraph [1] of this ruling were allegedly committed but he maintained that he was not part of the people who committed the offences. The applicant was further cross-examined whether he was found with money hidden under his trousers, stockings and underwear. Although he disputed that he had hidden money under stockings, he confirmed that he was found with money under his trousers and his underwear which he said was his.

[11] The Court was provided with the bail proceedings record which took place in the Magistrate's Court. The State did not call evidence.

[14] The sole issue which I have to determine at this stage is whether the applicant has placed new facts before this Court or not viewed in the light of the facts placed in the Magistrate Court, warranting the granting of bail.

[12] As Mbenenge AJ pointed out in *S v Mpozana* 1998 (1) SACR 40 (TkHC) at 44J- 45A that while a new application for bail was not merely an extension of the initial one, the court which entertains the new application should come to a conclusion after considering whether, viewed in the light of the facts that were placed before court in the initial application, there are new facts warranting the granting of the bail application.

[13] Having considered the testimony of the applicant and the record of the proceedings in the Magistrate's Court, the fact that the applicant's son had passed away is not a new fact as it was already brought to the attention of the magistrate on 13 December 2010. I have also considered the set of the alleged new facts, namely that applicant would pay N\$5000.00 bail with conditions attached and that he would make sure that he stood his trial.

[14] These again I do not consider them to be new facts, because it is common cause that whenever an accused is granted bail, the court granting bail has to set an amount of money to be paid first before an accused is released from custody and that conditions may be imposed. I therefore find that no new facts have been placed before me.

[15] In the result the application for bail is refused.

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**SHIVUTE, J**

**ON BEHALF OF THE STATE**

Ms Verhoef

**Instructed by:**

Office of the Prosecutor-General

**ON BEHALF OF DEFENCE**

Mr Wessels

**Instructed by:**

Directorate: Legal Aid