



CASE NO.: CC

28/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

ANTHONY SURESH KUMAR STANIS

ACCUSED

CORAM: SIBOLEKA, J

Heard on: 14, 15 JUNE 2011

Delivered on: 26 JULY 2011

JUDGMENT: BAIL APPLICATION

SIBOLEKA, J:

[1] The applicant, a 34 year old Sri Lankan National, is accused no. 6 on the partly heard criminal matter before this Court. He was the last to be arrested after the other five suspects and are all facing the following 1516 charges:

1. **CONTRAVENING SECTION 18(2)(a) OF THE RIOTOUS ASSEMBLIES ACT 17 OF 1956 - CONSPIRACY TO COMMIT FRAUD;**

2. **FRAUD
ALTERNATIVELY
THEFT**

3 - 1033 (as per Schedule 1). **FRAUD
ALTERNATIVELY
THEFT**

1034 - 1507 (as per Schedule 2). **FORGERY**

1508. **THEFT
ALTERNATIVELY
CONTRAVENING SECTION 8(1) OF ORDINANCE 12 OF
1956 -
USE OF PROPERTY**

1509. **THEFT
ALTERNATIVELY**

**CONTRAVENING SECTION 8(1) OF ORDINANCE 12 OF
1956 -
USE OF PROPERTY**

**1510. THEFT
ALTERNATIVELY
CONTRAVENING SECTION 8(1) OF ORDINANCE 12 OF
1956 -
USE OF PROPERTY**

**1511. THEFT
ALTERNATIVELY
CONTRAVENING SECTION 8(1) OF ORDINANCE 12 OF
1956 -
USE OF PROPERTY**

**1512. CONTRAVENING REGULATION 2(1) READ WITH REGULA-
TIONS 3(5) AND 22 OF THE EXCHANGE CONTROL REGULA-
TIONS, 1961, PROMULGATED BY GOVERNMENT NOTICE
R1111 of 1 DECEMBER 1961, AS AMENDED - UNLAWFUL
BUYING, BORROWING OF FOREIGN CURRENCY**

**1513. CONTRAVENING SECTION 14(1)(a) READ WITH SECTION
91
OF THE CUSTOMS AND EXCISE ACT 20 OF 1998 - NON
DECLARATION OF GOODS**

1514. CONTRAVENING REGULATION 2(1) READ WITH REGULA-

TIONS 3(5) AND 22 OF THE EXCHANGE CONTROL REGULATIONS, 1961, PROMULGATED BY GOVERNMENT NOTICE R1111 OF 1 DECEMBER 1961, AS AMENDED - UNLAWFUL BUYING, BORROWING OF FOREIGN CURRENCY

1515. CONTRAVENING SECTION 14(1)(a) READ WITH SECTION 91

OF THE CUSTOMS AND EXCISE ACT 20 OF 1998 - NON DECLARATION OF GOODS

1516. FORGERY (OF A DRIVER'S LICENCE)

[2] Since their arrest all six accused made various applications in the Magistrate's Court to be released on bail. Accused no. 6, the applicant before Court was refused bail on the 31st of October 2008, while no. 1 secured it in the amount of N\$200,000.00 on the 12th of December 2008. Accused no. 1 has been reported missing since the 18th of March 2009 to date. Accused no.'s 2, 3 and 5 were denied the same on the 31st of March 2009.

[3] This is the applicant's second application to be released on bail, and he is represented by Mr. Namandje, Ms. Lategan, assisted by Mr. Moyo appeared for the State.

[4] Bail is opposed on the following grounds:

Fear of abscondment, that the accused will not stand the rest of his trial, the seriousness of the offence, the fact that if convicted he would face a lengthy term of imprisonment, it would not be in the interests of the administration of justice to grant bail to the applicant, it is already a partly heard matter and if the applicant does not stand the rest of his trial the state's case, as well as the administration of justice would be prejudiced. It would also not be in the interest's of the public that he be granted bail.

Ms. Lategan said the applicant should not repeat the same facts that were already placed before another Court. She said such an exercise would be an abuse of process which should not be entertained. In the end, she said the Court should consider both new and old facts in totality to arrive at a conclusion. She said evidence which was there at the time of the first application, but for whatever reason was not revealed (placed) before Court cannot be relied on in the latter application as new facts or evidence.

[5] Before calling the applicant to testify, Mr. Namandje said he preferred the term 'changed facts' instead of new facts alluded to by Ms. Lategan. He said when the Magistrate decided on bail some years back, the Prosecutor-General had not yet indicted the accused on this matter. The Prosecutor and the investigation officer made the following allegation to the Magistrate during the applicant's first

application, that the applicant is linked to all the rest of the accused persons through invitation letters they received from accused no. 4 to visit Namibia. However, according to Mr. Namandje, no such evidence could be found in any of the witness's statements disclosed to him by the State. He said a number of witnesses have since testified and the applicant is not connected to the indictment he is facing.

[6] In essence the suggestion in the above paragraph are that there is no case against the applicant before Court. Mr. Namandje further said there was not even a weaker case against him, nothing at all. If there is something the applicant was facing, it is only a suspicion which can never be a basis for a conviction in our law. According to him the applicant has not been well there in custody. The above factors coupled with the period he has been in custody since 2007, it will be in the interests of justice that his client now be released on bail.

[7] In support of his own release on bail the applicant testified that he went up to Grade 12 at St Mary's College in Colombo, Sri Lanka in 1997. He also studied for a Diploma in computer, whereafter he started working with computers. He first came to Namibia on the 24th of May 2007 after he was invited by a friend, and went back home on the 4th of July 2007. During his stay here he was at Safari Court, Windhoek and he became a boyfriend to Rachel Elizabeth Slinger.

From there he started communicating with his girlfriend. On the 14th of August 2007 he came back for another visit and was housed at Safari Court where his girlfriend visited him and he also visited her residence.

[8] He said he was arrested on the 26th of September 2007 now in custody for a period of 3 years and nine months. After his arrest by a certain Mr. Zambwe, no reasons were told to him. His girlfriend's parents got him a lawyer from whom he learnt that he was facing charges of fraud, possession of foreign currency, forgery and theft. He was not told about these charges during the application for bail in the Magistrate Court. They only said they suspected him because he was a Sri Lankan, and that he was also part of the group arrested earlier on before him referring to his co-accused. His friend Roy, introduced him to accused no. 4 through internet and told him to send his particulars to him through e-mail. This was done and they greeted each other by e-mail. According to the applicant that is all that he had to do with accused no. 4. From there he did not physically come into contact with him and so is the rest of his co-accused until later in prison when they were arrested.

[9] The applicant denies he was part of his co-accused and said he does not even know anyone of them. He only came to know them as his co-accused in prison after his arrest. This is not correct because a

State witness Bruce Bronze Scheepers checked the applicant and accused no. 1 in at Safari Court Hotel during May 2007. On their request he showed them Windhoek and they started outing together for fun and drinks at clubs such as Funky Lab where at some stage they spent N\$6,000.00. On another occasion the applicant and accused no. 1 paid for two nights spent with this witness at Walvis Bay where they had gone clubbing and enjoying themselves. They became friends with this witness and from there they used to go and eat at restaurants where he sometimes saw the applicant with accused no. 4 during his two visits to Namibia.

[10] At some stage during the applicant's first visit he went clubbing with this witness. They were only two in the car and latter when the witness was dropped at his home the applicant gave him a plastic bag for safekeeping. Inside this bag was a pouch containing a white swiping device, a charger and a parcel wrapped in grey and red cello-tape. This wrapped parcel frightened witness Johannes Husselman and Zambwe as they thought it was an explosive. When it was later opened at the Explosive Unit it was found full of brand new shop like type of gift cards with magnetic strips. Another State witness Brenda Johanna Katupose who worked at the Central Café Restaurant as a waitress in 2007 where breakfast, lunch and internet connections were served became a friend to accused no. 2 who told her 'Big guy' was

the applicant's other name. According to her accused no. 2 sometimes came at her workplace with accused no. 4 and the applicant.

[11] From these testimonies there is a very clear indication that the applicant indeed knew his co-accused, and that he was associating with them during his visits to Namibia. For purposes of a bail application such as this, this is all that I need to highlight in relation to Mr. Namandje's contention that the applicant has not been connected to any of the charges he is facing.

[12] The applicant testified further that he worked in England from 2004 to 2007 and came back to Sri Lanka where he got into problems with his ex-girlfriend. He became stressed and after contacting a friend Roy here in Namibia through face book he was told it is a nice place. He was told about the good night life and as a person interested in drinking and partying he asked his friend to invite him. He did not know how to get a Visa, his friend Roy organized through accused no. 4 to give him an invitation letter. He was told to send his particulars by e-mail to accused no. 4, Travoltha, unknown to him at that stage. Accused no. 4 e-mailed an invitation letter to him which he took to his embassy and collected his Visa. He said it was only him that was invited by accused no. 4 and he is not aware of any similar invitation

letters sent to the rest of his co-accused. The appellant's invitation letter reads:

“ To whom it may concern
I Mr. Travoltha Mekaundapi Tjiuju a Namibian citizen ID No. 8104111-162 living at Erf 8374 Freedom Square, Hangane Katjipuka Kavezeri Street present this invitation letter to you as an invitation to my friend Antony Sures Kumar Stanis a Sri Lankan passport holder (Passport No. 1170909). I get to know him over the internet and find him very honest and kind person. I have arranged transport and accommodation for his visit to our beautiful country. Should you feel insecure about anything do not hesitate to contact me at 0812024014 any time.
Yours truly
Travoltha Tjiuju”

[13] The applicant's visits to this country were as follows:

First visit: 24 May 2007 to 4 July 2007

Second visit: 14 August 2007 to the date of his arrest on the 26th of September 2007. In my view and in particular from the wording of the above invitation letter, it is highly unlikely that the applicant would have failed to find out during his first visit or thereafter, and as one would normally expect it, to meet accused no. 4 and to say thank you to him. I am therefore convinced that the appellant was not telling the truth when he testified that he only met accused no. 4 in prison after his arrest.

[14] It was the above invitation letter that made it possible for the applicant to come to Namibia, 'a nice place' for the first time to enjoy what he described as 'good night life' in regard to 'drinking' and 'partying'. I take it and indeed commonsense tells me that one of the first things the applicant did when he arrived in Namibia for his first visit was to meet and get to know accused no. 4 for what he has done for him as reflected in the above letter.

[15] The applicant denied he ever gave gift cards or scanning devices to anyone. He denied he withdrew money from other people's accounts, and neither were any foreign currency found on him. He said he had his own credit cards from England, which he used to pay for his accommodation and transport here in Windhoek. In 2007 the State witness Xavier Cupido worked at Bank Windhoek Foreign Exchange department, Hosea Kutako International Airport. He first saw the applicant at the airport's arrival terminal when accused no. 1 and 2 came to pick him up. Later accused no. 1 and 2 came at his workplace to exchange Namibian Dollars into foreign currencies. He again saw these accused persons and the applicant at Funky Lab and twice at La Dee Das Club.

[16] The applicant further stated that he is not aware of a similar case or charge leveled against him in England apart from a drunken driving

case. He stated that no State witness has connected him to any of the charges he is facing before this Court, and that includes the remaining witnesses. He said he did not assist any of his co-accused to withdraw money from other people's accounts.

[17] The applicant said he has developed a high cholesterol and a continuous headache with blocked nostrils as a result of his stay in custody and the unhealthy food provided to him there. He is taking treatments from the doctor who referred him to a specialist but he has no money to pay for the service. The doctor advised him to eat low fat foods or to do some exercises to reduce cholesterol otherwise his life would be in danger of a heart stroke, but the latter could not come to Court because he was busy. In my view Ms. Lategan correctly intervened at this point to say the last testimony of the applicant is of minimum value because the doctor would not be called to testify and be tested thereon.

[18] The applicant said he will reside with his girlfriend if he is granted bail and can afford an amount of N\$10,000.00. He pledged to comply with any conditions the Court may impose. He said his passport is with the investigating officer and there was no way he could run away. He has no problem for his name being circulated to the police and immigration officials at all borders and airports. A communiqué

regarding his release on bail could also be sent to the SA Police and the Sri Lankan Embassy in that country. If he is denied bail and is acquitted next year he would have spent more than four years in custody for no good reason.

[19] In my view at the end of every criminal trial a suspect may be convicted or acquitted and this comes about irrespective of whether he is in custody, on bail or on warning. I take it that such a result suggests that the law has eventually taken its own course. It is therefore not correct for an acquitted accused who was in custody during the trial to say that the duration of his incarceration was “for no good reason”, because that is what a criminal trial is all about.

[20] In cross-examination he said that it was not possible for a person to enter or leave Namibia without a passport and he is not aware of illegal immigrants boarding trucks or using other illegal means to leave the country. According to him a person must have a valid passport and a Visa to leave or enter the country. When asked how his bailed co-accused no. 1 absconded while his passport is with the police he said he does not know where he is, or whether he is dead or alive. In my view accused no. 1's continued stay away from Court after being granted bail in the Lower Court is affecting the trial, because his side of the story will be unknown forever and that is not in the interests of

justice. The applicant is adamant that only a passport and a Visa enables a person to enter or leave Namibia. This is not correct. In my view it is possible for a person to enter or leave the country illegally without a passport due the vast and porous nature of our border areas which in most cases makes detection difficult.

[21] It emerged during cross-examination that at some point during the applicant's visit to Namibia he made a statement under oath to the police that the car he rented was stolen while in fact he damaged it in an accident and hid it under the bridge. When he was asked to explain his conduct he said he was drunk and was afraid of being locked up, a sign of untruthfulness.

[22] The applicant called his Namibian girlfriend Rachel Slinger to testify in support of his release on bail. She resides in Windhoek North, 15 Sturrock Street. Although she is currently doing a six month course in South Africa, she said the applicant can stay at her parents house, and in her absence they can report to the police if he disappears. She has no problem for him staying there until the finalization of the trial. During cross-examination it surfaced that she came to Court with another boyfriend, a situation she said was due to the fact that the applicant was in custody and no longer with her. According to her,

their relationship is back on track some two months before the bail hearing.

[23] Ms. Lategan called Warrant Officer Brian Sabo in support of her objection to the applicants release on bail. This police officer recently took over this matter from W/O James Mungabwa who has left the force, and by then all investigations had already been finalized. He did not get into the matter in detail to know what happened. He said the applicant was facing a lot of charges and he fears that if he is released on bail he will abscond. This witness testified that accused no. 4, was the host of accused no. 1 who has absconded. According to this witness they were told at Court on the 18th of March 2011 in the morning that accused no. 1 had absconded. Accused no. 4 said this only when he was asked about it. That was when he said he did not see accused no. 1 for the past three days. According to this police officer that was the end of the matter and to date accused no. 1 is nowhere to be found.

[24] During cross-examination and for the reasons already eluded to, the police officer could not say whether there is a connection between the applicant and any of the charges he is facing. He was nonetheless adamant that in his view if the applicant was released on bail he will flee and will not stand his trial.

[25] Mr. Namandje took strong exception to some of the evidence placed before the Magistrate during the applicant's first bail application and this related to the effect that:

- The applicant was linked to the rest of his co-accused through invitation letters they all received from accused no. 4.

According to this Counsel many State witnesses have already testified but none of them came up with the above allegations. He further argued that after going through the disclosed statements of all State witnesses including those who have not yet testified, no mention is made regarding the above allegation.

[26] I must mention here that most formal bail applications are brought in Magistrate's Courts before the completion of the investigations. It is my view that some of these investigations take long to finalize due to a variety of reasons among others the complexity and the difficulties experienced in tracing some of the witnesses. I must nonetheless emphasize that investigation officers and Public Prosecutors must always refrain from making allegations which they are not sure of or have not properly verified during such proceedings. This conduct has the potential to mislead the Court resulting in incorrect decisions. This conduct must therefore be

avoided at all costs. I don't find it appropriate to discuss this aspect any further, because I am dealing with a normal formal bail application.

[27] In his submissions before judgment Mr. Namandje referred to article 5 in our Constitution which reads:

“Protection of fundamental rights and freedoms.

The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner herein after prescribed.”

I will now deal with authorities cited by Mr. Namandje in support of the release of his client on bail. In *Mohamed and Ander v President of the Republic of South Africa and Others* 2001(3) SA 893 (CC) it was contended that Mahomed's constitutional rights to life, dignity, and not to be subjected to cruel, inhuman or degrading punishment were allegedly violated when he was arrested, detained, interrogated by South African immigration officers and handed over to the United States Federal Bureau of Investigation officers for interrogation and later removal to New York to stand trial. The Constitutional Court set aside The Cape of Good Hope High Court order and declared that the exercise was an unlawful violation of the appellants aforementioned rights in as much as there was no prior undertaking from the United States government that if a death sentence was imposed it would not

be executed. I agree with the reasoning of the Constitutional Court in this regard.

[28] In *St v Branco* 2002(1) SACR 531(W) the main reasons that heavily influenced the Magistrate to refuse bail to the appellant were, the seriousness of the charge, attracting a 25 years goal term, the strength of the State's case and the fact that he was a foreign citizen with no real ties to the country. He found the appellant and his wife to be flight risks. On appeal the refusal was set aside on the basis that the Magistrate misdirected himself by not having regard to the fact that the appellant permanently resided in the country, was employed, stayed there with his wife and three children for five years. Also found to have been disregarded was the appellant's degree of co-operation with the police resulting in the arrest of the kingpin of the operation, accused no. 5.

[29] All that the investigating officer told the Court *a quo* was that the appellant and his wife were flight risks if released. Apart from family connections in Mozambique, Portugal and Canada there was no evidence that he had any assets or even business interests outside the country. The appellant indeed had family and business ties in the country and bail was accordingly granted.

[30] In my view the facts in this matter are materially different to those of the applicant before Court in that apart from a short once broken and recently revived boy and girlfriend relationship with Rachel Slinger, the applicant is a foreigner with no other ties in this country whatsoever.

[31] In the unreported judgment by this Court, *St v Likius Aikela*, delivered on the 7th of April 1992 O'Linn J, as he then was stated at page 7:

“I wish to stress again that the administration of justice in general and the trial of accused persons and the need to bring them before Court and to ensure that they will stand their trial, is not a little game but a matter of fundamental national interest and importance.”

[32] In my view it will not be in the interest of the administration of justice and that of the public to release the applicant on bail, a Sri Lankan national who will not lose anything if he absconds.

[33] In the result the application to release him on bail is refused.

SIBOLEKA, J

ON BEHALF OF THE APPLICANT:

MR. S.

NAMANDJE

INSTRUCTED BY:

SISA NAMANDJE & CO.

INC.

ON BEHALF OF THE RESPONDENT:

ADV.

LATEGAN

ASSISTED BY ADV.

MOYO

INSTRUCTED BY:

THE OFFICE OF

THE

PROSECUTOR-

GENERAL