

CASE NO.: CC12/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

KAVIYENE GERSON KAMORUAO

APPLICANT

versus

THE STATE

RESPONDENT

CORAM: SIBOLEKA, J

Heard on: 24 FEBRUARY 2011

Delivered on: 10 MARCH 2011

JUDGMENT: BAIL APPLICATION

SIBOLEKA, J:

[1] The applicant is charged with three counts of Rape, two counts of assault with intent to do grievous bodily harm and one count of indecent assault.

[2] Before the commencement of the trial on this matter the applicant applied for bail, but was refused. The trial had in the meantime started and the State has lead all its witnesses. The matter has since been postponed to the 1st of August 2011 for the DNA test results. The applicant has availed himself for samples to be taken but only his saliva was taken and he has co-operated in that regard. This was confirmed by the State counsel, Ms. Esterhuizen during

the proceedings.

[3] At the start of the application Mr. Uirab who appeared on behalf of the applicant, raised what he referred to as fresh facts and these are:

- The State's fear of a likelihood of the applicant interfering with State witnesses no longer exists because these have already all testified.
- The second count of rape is weak, because the complainant did not know who raped her. She was drunk and unable to identify her assailant.

Latter the complainant happened to be in one of the offices at the police station when the accused and another person walked in at the gate. A police officer pointed at the accused through the window and asked the complainant whether it could be him who raped her or not, whereby the complainant said it was him.

- The applicant has spent three years and some months in prison, and in addition to that the matter will only proceed from the 1st of August 2011 on the request of the State.

[4] I am nonetheless in agreement with what was stated by Maritz, J as he then was in *State v Thomas Paulus Namundjebo* Case No. 36/98 where he stated that:

"The presumption of innocence ... operates in favour of the applicant in a bail application - even where it is said that there is a strong *prima facie* case against him."

[5] The applicant testified that since his grandmother passed away last year

things are in disorder, because he is the only son in the family, some of their animals have been stolen during his absence. He wants to stay with his mother at the stock houses at Okarakango Street, Okakango Location (an informal settlement in Okakarara). He pledged to report himself at Okakarara Police Station which is within walking distance should the Court make such an order.

[6] He is a mechanic and also does welding work. These will also keep him busy and enable him to generate money for himself.

[7] According to the applicant, even if the DNA results point him out as the person who raped the second complainant, he will still come and attend his trial.

[8] The applicant also called his sister, Jackeline Zaongara who testified that the applicant comes after her and that she was prepared to stay with him at House No. 2209 Kamberipa Street, Herero Location, Katutura, Windhoek, when his case resumes on the 1st of August 2011. She confirmed that if need be she was prepared to bring the applicant in a taxi to Court and then go to work. Ms. Esterhuizen on behalf of the State, opposed the application and in the main, she stated that:

- The charges the applicant was facing are serious. There is a likelihood of a conviction and;
- This may be followed/visited with a lengthy term of imprisonment.
- That in the light of the above, the applicant may be tempted

to abscond.

[9] The State counsel did not call witnesses to substantiate her fears, but only made submissions and referred to various authorities.

[10] In my view Mr. Uirab has a point when he argues as follows:

- The delay in finalizing the matter has been caused by the State when it opted to go for DNA tests at the very last moment after it has lead all the evidence, and that this could have been done right at the beginning.

All State witnesses have finished testifying.

The trial will only resume on the 1st of August 2011, and there is no guarantee whether the DNA results will be available then, leaving room for a likelihood of another request for postponement.

[11] It is my considered view that the State has not been able to show cause why the applicant should not be admitted to bail on this matter. I am persuaded by the remarks of Muller, J, in *S v Issack* 1965(2) SA 161 (D) at page 162 C, where it was 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."

[12] In the circumstances of this matter, I am persuaded to accept what the applicant placed before Court that as of now he will stay with his mother at Okakarara and later when his trial resumes on the 1st of August 2011, he will reside with his sister here in Windhoek. There is no

reason for me to doubt the testimony of the applicant and his sister, and I have no basis to anticipate that the applicant will abscond if released on bail.

[13] In the result I make the following order:

- That the applicant is in custody.

Bail in the amount of N\$3,500.00 is granted on the following conditions:

- That, should the above amount be paid, he is warned to be at Court on the 1st of August 2011 at 10h00 and to remain in attendance until excused.

That the applicant should then start to report himself to the Charge Office Sergeant at Okakarara Police Station on the following days and times:

Mondays, Wednesdays and Fridays between: 08h00 and 09h00 in the morning and between 18h00 and 19h00 in the evening.

- That the applicant should continue to observe the above conditions until he leaves Okakarara for the resumption of his trial in Windhoek on the 01st of August 2011 and should inform the Charge Office Sergeant accordingly.

[14] That when the trial resumes in Windhoek on the 1st of August 2011 the applicant must start reporting himself to the Charge Office Sergeant at Wanaheda Police Station on the following days and times:

- Mondays, Wednesdays and Fridays: between: 08h00 to 09h00 in the morning; and between 18h00 and 19h00 in the evening.

[15] These bail conditions may be revisited at any time should such a need

arise.

SIBOLEKA, J

ON BEHALF OF THE APPLICANT:

MR. UIRAB

LEGAL AID

ON BEHALF OF THE RESPONDENT:

ADV. ESTERHUIZEN

INSTRUCTED BY:

THE OFFICE OF THE

PROSECUTOR-

GENERAL