



CASE NO.: CC 05/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

**JOHANNES KHOASEB
APPLICANT**

AND

THE STATE

RESPONDENT

CORAM: SHIVUTE, J

Heard on: 2012 February 22-23

Delivered on: 2012 March 09

JUDGMENT ON APPLICATION FOR BAIL

SHIVUTE, J:[1] The Applicant, as second accused, had been jointly charged with two others and arraigned in this Court on five charges, namely:

One count of murder; a count of attempted murder, alternatively contravening section 38(1) read with sections 1, 10, 38 and 39 of the Arms and Ammunition Act 7 of 1996 (negligent discharge or handling of an arm);

robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977; contravening section 2 read with sections 1, 8, 10, 38 and 39 of the Arms and Ammunition Act (possession of firearms without a licence) and contravening section 33 read with sections 1, 8, 10, 38 and 39 of the Arms and Ammunition Act (possession of ammunition).

[2] Only the applicant and the 3rd accused person are in custody. The 1st accused, Paulus Mwengo, has escaped from custody.

[3] In these proceedings, the Applicant is represented by Mr Wessels instructed by the Directorate of Legal Aid whilst the respondent is represented by Ms Verhoef.

[4] It has been established that the Applicant is a 45 year old Namibian born at Otjimbingwe. He is unemployed. Both his parents are deceased. He has four siblings who are all residing in Namibia. He is married with six children. Two are employed, three are unemployed and the last born is still in school. The applicant attended school up to standard 2 and left school because his parents could not afford to pay for his school fees. He went to work on several farms. At the time he was arrested he was unemployed. His wife is also unemployed.

[5] The Applicant has no passport and he has never been outside Namibia. He was staying at a place called Single Quarters in Karibib with his family prior to his incarceration. He has been in custody for about two and half years. He has a previous conviction. He was convicted as an accessory after the fact to housebreaking with intent to steal and theft. He was convicted

together with one of his co-accused persons. Apart from the previous conviction he has two other cases pending in Karibib Magistrate Court, namely:

Housebreaking with intent to steal and theft and another case of theft read with the provisions of the Stock Theft Act. The Applicant indicated that he can only afford to pay bail in the amount between N\$800.00 and N\$1000.00. He has no source of income. If granted bail he would ask one of his children who is employed to pay bail for him.

[6] The Applicant maintained that he would plead not guilty to all the charges as he did not know the place where the offences were allegedly committed. He further stated that he was in custody when these offences were committed. According to him he was arrested on 03 November 2009 and these offences were committed on 07 November 2009. It was further the applicant's testimony that should he be granted bail he would attend his trial.

[7] The State opposed bail on the grounds that the offences the Applicant is charged with are very serious; the State has a *prima facie* case against the Applicant; the Applicant may abscond should he be released on bail, and that it is not in the interests of justice or public to release the Applicant on bail.

[8] The State adduced evidence to the effect that a balaclava which was alleged to have been worn by one of the persons who committed the offences was allegedly found covered with grass at the Applicant's house. Light green overalls and safety boots were also found at the Applicant's

place. The overalls and the boots were allegedly also worn by the culprits during the commission of these offences. Apart from the above mentioned items, there were other items allegedly recovered at the Applicant's place. Those items, the balaclava, light green overalls and safety boots were allegedly stolen during the housebreaking with intent to steal and theft in the matter which is pending in the Karibib Magistrate's Court. These goods are said to belong to a son of the deceased in the murder case who is staying at a farm neighboring the Riksberg farm where the murder and events forming the subject matter of the other counts allegedly occurred.

[9] The State further adduced evidence that the Applicant was not arrested whilst he was in custody on 03 November 2009 as he is alleging. He was arrested on 12 November 2009 and he was present when the goods were allegedly recovered from his house. The State alleged that the Applicant acted with a common purpose with the 3rd accused and the 1st accused who, as mentioned before, is still at large. There is information that the 1st accused is still within the boundaries of Namibia and he is expected to be arrested soon.

[10] When considering an application for bail, the Court should strike a balance between two competing interests being the liberty of the Applicant and the State's requirement that the Applicant stands his trial and the administration of justice or interest of society be safeguarded from frustration. The Court should also consider the notion that the accused is presumed to be innocent until he is proven guilty. However, as a general

proposition, although the presumption of innocence operates in favour of an accused despite a strong case against the accused, this should not be over emphasized. The ends of justice would not be served if there are indications that should the accused be granted bail he would not stand his trial. It is trite law that the *onus* is upon the Applicant to satisfy the Court on a balance of probabilities that it would be in the interests of justice if he is released on bail and that he would stand his trial.

Seriousness of the offences

[11] There is no doubt that the Applicant and his co-accused persons are facing very serious charges. In the event of the Appellant being convicted of the offences of murder and/or robbery with aggravating circumstances where a firearm was used, the probability is that the penalty to be meted out will be a long term of imprisonment without the option of a fine.

***Prima facie* case against the Applicant**

[12] Counsel for the Applicant conceded that there is a *prima facie* case against the Applicant. However, he argued that the Applicant is unlikely to be convicted because the State is only relying on circumstantial evidence. It is trite that a bail application is not a trial itself. The prosecution does not have to prove beyond a reasonable doubt that the Applicant is guilty at this stage of the proceedings. The requirement at this stage is for the prosecution to show through credible evidence that there is a *prima facie* case against the Applicant.

The risk of absconding

[13] The risk of absconding should be potential and it is guided by the nature of the charge and the penalties which are likely to be imposed should the Applicant be convicted; the strength of the State case; whether the Applicant has the means to leave the country; his past experience to being released on bail, and the assurance he gave that he will stand his trial. The Applicant in this matter appears to be a man of straw. He is unemployed. As previously mentioned, he indicated that if he is granted bail he would request bail money from one of his children. The chances of the Applicant leaving the country are very slim. However, it is a fact that an accused may not fail to stand his or her trial only if he or she leaves the country. An example is the 1st accused in this matter that appears to be evading his trial despite the fact that he is said to be in the country. As previously stated, the Applicant's response to the charges against him was to raise what appears to be an alibi. The allegation that he was in custody when the offences were allegedly committed was disputed by the State through the evidence that the offences were committed on 07 November 2009 and he was arrested on 12 November 2009 at his home.

[14] When the offences are serious and long term of imprisonment is likely to be imposed should the Applicant be convicted, there is a high inducement for the Applicant not to stand his trial.

The interest of justice or public

[15] The Court must weigh the interest of justice against the right of the accused to his liberty. The accused person has a previous conviction. He has two cases pending in the Magistrate Court, at the pain of being repetitive, namely:

Stock theft and housebreaking with intent to steal and theft whereby a motor vehicle was stolen. In this Court he is facing five counts, two of which are very serious and if convicted, are likely to attract a sentence of long term of imprisonment. All the offences which the accused person is charged with and the offence of which he was convicted are said to have been committed at the farms in Karibib district. Two of those farms are neighbouring each other. Having applied the proportionality test of the interest of justice against the deprivation of the accused's personal freedom, I have come to the conclusion that the interests of justice by far outweigh the interests of the Applicant. Therefore, the interests of justice will be prejudiced if he is released on bail, because he is likely to commit further offences and is unlikely to stand his trial.

[16] In the result, the following order is made:

The application for bail is refused.

SHIVUTE, J

ON BEHALF OF THE RESPONDENT

Ms Verhoef

Instructed by:

Office of the Prosecutor-General

ON BEHALF OF THE APPLICANT

Mr Wessels

Instructed by:

Directorate of Legal Aid