REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case no: CC 06/2016

In the matter between:

JANDRE JACQUES DE KLERK **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *De Klerk v S* (CC 06/2016) [2017] NAHCMD 67 (09 March 2017)

Coram: LIEBENBERG J

Heard: 28 February; 01 March 2017

Delivered: 09 March 2017

Flynote: Criminal procedure – Bail – Applicant to show on balance of probabilities – Granting of bail in interest of administration of justice – Factors for consideration – Amendment of Criminal Procedure Act by Act 5 of 1991 – Court given wider powers – Public interest – Important factor when serious crime committed – Strength of State case – Prima facie strong case against

applicant – Nature of offence and circumstances important factors – Applicant convicted of assault read with provisions of Combating of Domestic Violence Act 4 of 2003 whilst out on bail – Applicant bearing onus to have informed court of previous conviction and its effect on application – Not in public interest to admit applicant to bail – Application refused.

Summary: Applicant indicted on counts of murder and rape, the victim being a young girl aged 13 years who was brutally violated and murdered. Applicant was arrested on a charge of rape and whilst on bail, committed an assault for which he was convicted. Offences charged fall under Part IV of Schedule 2 and court considered whether it was in public interest to release applicant. Court took into account factors such as nature and circumstances of the crime charged and strength of the State case, the latter *prima facie* implicating the applicant. Court concluded that it would not be in public interest to release applicant on bail and refused the application.

ORDER

The application for bail is dismissed.

RULING IN BAIL APPLICATION

LIEBENBERG J:

[1] The applicant (hereinafter the accused), a 27 year old male of Namibian nationality has approached the court in an application to be admitted to bail. He was arrested on 24 October 2014 and has remained in custody to date, a period of two years and four months. It is common cause that the accused at

no stage during the pre-trial proceedings in the lower court applied for bail. When asked why he waited this long before bringing this application, the accused explained that he finds it difficult to consult with his legal representative whilst in custody, and also wanted to support his parents who live in Aroab, and his young boy who is in the care of the biological mother, residing in Henties Bay.

[2] The State opposes the application on grounds that the accused is indicted on multiple counts, all of which being of serious nature and whereas the State will make out a very strong case against the accused, the imposition of lengthy custodial sentences upon conviction, is inescapable, thereby increasing the flight risk. Furthermore, if admitted to bail, there is the further risk of the accused interfering with the State's witnesses and lastly, that it will not be in public interest to grant the accused bail, irrespective of any conditions attached thereto.

[3] As set out in the indictment, the accused is charged with murder, two counts of rape and one count of housebreaking with intent to rape and rape. As regards the rape charges, these were committed in contravention of s 2(1) *(a)* of the Combating of Rape Act, 2000.[1] The accused has intimated that he will be pleading not guilty on all counts preferred against him.

[4] The murder and rape counts contained in counts 1 – 3 were committed between 03 and 04 May 2014, for which the accused was arrested on 17 February 2015, approximately nine months later. The first charge of rape was provisionally withdrawn in the magistrate's court but again joined[2] with the other charges when the matter was referred to the high court for trial.

[1] Act 8 of 2000 and hereinafter 'the Act'.
[2] As count 4.

[5] The victim in the count of murder and two counts of rape, was a 13 year old girl whilst the complainant in count 4 is an adult female. From a reading of the summary of substantial facts, considered together with the post-medico report compiled in respect of the deceased victim, it is evident that this young child died a brutal and horrific death. In view of the serious nature of the offences charged, and regard being had to the aggravating circumstances under which these heinous crimes were committed, it seems inevitable to come to the conclusion that, upon conviction, each of these charges undoubtedly would attract severe punishment in the form of lengthy custodial sentences. What naturally follows therefrom is that this in itself could be an incentive for an accused to abscond.

[6] The accused testified in his application and also led the evidence of one Rudiger Talliaard and Suzetta Dausab in support thereof.

[7] It is common cause that the accused registered with the National Youth Service in Henties Bay, where he had been residing until his arrest. Though single, the accused has one child born from a relationship with one Zelda Plaatjies, both currently residing in Henties Bay. The relationship had been terminated in the meantime. On 16 June 2013 the accused was arrested on a charge of rape in contravention of s 2(1)*(a)* of the Act and was admitted to bail on 15 October 2013.[3] Whilst out on bail the accused on 24 October 2014 assaulted his partner Zelda Plaatjies, with whom he was is a domestic relationship as defined in the Combating of Domestic Violence Act 4 of 2003, by head butting and biting her on the side of her face and on the back. According to evidence she thereafter went into hiding at a safe haven for some months until she decided to lay charges against the accused. The accused pleaded guilty and was sentenced to a fine of N$1 000 or in default, 6 months' imprisonment, plus a further 6 months' imprisonment suspended on

[3] This charge forms the subject matter of the offence of housebreaking with intent to rape and rape in contravention of s 2(1)*(a)* of Act 8 of 2000, set out in count 4.

condition of good conduct.[4] According to the accused, he served the alternative sentence of 6 months' imprisonment. The significance of this conviction is that the accused, whilst out on bail on a charge of rape, committed a further crime of assault, read with the provisions of the Domestic Violence Act, 2003.

[8] A disquieting feature of the accused's application is that during his testimony, he did not disclose the fact that he had been convicted of assault whilst out on bail on a charge of rape. This undoubtedly is crucial information when it comes to considering the granting of bail to an accused charged with offences involving violence, especially when it is gender based and aimed at vulnerable persons in the community. The accused bore the onus to have shown on a balance of probabilities why his previous conviction (for purposes of the bail application) should be given little weight instead of hiding it from the court. This important fact was only extracted from the accused during cross-examination with supporting documentary evidence handed into evidence, evidence the accused does not dispute. Fairness and justice dictates from an accused in bail proceedings to disclose information pertaining to pending cases and previous convictions.[5] This the accused failed to do, from which it may be inferred that he was not honest and did not take the court fully into his confidence. It would further justify the drawing of an adverse inference regarding the accused's sincerity in bringing the application.

[9] As mentioned, the basis of the bail application is twofold ie to properly communicate with his legal representative, and secondly, to financially support his parents and young child. He explained that if there is a power outage then he finds it difficult to contact his counsel by telephone and once granted bail, this problem would be solved. This reason is so flimsy that it requires no consideration, more so when neither the accused nor his counsel

[4] The term of 6 months' imprisonment suspended is not a proper sentence as the accused was convicted in terms of s 112(1)*(a)* of Act 51 of 1977, which only provides for fines and not any form of imprisonment as punishment, except in the alternative to a fine.

[5] *Julius Dausab v The State* Case No CC 38/2009 delivered on 20.09.2010.

attempted to explain why the accused could not physically be consulted in prison, a practice not uncommon in the legal fraternity. This ground is accordingly found to be without merit. As for the accused seeking bail in order to financially assist his parents and child, the accused has led no evidence to show that these persons are financially dependent on him and what impact his continued incarceration has on their lives. In fact, the accused failed to present evidence to the court showing that he had been supporting his family prior to his arrest and, bearing in mind that he was a student at the time, it would appear that the contrary is more likely, namely, him being dependent on others and not the other way around. If the accused wanted to rely on this ground to advance his bail application, then he should have substantiated it with facts and not leave it to the court to speculate as to what the true facts are. This ground as basis for the application accordingly lacks substance.

[10] Upon enquiring from the accused why, in the light of the basis of this application, he had not brought a bail application sooner, he said that his previous counsel advised him against it. Although the record of the proceedings in the magistrate's court reflects that notice was given for a formal bail application, it never materialised. The lack of exigency on the part of the accused in the past to apply for bail stands in sharp contrast with his present desire to support his family, another indicator that the accused is not sincere in bringing this application.

[11] Mr Rudiger Talliaard testified in support of the accused's bail application. Though claiming to be a relative to the accused (his brother being married to a cousin of the accused) it emerged during his testimony that they had had very little contact with one another in the past. During the accused's detention at the Windhoek Correctional Facility he went to visit him and attended to his well-being. He declared himself willing to post bail in the amount of N$5 000 and offered the accused a place to stay if he were to be granted bail. Mr Talliaard echoed the same sentiments than the accused

wanting to support his family and added that the accused will not abscond as he intends clearing his name during the trial. In cross-examination he conceded that he is not acquainted with the facts of the case the accused is facing, neither did he know about the accused's previous conviction. He also said he would not be able to monitor the accused if he is out on bail.

[12] As for Ms Suzetta Dausab who is a cousin to the accused, she from a young age grew up with him in the same house and the gist of her testimony concerned the good character of the accused, an opinion based on perceptions formed in her childhood. Since 2011 she had no direct contact with the accused (except for talking to him on the phone) and visited him once in prison. Though she had vouched for the accused's good character and him being a law abiding citizen, she did not disclose to the court the fact that he had been convicted of assault, a fact she was aware of when she came to testify. When asked to explain why she omitted to mention this important fact and, on the contrary, painted a picture of the accused being law abiding and would stand his trial, she admitted that she should not have given evidence to that effect. She was equally not familiar with the facts on which the charges preferred against the accused are based.

[13] When the court considers the evidence of the two witnesses testifying for the accused, it is evident that neither of them is in any position to vouch for the character of the accused and had only come to court to advance his cause to obtain bail. Both witnesses had not closely interacted with the accused in recent years and barely knows what he was up to ever since he left home in 2010. Neither of the witnesses appeared to be objective and ventured opinions and perceptions based on past interactions with the accused many years ago. As to his character and the person the accused became since they had last met, their evidence is of no real assistance to the court. This is simply because they had had hardly any contact with him and is out of touch with the accused's personal circumstances. For example, though

Mr Talliaard said that the accused's child had been staying with the accused's parents for several years in Aroab, this has never been the case. Except for Mr Talliaard's willingness to post bail for the accused and provide him with accommodation once released on bail, nothing more turns on the evidence of these two witnesses.

[14] It was argued on the accused's behalf that the State's claim of having a strong case against the accused must be accorded little weight because the credibility of witnesses incriminating the accused had not been tested, or the witnesses might not even give evidence. With deference to counsel, the credibility of witnesses testifying for the State would only be tested in the main trial – except where the witnesses testify in bail proceedings – and to reason that the court in bail proceedings should not rely on documentary evidence handed in by agreement, and the evidence of the investigating officer claiming the State to have a strong case against the accused, is to put the cart before the horses.

[15] In bail proceedings the State is not obliged to prove its case against the accused, all it needs to do is to show on a balance of probabilities that the evidence in its possession, usually in the form of witness statements and other documentary evidence, will prove the guilt of the accused.[6] This is what the prosecution did in the present case. The investigating officer, Warrant Officer Havenga narrated to court the nature of the police investigation and the results of forensic analysis done on samples collected on the crime scene and from the victim's body and that of the accused. The results of these tests implicate the accused. The State is further in possession of two witness statements implicating the accused on the night on which the crimes were committed as regards him wearing blood-stained clothes, and scratch marks observed on his neck. The accused's response to these allegations was a blunt denial and in cross-examination invoked his right not to answer

[6] *S v Yugin* 2005 NR 200 (HC).

questions put to him pertaining to incriminating evidence in possession of the State. He explained that he will await the outcome of the trial to see whether these allegations are proved.

[16] In considering the accused's evidence, being a denial of guilt, against the strength or apparent strength of the State's case, there appears to be a real likelihood that the State will succeed in proving its case in respect of counts 1 – 3, all of which arising from the same incident. Bearing in mind the kind of sentence that would probably follow the convictions, this certainly increases the risk of the accused deciding to abscond.

[17] Having come to this conclusion, it would mean that there is *prima facie* proof that the accused is implicated in the commission of the offences charged. This, in turn, implies that these crimes were committed whilst the accused was out on bail on a charge of rape (count 4). This is a fact the court cannot ignore as it undoubtedly would make him a danger to society and, for that reason alone, he should not be released from custody.

[18] In order to curb the serious escalation of crime and the escalation of accused persons evading the course of justice by absconding, the Legislature gave the court wider powers and additional grounds to refuse bail in cases involving serious crimes, by amending s 61 of the Criminal Procedure Act 51 of 1977.[7] Section 61 provides as follows:

'61 Bail in respect of certain offences

If an accused who is in custody in respect of any offence referred to in Part IV of Schedule 2 applies under section 60 to be released on bail in respect of such offence, the court may, notwithstanding that it is satisfied that it is unlikely that the

[7] Amended by s 3 of Act 5 of 1991.

accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police investigation, refuse the application for bail if in the opinion of the court, after such inquiry as it deems necessary, it is in the interest of the public or the administration of justice that the accused be retained in custody pending his or her trial.'

The offences preferred against the accused are listed in Part IV of Schedule 2 of the Act.

[19] In considering what the public interest is, the court will look at the circumstances under which the crime was committed and whether the public must be protected against a dangerous offender[8]; whether there has been a public outcry over the commission of the crime committed, and whether the public interest is an important factor in deciding the granting of bail.[9]

[20] When applying these principles to the present facts, regard must be had to the following factors:

The nature of the crimes and the circumstances under which it was committed. Looking at the manner in which the present crimes were committed, it is evident that this was a callous act in which a young vulnerable girl had been brutally violated and murdered. This country at present suffers an unprecedented wave of violent crime committed against the most vulnerable in society. Women and children as a class of persons constituting a significant portion of society, have the most immediate, compelling and direct interest that the court protect them against those in society who has no respect for the rights to life, dignity and integrity of others, rights which are enshrined in our Constitution. Women are entitled to demand that these rights are upheld by the courts who, in circumstances as the present, must be alive to protect these rights even at pre-trial stage. The public cannot be left at the mercy of merciless criminals where neither the police nor the courts can effectively protect them. To this end, public interest becomes an important factor and where there is proper evidence before the court in support thereof,

[8] *Timotheus Josef v The State* Case No CA 63/95 delivered on 22.08.1995.
[9] *Charlotte Helena Botha v The State* Case No CA 70/95 delivered on 20.10.1995.

this may lead to the refusal of bail even if the possibility of abscondment or interference with State witnesses is remote.

Another factor is the strength of the State's case which *prima facie* links the accused directly to the crimes committed. A factor also taken into account is whilst the accused was released on bail in the lower court, he attacked his girlfriend and was convicted of assault read with the provisions of the Domestic Violence Act 4 of 2003. Though this incident might fall short from justifying an inference that the accused has a propensity to commit violent crime, it is in my view indicative of a person who has very little or no respect for the law. Conduct of this nature certainly poses a threat to the interests of the administration of justice and consequentially, is likely to adversely impact on the accused's quest to obtain his freedom.

[21] In conclusion, the accused's claims of being innocent and denials that he will not abscond, considered against those factors relied on by the State in its opposition of the bail application, are not very reassuring. All the evidence taken into account, I am not persuaded that the accused has shown on a balance of probabilities that it would be in the interest of the administration of justice that he be admitted to bail, pending finalisation of his trial.

[22] In the result, the application for bail is dismissed.

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JC LIEBENBERG

JUDGE

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