



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT**

Case No: CC 8/2016

In the matter between:

JESAJA BOOIS

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Boois v S* (CC 08/2016 [2017] NAHCMD 85 (16 March 2017))

Coram: USIKU, AJ

Heard on: 03 March 2017

Delivered: 16 March 2017

Flynote: Criminal Procedure – Bail Application – Section 61 of the Criminal Procedure Act (as amended) applicable – Respondent showing strong prima facie case against the Applicant – Court finding that it is not in the interest of the public or administration of justice that Applicant be released on bail.

Summary: Application to be released on bail – Respondent opposing bail on the ground that it is not in the interest of the public or administration of justice to release Applicant on bail – Respondent showing it has strong prima facie case against Applicant – Court refuses bail on the ground that it is not in the interest of the public or administration of justice to release Applicant on bail.

ORDER

1. The bail application is refused and the Applicant is remanded in custody pending his trial.
 2. The matter is postponed to **23 March 2017** at **09:00** for mentions roll before Liebenberg, J.
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USIKU, AJ:

INTRODUCTION

[1] During the late night hours of Tuesday the 02 September 2014 or the early morning hours of Wednesday the 03 September 2014, Bonaventura Jahs, an adult female, was attacked, raped and murdered, on her way home from Y2K Bar, at the village of Tses, Karas Region. According to the postmortem report submitted during the bail hearing, the deceased died of suffocation, and that at the time of her death, she was about four months pregnant.

[2] The Applicant was arrested and detained on 03 September 2014 and was subsequently charged with the following counts:

- (a) Count 1: Murder,
- (b) Count 2: Rape, (in terms of the Combating of Rape Act 8 of 2000),
- (c) Count 3: Defeating or obstructing or attempting to defeat or obstruct the course of justice,

(d) Count 4: Assault by threat, read with the provisions of the Combating of Domestic Violence Act 4 of 2003, and

(e) Count 5: Attempted murder.

[3] His case was referred to pre-trial conference for 18 August 2016 before this court, and the matter is presently on pre-trial mentions roll, in anticipation for trial. Full disclosure has been made by the Respondent, however, the Applicant is still to file his pre-trial reply to the Respondent's pre-trial memorandum. The matter is presently adjourned to 23 March 2017 for that purpose.

[4] In the meantime the Applicant launched this bail application on 3 March 2017. The Respondent opposes the bail application on the grounds that:

(a) the charges with which the Applicant is charged are serious and the Respondent has a strong prima facie case against the Applicant,

(b) there is risk of abscondment on the part of Applicant if released on bail,

(c) it is not in the interest of the public or the administration of justice that the Applicant be released on bail pending finalization of his trial, and

(d) the Respondent fears for the safety of some of its witnesses, should the Applicant be released on bail.

THE APPLICATION

[5] In support of his application, the Applicant testified that he is 41 years old, male, unmarried Namibian. Prior to his arrest, he lived at Erf No. 1554, in the village of Tses, Karas Region.

[6] He has now been in custody for about two years and seven months, since his arrest and detention on the 3 September 2014, awaiting trial.

[7] The Applicant has two twin-boys aged five years old, and the mother of the twin-boys is Anna-Marie Links, who is the complainant in respect of Count 4, and she is unemployed. The children long to see and be with the Applicant, and he wishes to be released on bail to be with and support them. Information at his

disposal is that the children are currently not well-being well-taken care of, as the mother drinks a lot.

[8] Before his arrest, the Applicant was employed as a plumber and used to financially support his children. The children are presently being supported by their maternal grand-mother and the Applicant's sister.

[9] The Applicant has three sisters. Both of his parents are deceased. He has no relatives living in any foreign country.

[10] As far as his assets are concerned, he has Erf 1554 in Tses, which he bought for N\$ 112, upon which he built a shack valued about N\$ 600.00; a bed, chairs and a cupboard, valued about N\$ 8000.00. He has left these belongings in the care of one of his sisters.

[11] He would be able to afford to pay a bail amount of not more than N\$ 5000.00. One of his sisters, and two cousins would be able to contribute to raising the required bail amount.

[12] If released on bail, the Applicant intends to live at Erf No. 1554, Tses but has an aunt in Windhoek, with whom he may live, should a condition be imposed that he should not live at Tses.

[13] If released on bail, the Applicant would attend his trial, as he has respect for the law. He is not a threat to any of the Respondent's witnesses, including Anna-Marrie Links, and will not hurt anyone. He undertakes to abide by all conditions that the court may deem appropriate. He is no longer involved with Anna-Marrie Links.

[14] Insofar as the present charges are concerned, the Applicant intends to plead not guilty to all five counts. He denies that he assaulted Anna-Marrie Links. He denied that he attempted to murder Lesly Tiboth. In regard to the rape, murder and the defeating or obstructing course of justice charges, he wishes not to touch on their merits, and would only do so during trial. For that reason he would not comment on whether or not he knows anything about them and would not confirm or deny whether he was at the scene of the crimes on the night the deceased was raped and

murdered. Under cross-examination, the Applicant testified that he had no intimate relationship with the deceased.

[15] The Applicant further testified that he has no pending criminal cases, and no previous convictions against him. He recounted that he was previously charged with theft but was acquitted of that charge.

[16] During cross-examination, the Applicant conceded that he was convicted of and sentenced to prison on the 18 April 1997 for:

- (a) murder and sentenced to 14 years imprisonment,
- (b) house-breaking with intent to rape and rape and sentenced to 10 years imprisonment, and
- (c) arson and sentenced to 7 years imprisonment.

He was released after serving 7 years of his prison term, on parole, in December 2004, and his parole period subsisted up to August 2006. Furthermore, under cross-examination, the Applicant confirmed that these crimes were committed on the same day at a farm, and the deceased, an elderly man in his 70s, was stabbed with a knife and hit with an axe to death. The rape took place at the same farm but at different premises, and the Applicant was convicted of rape of a female who was older than him. The arson was in regard to the burning down of the house of the aforesaid deceased.

RESPONDENT 'S OPPOSITION

[17] For the Respondent, Detective Sergeant Roos testified that he is the investigating officer in this matter. During his investigations, he has established through statements from witnesses that the Applicant had threatened the deceased at Y2K Bar, that night that she would see.

[18] Furthermore, during his investigations, he established that the Applicant had made certain admissions and pointed out the scene of the rape and murder crimes. He added that apart from the admissions and the pointing out implicating the Applicant in the commission of the offences, forensic evidence shall be presented at trial, showing that:

- (a) the DNA of the Applicant and his sperms were found in the vaginal vault of the deceased,
- (b) the DNA of the Applicant and sperms were also found on the clothing of the deceased,
- (c) the DNA of the deceased was found on the Applicant's under-pants and on Applicant's T-shirt,
- (d) the Applicant admitted that he was cut by the deceased on one of his fingers during a struggle with the deceased at the scene, before he raped and murdered the deceased, and
- (e) a bloody-stone was found at the crime-scene that tested positive for Applicant's DNA.

[19] In addition, he testified that evidence shall be led at the trial, that in the early night of the 2 September 2014, the Applicant had threatened to harm, Anna-Marrie Links should he see her that night. He further testified that Anna-Marrie Links had indicated that she does not oppose the application for bail, for the sake of the children, even though she is afraid of the Applicant.

[20] Detective Sergeant Roos deposed further that the Applicant, while in custody did attempt to murder a fellow detainee, Lesly Tiboth, on 21 June 2015. As a consequence whereof Applicant was charged with count 5 of the charges.

[21] In his opinion, the Applicant is prone to violence, and it would not be in the interest of the public or the administration of justice to release the Applicant on bail. He is further of the opinion that, in view of his previous convictions, there would be no guarantee that Applicant would not harm Anna-Marrie Links, if released on bail.

SUBMISSIONS

[22] Counsel for the Applicant submitted that notwithstanding the seriousness of the charges, the Applicant is still be to regarded innocent till proved guilty, and should be granted bail with appropriate conditions. There is no evidence put forth that Applicant would abscond or would harm any witness for the Respondent and Anne-Marrie Links had indicated she has no objection to bail being granted. No demonstrations by the public have been held in protest to the granting of bail to the

Applicant. In regard to the seriousness of the count of rape, in view of a sentence that may be imposed in respect of a possible second conviction, Counsel for Applicant submitted that the provisions of the Combating of the Rape Act would not be applicable as the previous conviction occurred before the promulgation of the Rape Act. Furthermore, Counsel for the Applicant submitted that the fact that the deceased in the present rape charge was pregnant, should not be considered at this stage, in assessing the brutal manner in which the offences were committed, as the Respondent did not lead evidence that the Applicant knew she was pregnant.

[23] Counsel for the Respondent, on the other hand, submitted that the Respondent has shown that it has a strong case against the Applicant. The strength of the Respondent's case, alone qualifies as a ground to deny bail to the Applicant. The fact that the deceased was pregnant, raped and suffocated attest to the brutal manner in which the offences were committed. Counsel for the Respondent further submitted that the seriousness of the offences coupled with the evidence of previous convictions of murder and rape against the Applicant, are likely to trigger into operation the imposition of substantial custodial sentences, should the Applicant be found guilty.

ANALYSIS OF EVIDENCE

[24] The crucial issue to be decided at this stage is whether the Applicant has discharged the onus resting on him, on the balance of probabilities that he is entitled, in the circumstances, to be released on bail.

[25] The Applicant in his testimony has given assurance that he would stand trial and would not harm Respondent's witnesses, if released on bail. Furthermore, he indicated his readiness and willingness to abide by any appropriate conditions that may be imposed.

[26] I find that there is no evidence that the Applicant presents a flight risk. However, that is not the end of the matter. Section 61 of the Criminal Procedure Act, (as amended) provides that bail may be refused if the court is of the opinion that it is in the interest of the public or administration of justice that the Applicant be retained

in custody pending his trial, notwithstanding that it is unlikely that the Applicant would, if released on bail, abscond.

[27] The determining factor in this matter, therefore, is whether on the evidence presented it is in the interest of the public or administration of justice that the Applicant be released on bail. It is trite law that where an Applicant for bail is charged with a serious offence and if convicted a substantial sentence of imprisonment would in all probability be imposed, a court would in such circumstances, on that fact alone, be entitled to refuse bail, if it is of the opinion that it would not be in the interest of the public or administration of justice to release the Applicant on bail.¹

[28] As alluded to earlier on, the Applicant declined to go into the merits of the charges he faces, which he is entitled to, on the basis that he would only deal with them at trial. For that reason he refused to answer Respondent's questions on the merits. That being the case, the Respondent's version on the strength of its case against the Applicant remains uncontradicted.

[29] I find that the evidence which the Respondent intends to present against the Applicant on the merits, namely: witnesses' testimony on what transpired in the Y2K Bar, the alleged admissions and pointing-out by the Applicant at the crime scene and the DNA evidence, constitute a strong case against the Applicant.

[30] On the totality of the evidence presented, I am satisfied that the circumstances and the violent manner in which the deceased, a woman, was attacked, raped and murdered by way of suffocation, are serious, and must be weighed when considering whether it is in the interest of the public or administration of justice to grant bail. The issue raised by counsel for the Applicant that pregnancy must not be brought into the equation, since the Applicant has not been shown to have known about the pregnancy, does not count in favour of the Applicant at this stage. The onus still remains on him to establish on the balance of probabilities that he is entitled to be released on bail, in the circumstances.

¹ *Noble v S (unreported) CA 02/2014 NAHCMD delivered on 20 March 2014 para [36]*

[31] It is common cause that the Applicant has previous convictions on murder, rape and arson charges. It is trite law that previous convictions may be relied upon to show a tendency on the part of the Applicant for bail to commit certain types of crimes.² I hasten to add that previous convictions should also be relied upon, where a strong case has been established by the Respondent, to assess the seriousness of the charges against the Applicant, in the light of possible sentences that may be imposed, if the Applicant is eventually convicted. I differ with the submission by Counsel for the Applicant that the provisions of the Combating of the Rape Act regarding consideration of previous convictions are inapplicable to this matter. Indeed Section 3 of the Combating of the Rape Act 8 of 2000 makes the provisions of the Act in respect a second or subsequent conviction applicable to previous convictions of rape under common law recorded before the coming into the effect of the
ct.³ A

[32] In the premises, I find that on the evidence presented, there is a strong prima facie case against the Applicant, and if convicted a substantial sentence of imprisonment would in all probability be imposed against the Applicant. In the circumstances, I am of the opinion that it would not be in the interest of the public or administration of justice to release the Applicant on bail.

[33] Accordingly, the bail application is refused and the Applicant is remanded in custody pending his trial. The matter is postponed to **23 March 2017 at 09:00** for mentions Roll before Liebenberg, J.

B Usiku
Acting Judge

² *S v Patel* 1970 SA (3) 565 at 568C

³ Also see *S v Mtsibe* (unreported) Case No. CC 15/2008, delivered on 5 March 2013 at para [7] to [8]

APPEARANCES

STATE: Ms Verhoef
Office of the Prosecutor General

RESPONDENT: Mr Mbaeva
Instructed by Directorate of Legal Aid