

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

BAIL APPLICATION RULING

Case no: CC 8/2017

In the matter between:

LAZARUS OSCAR AWASEB

APPLICANT

v

THE STATE

RESPONDENT

Neutral citation: *Awaseb v S* (CC 8/2017) [2018] NAHCMD 128 (16 May 2018)

Coram: SALIONGA, AJ

Heard: 3 - 4 May 2018

Delivered: 16 May 2018

Flynote: **Criminal Procedure** – Bail – New Facts – Investigation completed and accused health deteriorating are not factors which would warrant - release on bail – Bail Application refused.

Summary: Applicant brought a bail application based on new facts. The new facts were that; the investigation was completed; the holding cells where he is kept aren't properly ventilated and as a result of which he is developing breathing problems and the inability to maintain himself, his family and failure to honour his creditors and applicant has found fixed address. *Held*, that, the completed investigation, fixed address and deteriorated health condition does not address the issue of public interest or interest of the administration of justice and has not changed the position that it is not in the public interest to release applicant on bail. *Held*, further that stopping of salary and inability to pay creditors are the ordinary consequences of detention and do not warrant the granting of bail.

ORDER

- a) Bail is refused.
- b) Accused remanded in custody.

RULING

SALIONGA, AJ

[1] This is a bail application lodged by the applicant after the first application was refused in the district court of Gobabis. The applicant is now applying for bail on the basis of new facts. The matter was in the meantime transferred to the High Court, main division, for plea and trial to commence on July 2018 before Judge Usiku. The applicant is represented by Mr. Tjuturi, and Mr. Lutibezi is appearing for the respondent.

[2] The applicant is indicted on multiple charges of (a) Murder; (b) Attempted murder -read with the provisions of the Combating of Domestic Violence Act, Act 4 of 2003 with the alternative of negligent discharge or handling of fire-arm in contravening of section 38 and 39 of Act 7 of 1996 read with the provisions of Act 4 of 2003; (c) Contravening section 2 and 33 read with section 1, 8, 10, 38 and 39 of Act 7 of 1996 as amended – Possession of a fire-arm and ammunitions. The State alleges that the applicant on 22 March 2016, while armed with a firearm went to the complainant's house, in the attempted murder charge, where she was in the company of the deceased. It is alleged further that the applicant unlawfully and intentionally killed the deceased who was at the time 18 years old. The State further alleged that the applicant unlawfully fired shots at Meldried Hoases (the complainant in the second charge) with intent to murder her. The State also alleging that the applicant in addition to the above charges unlawfully and intentionally possessed a firearm and ammunitions on that particular day.

[3] For purposes of this bail application Mr. Tjituri has submitted that the following constituted new facts;

- a) The investigation has since been completed;
- b) The applicant's health condition has worsened since his incarceration. He developed chest infection which led to asthma. This condition is making him unfit to be further detained. As a result the doctor has recommended that, for him to recover he has to stays in a well ventilated area;
- c) The applicant has so far found an address where he can stay, at erven no. 92, Saamstaan, Nau-Eib location, in Okahandja;
- d) His salary was stopped and he is unable to pay his creditors.

[4] Mr Tjituli in addressing the court repeated the grounds as indicated in the written notice of the bail application. He emphasised more on the fact that investigation has been completed and the situation is now different from when bail was initially heard and refused in the district magistrate court. In this regard applicant cannot and will not interfere with witnesses. He further stated that the applicant has developed an infection and his health condition has deteriorated since his incarceration. The doctor in this regard has recommended that applicant lives in a well ventilated environment. Tjituri also submitted that applicant has so far found a place or address where he can stay and will be accessible should the police be looking for him. That the applicant's salary was stopped after the hearing of the last bail application and applicant is not in a position to sustain the livelihood of his adopted child, or his family and it has made it very difficult for him to honour his financial obligations towards the financial institutions.

[5] Two witnesses testified for the applicant, the first witness being Angelika Narases his girlfriend since 2016 and the second witness is a co-inmate at Hosea Kuutako holding cells and a former colleague in the Namibian Police Force. Angelika, testified that she is willing to accommodate the applicant at her place of resident. In other words, she has confirmed that the accused has found an address to stay pending the finalisation of his case. Ganeb testified on the unsuitability and lack of supervision at the Hosea Kuutako holding cells.

[6] The applicant in substantiating his application stated that he is 50 years of age and residing in Namibia. He testified that the investigation has since been completed because the Prosecutor General has decided to prosecute him and the docket has already been transferred to the High Court for 22-23 July 2018. Moreover, after the first bail application was heard and refused, he has since developed an infection but before that he was a healthy person. He confirmed Ganeb's evidence that in the cells there is a lack of supervision and there are opportunities for an inmate to escape should he wish to do so. He further testified that if one has a suicidal mind it is also easy to commit suicide since there are dangerous weapons lying around and one can just go and get a weapon. However it is applicant's evidence that he does not want to abscond or commit

suicide as he wants to be at the hearing and prove to court that he is not a murderer. He has a strong case and the state will not find him guilty. He testified that Angelika Nawases is his girlfriend and is going to stay with her if released on bail. As to the question of his two vehicles, he told the court that he has sold one vehicle and the other was repossessed by the bank. He denied that he intended to commit suicide at any stage and is not intending to do so. He is willing to go back to work immediately if he is given bail as stipulated in his suspension letter. He is a police officer and the fact that his salary was stopped badly affected him financially. He cannot maintain himself, his kids and he is unable to pay his debts.

[7] The applicant testified further that after the unsuccessful bail application he has developed chest problems and went to the doctor at the beginning of this year. The doctor referred him to a place where they could check his chest and according to the doctor's report he has got chest infection. He produced the report, although, the doctor was not called to testify. This health condition was confirmed by the State doctor whom he visited, that he has asthma. He never used asthmatic medication before his condition worsened as he developed an infection. According to the applicant's health passport, the state doctor who was not called to testify recommended that applicant stays at a well-ventilated place.

[8] Mr Lutibezi for the state opposed bail being granted to the applicant. He submitted that the only issue this court has to decide is whether the new facts considered in conjunction with the facts placed before the magistrate in the previous bail application are such that they change the basis on which bail was initially refused. His proposition is in line with the court's approach as laid down in *S v De Villiers*,¹ that, new facts must be placed before court and must be such that they are related and change the basis on which bail was initially refused. He stated that when bail was initially refused, many other factors were taken into consideration. He further submitted that factors such as investigations are finalised, applicant's medical or health condition could be regarded as new facts but they are not factors which could change the basis upon

¹ 1996 (2) SACR 122 (T) at 126 e-f.

which bail was refused. The inability to honour his financial obligation since his salary was stopped and new residential address, counsel submits are not new facts justifying the granting of bail and are ordinary consequences of detention.

[9] The state in amplification of their opposition submitted an affidavit from the investigation officer without calling him to testify and called Ms Hamukwaya, the station commander at the Hosea Kuutako holding cells. She testified that indeed she received medical related complaints from not only the applicant but other inmates too. After she attended to these complaints by putting them in one cell and ordering the cell door to be opened in the mornings she had not heard of any other complaints especially from the applicant. He testified that the complaints she received were about inmates with breathing problems and those with asthma; accused had reported a breathing problem. She however assured the court that if applicant has a medical or health problem he can still be transferred to a place that will mitigate his health condition. She denied that there is no supervision at the holding cells as inmates are properly and strictly monitored.

[10] In the light of the above, the court finds that there are indeed new facts, and the only issue to be decided is whether these new facts have changed the basis on which bail was initially refused.

[11] As regards to the health issues of applicant there is evidence from Ms Hamukwaya that arrangements can still be done. It is also not disputed that applicant is having chest infection as this evidently from his health passport and doctor recommended a well-ventilated place. Applicant conceded that at Windhoek central prison the place is well ventilated and according to the station commander applicant if applies can be transferred. He is a police officer and the court can take judicial notice that his detention at Hosea Kuutako is mainly for his own safety as it might be a risky to be detain elsewhere. Surely applicant is not without any remedy regarding his healthy problem and cannot use bail application as a remedy. The health condition issues of

inmates were addressed in *Samahina v The State*² where Hoff J agreed with the findings in *S v Mporofana*,³ where it was stated that;

‘. . .one whose detention has been pronounced lawful and in the interest of justice cannot simply resort to a further bail application merely because he has been detained under inhumane and degrading conditions or on the ground that his right to consult with a doctor of his own choice has been infringed. It is however, available to such person firstly to apply to the prison authorities concerned and call upon them to remedy whatever complaints he or she has with regard to the conditions of his/her detention. Should the prison authorities fail to remedy such complaints, it is available to the detainee concerned either to challenge the detention before a court of law as being unconstitutional or obtain a court interdict to force the prison authority to comply with the law’.

I concur and endorse the above findings and on the basis of the above this court, finds that applicant’s health condition if indeed has deteriorated there are remedies for actions as testified to by the station commander.

[12] In as far as the stopping of applicant salary and inability to pay creditors as well as other related issues are concerned, the court concurs with the finding of the court in the matter of *S v Ali*⁴ where it was held that ‘Financial loss is an inevitable consequence of the incarceration of any gainfully employed person’ and as such this new fact did not change the basis upon which bail was refused.

[13] Whereas I tend to agree with applicant that the investigation has been completed, it is my respective view that other factors were taken into account in the district court when bail was initially refused. Thus, relying on that argument alone does not justify the granting of bail because witnesses can still be influenced by the accused in view of the fact that applicant was a very senior commander for Gobabis.

² (CA) 77/2014 [2014] NAHCMD 291 delivered on 7 October 2014.

³ 1998 (1) SACR 40 (Tk) at 45 F-G.

⁴ 2001(1) SACR 34 (ECP) at para 19-20.

[14] I am in agreement with the judgement of Tommasi J in the unreported judgment of *Lupalwazi v State*⁵ where the applicant brought bail applications on new facts citing completed investigations and matters related to medical issues. The court at para 14 held that 'The above mentioned factors are not factors which would warrant a release on bail. The applicant has been deprived of his personal liberty according to procedures established by law.' The court further held at para 18, on the issue of investigations being completed and non-interference with witnesses that, 'they do not address the issue of the change in circumstances which would sway the pendulum in favour of the release of the applicant.'

[15] It is apparent from case law that the nature of the crimes committed and the strength of the state's case are extremely relevant during bail applications. The applicant herein faces multiple charges which are serious in nature. In *Namiseb v State*,⁶ a case dealt with by Siboleka, J, it was held that the allegations were very serious in nature, coupled with the fact that the victims were a defenceless elderly couple. It was held that it would not be in the interest of the public and the proper administration of justice to release the applicants on bail.

[16] It follows therefore that all factors have to be considered when deciding whether to grant or refuse the application. Section 61 of Act of 51 of 1977 creates wider powers when it comes to the issue of bail. The court has a discretion to exercise and such discretion must be exercised judicially depending on the circumstances of each case. As already stated, the allegations against the applicant are serious, the fact that the victims are defenceless 18 and 23 years respectively and the strength of the state's case. These must be considered against the background of all the evidence and facts. The complainant in an attempted murder charge is still alive and a risk for the accused ex-girlfriend safety is very high if the accused is to be released on bail. To accede to the applicant's request that he will go and stay with his girlfriend in Okahandja in a shack without a street number, would amount to `passing the buck` in the sense that it may

⁵ (CC 5/2016 [2017] NAHCNLD 93 delivered on 19 September 2017.

⁶(CC 19/2011) [2014] NAHCMD 251 (25 August 2014).

relieve the local community but that `change of scenery` would not necessarily bring about a change in the attitude of the applicant.

[17] As borne out by the record, the applicant was denied bail because it was not in the public interest or interest of administration of justice to do so, after the court has taken the following into consideration; that investigations were not completed, that applicant is facing serious charges. The fact that applicant is facing multiple charges, there is a likelihood that the accused shall be sentenced to a longer term of imprisonment if convicted, the likelihood for the accused to abscond and the fact that applicant had no fixed abode.

[18] Having given due consideration to all the relevant factors and the laws and notwithstanding that there are indeed new facts, the court is convinced that these new facts do not address the issue of public interest or interest of the administration of justice and has not changed the basis upon which bail was initially refused. The court found that it will not be in the interest of the administration of justice to let the applicant out on bail based on new facts.

[19] In the result, the application for;

- a) Bail is refused
- b) Accused remanded in custody

J.T. SALIONGA
Acting Judge

APPEARANCES:

For the Applicant:

M. Tjituri
Of Tjituri Law Chambers, Windhoek

For the Respondent:

C. Lutibezi
Of the Office of the Prosecutor General,
Windhoek