



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 15/2017

In the matter between:

LUKAS NICODEMUS

APPELLANT

v

THE STATE

RESPONDENT

Neutral Citation: *Nicodemus v S* (CC 15/2017) [2018] NAHCMD 331 (19 October 2018)

Coram: UNENGU AJ

Heard: 4 October 2018

Delivered: 19 October 2018

Flynote: Criminal Procedure – Bail – Application for bail – Applicant has a duty to prove on a balance of probability to be released on bail – the delay to apply for bail timeously, the nature of the charges preferred against the applicant and the fact that the trial is to start soon weighed against the granting of bail – Court held that it is in the interest of the public and the administration of justice to retain the applicant in custody while on trial.

Summary: Criminal Procedure – Bail – Application for bail – The applicant is facing two counts of murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 and offences under the Arms and Ammunition Act, 7 of 1996. The applicant waited for more than two and half years and only at the time when his trial has started, to apply for bail. Court – *Held* that it is in the interest of the public and the administration of justice to retain the applicant in custody while on trial.

ORDER

The application for the applicant to be released on bail is refused.

JUDGMENT

UNENGU, AJ

[1] This is a bail application by the applicant asking the court to be released on bail pending his trial. The State on the other hand is opposing the granting of bail and the release of the applicant on bail on the grounds that he is charged with serious offences; that he will abscond if released on bail; that he will interfere with witnesses; that he will influence witnesses, in particular his sister, with whom the applicant will share a house if released on bail and that it is not in the interests of both the administration of justice and the public to release him out on bail.

[2] In terms of the indictment read with the summary of facts and a list of witnesses delivered or served¹ on the applicant, it is alleged by the State that the applicant murdered Johanie Naruses and Clementia de Wee during the evening of 6 January 2016. Both counts are read with the provisions of the Combating of Domestic Violence Act.²

¹ S 144 of the Criminal Procedure Act 51 of 1977.

² Act 4 of 2003.

[3] The applicant is also accused of having dumped the bodies of the victims at the refuse site and put them alight with the aim of destroying the evidence and thereby committed an offence of defeating or obstructing or attempting to defeat or obstruct the course of justice and an offence under the Arms and Ammunition Act³ failing to lock away an arm.

[4] In his testimony during the hearing of the application, the applicant told the court that the two deceased women, Ms Naruses and Ms De Wee were his girlfriends at the same time. He said he had a romantic relationship with both and many other women.

[5] According to him at around 14h00 on 6 January 2016, Ms Naruses called and he picked her up and brought her to his house. Similarly, De Wee also arrived at his house at about 16h00. He further testified that a man with the name of Sebele joined them and they went together to play pool while the two deceased women were gambling.

[6] He furthermore testified that De Wee broke a beer bottle and was very aggressive. Ms De Wee asked them to go to Khomasdal where they met Bennie. It was around 20h00. Later the same evening, Bennie brought him his car keys and reported that the car had got stuck at Otjomuise.

[7] Upon hearing this information, he took his pistol and a container of petrol with and went to look for the car. He said that he found the car parked at the house of Ursula Masau, the mother of his 21 year old daughter. Both Naruses and De Wee were nowhere to be found. He was arrested the following day by a Police officer with the name of Nepela.

[8] According to him, he does not have family members outside Namibia, nor does he have a valid passport or pending cases against him. It is also his testimony that save for a few furniture worth about N\$20 000.00 and the car worth N\$40 000.00 which is in the possession of the Police, he does not have fixed assets and can only afford to raise N\$2000.00 for bail.

³ S 38 (1) read with sections 1, 3 (38) and 39 of Act 7 of 1996.

[9] In cross-examination the applicant conceded that he will stay in the same house with his sister, a State witness, if released on bail. On further questions put to him by Mr Lutibezi, counsel for the State, applicant agreed that the Police found blood and bullet holes inside his car, a projectile, tyre marks and shoe prints matching his car tyres and shoes found at his house on the scene at the dumpsite where the burned bodies of Naruses and De Wee were found.

[10] When further asked who Bennie was, the applicant replied that he was a friend of De Wee whom he knew before his arrest. However, he struggled for answers to explain where the bloodstains found on his blanket and shoes came from and why he washed both the blanket and the shoes.

[11] Further, when pressed for an answer why he took more than two and half years to mention Bennie's involvement in the matter, the applicant said that he told Mr Wessels, his former legal practitioner about Bennie but was not sure if he mentioned Bennie to the Police.

[12] As pointed out before, the applicant has a duty to prove on a balance of probabilities by means of credible evidence to get bail. The story of Bennie driving his car away with his two deceased girlfriends in my view, is an afterthought and subterfuge which is highly improbable. Why would the applicant protect Bennie? If it is true that Bennie had his (applicant) car, driving around with the applicant's joes that night, why did he not tell the police when they arrested him? Bennie would be the best person to explain the death of the two ladies not him. To disclose the name of Bennie to the Police for questioning would not have infringed on his right to remain silent or his right not to incriminate himself. Bennie's involvement in the matter is a child story which nobody will fall for. Neither me.

[13] Similarly, the justification for not applying for bail timeously or within a reasonable time from the date of his arrest, but waited for more than two years until the matter was set down for trial is also not acceptable.

[14] On the other side of the coin, the respondent (State) called two witnesses to testify in opposing bail. They were the investigating officer Joseph Ndokosho and Mr Willem Wimmert.

[15] Warrant Officer Ndokosho testified that he took statements from witnesses and therefore is aware of the strength of the State's case. He said that the applicant was implicated and traced through a sim card found on the scene at the dumpsite under the body of one of the deceased.

[16] It is further Warrant Officer Ndokosho's testimony that witnesses will testify that the applicant was the last person seen in the company of the two deceased. He testified that the car was found locked with the keys thereof in the possession of the applicant. According to him, the seats of the car were full of blood, with bullet holes on the passenger and the back seats. A projectile was also found in the car by the Forensic Institution people. They will give evidence in the trial about the result of the projectile.

[17] Warrant Officer denied that the applicant mentioned Bennie to him. He testified that he knows the applicant's family on his father's side. They stay at Okalongo in the north near the border of Namibia and Angola. According to him, the border is just an artificial line without a fence or a river making it easy for the applicant to cross into Angola. The fact is, he said, that there exists an arrangement between Namibia and Angola for people on either side of the border to visit family members within a radius of 10 kilometers without prior permission. He expressed fear that the applicant will abscond and influence witnesses if released on bail. He was cross-examined by Mr Siyomunji in detail, who denied that his client has a family at Okalongo in the north.

[18] Mr Wimmert is a family member of the late Johanie Naruses. He testified that the family and other members of the public are still angry for the applicant for what he has done and might hurt him if released on bail. He testified also that he knows the applicant well because they grew up together in the same location and handed up a petition (Exh "A") signed by him and other people objecting to the release of the applicant on bail.

[19] In terms of s 60 of the Criminal Procedure Act, *supra*, an accused who is in custody in respect of any offence may at his or her first appearance in a lower court or at any stage after such appearance, apply to such court or if the proceedings against such accused are pending in the High Court (as is the case in the present matter) to be released on bail in respect of such offence on the condition that the accused deposits the sum of money determined by the court in question, in this case, with the registrar.

[20] Additional to the provisions of s 60, the court is also enjoined to hold and inquiry and consider the provisions of s 61 and if in the opinion of the court, it is found that 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 application will be refused even though the court is satisfied that it is unlikely that the accused will abscond or interfere with witnesses for the prosecution or police investigation.

[21] In this application, when regard is had to the evidence adduced by the prosecution about the charges against the applicant and the strength of the State's case, I am satisfied that these factors might induce the applicant to abscond and not stand trial⁴. He may also influence his sister, a State witness not to testify against him.

[22] I am in agreement with Mr Lutibezi, counsel for the State that there is nothing which can keep the applicant in Namibia. He will lose nothing if he absconds. He has absolutely no bond with his children because he does not support them. Angola is a likely bolt hole for the applicant because his relatives are living next to the border of Angola and Namibia. It is common cause and the applicant knows that if convicted, severe sentences will be imposed on him and this factor will also provide an incentive to him to abscond.

[23] When referring to the seriousness of the crimes the applicant is facing in this case, I am not talking about mere labels of murder charges but of substance. The respondent established *prima facie* the nature of the crimes the applicant is facing.

⁴ S v Nichas 1977 (1) SA 257 (C); S v Hudson 1980 (4) SA 145 D.

He has already been served with the indictment and the summary of substantial facts together with a list of witnesses who will testify in the matter. It is my view that there are enough facts placed before me in the application and will adopt the approach followed in *Julius Dausab v The State*⁵, to exercise my discretionary power to grant or not to grant the application.

[24] With all that stated above in mind, I conclude that the applicant did not manage on a balance of probabilities, to discharge the *onus* resting on him to be released on bail. His delay in applying for bail, the nature of the charges preferred against him and the reason that his trial is to start within a few days are some of the factors weighing heavily against the granting of the application at this stage. Therefore, in my opinion, it is in the interest of the public and the administration of justice to retain the applicant in custody while on trial. In the result, the application for the applicant to be released on bail is refused.

E P Unengu
Acting Judge

⁵ Case No 38/2009.

APPEARANCES:

THE APPELLANT:

M Siyomunji

Instructed by Siyomunji Law Chambers, Windhoek

THE RESPONDENT:

C Lutibezi

Instructed by Office of the Prosecutor-General,

Windhoek