



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING IN BAIL APPLICATION

Case No: CC 19/2020

**PETRUS HOXOBEB**

**APPLICANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Hoxobeb v State* (CC 19/2020) [2021] NAHCMD 226 (12 May 2021)

**Coram:** SHIVUTE J

**Heard:** 23 and 28 April 2021

**Delivered:** 12 May 2021

**Fly note:** Criminal Procedure – Bail – Onus of proof required – Applicant to show on balance of probabilities – Rights contained in Articles 7 and 10 of the Namibian Constitution not infringed if applicant not released on bail – Rights to be considered in context with other fundamental rights – in the Constitution – Rights not absolute – Interest of public or administration of justice – Factors to be considered – Will the accused stand his trial? – Will he interfere with state witnesses or the police

investigation? Will he commit further crimes? Will his release be prejudicial to the maintenance of law and order and the security of the state?

**Summary:** The applicant is charged with the offences of murder and assault by threat. He has two previous convictions namely murder and assault with intent to do grievous bodily. Both offences were committed in respect of the deceased who had a romantic relationship with the applicant. The applicant is currently facing a murder charge in relation to his former lover and assault by threat in relation to the complainant in the second count who is said to have been an eye witness. The applicant has the onus to show on a balance of probabilities that he can be admitted to bail. Applicant argued that refusing him bail would amount to the infringement of his right of protection of liberty in terms of Article 7 and his right to be presumed innocent in terms of Article 12(1) (d) of the Namibian Constitution. Applicant's rights to be considered in the context of other fundamental rights entrenched in the Constitution. Applicant's rights are not absolute.

Interest of public or administration of justice – When considering refusing bail in the interest of justice or administration of justice – the court should consider whether the applicant will stand his trial if released on bail; whether he will interfere with State witnesses or investigations; whether he will commit further offences; whether his release will be prejudicial to the maintenance of law and order and the security of the State? In the present matter, the applicant has the propensity to commit violent offences and he is likely to commit further offences. The State appears to have a strong prima facie case against the applicant. Therefore, in the interest of the public or administration of justice bail is refused.

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**ORDER**

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The application for bail is dismissed.

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SHIVUTE J

[1] The applicant who is charged with one count of murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003 and one count of assault by threat has moved an application to be admitted to bail. He is a 57 year old male of Namibia nationality. He was arrested on 15 July 2019. He has been in custody for one year and nine months. It is for the first time the applicant has brought an application to be admitted to bail in this matter and at no stage did he apply for bail in the magistrate's court.

[2] The state opposes bail on the following grounds:

- (a) The applicant is indicted on two counts one of which is a serious count of murder and that the State will make out a strong case against the applicant.
- (b) The risk of absconding is high because the applicant was arrested in the mountainous area trying to flee. If admitted to bail, since the State will make out a strong case against the applicant, there is a flight risk due to the imposition of a lengthy custodial sentence that may follow a conviction.
- (c) Furthermore, there is a risk of committing further offences, the safety of the victim in count 2 will be at stake and there is a risk of the applicant committing suicide.
- (d) Lastly, it will not be in the interest of the public or the administration of justice to admit the applicant to bail irrespective of any conditions to be attached.

[3] The applicant had intimated that he was going to plead not guilty to both counts. Both offences were allegedly committed on 14 July 2019. The victim in the murder count had a romantic relationship with the applicant. Whilst the victim in the second count of assault by threat was allegedly in the company of the deceased at the time these offences were committed. According to the summary of substantial facts, whilst the deceased was on her hunches a distance away from the she-been, the applicant attacked her and stabbed her at least 9 times with a knife. When the victim in count 2 tried to stop him, he threatened to stab her whilst continuing to wield his knife. The deceased died on the scene due to hypovolaemia, heart attack and lung injuries caused by multiple stab wounds. The appellant fled the scene but the police traced him where he was hiding.

[4] The applicant testified in support of his application. He is married and produced his marriage certificate that was admitted in evidence as an exhibit. He has two children with another woman. Both his children are adults aged 35 and 30. They are staying on their own. The applicant attended school up to standard 3. Before his arrest on 15 July 2019, he was self-employed. He was getting tenders to fence off farms. He was also doing odd jobs if he was not given tenders. He was earning N\$7000 to N\$8000 per month. If the fence is short, he was earning N\$2000 to N\$3000 per month. He was using his monthly earnings to pay for their house and to look after his grandchildren. His wife is retired and she is sickly. The applicant produced a bill from the Municipality of Gobabis dated 20 July 2017. The bill indicates that the applicant's house was in arrears for water, electricity and other municipal services in the amount of N\$29 162.14. Currently the status of the house is not known.

[5] The applicant's grandchildren are staying with their mothers. His wife is no longer staying at their house. She is being assisted by her sister. The applicant is on treatment for hypertension and HIV since 2014. The applicant wants to be admitted to bail because of financial problems relating to his house. The second reason relates to his health. The accused testified that on one occasion whilst he was in custody he was not taken to the hospital on time to go and receive medication for his chronic diseases and

he was not given all his medication. It was only after he complained that the problem was solved. The applicant further testified that at the Correctional Facility where he is kept inmates are taken to the health facility according to sections. If his medication finishes then he has to wait for the specific day when his section will be taken to the health facility. Meanwhile he would be without medication. The applicant produced his health passport as an exhibit. The applicant further testified that if he is granted bail he will be able to pay N\$2000 (two thousand) - N\$3000 (three thousand).

[6] The applicant testified further that although the first count is a serious offence, he intends to plead not guilty to both counts and he will not abscond because he is innocent. The applicant is a resident of Gobabis where he and his wife reside. They have a house and furniture in Gobabis. If he is released on bail, he intends to stay at his, house. He has no family ties outside Namibia. All his family members are residents in Namibia.

[7] With regard to the public interest and administration of justice, the applicant testified that since he is innocent it would be in the public interest or administration of justice if he is released on bail. Keeping him in custody would affect him emotionally and his health. If the applicant is released on bail he would not go to the area where the incident took place. He urged the court to admit him to bail and attach conditions. Concerning the risk of committing further offences, the accused testified that he did not commit any murder. He is still presumed innocent until the court convicts him.

[8] It came out through cross-examination that the applicant had a previous conviction of murder of the mother of his children. The murder took place on 28 November 1993 in Gobabis district where he also allegedly killed the deceased in the present matter. The deceased in the murder case of 1993 was also stabbed with a knife. She was socialising at the shebeen, she went to the nearby bush to relieve herself. The applicant followed her and stabbed her to death. The applicant left the deceased at the scene of crime and went to a farm that is situated approximately 2 kilometres from Gobabis.

[9] The applicant was convicted for the murder of the mother of his children and sentenced during 1995 to 27 years' imprisonment, of which two years were suspended for five years. He served a term of imprisonment of 10 years and six months. After that, he was released on parole. It was also revealed during cross-examination that before the accused murdered the mother of his children, he had stabbed her with a knife. He was convicted of assault with intent to do grievous bodily harm. These previous convictions have been admitted by the applicant. The applicant testified that the reasons why he stabbed and killed the mother of his children was because he could not accept the fact that she did not want to continue with their relationship. The applicant further admitted that apart from the previous convictions, he was also charged with an assault with intent to do grievous bodily harm in respect of a certain man. When the applicant realised that his actions were wrong by assaulting the man, he asked for forgiveness. The man withdrew the charge against the applicant. Concerning the allegation that the applicant fled to the mountainous area where he was arrested in the present matter, he explained that he did not flee but he went there to collect firewood.

[10] The applicant again testified that although he went to the crime scene after he was arrested, he was taken there by the police and he did not make a pointing out. He further testified that a knife and a pair of trousers were recovered when he accompanied the police to his house. The applicant insisted that he could not have killed the deceased because he was never at the crime scene or near it when the incident took place. It was further put to the applicant that there was an eye witness who was with the deceased when the incident happened and that the State will be calling her during the trial. The applicant responded that the State could call her. Concerning the admissions allegedly made by the applicant that he had killed the deceased, these admissions were disputed. The applicant had disputed that he informed people that he would kill the deceased in this matter and thereafter kill himself.

[11] In support of the opposition to bail, the respondent called Warrant Officer Kandjombo who testified that he was the investigating officer in this matter. There is

evidence in the docket where the applicant had made some admissions in connection with this matter on the day he was arrested. The applicant also made some pointing outs of the crime scene. He took the officers to his house where the murder weapon was found. The witness further testified that when he went to the crime scene he met with the victim in the second count. She implicated the accused that he is the one who stabbed the deceased and she feared for her life. The police looked for applicant that specific night but he did not spend a night at his residence. He also did not spend a night at the place where his wife was staying. The applicant was only arrested the following day in the mountains after the police received information that the applicant had spent a night at his daughter's place and left early in the morning. When the applicant spotted the police he ducked in the grass but the police saw him. The applicant was not found collecting firewood. He never informed the police that he was collecting firewood.

[12] The applicant was arrested by officers who went to the mountains, because, where the applicant was found it could not be accessed by car. After the police took him from there, the witness drove up to a certain point where the applicant was loaded in the vehicle. The applicant had blood on his clothes. He had a wound on his leg. His shoes also had bloodstains. When the knife and clothes were taken to the laboratory for analysis they were found to contain human blood. The witness testified that the applicant freely and voluntarily made admissions and made a pointing out. He further confirmed the accused's two previous convictions as well as the case of assault with intent to do grievously bodily harm. It is the witness' evidence that the facts in the present murder case are similar to the murder the applicant had been convicted of. The applicant used the same modus operandi in committing these offences.

[13] The investigating officer continued to testify that he is in possession of a docket where, the applicant stabbed one Michael Guaib. The complainant withdrew the matter because the applicant asked for forgiveness. He is also in possession of two affidavits that the applicant told people that he would kill the deceased and kill himself. If the applicant is released he might commit further offences, kill himself or not stand his trial.

Therefore, it is in the interest of the public or of the administration of justice for the applicant to be remanded in custody pending the finalisation of his case. The witness testified further that even if conditions are attached to bail, that would not prevent the applicant from fleeing or committing further offences. Through cross-examination, the witness was asked whether he recorded the admissions in the applicant's warning statement, the witness responded that he did not but he recorded the alleged admissions in his own statement as the applicant decided to remain silent in the warning statement.

[14] Concerning the accused's flight risk, it was put to the witness that the applicant had no travel documents. The witness responded that the applicant does not necessarily need travel documents for him to abscond. He may abscond whilst he is still in Namibia or he may cross the border illegally. Concerning the applicant missing an opportunity to collect some of his medication, the witness testified that the applicant never reported to the court that such a thing happened. He further said there were doctors attending to those who are in holding cells and in correctional facilities.

[15] Counsel for the applicant submitted that the applicant suffers from high blood pressure and some allergies. His wife is of ill health. He wants to be released on bail in order to attend to his financial problems relating to his house that is in arrears to prevent it from being repossessed. Regarding the plea for the accused to be remanded in custody, counsel submitted that the court should have regard to the provisions of Article 12 of the Namibian Constitution, regarding the presumption of innocence as well as Article 7, regarding the liberty of the applicant. In connection with the laboratory results, that blood is for a human being, there is evidence that the applicant had an injury on his leg and this could be his blood. Counsel further argued that the defence during trial will challenge the evidence of the key witness who was allegedly present when the incident took place.

[16] In respect of the pointing out, counsel argued that his client was taken to the scene by the police. Although a knife that belonged to the applicant was taken from the



applicant's house, it was not recovered because of a pointing out. Concerning the grounds of opposition to the applicant's release on bail, counsel argued that the State can take steps to protect its witness who is alleged to have been present by deploying police officers to guard her house pending the finalisation of the trial or the court may impose stringent conditions to the granting of bail.

[17] Counsel for the respondent argued that the seriousness of the offence and the strength of the State's case may be an incentive for the applicant to abscond. Furthermore, public interest may demand in appropriate circumstances, that an accused person remains in custody even though the possibility of absconding is remote. Again, the relevance of a serious charge lies in the sentence that is likely to be imposed upon conviction. If the applicant is convicted in the present matter, he is likely to face a lengthy sentence of imprisonment without the option of a fine.

[18] With regard to the strength of the State case, the investigating officer had placed relevant facts before court that is sufficient to establish a prima facie case, so counsel argued. Counsel again argued that the issues that appear to be in dispute are a mere denial and the applicant's alibi is a recent fabrication.

[19] Regarding the applicant's flight risk, counsel argued that the seriousness of the offence and the strength of the State case may more likely induce the applicant to abscond than in the circumstances where the State has a weaker case.

[20] In respect of the factors involving the risk of committing further offences, the safety of the victim and the safety of the applicant, counsel argued that there are affidavits where the applicant informed people that he was planning to kill the deceased and thereafter kill himself. There is also evidence that the applicant's past is characterised by violence. Concerning the accused's right to be presumed innocent until proven guilty and his right to liberty, counsel argued that these rights are not absolute. Both counsel referred me to several authorities concerning the granting of bail that I have considered. I am indebted to them for this endeavour.

[21] Having summarised the evidence adduced during the application for bail, this court must now determine whether the applicant has discharged the onus of proof on a balance of probabilities that bail should be granted to him. In bail proceedings all what the State is required to show on a balance of probabilities is that it has in its possession the evidence, especially witness statements and other documentary evidence that will prove the applicant's guilty. The guilt of the applicant will be proved during the trial.

[22] The applicant mainly advanced two reasons why he would like to be admitted to bail namely; financial problems regarding his house that has been in arrears and his health problems. With regard to the arrears of the applicant's house, the applicant produced a bill from Gobabis Municipality that indicates that the house has been in arrears before 20 July 2017. Although the applicant was serving a term of imprisonment from 1995, he only served for 10 years and 6 months. During 2010 he got married to his wife and they have been residing in the house in issue. He was only arrested on 17 July 2019. The applicant testified that before his incarceration, he was earning between N\$7000 and N\$8000 per month and if he did not get tenders he was earning between N\$2000 and N\$3000 a month. Yet during 2017 the house was still in arrears. Although the applicant said he was paying for the house, it appears he did nothing to pay for the arrears. I therefore, find this ground to be flimsy and lacking substance.

[23] With regard to the issue of the applicant's health, he testified that it was only on one occasion when he did not receive his medication on time since he has been in custody from 2019. The applicant complained to the authorities and the situation was rectified. Furthermore, since the applicant had only had problems with his medication once in one year and 6 months this was an unfortunate situation which should not have happened. However, this court is satisfied that the applicant can receive adequate treatment whilst in custody. If what the applicant said concerning his late visitation to the health facility is accurate, this court does not condone a situation where an accused or suspect is not given his or her medication on time as this may jeopardise his or her health. The police or the correctional facility officers are urged to see to it that inmates

do not miss their appointments with doctors and that they are given their medication on time.

[24] Counsel for the applicant drew this court's attention to the provisions of Article 12(1) (d) of the Namibian Constitution regarding the presumption of innocence and the provision of Article 7 regarding the protection of liberty. Article 7 provides as follows:

'No person shall be deprived of personal liberty except according to procedures established by law.'

Article 12 deals with a fair trial. Article 12 (1) (a) reads as follows:

'In the determining of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent court or Tribunal established by law...'

Article 12(1) (d) provides that:

'All persons charged with an offence shall be presumed innocent until proven guilty according to law after having had the opportunity of calling witnesses and cross-examining those called against them.'

O'Linn J in *Albert Ronny du Plessis and Another v The State*, unreported judgment of this court delivered on 15 May 1992, cautioned against the selective emphasis placed by accused persons and their legal representatives on certain sections of the Namibian Constitution and certain fundamental rights such as 'the liberty of the subject, a fair trial and the principle that an accused person is regarded innocent until proven guilty' and stated that although these are very important fundamental rights, they are not absolute but circumscribed and subject to exceptions.

[25] He further stated as follows:

'The particular right relied on must be read in context with other provisions of the constitution which provide for the protection of the fundamental rights of all the citizens or subjects, provide for the responsibilities of subjects, provides for the maintenance of law and order, for the protection of the very constitution in which the rights are entrenched and for the survival of a free, democratic and civilised state.' (Para [13])

This court endorses the above approach.

[26] In the present matter, it is common cause that the applicant has two previous convictions. The first one was of assault with intent to do grievous bodily harm and the second one was of murder in respect of the same deceased who had a romantic relationship with him of which two children were born. The murder charge the applicant is facing in this matter, involves the applicant's girlfriend. The second count of assault by threat involves the eye witness who was allegedly present when the deceased was killed. The facts before court reveal that the applicant has a propensity to commit violent crimes, especially domestic violence crimes.

[27] Counsel for the applicant argued that, concerning the evidence of the eye witness, it will be challenged during the trial. In bail proceedings, the State is not obliged to prove its case against the applicant. The investigating officer testified that he has affidavits containing information implicating the applicant. One is from the eye witness who is the complainant in the second count and two other affidavits from people who were allegedly told by the applicant that he was going to kill the deceased and commit suicide. There is also evidence from the investigating officer that the applicant made pointing outs and as a result a knife that was allegedly used in the commission of the offence was recovered. All these are indications of a strong prima facie case that the State appears to have against the applicant. If the applicant is found guilty of murder, which is a serious offence, there is likelihood that he may be sentenced for a lengthy term of imprisonment without the option of a fine. This in itself is an incentive for the applicant to abscond.

[28] The applicant is charged with murder which is listed in Part IV of Schedule 2 to the Criminal Procedure Act 51 of 1977. Section 61 provides as follows with regard to 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 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 line interest of the public or the administration of justice that the accused be retained in custody pending his trial.’

[29] In considering whether the interest of justice will be prejudiced if the applicant is granted bail, the court must bear in mind that:

‘If an accused is refused bail in circumstances where he would stand his trial, the interests of justice are also prejudiced. Four subsidiary questions arise. If released on bail, will the accused stand his trial? Will he interfere with state witnesses or the police investigation? Will he commit further crimes? Will his release be prejudicial to the maintenance of law and order and the security of the state? At the same time the court should determine whether any objection to release on bail cannot suitably be met by appropriate conditions pertaining to release on bail...’

(See *Pineiro* 1992 (1) SACR 577(NM) at 580 c- d where Frank J cited Du Toit *et al* 9 – 8B.

[30] In applying the above principles, since the applicant has a propensity to commit offences where violence is an element, the applicant is likely to commit further offences if released on bail. His release will be prejudicial to the maintenance of law and order as he would be a danger to women and other vulnerable people. The State also appears to have a strong *prima facie* case against the applicant. It is therefore in the interest of the public or of administration of justice that he should be remanded in custody until the finalisation of his case.

[31] As to the question whether the accused’s fundamental rights in terms of Articles 7 and 12 are infringed, those rights relied upon must be read in the context of other provisions of the Constitution which provide for the protection of the fundamental rights. In this case, Article 6 which deals with protection of life and Article 8 which deals with respect for human dignity. The applicant’s rights relied upon are not absolute but circumscribed and subject to exceptions. Therefore, there is no infringement of constitutional rights.

[32] In the premise the following order is made

The application for bail is dismissed.

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NN SHIVUTE

Judge

APPEARANCES:

APPELLANT:

Mr Shikwa  
Directorate of Legal Aid

RESPONDENT:

Mr Kanyemba  
Office of the Prosecutor-General