REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON BAIL APPLICATION

Case No.: CC 9/2021

ERNST LICHTENSTRASSER **APPLICANT**

Versus

THE STATE **RESPONDENT**

Neutral citation: *Lichtenstrasser v S* (CC 9/2021) [2022] NAHCMD 28 (2 February 2022)

Coram: CLAASEN, J
Heard: **18-20 January 2021**
Delivered: **2 February 2022**

Flynote: Criminal Law and Procedure – Bail – New facts – Court's approach in considering whether there are new facts – Those new facts be considered against the background of the old facts – Notwithstanding new facts – Application for bail on new facts dismissed.

Summary: Applicant brought a bail application based on new facts. These were that, COVID-19 lockdowns delayed his trial and negatively affected consultation with his legal representative and that he suffers from certain mental health conditions.

Held – Applicant has not proven existence of the specific mental health conditions of critical proportions as he alluded, nor can it be called a new facts as it emanated from his arrest and was in existence at the time of the bail applications in the district court.

Held, that some of the grounds related to lockdown measures are indeed new facts, but that they do not displace the basis on which bail was refused by the district court, which conclusions had not been challenged on appeal.

ORDER

The application for bail on new facts is dismissed.

RULING

Background

[1] The applicant is currently on trial in the High Court to defend himself against two counts of murder, two counts of possession of a fire-arm without a license, unlawful possession of ammunition, unauthorized supply of a fire-arm and ammunition, defeating or attempting to defeat the course of justice, as well as theft of a fire-arm barrel.

[2] The applicant was arrested in Karibib one day after the shooting incidents of the two deceased persons in this matter. He subsequently appeared in the district court of Swakopmund on 9 May 2019. A formal bail application ensued during the course of

June 2019, wherein oral evidence was presented by the applicant and the investigating officer. The judgment for that was handed down on 24 July 2019, and the application was refused. Eight months thereafter on 23 March 2020, the applicant applied for bail on the basis of new facts, by way of an affidavit. That too was refused by the district court magistrate on 20 April 2020. He now approached this court, again under the auspices of new facts and testified in support of his application. The application was opposed by the respondent.

New facts, evidence and submissions in this application

[3] The new facts postulated by the applicant were:

3.1 COVID-19 lockdowns at the detention facility caused delays in trial;

3.2 Inability to properly prepare and or consult with his legal representative, also on account COVID-19 lockdown measures and or other restrictive conditions attached to telephonic use at the detention facility; and

3.3 Severe mental health effects such as depression and severe anxiety triggered by his arrest and worsened by the continued detention.

[4] The applicant testified that his trial commenced early in 2021 and although 14 state witnesses have testified there were 104 more witnesses yet to testify. He lamented the position that due to a COVID-19 lockdown at the Namibia Correctional Services (NCS), he lost the progress of 12 trial days during the course of 2021. Given the large number of witnesses and the unpredictability of COVID-19, he does not anticipate that the matter will be concluded this year. He regards the trial dates given for this year as preliminary or provisional. He calculated the period of his incarceration to be 2 years, 9 months and 3 days.

[5] As far as his second ground was concerned he testified that no physical consultation with his legal representative was possible during times when the NCS in Windhoek was under lockdown. He described that consultation now takes place in adjacent separate glass booths and that documents are passed between the parties

by a correctional services officer. The telephone system cuts off after 15 minute intervals, it is expensive and requires pre-payment on the part of the user. Furthermore, he testified that the official cellphone that is availed to inmates once a week is shared between 16 persons and each one only gets to use it for a few minutes. He testified that it would be proper consultation had there been unrestricted visits and consultations and had the telephone calls not been monitored. In particular, he mentioned that he had been in touch with a forensic expert via his biological sister in Austria and the research material on this issue comes in drips and drabs.

[6] In respect of the last ground, he informed the court that he is a veteran from the liberation struggle and that he had his 'flashbacks' under control but, that the experience during his arrest caused him trauma and anxiety, and it has reached clinical proportions. As such he had been seeing his private psychologist.

[7] He offered N$ 15 000 as bail, which amount he could obtain from his sister. He assured the court he has no problem to observe any bail condition and stated that he is innocent and has a permanent residential address at Otavi, which is within walking distance from the police.

[8] During cross-examination, counsel for the state, Ms Verhoef tendered in evidence the court order depicting the next trial dates. It was pointed out to the applicant that these dates are not provisional, but are fixed continuation of trial dates. He had a change of heart and answered that he now saw it differently, than during evidence in chief.

[9] In respect of the trial preparation, the applicant stated that they were not a hundred percent ready for the forensic evidence of one Ms Swart, which was countered by a comment by the respondent's counsel that the trial court was not apprised of that state of affairs. The applicant also agreed that the particular DNA report by Ms Swart was disclosed already during pre-trial phase, thus there could be no issue of being surprised by it or ill-prepared for it. Counsel for the respondent

postulated that the DNA report attested to by Ms Swart definitely incriminates the applicant, and drove the point that it is more obvious now as opposed to the period of the initial bail hearing when the results were not available yet. The applicant answered that he does not regard Ms Swart as an expert and that he intended to counter Ms Swart's opinion with that of his expert witness, one Dr. Herch. It was pointed out that these particular issues were not put to Ms Swart during the cross-examination, which the applicant was unable to dispute. It also became clear that the applicant intends to dispute the ballistic evidence, as he did not agree with the contention put to him by counsel for the state that the ballistic results show a link between a certain pistol and an intact cartridge.

[10] The applicant denies that the state has a strong case. He supported his opinion by referring to the absence on an eye witness, the absence of gunshot residue and blood-spatter on his clothes, that the police fabricated evidence against him and that his rights were violated during the interrogation process.

[11] Counsel for the state informed the accused that the witness list has been narrowed down to 30 witness yet to testify. It was also pointed out to the applicant that the courts are accommodating the issues caused by COVID-19. As an example thereof, she reminded the applicant that this court, granted an adjournment of one day for consultation and preparatory purposes on the new facts bail application, which was not possible earlier as the applicant's counsel informed the court that he was exposed to COVID-19. The applicant was questioned as to whether his lawyer has access to a laptop and internet facilities and that he is able to consult with defense witnesses, to which the applicant answered in the affirmative.

[12] The mental health issue was also canvassed during cross-examination with the applicant admitting that he had been taken to his private general practitioner and private psychologist. It was followed up with whether he is currently under any prescribed medication for depression and or anxiety and he said no. He elaborated

that at some stage he had been given sleeping pills by the general practitioner, but that had been discontinued since.

[13] Counsel for the respondent perceived the applicant's contact with his overseas sister and the pressure of a conviction as a red flag for absconding, but the applicant denied that to be the case. He was also confronted with an untruth about having no previous convictions in his affidavit for the second bail application in the lower court. The applicant explained that it was a mere typing error and that the affidavit was prepared by his erstwhile lawyer in circumstances of very little time for him to properly read the affidavit.

[14] In re-examination it was highlighted that the issue of the previous conviction already surfaced in the first bail application and thus, the magistrate could not have been misled by the incorrect affidavit in that respect. He also re-iterated the point that no 'accommodation' was done during the lockdown periods which coincided with the trial dates of 28 June 2021 to 2 July 2021 and 26 July 2021 and 30 July 2021.

[15] Counsel for the applicant Mr Titus, in his legal arsenal, relied on the matter of *Moussa v State*[1], wherein the appeal court granted bail in new facts bail hearing on the basis of an excessive delay in trial and found it amounted to a violation of the accused's fair trial rights. Mr Titus argued that in a similar manner, the applicant's fair trial rights are compromised as there is no end in sight of COVID-19 and that if lockdowns are again imposed it will be to the further detriment of the applicant.

[16] In respect of the impressions held by the applicant that the state has no strong case, Ms Verhoef replied that the issue of no eye witness is not a new fact, that the argument of gunshot residue is not valid as the clothes were simply not tested, that the believe by the applicant that the police fabricated the evidence of Ms Tsoeses, that such point was never put to her in cross-examination, that the interview techniques and the issues pertaining to the confession were covered during the first bail hearing.

[1] *Moussa v State* (CA 105/2014) [2015] NAHCMD 21 (11 February 2015).

As for the applicant's contention that he will challenge the state's forensic evidence and ballistic evidence, she argued that there was no concrete counter evidence put forward during cross-examination of the state's witness thus far.

[17] In respect of the mental health conditions, she argued that it was not a new fact, but even if this court wanted to consider it, that the applicant was currently under no treatment for the conditions, which makes the existence and severity thereof doubtful.

[18] She emphasized the grounds on which the initial bail was refused and argued that it was not dispelled. She referred the court to the new facts bail application of *Doyle v State.*[2] In that matter the court refuted the applicant's contention that there was no basis to invoke s 61 of the CPA and held that the seriousness of the crime, the circumstances and the manner in which the offence was committed may well be relevant considerations under this s 61 of the CPA.

[19] She continued to say that none of the new grounds changed any of the relevant considerations or the strength of the state's case, which just cemented the magistrate's findings on those aspects in the first bail hearing. She reiterated that the ballistic tests and DNA evidence links the applicant, plus the confession made before a commissioned officer and other evidence yet to be present are indicative of the state having a strong case. That also plays a role in risk of absconding which she argued still remains high especially with the imprisonment still looming and a biological sister abroad who has already indicated willingness to assist him financially to pay his bail.

[20] The risk of interference also remained the same, she argued, because the applicant testified of his need to catch up on the relationship with his 14 year old son, who has given a statement and is expected to testify in the matter. In addition, some of the other witnesses are colleagues of the applicant who worked at the Namibian Institute of Mining Training. She again referred to the *Doyle* matter wherein the court held that persons that stand in a specific relationship to an applicant, such as friends,

[2] *Paul Edward Doyle v The State* CA 16/96 delivered 10 October 1996.

neighbor and an ex-wife who still reside in the same house, increased the possibility of interference by the applicant.

The law and application to facts

[21] The legal position in respect of bail was immaculately confirmed by Salionga J in *Sheelongo v S*[3] at para 10:

> 'It is settled law that once a bail application is heard and concluded, there can be no new bail application on the same facts unless new facts exist. I agree with what the Court stated in *S v Petersen 2008* (2) SACR 355 (C) Van Zyl J at page 371 para 57 that 'When as in the present case, the accused relies on new facts which have come to fore since the first, or previous, bail application, the court must be satisfied, firstly that such facts are indeed new and secondly they are relevant for purposes of new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it.'

[22] Thus, the question before me is whether the facts as postulated by the applicant qualify as new facts, and if it does, whether it would in the interest of justice that he be released on bail.

[23] I start to consider the mental health conditions. Based on the applicant's oral evidence, he had a pre-existing mental condition which was activated by the trauma of his arrest and it was aggravated as a result of the continued detention. This in itself shows that the mental health conditions were in existence at the time of the first bail application and thus, it cannot be regarded as a new fact. In any event, the applicant's failure to bring any medical report as to the severity of his alleged mental conditions and his own admission that he is not receiving any medication for these mental health mean that he did not prove the existence thereof on a balance of probabilities.

[24] The essence of the other grounds were that there were trial delays and the right to consult with his legal representative was impeded on account of the COVID-19

[3] *Sheelongo v S* (CC 16/2018) [2020] NAHCNLD 51 (8 May 2020).

pandemic. Incidentally, the applicant brought in the issue of the telephone systems at the detention center, which he said was expensive, requires pre-payment and was monitored, which impedes on his right to privacy and his right to consult and or prepare for trial. My understanding of the telephone situation, as per his evidence, is that these are the general operational parameters of the system in place at the NCS for detainees, meaning it cannot be sneaked in as a purported new fact.

[25] I return to the remainder of grounds, which both stem from the adverse effects of COVID-19 in the country. These consequences were not limited to the health of our citizens, but had infiltrated other domains, be it in government or otherwise. The courts and related institutions were not spared either. Evidently, NCS in Windhoek had implemented what became known as 'lockdowns' during certain time intervals during the detention of the applicant in the course of 2020. The lockdowns by the NCS is not in issue, nor could it be disputed that no physical visits were permitted and it resulted in a restriction in the physical consultation set-up at the institution thereafter. In a similar vein, it was common cause that the applicant's continuation of trial had been interrupted on account of the COVID-19 measures at the relevant times. Clearly this was not in existence at the time of the bail applications in the district court. What remains is to consider whether these two grounds satisfy the second leg of the test in respect of new fact bail applications.

[26] Given that this type of bail application requires that the court consider the new facts against the background of the old facts it is necessary to momentarily shift focus to the bail hearings at the district court. In a nutshell, the reasons for the refusal of bail in the first place were that:

26.1 There is a *prima facie* strong case against the applicant;

26.2 The combination of the serious nature of the charges, the likelihood of lengthy imprisonment and the fact that the applicant, who was born in Austria and still has a biological sister there, makes the applicant a flight risk;

26.3 There is a risk of interference with some of the state witnesses, given that one of the witnesses is at a vulnerable age of 14 years and is the biological son of the applicant and that some of the other state witnesses are colleagues of the applicant at the Namibia Institute of Mining and Technology, and;

26.4 That in view of the seriousness of the offence, the callous and brutal manner in which the double murders were perpetrated that the society needs protection by the courts, which finding was made under s 61 of the Criminal Procedure Act as amended (the CPA).

[27] The applicant's second bail application which premised on health reasons as a new fact, was also refused and the *court a quo* reiterated the grounds on which bail was initially refused.

[28] In pursuit of the issue surrounding the *prima facie* strength or weakness of the state's case, the court was informed by the applicant that there are no eye witnesses, that there was no gunshot residue or blood-spatter found on him, that the police fabricated the evidence of Ms Tsoeses and that he intends to dispute the expert evidence already given by Ms Swart and that to be given by a ballistic expert. Most of these considerations were part of the spectrum before the initial bail court.

[29] In returning to the concern regarding an impediment in consultation at NCS, it is clear that the measure of no physical contact with the legal practitioner was not an indefinite and permanent practice. It was a temporary safeguard, which has since been discontinued. It is my understanding that during that period telephonic contact was permissible, which means that it was not a situation of total deprivation of consultation. As for the glass booth structure that is in place now for consultation, it is presumably aimed at keeping in line with directive of maintaining social distance between visitor and the detainee. It also has to be remembered that the applicant is detained in custody in terms of the law. It goes without saying that incarceration

cannot be expected to be a walk in the park, without any degree of inconvenience or hardship.

[30] I move to the ground of trial delay on account of the COVID-19 lockdown. It has to be said that each case turns on it each own facts. In my view the impetus behind the decision in the *Moussa* matter was a collective of the circumstances surrounding the delay in trial, namely the total period of pre-trial incarceration amounted to 7 years, some of the co-accused had escaped and the accused had not even pleaded to the charges, which inexorably led to the conclusion that there was no remote prospect of a trial date in sight. The position is different and thus, distinguishable from the applicant's situation. The period of detention is lesser, though this court understands the agony of any detainee that even a single day of incarceration is too much. In this matter the applicant made a first appearance in May 2019 and his trial commenced in the High Court in early 2021. Not only has the trial started, but 14 witnesses have testified with 30 more to take the stand, and the trial has been set down for continuance for a three week period during the course of this year. This is a far cry from the facts in the *Moussa* case. In addition, the cause of the 'lost' trial days was due to measures taken to ameliorate the outbreak at NCS, and it was not for feeble reasons.

[31] At this juncture, the trial has progressed with 14 witnesses that testified. The applicant has in this bail application singled out the evidence of two of these witnesses whose evidence he intends to attack and or dispute. In particular, he asserted that the evidence of Ms Tsoeses was fabricated by the police and he was intent on disproving the expert forensic report of Ms Swart with the opinion and or findings of a forensic expert to be called by the defense. These appear to have been a surprise to the respondent as that counsel was quick to point out that these specific lines of attack were never put to these witnesses while they were in court. Be that as it may, the cogency of the strategy, if these particular points were not posed to the witnesses respectively whilst they were under cross-examination, remains to be seen. Besides, given that this is a bail application it is not for this court to determine the cogency of

the evidence of these two witnesses at this intermittent stage. It is the duty of the court in a bail application to assess the relative strength of the state's case against the applicant as opposed to making provisional findings on the guilt or innocence of the applicant before court.[4]

[32] In this regard the finding of the magistrate that the state has a *prima facie* strong case has not been displaced by the evidential material placed before this court by the applicant. Thus, I am satisfied that the *prima facie* strength of the state's case remains intact. The same goes for the other findings of the magistrate. These findings constitute the foundation for the refusal of bail in the district court and they were not challenged on appeal nor were they disturbed by the evidence herein. As such they remain valid.

[33] Furthermore, the debacle of the false portrayal by the applicant in his affidavit in his new facts bail application in the district court, as having no criminal convictions, did not assist him in this application.

[34] In conclusion, after having considered the new facts, they have not displaced the basis on which the bail in the district court was refused. In the premises, the application for bail on new facts are dismissed.

_____

CM Claasen

Judge

[4] *S v Van Wyk* 2005 (1) SACR 41 (SCA).

APPEARANCES:

FOR THE APPELLANT:	Mr Titus Directorate Legal Aid
FOR THE RESPONDENT:	Ms A Verhoef Of the Office of the Prosecutor General