



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
BAIL RULING**

Case no: CC 5/2016

WALTER LWENDO LUPALWEZI

1st APPLICANT

NDOZI NDOZI

2ND APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Lupalwezi v State* (CC 5 /2016) [2017] NAHCNLD 93
(19 September 2017)

Coram: TOMMASI J

Heard: 13 September 2017

Delivered: 19 September 2017

Flynote: Criminal Procedure – Bail – Conditions of incarceration not factors warranting the release on bail — State functionaries however have a duty of care as accused is a ward of the State — New Facts — Court ought to determine if facts are new and relevant — Facts not entirely new and not relevant to the issue of whether the applicants should be admitted to bail.

ORDER

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1. The applications of first and second applicant are struck from the roll as the facts are not relevant to the issue of whether they should be admitted to bail;
 2. The Investigating Officer is directed to ensure that the first applicant receives the necessary medical attention as and when he requires same;
 3. The Station Commander of Oshakati and/or Kongola Police Station and/or any other police station where the first applicant is held, is directed to allow the first applicant to freely communicate with the Office of the Ombudsman regarding his complaints of the conditions in the holding cells;
 4. The Station Commander of Oshakati Police Station is directed to order an immediate and full investigation into the allegation of assault of the first and second applicant;
 5. Both applicants be held at Kongola Police Station pending their trial.
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REASONS

TOMMASI J:

[1] The applicants herein applied to this court to be admitted to bail on the strength of new facts. The first application by the applicants to be admitted to bail was refused in the district court and the matter has subsequently been transferred to this court. The first applicant appeared in person and Mr Tjiteere acted on behalf of the second applicant. Mr Shileka appeared for the Respondent.

[2] The application herein was struck from the roll and the above ancillary orders were granted on 18 September 2017. What follows are the reasons for the court's ruling.

[3] The applicants are indicted on charges of murder, kidnapping, robbery (with aggravating circumstances) and indecent assault. The State alleges that the applicants and a co-accused, on 9 July 2015 drove to place nearby Mudumu National Park where they parked the vehicle driven by their co-accused. First and second applicants walked to the camping site and during the early hours of the

morning of 10 July 2015, they cut the tent where Andy Christian Meier, the deceased, and his girlfriend were sleeping. They tied them up and robbed them of their possessions. They drove with the deceased and his girlfriend into thick bushes. The first applicant attempted to rape the victim and the deceased attacked the deceased. Second applicant joined in and both applicants stabbed him several times in the chest, abdomen, thigh and back. The applicants left the deceased and his girlfriend behind and took off with the loot. The deceased succumbed to the stab wounds.

[4] The first applicant opted to address the court from the dock. He urged the court to look at this matter differently from the lower court. He raised the following issues:

- (a) He suffers from an injured knee which he sustained as a result of an assault perpetrated on him by the police and he requires medical attention from a private medical practitioner who is in Windhoek. He related that he previously suffered ill health and the police officers failed to timeously take him for medical care.
- (b) He is detained far from his family and he suffers as they are unable to bring him toiletries;
- (c) He is required to pay in order to remit letters to the Ombudsman;
- (e) He is not given food at Oshakati Police Station where he is now detained. He recorded the dates and times when he was not given food.
- (f) The investigation is now completed.

[5] Mr Tjiteere submitted from the bar that the following were new facts:

- (a) The investigation is now completed;
- (b) The second applicant did not and would not interfere with the investigations; and if necessary conditions may be set to prevent any interference;
- (c) the second applicant is no longer at risk to commit suicide
- (d) The matter has now been pending since July 2015 and was postponed for trial only in March 2018;

[6] The parties requested the court to determine whether these facts are indeed new facts before determining the application based on the new facts. The matter stood down for the court to make a ruling whether or not these are new facts. The court held the view that the procedure proposed by counsel was incorrect. In *S v De Villiers 1996 (2) SACR 122 (T)* the court held that where an accused wishes to apply anew for bail in terms of s 65(2) of the Criminal Procedure Act 51 of 1977 as a result of new facts, such facts must actually be put before the magistrate by adducing *viva voce* evidence or by way of a document indicating facts that are common cause between the State and the defence. These are but two methods whereby evidence may be placed before the magistrate. The magistrate should then decide whether the facts constitute new facts and if they justify the granting of bail.

[7] In *S v Petersen 2008 (2) SACR 355 (C)* Van Zyl J at page 371 paragraph 57 stated as follow:

‘When, as in the present case, the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, firstly, that such facts are indeed new and, secondly, that they are relevant for purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it See *S v De Villiers 1996 (2) SACR 122 (T)* at 126e - f.’
[my emphasis]

[8] The magistrate in the first bail application refused to admit to applicants to bail. He concluded that sufficient evidence was provided that the applicants carefully planned and orchestrated the offences; and that legal convictions of the community will hold that the accused should not be released on bail. The court essentially refused to admit the applicants to bail premised on the conclusion that it would not be in the public interest and the administration of justice to do so.

[9] First applicant made submissions from the dock and Mr Tjiteere, made submissions from the bar. The State called the investigating officer and the Station Commander who testified under oath.

[10] The complaints by the second applicant referred to in paragraph 3 (a) – (e) relate to the conditions which prevails as a result of his detention.

[11] It was not disputed that he had a knee injury which was attended to at the State Hospital, Katima Mulilo. According to the investigating officer he was taken to hospital when he required medical care. The investigating officer indicated that he would take the first applicant to a private medical doctor of his choice if requested to do so. He also indicated that the Office of the Ombudsman visits the police station at Kongola bi-annually and the applicant would then be free to communicate his complaints to the Ombudsman. This offers little solace to the applicant who wishes to communicate with the office of the Ombudsman now.

[12] The Station Commander testified that they experienced a problem with serving breakfast for two mornings but the problem has now been resolved. He too indicated that the applicant would be assisted with his correspondence with the Office of the Ombudsman.

[13] Inspector Amakali, under oath, denied that he drove at an excessive speed and consumed alcohol while transporting the applicants to and from court. The court ordered an investigation into the allegations of the first applicant by the Complaints and Discipline Unit of Katima Mulilo Police. That order remains in force.

[14] 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 State may lawfully detain the applicant and infringe his right to liberty. The constitution however provides that his dignity shall be inviolable. The applicant is a ward of the State and as such functionaries of the State have a duty of care.

[15] Police officers are to ensure that the health and welfare of the inmates are attended. It must be borne in mind that the applicants are presumed to be innocent until proven guilty. Judges take an oath to uphold the Constitution of Namibia and where there are allegations of infringements of fundamental human rights the court cannot turn a blind eye. This court, in light of the complaints regarding the conditions prevailing whilst in detention, gave directions to address the complaints of the first applicant.

[16] The first and second applicant indicated that the investigations were not concluded at the time they brought the first application but it is now concluded. Mr

Tjiteere submitted that the second applicant is no longer suicidal and that he would not interfere with the witnesses. Mr Tjiteere further pointed out that the case has been postponed for a further 6 months.

[17] The stage of the investigation, the non-interference with the witnesses are coached in such a way that they appear to be new developments. The stage of investigation and the time it would take to complete it as well as the suicidal tendencies of second applicant were issues considered during the first application. The magistrate in fact envisioned that the incarceration of the second applicant would deter him from committing suicide. The possibility of interference and a lengthy trial awaiting period existed at the time of the first application. This was not addressed by the second applicant at the first bail application. Moreover, it has not been submitted that the delay in the prosecution of their trial was attributable to the negligence, fault or mala fides of the respondent in the conduct of the prosecution and neither is this borne out by the record.

[18] These facts, whilst they may be dished up as new, are directed at supplementing or amending some of the unsatisfactory aspects of the first application. Furthermore they do not address the issue of the change in circumstances which would sway the pendulum in favour of the release of the applicants. The court ruled that it would not be in the interest of the public and the administration of justice. None of these facts are relevant to show that this situation has changed. It remains in the public's interest that persons who are accused of serious, brutal murders ought not to be released lest the impression is created that the police nor the courts can effectively protect them. (See *Timotheus Joseph v The State* (unreported) delivered by Strydom JP on 22 August 1995; *Charlotte Helena Botha v The State* CA 70/95 HC delivered on 20 October 1995).

[19] There is no evidence adduced that is new and the facts submitted to the court are not relevant to the issue of whether they should be admitted to bail. There is thus no reason for the court to hear a second application.

[20] In the result the following order is made:

1. The applications of the first and second applicant are struck from the roll as the facts are not relevant to the issue of whether they should be admitted to bail;
2. The Investigating Officer is directed to ensure that the first applicant receives the necessary medical attention as and when he requires same;
3. The Station Commander of Oshakati and/ Kongola Police Station and/or any other police station where the first applicant is held, is directed to allow the first applicant to freely communicate with the Office of the Ombudsman regarding his complaints of the conditions in the holding cells;
4. The Station Commander of Oshakati Police Station is directed to order an immediate and full investigation into the allegation of assault of the first and second applicant;
5. Both applicants be held at Kongola Police Station pending their trial;

MA TOMMASI J

Judge

APPEARANCES

ACCUSED 1:

IN PERSON

MR WALTER LWENDO LUPALWEZI

KONGOLA POLICE STATION

ACCUSED 2:

MR TJITEERE

DR. WERDER, KAUTA & HOVEKA INC.

RESPONDENT:

ADV SHILEKA

OFFICE OF THE PROSECUTOR- GENERAL