

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION

HELD AT OSHAKATI

BAIL RULING

Case no: CC 14/2018

In the matter between:

TATENDA KATSAMBA

APPLICANT

v

THE STATE

RESPONDENT

Neutral Citation: *Katsamba v S* (CC 14/2018) [2019] NAHCNLD 60 (11 June 2019)

Coram: SALIONGA J

Heard: 3 - 4 June 2019

Delivered: 11 June 2019

Flynote: Criminal Procedure– Bail – Application for bail – Applicant to show on balance of probabilities it is in the interest of the administration of justice he be released

on bail – State opposing bail on grounds indicated in the application –Seriousness of the offence, strength and circumstances in which offence was committed important factors to be considered-- The delay in applying 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.

Held; that it is in the interest of the public and the administration of justice to retain the applicant in custody.

Summary: The applicant is indicted with murder read with the provisions of the Combating of Domestic Violence Act, 4 of 2003. The applicant waited for more than two and half years and only at the time when his trial had started, he applied for bail. The deceased, being the applicant's girlfriend was brutally stabbed and murdered. Applicant, station commander and investigating officer testified in the bail application. There is direct evidence to conclude that there is a strong case against the applicant. Court has to balance the interest of justice against the deprivation of freedom of the applicant in deciding whether or not to grant bail. The court held that it is in the interest of the public and the administration of justice to retain the applicant in custody and dismiss the application.

ORDER

The application for bail is dismissed.

RULING

SALIONGA, J

[1] This is an application wherein applicant is asking the court to release him on bail pending his trial. The respondent on the other hand is opposing the granting of bail on the following grounds; fear of absconding, public interest and administration of justice, fear of committing further offences, fear of interference with state witnesses and that the state has a strong case.

[2] Applicant is facing a charge of murder read with the provisions of the Combating of Domestic Violence Act¹. The indictment read with the summary of facts and a list of witnesses delivered or served² on the applicant, the State alleged that the applicant murdered Panashe Sande a female person during the evening of 28 July 2017.

[3] The trial is set to commence on 24 June 2019 before my brother January J who could not hear this application because he will proceed with the trial. Ms. Petrus representing the State and applicant, is a self-actor.

[4] In support of his application, the applicant testified that the reason why he wants bail is because he has the right to get bail. According to the constitution he is innocent until proven guilty. He is a first offender and has no other pending case against him apart from the one he is facing. He is a father of 2 children who need his attention. The condition at Oshakati police station is not conducive. As a foreign national he is being discriminated against and treated unfairly in custody. The State is failing to provide him with food, basic sanitary needs and his health is worsening since his incarceration. There is no family that can help him in this regard. Applicant further stated that he will stand his trial and will not run away. It is applicant's contention that the State has no reasonable grounds to refuse him bail because he is not the person responsible or answerable to the charge. Applicant will plead not guilty to the charge because he knows nothing about the case. He did not know the place where this incident took place. Applicant further testified that there is no victim as one Panashe Sande, who is a foreign national and no evidence to show that she was in Namibia at the time of the incident.

¹ 4 of 2003

² S 144 of the Criminal Procedure Act 51 of 1977.

For the State to allege that she was killed in Namibia there should be valid travelling documents. That none of the 30 witnesses could link him to the charge.

[5] Applicant further stated that, his family members were in Zimbabwe save the one in Oshikuku. His travelling documents were with the police. He was in custody for 2 years to date. He wants free bail or would afford bail in the amount of N\$500. If released on bail applicant will stay at Erf 3520, his relative's house in Oshikuku and is aware of the arrangements. Applicant came to Namibia as a tourist.

[6] During cross-examination, applicant denied the allegations against him, stating that he did not know the deceased Panashe Sande and was not in a relationship with her. Furthermore he denied staying in the house situated at Erf 149 Oshakati West with the deceased, that he was present on the 28 July 2017, the day the deceased was killed. When asked where and when he was arrested, the applicant was hesitant to answer stating that the police must answer that question.

[7] In opposing bail, respondent (State) called the station commander of Oshakati police station, Mr Aro Mathews and the investigating officer Lavinia Shilongo.

[8] Detective Warrant Lavinia Shilongo testified that applicant is a Zimbabwean national who has no fixed address, no family ties or travelling documents to be in Namibia. The applicant was in a relationship with the deceased as boyfriend and girlfriend. The day of the incident applicant / accused was seen in the company of the deceased and was pulling her in the street. They ended up in the house at Erf 149 Oshakati West where they stayed. Applicant fought with the deceased on the day of the incident and when witnesses tried to intervene, applicant locked the room. Thereafter, the applicant ran out through the kitchen door. He jumped the neighboring fence where he was arrested. The deceased was found dead in the house. The witnesses will come and testify further that the applicant was the last person seen in the room with the deceased.

[9] It is further her testimony that she fears that once applicant is granted bail he may not attend court and may interfere with state witnesses. The witness testified that there is nothing to keep applicant in Namibia because he is not working, he has no fixed address, has no fixed properties or family ties and has no travelling documents and even his own family members wants applicant to be in custody. The members of the public are still angry for what he has done.

[10] Applicant was a soldier in Zimbabwe and it is not true that he is being discriminated against. He is being treated like any other inmate.

[11] In assessing the risk of abscondment, the court has to assess the likely degree of temptation to abscond which may face the applicant. The applicant in this matter is a Zimbabwean national, he is unemployed, has no residential status in Namibia, no fixed address, no fixed assets and no family in Namibia. In the instant case there is nothing to keep him in Namibia as such his chances of absconding is very high.

[12] O'Linn J and Hanna J concurring in *Charlotte Helena Botha v The State* unreported judgement of the High Court of Namibia CA 70/1995 delivered on 20.10.1995 stated that: 'In such instances the letting out on bail of a person who is accused of a callous and brutal murder, or a person who continues to commit crimes, creates the perception that the public at large is at the mercy of such criminals and that neither the police nor the courts can effectively protect them. Considerations such as the public interest may if there is proper evidence before the court lead to the refusal of bail even where the possibility of abscondment or interference may be remote'. In my view this is the correct proposition of the law.

[13] Section 60 of the Criminal Procedure Act, *supra*, provides that 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.

[14] Additional to the provisions of s 60, the court is also enjoined to hold an 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.

[15] In this application, applicant is charged with a serious offence, murder. What is more aggravating is the fact that it was committed in a domestic relations. Applicant killed his girlfriend in this matter although he is denying it. Society is tired of perpetrators such as the applicant who have no regard for the lives of others. The investigating officer fears that if applicant is released on bail he may commit a similar offence because applicant was a soldier and in her dealing with him, applicant exhibited very aggressive behavior.

[16] It is common cause that the applicant has no place to stay while awaiting his trial if released on bail and the person applicant said to have made arrangement with at Oshikuku returned back to Zimbabwe as the documents expired. The possibility of interfering with witnesses is very high. Applicant denied any knowledge of the murder that he was not in Namibia and he was not arrested. However he was placed at the scene by the witnesses who saw him at Oshakati West that day.

[17] The strength of the State's case which *prima facie links* the accused directly to the crimes committed. A 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 as the date of trial has already been set a week from today are some of the factors weighing heavily against the granting of the application at this stage.

[18] Applicant's claim of being innocent and denials that he will not abscond, considered against those factors relied on by the state in the opposition of the bail application are not very assuring. Taking the above in mind, I am not satisfied that the accused has shown on a balance of probabilities that it would be in the interest of the public and the administration of justice that he be admitted to bail pending finalization of his trial.

[19] In the result;

The application for bail is dismissed.

J SALIONGA
Judge

APPEARANCES:

FOR THE APPLICANT: Mr T Katsamba, in person
Police Station, Oshakati

FOR THE RESPONDENT: Ms S Petrus
Office of the Prosecutor General, Oshakati