



CASE NO.: CC 23/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

NATANGWE IIPINGE NGATJIZEKO

APPLICANT

versus

THE STATE

RESPONDENT

CORAM: NDAUENDAPO J

Heard on: 2 & 12 November 2010

Delivered on: 28 January 2011

JUDGMENT - BAIL APPLICATION:

NDAUENDAPO J.: [1] The accused is charged with one count of murder and robbery with aggravating circumstances. In the summary of substantial facts, the State

alleges: “The accused, who was born on 10 July 1979, is the biological son of the deceased. On an unknown date, prior to Sunday 17 December 2006 and at the residence of the deceased, the accused travelled from Walvis Bay to Windhoek with the intention to kill the deceased. On 17 December 2006 and at the residence of the deceased, the accused boiled water and poured it over the body of the deceased and he fractured some of her ribs. He also stabbed her several times with at least two knives. The deceased died on the scene, due to injuries sustained. Before he left the scene, the accused took N\$20,00 cash money which was the property of or in the lawful possession of the deceased.

[2] The accused was arrested on 19 December 2006 and has been in custody since. His trial had commenced before me and could not be finalized and has been postponed to 9 – 13 May 2011. He has been in custody for almost 4 years now. At the commencement of the trial, the accused pleaded not guilty and the basis of his defence was that “at the time he committed the crimes, he was suffering from a mental defect caused by many years of substance abuse more particular marijuana and that he was psychotic when he committed the offences.”

[3] The accused applied to this Court to be released on bail. Mr. Wessels appears on behalf of the accused. The State, represented by Ms. Moyo, opposed the application for bail on three grounds, namely:

- (i) The fear that the accused is likely to abscond if released on bail pending the finalization of his trial;

- (ii) That if released on bail, the accused person is likely to commit further offences, and;
- (iii) That it will prejudice the interest of the Administration of Justice if bail is granted to the accused.

[4] The accused testified in support of his bail application. He is 31 years old and a Namibian citizen. His father is Immanuel Ngatjizeko (the Minister of Labour and Social Welfare). In 1980 he went into exile to Angola with his mother. In Angola he was separated from his mother and was raised in a refugee camp. Later his mother left and went to India and he returned to Namibia in September 1990, and stayed with his father and attended People's Primary School in Windhoek. He completed grade 12 at Concordia College, Windhoek. In 1998 he enrolled at the University of Namibia (UNAM) for a Bsc degree, majoring in chemistry and biology. After 2 years of study, he won a scholarship to go to Czech Republic where he enrolled for a degree in economics. He struggled to learn the Czech language and lost interest in his studies. He was kicked out of university and stayed in Prague with his friends. He started drinking and using drugs. He returned to Namibia in 2003 and in the same year enrolled at the Polytechnic of Namibia for a diploma in Media Studies. After 3 months he abandoned his studies. He joined the Namibia Defence Force (NDF) and while in the force he continued using drugs. He was in the NDF for seven months. In 2004 he was arrested for possession of drugs and stood trial at Okahandja magistrate's court. Before the completion of his trial, he absconded and fled to Zimbabwe. In Zimbabwe he was arrested for theft and contravention of the Immigration Act. He spent seven months in custody and in September 2005 he was deported back to Namibia. In

Namibia he stayed at his father's house and sometimes at his mother's house. In order to maintain and feed his drug habits he stole money from people. In January 2006 he left for Cape Town, and stayed with Rastafarians in Philipi, continued smoking dagga and using drugs. There, in Cape Town, he was arrested and deported in August 2006 back to Namibia. In September he moved to Walvis Bay to look for employment. Continued with his drug habits, got money for his drug addiction from friends and from stealing. He returned to Windhoek around December 2006. He testified that if he is released on bail (admitted to bail) he will not abscond and will be residing at his girlfriend's house (No 160, Theo-Ben Gurirab Street, Walvis Bay). He has no problem to report 2 or 3 times per day to the police station. He further testified that his father is in position to pay bail in the amount of N\$10 000,00. He has no passport and no property, either immovable or movable, of his own.

[5] He further testified that he was a changed person. He does not use drugs anymore and has converted to Islam, prays and reads the Khoran on a daily basis.

[6] Mathilda Haimbambe was called to testify for the accused. She testified that she is 32 years old and a Namibian citizen. She is employed at the Ministry of Fisheries as an inspector in Walvis Bay. She resides at no 160, Theo-Ben Gurirab Street, Walvis Bay. She owns that house since 2007. She and the accused started a romantic relationship in 1994 and it was an on-and-off relationship. She testified that she does not have a problem for the accused to come and reside at her house, if released on bail.

[7] That was the case for the accused.

[8] The State called Namtunga Julius. He is employed by the Ministry of Safety and Security since 1996. He is the head of security at Windhoek Central Prison. His duties include, *inter alia*, to ensure that offenders are in safe custody, to ensure that no unauthorized articles are brought into prison. He testified that offenders do sometimes, on rare occasions, bring in drugs, but in very small quantities. He further testified that the accused is generally a well behaved prisoner. Exhibit "J" (an affidavit by Mr. Immanuel Ngatjizeko, setting out the curriculum vitae or course of life of the accused was admitted in evidence. That was the case for the State.

[9] Mr. Wessels submitted that the accused is innocent until proven guilty and the court should ordinarily grant bail unless this is likely to prejudice the ends of justice. He further submitted that there is a reasonable chance that the accused may succeed with his defence. In support of his submissions he referred this Court to the two psychiatrist reports (exhibits "K" and "L") which were admitted in evidence. The report by Dr. Reuben Japhet (exhibit "K") under the headline 'findings' states:

"3.2 According to available particulars, the accused at the time of the commission of the alleged offence was having a mental defect as supported by the findings that he has been smoking marijuana for many years and he was psychotic when he committed the alleged offence. Because of psychosis, his cognitive function was greatly impaired and as such, he:

- a) *Was not fully capable to appreciate the wrongfulness of his act*
- b) *Was not fully capable of acting in accordance with an appreciation of the wrongfulness of his act.*

The accused is currently in good remission. He should be regarded as fit to stand trial with diminished capability. The accused is not longer mentally ill. He is fit to stand trial with diminished capability.” (my underlining).

[10] The second report compiled by Dr. Mthoko (exhibit “L”), (the relevant finding) states:

“At the time of the commission of the alleged crime, the accused did suffer from a mental disorder as supported by his history using psychoactive substances. Although he understood the nature of what he was doing, his action was the consequences of a delusion and therefore his ability to appreciate the wrongfulness of his alleged offence and act in accordance with such appreciation was diminished.”

[11] The report by Dr. Japhet is contradictory. Contradictory in the sense that it states that ‘at the time of the commission of the crime, the accused was psychotic and because of psychosis, his cognitive function was greatly impaired and as such he was not fully capable to appreciate the wrongfulness of acting in accordance with an appreciation of the wrongfulness of his act’. Yet at the end of the report the doctor concludes that the accused is no longer mentally ill. He is fit to stand trial with

diminished capability. If he is no longer mentally ill, where does the issue of diminished capability come from? It appears that the diminished capability that the doctor refers to was at the time of the commission of the crimes. Ms. Moyo submitted that the psychiatric reports establish that the accused might have suffered from a state of diminished responsibility at the time of the commission of the offences and it only 'serves to reduce the accused person's moral blame worthiness in the light of the gravity of his conduct. In essence all what it does is to mitigate or reduce the sentence which otherwise would have been meted out on the accused under normal circumstances.

[12] I do not wish to express myself on those submissions at this stage. The trial is still pending, the accused must still come and testify. However it appears that for the defence of mental illness to succeed all factors must be taken into account. The State, the defence and even the Court has the right to call the psychiatrists to come and testify about the reports and to clarify the content of the reports in order for the Court to be in a position to indeed conclude whether the accused was mentally sick or not when he committed the offences.

Is the accused a flight risk?

[13] In answering that question there are certain factors that the court must take into account. For instance, is it more likely that the accused would stand his trial or is it more likely that he would abscond and forfeit his bail? The determination of that issue involved a consideration of sub-issues such as:

- (a) How deep his roots are in Namibia;
- (b) What assets he owns in Namibia;
- (c) What means does he have to flee from the country;
- (d) How much he could afford the forfeiture of the bail money;
- (e) How serious was the offence in respect of which he had been charged;
- (f) How strong the case against him was and how much inducement there would be for him to avoid standing trial.

See **S v Anderson** 1991 NR1.

[14] It is trite law that the onus is on the accused to prove on preponderance of probabilities that he will not abscond if granted bail. In casu, the accused testified under oath that he will not abscond, if granted bail.

[15] In **S v Hudson 1980(4) SA 145D of 148E**: Thirion J cautioned about accepting the mere say so of the (accused) when he said the following:

“where an accused applied for bail and confirms on oath that he has no intention of absconding due weight has to be given to this statement on oath. However, since an accused who does not have such an intention is hardly likely to admit it, implicit reliance cannot be placed on the mere say-so of the accused, the court should examine the circumstances.”

[16] I now proceed to examine the circumstances in this case. In 2004 the accused was arrested and charged with possession of dagga while serving as a recruit in the

NDF (Namibian Defence Force). He appeared in the magistrate's court sitting at Okahandja and while awaiting trial (and to avoid standing trial), he managed to abscond and fled to Zimbabwe without any documentation. If the accused absconded for a relatively minor charge of (possession of dagga), how much more will the urge be to avoid standing this trial when he faces serious charges of (murder and robbery with aggravating circumstances) and, if convicted, he faces lengthy jail terms? In **S v Nichas and other 1977(1) SA 263**, it was observed that: [i]f there is a likelihood of heavy sentences being imposed, the accused will be tempted to abscond. In **S v Hudson 1980(4) SA 145(D) 146**, it was asserted that the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country. I fully agree with those observations. Since his return from Zimbabwe he has not reported himself to the authorities, he is still a wanted man. In addition he managed to go to South Africa without the necessary documentation. Although he claims that he does not have a passport, the borders of Namibia are easy to cross at unmanned points.

[17] In addition the accused does not own any movable or immovable property in Namibia. He also testified that his father agreed to pay N\$10 000,00 if bail is granted. That is no incentive for him not to abscond, the N\$10 000,00 is not his money and if he absconds and the N\$10 000,00 is forfeited to the state, what does he stand to lose? Nothing! The testimony by his girlfriend that she will provide him with a physical accommodation is also not convincing. Their relationship was not a steady one. What will change this time and more so having regard to the fact that he faces serious charges. In addition there is strong *prima facie* case against the accused person. He

admitted that he stabbed his mother to death although he says he was mentally sick at the time he committed the offences.

[18] For all those reasons, I am not satisfied that the accused discharged the onus of proving that he will not abscond if granted bail.

If released on bail, is the accused likely to commit further offences?

[19] On his own admission, the accused was addicted to drugs especially dagga. He testified that in order to feed or fulfill his drug habit he would steal from other people. He testified that he has now stopped taking drugs and has converted to Islam. Up until the date of his arrest, the accused was still using drugs. He only stopped when he was incarcerated and in all likelihood because it was difficult to get drugs in prison. He has not underwent any rehabilitation for his drug addiction of many years and nor did he testified that he intends to seek professional help to avoid using drugs again. The temptation (especially without having obtained professional help) is high and I am not convinced that the accused, once released on bail, will not go back to his old habits and start using drugs again. And once he start that, being unemployed, he will resort to stealing in order to feed his drug habit and thus committing further crimes.

Will it prejudice the interest of the administration of justice if bail is granted or put differently, is it in the public interest to release the accused on bail?

[20] Even if I am wrong, which I doubt, on the other two grounds on which I refused bail to the accused, I am fortified by the fact that it will not be in the public interest to

release the accused on bail. The accused is charged with serious crimes against his own mother. The Court has seen the 'bestly, cruelty and savagery' with which this murder was accomplished' (in the words of Ms. Moyo). The deceased was stabbed 39 times all over her body. As if that was not enough, he took time to boil water and poured the boiling water over her body causing 2nd and 3rd degree burns.

[21] The violence and brutality against the vulnerable in our society, especially women and children, is escalating at an alarming rate. Almost every day we read in newspapers how women and children are being assaulted and killed by men for petty issues. These crimes against them evoke a sense of helplessness in the national character. They are crying for protection from the Courts and other law enforcement agencies and for this Court to release the accused on bail (while his case is pending) is to ignore that call for protection. It will simply not be in the public interest to do so.

[22] I am mindful that the accused has been in custody for over 4 years now and, if convicted, the period of years spent in custody will undoubtedly be taken into account in determining an appropriate sentence.

[23] For all those reasons, the application to release the accused on bail is refused.

ON BEHALF OF THE STATE:

Ms. MOYO

Instructed by:

Prosecutor-General

ON BEHALF OF THE ACCUSED PERSON:

Mr. WESSELS

Instructed by:

Directorate of Legal Aid