



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

BAIL APPLICATION RULING

Case no: CC 17/2016

In the matter between:

DAVID MATALI**APPLICANT**

and

THE STATE**RESPONDENT****Neutral citation:** *Matali v S* (CC 17/2016) [2017] NAHCMD 295 (17 October 2017)**Coram:** USIKU J**Heard:** 2 October 2017**Delivered:** 17 October 2017

Flynote: Criminal 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 – Bail refused.

ORDER

The applicant’s application for bail on new facts is dismissed.

BAIL APPLICATION RULING

USIKU J:

[1] The applicant herein brought an application for bail on new facts. He is charged with several offences namely:

- (a) Murder
- (b) Robbery with aggravating circumstances as defined in terms of section 1 of Act 51 of 1977.
- (c) Conspiracy to commit murder in contravention of section 18 (2) (a) of Act 17 of 1956.

[2] It is common cause that the applicant had previously lodged a formal bail application at the magistrate court, Mungunda street, Windhoek on 11 May 2015 which application was unsuccessful.

[3] Having been dissatisfied with the refusal to grant bail, the applicant lodged an appeal in terms of section 65 (1) of the Criminal Procedure Act 51 of 1977 against such refusal. That appeal was also dismissed in the High Court.

[4] The applicant has now approached this court allegedly on the strength of new facts. Mr Van Vuuren appearing on behalf of the applicant, submitted that this is an application for bail based on new facts which have come to light since the applicant's previous application and appeal were heard. The new facts are said to be the following.

[6] Firstly that investigation revealed that the DNA analysis concluded that the applicant was not a DNA contributor and therefore does not link the applicant to the crime scene. Secondly that investigations have since the bail hearing been finalised being the reason why the hearing will commence on 1 November 2017 and thirdly that fingerprints (if any were taken) do not link the co-accused to the vehicle in which the applicant allegedly transported some co-accused to the crime scene.

[7] The State on the other hand submitted that the court's approach is to consider whether there are in the first instance, new facts, and, if there are, reconsider the bail application on such new facts against the back ground of the old facts.

[8] It is abundantly clear from our case law that the nature of the crime committed and the strength of the state's case, are extremely relevant at the stage when bail is considered. The applicant herein faces multiple charges which are serious in nature. In *Namiseb v State*¹ a case dealt with by Siboleka, J, it was held that the allegations were very serious, coupled with the fact that the victims were a defenseless elderly couple. It was accordingly held that it would not be in the interests of the public and the proper administration of justice to release the applicants on bail.

[9] As borne out by the record, the applicant was denied bail due to the reasons that he was a flight risk as he is married to a foreign national and there was further evidence that they had travelled in and out of the borders of Namibia. Also on the ground that the applicant is facing serious charges. Indeed the applicant herein is facing multiple charges and there is a likelihood for him to be sentenced to a longer term of imprisonment if convicted, thus that the more severe the sentence is likely to be imposed on him will tempt him to abscond and as a result the interests of justice will not be served.

[10] Whereas there are indeed new facts as submitted by the applicant's counsel with regard to the issue of DNA evidence, there is no indication before court that DNA evidence is the only evidence the state intend to rely upon against the applicant. Furthermore the applicant is not only charged with one offence but multiple serious offences and that if convicted, substantial sentences of imprisonment would in all probability be imposed, that, that fact alone would be sufficient to permit this court to form the opinion that it would not be in the interests of either the public or the administration of justice to release the applicant on bail.

[11] In *Wembondinga v S*² a judgment delivered by Ndauendapo, J with Liebenberg, J concurring in which the appellant was arrested on charges of robbery. It was held, amongst others that the fact that the witnesses who had testified thus far have not

¹ (CC 19/2011) [2014] NAHCMD 251 (25 August 2014)

² (CA 27/2017) [2017] NAHCMD 202 (28 July 2017)

implicated the appellant does not in itself mean, that the witnesses who are yet to testify will not either.

[12] It therefore follows that all factors have to be considered when deciding whether to grant or refuse the application. Section 65 of Act 51 of 1977 creates wider powers when it comes to the issue of bail. The court has a discretion to exercise and such discretion must be exercised judicially depending on the circumstances of each case. As already conceded, the applicant is facing serious charges, which must be considered against the background of all the evidence and facts.

[13] Another factor that could have been taken into consideration is the delay in the finalisation of the State's case. However, this is not an issue as a date has now been determined and the matter will come up for trial in about a month's time.

[14] Having given due consideration to all relevant factors and notwithstanding that there are new facts, I am of the view that it will not be in interest of the administration of justice to let the applicant out on bail based on the new facts.

[15] In the result, the applicant's application for bail on new facts is dismissed.

DN USIKU
Judge

APPEARANCES

APPLICANT: Mr Van Vuuren
Stern & Barnard, Windhoek

RESPONDENT: Mr Olivier
Of the Office of the Prosecutor-General, Windhoek

