

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

BAIL APPEAL JUDGMENT

CASE NO: HC-MD-CRI-APP-CAL-2020/00113

In the matter between:

JACK MULANDI**APPELLANT**

and

THE STATE**RESPONDENT**

Neutral citation: *Mulandi v The State* (CASE NO. HC-MD-CRI-APP-CAL-2020/00113)
NAHCM 136 (29 March 2020)

Coram: January J**Heard:** 9 March 2021**Delivered:** 29 March 2021

Flynote: Criminal procedure — Bail Appeal – Appellant represented – Partly *viva voce* then by way of affidavit – The use of affidavits reconfirmed – Respondent filed opposing affidavits – Appellant not truthful in giving his place of residence – Not in the interest of administration of justice and public interest to release on bail – No misdirections by magistrate – Appeal dismissed.

Summary: The appellant was arrested on 23 July 2020 on a charge of contravening Section 2(1)(a), read with sections 1, 2(2) and (3), 3, 4, 5, 6, and 7 of the Combating of Rape Act, 2000 (Act 8 of 2000)-Rape; Alternatively: Indecent Assault.

He applied for bail and testified partly under oath where after the matter could not proceed with viva voce evidence. By agreement affidavits were then filed. The appellant is a refugee from the DRC and was a resident of Osire Refugee Camp. He stated that he was residing in Windhoek. On the contrary he was only allowed for visits to Windhoek on permits issued by relevant authorities in Osire and Windhoek. It was found that the appellant was not truthful and not a good candidate for bail. There was no misdirection by the magistrate. The appeal is dismissed.

ORDER

The appeal is dismissed.

BAIL APPEAL JUDGMENT

JANUARY J*Introduction*

[1] The appellant was arrested on 23 July 2020 on a charge of contravening Section 2(1)(a), read with sections 1, 2(2) and (3), 3, 4, 5, 6, and 7 of the Combating of Rape Act, 2000 (Act 8 of 2000)-Rape; Alternatively: Indecent Assault

[2] The appellant is represented by Mr. Bangamwabo and the respondent by Mr. Lilungwe.

[3] The appellant is appealing against the refusal of bail in the district court of Windhoek on 24th September 2020 and a second refusal of bail on 13th November 2020 when the matter was struck from the roll.

Background and History-The first bail application

[4] The appellant is in custody now for about 8 months.

[5] The bail proceeding in the lower court commenced on 5th August 2020. It was postponed to 14th August 2020 for continuation. On this date, the respondent was not ready to continue because the investigating officer was under quarantine under the Covid 19-regulations. His unit commander was tested positive for Covid 19.

[6] The parties then agreed to continue with the bail application by filing affidavits. The affidavits and written submissions were to be filed on certain specified dates. Both parties could however, not manage to comply in filing the required documents on the specified dates due to various reasons, amongst others, the appellant not having funds to pay his lawyer and restrictions of movement due to regulations of restriction as a result of the Covid-19 pandemic. Bail was eventually refused on 24th September 2020.

The grounds of opposition

[7] The granting of bail was opposed on the following grounds:

- (a) The seriousness of the crime;
- (b) The fear of interference with the investigation;
- (c) The possibility that the appellant may abscond as he is a foreigner from the Democratic Republic of Congo (DRC);
- (d) That it is not in the interest of the public or the administration of justice to release him on bail.

The case for the appellant-The first bail application

[8] The appellant testified *viva voce* that he was 40 years old at the time of the bail application. He was residing with his wife at erf 1257, Patryshof Street, Tauben Glen, Hochland Park, Windhoek. He was residing there since 1st December 2019. He married in the DRC in 2016. He fled from the civil war in the DRC in 2018 with his wife. His wife

is residing at the same aforementioned address in Hochland Park. At the time of the bail application the wife was eight and a half months pregnant.

[9] They are taking care of four children of his siblings. He produced documents that the children attend school at Windhoek Central Primary School. Their ages reflect at the time as 13 years, 11 years, 7 years and 5 years respectively. The appellant testified that the children are residing with him and his wife. The parents are abroad in the DRC. The appellant is caring for the children as a guardian since January 2020. The parents are paying for the school fees and he is feeding them.

[10] The applicant and his wife are refugees from DRC. Before coming to Windhoek, the applicant was in Osire Refugee Camp as an asylum seeker. He entered Namibia on 8th May 2018. The appellant produced a document dated 23rd May 2019 from the Government of Namibia proving his status as a refugee. He never left Namibia after he was granted refugee status. He does not have any travelling documents.

[11] The appellant explained his presence in Windhoek. He stated that before he was granted refugee status, he could not leave Osire Refugee Camp as per Government orders. After he received refugee status, he was allowed to leave the Osire Refugee Camp (the camp) as there was no activity in the camp. He testified that because of inactivity in the camp persons are allowed to go elsewhere. He applied for an exit permit from the camp and was granted such. They (it seems him and his wife) decided to come to Windhoek. A copy of the exit permit was produced in court. It emerged later in his evidence that at all relevant times before this alleged incident he was with his wife.

[12] They left the camp in November 2019 and searched for accommodation in Windhoek. They found accommodation on 01st December 2019.

[13] The appellant acknowledged that he is facing a serious charge. He stated however, that he has no intention to abscond and will stand his trial. He stated that as a refugee, he cannot abscond as he has no place to go. Furthermore he needs to care for

the children and family and his wife was expecting a baby. Although he left relatives behind in the DRC, he does not know where they are now. As a responsible person he will stand his trial. At the time of the bail application the appellant was about two weeks in custody.

[14] He confirmed that he conducted spiritual services for the complainant from the 16th June 2020 until the 23rd June 2020 on three occasions. The complainant started making the allegations on the 24th of June 2020. He testified that the police approached him about three weeks thereafter, interrogated him about the incident and released him after he gave an explanation. After his release he did not attempt to abscond. He was arrested on 24th July 2020.

[15] The appellant beforehand did not know the place where the incident happened. He came to know the place when he was telephonically called by a friend, Sebastian, on 16th June 2020 in relation to the complainant who had a spiritual challenge. The complainant wanted someone to pray for her. The appellant invited her to his house with Sebastian where he prayed for her after she introduced herself to him.

[16] The complainant thereafter called on the 17th June 2020. As the appellant is not conversant with English he requested the complainant to call Sebastian and to explain to him. Through Sebastian, the complainant again raised the same spiritual problem and further elaborated on it.

[17] The recording of the court proceedings ended abruptly at this point in time. The record reflects: "cut off". The following recording proceeded on the 14th August 2020. The State could, however, not proceed with the bail application on this date due to challenges related to the corona pandemic. By arrangement between the State and the defense it was agreed to continue with the bail application by way of affidavit. This is a confirmed procedure to apply for bail. The appellant abandoned the *viva voce* proceedings. The appellant was therefore not subjected to any cross-examination.

There were again delays because affidavits and heads of argument were not timeously filed.

[18] The appellant in the meantime filed a founding affidavit. He repeated most of the evidence that he testified about in court. He stated that he is a 40 year old male citizen of the DRC. He is married to a 33 year old female. He fled with his wife to Namibia on 08 May 2018 because of insecurity and persecution during a civil war in the DRC. They entered the Namibian border through Katima Mulilo and handed themselves to the Namibian police.

[19] They were eventually taken to the Osire Refugee Camp. He was granted refugee status on 28th March 2019 to live with his wife in Namibia. His wife was pregnant and expected to deliver the baby any time from 20 August 2020. His wife experienced serious psychological problems and complications during her pregnancies. She had miscarriages in the past. The appellant decided to come to Windhoek for better treatment of his wife. They came to Windhoek towards the end of 2019.

[20] The appellant repeated that he is residing at erf 1256, Patryshof Street Tauben Glenn, Hochlandpark. He stays in a house rented by a certain Mr. Nawej, a businessman who travels in and out of Namibia. The appellant and his wife take care of the children who are schooling in Windhoek and are staying in the same house. Mr. Nawej provides money regularly for the care of the children.

[21] The appellant stated that he is a qualified electrician but is unemployed currently. He lost all contacts with relatives in the DRC and regards Namibia as his permanent residence. He will plead not guilty to the charge and rejects the accusations.

[22] He admits that he was contacted by Sebastian in relation to the complainant who had spiritual problems. He once invited the complainant to his residence and prayed for her with the assistance of Sebastian who was acting as interpreter as he (the accused) is not fluent in English. The complainant again contacted him with the same complaint.

On two occasions thereafter he went to the complainant's house and again prayed for her with the assistance of Sebastian.

[23] On the last occasion the complainant started to act strangely during prayer. Allegedly she started speaking as if she was a different character, laughed out loud uncontrollably, wore a wig, walked around in the living room, threw herself on the ground, turned and screamed.

[24] The appellant ask for a bottle of Olive oil from the complainant. He prayed for the anointment of the oil and allegedly requested the complainant to apply the oil to her body from time to time. According to the appellant he never touched the complainant. He stated that the complainant was dressed in a tight jeans trouser and well dressed. He could not have inserted his finger into her vagina. He denies of ever assaulting, harassing or raping the complainant. He only prayed for her and afterwards left with Sebastian when the complainant looked calm and happy.

[25] After a few weeks on the 13th July 2020, the investigating officer contacted the appellant and informed him about the allegations against him. He was arrested on the charge of rape. About 30 minutes thereafter he was released. Apparently the case docket had first to be sent to the Prosecutor-General for a decision to prosecute or not. The appellant was warned that he could be re-arrested and taken to court. The appellant went home.

[26] About 10 days later the appellant was called by the investigating officer to report to the police station. He reported at the police station to the investigating officer and was arrested.

[27] The appellant states that he is not a flight risk and will not abscond. He was arrested and shortly thereafter released. He states that he could then have absconded if he wanted to.

[28] He states that he is not going to interfere with the investigation as he does not know what investigation the police still have to complete. He is aware that his friend Sebastian gave a statement. He never interfered or attempted to interfere with this witness. All the more, he has cut all contact with this witness.

The case for the respondent

[29] The respondent filed an answering affidavit by the investigating officer. The investigating officer obtained a statement from the complainant. The complainant stated that she needed spiritual healing and was put in contact with the accused. She confirmed that the accused is a Congolese citizen and a pastor.

[30] She secured the services of the accused to assist her with prayers, visiting her house and conducting the necessary services. She stated that the accused came to her house on three occasions. He used to come in the company of Sebastian Mutangala. The accused prayed for her, shook her and applied olive oil on her body until she fell to the ground. He thereafter continued with his services. On the 23rd July 2020, during the process, the accused inserted his fingers into her vagina twice and rubbed her clitoris. She felt uncomfortable and stood up.

[31] She reported the matter to the sister of Sebastian. She also confronted the accused as to why he conducted him in such a manner. The accused started to send short text messages (sms's) asking for her apology. A statement was obtained from Sebastian. He confirmed the incident.

[32] The investigating officer confirmed that the accused was arrested on 23rd July 2020. The accused is a Congolese citizen and enjoys refugee status at Osire Refugee Camp.

[33] The investigating officer testified that the case is serious and will attract a long custodial sentence if the accused is convicted. The State further has a strong case. He further testified that there were attempts to interfere with the case as the accused

contacted the complainant and apologized. There is also evidence that Congolese nationals and the accused contacted the complainant to withdraw the case.

[34] The appellant's address of residence is Osire Refugee Camp as he was only allowed to visit Windhoek from time to time with an exit permit from the relevant authorities. The investigating officer further stated that the appellant was conducting pastoral services without a work permit. He opined that this conduct is a clear indication that the appellant has no respect for the Namibian laws. On a question by this court as to how the appellant will be able to pay bail in view of his claim that he is a refugee and unemployed, the legal representative, after consultation with the appellant informed the court that the appellant can pay from money he receives from his pastoral services and allowance to take care of his family.

[35] In his replying affidavit, the appellant denies that he is a pastor and states that he is an ordinary member of his church and that he was just praying as a believer. According to him, he does not earn money for that.

[36] The ruling was eventually handed down on 24th September 2020 where bail was refused.

The second bail application

[37] The second bail application was brought on the grounds of purportedly new facts. It was submitted that the new facts were that the appellant's wife gave birth to a baby girl on 17th September 2020 after several miscarriages in the past; the investigations in the matter was now at an advanced stage. The only outstanding document at the time was a MTC record of a cell phone.

[38] It was submitted that the new born baby has a constitutional right to be raised and cared for by both parents. Further the wife needs to be assisted by the appellant as she needed to go to the hospital for follow up medical examination after the baby was born by caesarian section.

[39] The appellant was willing to report at Osire Police station twice daily if he is released on bail.

[40] The respondent opposed the new bail application on the ground that the appellant's wife was already pregnant at the time of the first bail application. It was contented that the birth of the child does not constitute a new fact on which the second application for bail could have been entertained. The pregnancy was already an existing factor in the previous bail application.

[41] The magistrate found that the purported new facts were not relevant for purposes of the bail application and struck the application from the roll.

The ruling of the learned magistrate and the principles of bail

[42] The magistrate competently dealt with the principles applicable in bail applications as is reflected in his rulings. He referred to authority that the overall all-embracing issue is if the interest of justice will be served if an accused is granted bail.¹ One of the main considerations is whether the accused will stand his/her trial or abscond.² Courts should lean in favor of granting bail and not be against the liberty of the accused as long as the interest of justice will not be prejudiced.³ Notwithstanding a court finding that an accused will not abscond and/or not interfering with any witness or the police investigation, a court may refuse bail if in the opinion of the court, it is in the interest of the public or the administration of justice that the accused be retained in custody pending his/her trial.⁴

[43] It is trite law that the applicant bears the onus to prove on a balance of probabilities that his release on bail will not be prejudicial to the administration of justice.⁵ The State however, is not relieved of the duty to lead evidence in support of its

¹ *S v Pineiro* 1992 (1) SACR 577 (Nm) at 580 C-D

² *Noble v State* (CA 02/2014) [2014] NAHCMD 117 (20 March 2014) at par 31

³ *S v Branco* 2002 (1) SACR 531 at 533

⁴ Section 61 of the Criminal Procedure Act 51 of 1977

⁵ *S v Dausab* 2011 (1) NR 232 (HC)

objection to the release of the appellant on bail. Both parties, therefore, are under the obligation to place sufficient evidence and factual material before the court to assist it in balancing the two competing interests to arrive at a just and fair decision.

Analysis of the evidence by the magistrate

[44] The appellant stated that he was residing in Windhoek at a particular address. He admitted that he was a refugee who was admitted to stay in Osire Refugee Camp. The investigating officer testified that the appellant was supposed to stay in Osire refugee camp. He was only allowed exit from the camp from time to time with written permission from the relevant authorities. The appellant was accordingly granted exit permits from 08/04 2020 to 31/05 2020 and again from 09/07/2020 to 31/07/2020. The court found that the applicant's place of residence was Osire Refugee Camp and not the address in Windhoek as he stated. He only visited the address in Windhoek.

[45] The court drew an adverse inference from the conduct of the appellant where he misled the court in relation of his place of residence. The court found that the appellant did not take the court into confidence in his evidence pertaining to his place of residence. It was found that in the circumstances it was not in the interest of justice to release an applicant who is untruthful on bail on the strength of *Van Wyk v S*⁶.

This bail appeal

[46] The applicable section in the Criminal Procedure Act⁷ in relation to appeals against the refusal of bail by a lower court provides in section 65(4) as follows:

'The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong in which event the court or judge shall give the decision which in its or his opinion the lower court should have given'.

⁶ Van Wyk v S 2020/00076 [2020] NAHCMD 399 (7 September 2020)

⁷ Criminal Procedure Act 51 of 1977

[47] In *S v Timotheus*,⁸ this court explained the implication and purport of subsection 4 with reference to and with approval of *S v Barber*⁹ at 220 E-H where Hefer J stated as follows:

'It is well known that the powers of this Court are largely limited where that matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly...'¹⁰

(My Emphasis)

The grounds of appeal

[48] The following are the grounds of the appeal; The learned magistrate erred in law and on facts in that he: failed to consider the real issues in the bail application by incorrectly analysing the evidence in relation to the appellant's place of residence; he omitted to consider that the appellant presented sufficient evidence to counter the grounds of opposition and that he satisfied the court on a balance of probability that he is a good candidate for bail; erred by finding that the appellant is not a truthful witness; by not considering that the appellant was on the 9th July 2020 in Windhoek where he extended his exit permit when he gave his place of residence whilst as in Windhoek.

Conclusion

[49] I am in agreement with the magistrate that the appellant did not proof on a preponderance of probability that he is a good candidate for bail. The analysis of the evidence shows that the appellant was not honest when he informed the court a quo about his place of residence. I do not find any misdirection and that the magistrate was wrong on his conclusions in both bail applications.

⁸ *S v Timotheus* 1995 NR 109 (HC) at 113 A-B.

⁹ *S v Barber* 1979 (4) SA 218 (D).

¹⁰ See also: *S v Miguel & others* 2016 (3) NR 732 (HC).

[50] In the result:
The appeal is dismissed.

H C JANUARY
JUDGE

APPEARANCE

APPELLANT:

MR F BANGAMWABO
FB LAW CHAMBERS
WINDHOEK

RESPONDENT:

MR B. LILUNGWE
OFFICE OF THE PROSECUTOR-GENERAL
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