REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

BAIL APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2023/00036

In the matter between:

SAKARIA KUUTONDOKWA KOKULE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Kokule v S* (HC-MD-CRI-APP-CAL-2023/00036) NAHCMD 476 (7 August 2023)

Coram: D USIKU J *et* JANUARY J
Heard: 28 July 2023
Delivered: 7 August 2023

Flynote: Criminal Procedure – Bail – Appeal against the magistrate court's refusal to grant bail – Section 65 (4) of the Criminal Procedure Act 51 of 1977 (as amended) – Appeal court's powers largely limited where the matter comes before it on appeal – Appeal court's interference only permissible when satisfied that the magistrate was clearly wrong – Court found that it is not in the public interest and the interest of justice for the appellant to be released on bail. There was no misdirection by the court *a quo* – Magistrate's discretion was not wrongly exercised – Appeal against the magistrate's refusal to grant bail dismissed.

Summary: The appellant, a police officer was charged jointly with another person in the Windhoek Magistrate`s Court, on one count of corruptly giving gratification to an agent as an inducement alternatively bribery and one count of attempting to defeat or obstruct the course of justice. The appellant initiated a formal bail application in the lower court on 21 April 2022, which bail application was opposed by the State.

The investigating officer testified that he is objecting to the granting of bail because he feared that the appellant will interfere with witnesses and further that the appellant had approached him and there was nothing to prevent him from doing it again. Further, that the appellant was a police officer who was well aware that the requested documents were exhibits in the pending Fishrot case. The appellant testified in the court a *quo* that he knows the investigating officer both at a personal and professional level. He further testified that the docket was disclosed to him and that investigations have been completed. Since his arrest, he had no contact with the investigating officer, Mr Junias Iipinge, neither the arresting officer, Mr Cloete.

Upon consideration of the material placed before the court a *quo* by both parties, the magistrate refused to grant the appellant bail on 10 October 2022. The court a *quo* cited that there was a real risk of interference with State witnesses and that it was not in the interest of justice to grant the appellant bail. Bail was consequently refused.

Dissatisfied with the outcome of the bail proceedings in the lower court, the appellant filed an appeal in this court. The respondent opposed the appeal.

Held: that it is the appellant who bears the onus on a preponderance of probabilities to persuade the court why he should be released on bail.

Held: further that the powers of the appeal court in bail refusal applications are largely limited where the matter comes before it on appeal and not as a substantive application for bail.

Held: further that the public interest and the seriousness of the offence carry more weight than the personal circumstances of the appellant.

Held: further that the appellant be kept in custody in the interest of the administration of justice. No misdirection by the court a *quo* when it refused to grant appellant bail. Appeal against the refusal of bail dismissed.

ORDER

The appeal against the refusal of bail is dismissed.

BAIL JUDGMENT

D USIKU J (JANUARY J concurring):

Introduction

[1] The appellant is facing the following charges in the Windhoek Magistrate`s Court; one count of corruptly giving gratification to an agent as an inducement; first alternative to count one improperly influencing an authorized officer, second alternative to count one bribery of a police officer, 3rd alternative to count one bribery and a second count of defeating or obstructing the course of justice. He is jointly charged with another person.

[2] The appellant's formal bail application was heard on 21 April 2022 in the lower court. The respondent opposed bail on the following grounds:

a) The seriousness of the charges preferred against the appellant and the strength of the state's case.
b) Fear that the appellant will interfere or might interfere with the state's witnesses.
c) That it is not in the interest of the public nor the administration of justice for the appellant to be granted bail.

[3] The court *a quo* subsequently refused to grant bail to the appellant on 10 October 2022 citing that there was a real risk to interfere with State witnesses and further making reference to the fact that it was not in the interest of the administration of justice to grant the appellant bail. Thus, bail was refused.

[4] Mr Muchali appeared on behalf of the appellant whilst the respondent was represented by Ms Esterhuizen.

[5] The appellant's grounds of appeal against the decision of the court *a quo* are as hereunder:

1 The learned magistrate erred in law and or facts in finding and/or concluding that the appellant will interfere with witnesses if released on bail without any credible and *prima facie* evidence presented to court.

In amplification of this ground of appeal:

1.1 The appellant made a detailed warning statement to the Anti-Corruption Commission that corroborates the statement of Mr Junias Iipinge (main witness);

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1.2 The investigations are completed and the appellant has been provided with full disclosure;

1.3 The main case has been set down for plea and trial on more than 2 occasions without any interference with state witnesses;

1.4 The appellant has been in custody for more than 2 years with access to telephones and he never influenced or intimidated any of the state witnesses;

1.5 The appellant took the court in confidence and testified that he knows Mr Junias Iipinge personally and professionally.

1.6 The appellant testified that he will comply with any bail conditions imposed by the court.

2 The learned magistrate materially misdirected himself in law and or facts when he concluded that granting bail to the appellant is not in the interest of the administration of justice without any factual basis and prima facie evidence testified to in court. In amplification on this ground of appeal.

2.1 There was no evidence testified to before court that the appellant will abscond and/or that he is a flight risk;

2.2 There was no evidence testified to before court that the appellant is a threat to the maintenance of public order;

2.3 There was no evidence testified to before court that the appellant will interfere with any of the state witnesses in the main case;

2.4 The investigation in the main case was completed and full disclosure has been provided to the appellant;

2.5 There was no evidence testified to before court that the appellant will commit further offences if released on bail.

[6] Mr Muchali for the appellant submitted that the learned magistrate failed to consider that there is no real risk that the appellant will interfere with witnesses or with the investigations.

[7] The appellant testified that he knows the investigating officer both at a personal and professional level. He further testified that the docket was disclosed to him and that investigations have been completed. Since his arrest, he had no contact with the investigating officer Mr Junias Iipinge, neither the arresting officer Mr Cloete.

[8] With regard to the second ground of appeal, Mr Muchali submitted that the learned magistrate failed to apply his mind when considering the interest of justice as there was no factual basis or evidence that was presented before the court *a quo*, that granting bail to the appellant will not be in the interest of justice. He submitted further that there was no evidence to substantiate the bail refusal, on the ground of the interest of the administration of justice.

[9] Counsel for the appellant further submitted that the appellant is not a flight risk. Reference was made to several authorities that define the concept when it will be in the interest of the public or in the interest of the administration of justice.

[10] It was further submitted that the appellant is not a threat to the general public or the maintenance of public order, and as such there was no reason to refuse bail on the second ground.

[11] The appellant's testimony is that he reported himself to the Anti-Corruption Commission and offered to make a statement, whereafter he was released by the Anti-Corruption Commission. When he was recalled, he willingly reported himself and was subsequently arrested. He cooperated with the Anti-Corruption Commission in their investigations.

[12] On the other hand, counsel for the respondent submitted that the court *a quo* did not misdirect itself when it relied on the fact that it was not in the interest of the administration of justice to grant the appellant bail. Counsel

submitted further that there was a real risk that the appellant will interfere with witnesses.

[13] The investigating officer testified that he was objecting to the granting of bail because he feared that appellant will interfere with witnesses and further that the appellant had approached him and there was nothing to prevent him from doing it again. The appellant was a police officer who was well aware that the requested documents were exhibits in the pending Fishrot case. Further the investigating officer testified that there is a real risk of interference with witnesses by the appellant.

[14] It is common cause that the appellant is facing charges of bribery as well as a charge of defeating or obstructing the course of justice. The appellant conceded to the fact that the charge of bribery he is facing is of a serious nature as it falls under Part IV of schedule 2 of the Criminal Procedure Act, 51 of 1977 as amended.

[15] It is trite that the appellant bears the burden of proof on a preponderance of probabilities to persuade the court why he should be released on bail. Appeals in respect of bail refusal are governed by s 65 (1)(*a*) of the Criminal Procedure Act, (as amended) which provides as follows:

> '(1) (a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.'

[16] In addition to the above, s 65(4) of the Criminal Procedure Act, (as amended) provides:

'(4) 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.'

[17] Furthermore in *S v Barder*[1] where Hefer J, had the following to say:

'It is well known that the powers of this court are largely limited where the 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/she has wrongly. Accordingly, although this court may have a different view, it should not substantiate 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 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.'

[18] Similarly, having conceded to the fact that the appellant is facing charges of a serious nature, it is indeed so that the public has a significant interest that persons accused of committing such crimes stand their trial and do not abscond. Thus in this regard, the public interest is a weighty consideration. The alleged bribery could hinder the proper administration of justice.

[19] In *S v Gustavo*,[2] it was held as follows:

'When dealing with applications for bail, a court engages in a balancing exercise by balancing the need to preserve the liberty of individuals presumed to be innocent until proven guilty and the interests of due administration of justice on the other hand. By engaging in this balancing process, the court is required to exercise a

[1] *S v Barder* 1979 (4) SA 218 (D & CLD).
[2] *S v Gustavo* (SA 58-2022)[2022] NASC (2 December 2022).

discretion in deciding whether a person in custody awaiting trial should or should not be released on bail pending that trial. Furthermore it was held that s 61 of the CPA, when viewed in its legislative context, allows for a broader approach to the concepts of the 'interest of the public' and the 'administration of justice'. In effect affording the court wider powers to refuse bail in the context of escalating crime, even if an accused has shown on a balance of probabilities that he or she will not abscond or interfere with the investigation or witnesses.'

[20] Having considered the nature of the charges the appellant is facing as well as the circumstances surrounding the charges, I find that the principles established in the cases referred to are applicable to the instant matter.

[21] Therefore, having considered the magistrate's ruling, the submissions by the appellant and the respondent as well as the applicable legal principles, the court is satisfied that there was no misdirection by the court *a quo* when it came to a conclusion and refuse bail for the appellant. The magistrate did not exercise his discretion wrongly. I am of the view that it is not in the public interest and the interest of justice for the appellant to be released on bail.

[22] As a result, the following order is made:

The appeal against the refusal of bail is dismissed.

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D N USIKU

Judge

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H C JANUARY

Judge

APPEARANCES:

APPELLANT: J Muchali

Of Jermaine Muchali Attorneys, Windhoek

RESPONDENT: K Esterhuizen

Of the Office of the Prosecutor General, Windhoek