CASE NO.: CA 157/06

SUMMARY: BAIL APPEAL

JOHANNES GASEB versus THE STATE

PARKER, J *et* MANYARARA, AJ

11TH MAY 2007

Criminal procedure	-	Bail – Appeal against the refusal of magistrate to grant bail – Approach of the Court.
Criminal procedure	-	Appeal against the refusal of magistrate to grant bail – No matter what the appeal Court's views are, the real test is whether magistrate who had the discretion to grant bail exercised his or her discretion wrongly.
Criminal procedure	-	Bail – Appeal against the refusal of magistrate to grant bail – Magistrate entitled to consider evidence that the applicant was on bail on a charge of fraud when he was charged with the present rape offence.
Criminal procedure to	-	Bail – Appeal against magistrate's refusal grant bail – interpretation and application of s. 61 of the Criminal Procedure Act, 1977 (Act 51 of 1977), as amended by ss. 3 and 7 of the Criminal Procedure Act, 1991 (Act 5 of 1991) considered and taken into account – Court not satisfied that magistrate's decision was wrong – Appeal accordingly dismissed.

CASE NO.: CA 157/06

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOHANNES GASEB **APPELLANT**

versus

THE STATE **RESPONDENT**

CORAM: PARKER, J. *et* MANYARARA, AJ.

Heard on: 11th May 2007

Delivered on: 11th May 2007

APPEAL JUDGMENT:

PARKER, J:

[1] The appellant appeals against the decision of the learned magistrate of the Usakos Magistrates' Court to refuse to admit him to bail upon his application for bail on 28 September 2006. The appellant appeared before the magistrates' court charged with rape, i.e. in contravention of s. 2 of the Combating of Rape Act 2000 (Act 8 of 2000).

[2] Mr. Kadhila Amoomo represented the appellant and Mr. Adams (a public prosecutor) represented the State during the formal bail application in the magistrates' court. In the appeal before this Court, Mr. Kadhila Amoomo represents the appellant and Mr. Marondedze (a public prosecutor) the State. I have considered Mr. Marondedze's points *in limine* and Mr. Kadhila Amoomo's response thereto. The

points are generally well founded, but in the larger interest of fairness, I think the appeal must be heard on the merits. By a parity of reasoning, the appellant's condonation application respecting the late filing of the Notice of Appeal is also granted. This is not to say that where the conduct of a legal practitioner in noting an appeal is so slovenly and his or her non-compliance with the Rules are so deplorable, this Court will not refuse an application for condonation, even if that means visiting the wrongs of the legal practitioner on the litigant he or she represents. But, as I have said above, in my view, taking all the circumstances of the case into account, I think the application should be granted and the matter heard on the merits.

[3] The appellant's grounds of appeal are based on two main aspects, namely that (1) the learned magistrate erred in law and/or on the facts in certain mentioned respects; (2) the learned magistrate misdirected herself in the application of s. 61 of the Criminal Procedure Act, 1977 (Act 51 of 1977), by refusing the applicant bail mainly on the ground of "the interest of the public or the administration of justice."

[4] The State opposed the application on the following major grounds: (1) the administration of justice will be prejudiced, considering the public interest in the matter; (2) the appellant might interfere with the witnesses; (3) the accused might commit further and/or similar offences while on bail; (4) the seriousness of the offence and the possibility of a long sentence of imprisonment if the appellant was found guilty; and (5) there is a strong *prima facie* case against the appellant.

[5] The tenor of the appellant's counsel's counter argument is that there is no *prima facie* case against the appellant; the appellant will not abscond; and appropriate conditions can be set to counter the

objections raised by the State. The learned magistrate gave reasons in her judgment for refusing the appellant's application.

[6] In hearing an appeal against a lower court's refusal to grant bail, this Court is bound by s. 65 (4) of Act 51 of 1977 in the sense that it must not set aside the decision of the lower court "unless the Court or judge is satisfied that the decision was wrong..." The interpretation and application of s. 65 (4) by Hefer, J in *S v Barber*[1] is insightful and instructive. The learned Judge said:

> 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 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 wrongful.[2]

[7] It is urged on behalf of the appellant that the magistrate misdirected herself in concluding that there was the likelihood that the appellant might commit further and/or similar offences whilst on bail. This conclusion was based on the appellant's testimony in the lower court that he was on bail on a charge of fraud when he was charged with the rape offence. I have no good reason to fault the learned

[1] 1979 (4) SA 218 (D).
[2] At 220E-F.

magistrate for taking this into consideration. From the authority[3] relied on by the appellant's own counsel (the case is also relied on by Mr. Marondedze), in my opinion, this fact has a bearing on the result of the application and therefore it was receivable in evidence and the learned magistrate was entitled to consider it. The learned magistrate does not say in her judgment that the fact was "cogent or persuasive", as Mr. Kadhila Amoomo appears to suggest in his submission.

[8] Counsel for the appellant submits that the learned magistrate misdirected herself when she relied "mainly" on the basis of administration of justice and public interest to refuse the application. With respect, I fail to see the substance and persuasiveness of counsel's submission: the submission is weak and untenable if regard is to be had to s. 61 of Act 51 of 1977 (as amended by ss.3 and 7 of the Criminal Procedure Act, 1991 (Act 5 of 1991)). Section 3 provides:

> If an accused who is in custody in respect of any offence referred to in Part IV of Schedule 2 applies under section 60 to be released on bail in respect of such offence, the court may, notwithstanding that it is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police investigation, refuse the application for bail if in the opinion of the court, after such inquiry as it deems necessary, 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.

And a new Part IV was inserted in the Second Schedule, listing a number of what the Legislature considers to be serious offences.

[9] Doubtless, the enactment of Act 5 of 1991 must be seen as expressing the concern of the Legislature – the representative body of the Namibian people – at the escalation of crime and ensuring that accused persons stand their trial for serious offences. Thus, the aim of the amendment to Act 51 of 1977 is to combat crime and to ensure the proper administration of justice, particularly in respect of serious crimes as adumbrated in the new Part IV of Schedule 2 of Act 51 of 1977.

[3] *S v Fourie* 1973 (1) SA 100 (D).

[10] The upshot of all this is that the courts are given wider discretion to refuse bail if the crime committed is one of those listed in Part IV of the Second Schedule and if the interest of the public or the administration of justice will be served thereby. The Legislature has in the amendment to Act 51 of 1977 clearly announced that the offences in Part IV are serious crimes. In addition, the "courts have expressed themselves repeatedly over many years on the gravity of these crimes and offences."[4] Indeed, it is only an individual who is living in a hole and does not come out of the hole, even for a brief moment, who cannot see that sexual assault of women and child girls is a serious concern to all and sundry, hence the passing of Act 5 of 1991 and Act 8 of 2000 by the Legislature, which stands in a better and commanding position to gauge and articulate the public interest in these matters.

[11] The above-mentioned amendments to Act 51 of 1977 are, in my opinion, meant to serve the interest of the public and the administration of justice, and therefore the Court must make a serious effort to give effect to their provisions.[5]

[12] From the record, I have no good reason to reject the learned magistrate's factual finding that although the complainant was about nine years old, her testimony made a striking impression on the court and that the strength of the State case was evident. And in this case, the appellant is charged with one of the offences mentioned in Part IV of Act 51 of 1977 and the learned magistrate has found that there is a strong case against the appellant.

[13] I do not see how the appellant's counsel's argument that the complainant was a single witness and, therefore, her testimony ought to

[4] *S v Du Plessis and Another* 1992 NR at 82E-85I.

[5] See *S v Timotheus* 1995 NR 109 at 114I-115A.

have been treated with caution can assist the appellant. In terms of our law, the uncorroborated evidence of a single witness is sufficient for a conviction.[6] And on the authorities,[7] I cannot interfere with the learned magistrate's decision to accept the complainant's evidence because it is not apparent on the record that the complainant had an interest or bias adverse to the appellant, or she had made a previous inconsistent statement, or had contradicted herself in the witness box in any material respect, or had been found guilty of an offence involving dishonesty, or that she was liable to prosecution and, therefore, it would be to her advantage to shift blame.

[14] For all the above, in my view, it is not in the interest of the public or the administration of justice that the appellant is admitted to bail: the granting of bail is likely to prejudice the ends of justice.[8] I, therefore, find that the learned magistrate was entitled to refuse bail even if it is unlikely that the appellant, if released on bail, would abscond or interfere with any Prosecution witnesses or with police investigations. Thus, I am not persuaded that the learned magistrate was wrong in refusing bail.

[15] I am, therefore, of the view that this appeal cannot succeed. In the result, the appeal is dismissed.

[6] S. 208 of Act 51 of 1977

[7] See *Rev v Mokoena* 1932 OPD 79 at 80; *R v Abdoorham* 1954 (3) SA 163 at 165; *S v Shaanika* 1999 NR 247 (HC); *Lasarus Tutu Nowaseb v The State* HC Case No.: CA 51/05 at pp 20-22. (Unreported)

[8] *S v Acheson* 1991 NR 1 at 19E.

PARKER, J.

I agree

MANYARARA, AJ.

THE APPELLANT:	Mr. S. P. Kadhila Amoomo
Instructed by:	Kinghorn Associates
ON BEHALF OF THE STATE:	Adv. E. F. Marondedze
Instructed by:	The Office of the Prosecutor-General