CASE NO.: CA 18/2012

IN THE HIGH COURT OF NAMIBIA:
NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

In the matter between:

MATIAS NAFUKA **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: LIEBENBERG, J *et* TOMMASI, J.

Heard on: 26 June 2012
Delivered on: 26 June 2012
Reasons released: 09 July 2012

APPEAL JUDGMENT

LIEBENBERG, J.: [1] This is an appeal against the refusal of bail by the Magistrate's Court, Oshakati. After oral submissions were heard on the 26th of June 2012, we dismissed the appeal, with reasons to follow. These are the reasons.

[2] When the bail application was brought before the court *a quo* the State opposed it on the following grounds: (i) Appellant might commit a similar offence (rape); (ii) Appellant might interfere with the police investigation and State witnesses; and (iii) Public interest. Appellant was legally represented during these proceedings.

[3] It appears from the record that the indictment had not been drawn by the time the bail application was heard, as same does not form part of the appeal record. However, it is common cause that the accused at the time of the bail hearing was in custody on a charge of rape, read with the provisions of the Combating of Domestic Violence Act.[1] It is alleged that appellant, on diverse occasions between 2006 and 2009 raped the ten year old daughter (the victim) of his partner, Invula Erica (Invula), with whom he was cohabiting since 2004.

[4] Appellant is a police officer with sixteen years' service, attached to the Explosives Unit, and is stationed at Outapi. He gave evidence in support of the bail application and said he has seven children of which three are staying with him in an NHE[2] house, towards which monthly payments of N$2 900 are

[1] Act No 4 of 2003
[2] National Housing Enterprise

being made. Not only his children, but also his elderly mother and other family members are dependent on him for financial support. Appellant contended that the motive behind the charge of rape laid against him derives from an incident during this year (2012) when he went to Windhoek and was then called on his phone by his partner, accusing him of impregnating another girlfriend of his. According to him she would have said that *"she will do something stupid to [him] and [his] girlfriend"* and upon his return he learned that a case of rape was opened against him. He testified that if admitted to bail, he would not interfere with the investigation and will stand his trial. Appellant disputed allegations put to him in cross-examination that he threatened and assaulted Invula when she wanted to report the matter to the police in 2009. He further denied having threatened to kill her and then himself if she were to make a report to the police.

[5] It is common cause that when the alleged crimes were committed the victim was staying with her mother in the appellant's house. Also, that already in 2009, the victim reported to her mother that she had been sexually abused by the appellant on diverse occasions, which she (Invula) then took up with the appellant. It is not in dispute that the victim was eventually taken to the hospital for medical examination, though no medical evidence was adduced as to the outcome of the examination; besides the testimony of the investigating officer about the victim having been treated at some stage for a sexually transmitted disease. According to the appellant the medical report is still with the doctor who conducted the examination.

[6] Ms Invula testified that she and the appellant had been cohabiting since 2004 and that one child was born from this relationship (not the victim). The victim was born in 1996 and is now sixteen years of age. She said that one day in 2009 the victim came from school crying and upon her insistence, she told her (Imvula) that the appellant had been raping her since 2006; also, that he had threatened her not to tell her mother. When she confronted the appellant about these allegations, he denied it. It is not clear how long thereafter did they go to the hospital, but it would appear from Invula's evidence that when the nurse on duty heard that the alleged rape was not committed the same day, she showed no interest as they were not assisted, and returned home.

[7] Back home when they discussed the matter, the appellant became angry and threatened to kill Invula and her child if she were to report the matter to the police, or the Women and Child Protection Unit. She said the appellant has been threatening her ever since. She testified about an incident in 2009[3] when the appellant took her from the house into the bush where she was "badly" (severely) assaulted. He thereafter pushed her into the car and drove to the police station, saying that she could go and report the matter. However, before she could enter the police station, he grabbed her and threw her into the back of his vehicle and drove home where he continued assaulting her through the night. Further threats of assault were made if she were to go to the police. She thereafter left the house and went to stay with family at Oshikuku until the appellant at some stage arrived. When he threatened to

[3] The hand written record reads 2008, which is erroneous because by then the rape incident had not yet been reported to Ms Invula.

break down the door of the house, her sister advised her to rather return with the appellant and to discuss their problems. When appellant promised not to continue his assaults, she accompanied him home. According to her the appellant unfortunately did not keep his promise, for she was again assaulted in 2012, whereafter she fled the house whilst naked.

[8] Ms Invula testified that she never reported her daughter's complaint about her being raped by the appellant to the police as she was afraid that she would be killed; evinced by the earlier assaults perpetrated on her by the appellant. She said she had been staying with him for nine years and knows what he is capable of doing; describing him as a violent person. She was strongly opposed to appellant being granted bail, regardless of conditions attached thereto. The victim at present is under police protection. Ms Invula was further of the view that, if appellant were admitted to bail, she would then return to her previous home and require full time protection from the police against the appellant.

[9] She said in cross-examination that she laid a charge of assault with intent to do grievous bodily harm against the appellant, though it is not clear when this was. She disputed having instigated her daughter (the victim) to open a criminal case against the appellant due to his involvement with another woman. In fact, she denied having had prior knowledge about the appellant having impregnated their neighbour.

[10] It is common cause that what led to criminal charges being laid against the appellant came as a result of a report made by the victim to a teacher at her school during this year.

[11] Ms Angala Malakia, a teacher at John Alfons Pandeni Combined School, testified that she knows the victim as a learner in that school since 2010. In March 2012 the victim told her that she was raped by her step-father during the period 2006 to 2009, and that the matter was never reported to the police. It was further reported that her mother had taken her for HIV testing and that she had since developed an infection in her genitalia; that her step-father took her to a doctor at Outapi from where she was referred to Oshakati hospital; that they were told to return after some weeks for the results but that appellant refused to disclose same to the family. Ms Malakia said that according to the victim the reason why she came to make the report was because the victim was afraid that she might also fall pregnant, as her step-father (appellant) had impregnated a neighbour of theirs. Ms Malakia thereupon wrote a report to the Special Education Division which prompted the police investigation. She further said that since 2011 she observed unusual behaviour on the part of the victim in that she became emotional and had isolated herself and when questioned about it, she said that there were problems at home, without explaining what exactly she was referring to.

[12] The investigating officer, Martin Simpson (rank unknown), testified that he and two of his colleagues proceeded to the appellant's house on the morning of 31 March 2012 in order to arrest him on charges of rape. After

informing appellant accordingly, officer Simpson asked him to subject himself to a body search, which he refused. Appellant stood up and then tried to force his way into his bedroom, but was overpowered in time, and had the firearm he was carrying, taken away from him. In his testimony the appellant did not dispute this incident happening, but said he merely wanted to fetch something from his room, without mentioning what that was. The investigating officer was further of the view that he had a strong case made out against the appellant. He interviewed a certain Dr Matayaya who confirmed that the victim was treated during the year 2010 for a sexually transmitted disease (STD).

[13] The magistrate, in a comprehensive judgment covering over eight pages, summarised and considered the evidence presented, and after applying the applicable law, came to the conclusion that it would not be in the interest of society or justice to admit the appellant to bail.

[14] In the appellant's notice of appeal there are mainly seven grounds on which the appeal is based of which some grounds are subdivided in a host of additional grounds. I do not intend dealing with these in any detail as it forms the basis of the actual grounds set out in the appeal notice. It must be said that a fair number of the perceived grounds listed in the notice are not borne out by the evidence adduced, while others are not relevant in the final analysis of bail. In summary, those grounds deserving further consideration are the following:

- The court *a quo* erred in its finding on the facts that the alleged sexual abuse occurred between 2006 and 2012 (instead of 2009);
- That there was insufficient evidence on which the court could find that the appellant has threatened to cause physical harm to the victim's mother;
- Facts which support the appellant's evidence were either rejected or ignored by the court i.e. since 2009 no report was made to the police while the victim and her mother continued living together with the appellant; that appellant impregnated another lady, which fact is used by the victim's mother to punish the appellant, in that it forms the basis of the report made by the victim to her teacher.
- Undue emphasis was placed on the "merits of the case" at the expense of the appellant's personal circumstances;
- The court's failure to consider imposing bail conditions which, in the circumstances, would have been proper;
- Undue weight accorded to the appellant being a suicide risk;
- The court misdirecting itself by giving undue weight to evidence that purports to show that the appellant has a propensity to commit violent crimes against the victim's mother *"when the Appellant has had no opportunity to reply thereto through cross-examination; or the court's mero (sic) enquiry"*; and lastly,
- The refusal of bail constitutes 'pre-emptory punishment'.

[14] Ms *Kishi,* who appeared before us on behalf of the appellant, and Mr *Wamambo,* for the respondent, filed comprehensive heads of argument and we appreciate their industry in this regard.

[15] This Court, sitting as a Court of appeal, is bound by the provisions of s 65 (4) of the Criminal Procedure Act[4], not to interfere and set aside the decision of the magistrate in the court *a quo "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."*

[16] In *S v Timotheus*[5] the Court cited with approval the *dictum* in *S v Barber*[6] where Hefer, J said the following:

> "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 wrongly."

[4] Act 51 of 1977
[5] 1995 NR 109 (HC)
[6] 1979 (4) SA 218 (D & CLD)

[17] The Court, in the same vein, said in *S v Gaseb*[7] that the Court of appeal should not set aside a refusal of bail by the lower court *unless satisfied that the case was wrongly decided*; and though the same was said in *S v Du Plessis and Another*[8] it was further held that the Court is not allowed to take new factors into account. In this respect I refer to Ms *Kishi's* submission that the appellant will lose his employment if he is refused bail.

[18] The court *a quo* in its judgment correctly appreciated the principle that the court, when considering a bail application, has to strike a balance between the interests of society and the liberty of the accused person who, in terms of the constitution, is innocent until proven guilty.[9] The court was further alive to the fact that an accused person's rights in terms of the constitution are not absolute and that such person may be deprived of his/her rights through procedures established by law. Though entitled to apply for bail following an arrest, the accused has no *right* to be admitted to bail. Also that the accused bears the onus of proof in bail applications and must convince the court on a balance of probabilities that he/she should be admitted to bail. I am unable to fault the learned magistrate in his understanding and appreciation of the law relevant to bail; neither in his application of the law to the facts and circumstances at hand.

[19] In a case as the present where bail was refused for reasons of it not being in the interest of justice to grant the appellant bail, regard must be had

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[7] 2007 (1) NR 310 (HC)
[8] 1992 NR 74 (HC)
[9] *S v Acheson*, 1991 NR 1 (HC)

to the specific provisions of s 61 of Act 51 of 1977 (as amended)[10] which substituted the previous section and now reads:

> "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 trail."
>
> (Emphasis provide)

[20] The court *a quo* had regard to the victim and her mother being in a domestic relationship with the accused, and on whom they were dependent. This is an important factor, particularly where the accused would be entitled to return to his house if bail were to be granted, thereby coming in direct contact with State witnesses. More so, where Ms Invula testified that, in view of previous threats and assaults perpetrated by the accused, for reasons connected to the laying of charges against him, she at this stage considers her life to be in danger; especially now that the matter has been reported. She said from previous experience she knew what the accused was capable of doing and that police protection is sought if the accused were to be released.

[10] S 3 of the Criminal Procedure Amendment Act, No 5 of 1991.

[21] A factor the court was entitled to take into account, and in my view was correctly given sufficient weight, is Ms Invula's testimony about the assaults committed by the accused over a protracted period of time; all of which aimed at discouraging her to lay charges of rape with the police, ever since the victim made the first report to her in 2009. There can be no doubt that the accused over this period succeeded in his endeavours and had it not been that the victim, three years later, decided to make a second report to her teacher, then nothing would have come from the first report made to Ms Invula. Appellant's complaint about him not having been afforded the opportunity to 'reply' thereto has no merit. He was throughout the bail proceedings in the magistrate's court legally represented and the witness was indeed cross-examined on the alleged assaults – albeit half-heartedly. The reason for this may lie in the witness' testimony that she laid a charge of assault with intent to do grievous bodily harm against the accused; the outcome of which unfortunately was not explored. It can be gleaned from the evidence of Ms Invula that the only reason why she never came to report the alleged rape of the victim to the police, is because of the threats and assaults perpetrated on her.

[22] The witness Invula was not shown during cross-examination to be untruthful and the seriousness of the allegations made during her testimony could not simply be ignored. On the contrary, these are strong pointers showing not only that there are signs of the appellant being a violent person, but also that he was obstructing the course of justice. This in my view supports the contention that the appellant could possibly again interfere, not

so much with the police investigation, but with the State witnesses in order to jeopardise the trial.

[23] The fact that the accused is a police officer was considered by the court a factor that could increase the possibility of interference by the appellant, or to eliminate himself by committing suicide. This conclusion is based on evidence about the appellant having refused to be searched by the arresting officer, and his intention to go into the bedroom while armed with his service pistol – evidence not disputed by the appellant and his conduct in this regard neither explained during his testimony. In the circumstances it cannot be said that the magistrate's conclusion is unmeritorious.

[24] In view of the foregoing, I find appellant's contention that, failure to report the matter since 2009, and the victim and her mother's continued lodging with the appellant supporting his version, surprising. In the light of the evidence given by Ms Invula, her failure to report her daughter's complaint to the police and their continued staying on in his house, in my view, would rather seem to support her evidence about the assaults and threats uttered against her. It was not disputed by the appellant that Ms Invula questioned him in 2009 on the report made to her by the victim about him having had sexual intercourse with her child. This led to the victim being medically examined and which the appellant admitted during his testimony. Thus, it would be misleading to contend that *nothing* was done after the victim complained to her mother already in 2009 – it was indeed not reported to the

police, but this, according to the evidence, was because of the appellant's threats and continued assaults perpetrated on the witness Invula.

[25] The magistrate in his judgment indeed erred on the facts when he said that the alleged rapes took place between 2006 and 2012. According to the evidence presented it was between 2006 and 2009 and not up until this year. This notwithstanding, I am not persuaded that the misdirection could have had any significant impact on the conclusion reached by the magistrate when refusing to admit the appellant to bail. The court was entitled to take into account that this was not an isolated incident, but according to the victim's report, the alleged rapes were committed over a period of time during which the appellant successfully quashed the reporting thereof. Thus, there is no merit in this ground of appeal.

[26] I now turn to consider the appellant's contention about the actual reason why the complaint was laid against him, namely, for him having impregnated another woman, i.e. his neighbour.

[27] It indeed appears from the evidence of Ms Malakia (the teacher) that the reason why the victim decided to make the report to her, was because of the appellant having impregnated a neighbour and her fear of falling pregnant as well. In view of evidence that the alleged incidents of rape purportedly went up to 2009 only, it certainly begs the question how the victim could still have feared falling pregnant three years later. Whereas the victim did not give evidence during bail proceedings, the extent of her evidence has not been

disclosed – neither whether the alleged rapes took place beyond 2009 as may be inferred from the report made to Ms Malakia. Although the reason why the victim decided to make a report to her teacher may, on the evidence presented, appear peculiar, it does not negate evidence to the effect that a similar complaint was already made in 2009, unconnected to any subsequent allegations about appellant having impregnating another lady.

[28] In the present circumstances I do not believe that during bail proceedings the reason *why* the complaint was made should be given more weight than the actual making of the second complaint by the victim. Appellant's legal representative in the court *a quo,* through the investigating officer, placed before the court his opinion, that on the statements he was of the view that the appellant was guilty of the offence. Although the court remains the final arbiter on the question of whether bail is to be granted or not, the opinion of the investigating officer on questions as to whether the person seeking bail will stand his trial, or is likely to interfere with the investigation, should carry some weight.[11] It seems to me that by saying that the appellant, according to the witness statements and through the investigation is considered to be guilty of the offence, means that the State has a strong case against the appellant – a conclusion reached by the investigating officer and a factor the court had to give due consideration to when deciding whether or not to admit appellant to bail.

[29] The court in the exercise of its discretion has to consider all the relevant facts and circumstances placed before it before coming to the conclusion that

[11] See *S v Du Plessis* (*supra*) at 113E-G

the release of the accused will not jeopardise the interests of justice. It is clear from the judgment that all circumstances were duly considered by the court *a quo* and despite having found that the appellant has satisfied 'all requirements' for bail, it was not persuaded that the appellant, in a case as the present where the victim is a minor child, and the setting of the case in an atmosphere of domestic violence, should be admitted to bail. Specific regard was had to the interest the public had in cases where the rights of women and children were disregarded and the need for the courts to protect same to the maximum. The court was clearly of the view that this was an instance where the provisions of s 61 had to be invoked, and that an injustice would be done to admit the appellant to bail; also, that no meaningful amount of bail or conditions attached thereto would deter the appellant from giving effect to his earlier threats. Regard being had to the circumstances of this case, I find myself unable to fault the magistrate's reasoning and the conclusion he came to.

[30] For the foregoing reasons, the appeal was dismissed.

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LIEBENBERG, J

I concur.

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TOMMASI, J

ON BEHALF OF THE APPELLANT **Ms F Kishi**

Instructed by: **Dr Weder, Kauta & Hoveka**

ON BEHALF OF THE RESPONDENT **Mr N M Wamambo**

Instructed by: **Office of the Prosecutor-General**