CASE NO.: CA 12/2012

IN THE HIGH COURT OF NAMIBIA

In the matter between

FADI AYOUB

APPELLANT

versus

THE STATE

RESPONDENT

CORAM: **SIBOLEKA, J**

Heard on: **2012 March 27**

Delivered on: **2012 June 06**

<u>APPEAL JUDGMENT: (BAIL)</u>

<u>SIBOLEKA J:</u>

[1] On 30 April 2012, I dismissed an application for appeal against the refusal by the Magistrate's Court Windhoek to release the applicant on bail.

I indicated then that my reasons will be furnished later, they are now available and are as follows:

[2] The appellant, a 44 year old Lebanese Muslim National, is allegedly a suspect on a rape charge committed in France in 1992. After his appearance in Court there, he was admitted to bail, but absconded and did not stand his trial, resulting in an international warrant of arrest being issued against him.

[3] After Magistrate Nandango, Windhoek, has endorsed that warrant of arrest for execution in Namibia, the appellant was placed in custody on 01 March 2012. On 02 March 2012 he unsuccessfully launched an application for his release on bail pending the outcome of an extradition enquiry as contemplated in section 12 of the Extradition Act, Act No. 11 of 1996.

[4] The purpose of the bail application in the Court *a quo* was to determine whether the applicant should be allowed to stay outside or be placed in custody for the duration of the extradition proceedings, and the outcome whether he should be sent back to France or not.

[5] In this Court the appellant was represented by Mr. Geier on the instructions of Shikongo Law Chambers, while Ms. Katjipuka appeared for the respondent.

[6] The grounds of appeal are as follows:

> "(a) That the learned Magistrate erred and/or misdirected herself in concluding:
>
> "Is this person going to stand his trial? Is this person going to wait for enquiry to be conducted? I doubt."
>
> In the absence of any evidence of which any such 'doubt' could be based;
>
> (b) That the learned Magistrate erred and misdirected itself in finding that it would not be in the interests of justice to admit the Appellant to bail."

[7] The appellant testified under oath in the Court *a quo* in support of his application and stated the following:

[7.1] He came to Namibia in 1999, married a Namibian lady in community of property on 05 December 2003 and has two children. He resides in this country since then. In 2003 he left Namibia and went to reside in Bloemfontein, South Africa for five years in order for his wife to finish a degree specializing in anesthetic there. He permanently returned to Namibia in 2007 and is residing with his family at 66 Eros Road, Eros Park. His

wife's practice is in Sinclair Street, Windhoek. He has two Lebanese passports, one valid, the other expired. He applied for South African citizenship and he has got it. They only go out during holidays and come back to their home. He has a valid re-entry visa for Namibia and a pending application for domicile. The one year renewable residence permit visa is endorsed in the Lebanese passport. His entry visa expires on 18 August 2012. He was arrested on a charge of rape in 1992, released on bail, absconded in 1993 due to youthfulness and according to him he acted stupid. He knew about the Interpol Warrant of Arrest against him two and a half years ago. Despite this knowledge, he testified, he has left and returned to Namibia several times. He rents out a bulldozer and sells imported vehicles on a small scale. He has a feeding lodge in Rehoboth and contributes half to a monthly bond installments on the properties in Eros Park. He owns movable assets such as motor vehicles and cattle. He has deep emotional and family roots within Namibia.

[7.2] He was taken in custody after the Interpol Warrant of Arrest was endorsed here in Namibia.

[8] On the alleged rape charge in France the appellant testified that he moved to Rouen, some kilometers outside Paris in 1993. He was in partnership with Lebanese people, one of whom lived in a Restaurant

business there. There he met a lady by the name of Jamilla Ultruiz, a mix of Algerian and French nationality. They were in a relationship, and this complainant at times used some drugs such as cocaine, and as a result thereof they argued on many occasions.

[8.1] The appellant is of Muslim religion, he does not drink or use alcohol. Talking about suicide and other related stuff caused regular break ups in their relationship, but he nonetheless felt responsible and carried on with her. The complainant one day came home crying, it was a very terrible situation. He opened the door of the house for her and they had something to eat. Thereafter they had sex together in a very normal way, such that he did not foresee a charge of rape coming his way, hence his defence of consensual sexual intercourse.

[8.2] The complainant did not tell him how he raped her. She was always running after money, and had sucked a lot from him. When he woke up in the morning the following day a police officer was around his bed and he was taken to the Police Station. He was held for 48 hours, and charged for rape. He was put in goal, and was later released on bail in January 1993. He ran away from France, according to him he acted stupid because of his then youthful age, 25.

[8.3] One day the appellant appeared before a Judge for an enquiry in order for him to give a statement. As he stood outside in the Court yard, the Judge called a police officer and told him ‘bring that Muslim guy who raped the lady’. At 25 years then, when he heard this he

decided to run away. That was how he came to Namibia to stay, and got married. He was scared about issues of racism.

[8.4] That same year he went to Angola four times trying to do some business but he didn't have enough money. His brother was doing business at Oshikango for a couple of years, he and his partner invited him to come to Windhoek. At some stage he also went out of Namibia to Morocco in 2002 to do business with a Lebanese guy there. He also visited Lebanon and then Syria for a religious ceremony. It was in that same year that he met his wife on the aero plane, and started dating her.

[8.5] At the moment he farms with ± 400 cattle 50 kilometers outside Windhoek. Sixty percent of this property is owned by his wife and forty percent by her grandmother. He owns a bulldozer which he rents out on an hourly basis. There is game on the farm, with sheep and goat farming also taking place. He imports vehicle for sell on a very small scale. He also farms with parrot birds, they share premiums and it is registered in his wife's name. They have a 3400 square meter erf in Chamonix Street, Ausblick which is registered in a CC. The wife owns ninety percent and he owns ten percent. The close corporation owns the property in Auasblick. The appellant and his wife are the owners of the close corporation which in turn owns the property.

[8.6] The appellant intends to become the full owner of that erf in Ausblick. He has a feeding lodge in Rehoboth which he established nine months ago. This property belongs to Trans Namib, and he is contracted for five years to buy cattle, feed them and sell them to Meatco. He enjoys the first option to renew and to buy it. The property is valued at N$212,000.00 he was still busy with the electrical fence. He has 100 tollies valued at N$450,000.00 on the property ready to be fed and to be sold to Meatco for slaughter. On his name is a fully paid up Land Cruiser 2010 valued at N$350,000.00 and two vehicles, used to transport workers, a Nissan and a Toyota Corolla.

[9] The appellant's counsel referred to various cases, among these were:

Koch v The State CA 111/2002 delivered on 12 December 2002 where the Court ruled that one of the circumstances prompting the Appeal Court to conclude that the Magistrate exercised her discretion wrongly is when her conclusion is vitiated by a misdirection.

[9.1] In the matter of *S v Essack* 1965(2) SA 161 at 162 C, the Court stated that in bail applications a balance must as far as that can be done be made between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice.

[9.2] In *S v Bennet* 1976(3) SA 652 CPD at 655 G: The Court stated that the proper approach should be that, unless the State can say "that

there is a real risk that he will," not "merely may" interfere, there does not appear to be a reasonable possibility of interference with the investigation.

[9.3] According to the appellant's counsel the above authorities make it very clear that in refusing bail to the appellant the Magistrate has misdirected herself as she should not have done so, but should have granted it. In my view, it is not correct to argue that the above cases displace the Magistrate's reasons for refusing bail at all.

[10] In the Court *a quo*, and indeed before this Court, the Prosecutor opposed the release of the applicant on bail. The fear is that he will abscond in the same way he did in France when bail was granted to him. With that opposition placed before the Court *a quo* the appellant felt there was a need for him to testify under oath to persuade the Court to find and rule in his favour and grant him bail. In my view it is not correct to suggest that bail should only be refused where there is evidence countering that of the appellant. Every case must be treated on its own merits. On this matter the evidence of the appellant, without any countering testimony was sufficient enough, such that from it the Magistrate was able to see a reasonable possibility that if he is released on bail he will not stand his trial and neither will he wait for the conclusion of his extradition proceedings. Magistrate Nandango was therefore entitled and has indeed correctly based her decision on

the evidence of the appellant himself. I hold the view that there is judicially nothing wrong in such an exercise.

[11] The appellant argues that if released on bail he will not abscond because his personal circumstances have now changed completely as follows:

- He is now 44 years of age, married to a Namibian Anesthetic doctor with two children;
- He has a farm outside Windhoek and has property and business interests in the country;
- He testified he had consensual sexual intercourse with the complainant in France.

[11.1] According to him the words “Bring that Muslim guy who raped the lady” frightened him, he took them serious and decided to abscond and leave France. These remarks, so he testified, coupled with the fact that he was then only 25 years of age, made him act stupid by not attending the this trial to the end. In my view the above factors are by and large outweighed by the following considerations emanating from the appellant’s own evidence:

[11.2] Looking carefully at the countries the appellant has visited, Angola, Syria, Lebanon and South Africa, it is my considered view that the only reasonable impression that comes to one’s mind is that he has

friends and acquaintances there, where if he so elects can easily go and reside to evade being traced.

[11.3] The fact that the appellant’s defence to the alleged charge of rape is consensual sexual intercourse but nonetheless still elected not to attend trial on his own accord and state his innocence accordingly.

[11.4] The handing in of all the travelling documents in his possession would not be of much assistance because it is common knowledge that a person can enter and leave this country illegally, without a passport.

[11.5] The possibility of the extradition proceedings not unfolding in his favour, the perceived racial remarks by the examining Judge in France, the eventual pertinent consequence of being tried in what he views will be a hostile Court; (a reason which, coupled with his age of 25, made him act stupid and absconded), his election to rather get arrested here in Namibia than going back to France at his own accord and convenience all bear testimony to the possibility of a likelihood that the appellant may abscond if he is released on bail.

[11.6] He has learnt about the Interpol warrant of arrest against him, two and half years back, so he testified, and had already been arrested and released at some stage, but still he did not make any efforts to go back on his own accord and stand his trial.

[12] From the above it follows that his contention that if released on bail with or without strict bail conditions he will not flee as he did 19 years ago cannot be relied on. The purpose of the extradition proceedings is to determine whether he should be deported back to France for the trial of the matter or not.

[13] In *S v Acheson* 1991(2) SA 805 (Nm) at 822 A-E Mahomed AJ as he then was had the following to say regarding an accused's release on bail:

> "The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice."
>
> (My own underlining)

[13.1] From the above it is clear that it is not a requirement that a 'real risk' should exist or should be established before bail can be refused, not at all.

[13.2] The Judge went further and stated that:

> "The consideration which the Court takes into account in deciding this issue include the following:
>
> 1. Is it more likely that the accused will stand his trial or is it more likely that he will abscond and forfeit his bail? The determination of that issue involves a consideration of other sub issues such as
>   (a) how deep are his emotional, occupational and family roots within the country where he is to stand trial
>   (b) what are his assets in that country

(c) what are the means that he has to flee from the country

(d) how much can he afford the forfeiture of the bail money

(e) what travel documents he has to enable him to leave the country

(f) what arrangements exist or may later exist to extradite him if he flees to another country

(g) how inherently serious is the offence in respect of which he is charged

(h) how strong is the case against him and how much inducement there would therefore be for him to avoid standing trial

(i) how severe is the punishment likely to be if he is found guilty

(j) how stringent are the conditions of his bail and how difficult would it be for him to evade effective policing of his movements. (My own underlining)

[14] It is also interesting to note that in the Acheson case although the Court ordered stringent bail conditions to be put in place, the accused absconded and was never tried for his crime of murder to this day.

[15] Carefully looking at the then and present circumstances of the appellant, the evidence placed before the Court *a quo*, the submissions by both counsel in this Court and the observations that I have alluded to above, I have not been persuaded to find that Magistrate Nandango has misdirected herself or exercised her discretion wrongly when she refused to grant bail to the appellant.

[16] It is my considered view that the Magistrate's doubts that the appellant was a person that was going to stand his trial or wait for the conclusion of his extradition enquiry were correctly based on the evidence of the appellant himself. The wording of her decision to refuse bail is crystal clear and no further explanation or details were necessary.

[17] The interests of justice were already frustrated the time the appellant failed to stand his trial in France and in my view bail was correctly refused in the Court *a quo* to prevent a repetition of that same frustration.

[18] I am therefore not convinced that the change in the appellant's personal circumstances has affected his original decision not to stand his rape trial in France. Therefore the Windhoek Magistrate's refusal to release him on bail was legitimate, correct and I have no reason to fault it.

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SIBOLEKA, J

COUNSEL ON BEHALF OF THE APPLICANT: MR. GEIER

INSTRUCTED BY: SHIKONGO LAW CHAMBERS

COUNSEL ON BEHALF OF THE RESPONDENT: MS. KATJIPUKA

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