REPUBLIC OF NAMIBIA **REPORTABLE?**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 25/2012

In the matter between:

HENDRIK PIENAAR **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Pienaar v The State* (CA 25/2012) [2012] NAHCMD 113 (07 August 2012)

Coram: GEIER J

Heard: **07 August 2012**
Delivered: **07 August 2012**

Flynote: Criminal Procedure – Bail Appeal – Court a quo having found that Appellant not a suitable candidate for bail because of previous convictions – On appeal found that the consideration of whether or not there was a likelihood that an accused would commit further crimes if admitted to bail was a relevant consideration for the granting or refusing of bail given the provisions of Section 61 of the Criminal Procedure Act 51 of 1977 and that bail could be refused on that basis alone - decision of the court a quo upheld

Summary : Appellant had appealed the refusal of the court a quo to admit him to bail – bail having been refused on the ground that ‘in the light of the appellant’s previous convictions and because he would not suffer financially even if detained it meant that the appellant was not a good candidate for bail and that appellant’s application for bail thus had to be dismissed – After an analysis of the appellants previous convictions court finding that this history disclosed a propensity on the part of the appellant to come into conflict with the law on a regular basis and that there was real likelihood that appellant, if released on bail, may commit further crimes - appellant’s criminal record also disclosing two previous convictions for assault - such previous convictions also underscoring the evidence of the investigating officer that there was fear from the witnesses who had informed him that they know the appellant very well, that he is an aggressive type of person and that he may just injure them – accordingly found that the appellant might very well harbour resentment towards such witnesses - accordingly fear of being assaulted on the part of such witnesses becoming so much more real given the appellant’s previous conviction for assault – the likelihood that the appellant might commit further crimes if released on bail was thus reinforced by the evidence in this regard -

Held : the consideration of whether or not there was a likelihood that an accused would commit further crimes if admitted to bail was a relevant consideration for the granting or refusing of bail given the provisions of Section 61 of the Criminal Procedure Act 51 of 1977 and that bail could be refused on that basis alone –

Held : appellant’s history of previous convictions disclosed a propensity on the part of the appellant to come into conflict with the law on a regular basis.

Held : that such history also pointed to the real likelihood that appellant, if released on bail, may commit further crimes.

Held : that it couls not be said that the decision of the court a quo to refuse bail on this ground was wrong. Appeal accordingly dismissed.

ORDER

The appeal is hereby dismissed.

JUDGMENT

GEIER J:

[1] The appellant has been charged with murder, supplying a firearm to a child below 18 and with an alternative count of contravening section 38 (1) of the Arms and Ammunition Act 7 of 1996 and thirdly with defeating or obstructing the course of justice.

[2] He was charged together with two other accused.

[3] It should be mentioned right at the outset that the parties were not *ad idem* as to whether the State's case on a murder charge was a strong one and I will accordingly assume for purposes of this judgment that it is not.

[4] Subsequent to their arrest all three accused persons applied for bail in the Outjo Magistrate Court held at Kamanjab. Only the appellant's quest for bail was not successful hence, this appeal.

[5] The appellant is not in conflict with the law for the first time, he has a number of previous convictions to wit :

(a) A conviction under case 39/2006 for contravening Section 2 of Act 12 of 1990, as amended, in respect of the possession of stolen stock (found in the possession of meat). In this regard he was sentenced to a fine of one thousand five hundred Namibia Dollars (N$1500-00) or nine months imprisonment. He was sentenced in this regard on 12 May 2008.

(b) Under Kamanjab case 65/2009 for the possession of a fire arm without a licence - in respect of which he was sentenced to six thousand Namibia Dollars (N$6 000-00) or 24 months imprisonment of which three thousand Namibia Dollars (N$3 000-00) or 12 months imprisonment were suspended for a period of five years on condition that payment of a portion of the fine was deferred i.e. two thousand Namibia Dollars (N$2 000-00) to 7 June 2010. The accused was also declared to be unfit to possess a fire arm for two years and that the firearm in question was to be forfeited to the State for disposal. He was sentenced in this regard on 18 May 2010.

(c) Under Kamanjab case 64/2010 he was found guilty of assault and was sentenced to two hundred Namibia Dollars (N$200-00) or 60 days imprisonment on 19 May 2010.

(d) Under Kamanjab CR 10/12/2008 for trespassing, assault GBH by threat and criminen injuria in respect of which an admission of guilt fine of two hundred Namibia Dollars (N$200-00) was paid on the 13th of February 2009.

[6] It thus comes as no surprise that the Learned Magistrate in the court a quo – (who also found that the appellant would not abscond, if he be granted bail, and that he would not interfere in the investigations and with the state witnesses) … ultimately concluded,

> 'What this Court is tasked to do at this stage of the proceedings is whether to decide whether the Accused is a good candidate for bail not, having said the above Accused 1 previous convictions and he will not suffer financially even if he is detained in custody, this means that the Accused 1 is not a good candidate for bail and thus Accused 1's Application for bail must be dismissed. This means that Accused 1 will not be granted bail, but Accused 2 will be granted bail …'.

[7] On my understanding of the magistrates reasoning, bail was thus refused on account of all the appellant's previous convictions and because he would not suffer financially.

[8] This understanding is reinforced by one of the grounds on which the State objected to bail, namely, that by virtue of the appellant's previous convictions there was a likelihood that Appellant would commit similar offences if released on bail and that he was thus not a suitable candidate for bail.

[9] In evidence the appellant, save for explaining the circumstances leading to his arrest and the sketching of his personal circumstances, only led evidence in regard to the other grounds on which the State had objected to bail. He testified as follows :

> ' … If I am released on bail I will not run away. I also never had a warrant of arrest before. If I am released on bail I will not Interfere with investigations. I was informed that Investigations are already finalised and I will not interfere with the investigations.'

Wessels : … look at these previous convictions see whether you confirm those convictions?.

Accused 1: 'I do confirm all the previous convictions'.

Wessels: 'I will hand up this document',

Court: Received and marked the document as exhibit "A".

….

Accused: 'If I am granted bail I will attend court every time there is court'.

Wessels 'evidence-in-chief'.

[10] The appellant thus failed to address this ground of objection altogether. It appears further from the record that the prosecutor also did not take up this ground during cross- examination.

[11] There is thus no direct evidence on the record, save for the appellant's admission of his previous convictions, against which the merits or demerits of the State's third ground of objection - and the court a quo's related finding - that the appellant was not a good candidate for bail - can be determined. Put differently, the appellant's propensity to commit further crimes if released on bail will in this instance thus have to be determined only with reference to the appellant's previous convictions alone and with it, the correctness of the resultant finding made by the Learned Magistrate.

[12] The appellant track record was on closer analyses the following :

a) his first recorded brush with the law was in 2006 relating to possession of stolen stock/meat, in respect of which he was convicted and sentenced on 12 May 2008;

b) Later during 2008 he seems to again have committed an offence, the offence of trespassing, assault by threat and criminal injuria in respect of which he paid an admission of guilt fine on 13 February 2009;

c) During 2009 he was prosecuted for possession of fire arm without a licence in respect of which he was convicted and sentenced on 18 May 2010;

d) Before being sentenced in this regard he was again charged with assault GBH, in respect of which he was then convicted one day later, namely on the 19th of May 2010.

[13] Relevant in this regard is also that appellant now - once again - amongst other charges - faced a charge relating to a contravention of the Arms and Ammunitions Act, while the period of suspension, operative on account of the appellant's conviction of 18 May 2010, had not yet expired.

[14] Mr Visser who appeared on behalf of the appellant submitted that this latest charge, involving the contravention of the Arms and Ammunition Act, has very little chance of success as there was evidence that the appellant had not been aware of the firearm that was involved in the matter.

[15] Mr Khumalo who appeared on behalf of the State on the other hand, submitted with reference to the investigating officer's further evidence that the appellant was the one that had told accused number 3 to store the firearm in the house before the incident.

[16] Mr Visser countered this submission by pointing out that such evidence was based on hearsay and, while conceding that hearsay was admissible in bail proceedings, he never the less submitted that such evidence should carry very little weight.

[17] Even if one accords very little probative value to this aspect of the evidence, it at least appears therefrom that the State is in possession of evidence which at the very least indicates that appellant, in contravention of the declaration of unfitness to possess a fire arm for a period of two years, once again came into possession of a fire arm during the two year period of suspension.

[18] This history in my view discloses a propensity on the part of the appellant to come into conflict with the law on a regular basis.

[19] This history also points to the real likelihood that appellant if released on bail may commit further crimes.

[20] What is more is that the appellant's criminal record also discloses two previous convictions for assault, the first, emanating from December 2008, in respect of which an admission of guilt was paid on 13 February 2009 and the second, emanating during April 2010, in respect of which he was sentenced on 19 May 2010.

[21] These previous convictions underscore the evidence given by the investigating officer that there was fear from the witnesses who had informed him that they know the appellant very well, that he is an aggressive type of person and that he may just injure them.

[22] It does not take much to infer that the appellant may very well harbour resentment towards such witnesses. After all it could only have been on account of their testimony that the appellant was ultimately arrested and now finds himself in detention, which fear of being assaulted therefore becomes so much more real given the appellant's previous convictions for assault.

[23] The likelihood that the appellant may commit further crimes, if released on bail, is thus reinforced by the evidence in this regard.

[24] Counsel were *ad idem* that this consideration was indeed relevant one given the provisions of Section 61 of the Criminal Procedure Act 51 of 1977 and that bail could be refused on that basis alone[1].

[25] At this juncture it is apposite to deal briefly with the second leg on which the finding of the court a quo was based to the effect that the appellant was not a suitable candidate for bail. Counsel were also agreed, on this score at least, and I did not understand Mr Khumalo to press this issue further, that the finding of the court a quo, that the appellant would not suffer financially if he would be detained, was not in accordance with the evidence before the court.

[26] At the same time it however becomes clear that such incorrect finding does not affect the correctness of the court a quo's ultimate conclusion that appellant was not a suitable candidate for bail because of his criminal record. This is particularly so

[1] See for instance generally : *'Commentary on the Criminal Procedure Act'* - by *Du Toit, De Jager and others* at page 9 - 24 Service 46 - 2011 - See also *S v Patel* 1970 (3) SA 565 W at 568 B; *S v Fourie* 1973 (1) SA 100 D& CLD) at page (102 A to103 B; *S v Ho* 1979 (3) SA 734 (W) at page 738 - The principle also seems to have been adopted by this Court if one has regard to the unreported judgment of *S v Gariseb& Another* delivered by Justice Van Niekerk, in case CC 16/2010 at paragraph 10 as delivered on 3 November 2010.

as it has appeared - and it must be accepted - that the appellant's previous convictions show a propensity to commit further similar offences if admitted to bail and that this factor was thus given sufficient weight in this case by the court a quo. It therefore also cannot be said that the learned magistrate's decision to refuse bail on this ground was wrong.

[27] It thus follows that the appeal cannot succeed and is therefore dismissed.

H GEIER

Judge

APPEARANCES

APPELLANT: W H Visser

Stern & Barnard, Windhoek

RESPONDENT: P S Khumalo

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Office of the Prosecutor General,

Windhoek