REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 38/2013

In the matter between:

EPAFRADITUS N. UNENGU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Unengu v State* (CA 38/2013) [2013] NAHCMD 202 (18 JULY 2013)

Coram: NDOU AJ
Heard: 12 July 2013
Delivered: 18 July 2013

ORDER

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1. That the appeal succeeds.
2. That the decision of the Magistrate Windhoek under case No WHK-CRM 21437/2012 refusing the appellant's release on bail is set aside and substituted with the following order:

"The Appellant is granted bail in the amount of N$ 30 000-00 on the following conditions:

(a) That the Appellant reports daily between the hours of 08:00 and 18:00 to the Namibian Police at the Windhoek Police Station.

(b) That the Appellant shall not leave the local authority area of the Municipality of Windhoek without the written authority of a Windhoek Magistrate.

(c) That the Appellant shall not in any way interfere with state witnesses or tamper with state evidence.

(d) That the Appellant appears on the date and at the time to which his cases have been remanded in the Magistrate's Court, Windhoek and Rundu respectively.

(e) That he surrenders his passport or any other travel documents not yet handed over to the Namibian Police, to the Station Commander Windhoek and furthermore does not apply for issue of any new similar documents.

(f) That he resides at a fixed address in Windhoek which must be notified to the station commander of the Namibian Police at Windhoek immediately upon his release on bail and likewise, any change of address must be immediately notified.

(g) That any application for variation of the above conditions must be made to the Magistrate's court, Windhoek.

JUDGMENT

NDOU AJ [1] This is an appeal against the decision of the Magistrate of Windhoek's refusal to grant bail to the appellant. The appeal is brought in terms of Section 65 of the Criminal Procedure Act, as amended, Act 51 of 1977. The appellant was arrested on 10 November 2012. Although his bail application started as early as 22 November 2012 the judgment, regrettably, was only delivered on 25 March 2013 after several postponements some of which appear *prima facie*

unwarranted. The matter was not handled with due regard to the importance and urgency of bail applications. It is important for the Magistrates to bear in mind that bail applications and appeals are *prima facie* urgent.- Prokureur-General Vrystaat v Ramokhosi 1997 (1) SACR 127 (O) and Garces v Fouche and Others 1997 NR 278 (HC). What the court should always bear in mind is that in such applications we are dealing with the liberty of the individual. The matter was further prolonged by the decision of the Magistrate to refer the appellant for Psychiatric evaluation in terms of Sections 77 and 78, which on record there were no facts that justified such an order in a bail application.

[2] Following the refusal of bail by the Magistrate, the appellant filed a Notice of Appeal which reads as follows:

"1. The court failed to properly undertake an inquiry as contemplated in terms of Section 61 of the Criminal Procedure Act, as amended, with a full view to considering all relevant facts and to properly balance both the interests of the appellant properly and fair with that of the state before refusing bail.

2. The court erred in finding that it was in the interest of the public that the appellant be refused bail.

3. The court unduly gave weight to the evidence of the complainant on the merits at the expense of the appellant's own evidence on the merits, notwithstanding the fact the evidence of the two were mutually destructive.

4. The court erred in finding that it was in the interest of the public to refuse bail when there was no fear from the state's and/or complainant's side that the appellant would abscond and/or that he would interfere with the investigation.

5. Should the court have acted reasonably it would have found that cumulatively, and given the constitutional Bill of Rights, in particular the right to be considered innocent until proven guilty, the court in the circumstances ought to have granted

bail, particularly given the personal circumstances of the appellant, including the family and his employment and the devastating effect if he was remanded in custody pending trial.

6. The court erred in finding that any fear that exists would [not] be allayed by attaching certain bail conditions instead of refusing bail"

In her comprehensive judgment covering over twenty (20) pages, the Magistrate summarized and considered the evidence presented and came to the conclusion that it would not be in the interest of society or justice to admit the appellant to bail.

[3] It is trite law that this court, sitting as a court of appeal, is bound by the provisions of Section 65 (4) of the Criminal Procedure Act, *supra*, not to interfere and set aside the decision of the Magistrate in the court *aquo* "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."

In S v Timoteus 1995 NR 109 (HC) this court cited with approval the dictum in S v Barber 1979 (4) SA 218 (D & CLD) 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/she 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 view are, the real question is whether it can be said that the Magistrate, who had the discretion to grant bail, exercised that discretion wrongly." – see also S v Branco 2002 (1) SACR 531 WLD; S v Du Plessis 1992 NR 74 (HC) and S v Swanepoel 2004 (10) NCLR 104. This is the approach I will follow in dealing with this appeal. As alluded to the magistrate gave a detailed judgment. After assessing evidence, she concluded:

"I have given consideration to the possibility of releasing the accused person subject to appropriate conditions, especially considering his profession and the fact that he is

married with children, the fact that he was prepared to pay thirty thousand (N$ 30 000.00) bail, subject to reporting conditions and other conditions, *however, given the fact that although bail was granted over a year ago for the offence of rape, the accused is before court again asking for bail in another rape case in a different district. I could find no appropriate conditions which could rest the court's fears, that he will not be before court facing a similar offence*. As a result, I made the following order; That the Accused person's bail application is refused, the accused is remanded in custody pending trial." (Emphasis added)

[4] Earlier on in here judgment the magistrate stated –

"The offence of rape includes an element of violence and I have to state that in recent years the obligation on our courts to protect the members of the public, especially women and children, has intensified. *In any event, no authorities were advanced by the defence to persuade the court that the granting of bail would be in the public interest or the interest of the administration of justice. No real efforts were made to assuage any fears that court might have had and to persuade the court that the accused could be trusted in future*." (Emphasis added)

The Magistrate made no specific finding that the appellant would, if granted bail, not stand his trial. The evidence does not, in any event, justify such a finding. Similarly the Magistrate made no finding that the appellant will interfere with witnesses or evidence or investigation. Three factors which weighed heavily with the Magistrate were:

(a) The seriousness of the charge of rape.
(b) The strength of the state case as evinced by the testimony of complainant and the investigating officers.
(c) The likelihood to commit similar offence as the appellant allegedly committed this office whilst on bail for a similar offence for which he is on remand, in Rundu Regional Magistrate's Court.

[4] Most of the evidence adduced during the bail hearing was about (a) and (b) i.e the seriousness of the charge and the strength of the state case. It is trite law that the primary reason for these factors is to establish an inducement to abscond and not stand trial – S v Nichas 1977 (1) SA 257 (C), S v Hudson 1980 (4) SA 145 (D) and S v Brancho, *supra* at 535 (a-i). In other words, in assessing the risk of flight the courts may properly take into account not only the strength of the case for the state and the probability of a conviction but also the seriousness of the offence charged and the concomitant likelihood of a severe sentence. S v Lulane 1976 (2) SA 204 (N) at 213 C-F, S v Nichas, *supra*, at 263 and s v Hudson, *supra*, at 740B. The reason for this traditional approach is that the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond. In this case, risk of abscondment was not an issue but the Magistrate seems to have used these factors to conclude that it was not in the best interest of the public or the administration of justice that he be released on bail. This ground is introduced by amendment of Section 61 of the Act. The effect of this amended Section 61 is that even if the court were to consider that there is not a likelihood, but only a possibility, that the appellant will abscond or interference with witnesses, the court may still refuse bail if it is in the interest of the public and administration of justice to do so.

[5] The Magistrate concluded that the appellant is facing a serious offence, but the evidence of the appellant must be taken and considered, regarding being had to the fact that it appears from the record that by the time the appellant was called to testify the state did not layout the allegations against him on the record as, to what exactly he was alleged to have done. The charge sheet that is now in the record was prepared after the bail application for purposes of the Section 119 plea proceedings which took place on 27 May 2013. This is evinced by the following extracts from the record – (pages 26 lines 16 – 20; page 29 lines 5 – 10 and page 27)

“Court: Can I just stop, I am a bit in dark. I would like to know what were the allegations. What are the dates? What are we referring to? Can we just elaborate on that? -----

Court: Yes I need to know dates, I need to know the allegation; the place, the time”

The fact is that the state did not sufficiently give notice to the appellant as to exactly what the allegations were. Section 61 itself requires its application after due inquiry. In S v Axarou Tsowaseb and Ignatius Bampton CA 88/1996, unreported Strydom JP stated –

“Section 61 itself requires its application *only after due inquiry*. It means there should be evidence put before the court in terms whereof it could come to such an opinion. After all, it is the court hearing the application that is empowered to determine what would be necessary.” (Emphasis added). In Julius Dausab v The State Case No 38/2009, unreported, the court remarked as follows:

“I am of the opinion that the approach followed by a court seized with the application in exercising its discretion to grant or refuse bail remains the same even after the amendment was introduced to the Criminal Procedure Act, save that *the courts now have been given a more active role and a slightly wider discretion when conducting the inquiry* into whether the release of the accused on bail will be against the public interest and the administration of justice or not. The *inquiry involves the making of a value ridden assessment of all the facts relating* to the traditional factors attended to bail applications.” (Emphasis added)

[6] In *casu*, in conducting the inquiry enshrined in Section 61, *supra*, the court should have ensured that the appellant was afforded a meaningful summary of facts or a charge sheet of the charge levelled against him. The facts should have outlined that the state objects to him granted bail on the grounds that he is considered a dangerous offender, a recidivist or that he was likely to commit a similar offence. In a nutshell the appellant should have been made aware of the reasons why the state was objecting to his being granted bail. The inquiry (in terms of Section 61) should be conducted in a fair manner to both parties. The court *aquo* should have further realized that activity in court premised on the guilt of the accused threatens the presumption of innocence. And that procedures designed to protect victims of crime from further victimization place considerable strain upon the presumption of innocence, since the difficult suspension of disbelief entailed by respect for the presumption seemed almost impossible where the procedures adopted assume the accused is guilty as charged – Constitutional Law of South Africa (2nd ed.) Volume 2

– Woolman, Roux, Klaaren, Stein & Chaskalson at 51 – 145. The court hearing the bail application retains the overall responsibility to ensure that it has sufficient facts to decide the issues involved and must make use of its powers. In the decision of the court in Sibonyone v State, 21/12/1993, NMCH, unreported, the need for a proper inquiry and the role of the court as administrator of justice was stressed.

[7] When we talk of a serious crime, we are not talking merely of a label placed by the police on the alleged crime at the preliminary or investigative stage, we are talking of a crime which in substance is such a crime. A fundamental part of the inquiry is to attempt to establish, at least *prima facie*, what is the nature of the alleged crime. This foundation of fact is crucial in deciding all the other issues, such as the possibility of absconding, of interfering with the investigation, of committing further crimes, of the interest of the public, the administration of justice, the effectiveness of bail, the conduct of bail. The role and responsibility of the prosecutor or defence counsel in a bail application does not absolve the court from discharging its function and its role as administrator of justice, when the mechanism of prosecution and defence fails to function sufficiently to enable justice to be done – Charlotte Helena Both v The State Case No CA 70/95, unreported; Sibanyone V State, *supra*, and S V Barend Gariseb NMHC, 26/4/1995, unreported.

[8] In *casu*, the most glaring omission was the failure to give particulars of the alleged rape. During the inquiry there was poor testimony by the complainant on whether or not the appellant committed a sexual act as contemplated in terms of Section 2 (1) of the Combating of Rape Act, Act 8 of 2000. One of the main considerations by the Magistrate was that there was a strong case against the appellant according to the evidence presented. Such reasoning was based on a fatal and fundamental fault line.

Although the state is not required to prove its case beyond reasonable doubt during a bail application, it should at least lead sufficient evidence aimed at alleging and proving commission of an offense on the basis of which court can conclude that

there is a strong case that the accused committed such act. In as far as it relates to rape, the main and central element, is penetration as defined in Section 2 (1) of the Combating of Rape Act, *supra*.

Seeing that the examination report by the doctor was not handed in and the complainant simply interchangeably used the words “rape”, which is a legal conclusion, and/or “sexual intercourse” in that respect the state did not even begin to allege and prove the strength of its case against the appellant. The word “rape” is a legal conclusion determining whether or not penetration was alleged and proved. Further, *sexual intercourse*, without clarification as to what that meant, cannot prove penetration – S v Katuta 2006 (1) NR 61 (HC) at 62-2 Nemavhola v The State (45/13 [2013] ZASCA 81 (30 May 2013), unreported.

[9] Given the cursory description of her ordeal, the Magistrate had to assess whether the state had brought the appellants conduct within the four corners of Section 2 of the Combating of Rape Act, supra, and more in particular, whether it had been brought within the four corners of the allegations contained in the charge. Because of the failure of all parties to clarify “sexual intercourse” and to lead good evidence as to whether or not there was penetration – as all parties including the Magistrate contended themselves with the usage of the words “rape” and/or “sexual intercourse”, it cannot be said that the state case is strong. The Magistrate was therefore not in a position to consider the gravity or otherwise of alleged charge. Sibanyone v S, *supra*, and Botha v State, *supra*.

The cumulative effect of the above flaws in the conduct of the inquiry is that, a case has been made out that the decision of the Magistrate was wrong as contemplated in terms of Section 61 (4), *supra*, thus entitling me to set aside the refusal of bail. In the circumstances I shall give the decision which, in my opinion, the Magistrate should have given. From the record of the Magistrate’s proceedings, the personal circumstances of the appellant as evinced in his own, and the testimony of his wife, are really not in any material dispute. He was aged 32 years old at the time. He is a Namibian citizen. He possesses a Bachelors Degree in Civil Engineering and is currently studying towards a Masters Degree with an Australian institution through

the Polytechnic of Namibia. He works for the Roads Authority of Namibia, where he occupies a senior engineer position and receives an annual salary before tax of N$382 000.00. He is married with two children. His wife works at Namibia Agronomic Board receiving a salary of N$8 000.00 after tax. His monthly expenses are around N$22 000.00. It is common cause that he is facing a rape charge for which he was arrested about a year ago. This factor weighs heavily against his case. The complainant is aged 18 years and knows the appellant only in connection with this case. She is opposed to the appellant being granted bail. She said she wanted the appellant to be punished “now” and kept in custody. It is, however, trite law that an accused person cannot be kept in detention pending his trial as a form of anticipatory punishment – S v Acheson 1991 NR 1 (HC) at 19. The appellant has already spent a period of about four months when the Magistrate delivered her judgment. He is likely to spend some more time awaiting trial judging by the rate at which cases are disposed off by the Regional Magistrates. The appellant needs to continue working in order to meet his financial obligations. The major fear raised by the Prosecutor and the Magistrate is the likelihood of commission of further crimes of a similar nature. In considering this factor one should not derogate from the constitutional presumption of innocence. Unless and until an accused has been proven guilty in a court of law, he should be presumed innocent – S v Swanepoel, *supra*. I have, however, given consideration to the provisions of Section 61, as amended and the affect thereof to this bail application. The above fears as contained the Magistrate’s judgment can be appropriately addressed by the imposition of stringent conditions. In the result I have concluded that the appeal should succeed.

The following order is made:

1. That the appeal succeeds.
2. That the decision of the Magistrate Windhoek under case No WHK-CRM 21437/2012 refusing the appellant’s release on bail is set aside and substituted with the following order:

   “The Appellant is granted bail in the amount of N$30 000-00 on the following conditions

(a) That the Appellant reports daily between the hours of 08:00 and 18:00 to the Namibian Police at the Windhoek Police Station.

(b) That the Appellant shall not leave the local authority area of the Municipality of Windhoek without the written authority of a Windhoek Magistrate.

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(g) That any application for variation of the above conditions must be made to the Magistrate's court, Windhoek.

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Acting Judge

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APPEARANCES

APPELLANT:	MR NAMANDJE Of Sisa Namandje & Co Windhoek
ACCUSED:	Ms Esterhuizen Of the Office of the Prosecutor General Windhoek