REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL FOR BAIL JUDGMENT

CASE NO: CA 41/2013

In the matter between:

WILLIAM IMMANUEL **APPELLANT**

vs

THE STATE **RESPONDENT**

Neutral citation: *Immanuel v State* (CA 41/2013) [2013] NAHCMD 254 (12 September 2013)

Coram*:* SIBOLEKA J

Heard on: **26 July 2013**

Delivered on: **12 September 2013**

Flynote: Criminal Procedure: The approach of this court in appeal matters is that it has to be satisfied that the judgment of the court below was wrong before it

gives the decision which in its opinion the lower court should have given.

Summary: The Appellant allegedly saw a person among four others hit the left side body of his car as he was driving past. He turned to ask why, and swearing started, and the Appellant hit the person with a fist. Among the four was the deceased who approached the Appellant with a knife, the latter took out the firearm, cocked it, thinking it would scare the deceased, who instead continued coming and was shot once in the chest. Appellant left the deceased dying at the scene and went home to watch TV instead of reporting the matter to the police there and then, a conduct the Magistrate found to be inconsistent with innocence.

Held: Section 61 of Act 51 of 1977 as amended gives the presiding officer the discretion to refuse bail even where the Appellant has shown on a balance of probabilities that he will stand trial if in the opinion of such presiding officer the granting of bail will not be in the interests of the public and the administration of justice.

Held: further, that this court is satisfied that the Magistrate correctly applied her mind to the facts of the matter in this regard.

Held: further, that the Appeal is dismissed.

ORDER

The appeal is dismissed.

JUDGMENT

SIBOLEKA J

[1] On 26 July 2013 I dismissed the appeal against the Magistrate's refusal to release the appellant on bail. I indicated then that the reasons will follow later, and are as follows:

[2] Introduction: On 22 February 2013 the Appellant was driving from Grysblock when he felt and saw a guy hitting his car on the left side. He thought it could be someone he knows, he turned, stopped and got out. He saw four guys, two in front, the other two behind coming towards him. He asked the one who hit his car why he did it, but the latter started coming to him swearing and asking what he wanted to do about it. This guy attacked and the appellant hit him with a fist. The deceased who was among the four guys came towards him with a knife. He took out his gun, cocked it, thinking it will stop him coming, but he instead continued, and he shot him once. During the hearing Ms Visser appeared for the Appellant and Ms Wantenaar for the Respondent. The court is indebted to their valuable submissions in this regard.

[3] I will now look at the evidence placed before the Magistrate, Windhoek during the bail application.

[3.1] William Immanuel is the 36 year old Appellant who testified in support of his bid to persuade the Magistrate to release him on bail, and did not call other witnesses. He has six children whom he maintains, two stay at his place and four with their respective mothers. On the day of the incident he was coming from Grysblock. When he drove past some people he felt the sound his car was hit

with an unknown object on the left side of the body. He saw who hit it and he turned, stopped to find out what has happened. Four male persons two in front and two behind then approached him. Among these were the guy whom he saw hitting his car, and the deceased. He got out of his car and asked the guy who hit his car why he did it, but he instead started swearing at him asking what the Applicant wanted to do, coming towards him to attack. He hit him with a fist. The deceased came with a knife, he took out his firearm and cocked it, thinking that that would make him stop 'approaching' but it didn't he kept on coming. He shot at him once. People started coming at the scene and he felt unsafe to stay there. He got into his car and drove away. He reported himself, to the police the following day. He suffers from sugar diabetes class two and is taking tablets for the sickness.

[4] Fredrick Ndjadila testified for the Respondent stating that he is thirteen years in the police service, a detective W/O Class I, and is the investigator of the matter. This officer has an objection to bail being granted to the Appellant, because he feels the State has a strong case involving a 19 year old male deceased person. He stated that the unprovoked circumstances in which the murder was committed, the interest of society and the safety of the Applicant himself. According to the officer the deceased was together with three other people, two males and one lady. The Appellant came out of his vehicle already having a pistol in his hand. He confronted the guy who was walking with the deceased why he hit his car. In the process the guy was hit with a rifle butt. The deceased was unarmed and had no object in his hands.

[4.1] After hitting the first victim with a pistol butt, he shot at the deceased who was next to him. According to this officer, eye witnesses told him they only saw a car driving past, it then made a U-turn, the Appellant disembarked with a pistol in his hand and started accusing them of hitting his vehicle. When he received the report of the incident he went to the scene, the Appellant was not there. The lady who was walking with the deceased at the time he was shot took him to where

the Appellant was residing some time back. She did not know the Appellant by name but only from seeing him in and out of the said residence. There he got the Appellant's cellular phone, he called but was unreachable. The following morning another police officer provided him with Appellant's other cellular number. At 08h00, he called and said he was looking for him. The Appellant requested to be given time till 11h00 as he was still busy in a meeting with family members. At 11h00 Appellant again asked for more time. Hereafter the Appellant was picked up by a member of city police and brought to the Police Station.

[4.2] According to this officer our borders are vast such that one does not need a passport to cross over to Angola or Botswana, if he wishes to abscond. He stated that it was a cold blooded murder and the public demonstrated and held petitions opposing bail being granted. He stated there were two petitions opposing the granting of bail, one from the deceased's family members, the other from the community who matched from Okuryangava to Katutura Magistrate's Court. On the diabetic condition of the Appellant which the officer was not aware of he said the Appellant will be assisted whenever there was request.

[5] The approach of this court to appeal matters was stated as follows in *S v Barber*, 1979(4) SA 218D at 220 E-H:

> "…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."

[6] The grounds of appeal are as follows:

"1. The learned magistrate erred in law and/or the facts by finding that the state had a *prima facie* strong case against the Appellant in that she *inter alia* –

1.1 placed significant reliance on the unsubstantiated hearsay evidence of the investigating officer to the effect that the cousin of the Appellant, who was in the motor vehicle with the Appellant at the time of the incident, allegedly confirmed that

the Applicant already had his firearm with him when he got out of the motor vehicle, when this particular aspect –

1.1.1 was never put to the accused in cross examination;

1.1.2 the Appellant's cousin never testified to this effect;

1.1.3 the Appellant's cousin's witness statement was not produced at court;"

[6.1] It is correct that the appellant's cousin never testified, his statement is not before Court, however it is my view that such a failure does not spel out a devastation of the party's case similar to the one in the criminal trial where the State is burdened to prove its case against the accused beyond reasonable doubt.

[6.2] The traditional approach of our Courts to bail matters is that the onus to show, on a balance of probabilities that one is entitled to bail remains on the applicant. See *Charlotte Helena Botha v The State* Case No. CA 70/1995 pages 10-11 unreported, delivered on 20 October 1995, *Albert Ronny Du Plessis and Another v The State*, unreported, delivered on 15 May 1992, and *Fouche v The State* Case No. CA 20/1993 unreported, delivered on 17 August 1993. The prosecution on the other hand has a duty during a bail hearing to place among others the following on the record, the strength, seriousness of the case against the Appellant, the possibility of a custodial sentence if a conviction eventuates and many others including factors favourable to the accused's release and bail.

[7] "1.2 failed to consider applying the provisions of section 167 of the Criminal Procedure Act;"

[7.1] Section 167 of Act 51/1977 refers to the powers conferred on the Court to examine, recall and re-examine any person other than the accused who has been subpoenaed to attend the proceedings if his evidence appears to be essential to the just decision of the case. This argument is correct – but it must be noted that in that section the legislature uses the word '…may'. In my view it means that the court is not obliged to invoke the section if it is satisfied with what

has been placed before it.

[8] "1.3 erred in law and/or the facts by failing to consider the reasonable explanation and defence of self-defence of the Appellant, and that his explanation and said defence could possibly be true."

[8.1] The Magistrate clearly stated that she saw and found fault in the appellant's conduct of leaving the deceased dying at the scene, the going to his home to watch TV after shooting, instead of reporting to the police there and then so that help could be secured. It appears from the record that in the mind of the Magistrate the conduct of the appellant discounted the truthfulness of his plea of self-defense. She refused bail even though the applicant had shown he will not abscond, interfere with investigation and witnesses, a decision in my view she is allowed to take in terms of Section 61 of Act 51 of 1977. I agree with the reasoning of the Magistrate because the Appellant's conduct after the shooting was inhuman and granting him bail would easily put the image of our justice system in serious disrepute.

[9] "2. That the learned magistrate erred in the law and/or the facts in finding that it will not be in the interests of the public or the administration of justice if the appellant is released on bail. In this regard the learned magistrate *inter alia*:

2.1 erred in the law and/or the facts in that she did not correctly interpret and apply the principles as envisaged in terms of section 61 of the Criminal Procedure Act, 51 of 1977 as amended;

2.2 relied mainly on the unsubstantiated hearsay evidence of the investigating officer that the Appellant's cousin confirms that the Appellant already had his firearm in his possession when he got out of the motor vehicle, which evidence was not put to the appellant in cross examination;

2.3 erred in law and/or the facts by considering the seriousness of the offence in isolation to find that it would not be in the interest of the public if the Appellant is released on bail;

2.4 erred in law and/or the facts in failing to evaluate according to judicially accepted

principles the mutually destructive versions of the Appellant and the investigating officer;

2.5 erred in law and/or the facts by relying on the general and unsubstantiated hearsay allegations of the investigating officer;

2.6 erred in law and/or the facts by failing to consider the reasonable explanation and defence of the Appellant;

2.7 erred in law and/or the facts by failing to provide cogent reasons why it was not in the interest of the public or the administration of justice to release the Appellant on bail;

2.8 erred in law and/or the facts by failing to consider that the Appellant has been incarcerated for more than one month, during which time the investigating officer has made little process with the investigation of the matter".

3. The learned magistrate erred in the law and/or the facts in not considering and taking into account, on the evidence that the Appellant is not likely, if released on bail to abscond. In failing to do so the magistrate *inter alia*:

3.1 erred in law and/or the facts in failing to take into consideration, and or properly evaluating all the relevant evidence adduced in court which was not meaningfully disputed by the State, in particular the personal circum-stances of the appellant namely that:

3.1.1 the Appellant has been a permanent resident in Namibia for 36 years;

3.1.2 the Appellant has deep emotional, family and social roots in Namibia;

3.1.3 the Appellant has 6 children, 2 of which, age 14 and 8 years old respectively, lives with the Appellant;

3.1.4 the Appellant has been the sole provider, caretaker and custodian parent for the two children residing with him, since they have been 6 months and one year old, respectively;

3.1.5 the Appellant, as the eldest son, is taking care of his father, mother and other dependent relatives residing at his parent's household;

3.1.6 the Appellant has been residing in Windhoek for the last 13 years, since 2000, when he moved from Swakopmund, where he was residing prior to 2000;

3.1.7 the Appellant has been steadily employed for the past approximate 8

year, since 2005, at the Namibia Public Workers Union as a branch organizer;

3.1.8 the Appellant is not in possession of a valid passport;

3.1.9 the Appellant at all material times was and is the sole breadwinner in his family and needs to continue working to be able to support his children and other family members;

3.1.10 the Appellant does not have a close relationship with the mother his 1 year old son, who resides in Europe;

3.1.11 the Appellant is suffering from diabetics type two and needs insulin medication on a daily basis;

3.1.12 the Appellant handed himself, together with his firearm and his firearm licence over to the police;

3.1.13 the Appellant undertook to comply with all bail conditions to be imposed by the court;

3.2 erred in law and/or the facts by failing to consider the imposition of bail conditions to reduce any risk of the Appellant absconding, alternatively:

3.3 erred in law and/or the facts by relying on the *ipse dixit* of the investigating officer to the effect that bail conditions would not be effective.

4. The learned magistrate erred in the law and/or the facts in finding that the incident that occurred was a callous killing of the deceased and that the Appellant are uncontrollable and that he acts with the slightest provocation and that the public should not be exposed to such danger, if the appellant was released on bail. In this regard, the learned magistrate *inter alia*:

4.1 erred in law and/or the facts in that she gave no, alternatively insufficient weight to the presumption of innocence as contained in Article 12(1)(d) of the Constitution;

4.2 erred in law and/or the facts in that she gave no, alternatively insufficient weight to the Appellant's explanations and defence of self-defence;

4.3 erred in law and/or the facts by relying on the general and unsubstantiated hearsay allegations of the investigating officer to the effect that no knife or

other weapon was found at the scene of the incident;

4.4 erred in law and/or the facts by failing to consider the application of the provisions of section 167 of the Criminal Procedure Act with regard to the calling of the cousin of the Appellant and/or the two eyewitnesses at the time of the shooting of the deceased."

[9.1] The discussion of grounds 2, 3 and 4 is as follows:

[9.2] In *S v Hlongwa* 1979(4) SA112 C-D the Court stated the following in regard to bail matters

"The correct approach to the decision of a bail application is that the Court will always grant bail where possible, and will leave in favour of, and not against, the liberty of the subject, provided it is clear the interests of justice will not be prejudiced thereby. The accused bears the onus of proving – on a balance of probabilities – that if bail is granted the interests of justice will not be prejudiced … And, depending on the circumstances, the Court may rely also on the investigating officer's opinion … even though his opinion is unsupported by direct evidence".

[9.3] Section 61 of the Criminal Procedure Act 51 of 1977 as amended reads:

"Bail in respect of certain offences:

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, not withstanding that it is satisfied that it is unlikely that the accused, if released on bail, will not abscond or interfere with any witnesses 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 interests of the public or the administration of justice that the accused be retained in custody pending his or her trial."

[9.4] The above section gives the presiding officer a discretion to refuse bail if she is satisfied that granting it would not be in the interests of the public or the administration of justice.

[9.5] The Magistrate said she relied on the case of *S v Spangenberg* 2004(8) NCLP 123 whose facts were similar to the matter before Court. In this case, Appellant and a friend went to hunt with a telescoped rifle on a farm. From the shooting tower they spotted a movement in the grass which in the sight the Appellant saw it was a person. His friend went to arrest him, while he remained observing the spot in the sight. When the friend closed in he shouted, 'come here', and as the Appellant put the firearm down a shot went off killing the person he saw making some movements in the grass earlier on. He argued he did not know the firearm was loaded, neither did he pull the trigger, and that the movement of putting the rifle down may have caused the shot to go off. He radioed his father-in-law, loaded the deceased's body on his bakkie and left it on the verge beside a public road 55km from the scene. He still did not report the matter to the police and did not bother to do so the following day, (Sunday). On Monday he called his lawyer who advised him to report the matter to the police. He still did not do so, but instead drove to his father-in-law where he found the police in attendance. He took them to where he dumped the body and was arrested. The Appeal Court upheld the Magistrate's refusal to grant bail, holding that there was a real likelihood that the Appellant may act equally irresponsibly with regard to any condition of bail.

[10] After carefully looking at the evidence adduced during the bail hearing, the reasons of the Magistrate in this regard, the court is satisfied that she correctly applied her mind on the matter when she refused to release the appellant on bail.

[11] I am therefore of the view that the appeal cannot succeed.

[12] In the result the appeal is dismissed.

A M SIBOLEKA
Judge

APPEARANCES

APPELLANT: Ms Visser
La Grange Legal Practitioners

RESPONDENT: Ms Wantenaar
Office of the Prosecutor-General, Windhoek