REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No.: CA 93/2013

MAURUS VALOMBOLA

and

THE STATE

Neutral citation: *Valombola v The State* (CA 93/2013) [2013] NAHCMD 279 (9 September 2013)

Coram: SHIVUTE, J

Heard: **13 September 2013**

Delivered: **09 October 2013**

Flynote: **Criminal Procedure – Bail – Appeal against the decision of the lower Court to grant bail – Court should not set aside decision to refuse bail by lower court unless satisfied that magistrate exercised discretion wrongly**

Summary: **In hearing an appeal against a lower court's refusal to grant bail this Court is bound by s 65(4) of the Criminal Procedure Act in the sense that it must not set aside the decision of a lower Court**

"unless such Court or Judge is satisfied that the decision was wrong."

Order: The appeal is dismissed

JUDGMENT- BAIL APPLICATION

SHIVUTE J:

[1] The applicant appeared on a charge of murder in the Magistrate's Court sitting at Outapi. He applied for bail and his application was dismissed. He has now appealed against the refusal of bail by the magistrate.

[2] Mr Namandje argued the appeal on behalf of the appellant whilst Mr Nyambe appeared for the respondent.

[3] The appellant advanced the following grounds in the Magistrate's Court why he should be released on bail: He is a businessman with many mini markets and he had 47 employees; if granted bail he would stand his trial and comply with any bail conditions to be attached; to safe guard his own safety he was prepared to leave his residential place and reside at some other places.

[4] The State opposed bail on the grounds that it was against public interest to grant the appellant bail; the appellant would interfere with investigations; he would commit similar offences; his safety would be compromised.

[5] The learned magistrate refused bail for the reasons that it would not be in the interest of the public and administration of justice to do so; there is a likelihood that the appellant would tamper with State witnesses and police investigations; the offence committed is serious; there is strong evidence against the appellant, and that the investigations were still incomplete.

[6] The appellant's grounds of appeal are that:

(a) The learned magistrate erred in relying on evidence of the witness Alexander when such evidence was not put to and canvassed with the appellant by the State in cross-examination;

(b) The learned magistrate erred in finding that since the appellant occupies a number of influential positions then it follows that he may interfere with witnesses in the matter if released on bail.

(c) The learned magistrate erred in deciding that it was in the interest of justice and public to refuse bail.

(d) The learned magistrate erred in having regard and putting undue weight on the petition presented in court as evidence and the list of petitioners opposing bail.

(e) Had the magistrate properly applied his mind he would have found that it would have been in the interest of justice and public for the appellant to be released on bail with or without conditions.

[7] Counsel for the appellant argued that the appellant was a 57 years old businessman who trades as a general dealer. He owns supermarkets, bakeries, restaurants and a milling business. He has nineteen children; sixteen of them are school going and he looks after them. He has 50 people in his employment.

[8] He further submitted that the incident ensured because of a quarrel that took place on 7 February 2013 at one of the appellant's business premises. The deceased allegedly pushed the appellant with a pool stick. The appellant took the stick from the deceased and hit the deceased. They scuffled and the deceased threw stones at the appellant. The appellant hid. Later on the appellant met the deceased a distance away from the appellant's business. The appellant stopped his vehicle in order to arrest the deceased. The deceased ran away and the appellant chased him with his vehicle. After getting out of the vehicle they had a short argument, the deceased ran away.

[9] The appellant contributed to the funeral of the deceased by giving two heads of cattle valued at N$5,500 and a tent which he paid for N$6000. He further

provided a coffin and food to the value of N$5000. If the appellant remains in custody nobody would run his businesses.

[10] Counsel for the appellant contended that the court *a quo's* reasoning when refusing bail was bad in law because, among other things, it relied on the statement of the deceased when such statement did not amount to a dying declaration as an exception to hearsay evidence. Even if hearsay evidence is admissible in bail applications, such evidence is only admissible when not disputed. Therefore, so counsel continued with his submissions, the alleged statement made by the deceased a day before he died concerning the circumstances in which he was injured cannot be admissible. Even if hearsay evidence is not disputed it can only be relied upon if it will be tendered at the trial. The deceased's statement has not met the necessary requirements therefore it would not be tendered during the trial, so counsel argued.

[11] Concerning the possibility whether or not the appellant would interfere with the investigations or State witnesses, counsel argued that the court *a quo* misdirected itself by stating that "there was undisputed evidence that the accused is an influential member of the community because of his role as a political and traditional leader. The Court believes that because of this role one cannot rule out the possibility of interfering with State witnesses even though statements were taken. Evidence was submitted that some of the witnesses are his employees who were present when the assault took place at his bar. It is possible that such witnesses can be influenced against the State as long as they continue to be employed." Counsel argued that according to the above finding, people who hold influential positions in our society, on that basis alone cannot be candidates to bail and that a possibility can never be ruled out that they will be interfering with witnesses. He argued that the court did not exercise its discretion properly.

[12] It was further a point of criticism by counsel for the appellant that the Court *a quo* erred in relying on the evidence of one Johannes Alexander that if the appellant was to be released on bail, he would commit further offences. The State did not give notice to the defence that they will rely on Alexander's evidence and it was not put to the witness through cross-examination. Counsel argued that such evidence should not have been relied upon and it was also of poor quality.

This court was referred to the matter of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA (CC) at 61-63.

[13] Counsel argued that the learned magistrate relied on a petition typed by a close relative of the deceased. He further argued that the cumulative effect of the alleged misdirections on the part of the magistrate would not satisfy the court that the discretion in terms of s 65 of the Criminal Procedure Act was properly exercised. Counsel further argued that when the court is considering the issue of bail, it should be mindful of the appellant's presumption of innocence and his right to liberty. He referred this Court to several authorities wherein principles relating to applications for bail were set out. Counsel contended that even if the appellant is released on bail, he would not influence the witnesses because they did not see the bumping incident. They only witnessed the scuffle that took place at the bar. Counsel argued further that if the appellant was to remain in custody, his business is going to suffer. The appellant had satisfied the onus placed on him; therefore the Court would be justified to interfere with the Court *a quo*'s exercise of discretion.

[14] On the other hand, counsel for the respondent argued that the Court below did not only rely on the testimony of Alexander in assessing the accused's character. It also relied on appellant's previous conviction for culpable homicide involving a shooting incident. Concerning the version of Alexander that was not canvassed through cross-examination, counsel argued that the appellant was represented throughout the proceedings and his lawyer could have requested for the disclosure of Alexander's statement. This court was referred to authorities with regard to the failure of the State to canvass the statement of a witness through cross-examination, as well as the consideration of previous convictions in bail applications.

[15] With regard to the testimony of Nantana who was allegedly told by the deceased that the appellant had beaten him up and bumped him with his vehicle, counsel for the respondent argued that the court *a quo* found that there was evidence establishing murder in favour of the State without even considering the issue of a dying declaration. Counsel further argued that the criticism of the State's reliance on hearsay evidence as submitted by counsel for the appellant is misplaced, because the prosecution did not lead hearsay evidence to prove the appellant's guilt but to demonstrate through credible evidence the strength of its case, which is

normally done through the mouth of the investigating officer. In this matter the investigating officer outlined specific allegations against the appellant.

[16] Counsel for the respondent argued that the principles set out in *Jordaan v Snyman* 2008 (2) NR 729 (HC) at 730D-F that were relied on by counsel for the appellant for the contention that what the deceased told Nantana a day before his death should not have been admitted in evidence because it will be inadmissible during trial are applicable only in normal trials and not in bail inquiries.

[17] Counsel further argued that the court *a quo* did not refuse bail solely on the ground that the appellant would interfere with state witnesses and investigations if granted bail. The court relied on other grounds as well namely, the interest of the public or administration of justice. He again argued that the court *a quo* did not only take into account the petition from the community. It also considered other factors such as the interest of the public or administration of justice as well as the possibility of tampering with State witnesses and investigation, seriousness of the offence, evidence against the appellant and the fact that the investigations were incomplete.

[18] Concerning the appellant's presumption of innocence, right to liberty and personal freedom, counsel argued that these rights are not absolute but circumscribed and subject to exceptions. Counsel argued that the court was alive to the *onus* of proof in bail applications.

[19] Counsel further argued that the Court *a quo* was mindful that a balance must be struck between the protection of liberty and the administration of justice. Furthermore, the Court a quo was aware of the provisions of s 61 of the Criminal Procedure Act 51 of 1977 pertaining to an accused who was in custody in respect of any offence referred to in Part IV of schedule 2 when applying for bail. Therefore, so counsel concluded his submissions and in the process urging the Court to dismiss the appeal, there is no justification for this Court to interfere with the Court a quo's findings.

[20] In hearing an appeal against a lower court's refusal to grant bail, an appellate court is bound by the provisions of s 65 (4) of the Criminal Procedure Act in the sense that it must not set aside the decision of the lower court unless such court or Judge is satisfied that the decision was wrong. The interpretation and application of s

65 (4) was illustrated in *S v Barber* 1979 (4) SA 218 (D) by Hefer J who said at 220E-G:

> "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, 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''.

The above approach was adopted in *S v Gaseb* 2001 (1) NR 310 and I will also be guided by this legal principle in this appeal.

[21] It is apparent from the record that the evidence of Alexander was not put to the appellant during cross-examination. Although it was open to the appellant to have taken steps to ask for a disclosure, the prosecution should have addressed this issue and canvassed it in cross-examination with the appellant. However, the failure to have done so should not necessarily entitle the appellant to bail. See *Hangombe v State,* judgment of this Court in *C*ase No. CA 43/2012 unreported and delivered on 23 August 2012. I agree with the above principle and it is my humble opinion that although the State had failed to give notice to the appellant or to cross-examine the appellant on the testimony of Alexander, the failure to do so would not necessarily entitle the appellant to be granted bail.

[22] Concerning the criticism that the learned magistrate relied on the so called dying declaration of the statement the deceased allegedly made to Nantana, although the magistrate commented on the issue by saying that the only evidence before the Court is that of Nantana who took a statement from the deceased whereby he stated that the appellant bumped the deceased and also assaulted him, the learned magistrate proceeded to say:

> ''In casu ex-facie there is evidence in favour of the State for murder without even considering the issue of the dying declaration''.

Interpreted in its proper context, what the magistrate said in this statement could not be understood to mean that the Court a quo relied on a so called dying declaration. On the contrary, my understanding of the above statement is that the learned magistrate found that it was not necessary to consider evidence of the so-called dying declaration, because there was evidence alliunde pointing to murder. It is therefore my considered view that there was no misdirection on the part of the learned magistrate in this regard.

[23] Regarding the criticism that the learned magistrate erred in having regard to and putting undue weight on the petition presented in Court as evidence and the list of petitioners opposing bail, the learned magistrate said, among other things:

> ‘‘Although there was no direct evidence to show that there could be pandemonium or threat to accused’s life if the accused were to be seen in the streets, the Court is convinced that there remains a reasonable possibility that there will be threat to the maintenance of the public order. Even if the police are there to protect every citizen it may be difficult to guarantee the safety of the accused person’’.

The Court was provided with a document Exhibit "3" captioned: ‘‘Petition over the murder of Bernhard Kalimbo." I pause to observe that exhibits that are documents should have properly been marked with letters as opposed to numbers. Apart from Exhibit "3", a list of names was handed over to the Court and marked as Exhibit "4". The documents with the list of names and signatures had a title written in Oshiwambo language, and no translation thereof was given in the official language. However, the witness who identified the document testified that the documents were a list of people who were opposed to the granting of bail.

[24] Apart from the petition and the list of names as well as signatures, there was evidence that the Court was full to its capacity and there were other people outside the Court room because of the lack of space inside. In my opinion, by referring to the petition and mentioning a list of names the magistrate made statement based on the evidence before him and was commenting on a factor relevant to the consideration of bail, namely the public interest or the administration of justice and the personal safety of the appellant. I therefore do not find it to amount to misdirection on the part of the Court *a quo* to refer to the petition and the list of names and signatures.

[25] The criticism that the learned magistrate erred in finding that since the appellant occupies a number of influential positions, then it follows that he may interfere with state witnesses or police investigations if released on bail is also not justified. The magistrate made the statements based on the evidence before him and was not setting general principles. Given the evidence about the accused's apparent influential position in the community, it was a relevant consideration in the delicate act of balancing the appellant's right to liberty against the interests of justice and he cannot therefore be faulted in so doing. Moreover, this is not the only basis upon which the learned magistrate exercised his discretion to refuse bail. The court below also considered the seriousness of the offence, the *prima facie* case made out against the appellant, and the fact that the investigations were not complete. As Hoff J stated in *Shaduka v State*, Case No. CA 119/2008, unreported judgement of this Court, delivered on 24 October 2008 with which I agree:

> "Since the enquiry is now wider a court will be entitled to refuse bail in certain circumstances even where there may be a remote possibility that an accused will abscond or interfere with the police investigations. The crucial criterion is thus the opinion of the presiding officer whether it would be in the interest of the public or the administration of justice to refuse bail."

[26] Submissions relating to the presumption of innocence, rights to liberty and personal freedom of the appellant were also made on his behalf. Article 12(1)(b) of the Namibian Constitution provides in effect that an accused be released from detention if a trial does not take place within a reasonable time. This must be read with the provisions of article 12(1)(d) of the constitution which provides that:

> *"All persons charged with an offence shall be presumed innocent until proven guilty according to law..."*

There are obviously limitations to these fundamental rights. They are subject to exceptions contained, among others in Articles 7 and 11 of the constitution. Article 7 provides that "no persons shall be deprived of personal liberty except according to procedures established by law". Whilst Article 11 provides for deprivation of an individual's liberty by arrest and detention provided certain specified safeguards are adhered to. Surely if regard is had to the provisions of our constitution as referred to above, the Court a quo cannot be said to have infringed the appellant's rights by

refusing to admit him to bail as these fundamental rights enshrined in our constitution are not absolute, as previously mentioned.

[27] The court a quo by arriving at its conclusion had relied on the provisions of s 61 of the Criminal Procedure Act as amended by Act 5 of 1991. Act 5 of 1991 was introduced to give courts wider powers and additional grounds for refusing bail in order to combat the escalation of crimes and offences listed in Part IV of the Second Schedule of the Criminal Procedure Act of which murder is one. I am therefore not persuaded that the learned magistrate misdirected himself in any manner by invoking the provisions of Act 5 of 1991 on the factors he took into consideration in refusing bail. I am not satisfied that the decision of the magistrate not to grant bail to the appellant is wrong. The appeal cannot therefore succeed.

[28] Order:

The appeal is dismissed.

N N Shivute

Judge

APPEARANCES

APPELLANT	**Mr Namandje:**
Instructed by	**Sisa Namandje and Co. Inc**
RESPONDENT	**Mr Nyambe**
Instructed by	**Office of the Prosecutor-General**