REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CA 93/2013

MAURUS VALOMBOLA

versus

THE STATE

Neutral citation: *Valombola v The State* (CA 93/2013) [2014] NAHCMD 33 (5 February 2014)

Coram: SHIVUTE, J

Heard: **13 December 2013**

Delivered: **5 February 2014**

ORDER

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1. The application for condonation of the late filing of the notice for leave to appeal is granted.
2. Application for leave to appeal is refused.

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL.

SHIVUTE J:

[1] This is an application for condonation for the late filing of a notice of appeal and for leave to appeal to the Supreme Court.

[2] The appeal stems from the decision of the Outapi Magistrates' Court refusing to admit the applicant on bail. The applicant who is charged with murder appealed against the decision of the magistrate and his appeal was dismissed by this court. He now seeks condonation for the late filing of his notice of appeal and at the same time makes application for leave to appeal.

[3] Mr Namandje, counsel who appeared on behalf of the applicant in the appeal hearing, moved and argued the applications. Mr Kumalo appeared on behalf of the respondent.

[4] Counsel for the applicant filed a notice for leave to appeal accompanied by an application for condonation as well an affidavit explaining why he failed to file the notice within the time period set out in the rules of court. Among the reasons given, counsel stated that he was taken ill during the period that the applicant was required to file the notice. The respondent did not oppose the application for ondonation. Having considered the explanation proffered by the applicant's counsel, I am of the view that such explanation was reasonable and that the application for condonation should be allowed. I will now consider the merits of the application for leave to appeal.

[5] The grounds of appeal are as follows:

1. That this Court erred in not finding that the reliance on the evidence of State witness Alexander and the fact that such evidence was not canvassed with the applicant by the State in cross-examination was a material misdirection.

2. That both the magistrate and this Court erred in unduly relying on the influential position of the applicant as a politician and a traditional leader and inferring from there that he would interfere with witnesses.

3. That both courts erred in relying on and putting undue weight to the petition handed up as evidence in finding that it was not in the public interest to grant bail.

4. That both courts erred in not proceeding after coming to a *prima facie* view that bail should not be granted and seriously assess whether or not it was appropriate to attach certain conditions for the applicant to be released on bail.

[6] The application for leave to appeal was opposed by the respondent on the ground that there is no reasonable prospect of success on appeal.

[7] In support of his grounds of appeal counsel for the applicant in respect of witness Alexander's testimony, criticised this court for finding that "It is apparent from the record that the evidence of Alexander was not put to the appellant during cross-examination. 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*, CA 43/2013 HC unreported delivered on 23 August 2012"

Counsel argued that the *Hangombe* case is distinguishable because the issue that was not canvassed with the accused was limited. At the time of the hearing of the bail application, the police investigation in the *Hangombe* matter was finalised and the appellant already had discovered police statements relating to the issue in question. In the instant case, so counsel argued, there was a total disregard of the applicant's rights. The court appeared to have accepted that, the applicant should have asked for discovery of the police statements. Neither the magistrate nor this court referred to any accepted legal basis for such a procedure before finalisation of police investigation so, counsel argued.

[8] Although the investigations in the *Hangombe* case were finalised whilst in the present matter the investigations were ongoing at the time of the hearing of the bail application, the legal principle remains the same that although the State had failed to give notice to the applicant or to cross-examine the appellant on the testimony of Alexander, the failure to do so would not necessarily entitle the applicant to be granted bail. As to the criticism that neither this court nor the magistrate's court referred to any accepted legal basis for such a procedure to request for disclosure before the finalisation of police investigation, there is also no rule of practice that says that the defence cannot ask for a witness' statement already taken before the finalisation of the investigations. In my opinion, nothing precludes the defence from asking for disclosure. However, it is up to the prosecuting authorities to decide whether or not to give the statement in question.

[9] Counsel for the applicant argued that witness Alexander testified that he did not give a statement. However, this submission is not borne out by the evidence on the record.

[10] Concerning counsel for the applicant's argument that the applicant is in the dark as to what the position of this court with regard to Alexander's "bad evidence" is, I think that counsel for the respondent is correct in submitting as was stated in *S v Holder* 1979 (2) SA 70 (A) at 77E that "no judgment can ever be perfect and all embracing." For the avoidance of any further doubt, although I found that the evidence of Alexander was admissible, I attached very little value, if any, to it.

[11] With regard to counsel for the applicant's criticism that the accused was refused bail because of his influential position, this court has already pronounced itself thereon in the appeal judgment and still holds the views expressed therein.

[12] Counsel for the applicant argued that this court did not properly consider the petition "purportedly" handed in at the hearing of the bail application. If it had, it would have found that it was based on the misconception on the question of bail and a complete suppression of the constitutional right relating to the presumption of innocence. This court had stated in its judgment that the court in its exercise of its

discretion had to consider all the relevant facts and circumstances placed before it and this is in line with the legal principle enunciated by Namandje AJ in *S v Dausab* Case No CC38/2009, delivered on 20 September 2010 and unreported, which views I respectfully endorse:

> "Petitions in such situations can fairly be handed to the prosecutor who represents the public and the State's interest in criminal proceedings. Judicial officers are expected to be impartial when they hear cases. If the public petitions are relevant such can and must be produced by the State in Court in terms of the rules of evidence."

[13] It was argued on behalf of the applicant that the court should have considered granting bail with conditions attached. The failure to consider suitable, conditions may lead to a failure to exercise a proper discretion. This may be so in appropriate cases. However, in the present case I did not consider granting bail let alone with conditions attached, because I am of the view that the learned magistrate did not misdirect himself in refusing to admit the applicant to bail. He has made a proper consideration in balancing the applicant's right to liberty against the interest of justice. 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 51 of 1977 in the sense that it should not set aside the decision of the lower Court unless such court or judge is satisfied that the decision was wrong. I did not and do not now hold the view that the decision of the learned magistrate was wrong.

[14] Counsel for the applicant argued that there are prospects of success that another court may arrive at a different conclusion and leave should therefore be granted. Counsel for the respondent argued, on the other hand, that there are no prospects of success and the application should be refused.

[15] The legal position was stated in *S v Barber* 1979 (4) SA 218 (D) at 220E-G as follows:

> "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 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 by this Court in *S v Gaseb* 2007 (1) NR 310 at 311E-F.

[16] I remain of the firm view that the learned magistrate exercised his discretion properly by invoking the provisions of s 61 of the Criminal Procedure Act as amended. I am not persuaded that there are reasonable prospects of the appeal succeeding in the Supreme Court. The application for leave to appeal should therefore be refused.

[17] In the result the following order is made:

1. The application for condonation of the late filing of the notice for leave to appeal is granted.

2. The application for leave to appeal is refused.

N N Shivute

Judge

APPEARANCES

APPELLANT	:	Mr S Namandje Sisa Namandje & Co Inc.
RESPONDENT	:	Mr Kumalo Office of the Prosecutor-General