

**REPUBLIC OF NAMIBIA**

**NOT REPORTABLE**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
BAIL APPEAL JUDGMENT**

**CASE NO.: CA 23/2016**

In the matter between:

**JACO KENNEDY**

**APPELLANT**

And

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Kennedy v State* (CA 23/2016) [2016] NAHCMD 163 (08 June 2016)

**CORAM:** SIBOLEKA J

**Heard on:** 23 May 2016

**Delivered on:** 08 June 2016

**Flynote:** Criminal Law – Bail – appeal against the Magistrate’s refusal – current allegations of Rape made while appellant is on bail for another Rape matter.

**Summary:** The appellant found the complainant waiting for her female friend so that they can take a taxi to work. He offered to take both of them to work and she boarded the appellant's car. Instead of going to her friend's residence to collect her as promised, he first drove to a nearby riverbed, passed water, got back into the car and sexually assaulted her there and then without her consent.

Held: A *prima facie* case exists in the victim's complaint.

Held: There was no misdirection in the Magistrate, refusal to grant bail to the appellant, and the appeal is dismissed.

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### ORDER

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In the result the appeal against the Magistrate's refusal to grant bail to the appellant is dismissed.

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### BAIL APPEAL JUDGMENT

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SIBOLEKA J:

[1] This is an appeal against the Magistrate sitting at Katutura's decision to refuse bail to the appellant.

[2] At the hearing of this matter Mr Isaacks appeared for the appellant and Ms Nyoni for the respondent. The court appreciates their valuable arguments on the matter.

[3] The appellant is charged with Rape in contravention of The Combating of Rape Act 8 of 2000.

[4] The grounds of appeal are as follows:

**“THE GROUNDS OF APPEAL**

*Personal Circumstances*

5. It is trite law that in a bail application a Court has a legal duty to properly and adequately consider the personal circumstances of an accused before deciding on whether or not to grant the accused person bail. The court *a quo* herein erred in law and/or fact by finding that it could not make a proper assessment of the Appellant's personal circumstances because of mainly three (3) reasons: (a) Appellant's failure to provide the monthly salary amount of his wife; (b) That the Appellant drew a mere inference from the consultation with his mother that his brother is unable to support his mother financially if he is subjected to further detention and (c) because of two provisionally appointed directors working at the Appellant's company the business entity will not suffer prejudice.
  
6. It is evident from the record that the court *a quo* merely paid lip service to the personal circumstances of the Appellant and thus failed to take into account the personal circumstances of the Appellant *in toto* and thus given a fair, proper and adequate consideration to those personal circumstances. The court *a quo* essentially rejected the Appellant's personal circumstances on the basis of only three factors but materially failed to take into account the fact that the Appellant is the primary breadwinner in his household and have 4 minor children which he supports financially. The court *a quo* to consider the Appellant's duty of care and financial support towards is minor children, the nature of his employment and the financial obligations of the Appellant.

*Strength of State's Case*

7. The court *a quo* erred in law and/or fact by denying the Appellant bail based on the strength of the Respondent's case and therefore over-emphasizing the strength of the state's case at the expense of the Appellant's constitutional right to liberty.
  
8. The court *a quo* misdirected itself in law and/or fact by dealing with the Appellant's bail application as if it was his trial and therefore materially failed to

apply its mind within the boundaries of the underlying principles of a bail application in general.

9. In considering the strength of the Respondent's case against the Appellant the court *a quo* erred in law and/or fact by failing and/or neglecting to take into cognizance the following factors:
  - (a) After Appellant gave the requisite written notice of intention to formally apply for bail the Respondent failed, refused and/or neglected to afford the Appellant with a meaningful summary of facts or a charge sheet of the charge levelled against him;
  - (b) Throughout the proceedings the Respondent failed and/or glaringly omitted to give proper particulars of the alleged rape in particular on whether or not the Appellant allegedly committed a sexual act as contemplated in terms of Section 2(1) of the Combating of Rape Act, Act 8 of 2000;
  - (c) No medical examination report was placed before the court *a quo*. The Respondent also failed to take the court *a quo* in their full confidence by handing in a copy of the medical examination report in order for the court *a quo* to establish the strength of Respondent's case against the Appellant.
  - (d) The version of the Appellant and complainant was mutually destructive and the legal principles thereto ought to be applied by the court *a quo* in making a credibility test.
10. The Appellant refers the Honourable Court to *Unengu v S (supra)* at paragraph 8 – 10.
11. It is submitted that the errors committed by the court *a quo* in the *Unengu* case is strikingly similar to the errors committed by the court *a quo* herein. The Respondent failed to establish a strong case against the Appellant and thus such factor should not have been a reason for denying the Appellant's application for release on bail.
12. The court *a quo* erred in law and/or fact by concluding that it is sufficient *in casu* to deny the Appellant bail on the mere basis that if convicted the Appellant was facing a substantial sentence of imprisonment.

*Interference with Witnesses, Danger to Complainant*

13. The court *a quo* misdirected and/or confused itself in law and/or fact by finding on the one hand that there is no other evidence of communication and/or interference by Appellant with the state witnesses other than the challenged and disputed testimonies of the state witnesses. And on the other hand concluded that the testimonies of the three (3) state witnesses corroborated the fact that there were interferences without specifying how and in which respect the said interferences is linked to the Appellant. The court *a quo* erred in law and/or fact by making such a finding.
14. During cross-examination the Appellant's legal representative challenged and disputed the allegations of communications and/or interference by Appellant with the complainant whereas the Respondent failed to provide corroborative evidence in this regard and thus the Respondent merely relied on inadmissible hearsay and/or uncorroborated evidence in this regard. The court *a quo* should have rejected this evidence during the Appellant's bail application.
15. The court *a quo* erred in law and/or fact in denying the Appellant bail on the basis that the Appellant may hinder with the safety of the complainant despite the lack of material evidence of such nature placed before the court *a quo*. No evidence were placed before the court *a quo* suggesting that Applicant ever threatened the Complainant in any way that he will injure or kill her.
16. Taking into consideration the period between the date of the commission of the alleged offence and the date of arrest of the Appellant it is evident that the Appellant had all the opportunities to have injured the Complainant if he had such an intention. He never did this. The so-called threats are imaginative and can be cured by appropriate bail conditions attached to the bail of Appellant by the Court.

*Propensity to Commit Further Offences*

17. The court *a quo* erred in law and/or fact by failing to properly and judicially clarify

and/or justify on what basis it concluded that the Appellant have a propensity to commit further offences. The Appellant have no previous convictions.

18. In *Unengu v S (supra)* at paragraph 10 the Court had the following to say:  
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.
19. In *Acheson 1991 (2) SA 805 at 822A-B* Mohamed J said: An accused cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.

*The interests and/or Administration of Justice*

20. The court *a quo* erred in law and/or fact by failing to properly clarify in what respect the interests of justice or the administration thereof may be affected or prejudiced if Appellant is granted bail. It is conceded that the first pending rape case against appellant weigh heavily against him.
21. In *S v Pineiro*, 1999 NR 18 Frank J, as he then was, and relying on *S v Bennett* 1976(3) SA 652 (C) opined: 'In the exercise of its discretion to grant or refuse bail, the court does in principle address only one all-embracing issue: Will the interests of justice be prejudiced if the accused is granted bail? And in this context it must be borne in mind that, if an accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced. At the same time the court should determine whether any objection to release on bail cannot suitably be met by appropriate conditions pertaining to release on bail.' It is submitted that the court *a quo* could have imposed appropriate and stringent bail conditions on

the Appellant in order to ensure that the interests of justice can be policed effectively. The Appellant indicated without any challenge from the Respondent that he shall comply with any bail condition imposed unto him by the court *a quo*. The Appellant is not a flight risk.

22. In *Ephraim Kariko v The State* CC 18/2009 the Court stated at Para 12: "To balance the competing interest of individual liberty and public interest I have set more stringent conditions to attempt to ensure that the applicant will stand his trial considering at the same time that the amount of bail must be such that the applicant will consider it more advantageous to stand his trial". In *S v Bennet* 1976 (3) SA 652 (CPD) at 655G the court stated that: 'In striking a balance between the liberty of the subject and the proper administration of justice, the imposition of conditions in an application for bail can be decisive'.
23. It is submitted that the court *a quo* erred in law and/or fact by failing, refusing and/or neglecting to consider the imposition of stringent and appropriate bail conditions unto the Appellant. From the record of proceedings it is clear that the court *a quo* made no attempt to consider the imposition of bail condition."

[5] In regard to the grounds of appeal, the trial Court did not overemphasize the strength of the state's case and ignored the liberty of the appellant because from the record he was already a free person on bail when the incident happened.

[5.1] It was unfortunate that the alleged charges / medical examination of the complainant were not availed to the appellant at the time of his bail application in the Court *a quo*.

[5.2] Strange communications to the complainant via her cellphone started immediately after the incident which shows a clear connection with the appellant's arrest over this matter. The trial Court's reasoning in that regard was genuine and cannot be faulted. The Court *a quo*'s use of the words 'prompensity to commit further offences' was prompted by the repeat of sexual assault

allegations against the appellant while he was on bail on the same allegations. Bail is just what it is, whether with or without conditions. It was incumbent on the appellant to exercise some restraint in his further encounter with female persons

[6] The facts of the matter are that the appellant who is already on bail pending another rape matter found the complainant waiting for her female friend so that the two can take a taxi together and go to work. He offered to take her and then drive to her friend's residence and drop both of them at their workplace. This sounded a free hassle arrangement to the complainant who then boarded the appellant's car. The appellant instead first drove to the nearby riverbed to pass water, which he in fact did, but shortly thereafter he got on the car, undressed himself, did the same to the complainant and sexually assaulted her there and then without her consent. The appellant then dropped her at her work where her friend was already waiting for her. They took the registration number of the accused's vehicle. The complainant's friend escorted her straight to the police station and her complaint was accordingly processed. The Magistrate found that the allegations were a *prima facie* case.

[7] The appellant's personal circumstances were considered including the fact that he has relatives in South Africa, and that rape was a serious offence. The Magistrate refused bail. It is my considered view that it would not have been in the public interest for the Magistrate to grant bail to the appellant in such circumstances.

[8] The judgment in the *Unengu v State* Case No. CA 38/2013, an unreported matter delivered on 18 July 2013 consulted but not followed. I did not find any misdirection in the Magistrate's refusal to grant bail.

[9] In the result the appeal is dismissed.



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A M SIBOLEKA  
Judge

APPEARANCES

APPELLANT : Mr. B. Isaacks  
Isaacks & Associates Inc.

RESPONDENT : Ms. I. M. Nyoni  
Office of the Prosecutor-General, Windhoek