REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 11/2016

In the matter between:

FELIUANO ABILIO JANO MIGUEL	**FIRST APPELLANT**
FRANCISCO SOSSINGO	**SECOND APPELLANT**
JOAQUIM ANTONIO	**THIRD APPELLANT**

And

THE STATE	**RESPONDENT**

Neutral citation: *Miguel v The State* (CA 11/2016) [2016] NAHCMD 175 (20 June 2016)

Coram: LIEBENBERG J

Heard: **01 June 2016**
Delivered: **20 June 2016**

Flynote: Criminal procedure – Appeal against magistrate's refusal to grant bail on ground that court a *quo* relied on s 61 (as amended) when

refusing the appellants bail – Section 61 only applies to offences referred to in Part IV of Schedule 2 – Appellants not charged with offence referred to in Part IV of Schedule 2 – Section 61 not finding application – Court *a quo* not relying on section – Court found appellants failed to show they are not a flight risk.

Criminal procedure – Section 65(4) of the Criminal Procedure Act 51 of 1977 – Court on appeal may only overturn court a *quo's* decision once satisfied court exercised its judicial discretion wrongly.

Criminal procedure – Court of appeal not to consider new grounds raised for first time on appeal – Only in exceptional circumstances – Aspect of jurisdiction to have been raised before trial court for consideration – Considered to be new ground.

Criminal procedure – Court relied on fact contained in document not admitted into evidence – Constituted irregularity – Irregularity not of fundamental nature justifying setting aside of court's decision on bail.

Summary: The three appellants appealed against the magistrate's refusal to grant them bail on grounds that trial court *inter alia* relied on s 61 of Act 51 of 1977 (as amended) when refusing the appellants bail while they were not charged with any of the offences referred to in Part IV of Schedule 2. Court however did not rely on s 61 but had found that appellants were a flight risk. Court had also taken notice of the terms of an agreement that did not form part of the evidence presented to court. This constituted an irregularity. However, the irregularity committed is not of a fundamental nature justifying the setting aside of that court's decision. Court of appeal satisfied that appellants failed to prove on a balance of probabilities that they would not be a flight risk. Appeal dismissed.

ORDER

1. The late filing of appellants' amended notice of appeal is condoned.
2. The appeal is dismissed.

JUDGMENT

LIEBENBERG J:

[1] This is an appeal against an order of the Magistrate's Court Otjiwarongo, dated 10 November 2015, refusing bail to the appellants who stand charged with offences in contravention of sections 4, 5 and 6 of the Prevention of Organised Crime Act, 29 of 2004 (POCA), as well as contraventions of the Exchange Control Regulations, 1961. During bail proceedings in the magistrate's court the appellants intimated that they intend pleading not guilty on all charges preferred against them. Appellants were legally represented in the court *a quo* by Mr *Siyomundji*.

[2] Mr *Namandje* argued the appeal on behalf of the appellants while Mr *Khumalo* represented the respondent (the State).

[3] Appellants were arrested on the 22nd of September 2015 at a roadblock just outside of Otjiwarongo on the main road leading to Otavi, and approached the court on 15 October 2015 with an application to be admitted to bail. At the time of the application and until the court delivered its ruling, formal charges had not yet been drawn by the prosecution as the investigation, according to the evidence of the investigating officer, had not been completed; hence, the appellants had not been required to plead to any of the charges on which they were arrested. From the evidence presented there appears to be a real

likelihood that further charges under the Immigration Control Act, 7 of 1993 will be added.

[4] It is trite law in bail applications that the onus of proof is on the applicant to prove on a balance of probabilities that bail should be granted[1], more so where it is alleged that applicant will be prejudiced if admitted to bail, and that it would be in the interest of justice to do so.

[5] In a Notice of Appeal filed on 01 December 2015 the grounds of appeal enumerated therein are twofold: (a) That the magistrate misdirected herself in law and in fact by finding that the appellants are a flight risk, and (b) that the court's finding of it not being in the interest of justice to grant the appellants bail, constituted a misdirection. Subsequent thereto the appellants on 12 April 2016 filed an Amended Notice of Appeal, together with an application for condonation of the late filing of the amended notice of appeal, setting out additional grounds of appeal. A supporting affidavit of Mr *Namandje,* explaining the delay in filing the amended notice on time, was simultaneously filed. The amended notice was served on the clerk of the Otjiwarongo Magistrate's Court, however no additional reasons from the presiding magistrate were filed. The respondent did not oppose the application for condonation of the amended notice and, having found the explanation for non-compliance reasonable and acceptable, condonation will be granted.

[6] The following additional grounds of appeal were introduced: (aa) That the magistrate erred in dealing with offences in terms of POCA as set out in the charge sheet in that the court, in view of the facts presented, did not have jurisdiction in terms of s 8 of POCA to deal with such offences; (bb) that the court erred in not realising that on the evidence adduced, the State did not have a strong case; and (cc) that on the facts the court should have realised that the accused did not commit any offence whatsoever and that it would have been in the public interest to release the appellants, given the weak case presented by the State.

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[1] *S v Dausab* 2011(1) NR 232 (HC) at 235.

[7] Reference to the strength of the State case and public interest in the last additional ground is a mere repetition of similar grounds raised in argument and need not be dealt with separately. Though not specifically noted as a ground of appeal in either of the notices filed, counsel for the appellants, Mr *Namandje*, surreptitiously incorporated a further ground of appeal in his written heads of argument, namely, that in the absence of evidence that the appellants committed any offence within the district of Otjiwarongo, the court *a quo* lacked jurisdiction to hear the bail application.

[8] During oral argument the court *mero moto* raised with counsel for the appellants the basis on which grounds pertaining to jurisdiction have now, for the first time, been raised on appeal when same had not been placed before the court *a quo* during the bail hearing. In reply Mr *Namandje* submitted that there could be exceptions to the rule that new issues are not to be entertained on appeal for the first time, but in the end conceded that there was no basis for appellants to rely on any such exception when raising the issue of jurisdiction in the court of appeal for the first time. The concession is correctly made.

[9] The desirability to raise issues in dispute at the outset of proceedings, and not for the first time on appeal, is clear from *S v Paulo and Another*[2] where the Supreme Court, as per Mainga J.A., stated thus:

> '[I]t should be as a matter of general principle be required that issues of the nature under consideration be raised in courts from which the appeal arises, before it can be entertained in this court. The views of the court below are of particular significance and value to us. This court being a court of ultimate resort in all cases, will entertain proceedings as a court of both first and final instance "only when it is required in the interest of justice". And only in circumstances where it will be appropriate to do so.'
> (Emphasis added)

[10] Although the remarks in the excerpt above were made in a different context in that it relates to provisions of the Constitution, the principle, in my

[2] 2013 (2) NR 366 (SC) at p. 374 para [18].

view, remains the same. Had the appellants at the outset of bail proceedings challenged the court's jurisdiction as it was supposed to have done, then the court *a quo* would have invited argument from both sides and ruled on the point raised *in limine*. In absence thereof, the court of appeal is now required to sit as court of first instance on issues belatedly raised and without the benefit of hearing the views of the court below on point. At no stage during the bail application did the appellants give notice that the court's jurisdiction would be challenged. The State (respondent) was entitled to know the nature and extent of the case, in this instance the bail application, it had to meet and be afforded the opportunity to present evidence and/or argument when meeting the challenge.

[11] No application to lead further evidence on appeal was made and neither has any explanation been tendered as to why the appellants should be permitted to be heard on issues not raised and dealt with during the bail application.

[12] In the premises, I had come to the conclusion that it would not be in the interest of justice to entertain any argument on the grounds pertaining to jurisdiction as noted in the appellants' notice of appeal, or heads of argument. The court conveyed its views to counsel and accordingly declined hearing any further argument on point. For reasons stated, the issue need not be addressed at all, more than I already have.

[13] Mr *Namandje*, before arguing the appeal on the merits made two introductory remarks which this court, in his view, ought to take cognisance of. These are (a) Nine months down the line since the appellants' arrest, the investigation has not been completed whilst the appellants are kept in custody. This, it was said, seems to be endemic of our legal system where the wheels of justice turn slowly. (b) That during proceedings of this nature foreign nationals should not be treated differently and in such way that they are ultimately left without hope simply because of the fact that they are foreigners.

[14] Pertaining to the investigation of criminal cases in this jurisdiction, experience has shown that the time afforded by lower courts for purposes of investigation of cases is, more often than not, exceptionally long – even where the facts are simple and uncomplicated. Not only is this practice demoralising to the accused, it also affects persons such as witnesses and interested parties who lose faith in the criminal justice system when proceedings are unjustifiably protracted. It is not in the interest of justice to harbour such practices and as the old adage goes, 'justice delayed is justice denied'. An accused's right to a fair trial is enshrined in our Constitution and more specifically in Article 12 (1)*(b)* which states in imperative terms that a trial shall take place within a reasonable time, failing which the accused shall be released.

[15] That being said, one should guard against oversimplification as there are indeed cases that would require a different style of investigation due to its complexity. This will obviously differ from one case to the next and each investigation must be approached and conducted on the basis of finding the best way to collect and preserve evidence relevant to the offence(s) charged, within the shortest possible time. As for the present matter, evidence was adduced that cross-border investigation was required which, for obvious reasons, will require more time. However, the fairness of any additional time required by the State to complete the investigation must be gauged by the court. It should only be granted when found to have merit and when reasonable in the circumstances of the particular case. In short, an extended period of time for purposes of investigation should only be granted when it is in the interest of justice to do so. Under s 60(1) of the Act the accused has the right at a later stage to (again) approach the court seized with the matter to reconsider the granting of bail. This would normally happen when new facts emerge.

[16] As for the present appellants being foreigners, I am unaware of any authority to the effect that the court, in a bail application, should follow a different approach in its assessment of the evidence simply because the accused is of foreign nationality. Though it being an important factor that must

obviously be taken into consideration, it is not the determining or sole factor the court will have regard to. This was indeed the approach followed by the court *a quo* and which is equally born out in this court's judgment.

[17] The court sitting as court of appeal against the refusal of another court to grant bail, is bound by the provisions of s 65(4) of the Criminal Procedure Act 51 of 1977, and may only overturn the court *a quo's* decision once satisfied that the court exercised its judicial discretion wrongly.[3] To this end appellants contend that the learned magistrate erred and misdirected herself on the law and/or the facts in various respects. I will return to these grounds shortly.

[18] The State opposed the application for the granting of bail on the following grounds: It was asserted that, based on facts that appellants are Angolan nationals residing in Angola and having failed to provide the investigating officer with their fixed addresses at home, this makes them a flight risk. The risk, it was argued, is further exacerbated by the absence of any extradition treaty between the two countries. Though the State initially asserted that appellants had entered into Namibia without official travelling documents, it emerged during court proceedings that they had handed their official passports over to the investigating officer after their arrest. A further ground on which bail is opposed is that the police investigation is only at a preliminary stage and would necessitate cross-border and, possibly, international investigation. This is due to the large amount in cash found in possession of the appellants requiring further investigation as to whether or not it is the proceeds of crime or emanates from organised crime. It was further contended that if the appellants were to be admitted to bail, there is a real possibility of their interference with police investigations or the influencing of State witnesses living outside Namibia. Lastly, that it would not be in public interest or in the interest of the administration of justice if bail were to be granted, as the cause for appellants having such large amounts in cash in their possession, and whether the moneys are the proceeds of crime, still had to be established during the investigation.

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[3] *S v Timotheus* 1995 NR 109 (HC) at 112H-I.

[19] The court's power to refuse bail on grounds of public interest and interest of the administration of justice is set out in s 61 of the Act in the following terms:

> **'Bail in respect of certain offences**
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> 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, notwithstanding that it is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness 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 interest of the public or the administration of justice that the accused be retained in custody pending his or her trail.'[4]

[20] Mr *Namandje* submitted that the court *a quo* committed a misdirection by relying on the provisions of s 61 (as amended) when refusing the appellants bail. It was argued that s 61 only applies to those offences referred to in Part IV of Schedule 2 whilst none of the offences for which the appellants were charged at the time of the bail application, are listed thereunder. Offences under POCA and the Exchange Control Regulations are indeed not incorporated in the schedule which, on a proper interpretation of s 61, would exclude the application of the section in the present instance. In reply thereto Mr *Khumalo*, pointed out that the schedule refers to 'Any offence relating to the coinage' which, in his view, could be interpreted to also include cash found in possession of the appellants.

[21] Whereas the word 'coinage' is not defined in the Act[5], it must for purposes of interpretation be given its ordinary meaning. In the Dictionary of Legal Words and Phrases[6] the word coinage means: The process of making money. A similar meaning is given thereto in The Concise Oxford Dictionary (10th ed.) namely: 1. The art or process of coining. 2. Coins collectively.

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[4]Section 61 substituted by s 3 of Act 5 of 1991.
[5]Act 51 of 1977.
[6]Judge R.D. Claassen (compiled) Service Issue, 14 June 2011.

[22] When applying the aforesaid meaning to the word 'coinage' as it appears in Schedule 2 of the Act, then it is clear that it is out of context with what the Legislature intended i.e. a specific offence which involves the process of making coins, and not any offence involving money in cash. The possession of money not deriving from any of the offences listed in Schedule 2 would thus be excluded from the provisions of s 61 and may not be relied upon to refuse bail on grounds that it is in public interest or the administration of justice to retain the accused in person.

[23] Appellants at the time of the bail application were in custody on charges in contravention of POCA and the Exchange Control Regulations, 1961 which offences are clearly not included under Schedule 2 of Part IV of the Act. For the court to have included these offences under Schedule 2 would definitely constitute a misdirection. It was submitted on behalf of the appellants that the magistrate hearing the bail application indeed incorporated the offences charged under the Schedule. This, it was argued, constituted a misdirection which entitles a court of appeal to interfere with the decision of the court below.

[24] From a reading of the judgment[7] it is clear that, by quoting s 61, the court was familiar with the provisions of the section, but failed to state in any specific terms whether the court relied on the section when refusing bail. The court immediately thereafter went over to discuss the other grounds of appeal[8] and, in conclusion, found that the appellants failed to prove on a balance of probabilities that they would not be a flight risk.[9] Reasons for having come to this conclusion were stated, full regard being had to other grounds on which the court relied when taking a decision. I will return to these grounds later.

[25] As mentioned in the preceding paragraph, there is nothing in the court *a quo's* judgment stating that the provisions of s 61 were invoked in order to

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[7]Record p.359 line 14.
[8]Record p. 359 line 22 *et seq.*: The risk of absconding; the risk of interference with investigations; the fact that the investigation was still at a preliminary stage; the strength of the State case; that appellants admitted possession of the money which they failed to declare upon entry; and that they relied on other persons to bring part of the money into Namibia.
[9]Record p. 361 line 25.

refuse the appellants' bail. The reason for this seems to me to lie in the court's earlier finding that the appellants are a flight risk and therefore cannot be admitted to bail; hence, there was no need to invoke the provisions of s 61. This is augmented by the court having found, even if bail conditions were to be set, that in view of the seriousness of the offences charged and applicable penalties, there is a real likelihood that appellants would still be induced to breach bail conditions. Accordingly, I am not persuaded by counsel's contention that the court misdirected itself in this regard.

[26] Mr *Namandje* also submitted that the magistrate further misdirected herself when stating that the offences charged requires strict liability; also that she took cognisance of an agreement between the Bank of Namibia and its counterpart in Angola, Bankor Nationale De Angola. The magistrate explained in her judgment that, for purposes of her decision, she had scrutinized the said agreement and after briefly explaining some aspects thereof, came to the conclusion that the appellants were in breach of certain terms of the agreement. Other than reference being made in the evidence about the said agreement, no direct evidence in respect thereof, or a copy of the agreement itself, had been presented in evidence.

[27] The agreement between the banks had not been signed into law and non-compliance of any of its provisions by the appellants would thus not have constituted an offence, either in Angola or Namibia. Neither was the agreement before the court as evidence and for the court below to have taken judicial notice of facts contained in an agreement not properly placed before the court, constituted a misdirection. It would appear to me that the magistrate deemed the action taken by herself necessary to shed more light on the arrangements between the banks and to point out the limitations placed on the exchange of currency by the central banks of both countries. The court *a quo* had also come to the conclusion that appellants, on the strength of this agreement, were in breach thereof. Though the conclusion reached seems to suggest that appellants are not law-abiding citizens, this is not an instance where the court, as in *S v Swanepoel*[10], (authority relied upon by the

[10]2004 (10) NCLP 104 (HC).

appellants), was already convinced during the bail application that the appellants were guilty. In the present instance the court specifically stated that their guilt still had to be established during a full trial. What must be decided is what effect did the irregularity committed have on the outcome of the bail proceedings?

[28] It is well established that not every irregularity will have the same result, namely, that a finding of the court *a quo* will be overturned on appeal once an irregularity had been committed. In *S v Shikunga*[11] it was held that where the court is dealing with an irregularity of a less severe nature and depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Though the irregularity under consideration did not arise from a trial, but bail proceedings, the principle remains the same. What the court of appeal must look at is the extent of the irregularity and then determine whether or not the decision reached by the court *a quo* was tainted by the irregularity.

[29] When applying the aforesaid principles to the present facts, I am respectful of the view that the irregularity committed by the court below, in the circumstances of the case, is not of a fundamental nature justifying the setting aside of that court's decision. Though it was impermissible for the court to have regard to facts falling outside the scope of the evidence adduced, the facts so established did not, from a reading of the judgment, influence the magistrate in coming to the conclusion that appellants were a flight risk. The effect of the irregularity was that the magistrate formed an opinion that appellants were, in addition to the counts they were facing, also in breach of an agreement reached between the central banks of the two countries, though mindful that it had to be proved during the ensuing trial. It does not appear to me that the irregularity was fundamental and of such nature that it taints the decision reached by the court *a quo* regarding the refusal of bail. The submission on this score on behalf of the appellants is therefore without merit.

[11]1997 NR 156 (SC).

[30] Although the magistrate's interpretation of POCA is that the Legislature intended strict liability, she made it clear in the judgment that this was an aspect to be decided during a trial and not the bail application. It was therefore not taken into consideration. Accordingly, argument presented on this point also has no prospect of success on appeal.

[31] For the sake of completeness it seems necessary to briefly state the facts which led to the arrest of the appellants on the 22nd of September 2015 and the facts the court *a quo* had to consider in the bail application.

[32] Appellants were driving from Oshikango in a vehicle belonging to first appellant when they arrived at a road block just before reaching Otjiwarongo. They were questioned by the police as to their whereabouts and during a search of the vehicle a substantial amount of cash in Namibian currency was found in three bags in the boot of the car.[12] In addition thereto an even larger amount was found stashed under the rear seat.[13] Following their arrest they were taken to the police station where more cash was found on second and third appellants, stuffed into their socks.[14] What is clear from the evidence is that, although different amounts belonged to each of the appellants, they had put their respective moneys together whilst transporting it in the vehicle. First appellant claimed N$1 020 000 of the money to be his, N$250 000 belonged to second appellant and N$750 000 to third appellant. Appellants' explanation for having hidden the money as they did was that they feared of being robbed whilst *en route* to Windhoek to have the Namibian dollars exchanged for US dollars.

[33] As to how these sums of money came in their possession, each testified that it was the proceeds of their operations as money-brokers in Angola. According to them they conducted their business on the street and was not by law required to be licenced or registered in any way to ply their trade. They had during the bail application not presented any official proof or evidence from an independent source in support of these contentions. The closest

[12] N$140 000 in each bag, totaling N$420 000.
[13] The amount of N$1.32 million.
[14] N$140 000 each.

appellants had come to the production of such evidence is a set of photographs taken by a family member who had travelled from Windhoek to Santa Clara in Angola (at their lawyer's request) to take photos of unknown persons handling money on the streets. The production of these photographs into evidence as proof of the (lawful) exchange of foreign currency on the streets in Angola, in my view, falls far short of establishing proof that this practice is indeed legal and not regulated in any way by the laws of that country. Substantive and concrete evidence pertaining to the regulation or otherwise of the exchange of foreign currency in our neighbouring country seems to be key to the appellants' case, especially when regard is had to the charges they are presently facing. Although the alleged offences committed by the appellants must still be proved in a court of law, reliable and concrete evidence as to how they had come into possession of such large sums of money would likely have carried more weight at the bail application. In the absence of statutory evidence regarding the unregulated trading of foreign currency in Angola, the mere production of the photographs had very little, if any, probative value.

[34] Appellants further intimated that they will rely on the defence of ignorance of the laws of Namibia when entering the country without declaring the amount in cash in their possession. In support thereof and serving as justification of their ignorance, appellants testified about a similar incident on 16 September 2015 when they had also entered into Namibia with large sums of cash in Namibian currency, which were exchanged for US dollar in Windhoek before returning to Angola the next day.[15]

[35] Evidence crucial to the question as to whether or not the appellants posed a flight risk, emerged during the testimony of the investigating officer, Detective Warrant Officer Ipumbu, when he disclosed that it had been established that appellants, upon leaving Namibia on the 17th of September 2015, failed to report themselves to an immigration officer at Oshikango border post as they were by law required to do. Although the passport of each reflects that they had entered on the 16th, it bears no departure stamp from

[15]First appellant entered with N$140 000; second appellant with N$130 000; and third appellant with N$150 000.

the immigration office at Oshikango, or any other designated border post in Namibia. Neither do their passports reflect any stamp upon entry into Namibia on either the 21st or 22nd of September 2015 which, according to the investigating officer, clearly shows that the appellants in the past have crossed the border without being monitored.

[36] Upon further investigation the investigating officer was unable to find proof at any of the banking institutions and Bureau of Exchange at Oshikango of transactions conducted between the appellants and these institutions for the period 16 September 2015 to date of arrest one week later. The reason for this seems to be that the appellants, in some instances, claimed to have made use of other persons to bring the money into Namibia and then made use of 'authorised dealers' to exchange money at the banks in Oshikango. These so-called 'authorised dealers' appears to be ordinary people on the street. They have not explained as to why they could not have done so themselves, except for third appellant saying that he was aware that only N$150 000 per person may be brought into Namibia and that is why he had made use of four other persons to bring his N$750 000 across the border on the 21st of September 2015.

[37] In an attempt to counter evidence about the appellants having unlawfully left the country on 17 September 2005, it was put to Ipumbu in cross-examination that he was in possession of a Road Fund Administration receipt bearing the same date, on which appellants were allowed to pass. Appellants had given no evidence themselves on this crucial aspect and, because evidence cannot come from the Bar, it should not be accorded little weight, if any. In any event, it seems to me that the argument is based on incorrect facts. Appellants would have been required to pay a specified amount as road tax upon *entering* Namibia (on the 16th) and not when they *departed* on the 17th of September 2015. Furthermore, as pointed out by the investigating officer, the office responsible for the collection of road tax is not connected to immigration control and the appellants could not have continued simply because they arrived at the border post after office hours. No evidence was presented as to why first appellant upon entry on the 22nd did not again obtain

a receipt for any road tax payment made. Neither did they explain why their passports were not endorsed at the same time; again this was left to their counsel to explain whilst he was not a witness to the proceedings.

[38] Contrary to the explanations submitted on the appellants' behalf, it is clear from the evidence of Ms Amukotu, an immigration officer employed by the Ministry of Home Affairs and stationed at Oshikango, that no person is permitted to enter or depart from Namibia without his or her passport being endorsed by an immigration official. This witness further testified that illegal border crossing at Oshikango can readily be executed undetected, as control at the border is not impenetrable.

[39] Not surprisingly, the magistrate held that important evidence pertaining to the appellants' cross-border movements earlier, had been left out during their application for bail. The court also had regard to the passports of first and third appellants, showing that during previous visits to Namibia they had their passports endorsed upon entry and departure, but failed to act similarly on the date of their arrest. It was thus not their first visit to Namibia and they had no reason to have acted any differently.

[40] In view of these shortcomings in the appellants' application, the court was not persuaded that it had been established that they were not a flight risk. The court also took cognisance of the appellants being foreigners from a country with whom Namibia has no extradition arrangements. Also, that the border between the two countries, as the evidence has shown, is porous and could be crossed undetected by the authorities with ease. This court in *S v Yugin and Others*[16] as per Hannah, J said thus:

'The next step is to consider the ties which an accused has with this country. This again goes to the incentive to abscond. Common sense dictates that an accused who has been born and bred in Namibia, whose home and family are in Namibia and who has no refuge elsewhere, is less likely to abscond than an accused who is a foreign national resident here solely or mainly for business reasons.

…

[16]2005 NR 196 (HC) at 200I – 201C.

Another factor to be brought into the equation is an ability by an accused to abscond. It is said that the appellants lack such ability because their travel documents have been surrendered, their country of origin is far away and, in the case of the first appellant, he is seriously incapacitated. I do not regard such matters to be insurmountable obstacles for a person who has a real incentive to evade trial by leaving Namibia and returning to his home country. We have many borders and, as experience has shown, they can be penetrated with relative ease.'

These remarks equally find application in the instant matter. In fact, the evidence presented clearly shows that appellants, on more than one occasion, had crossed the border between Namibia and Angola with ease and undetected.

[41] Appellants are facing serious charges under POCA and, undoubtedly, are likely to attract severe punishment if they were to be convicted. This is indeed a risk the appellants must be alive to and which in itself might be an incentive for them to abscond and not stand trial. However, this is not a factor to be considered in isolation, it must be weighed together with all other factors relevant to the bail application.

[42] The evidence further established that appellants, apart from one or two distant family members, have no ties with Namibia. Mention was made about someone who had deposed to a statement that he or she was willing to accommodate the appellants during their stay in Namibia, that is, if they were to be granted bail. However, in the absence of concrete evidence pertaining to the identity of this person, the extent of the commitment towards the appellants and the circumstances under which they were to be accommodated, this is not a factor the court was obliged to have taken into consideration. As Mr *Tjiveze* for the State argued, even if someone were to offer assistance to the appellants by providing them with accommodation, there was still no guarantee that they will not evade justice, as this person would have no control over their movement because of them being adults, not minors who could be placed in someone's custody and that person being held accountable for the minor's behaviour.

[43] Another factor taken into consideration by the court *a quo* arose from the testimony of the investigating officer and concerns the stage at which the investigation was at the time of the application. According to his evidence it was merely at a preliminary stage and in order to verify information provided by the appellants as to how they came in possession of moneys claimed to have been legally earned in Angola, cross-border investigation was inevitable which, in itself, would require authorisation at diplomatic level, a step likely to protract the investigation. He was further of the view that the possibility of the appellants interfering with the investigation, when granted bail, cannot be ruled out completely; more so, where they claim to have generated the money in question by conducting business on the streets back home, not from any businesses registered in their name.

[44] When looking at the nature of the charges preferred against the appellants and the extent of the investigation to amass evidence in order to prove the offences charged, it would appear to me that this is not the ordinary run of the mill case where the investigation could be finalised within a reasonably short period of time. Appellants' alleged lawful claim to the money is based on bank statements submitted as evidence at the hearing. Bank statements of two different accounts held in the name of first appellant, and a bank statement in the name of second appellant reflect large sums of money having been deposited into these accounts, running into millions at a time. It also reflects the transfer of large amounts of money made between first and second appellants as account holders.

[45] As stated by Warrant Officer Ipumbu during his testimony, the fact that two of the appellants have submitted their bank statements reflecting the deposit and withdrawal of large sums, does not *per se* prove that the money was legally generated and therefore not the proceeds of crime. The origin of the money still has to be investigated and determined.

[46] It is settled law that the opinion of the investigating officer on questions as to whether or not it is likely that the accused will abscond or interfere with the investigation should also carry some weight: Provided that the final

decision still lies with the court who must not allow the mere *ipse dixit* of the investigating officer to substitute the court's discretion.[17]

[47] When considering as to whether the testimony of the investigation officer is reasonable in the light of all the evidence, there are in my view two aspects that weigh against the appellants i.e. (a) the fact that the investigation was still in the beginning stage when the bail application was brought; and (b) that the investigation in all probability will extend beyond the borders of Namibia.

[48] Without expressing any views on facts that might later become relevant to establish the guilt of the appellants during the trial, it would appear to me that the volume of money handled by the appellants, as reflected in the bank statements of first and second appellants, stand in sharp contrast with their own evidence as to how much each of them earned per month as money-brokers on the streets. According to their testimony, about half of their earnings is used to cover their monthly expenses which, in my view, raises more doubt as to their ability to raise that much money within such short period of time. Neither do the deposits into their bank statements support contentions that these were the proceeds of interest fees collected from exchange transactions done on the street. Substantial amounts were deposited at short intervals into both accounts, which makes it highly unlikely to have been the proceeds of commission generated off the streets from simple transactions.

[49] Furthermore, bearing in mind that third appellant admitted having made use of other persons to bring large sums of cash across the border on his behalf in order to circumvent exchange regulations (of both countries); that they themselves had stashed cash under the seat of the vehicle in which they were travelling, as well as in their socks, it then seems inevitable to come to the conclusion that their actions are highly suspect. They have made no attempt to explain why they themselves, having been in the business as money-brokers for many years, could not directly approach banks in Angola or

[17] *S v Du Plessis* 1992 1992 NR 74 (HC) at 83G-I.

Namibia to have foreign currency exchanged, and why they had to rely on unknown persons to do these transactions on their behalf.

[50] Had the appellants taken the court into their confidence, they would have addressed these issues when testifying on the merits of their application but, instead of doing just that, they concocted a story which had only one aim and that was to mislead the court. The court *a quo*, however, did not buy it.

[51] Factors such as to whether or not it would be in the interest of justice to grant the appellants bail, or whether the State has a strong or weak case against the appellants must not be viewed in isolation. As with the evaluation of all evidence, the court must follow a holistic approach when assessing and weighing the evidence for and against the applicants in a bail application.

[52] It would of course not be in the interest of justice if bail is refused in circumstances where, on the facts it is clear from the onset that there is no case made out against the accused. This would be the case where the facts are simple and straight forward and not implicating the accused. In the same vein would it not be in the interest of justice to grant bail, even more so when it involves a serious offence, if the State's inability to make out a strong case against the accused at the time of the bail application, can be ascribed to the investigation being at a primary stage and the State requiring more time to build or strengthen its case. This, one would find where the investigation is complex and likely to take up more time than usual to investigate. The present matter seems to be one such case.

[53] For the afore-going reasons, it seems to me premature at this stage of the proceedings to come to any final conclusion as to the strength of the State case; this much is evident from the investigating officer's testimony. The court below was alive to the gravity of the offences appellants are facing and after due consideration of the appellants' testimony, was satisfied that they had a case to answer. On their own evidence they have employed ways and means to bring large sums of money in cash across the border in circumstances

where their movement went undetected. These facts clearly, and in my view correctly, weighed heavily against the appellants in the bail application.

[54] It was further argued on the appellants' behalf that the State should have raised with the appellants, when on the stand, that they had crossed the border illegally and not to have waited to do so when leading its own witnesses. I do not agree. Appellants bore the onus to show that they will stand their trial and bearing in mind that they were foreign nationals, ought to have foreseen that any crossings between Angola and Namibia would be a contentious and crucial aspect of their case. They had the duty to explain to the court why their passports had not been endorsed either on departure or upon entry, but chose not to do so. It was only when this was detected by the investigating officer during his testimony that they attempted to proffer an explanation through their lawyer. They cannot afterwards be heard complaining that they were prejudiced in any way and only have themselves to blame for failing to give evidence in that regard. There is thus not merit in this ground either.

[55] In the final analysis, the conclusion reached by the court below that appellants are a flight risk, was based on a proper assessment of all the facts placed before the court. It is furthermore consistent with legal principles applicable to applications of this nature. I am therefore unable to fault the magistrate in the conclusion reached. Consequently, there is no merit in the appellants' contention that they are not a flight risk and the appeal falls to be dismissed.

[56] In the result, it is ordered:

1. The late filing of appellants' amended notice of appeal is condoned.
2. The appeal is dismissed.

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JC LIEBENBERG

JUDGE

APPEARANCES

APPELLANTS	S Namandje Of Sisa Namandje & Co. Inc., Windhoek.
RESPONDENT	P S Kumalo Of the Office of the Prosecutor-General, Windhoek.