

HIGH COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

Case No: CA 7/2016

In the matter between

DAVID MATALI

APPELLANT

Versus

THE STATE

RESPONDENT

Neutral citation: *Matali v The State* (CA 7/2016) [2016] NAHCMD 181 (23 June 2016)

Coram: SHIVUTE, J

Heard: 1 June 2016

Delivered: 23 June 2016

Flynote: Criminal Procedure – Bail – Appeal court should only interfere if magistrate exercised its discretion wrongly – Bail – Appellant interfering with State witnesses – Evidence that appellant phoned potential State witnesses – Appellant close friends to State witnesses – Magistrate entitled to refuse bail – Bail – In determining bail – Factors to be considered – Seriousness of offence – In light of lengthy sentence which would be imposed if convicted – Incentive for appellant to abscond – Whether the state established prima facie case – Court should consider evidence in its totality including accused’s version – Court held that no reason to interfere – Appellant’s appeal dismissed.

ORDER

The appeal is dismissed.

JUDGMENT ON BAIL APPEAL

SHIVUTE, J

[1] This appeal originated from the magistrate's court after the magistrate refused to admit the appellant on bail pending his trial on counts of murder, robbery with aggravating circumstances and conspiracy to murder contravening s 18 (2) of Act 17 of 1956. The State opposed bail on various grounds namely: The offence is too serious, there is a prima facie case established against the appellant, there is a risk of absconding, the appellant may interfere with witnesses, the investigations are not completed and that it is not in the interest of public or administration of justice.

[2] The personal circumstances of the appellant are that he is a Namibian citizen who is married to a German national. He has no immovable property registered in his name. However, he has movable property namely three motor vehicles and twenty heads of cattle. He is HIV positive and he is taking Antiretroviral medication. He is well travelled and his wife is working in Namibia on a contractual basis. At the time the appellant was arrested he was on bail in respect of an assault with intent to do grievous bodily harm case. However, that case was withdrawn due to the fact that the docket was not taken to court.

[3] The appellant testified that should he be admitted to bail he would stand his trial. He denied any involvement in the commission of the offences preferred against him by the State. He testified further that he will not interfere with State witnesses. He further relied on the defence of an *alibi*.

[4] It was again the appellant's testimony that due to his ill health he could not get proper treatment as he so required whilst he is incarcerated. To support his claim he called his wife who testified that the appellant needs a proper diet and regular visits to his doctor for check-ups and to obtain his medication.

[5] The state called the investigation officer and two other witnesses who are also police officers. According to the investigating officer, the appellant is heavily implicated in the commission of the offence by three of the co-accused persons who made confessions that he was involved in the murder of the deceased. There is also a statement from Mr Sambu who said that he was approached by the appellant who was looking for poison but he told him that he had no poison. The appellant confirmed the allegation that he was looking for poison but he said the poison had nothing to do with the deceased. He wanted it in order to go and poison animals particularly lions at the cattle post. The State led further evidence that the appellant was phoning potential witnesses whilst he was in custody. He phoned warrant officer Sambu who is a witness in this matter requesting him to inform one Sambu and Victor, both potential witnesses in this case, to tell them to bring his medication to the police station. The appellant was found with two sim cards and two cell phones whilst he was in the holding cells.

[6] The appellant gave his ATM card to a lady to serve as security for the money that was borrowed by the appellant and the deceased's wife who is a co-accused in this matter. The state further led evidence that the third accused was arrested as a result of sms that was sent from accused 3's cell phone to the appellant. Accused 3's number was registered as code 'AAA' in the appellant's phone book. Appellant further communicated with accused 1 who phoned him whilst she was using the sim card of her son.

[7] The appellant appealed on the following grounds:

- 'a) That the court relied on the opinion of the investigation officer that there is a strong case against the appellant whilst the investigating officer's opinion was based on the confessions by the co-accused persons.
- b) That the court assumed that if the confessions are one day admitted, the state will have a strong case against the appellant and when he stated that once the co-accused persons decide to testify against the appellant, their evidence would constitute a strong case against the appellant.
- c) That the court paid lip service to the appellant's evidence tendered by him and on his behalf by making a finding that such evidence is not honest and full of discrepancies without any justification.
- d) That the court relied on documents submitted by state without taking cautions to admissibility of the content whilst the author did not testify.
- e) It was further a point of contention that court misdirected itself by making a finding that the appellant would abscond if granted bail without any explanation for such a decision ignoring the fact that the appellant went to the police station on his own after he was called by the police.
- f) That the learned magistrate misdirected himself when he made a finding that there is a strong possibility that the appellant would interfere with state witnesses namely; Sambu and Victor merely because they are friends and no evidence adduced suggesting the realisation of such alleged possibility.
- g) The appellant alleged that the court made a finding that the community was shocked and outraged without any basis.
- h) That the court erred by ruling that the appellant's wife is a foreign citizenship thus making the appellant to be a flight risk, whilst the wife is still waiting for her citizenship documents from the Ministry of Home Affairs in Namibia.
- i) The court misdirected itself when it ruled that the appellant had failed to prove his case to be granted bail whilst when one considers the appellant's evidence it is apparent that the appellant proved its case on a balance of probabilities that he should be admitted to bail. Furthermore, the court misdirected itself when it ruled that the state's evidence is reliable and the truth despite material discrepancies and contradictions adduced by Sgt Nuule and Sgt Hangule when searching the appellant.
- j) It was again a ground for an appeal that the court a quo failed to consider the evidence in toto from both parties and mostly relied on the state's version.'

[8] When the court *a quo* considered the appellant's application it considered that there were contradictions and anomalies that came out in cross-examination namely: Evidence concerning pending cases against the appellant, the poison he sought to obtain from one Sambu, his knowledge of the marital problems between accused 1 and the deceased, his relationship with accused 3, evidence regarding his explanation for the code name 'AAA', particulars about his travels outside Namibia in the past year, the changed status of his wife's nationality, the reason why he requested warrant officer Sambu to contact Sambu and Victor to bring his medication and not his wife and the total silence about the pending case in Katima Mulilo court in which bail was already forfeited in that case.

[9] In respect of the evidence presented by the State, the court took into consideration that the State's case is not fully investigated and that there is strong circumstantial evidence linking the appellant to the commission of the offences.

[10] Furthermore, the court was alive to the implications regarding confessions of co-accused persons against the appellant and stated the following:

'Even though the confessions made by co-accused are not admissible against appellant, there are ways in which such statements can become evidence against the applicant, for instance,

- (a) if those making confessions decide to plead guilty and testify against appellant;
- (b) If those who made confessions testify during the trial linking appellant to the offence;
- (c) If those people are used in terms of section 204 of the CPA. Then also, the DNA evidence that has not yet been obtained, might place appellant at the scene of the crime.'

[11] The court then arrived at the conclusion that the appellant failed to convince the court that he was completely honest in his application. He failed to convince the

court on a balance of probabilities that he would stand his trial, or not interfere with State witnesses. It further reached a conclusion that there is a possibility for the accused to abscond. Concerning the illness that the appellant suffers from, the court arrived at the conclusion that the appellant has to prove extra-ordinary circumstances regarding his medical conditions that require his release on bail.

[12] When considering bail application the court will have to consider various factors inter alia, if granted bail, whether the accused will stand his trial or whether there is a real possibility that he will abscond. The court will further consider the seriousness of the charge in light of the lengthy sentence to be imposed should the appellant be convicted. If the sentence to be imposed is likely to be long then there is an incentive for the appellant not to stand his trial. If the accused in this matter is convicted of murder and robbery with aggravating circumstances it is obvious that he will be met with a lengthy term of imprisonment. However, the above mentioned factors are not themselves determining factors. The court needs to consider the likelihood of conviction on such charges. This is in line with the matter of *S v Yugin and others* 2005 NR 196 at 200E-D at para 11 where it provides that:

'In considering this factor the court must perform a balancing act. It must balance in the scales the evidence adduced by an accused, which will usually be a denial of guilt, against the strength or apparent strength of the case which the prosecution says it will present at the trial. The result of this balancing act will play an important part in determining whether an accused may or may not decide to be a fugitive from justice rather than stand his trial.'

The court rightly indicated that there is strong circumstantial evidence against the appellant.

[13] Furthermore, the court should also consider the interference of witnesses, whether the appellant knows the witnesses and whether there is a real likelihood for the appellant to interfere with witnesses. In this matter the accused is a friend to two potential State witnesses namely Sambu and Victor. He already tried to contact them

whilst he was in custody with a cell phone that he was not supposed to keep in custody. Concerning the appellant's HIV status, the State adduced evidence that there is a clinic at the Windhoek Correctional Facility where the accused is being held. Therefore, he will be able to have access to medical facilities and to be referred to the doctor when the need arises.

[14] The appeal court may only set aside a decision refusing bail if it is satisfied that it was wrong. The decision to grant bail lies in the discretion of the court conducting the bail inquiry. This discretion should not be lightly interfered with especially not on the basis that the appeal court is of the opinion that it would have made a different decision if it had sat as a court of first instance. The court should only interfere if the court a quo exercised its discretion wrongly by either applying the law wrongly or by getting the facts wrong or by taking into account irrelevant considerations and disregarding relevant considerations. The question to be asked by the appeal court is whether the court a quo who had the discretion to grant bail exercised that discretion wrongly. (See S v Timotheus 1995 NR 109A-B.)

[15] The court a quo was heavily criticised by counsel for the appellant that it relied on the confessions of the co-accused against the appellant and assumed that if such confessions are later admitted into evidence, the State will have a strong case against the appellant in the trial court. However, I am of the opinion that this criticism has no merit because the court a quo did not rely on the confessions of the co-accused. The learned magistrate specifically said that there is strong circumstantial evidence against the appellant. These circumstantial evidence can be inferred from the poison the appellant went to look for, a fact which is not denied although it was stated that he wanted the poison to go and kill lions at the cattle post. The ATM card that was left as security, the link between appellant and accused 3 and that the 3rd accused was arrested as a result of an sms that was sent to the appellant's cell phone. Again, the appellant was aware of the death of the deceased when he allegedly phoned Sambu on 31 March 2015 before 10h00 whilst the deceased's body was only discovered at about 17h00 that same day. This is just to mention a few.

[16] The magistrate by saying that even though the confessions made by a co-accused are not admissible against the appellant and by referring to instances when such statements may be admissible did not mean that he relied on the confessions of the co-accused persons against the appellant. He merely stated that in order to indicate that he was alive to the fact that confessions made by co-accused are not admissible. However, there are some exceptions to that.

[17] With regard to the remarks by the learned magistrate that there is a possibility that the appellant might be implicated by DNA evidence, unfortunately this is not the only possibility as DNA evidence may also exonerate the appellant. The magistrate in this regard misdirected himself by making such an assumption. However, this assumption is not material to vitiate the proceedings as the magistrate has relied on other factors when he denied the appellant bail.

[18] Having considered the evidence regarding the application for bail, I am of the opinion that the magistrate considered the appellant's evidence and the evidence adduced by the State and struck a balance between the two opposing versions and arrived at the conclusion to refuse to grant the appellant bail. As I alluded to earlier, the decision to grant or refuse bail is in the discretion of the court that is conducting the bail inquiry and it should not be lightly interfered with unless that discretion has been wrongly exercised. The learned magistrate relied on the evidence of the investigation officer as well as the evidence of warrant officer Sambhi and Sgt Hangula in reaching his conclusion. I am not satisfied that the learned magistrate wrongly exercised his discretion.

[19] It follows that this court has no reason to interfere with the decision of the learned magistrate.

[20] In the result, the following order is made:

The appeal is dismissed

N N Shivute
Judge

APPEARANCES

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