

**REPUBLIC OF NAMIBIA**

**NOT REPORTABLE**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK  
RULING: APPLICATION FOR LEAVE TO APPEAL**

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

In the matter between:

**JACO KENNEDY**

**APPLICANT**

And

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Kennedy v State* (CA 23-2016) [2016] NAHCMD 244 (30 August 2016)

**CORAM:** SIBOLEKA J

**Heard on:** 28 July 2016

**Delivered on:** 30 August 2016

**Flynote:** Criminal law: Application for leave to appeal – applicant must show that he has reasonable prospects of success should the application be granted.

**Summary:** The applicant – originally a suspect on the charge of Rape in contravention of Section 2(1) of the Combating of Rape Act, Act 8 of 2000. He was granted bail pending finalization of the matter. While still a free person on that case fresh allegations of another Rape again surfaced against him triggering his arrest and incarceration. An application for bail on this matter was refused by the Magistrate. An appeal against that refusal was dismissed by this court – hence an application for leave to appeal to the Supreme Court.

Held: The test in an application for leave to appeal is whether the applicant has shown on a balance of probabilities that he has reasonable prospects of success should such an application be granted.

Held: No prospects of success have been shown.

Held: The application has no merit and is dismissed.

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**ORDER**

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In the result I make the following order:

The application for leave to appeal is dismissed.

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**RULING: APPLICATION FOR LEAVE TO APPEAL**

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SIBOLEKA J:

[1] This is an application for leave to appeal this Court's dismissal of the applicant's appeal against the Magistrate's refusal to release him on bail.

[2] The discussion of the grounds of application for leave to appeal.

[2.1] Propensity to commit further offences if released on bail: Failure to consider the imposition of appropriate bail conditions unto the appellant:

Bail simply means the release of a suspect after depositing an amount of money ordered by Court in a serious matter. It enables the suspect to go on with his day to day life as a free person save to appear before Court on particular dates ordered. A re-arrest of a suspect who is already on bail on a similar or other serious crime will alert any Court acting carefully to be hesitant to again release the same suspect on bail.

The applicant was a free person after being granted bail on the first allegations of Rape levelled against him. The normal consequences of bail without conditions, being that he keeps on appearing in Court at various stipulated Court dates applied to him. He was entitled to remain on bail until such allegations were fully heard and adjudicated upon accordingly.

[2.2] Disregarding the legal principle of *stare decisis et non quieta movere*:

In my appeal judgment I said I did not follow the Unengu matter (*Unengu v S* CA 38/2013). This matter was heard by a single judge of this Court. It is therefore not correct for the applicant's counsel to suggest that it is a settled authority on the principle of *stare decisis* that a suspect who has a serious pending case should be granted bail on fresh allegations of the same offence. Two judges of this Court in the matter of *Michael Onesmus v S* Case No. CA 01/2013 delivered on 22 April 2013 endorsed the Magistrate's refusal to grant bail to a suspect who already had serious pending cases of similar nature to what he was facing.

[2.3] While the applicant had the pending Rape case against him fresh allegation of another Rape surfaced against him and he was arrested. He made an application to be again released on bail on these second accusations, and the

application was successfully opposed by the victim in the trial Court. The record of proceedings clearly shows that unknown persons sent messages to the victim clearly showing a credible connection to the case the victim has filed against the applicant.

[2.4] Two mutually destructive versions between appellant and the complainant versions:

The ground of destructive versions is misplaced because it only becomes relevant in appeals against conviction. In bail applications it is only a *prima facie* case that the complainant/victim is required to place before Court in opposition to the granting of bail.

[2.5] The applicant appealed against the Magistrate's refusal to release him bail. On perusing the record of proceedings on the matter and in particular the fresh allegations of another Rape against the applicant, which for the sake of completeness I will quote verbatim paragraph 6 in my judgment, and it reads:

“[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.”

I came to the conclusion that there was indeed a *prima facie* case which in the normal course of our criminal justice system requires an answer from the

applicant.

[2.6] In my view the words I used in my judgment that it was merely “unfortunate” that the alleged charges/medical examination report were not availed to the applicant during his bail application do not take the applicant’s case anywhere. It suffices to state here that the applicant would not have applied for bail if he didn’t know the charges he was facing although the same was not availed to him. I am also sure that the prosecution had a reason for not being ready with the formal charges at the time of the hearing of the bail application, but the transgression was known to all parties.

[2.7] Applicant’s family ties in South Africa as a primary ground for reasoning that it would not be in the public interest for the Magistrate to grant bail to him: This is just one of the considerations for the trial Court to refuse bail, and it is reasonable in bail applications.

[3] The applicant’s counsel has referred to various authorities in support of the liberty of the applicant. It is my considered view that the justice system is there to ensure that justice is impartially dispensed to all litigants. This court would dismally fail in its duty if it ignores or trivializes the plite of women. These are vulnerable, defenceless members of society who require the most protection available.

[4] Apart from the concerns of safety the victim has successfully placed before the trial Magistrate, the applicant and only him had the duty to reflect on the reason why he was granted bail and not only warned on the first allegations of Rape. He should have realized that the trial Court took him in its confidence. He should have seen to it that while on bail he and in particular during his day to day interacting with female persons, he refrains from any conduct that would likely give rise to him being again subjected to another sexual related complaint.

[5] Counsel for the applicant submits that this court misdirected itself when it held that there was a *prima facie* case against the applicant. Counsel appears to have lost sight of the fact that the complaint of rape as paragraphed herein *infra* is more persuasive than what the applicant placed before the same trial court; briefly to the effect that:

'That the applicant could not have given the complainant a lift on the morning of the rape because he was at his neighbors house, he failed to call the neighbor or any other witness to confirm his version.'

[6] The Magistrate in the trial Court rightfully took into account the fact that the victim would be at risk; applicant had similar pending allegations that have been committed in similar circumstances.

[7] It is my considered view that in the same vein the Magistrate was legally bound to draw a line somewhere, to say enough is enough. The applicant cannot be allowed back into society while fresh serious allegations of Rape are resurfacing just because the courts '... will always grant bail where possible, and will lean in favour of and not against the liberty of the subject ...' It is for the above reason that I mentioned and still do so that it would not have been in the public interest for the Magistrate to grant bail to the applicant in such circumstances.

[8] There are no prospects that another Court will release the applicant on bail in these circumstances.

[9] In the result the application for leave to appeal is dismissed.

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A M SIBOLEKA  
Judge

APPEARANCES

APPLICANT : Mr. B. Isaacks

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