

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Appeal Judgment

CASE NO. HC-MD-CRI-APP-CAL-2018/00064

In the matter between:

SIYONG XU

1st APPELLANT

HAIFEN YANG

2ND APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Xu v S* (HC-MD-CRI-APP-CAL-2018/00064) NAHCMD 409 (14 December 2018)

Coram: VELIKOSHI AJ

Heard: 11 December 2018

Delivered: 14 December 2018

Flynote: Bail Appeal – Regulated by s 65 of Act - Appeal court to interfere only if magistrate exercised her discretion wrongly – Bail – In determining bail – Factors to be considered – Seriousness of offence – Appellants convicted and sentenced – Possibility

of absconding out of fear of serving sentence– Incentive for appellant to abscond – Court held that no reason to interfere – Appellants appeal dismissed.

Summary: The appellants in this matter are appealing against an order of the Windhoek Magistrates' Court refusing them bail, pending appeal. The appellants Siyong Xu and Haifen Yang appeared before a Magistrate at the Windhoek Magistrates' Court on a charge of contravening ss 32, 35(5), 46, 49 and 51 of the Anti-Corruption Act in that they directly or indirectly and corruptly offered or gave Inspector Beauty Mukuwa, a police officer N\$ 4 000 as an inducement for her to stop the investigations against the second appellant into the offence of money laundering involving approximately N\$ 1 000 000. On 7 September 2018 the appellants pleaded guilty to the charge and were convicted and on 14 September 2018 they were sentenced to undergo 24 months imprisonment each.

On 14 September 2018 the appellants filed a notice of appeal, against the imposed sentence of 24 months imprisonment. On 24 September 2018 the appellants' application for bail pending appeal was heard and dismissed by the magistrate on 27 September 2018. Dismayed by the dismissal of their application to be admitted on bail pending appeal, the appellants lodged an appeal against the magistrate's refusal to admit them on bail pending appeal. The state opposes the appeal.

Held that in deciding whether the decision of the court a quo was wrong, the court hearing the appeal has to look at how the magistrate has decided on three main factors traditionally taken to account in applications for bail pending appeal which are: the appellants' prospects of success on appeal, the risk of abscondment and the interest of the due administration of justice and public interests. Held further that other secondary factors may be, the delay before the appeal is heard, and/or any other relevant factors

Held that the argument or ground that the magistrate erred by concluding that the appellants are a flight risk without hearing evidence to that effect can therefore not stand because it would have been unproductive for the state to lead counter evidence on issues not in dispute. In any event failure by the respondent to lead evidence does not inevitably entitle the appellants to bail.

Held that now that the appellants have been convicted and sentenced to a sentence that has shocked them, they will abscond to avoid serving it seeing that they are Chinese nationals with no or very little ties to Namibia. *Held further* that the court is of the view that the magistrate did not need evidence to arrive at that decision. The fear of serving 24 months imprisonment is, after all, the reason why bail pending appeal was lodged in the first place.

Held that the sentencing Magistrate, in her reasons for sentencing indicated that she took into account the appellants personal circumstances, she acknowledged that the appellants were first offenders; that they have pleaded guilty and that they are family men with family responsibilities. *Held further* that she also looked at the sentence with an option of a fine, but that in her view, was inappropriate in light of the seriousness of the offence because it would not have achieved the objective of deterrence. It was from this reasoning that the magistrate made a conclusion that it was unlikely that the court of appeal would upset the sentence of 24 months imposed on the appellants.

Held that in any event the fact that the appeal court would have passed a different sentence is not good enough a reason to justify the substitution of a trial court's sentence. The court hearing an appeal must first ask itself the question whether or not the sentence was in compliance with the general principles regarding sentence.

Held that if a convicted and sentenced offender desires to be admitted to bail pending appeal, he or she must go beyond showing prospects of success on appeal and must establish that there are positive grounds commending him or her to the grant of bail and that the admission to bail will not jeopardise the interests of the public and that of the due administration of justice. *Held further* that in considering the interests of justice the public perception is an important aspect to be taken into account and where the admission of an applicant to bail may trigger a public outcry the court should be slow to grant it. *Held furthermore that* the earlier a convict starts serving his sentence the better for himself and the due administration of justice.

Held that the court is unable to find misdirection or an irregularity in the manner in which the magistrate exercised her discretion. In order for this court to invoke the power

conferred under section 65(4) of the CPA, it must be satisfied, from a consideration of the record before it on appeal that the circumstances are such that no reasonable Court properly directing itself, could have come to the conclusion that the magistrate arrived at. *Held* lastly that the appeal is dismissed.

ORDER

The appeal is dismissed.

JUDGMENT

VELIKOSHI AJ;

Introduction

[1] This is an appeal against an order of the Windhoek Magistrates' Court refusing bail, pending appeal to the appellants. The appellants Siyong Xu and Haifen Yang appeared before a Magistrate at the Windhoek Magistrates' Court on a charge of contravening ss 32, 35(5), 46, 49 and 51 of the Anti-Corruption Act¹ in that they directly or indirectly and corruptly offered or gave Inspector Beauty Mukuwa, a police officer N\$ 4 000 as an inducement for her to stop the investigations against the second appellant into the offence of money laundering involving approximately N\$ 1 000 000. On 7 September 2018 the appellants pleaded guilty to the charge and were convicted and on 14 September 2018 they were sentenced to undergo 24 months imprisonment each.

[2] On that same date the appellants filed a notice of appeal against the imposed sentence of 24 months imprisonment only on the ground that the sentence of 24 months imprisonment without an option of fine is harsh and induces a sense of shock. On 24 September 2018 the appellants' application for bail pending appeal was heard and

¹ Act 8 of 2003 (hereinafter the Anti-corruption Act).

dismissed by the magistrate on 27 September 2018. Upset by the dismissal of their application to be admitted on bail pending appeal, the appellants lodged an appeal against the magistrate's refusal to admit them on bail pending appeal.

Applicable Legal Principles

[3] Appeals on refusal of bail are regulated by s 65 of the Criminal Procedure Act.² The court hearing the appeal against the refusal of bail is guided by s 65(4) which provides that the judge hearing the appeal shall not set aside the decision of the lower court unless it is satisfied that that the decision was wrong, only then can it substitute that decision with its own. Hefer J (as he then was) in *S v Barber*³ said the following:

'It is well known that powers of this court are rather limited where the matter comes before it on appeal and not as a substantive application. 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 an unfair interference with the Magistrate's exercise of his discretion. I think it should be stressed that, no matter what this court's own views are, the real question is whether it can be said that the Magistrate who has the discretion to grant bail exercised that discretion wrongly ... Without saying that the magistrate's view was actually the correct one, I have not been persuaded to decide that it is the wrong one'.

The above principle has been accepted, endorsed and followed in several cases such as *S v Gaseb*⁴ and *Valombola v The State*.⁵

[4] In deciding whether the decision of the court *a quo* was wrong, the court hearing the appeal has to look at how the magistrate has decided on three main factors traditionally taken to account in applications for bail pending appeal which are: the appellants' prospects of success on appeal, the risk of abscondment and the interest of the due administration of justice and public interests. Other secondary factors may be the delay before the appeal is heard, and/or any other relevant factors. For the purpose of this judgment, resources would not allow me to repeat the evidence adduced in the

² Act 51 of 1977 as amended (in the CPA).

³ 1978 (4) SA 218 at 220 page 220.

⁴ 2001(1) NR 310.

⁵ (CA 93/2013) 2013] NAHCMD 279 (9 September 2013).

bail inquiry heard in the lower court. I would however refer to specific evidence if and when it becomes necessary to do so. I would also not address each and every ground of appeal enunciated in the amended notice of appeal. I would however, consider the relevant grounds as they relate to the factors that had to be considered as I have indicated above.

Grounds of Appeal

[5] The appellants' major grounds of appeal as I understand them from the long list of grounds in the notice of appeal dated 26 November 2018, appears to be that the magistrate misdirected herself in her findings that the appellants are a flight risk with no prospects of success on appeal. In particular it was argued that the magistrate failed to take the fact that the appellants are first offenders who were convicted on their own pleas of guilty when she assessed the appellants' prospects of success on appeal. It was argued further that the sentence imposed on appellants on their first conviction was shocking because a gaol sentence, as per case law appears to be a norm only where police officials were convicted of corruption and this court was referred to several of them including the case of *Likando v The state*.⁶

[6] It was also specifically argued that the court *a quo* misdirected itself when it held that the appellants were a flight risk based on their nationality, when in fact it should have considered other factors such as the appellants' occupations and skills, as well as their contribution to Namibia as they were involved in 'very serious, sensitive multimillion dollar construction projects' that would benefit the country. Because of these, it was argued that, the risks of the appellants absconding are minimised.

Discussion

[7] It is common cause that the appellants are Chinese national who have been in Namibia for purposes of employment. It is also common cause that they have been convicted and sentenced of a serious offence to 24 months imprisonment, albeit on their own pleas of guilty. The argument or ground that the magistrate erred by concluding

⁶ (CA 70/2016 [2016] NAHCMD (02 December 2016)).

that the appellants are a flight risk without hearing evidence to that effect can therefore not stand because it would have been unproductive for the state to lead counter evidence on issues not in dispute. In any event failure for the respondent to lead evidence does not inevitably entitle the appellants to bail.⁷

[8] Regarding the decision of the magistrate when she concluded that the appellants are a flight risk, I think there was a misread and perhaps a misunderstanding of the magistrate's reasoning. As I understand the magistrate's reasoning, which is also an argument by the state is that, now that the appellants have been convicted and sentenced to a sentence that has shocked them, they will abscond to avoid serving it seeing that they are Chinese nationals with no or very little ties to Namibia. I do not think that the magistrate needed evidence to arrive at that decision. The fear of serving 24 months imprisonment is, after all, the reason why bail pending appeal was lodged in the first place.

[9] Counsel for the appellants placed much emphasis on the fact that the penalty clause provides a sentence with an option of a fine; and that because the appellants were first offenders who were convicted on their own admissions, the court should have imposed a sentence with an option of fine. Liebenberg J in *Likando v The State*⁸ stated that:

'The fact that a fine is provided for in the penalty provision does not mean that it must be imposed in all instances. It is trite that in serious offences it has become the norm to resort to custodial punishment even on first offenders, as the objectives of punishment in these cases are usually deterrence and retribution. The message that has to come from the courts is that anyone who commits serious crime must know that these transgressions will be met with severe punishment. To impose a fine in all instances of this nature might create a wrong impression, that the offence is not all that serious and makes it financially worth taking a chance.'

[10] The sentencing Magistrate, in her reasons for sentencing dated, 14 September 2018 indicated that she took into account the appellants personal circumstances, specifically, she acknowledged that the appellants were first offenders; that they have

⁷ See *Valombola v The State* supra at page 7 paragraph 21.

⁸ (CA 70/2016 [2016] NAHCMD (02 December 2016))

pleaded guilty and that they are family men with family responsibilities. She also looked at the sentence with an option of a fine, but that in her view was inappropriate in light of the seriousness of the offence because it would not have achieved the objective of deterrence. It was from this reasoning that the magistrate made a conclusion that it was unlikely that the court of appeal would upset the sentence of 24 months imposed on the appellants.

[11] In any event the fact that the appeal court would have passed a different sentence is not good enough a reason to justify the substitution of a trial court's sentence. The court hearing an appeal must first ask itself the question whether or not the sentence was in compliance with the general principles regarding sentence. Has the magistrate applied the general applicable principles regarding sentence? There is no argument advanced that she has not. But even in the absence of such an argument, the record indicates that the magistrate has indeed considered the general applicable principles at length. That being the case, can it be said that the magistrate's decision to the effect that the appellants have no prospects of success on appeal was wrong? I do not think so.

[12] The appellants being applicants in the Court *a quo*, carried the onus to prove on a balance of probabilities that the court should exercise its discretion in favour of granting them bail. This onus is discharged if it is shown by an applicant that public interests and the interest of justice will not be prejudiced by his letting out on bail and that he is likely to serve his sentence should his appeal not succeed.

[13] In that regard if a convicted and sentenced offender desires to be admitted to bail pending appeal, he or she must go beyond showing prospects of success on appeal and must establish that there are positive grounds commending him or her to the grant of bail and that the admission to bail will not jeopardise the interests of the public and that of the due administration of justice. In considering the interests of justice the public perception is an important aspect to be taken into account and where the admission of an applicant to bail may trigger a public outcry the court should be slow to grant it. Counsel for the appellants argued that the appellants would have served their sentence

by the time the appeal is heard. This observation is not quite correct because if I take judicial notice, lately appeals do not take long to be heard in the High Court unless the record is voluminous and takes long to be processed. In this case however, the record is not voluminous as there was no trial. In my view the earlier a convict starts serving his sentence the better for himself and the due administration of justice.

[14] It is a serious matter of public interest and the interest of the due administration of justice that those convicted of serious and rampant crimes serve their sentences. The appellants being convicted on their own guilty pleas sought to suspend their gaol sentences in the hope and perhaps with a belief that the court of appeal would substitute their gaol sentence with a fine or perhaps shorten their term of imprisonment. This court has provided guidelines on sentencing in as far as corruption matters. Those convicted of corruption and bribery should therefore not be shocked when sentenced to imprisonment without fines. Quite clearly, the tags from which everyone can read the type of sentences to be imposed if convicted of corruption involving a law enforcement officer is there for all to see and read for themselves.

[15] I was not able to find misdirection or an irregularity in the manner in which the magistrate exercised her discretion. In order for this court to invoke the power conferred under section 65(4) of the CPA, it must be satisfied, from a consideration of the record before it on appeal that the circumstances are such that no reasonable Court, properly directing itself, could have come to the conclusion that the magistrate arrived at.

I am not so satisfied.

[16] The order that follows that is that:

The appeal is dismissed.

ITON Velikoshi

Acting Judge

APPEARANCES:

For the Appellants: LC Botes (with him W. Boesak)

Instructed by Siyomunji Law Chambers, Windhoek

For the Respondent: F Shikerete-Vendura

Instructed by Office of the Prosecutor-General, Windhoek