

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

BAIL APPEAL

Case No.: HC-MD-CRI-APP-CAL-2018/00053

In the matter between:

BURUXA BURU BUTKUS**1ST APPELLANT****LEE DOUGLAS SRTEES JENKINS****2ND APPELLANT****WESLEY WELGEMOED****3RD APPELLANT****VERANA SALZMANN****4TH APPELLANT**

and

THE STATE**RESPONDENT**

Neutral citation: *Butkus v S* (HC-MD-CRI-APP-CAL-2018/00053) [2019] NAHCMD 173
(28 May 2019)

Coram: VELIKOSHI AJ**Heard:** 13 December 2018**Delivered:** 13 December 2018

Reasons: 28 May 2019

Flynote: Criminal Procedure – Bail – Appeal – Regulated by s 65 of Act 51 of 1977 - Appeal court to interfere only if magistrate exercised his or her discretion wrongly. Appeal court limited to record of proceeding – raising new facts on appeal prohibited.

Reasons

VELIKOSHI AJ:

Introduction

[1] This is an appeal against the refusal of the district magistrate court to admit the appellants to bail. On the 12th December 2018, after hearing arguments in this matter, I delivered an *ex tempore* ruling and indicated that written reasons would follow. Regrettably, the reasons were inordinately delayed due to administrative reasons. The appellants were represented by Mr. Brockerhoff and the respondent was represented by Mr. Moyo. After hearing the arguments, I made an order dismissing the first, second and third appellants' appeals. I upheld the fourth appellant's appeal and granted the following order:

1. In respect of appellants 1, 2 and 3 the appeal is dismissed and the decision of the magistrate refusing to admit the appellants to bail is confirmed. The 1st, 2nd and 3rd appellants are remanded in custody pending trial.

2. In respect of appellant No. 4 the appeal is upheld and the decision of the magistrate refusing to admit her to bail is set aside.

3. The 4th respondent is granted bail in the sum of N\$ 30 000 (thirty thousand Namibia Dollars) with the following conditions:

3.1. The 4th appellant must hand in her travelling documents i.e. passport to the investigating officer, Sgt. Malakia Nuule.

3.2. The appellant must report herself at the Windhoek Police Station twice a week, between 08h00 am and 11h00 am on Mondays and Fridays.

3.3. The 4th appellant must not leave the district of Windhoek without the permission of the Investigating Officer.

3.4. The 4th appellant is prohibited from acquiring any new travelling document of any kind.

4. The Registrar of the High Court must forward a copy of this order to the Embassy of the Federal Republic of Germany in Namibia as soon as possible.'

[2] On 14 August 2018 the appellants, a Namibian national; a British National with South African permanent residence; a South African and German National appeared in Magistrate's Court sitting at Windhoek facing a charge of dealing in or possessing potentially dependence producing substances to wit MDMA tablets, LSD stamp and Mushroom, that is in contravention of s 3(a) r/w ss 1, 3(i), 7,8,10,14 and Part III of the Schedule of Act 41 of 1971 as amended alternatively contravening s 3(b) read with ss 1,3(ii), 7, 8, 10 and 14 and Part III of the Schedule of Act 41 of 1971. The appellants were also charged with dealing in dependence producing substance or possessing dependence producing substance namely cannabis valued at N\$ 200 000 that is in contravention of s 2(a) read with ss 1, 2(i) and/or s 2(ii), 8, 10, 14 and Part I of the Schedule of Act 41 of 1971 alternatively contravening s 2(b) read with ss 1, 2(i) and/or 2(iv), 7, 8, 10, 14 and Part I Schedule of Act 41 of 1971 as amended.

Background

[3] The appellants were arrested in Windhoek on 19 July 2018, following a police operation that involved an informer disguised as a purchaser who was set to purchase drugs from the first appellant. The informer, embarked on the vehicle of the first appellant which had the second and third appellants as passengers. Fearing for the safety of the informer, the vehicle was intercepted by the police who were secretly observing the situation. After their vehicle was intercepted, the first appellant's residence a certain house in the suburb of Klein Kuppe was searched and several drugs were found namely cocaine, cannabis valued at about N\$60 000, MDMA capsules, TIC,

and the LSD mushroom suspected schedule 5 medicines (steroids). The fourth appellant, who is a girlfriend of the first appellant, was also found sleeping at the said residence. The appellants were then arrested and charged as above.

[4] At the time their application for bail in the court *a quo* was heard, the appellants were only formally charged with two main counts namely, dealing in potentially dangerous substances (drugs) and dealing dependence producing substances as well as two alternative counts of possession of potentially dangerous dependence producing drugs and possession of dependence producing substance. According to the Investigating Officer, some of the drugs were sent to the laboratory for forensic analysis. The laboratory results were to be expected within a month from the date the appellants' bail application in the court *a quo* was heard, on the 14 August 2018. The matter was thereafter postponed for further investigations, specifically for the outstanding laboratory results.

Court *a quo*'s reasoning

[5] The court *a quo* after going through the evidence of the appellants and the respondent found that the second, third and fourth appellants posed a flight risk as they were all foreigners who had no ties in Namibia. With regards to the first appellant whom the trial court found not to be a flight risk because he was a Namibian citizen and employed to Namibia, it was found that he may commit further offences once he is admitted bail. The court applied s 61 of the Criminal Procedure Act¹ which empowered the court to refuse bail if it was in the administration of justice to do so. The court found that because of different drugs found at the first appellant's home and the value of it, it was not in the administration of justice to admit the first appellant to bail.

Grounds of appeal

[6] Aggrieved by the magistrate's refusal to admit them to bail, the appellants lodged an appeal. Upon being served with the notice of appeal, and the elaborate heads of

¹ Act 51 of 1977 as amended hereinafter "the CPA"

argument the respondent opposed the appeal against all four appellants. The grounds of appeal were framed as follows:

'1. The learned Magistrate erred in law and/or fact by finding that the evidence presented by the entire appellants was insufficient to prove their case on a balance of probabilities.

2. The learned magistrate erred in law and/or fact or materially misdirected himself by taking into account his own unsubstantiated evidence which was not based on the evidence of the investigating officer when concluding that 2nd, 3rd and 4th appellant is a flight risk."

3. The learned Magistrate erred or misdirected in law by relying on section 61 of the Criminal Procedure Act, no. 51 of 1977 CPA, as amended and applicable to Namibia, when concluding that it will not be in the interest or that of the administration of justice to grant bail to 1st appellant."

4. The learned Magistrate erred in law and/or fact and committed a serious misdirection by failing to pronounce himself on the strength of the state's case against the 1st - 4th appellants, especially where it has not been *prima facie* shown that the appellants are guilty of one or more of the serious crimes or offences listed in part IV of the second schedule or, at least where the investigating officer didn't' conclusively testify that there is a strong case against the appellants."

5. The Learned Magistrate erred in law and/or fact by concluding that the 1st appellant will re-offend without the presentation of credible evidence by the investigating officer or the Prosecutor General."

6. The learned Magistrate erred in law and/or fact by ordering the detention of all the appellant without considering alternative and/or appropriate bail conditions.'

The Law

[7] It is trite that a Court when sitting and hearing an appeal against a lower court's refusal to grant bail, is bound by the provisions of s 65(4) of the Criminal Procedure Act 51 of 1977 not to interfere and set aside the magistrate's decision unless such Court or judge is satisfied that the decision was wrong, in which event the Court or judge shall give the decision which in his or her opinion the lower court should have given.² The

² S v Timotheus 1995 NR 109 (HC) at 112I

Court in *S v Barber*³ interpreted this to mean that an Appeal Court has to be persuaded that the magistrate exercised the discretion which he or she has wrongly exercised and, although the Appeal Court may have a different view, it should not substitute its own view for that of the magistrate.

[8] The reason why an Appeal Court would be slow to interfere with the trial court's discretion comes into play where the credibility and the character of the accused and any other witness is relevant, the Court that hears the witnesses and observes their demeanour, always has an advantage over a Court of appeal which is restricted to the record of the proceedings.⁴

[9] Now for purposes of this appeal the question which has to be answered is whether it can be said that the trial magistrate who had exercised his discretion in refusing bail exercised that discretion wrongly.

Arguments and Discussion

[10] Mr Brockerhoff argued succinctly that the State in the court *a quo* placed insufficient evidence to prove that the appellants would abscond if they are realised on bail and therefore the trial court misdirected itself. Conversely, Mr Moyo, for the respondent, argued that the trial magistrate was not wrong and therefore the Appeal Court should not interfere with the trial court's discretion.

[11] From the record of proceedings, the second, the third and fourth appellants testified that they are not Namibian citizens. They each came to Namibia on a 90 days visitor's visa. They do not have family ties to Namibia. They also do not have properties or any other investments in Namibia. The second appellant is a British National with a South African permanent residence. He has relatives in Georgia. The third appellant is a South African National and the fourth is a German national. All these decrees came out of the second, third and fourth appellants' own mouths respectively. There was

³ 1979 (4) SA 218 (D) at 220E-H:

⁴ *S v Du Plessis and Another* 1992 NR 74 (HC) at 79I-J

therefore, no need for the State to lead evidence to that effect, let alone the need to substantiate them. The argument that the court *a quo* did not have sufficient evidence before it to find that the appellants are a flight risk is thus with respect, without merit.

[12] The second and third appellants are foreigners from South Africa with whom Namibia shares its Southern borders. The court in *S v Yugin and Others*⁵ observed how easily one can cross over our borders without being noticed. Hannah, J said the following:

'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. . . .

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.'

[13] While it may be easy for the second and third appellants to cross over the Namibian borders into South Africa the same cannot be said for the fourth appellant who is a German citizen. If one carefully evaluates the evidence of Sgt. Nuule linking each accused to the offences that they are facing it is realised that the case against her is not as strong as it is against the other appellants. The risk of her absconding, although real is rather remote. On that basis alone, she is unlikely to abscond and the court *a quo* ought to have considered her application for bail favourably. Even though this court has in the past indicated that bail may be denied even where the risk of absconding is remote, I am of the view that in her case appropriate bail conditions will reduce her chances of absconding to none. The fourth appellant's involvement in the matter is also minimal.

⁵ 2005 NR 196 (HC)

[14] On the argument that the State did not prove a *prima facie* case it is important to note that the issue of proving a *prima facie* case is an issue that has to be decided by the trial court. In this specific case however, there is evidence linking the appellants to the case. In addition to the finding of several drugs at the house where the appellants lived, the second and third appellants made *extra curiae* admissions to the arresting officer Sgt. Nuule which were not disputed. The first appellant informed Sgt. Nuule that he delivered a consignment of drugs to the first appellant for a fee because he needed to help his mother who was struggling to make ends meet after the death of his father. These too were the words of the third appellant. Sgt. Nuule also testified that the appellants were arrested after an operation involving an informer who was set to purchase drugs from one of the appellants. In addition, Sgt. Nuule stated that the States' case against the appellants is very strong, although he added that some of the drugs were sent to the laboratory for testing. When he gave his evidence he said the laboratory results would be available within a month. Apart from the appellants' bare denial, the appellants failed to show that the state's case against them is weak or altogether non-existent to the effect that they will eventually be acquitted.

[15] Mr Brockerhoff also argued that because the appellants have been in custody for about six months as trial awaiting prisoners, this court should admit them to bail. This fact was not placed before the magistrate to consider. Well, it did not exist then. In *S v Moussa*⁶ Parker, AJ held that a long period of detention after bail application constitutes new facts which the court may consider in the next application. Section 65(2) of the CPA explicitly prohibits an appeal against the refusal of bail based on new facts. But there is more, the fact that the appellants have been in custody for a period of time after their initial bail application has failed has not been raised in the notice of appeal. It cannot be introduced and supplemented in their oral arguments.

[16] In respect of the Namibian citizen the court correctly found that he is not a flight risk. He was nonetheless denied bail because it would neither be in the interest of the administration of justice nor that of the public. By invoking the provisions of s 61 of the CPA, Mr Brockerhoff argued that the court has misdirected itself. Mr Brockerhoff argued

⁶ 2015 (3) NR 800 (HC) also see *S v Miguel* 2016 (3) NR 732 (HC) p. 743 G-H

further that the court *a quo* misdirected itself when it found that if admitted to bail the first appellant will commit similar offences. Starting with the latter, the first appellant is a self-confessed cocaine addict who has sought different interventions including attending to a rehabilitation centre but without success. On the date he was arrested, he said he was to meet a certain man from whom he was to purchase cocaine. A chance that a self-confessed drug addict will commit a similar offence to quench his addiction is thus a real possibility. Admittedly, the first appellant has earned a previous conviction on possession of cocaine to which he is addicted. Figuratively speaking, the first appellant's own tongue steered the court *a quo* to the conclusion that he is likely to commit a similar offence if admitted to bail. Coming to the former, that the court *a quo* misdirected itself by invoking the provisions of s 61 of the CPA the question is whether the offences preferred against the appellants falls under Part IV of Schedule 2 of the CPA. If they do, s 61 of the CPA may be applied⁷.

[17] The decision to admit or deny an accused bail is a discretionary one. The magistrate can either grant or deny bail to an accused and the aggrieved party has a right to appeal to this court in such matters. I wish to add that when it comes to an application for bail, the applicant if denied bail today he or she may apply for it again another or subsequent day and has a right to be heard *de novo* again without being hindered by arguments of the matter being *functus officio*. That is to say that if an accused has failed to secure his liberty through a bail application on his or her first attempt, he or she has the right to lodge another application for bail in the same court based on new facts that were non-existent when the first application was lodged.

[18] The decision whether to lodge a fresh application in the same court based on new facts or to lodge an appeal to this court lies with the applicant and/or his legal practitioner who must carefully assess the reasons why the applicant's application to be released on bail failed. This involves the evaluation of whether there are new facts that arose and if there are, whether the applicant is likely to be released on bail in a fresh application based on new facts or on appeal. If, for instance, one or more of the grounds

⁷ See *Noble v S* (HC-MD-CRI-APP-CAL-2018/00079) a reportable judgment of the High Court of Namibia delivered by Shivute, J on 5 February 2019 at p. 12 par. 35

the appellant intend to lodge an appeal against the refusal of bail is one that has an effect on the seriousness and/or the strength of the State's case, the appellant and/or his legal practitioner must show that the outstanding laboratory results or further investigations would not strengthen the State's case against them. In this case for example, some drugs were sent for forensic analysis, the results of which were to be expected within a month. Obviously, one would expect the outcome of the forensic analysis to have an effect on the seriousness offences against the appellant. It would either strengthen or weaken the State's case against them.

[19] For an appeal that was lodged almost 6 months later, I am of the view that it would have been desirable for the appellant's legal practitioner to first have acquainted himself with the laboratory results before lodging an appeal to this court. The laboratory results may have confirmed the investigating officer's suspicion that the appellant dealt in potentially dangerous dependence producing drugs such as cocaine or just in much less serious offence of dealing in dependence producing substances. The gravity of the sentence to be expected depends on the seriousness of the charges preferred against the appellant. The more the likelihood of him or her being sentenced to a short imprisonment term or to a non-custodial sentence the lesser the temptation and the risk of absconding. It is my considered view, that the appellant had and perhaps still have much brighter prospects of succeeding in their bail application based on new facts in the district court than on appeal.

[20] On an analysis of the evidence as a whole and the arguments advanced in this matter it follows necessarily that, except for the fourth appellant whose appeal was upheld, the appellants had not succeeded in demonstrating that the decision of the court below was wrong for this court to set it aside. The foregoing were the reasons for the orders I have made in my *ex tempore* judgment.

ITON Velikoshi

Acting Judge

APPEARANCES:

Applicant:

Mr. T Brockerhoff

Brockerhoff & Partners

Respondent:

Mr. E Moyo

Office of the Prosecutor-General, Windhoek