REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: HC-MD-CRI-APP-CAL-2019/00022

In the matter between:

JOHANNES NEUAKA **APPLICANT**

and

THE STATE

Neutral Citation: *Neuaka vs S* (HC-MD-CRI-APP-CAL-2019/00022) [2019] NAHCMD 215 (02 July 2019)

CORAM: **UNENGU, AJ**

Heard: 04 June 2019

Delivered: 02 July 2019

Flynote: Bail Appeal — Appeal against district court's refusal to admit the appellant to bail pending the finalization of the investigation – Court should not set aside refusal of bail of lower court unless satisfied that case was wrongly decided.

ORDER

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a) Appeal is dismissed.

BAIL APPEAL RULING

UNENGU, AJ

Introduction

[1] The appellant, currently in custody, faces a charge of murder read with the provisions of the Domestic Violence Act 4 of 2003. He applied for bail in the Windhoek's Magistrate's Court at Mungunda Street, Katutura which such bail application was refused by the magistrate in the judgment dated 11 October 2018. The State opposed the application on grounds of the seriousness of the charge preferred against the appellant, strength of the state's case; risk of absconding; not in the interest of public or the administration of justice and fear of the safety of the witnesses should the appellant be released on bail.

[2] Primarily, the magistrate in her judgment held the view that the appellant's version of events on the incident that took place, bringing rise to the charge of murder read with the provisions of the Domestic Violence Act, was characterized by contradictions and rendered his version less believable than the version of the respondent. The magistrate thus held that the appellant failed to satisfy the court on a

balance of probabilities that he should be released on bail. The magistrate, after having considered the evidence placed before her, further added that it was not in the best interests of the administration of justice to release the appellant on bail. It is this judgment that the appellant now appeals against. As fate would have it, the State opposes the appeal.

Grounds of appeal

[3] The appellant raised various grounds of appeal, which could be summarized as follows:

a) Grounds 1 and 2: The learned magistrate erred in law and/or fact by not taking into consideration that the appellant's version of what transpired was not challenged and that no contrary version of the respondent was put to him.

b) Ground 3: The learned magistrate erred in law and/or fact by concluding that the appellant exaggerated the number of children he had. The learned magistrate indicated that this was done to implore sympathy on the court and sway it to grant bail.

c) Ground 4: The learned magistrate erred in law and/or fact by not considering that personal circumstances of the appellant.

d) Ground 5: The learned magistrate erred in law and/or fact by believing the version of the Investigating Officer which was based on witness statements which were never handed up in court and neither were the so called witnesses called to testify in court.

e) Ground 6: The learned magistrate erred in law and/or fact by believing the version of the second witness of the respondent yet this version was not put to the appellant to accord him an opportunity to comment on it.

f) Ground 8, 9, 10 and 11: The learned magistrate erred in law and/or fact by concluding that the appellant was not a good candidate to bail and yet there was no evidence before her that would logically make her to come to that kind of conclusion.

[4] It is trite that the appellant bears the *onus* on a preponderance of probabilities to persuade the court why he should be released on bail. Appeals with regard to refusal of bail are regulated by s 65(1) of the Criminal Procedure Act 51 of 1977 (CPA) which states:

"(1) (a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting"…

[5] Furthermore, in terms of ss (4) it provides that:

"the court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or the judge shall give the decision which in its or his opinion the lower court should have given".

[6] Evenly said, in *S v Barber* 1979 (4) SA 218 (D) Hefer J at 220E – G, illustrated the rationale behind s 65 (4) of the CPA in the following terms :

'It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. 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 had the discretion to grant bail exercised that discretion wrongly.'

[7] The above approach was adopted in *S v Gaseb* 2007 (1) NR 310 (HC) and this court will also be guided by this legal principle in this appeal.

[8] It has become trite in bail appeals that the nature of the crime alleged to have been committed and the strength of the state's case are extremely relevant at the stage when bail is considered. The appellant faces a count of murder read with the provisions of the Domestic Violence Act, which in no doubt, if found guilty, would attract a considerable heavy imprisonment sentence.

[9] It is the duty of the court of appeal to take into account factors such as the seriousness of the offences with which the appellant is charged which could result in heavy sentences being imposed. That fact would indeed tempt the appellant to abscond. Although the appellant intimated that on a previous conviction, he was granted bail and stood his trial, when he was charged with theft of a motor vehicle, while in this instance the charge of murder is particularly more serious compared to that of theft.[1] Though the appellant is entitled to apply for bail, it should always be noted that there is no automatic right to bail. It therefore follows that the refusal of bail does not deprive the appellant of his right to liberty contrary to the Constitution. The *court a quo* had a discretion to exercise to either grant or refuse to admit the appellant to bail. This court is therefore not persuaded by the appellant that the magistrate's decision to refuse bail was wrong to enable it to interfere with the decision. This is particularly so, keeping in mind the provisions of s 61 of the CPA that provides as follows:

'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 trial.'

[10] With respect to grounds 1 and 2 raised by the appellant that the respondent's version was not put to the appellant to provide him with the opportunity to answer them and even though it was open to the appellant to have taken steps to ask for a

[1] Records pg. 71.

disclosure, I do agree that the respondent should have addressed this issue and canvassed it in cross-examination with the appellant during the bail application proceedings. However, the failure to have done so would not necessarily entitle the appellant to bail.[2] This court holds the same view with respect to ground 6.

[11] With respect to ground 3, the magistrate cannot be faulted for having reservations as to the number of children the appellant has. During the bail proceedings, the appellant managed only to provide the birth certificates of 8 children as opposed to 11 children he alleges to have. Be that as it may, the fact that the respondent never challenged this position and was never put in doubt, this ground, although the magistrate mentioned it in her judgment, is not the sole basis upon which bail was refused and making a determination on this ground will not render the discretion exercised by the magistrate defective in any manner. This court cannot and should not substitute its own view for that of the magistrate, although it may have a different view, because that would be an unfair interference with the magistrate's exercise of her discretion.[3]

[12] With respect to ground 4, that the magistrate made no considerations regarding the personal circumstances of the appellant. It is trite that the personal circumstances of the appellant as well as the considerations of public interest should be weighed against one another and the court a quo did consider the personal circumstances of the appellant.

[13] In *David vs S* (CC 13/2018) [2019] NAHCMD 111 (2 April 2019) Miller AJ expressed the following view regarding personal circumstances and the interest of the public:

'[10] As regards to the seriousness of the offence faced by the accused, I reiterate that the offences are serious and this court will be naïve not to take into account that cases of gender-

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[2] *S v Hangombe* (CA 43/2012) [2012] NAHC 304 (23 August 2012).

[3] *S v Barber* 1979 (4) SA 218 (D).

based violence are serious in their nature and are prevalent in Namibia. It is indeed so that the public has a significant interest that persons accused of committing such crimes stand their trial and do not abscond. In this regard, the public interest is a weighty consideration.

[11] The evidence before me establishes that the State seems to have a prima facie case against the accused. All relevant considerations, although they are at tension with one another, should be taken into account and by taking those into account, it does not always follow that the opposing considerations carry the same weight.

[12] In my view, the public interest and the gravity of the offences will carry more weight in the circumstances than circumstances personal to the accused. The onus remains on the accused to satisfy the court that he should be released on bail and in my view, that onus was not discharged.'

[14] With the above in mind, this court holds the same view in that public interest demands that persons accused of crimes such as murder as is the case in the present matter, must stand their trial and not abscond. The court a quo pronounced itself that it considered all the evidence before it and paid due regard to the submissions by counsel for and against the granting of bail, and ultimately decided not to grant bail. This court is not in the position to stand over the shoulder of the court a quo to ensure that each and every aspect of the case presented before that court was considered. This court further remains alive to the fact that the court a quo had first-hand experience of the aspects surrounding the matter presented before it and it would be undesirable for this court to overrule this unless well and truly, this court is satisfied that the court a quo misapplied its discretion or misdirected itself.

[15] With respect to ground 5, it is trite and as was stressed in *State v Yugin and Others,*[4] that what the State or the respondent in this matter essentially has to do is not to prove the guilt of the accused, but rather to demonstrate through credible evidence the strength or apparent strength of its case. This is usually done through the mouth of an investigating officer.

[4] 2005 NR 196 (HC) at 200.

[16] Although, as in *S v Amunyela*,[5] the moment hearsay evidence is disputed, that evidence loses weight and the fact that the appellant was confronted with versions of the respondent's witnesses, it could be considered that the appellant would've confronted the respondents' versions, rendering them incapable for the court a quo to place any consideration upon them. However this point remains unclear as the respondent never placed its witnesses versions to the appellant during cross-examination in the bail application proceedings.

[17] With respect to grounds 8, 9, 10 and 11, it is not for this court to speculate why the court a quo arrived at the decision that the appellant is not fit or a good candidate for bail. It is solely the court a quo discretion to make such a determination taking into account various factors such as the demeanour of the appellant and of the witnesses during the proceedings and the evidence adduced before it. Bear in mind again that for bail proceedings, it not for the respondent to prove the appellant's guilt but a prima facie case it has against the appellant.

Conclusion

[18] At face value, I am satisfied that there are no grounds upon which this court can interfere with the ruling of the court a quo based on the premises that the court a quo did not exercise its discretion wrongly when it refused bail. As pointed out above, the onus is on the appellant to prove on a balance of probabilities that he should be released out on bail by the court a quo, which he failed to discharge.

[19] I therefore make the following order:

a) Appeal is dismissed.

[5] (CA 24/2012) [2012] NAHC 199 (28 June 2012).

E P UNENGU

Acting Judge

APPEARANCES:

For the Applicant: M Siyomunji

Of Siyomunji Law Chambers

For the Respondent: E Moyo

Of the Prosecutor-General's Office