REPUBLIC OF NAMIBIA **REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case No.: HC-MD-CRI-APP-CAL-2019/00092

JEFTA IHAMBO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ihambo v S* (HC-MD-CRI-APP-CAL-2019/00092) [2020] NAHCMD 235 (18 June 2020)

Coram: CLAASEN, J
Heard: **1 June 2020**
Delivered: **18 June 2020**

Flynote: Criminal Procedure – Bail – Appeal against refusal by magistrate to admit appellant to bail – Record of bail application – Evidence adduced in bail application complete - Magistrate failed to give reasons for order.

Issue – whether failure of magistrate to give reasons for order vitiate the magistrate's decision - record of bail proceedings not fatally inadequate.

Held – appeal court has duty to reassess evidence tendered during the bail proceedings to see if it supports finding of the magistrate. Appeal – Court not to set aside decision to refuse bail unless satisfied that magistrate was clearly wrong. – Appeal dismissed.

ORDER

The appeal against the refusal of bail is dismissed.

JUDGMENT

CLAASEN, J

Introduction

[1] This is an appeal against the refusal of bail by the magistrate sitting in Mariëntal Magistrates' Court, where the appellant was arrested with four others on a charge of fraud.

[2] The appellant is represented by Mr Isaacks and the respondent represented by Mr Lilungwe. The matter was previously struck from the roll due to non-compliance of rule 118(6) and (7) of the Rules of the High Court. Re-instatement of the matter was granted on the hearing date.

Bail proceedings in the court a quo

[3] The appellant represented by Mr Le Grange launched a formal bail application on 30 October 2018. The appellant testified in support of his application, testimony was led on behalf of the respondent and after closing submissions the matter was postponed for a ruling on the bail application.

[4] On 2 November 2018 the matter was postponed to 6 November 2019 for the ruling. On that date the magistrate gave an order that bail for the appellant is refused, with an inscription that the reasons will be filed.

[5] The appeal file contains a letter dated 27 August 2019 from the magistrate of Mariental, Ms Kruger addressed to the Registrar of the High Court. The letter confirms that the bail ruling was given without reasons and that subsequently that magistrate was suspended.

[6] It is now common cause that the reasons for the ruling on the bail application was never given by magistrate Mr Kamahene, who presided over the bail hearing.

Appellant's Arguments

[7] Though the grounds of appeal was framed in the terms that the Magistrate erred in law and or fact to refuse bail because the investigations were not complete, that the appellant would interfere with the investigations and that the appellant has a propensity to commit crime, the magistrate's failure to give reasons became the point of departure in the appeal.

[8] The essence of the argument by counsel for the appellant was that since there are no reasons, one cannot say what evidence was considered and thus it cannot be said that the decision was judicially made.

[9] He submitted that the incomplete bail record causes prejudice to the appellant and that the appellant should get the benefit of the anomaly. Counsel referred the court to *Jankowski v State*[1] which held that if a record cannot be reconstructed the result is that no proper appeal can be heard.

[1] CA 60/2017 [2018] NAHCMD 158 (12 June 2018).

[10] He furthermore relied on *Soondaha v the State*[2] in which the court held that:

'This court must be placed in a position to evaluate the evidence in conjunction with the reasons of the learned magistrate in order to decide if the convictions were just and in accordance with justice and if the alleged misdirection have any merit.'

[11] Counsel for the appellant submitted that in the event that the court does proceed to the merits, the magistrate had no reason to refuse bail as the only evidence that links the appellant is that he drove with the other accused.

Respondent's Arguments

[12] Counsel for the respondent argued to the contrary. According to him the record provided a clear narrative account of the evidence that was led in the bail hearing.

[13] He submitted that there was no mistake in the outcome of the bail hearing and that the magistrate's refusal of bail to the appellant was based on merit and judiciously made. According to him the decision of the magistrate was made after carefully considering the evidence that had been placed before him.

[14] In support of this contention he relied on *Miguel v S*[3] wherein it was held that:

'The court sitting as court of appeal against the refusal of another court to grant bail, is bound by the provisions of s 65 (4) of the Criminal Procedure Act 51 of 1977, and may only overturn the court a quo's decision once satisfied that the court exercised its judicial discretion wrongly.'

The issue before the court

[15] The magistrate who presided over the bail application was duty bound to give reasons for the decision to refuse to admit the appellant to bail. There is no qualm that

[2] CA 28/2013 [2016] NAHCNLD 76 (22 August 2016).
[3] (CA 11/2016) [2016] NAHCMD 175 (20 June 2016).

the magistrate's failure in that regard constitutes an irregularity. That being the case where does that leave the appeal court? Put differently, is the magistrate's ruling vitiated by the lack of reasons?

[16] In pursuit of the issue of the irregularity of not giving reasons at the end of the hearing and the effect thereof on the validity of the order, this court had regard to the approach postulated in *S v Shikunga and another*[4] at para 171-172:

'In such cases the court might have to analyse carefully the evidence in order to determine whether it would be safe to uphold the conviction, and it might often be reluctant to come to that conclusion.'

[17] In the *Shikunga* matter the irregularities occurred in the context of a trial, but in my opinion it is the same principle that is relevant.

[18] In the matter before me, the record of the bail proceedings is not fatally inadequate. Apart from the reasons for the ruling, the record is complete with evidence, cross-examination, re-examination of all the witnesses that were called in the bail application. The material evidence is properly before the court and the appeal court is able to exercise its duty as encapsulated in section 65(4)[5] that provides:

'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 judge shall give the decision which in its or his opinion the lower court should have given.'

[19] I thus move on to re-assess the evidence in order to answer the question of whether the outcome of the bail hearing in the *court a quo* was consistent with the evidence that was led.

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[4] 1997 NR 156 (SC).
[5] Criminal Procedure Act 51 of 1977 as amended.

Factual Background

[20] The appellant was arrested with one Joel Tjombo, accused 1 in the main case and Hangome Sherigo, accused 3 in the main case on 11 October 2018 in Windhoek. The arrest ensued as a result of a sting operation that was organized by the Namibian Police and the forensic auditors of First National Bank. Subsequent thereto, two more accused persons were arrested and joined to the charge.

[21] The charge consists of allegations of fraud perpetrated by the replacement of a sim card of the complainant, which sim card was used for registration for on-line banking facilities of the complainant's bank account at First National Bank. Funds in the amount of N$ 488 000-00 was withdrawn and or transferred from the said bank account to other accounts whereas the complainant never applied for the internet banking facilities.

[22] At the outset, the respondent advanced the grounds of objection to bail as that investigations are not finalized, that they fear interference with investigations and that it will not be in interest of public or administration of justice for accused; the propensity to commit crime to be admitted to bail. The fear of absconding was also raised, but it was abandoned later in the proceedings.

[23] The appellant testified in support of his bail application. He declared that he was a 28 year old Namibian citizen and resided at his mother's house in Mondesa Swakopmund. He operated a shebeen and a catering business from there and he employed two ladies in the business. He was the owner of most of the furniture in the home and also owns a 2009 model Mercedez Benz vehicle.

[24] According to him he did not know any of the state witnesses and could thus not interfere with investigations. He furthermore denied any wrongdoing and declared himself willing to hand in his passport.

[25] The respondent called one witness, Mr Gert Boois, who was employed as a unit commander of Serious Crime Unit in the Namibian Police in Mariental. He stated that he was part of the investigations and gave instructions to the investigating officer who was in Windhoek at the High Court on the date of the bail application.

[26] According to him the modus operandi of the fraud was that the sim card was replaced at an MTC branch in Swakopmund, which was used to register for online banking services that in turn facilitated access to the complainant's bank account. Thereafter monies were withdrawn and transferred from the complainant's bank account. He testified that the complainant is a pensioner who resides on a farm in the South of Namibia, is not computer literate and did not apply for internet banking.

[27] Regarding the status of the investigations he testified that:

> 'There are many people to be arrested; there is a person who did replacement card at MTC who is not arrested; their names are known. This persons can either witnesses or accused persons depending on the explanations they gave. Through the investigations of this matter, its very clear that this was an organized crime involving a lot of people.' *(sic)*

[28] He spoke of at least two witnesses, from Swakopmund, who can link accused 1 and the appellant to one of the persons whose bank account was allegedly used to deposit part of the money. According to unit commander one of the witnesses in Swakopmund was hesitant to speak freely and feared that the unit commander was a police impersonator. He also testified about cell phone records, bank records and footage that was in the process of being obtained.

[29] Regarding the appellant's involvement, the unit commander testified that the Mercedez Benz vehicle, wherein accused 1, accused 3 and the appellant were apprehended is registered in the appellant's name. A diary that contains personal details of the complainant such as his account number, the account balance and his identity number was found under the driver's seat in this vehicle. Furthermore, the unit

commander testified that cell phones that are linked to the case and approximately N$ 10 000-00 was found in this vehicle.

[30] The unit commander also explained the circumstances wherein accused 1, accused 3 and the appellant was arrested. It appears that at the time accused 1 and accused 3 withdrew money from the complainant's account at an ATM where after accused 3 went inside the bank to withdraw money. Accused 3 was handed a bag and upon his exit from the bank led the police to the vehicle in question. The police followed the vehicle, stopped it and apprehended accused 1, accused 3 and the appellant.

[31] During cross-examination the appellant was confronted with the details of the charge allegations and the features that point to his involvement, to which he continuously replied that he has nothing to say.

[32] The evidence of the unit commander was not discredited in cross-examination. Instead counsel for the appellant put a version to the witness that the appellant will testify that he went to buy tyres and that accused 1 and accused 3 took a hike with him. None of this surfaced when the appellant testified in respect of the bail application.

[33] At the time that the bail hearing was conducted it was barely two weeks after arrest, meaning that it was an early stage of the investigations. More than a year has passed and the investigations and possible interference are likely not to be an issue anymore.

[34] The appellant faces a serious charge of fraud. The operations implicates the presence of a syndicate that orchestrated the commission of the offense and their target was a vulnerable member of society who lost the amount of N$ 488 000 as a result.

[35] The evidence presented by the respondent has shown that the state has a *prima facie* strong case for the appellant to answer. A nexus between the appellant and the commission of the offence has been established.

[36] The matter of *Noble v S*[6] held that where an applicant for bail faces a serious offense and if convicted the court would in such circumstances, be entitled to refuse bail if it is of the opinion that it would not be in the interest of the public or administration of justice to release the applicant on bail.

[37] The appellant is charged with the offence of fraud as listed in Part IV of Schedule 2 of Act 51 of 1977 and thus section 61[7] finds application.

[38] On the assessment of the totality of the evidence that was presented I am of the opinion that it will not be in the interest of the public or the administration of justice to release the appellant on bail. Therefore, I cannot fault the conclusion to which the magistrate came to have refused bail to the appellant.

[39] In the result the appeal against the refusal of bail is dismissed.

[6] CA 02/2014 NAHCMD 117 delivered on 20 March 2014. Para 36.
[7] Criminal Procedure Act 51 of 1977 as amended.

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CM Claasen

Judge

APPEARANCES:

APPELLANT: Mr B Isaacks
Of Isaacks & Associates Inc., Windhoek

RESPONDENT: Mr B Lilungwe
Of the Office of the Prosecutor-General, Windhoek