REPUBLIC OF NAMIBIA Not Reportable

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

Case No.: HC-MD-CRI-APP-CAL-2020/00040

MWEUTWIKANGE ELIAS HEITA **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Heita v S* (HC-MD-CRI-APP-CAL-2020/00040) [2020] NAHCMD 311 (23 July 2020)

Coram: CLAASEN, J
Heard: 02 July 2020
Delivered: 23 July 2020

Flynote: Criminal procedure — Bail — Appeal against magistrate's refusal to grant bail - Criminal Procedure Act 51 of 1977, s 65(4) - Appellate court must not set aside decision of lower court unless satisfied that decision is wrong - Question whether the magistrate who had discretion to grant bail exercised his discretion wrongly.- Court not satisfied that magistrate’s decision was wrong – Appeal dismissed

ORDER

The appeal is dismissed.

RULING IN BAIL APPEAL

Introduction

[1] This is an appeal against the refusal to admit the appellant to bail. Though counsel for the respondent raised points-in-limine in their heads of argument, he abandoned them at the commencement of this hearing. One of the issues were that of a late notice of appeal and the court grants condonation.

[2] The appellant was arrested on a charge of housebreaking with the intent to steal and theft. The parties referred to different dates of arrest in their heads of argument, but according to the transfer charge sheet the appellant was arrested on 30 August 2019.[1] The appellant appeared in the Outjo Magistrates' Court on allegations that between 9 and 10 August 2019 and at or near Erf 23, Meesterland Street, Outjo, the appellant wrongfully and unlawfully break in and entered the house of Mr André Nel with the intent to steal and unlawfully stole properties, to wit: 34 rhino horns valued at N$ 5 047 160, 3 revolvers and jewelry.

[3] The appellant, accused 1, Mr Hofen Amakali and accused 3, Mr Jerry Shikongo, in the main trial, brought a formal bail application in the District Court of Outjo. At the outset of the bail application, accused 1 abandoned his application for bail and it proceeded with the appellant and accused 3. On 11 November 2019 the court granted bail to accused 3 and bail was denied for the appellant.

[1] Page 14 of appeal record.

Appellant's evidence in the court a quo

[4] The appellant testified that he is a single, 30 year old Namibian male that attended school up to grade 9. He hails from Okalongo in northern Namibia and currently resides in Windhoek at the property of his late grandfather. According to the appellant he has one child.

[5] He testified that he supports his unemployed parents and his five siblings and has no relatives outside Namibia. He is the sole owner of a business known as Elias Heita Trading CC which inter alia is involved in the buying and selling of cars. As a result of the trading in vehicles, he testified that he travelled to South Africa regularly and has travelled to Botswana twice. The income derived from buying and selling cars fluctuates between the ranges of N$ 3000 to N$ 5000.

[6] As far as assets are concerned, apart from the vehicle that the police confiscated the appellant does not own property in Namibia.

[7] The appellant intends to plead not guilty. The appellant denied any involvement in the offense and stated that prior to his arrest, he has never been in Outjo where the housebreaking took place. He stated that at the time of his arrest the police confronted him with the MTC cellphone call records linking him to accused 1 at 2h00 a.m. in the morning.

[8] The appellant's explanation was that he anticipated the purchase of one of his vehicles by accused 1. According to him, accused 1 contacted him at 2h00 in the morning of the 10th of August 2019 to request him to bring the car to Otjiwarongo. Accused 1 wanted to buy a car to attend his sister's wedding in the north. The appellant contacted accused 3 to accompany him, and they left for Otjiwarongo around 3h00 in the morning and arrived there at 6h00 a.m. Upon

arrival Mr Amakali told the appellant that he only has N$ 90 000. The appellant was not willing to sell at such low price and returned to Windhoek thereafter.

[9] It also emanated that after his arrest the police went to search his residence but it came to naught.

[10] During cross-examination the prosecutor advanced that the police does not have his passport, but the appellant insisted that his passport was in his car and therefore the passport was in police custody.

[11] The appellant did not dispute that 34 rhino horns, 3 revolvers and jewelry were stolen from the house of one Mr André Nel in Outjo. However he disputed the averment that part of the jewelry that was stolen in this case was sold to or given to him.

[12] During evidence in chief the appellant was asked by his counsel whether he has a previous conviction and he answered in the negative.[2] During cross-examination the appellant stated that he misunderstood that question and then admitted to having a conviction in possession of an unlicensed fire-arm.

[13] Regarding possible interference the prosecutor put to the appellant that the investigating officer will come and testify that some of the property was sold in Angola and that the appellant knew a witness, a certain Mr Petrus Iipinge as an acquaintance, alternatively a friend. Regarding the sale of items in Angola, the appellant stated he was not aware thereof and stated that Mr Petrus Iipinge was not his friend but that they just knew each other.

Respondent's evidence in the court a quo

[2] Page 61 of appeal record.

[14] The investigating officer, Mr. Daniël Wilbard postulated the grounds of objection to bail as follows:

‘(a) the likelihood of the applicant to re-offend if released on bail;

(b) the possibility of absconding;

(c) possible interference with state witnesses; and

(d) public outcry, construed as that it will not in the public interest or the administration of justice for the appellant to be granted bail.

[15] At the time of the bail application none of the items stolen were recovered. The investigating officer stated that the offense was serious, the value of the stolen items is high and that if convicted the appellant will face a stiff sentence.

[16] He testified that this is one of the biggest cases in Namibia as it involves 34 rhino horns. He further stated that the matter was widely covered in the media, that the public is aware of the matter and thus it will not be in the public interest to grant bail.

[17] The respondent’s contention of fear of re-offending was based on the previous conviction and as far as fear of absconding was concerned the investigating officer stated that the offense was committed between 9 and 10 August 2019 whereas the appellant was arrested only on 29 August 2019.

[18] The investigating officer testified that one of the witnesses, Mr Petrus Iipinge is known to the appellant alternatively is a friend to the appellant and hence the risk of interference is high. It was gathered that this Mr Iipinge is the witness that purportedly bears knowledge that the appellant received proceeds of the crime namely to wit: jewelry.

[19] As for the evidence that incriminates the appellant the investigating officer stated that MTC printouts shows that accused 1, whom he described as the main accused in the housebreaking case, called the appellant around 2.a.m. in the

morning, of 10 August 2019. According to the investigating officer, in response to this call, the appellant picked up accused 3 and drove to Otjiwarongo. When they arrived in Otjiwarongo at around 5:00 a.m. they met with accused 1. The investigation furthermore revealed that the appellant received two rings from accused 1 and accused 3 received a necklace and three firearms from accused 1.[3] Furthermore, the investigating officer testified that the appellant informed the police that the rings which he melted into and sent it to South Africa. The appellant ostensibly received N$ 8000.00 for it. He retained N$ 6000 for himself and gave N$ 2000 to accused 3.

Discussion

[20] In an appeal against the refusal of bail the court is bound by the provisions of section 65(4)[4] not to 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 opinion the lower court should have given.

[21] From this it follows the question is whether the magistrate has erred in the exercise of his or her discretion. To consider this question I turn to the ruling given by the magistrate. The magistrate herein indicated that he was mindful that the onus was upon the applicant and stated that he considered the right to liberty and the presumption of innocence against the grounds of opposition to bail.

[22] From the reasons it appear that the magistrate heavily relied on the evidence that links the appellant to the charge allegations. In particular, he mentioned that there was cellphone communication between accused 1 and the appellant where-after the appellant and accused 3 drove to Otjiwarongo. The magistrate appears not to have been satisfied with the explanation advanced by the appellant to drive to Otjiwarongo at 2.a.m as he remarked that the appellant

[3] Page 167 of appeal record.
[4] Criminal Procedure Act 51 of 1977 as amended.

could not answer as to why he as a car dealer would be prepared to travel such a distance without finding out from the purchaser if he indeed has the full purchase price, unless the trip was not for the purpose of selling a car. Nor did the appellant make use of the method of electronic funds transfer. The magistrate essentially rejected the explanation tendered by the appellant as one that is improbable.

[23] In turning to the notice of appeal, some of the grounds overlap and some appears to be a general critique against the refusal of bail. I will not replicate the grounds as in the notice of appeal, but rather deal with it as per the oral arguments advanced by counsel.

[24] In a bail application, one of the critical issues to be considered is the strength of the state's case or the lack thereof. Several of the appellant's grounds relates to this issue. The argument was that the state failed to present a *prima facie* strong case against the appellant and that the magistrate erred in concluding that the appellant cannot be granted bail as he is linked to accused 1.

[25] In this regard the appellant argued that the MTC call records that the state intends to rely on, do not place the appellant at Outjo where the offense took place and that none of the stolen items were found at the appellant's residence. The argument was also advanced that it was never put to the appellant how he was linked to the case and that he received two rings and a necklace from accused 1, that the rings were melted into gold and that he received money which he shared with accused 3.

[26] Though the property ostensibly received by the appellant was not described as rings, when it was raised in cross-examination, the point was put across that the appellant received property. It appears from the record that during cross-examination that the prosecutor asked a pertinent question i.e. 'What is

your comment sir if I were to tell this Court that this very Iipinge Petrus is also aware of you taking part of the stolen property?'[5] The appellant denied that.

[27] In addition, the investigating officer was adamant about having evidence regarding the receipt of jewelry by the appellant from accused 1. This impression stemmed from a witness statement by one Mr Petrus Ipinge, the bank statement of the appellant that showed a deposit of N$ 8 000 and an ostensible admission that the appellant made which the investigating officer recorded in his interview notes regarding the melting of the rings and receipt of money for that. This evidence by the state may suggest that the appellant shared in some of the proceeds of the crime that was committed and may be regarded as an accomplice.

[28] The issue of cellphone contact between the appellant and accused 1 was canvassed during cross-examination. The prosecutor put it to the appellant that he said when accused 1 called the appellant, the appellant in turn called accused 3 at 2.a.m. and then they drove to Otjiwarongo.[6] The question was answered in the affirmative.

[29] In any event, it was not in issue that there was cellphone contact between the appellant and accused 1 at the peculiar hour on the date on which the alleged housebreaking took place. Furthermore, in the words of the investigating officer, accused 1 appears to be the principal figure in the case.

[30] In a nutshell the evidence about the cellphone contact between the appellant and accused 1, cannot be made off as nothing. Once the evidence regarding the receipt of some of the stolen property is added, cumulatively that constitutes that the appellant has an answerable case.

[5] Page 98 of appeal record.
[6] Page 101 of appeal record.

[31] Furthermore his version as to the purpose for the contact and the subsequent trip remain un-substantiated whilst accused 1, who in his version was the purchaser, was right there in court.

[32] The Magistrate was not wrong in treating the appellant's explanation for travelling to Otjiwarongo at 2.a.m in response to a call from accused 1 as suspicious.

[33] One of the grounds of appeal relates to the adverse inference drawn by the magistrate in relation to the appellant's initial response about his previous conviction. The magistrate cannot be faulted as the appellant made a u-turn on this aspect only after the prosecutor alluded to obtaining documentary proof in this regard.

[34] The appellant also contended that the respondent lied that the passport was not in police's custody and that there was no advert for the Golf-6GTI vehicle on facebook. No reference was made in this regard in the magistrate's ruling. However, that does not necessarily mean that it was not taken into consideration when weighing the issues for and against the granting of bail.

[35] Ultimately the onus was upon the appellant to persuade the court that the ends of justice will be served better if he is released on bail, which in this case he failed to do.

[36] In *S v Timoteus*[7] the court cited with approval the dictum in *S v Barber*[8] where Hefer J, said the following:

'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/she has, wrongly. Accordingly, although this court may have a different view, it should not substitute its

[7] 1995 NR 109 (HC).
[8] 1979 (4) SA 218 (D & CLD).

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 view are, the real question is whether it can be said that the Magistrate, who had the discretion to grant bail, exercised that discretion wrongly.'

[37] In any event the offense in question falls under Part IV of schedule 2 referred to in section 61.[9] Though the court appears not to have relied on the public interest or administration of justice, given the nature, extent and proceeds of the offense, the court would have been entitled to refuse bail on account of this provision.

[38] Having considered the reasons advanced by the magistrate and the evidence in the matter I am satisfied that the magistrate has not exercised his discretion wrongly, in his refusal to grant bail to the appellant.

[39] In the result:

The appeal is dismissed.

_____

CM Claasen

Judge

[9] Criminal Procedure Act 51 of 1977 as amended.

APPEARANCES:

FOR THE APPELLANT: M Siyomunji

Of Siyomunji Law Chambers

Windhoek

FOR THE RESPONDENT: D Lisulo

Of the Office of the Prosecutor General

Windhoek