

REPUBLIC OF NAMIBIA



REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CRI-APP-CAL-2020/00065

In the matter between:

FORTUNATO JOSE QUETA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Queta v S* (HC-MD-CRI-APP-CAL-2020/00065) [2020]
NAHCMD 328 (3 August 2020)

Coram: LIEBENBERG J

Heard: 24 July 2020

Delivered: 3 August 2020

Flynote: Criminal Procedure – Bail – Appeal against refusal by magistrate to admit appellant to bail – Court of appeal limited to the provisions of section 65 (4) Criminal Procedure Act – Interfering by appellate court only permissible when satisfied that magistrate was clearly wrong – Criticisms of substance do not constitute material misdirection – Trial court correctly exercised its discretion in

favour of the evidence of the investigating officer – Such evidence reliable and credible when weighed against the evidence of the appellant.

Summary: Following the refusal of bail in the Windhoek magistrate's court, this appeal essentially attacks the reasons advanced by the magistrate in finding that the appellant is a flight risk. Additionally, the appellant complains about the magistrate's application of section 61 of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the CPA) as well as the reasoning in finding that the appellant had no emotional roots in Namibia. The appellant faces charges of dealing in controlled wildlife products under the Controlled Wildlife Products Act 9 of 2008 to the value of N\$4 989760; contravening a section under the Prevention of Organised Crime Act 29 of 2004; as well as an accessory after the fact to a charge of Housebreaking with intent to steal and theft.

Held, the court factually considered that the appellant with relative ease, entered Namibia without presenting himself to an immigration officer as required by law and cannot be faulted for drawing a conclusion that the appellant may cross the border without detection.

Held further, the allegation by the appellant i.e. that he simply needs to present an employment certificate at the border post, is a fabrication.

Held further, even if the appellant provided an address where he will be residing, has a child or cousin in the territory where he is applying for bail, it does not equate to establishing deep emotional roots in that territory.

Held further, the ground of appeal attacking the magistrate's application of section 61 of the CPA is largely academic as it does not taint the evidence and the finding by the magistrate that the appellant is a flight risk. The magistrate principally refused bail on the basis of the appellant being a flight risk. The court merely augmented this finding by stating that it would not be in the interest of the public or administration of justice to admit a person who poses a flight risk on bail.

Held further, there is no rule in bail proceedings that a court is prevented from utilizing more than one ground in the refusal of bail.

ORDER

1. The appeal is dismissed.
 2. The matter is finalised and removed from the roll.
-

APPEAL AGAINST REFUSAL OF BAIL

LIEBENBERG J

Introduction

[1] This appeal emanates from the refusal of bail subsequent to an application launched by the appellant in the Windhoek magistrate's court. The record reveals that the judgment was delivered on 15 May 2020 and the notice of appeal filed on 4 June 2020. The appellant filed an amendment, titled 'Amended grounds of Appeal', which outlines issues overlapping with those stated in his notice of appeal. This court will infer that the latter document titled 'Amended grounds of Appeal' substitutes the former and will only have regard thereto. Both documents were filed within the prescribed time limits.

[2] The appellant is represented by Mr. *Shimakeleni* and Mr. *Lusilo* represents the state. The parties have agreed in writing, which agreement is filed of record, that this matter may be decided on the papers and in chambers. Both parties have duly filed their heads of argument.

[3] The appellant and his two co-accused are facing the offences of contravening section 4(1)(2) of the Controlled Wildlife Products Act 9 of 2008 as amended – Dealing in controlled wildlife products: to wit 33 x rhino horns valued at N\$4 989760; alternatively contravening section 2(4)(2) of the Controlled Wildlife Products Act 9 of

2008 as amended – Unlawful possession of same; contravening section 6 read with section 1, 7, 8 and 11 of the Prevention of Organised Crime Act 29 of 2004; as well as being in possession of suspected stolen property under the General Law Amendment Ordinance 12 of 1956, as amended. Additionally the appellant is charged as an accessory after the fact to a charge of Housebreaking with intent to steal and theft in respect of the 33 rhino horns. What is clear from the facts on record, this matter emanates from a housebreaking incident which occurred on 10 August 2019 whereby 33 rhino horns valued at 4.9 Million were stolen in the town of Outjo.

The law relating to Bail Appeals

[4] Firstly the applicable section in CPA in relation to the refusal of bail by a lower court is provided in section 65(4). The section reads:

‘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.’

[5] This section finds application in our courts on a daily basis. In *S v Timotheus*,¹ the court referred with approval to *S v Barber*² at 220 E-H where Hefer J explained the implication and purport of subsection 4 as follows:

‘It is well known that the powers of this Court are largely limited where that 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...³

¹ *S v Timotheus* 1995 NR 109 (HC) at 113 A-B.

² *S v Barber* 1979 (4) SA 218 (D).

³ See also: *S v Miguel & others* 2016 (3) NR 732 (HC).

(My Emphasis)

Similarly stated in *Thalasithas and 2 others v The State*,⁴ Damaseb JP held that:

'...we are to interfere only if the discretion was wrongly exercised and it is wrongly exercised if the court took into account irrelevant consideration, disregard relevant consideration, applied the law wrongly or got the facts plainly wrong.'

[6] In every matter before a court, inevitably, there will be a successful and unsuccessful party and where the latter disagrees with the findings of the court. This disagreement or differed view however, does not inspire grounds of appeal. What should be emphasised is that it matters not whether this court agrees or disagrees with the factual findings of the magistrate, the inquiry is limited to whether the court's discretion was exercised wrongly. It is further trite law that an accused who applies for bail bears the onus to prove on a preponderance of probability that it is in the interest of justice that he should be granted bail.⁵ This translates that an applicant must place before a court reliable and credible evidence in discharging this onus.

[7] The state objected to bail on the following grounds: the state had a strong *prima facie* case against the accused; the charges against the accused are serious; fear that the accused would abscond; the accused was likely to reoffend; and finally, that it is not in the interest of the public or in the interest of the administration of justice that the accused be released on bail.

Brief Background

[8] On the evaluation of the evidence as gleaned from the record, the court considered that the applicant was a married Angolan national male. He lived in Angola with his parents and has relatives in Namibia, namely a child and an aunt, but does not visit them often. That himself and his wife are teachers by profession and that he has 15 children. The court considered that he entered Namibia and was arrested on the same day by the Namibian Police. There is no proof of entry into Namibia in the applicant's passport, nor a permit legalising his presence in Namibia.

⁴ *Thalasithas and 2 others v The State*, 80/2009 delivered on 20 March 2009.

⁵ *S v Pineiro* 1992 (1) SACR 577 (Nm) at 580; *S v Dausab*, 2011 (1) NR 232 (HC) at 235.

[9] Furthermore, the applicant has a similar case in the town of Omungwelumbe of contravening section 4(1)(2) of the Controlled Wildlife Products Act 09 of 2008 as amended – Dealing in controlled wildlife products and a charge relating to the illegal entry into Namibia under CR 03/03/2020. The applicant admitted during cross-examination that he indeed had such case in Omungwelumbe and that he made admissions in the form of a written statement, albeit, indicating that he will dispute the voluntariness thereof at his trial in that matter.⁶

[10] The view of the investigating officer is that the accused forms part of a syndicate dealing in illicit trade of controlled wildlife products i.e. rhino horns. He further indicated that the applicant's involvement in the past is that he met up with one of his co-accused at Oshikango from where they proceed to Ondjiva; there the rhino horns would be sold and the proceeds thereof portioned.

Grounds of Appeal

[11] There are 4 grounds of appeal. The first three essential overlap as they relate to the court's finding that the appellant is a flight risk. I shall deal with the first three grounds individually along the enquiry whether the magistrate exercised his discretion wrongly, and provide a brief discussion thereon before moving to the fourth ground of appeal.

[12] The first ground of appeal relates to the magistrate having erred in law or in fact by finding that the Angolan/Namibian border is not fenced, despite the fact that the investigating officer stated that he has no knowledge as to the extent and frequency the border is patrolled; and that no evidence was led for the magistrate to conclude that the border is 'not protected and difficult to manage'.

[13] The ground of appeal appears to be a misinterpretation of the facts testified to by the state witness and the reasoning of the magistrate, as it does not clearly reflect what appears on record. When posed with a question regarding this issue by the magistrate the investigating officer stated the following:

⁶ Record 306-310.

'Yes. --- [according to] my knowledge Your Worship the border between Namibia and Angola is not fenced, it is not fenced and [I] know that there are authorities that used to be based on the border but Your Worship I do not know whether this [border] is regularly patrolled but I only know that one can easily cross over to Angola or from Angola to Namibia at any point along the border because the border is not fenced Your Worship.'⁷

(Emphasis added)

When further probed by the Mr *Shikameleni* on the same issue, the witness stated as follows:

'I do not agree with your comment because I said I know that there are authorities that had been positioned along the borders to control, to patrol but not always that border is being patrolled and I said the border is not fenced, can easily cross over to and from [without] being noticed.'⁸

(Emphasis added)

[14] Evidently from the above extracts, there was indeed *prima facie* evidence given by the witness regarding the extent of the fencing. From his evidence, the witness clearly stated that the fencing and patrolling of the border is substandard and permeable; this evidence cannot be wished away. The argument by *Mr Shimakeleni* that the investigating officer was not a competent witness to testify about the border does not find support in any basis laid thereto. Unless otherwise so directed by the court, all witnesses are competent to give evidence in court. Evidence can only be assessed along its credibility, reliability and probative weight. It is trite that evidence in bail applications is given through the investigating officer. In addition, the investigating officer provided sufficient detail on his investigations which spanned from the Namibian towns of Outjo, Grootfontein, Otjiwarongo, Windhoek, Karibib and Oshikango to Angola. Can this court say that the magistrate exercised its discretion wrongly? I have no doubt that from the evidence, the magistrate cannot be faulted for reaching the conclusion that he did. This ground of appeal accordingly fails.

[15] The second ground of appeal relates to the magistrate having erred in law or in fact by finding that the circumstances under which the appellant entered Namibia

⁷ Record 87.

⁸ Record 88.

was not plausible as the evidence that appellant gave, namely, that an employee of the Angolan Government is permitted to enter Namibia without having his passport stamped, was not challenged during cross examination; and no immigration officer was called to refute the version of the appellant.

[16] The appellant admitted to entering Namibia without having documented his proof of entry as required by the Immigration Control Act 7 of 1993. His explanation for this is that because he is a teacher in Angola, he simply has to present proof of employment or appointment certificate to immigration officials at the entry point in order to gain entry into Namibia. He went on to say that employees of Angola in Ondjiva and Namakunde are allowed to enter Oshikango.

[17] With deference, this allegation relates to a pivotal issue in his bid for bail. It therefore calls for a proper foundation and specific evidence to be led in that regard. The mere *ipse dixit* will certainly not suffice as it paints an incomplete picture before the court. It is incumbent on the appellant to have expounded on his allegation and where necessary, provide such agreement between Namibia and Angola, its terms, the nature and extent of the permit allowing him access to Namibia or proof of entry through the designated border post, whether challenged or not.

[18] According to an agreement between the Government of the Republic of Namibia and the Government of the Republic of Angola, dated and signed on 1 April 1996 at Windhoek, in a bid to strengthen solidarity between the two countries and its citizens, special provisions are set out relating to the crossing over of persons living in border towns from the two countries at certain border points. Article 4 of the Agreement reads as follows:

‘Any border resident who may wish to travel across the common border shall be issued with a permit by the competent authority of the respective party, valid for a stay of seventy-two (72) hours renewable at the discretion of the receiving country.’⁹

(Emphasis added)

The agreement goes on to say at Article 3.1:

⁹ Agreement between the Government of Namibia and the Government of Angola on Defence and Security, dated and signed 1 April 1996 at P. 10.

'Any person travelling to and from the territories of the Parties, shall pass through designated border posts.'¹⁰

(Emphasis added)

[19] It is clear from the above extracts that the allegation by the appellant i.e. that he simply needs to present an employment certificate at the border post, is a fabrication. Article 4 of the agreement clearly speaks of a permit which, if the appellant was in possession of one, should have presented evidence to that effect. It must be remembered that the applicant bears the onus to prove his case and in particular, this point, on a balance of probabilities in bail applications. He was open to call a witness or provide any corroborative proof to support his claim, the failure of which falls on him.

[20] This ground of appeal further omits to take into account that the version of the appellant was put to the investigating officer by the magistrate and the investigating officer refuted this evidence and supported his view with the Immigration and Control Act. The submission therefore that the evidence of the appellant was not refuted is not correct. The court was entitled to exercise its discretion in favour of the evidence of the investigating officer if it deemed it reliable and credible after weighing it against the evidence of the appellant. Moreover, the appellant's version is in stark contrast to his pending matter of illegal entry into Namibia in the town of Omungwelumbe. This court cannot find that the magistrate was wrong in doing so and this ground of appeal equally fails.

[21] The third ground of appeal is that the magistrate erred by finding that the appellant had no emotional roots in Namibia despite there being unchallenged evidence that the appellant has a child and relatives living in Namibia whom he visited, and that the appellant speaks fluent Oshiwambo.

[22] The question is not whether the evidence establishes that the appellant has a child in or not in Namibia, as this fact, in itself, does not establish deep emotional roots in Namibia. Notwithstanding the above fact, he must prove by way of evidence that he has strong ties and/or deep emotional roots in Namibia. These factors are to be placed on record distinctively and this was not done by the appellant. The appellant at no stage placed evidence on record relating to how long and often he

¹⁰ *Abid.*

resided, visited, attended to family responsibilities, worked, or owns any assets in Namibia. The magistrate did consider that the appellant has family in Namibia when stating:

‘..the Applicant has never lived in Namibia, has no deep emotional, no asset, no occupational or family root to Namibians except his aunty and her children, that alone is worth considering.’

(Emphasis provided)

[23] The court will take various factors into account when considering whether an applicant has strong ties or deep roots in a country and these factors should be taken together, no one factor can stand by itself. Therefore, even if the appellant provides an address where he will be residing, has a child or cousin in the territory where he is applying for bail, it does not equate to establishing deep emotional roots. Certainly these factors are relevant in establishing such fact, however, the magistrate cannot be said to have wrongly found that this was not enough to have established deep emotional roots in Namibia, especially in light of the fact that the appellant was not ordinarily resident in Namibia; was fully employed in Namibia and resided in Angola; and has penetrated our borders without needing his passport to do so. I am satisfied that the magistrate did not misdirect himself on the law or facts when considering the evidence as to whether the appellant had emotional roots in Namibia.

[24] The court having factually considered that the appellant with relative ease, entered Namibia without presenting himself to an immigration officer as required by law, cannot be faulted for drawing a conclusion that the appellant may cross the border without detection.¹¹ Notwithstanding the above, our courts have recognised that Namibia has borders that can be penetrated with relative ease. This can be seen from *S v Yugin and Others*,¹² where Damaseb JP stated at 201 C:

‘We have many borders and experience has shown, they can be penetrated with relative ease. Replacement documents can be obtained and air carriers are equipped to carry individuals.’

¹¹ Record 415.

¹² *S v Yugin and Others* 2005 NR 196 HC.

The court went on to say at 200 A-G:

‘In a bail application the Court has to consider a number of factors. Some militate towards bail being granted, some militate against. One such factor is whether the accused, if granted bail, will stand his trial or whether there is a real possibility that he will abscond. If there is such a possibility no one can properly criticise a Court which, in the exercise of its discretion, refuses bail.’

[25] I safely conclude that the court *a quo* indeed carefully considered all the facts when considering whether the appellant was a flight risk and cannot be criticised for refusing bail on that score.

[26] The fourth ground of appeal criticises the magistrate for invoking section 61 of the CPA, when the court already made a finding that the appellant is a flight risk. This ground is largely academic as it does not taint the evidence and the finding by the magistrate that the appellant is a flight risk. Moreover, the wording of section 61 of the CPA does not prevent its invocation in the circumstances of this matter. From this court’s understanding of the ruling, the magistrate principally refused bail on the basis of the appellant being a flight risk. The court merely augmented this finding by stating that it would not be in the interest of the public or administration of justice to admit a person who poses a flight risk on bail. Moreover, there is no rule in bail proceedings that a court is prevented from utilizing more than one ground in the refusal of bail. Equally, this ground of appeal stands to fail. There can never be a perfect judgment or ruling, and in this regard I endorse what has been stated in *S v De Beer*¹³ where the court stated:

‘No judgment can ever be ‘perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.’¹⁴

[27] From the investigating officer’s evidence it appears that the appellant is part of the link between locals who illegally obtain rhino horns and the international market. Before he is contacted to confirm arrangements for a purchase, the rhino horns go

¹³ *S v De Beer*, 1990 NR 379 (HC) at 387I-J.

¹⁴ (See *S v Pillay*, 1977 (4) SA 531 (A) at 534H-535G and *R v Dhlumayo and Others*, 1948 (2) SA 677 (A) at 706).

through various meetings of persons who link up in Namibia. Pictures are eventually sent to the appellant who thereafter either confirms the deal or not. Once confirmed, the appellant arranges the sale with a foreign buyer. On the strength of the investigating officer's evidence, it would appear that the appellant forms part of a multi-levelled operation in that he links the lower level perpetrators with higher level perpetrators in furtherance of the illicit trade of rhino horns. I am satisfied that the evidence by the investigating officer *prima facie* establishes the appellant's involvement in this matter pertaining to a criminal syndicate; and is consistent with acting in common purpose in furtherance of the illicit trade. Section 61 of the CPA, on the charge relating to the initial charge of housebreaking with intent to steal and theft of 33 rhino horns, albeit an accessory thereto, would inspire a court to invoke the provisions of section 61 of the CPA.

[28] As stated in *Timotheus* (supra), it matters not what this court's 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. The issues raised by Mr *Shimakaleni* mainly leveled criticism to the reasoning of the magistrate. These criticisms although holding substance, do not constitute any material misdirection. I am not convinced that a case has been made that the magistrate exercised his discretion wrongly. The appeal accordingly falls to be dismissed.

[29] In the result, it is ordered:

1. The appeal is dismissed.
2. The matter is finalised and removed from the roll.

JC LIEBENBERG

JUDGE

APPEARANCES

APPELLANT:

A Shimakeleni
Of Appolos Shimakeleni Lawyers,
Windhoek.

RESPONDENT:

D Lusilo
Of the Office of the Prosecutor-General,
Windhoek.