REPUBLIC OF NAMIBIA

NOT REPORTABLE

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no.: HC-MD-CRI-APP-CAL-2022/00062

In the matter between:

SAKEUS PAULUS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Paulus v S* (HC-MD-CRI-APP-CAL-2022/00062) [2022] NAHCMD 498 (23 September 2022)

Coram: LIEBENBERG J *et* JANUARYJ

Heard: **12 September 2022**

Delivered: **23 September 2022**

Flynote: Criminal Procedure – Bail Appeal on new facts – Failure by Court *a quo* to afford appellant opportunity to bring new facts – Approach to bail application on new facts – Procedurally flawed.

Summary: The appellant unsuccessfully brought an application for bail on new facts in the Swakopmund Magistrate's Court. Aggrieved by the manner in which the presiding magistrate handled the latter proceedings, the appellant noted an appeal. Before the intended application for bail based on new facts, the court was informed that the appellant wished to lead evidence.

Essentially, the appellant's grounds of appeal are solely premised on the fact that the presiding magistrate erred in law and/or the facts, when concluding that the appellant's application bore no new facts without affording counsel the opportunity to lead evidence as the appellant wished to do.

Held that the appellant was not afforded an opportunity to call witnesses in order to place sufficient evidence before court in order for the court to consider such evidence and to thereafter make a ruling.

Held that the presiding magistrate's reasoning is clearly wrong in law and is procedurally flawed.

Held further that it is settled law that a judicial officer must first afford both parties *audi* in order for the parties to place all sufficient facts before the court and only after considering the evidence, together with the evidence adduced during the first bail application would the court be able to rule on the application brought on new facts.

ORDER

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1. The appeal succeeds.
2. The matter is remitted to the court a quo with the direction to allow the appellant to lead evidence, based on new facts.

JUDGMENT

LIEBENBERG J (JANUARY J concurring):

Introduction

[1] The appellant's initial bail application, heard in the Swakopmund Magistrate's Court was unsuccessful. Subsequent thereto he lodged a second bail application. This time on new facts. This second application was dismissed on 19 May 2022. Aggrieved by the manner in which the presiding magistrate handled the latter proceedings, the appellant noted an appeal.

[2] The appellant is represented by Mr *Kanyemba*, same counsel who appeared for the appellant in the latter bail application. Mr *Muhongo* appears for the respondent.

[3] Appellant is charged with eleven (11) counts of contravening s 2(1)(*a*) read with sections 1, 2, (2), 3, 5, 6 and 18 of the Combating of Rape Act 8 of 2000; five (5) counts of kidnapping; two (2) counts of assault by threat; and two (2) counts of common assault.

Proceedings in court a quo

[4] On 18 May 2022, the appellant filed his second bail application, premised on new facts. The application for bail was based on the following new facts:

> '(a) Investigations are finalised, there exists no threat of interference.
>
> (b) Applicant has developed a medical ailment while in custody.
>
> (c) Applicant's personal circumstances have deteriorated exponentially over the past two to three years.
>
> (d) The state has not established a prima facie case against the applicant.'

[5] After counsel, at the behest of the presiding magistrate, made oral submissions as regards the appellant's intended formal bail application based on new facts, the presiding magistrate indicated that:

> 'I want to peruse this record so that I can make my decision whether to proceed or not on this bail new facts'.

[6] Mr *Kanyemba*, counsel for the appellant, responded in the following terms that:

'… It appears my Learned friend for the State at the very last minute has decided not to call witnesses, we got a copy of an affidavit from a police officer that they intend using so they will not be calling any witnesses and we were only placed in that position a few minutes before 13:00 today. So but our approach is that we are bringing this application, we are going to lead viva voce evidence and we intend calling two witnesses.' (Emphasis provided)

[7] On 19 May 2022 when the matter was called, the Prosecutor addressed the court and indicated: 'Your worship we are ready to note down the judgment'. Mr *Kanyemba* in his address to the court stated that he was under the impression that he filed the bail application on new facts and would lead evidence from the applicant but, to his surprise, he is learning that the matter is up for judgment. In his view, the application for bail had not commenced as yet as he was not afforded an opportunity to call any witnesses and to make final submissions before the court would hand down its ruling.

[8] The presiding magistrate responded in the following terms:

' …If you read various judgments what the judgments do not want is reiteration of going through the same facts or issues that was canvassed already again over and over that is what should not be allowed. So when an application is brought it is also for me to go and evaluate and see based on the grounds that you raised whether it is then prudent for the court to proceed to hear the matter. Whether based on the grounds that you have given we are now permitted to proceed to the next stage of calling witnesses. … Now basically all these factors does not warrant for the Court to now open up the Bail that was previously already refused and the Bail grounds that was set by the state was proved and it basically still stands. So based on that the Court finds there exists no new facts and that the bail still remains the applicant is actually dismissed for Bail application. . . . ' (sic)

The appellant's grounds of appeal

[9] For the sake of completeness all the appellant's grounds of appeal are quoted:

‘(a) The learned magistrate erred in law and or in fact by handing down judgement concluding that there were no new facts, without hearing any testimonies from the appellant and/or the state on which the learned magistrate could rely, hence the conclusion of the court was not supported by evidence.

(b) The learned magistrate failed to hold a proper inquiry as it was not a balanced approach in the inquiry or weighing of all the relevant factors. That was because the Court a quo disregarded the personal circumstances of the Appellant, the prejudice that incarceration has on the Appellant and his family.

(c) The learned magistrate failed to conduct a fair, impartial and objective bail hearing, in view of the numerous unwarranted statements indicative of a pre-mediation as to the guilt of the Appellant on the part of the Court a quo, which materially influenced the Court.

(d) The court erred in its conclusion that the state had a strong *prima facie* case against the Appellant without a shred of evidence placed before her to demonstrate same and for her to make an assessment before coming to a conclusion, since the investigations are now finalised which was not the case at the time of the initial bail application.

(e) The court erred in law and/or fact by finding that the correct position in our law is that courts should not hear any evidence in an application for bail on new facts but must first make a finding that new facts exist before the bail application can proceed and/or evidence could be led.

(f) The court erred in law and/or in fact by finding that the approach taken by the High Court in the recent similar cases of bail applications on new facts is not the correct position in our law as that is not the approach and/or practice at the Swakopmund Magistate’s court.

(g) The learned magistate erred in law and/or fact by suggesting that the applicant’s case should be used as a test case and or case study at the expense and/or prejudice of the applicant by remarking that “*perhaps the applicant should appeal to the High Court so that we can be schooled on the correct position of the law*” despite the fact that she was referred to recent similar High Court cases that dealt with applications for bail on new facts.’

[10] Essentially the appellant’s grounds of appeal are solely premised on the fact that the presiding magistrate erred in law and/or the facts, when concluding that the appellant’s application bore no new facts without affording counsel the opportunity to lead evidence as the appellant wished to do.

The State's grounds of opposition

[11] The initial formal bail application lodged by the appellant was opposed by the respondent on the following grounds:

(a) The charges brought against the appellant are serious.
(b) The state has a strong prima facie case against the appellant.
(c) Fear of interference with state witnesses.
(d) Investigations are incomplete.
(e) It would neither be in the interest of justice to grant bail.
(f) The complainant fears for her life should the accused be released on bail.

[12] It is common cause that the appellant brought a formal bail application before the court *a quo* on 19 December 2019. After hearing evidence from both the appellant and the state the court *a quo* denied bail.

[13] We now turn to considering the arguments proffered on behalf of both parties.

Arguments on behalf of the appellant

[14] It is contended that as is required by our law, a court is duty-bound to analyse evidence judicially and in line with the established rules of evidence. The Appellant carries the burden to discharge the onus by placing new facts and leading credible evidence before the court. A presiding officer can only rely on the evidence placed before court considered together with the evidence already adduced during the first bail application to make a fresh ruling. It would be highly irregular for the presiding officer to make a ruling without evidence being placed before him or her in circumstances where one or both parties wished to do so.

[15] We were referred to the matter of *Awaseb v S,*[1] where the court stated that:

[1] *Awaseb v S* [2018] NAHCMD 128.

'The typical approach taken by the Courts when an accused wants to make an application for bail on new facts is that new evidence must be placed before it and must be such that they are related and must change the basis on which bail was initially refused. Furthermore, when factors such as investigations being finalized are considered, an Appellant's health condition could be regarded as a new fact and it should change the basis on which bail was initially refused.'

[16] Appellant contended that in this case, the presiding magistrate refused new evidence to be placed before the court and as such, did not make any findings of facts on several parts of the evidence. This was relative to the evidence that was barred from being presented by the appellant as new evidence with regard to having been prejudiced by his continued incarceration.

[17] Appellant further made reference to the matter of *Sheelongo v S,*[2] where the court held that:

'…when as it is in the present case, the accused relies on new facts that has come to fore since the first or previous bail application, the Court must firstly, establish whether these facts brought before it are indeed new and are relevant for the new bail application.'

[18] In the above-cited case, the court found that new facts can and should be put before a magistrate by adducing oral evidence or submitting a document stating facts that are common cause.

[19] Appellant further contends that the magistrate could only have decided the question of new facts after the appellant was afforded the opportunity to present such facts.

Arguments on behalf of the respondent

[2] *Sheelongo v S* (CC 16/2018) [2020] NAHCNLD 51.

[20] The respondent's counter argument is that in a bail application on new facts, it should firstly be proved that new facts exist and secondly that those new facts warrant the release of the applicant, considered together with the facts in the initial bail application. It is submitted that the appellant stated before the *court a quo* new facts to wit: that the investigations are finalised; that the appellant has developed a skin ailment; that his personal circumstances have deteriorated in that he cannot run his business to support his family; and that the State's case is not strong.

[21] During oral argument, although belatedly, counsel for the responded conceded rightfully so that the court *a quo* did not hear and consider the appellant's intended bail application on new facts. The concession is properly made.

[22] We were referred to the matter of *Kauejao v S*[3] where the court held that:

> 'Applicant opted not to lead any evidence during the application and the only new evidence adduced came in the form of a letter from the applicant's erstwhile legal representative, Mr Sibeya, which was handed in by agreement (Exhibit 'C').'

Discussion

[23] As indicated earlier, the appellant's grounds of appeal are solely premised on the fact that the presiding magistrate erred in law and or fact when concluding that the appellant's application bore no new facts, without any evidence placed before her by the appellant, nor by the state. As can be gleaned from the record, after counsel for the appellant stated the grounds upon which he intends to bring the bail application based on new facts, the presiding magistrate indicated that she intends rolling over the matter because she wants to 'reconsider, read through the record again and make a ruling.' She further indicated that: 'I want to peruse this record so that I make my decision whether to proceed or not on this bail new facts.' (sic)

[3] *Kauejao v S* (CC 06/2014 [2014] NAHCMD 316 (29 October 2014).

[24] The appellant was not afforded an opportunity to call witnesses to place sufficient evidence before court in order for the court to consider such evidence and to thereafter make a ruling. The magistrate reasoned as follows:

> 'So when an application is brought it is also for me to go and evaluate and see based on the grounds that you raised whether it is then prudent for the court to proceed to hear the matter. Whether based on the grounds that you have given we are now permitted to proceed to the next stage of calling witnesses. . . '
> Now basically all these factors does not warrant for the court to now open up the bail that was previously already refused and the bail grounds that was set by the State was proved and it basically still stands. So based on that the Court finds that there exists no new facts and that the Bail still remains the Applicant is actually dismissed for bail Application. . . .' (sic)

[25] It goes without saying that the presiding magistrate's reasoning is clearly wrong and her approach is procedurally flawed. It is settled law that a judicial officer must first afford both parties *audi* to allow for the parties to place all sufficient facts before the court and only after considering the evidence, together with the evidence adduced during the first bail application, would the court be able to rule on the application brought on new facts. It is evident from the record that the court *a quo's* approach during the purported new bail application in this instance is not consistent with recognized and established rules of law, followed in this jurisdiction. We find that the presiding magistrate erred when concluding that the appellant's application bore no new facts without any evidence placed before the court by the appellant or by the state.

[26] In the result, it is ordered:

1. The appeal succeeds.
2. The matter is remitted to the court *a quo* with the direction to allow the appellant to lead evidence, based on new facts.

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J C LIEBENBERG

JUDGE

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H C JANUARY

JUDGE

APPEARANCES:

Appellant:	Salomon Kanyemba Of Salomon Kanyemba Legal Practitioners, Windhoek
Respondent:	Henry Muhongo Of Office of the Prosecutor-General, Windhoek