REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2022/00063

In the matter between:

PIETER JACOBUS BOOYSEN **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Booysen v S* (HC-MD-CRI-APP-CAL-2022/00063) [2022] NAHCMD 528 (3 October 2022)

Coram: JANUARY J et SHIVUTE J
Heard: **14 September 2022**
Delivered: **3 October 2022**

Flynote: Bail – Application pending appeal - Appellant convicted and sentenced for culpable homicide– Appellant appealed in terms of s 321(1)*(b)* and s 60 of the Criminal Procedure Act 51 of 1977 as amended (the CPA) - Court given wider powers - Onus on

appellant to show on a balance of probabilities of being a good candidate for bail –The interest of administration of justice and public interest considered – Application to be admitted on bail succeeds.

Summary: The appellant was charged with culpable homicide. He was convicted and sentenced to 3 years imprisonment, of which one year was suspended on certain conditions. He filed an appeal against conviction and sentence. His appeal is in terms of s 321(1)*(b)* and s 60 of the Criminal Procedure Act 51 of 1977 as amended (the CPA).The appellant was unsuccessful with a bail application pending appeal in the lower court. He is now appealing against the refusal of bail pending the hearing of the appeal. The public interest and administration of justice are considered. Application to be admitted on bail with conditions granted.

ORDER

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1. The applicant's application for bail pending appeal is upheld.

2. Bail in the amount of N$10 000 is granted to appellant with immediate effect on the following conditions:

   2.1 The appellant is to hand in all his travel documents to the investigating officer as soon as possible and should not apply for a new passport and travelling documents.

   2.2 The appellant is to report to the office of the Namibian Police in Keetmanshoop, alternatively to the investigating officer, once a week between the hours 08h00 to 18h00.

   2.3 If the appellant wishes to leave Keetmanshoop for any reason he should inform the investigating officer in this regard prior to leaving.

2.4 The appellant is directed to present himself at court personally at the time that his appeal is heard and/or at the time the judgment in the appeal is delivered.

JUDGMENT

JANUARY J (SHIVUTE J concurring):

Introduction

[1] Appellant was convicted on 17 March 2022 on a charge of culpable homicide pursuant to motor vehicle accident in which he allegedly negligently caused the death of a child. He was sentenced on 18 March 2022 to 3 years' imprisonment of which one year was suspended on certain conditions. On 22 March 2022, he lodged an appeal against the conviction and sentence. On 27 March 2022, he unsuccessfully applied for bail pending appeal. On 30 March 2022, appellant lodged an appeal against the magistrate refusal to grant him bail pending the adjudication of the appeal against conviction and sentence. This appeal is in terms of s 321(1)*(b)* and s 60 of the Criminal Procedure Act 51 of 1977 as amended (the CPA).[1]

[2] The State objected to the granting of bail pending appeal in the lower court and is opposing the appeal.

[3] The appellant is represented by Mr. Percy McNally, who also represented him in the court a quo. Counsel for the respondent is Mr. Tangeni Itula.

[4] The appellant's grounds of appeal are as follows:

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

‘1) ‘That the Learned Magistrate erred in refusing to apply the test as espoused in *S v Beyer*[2] and *State v Lang*[3] (to which decisions she was bound) to the application for bail pending appeal that she was seized with.

2) That the Learned Magistrate erred in finding that appellant’s release on bail pending appeal would defeat the course of justice. There being no basis for such a finding, more especially of her explicit finding that he was not a flight risk.

3) That the learned magistrate erred in finding:

“Whether or not the applicant should be granted bail pending appeal to this court’s opinion, is that the trial court must be satisfied that the applicant has stood trial fairly and justly and that all evidence, facts and law have been considered and judiciously applied but such court came to a fair and just conclusion”. - Such finding being illogical, irrational, non-sensical and not the test to be applied when adjudicating an application for bail pending appeal.

4) That the learned magistrate erred in finding that:

“*Judicial officers are expected to exercise and apply their mind independently when considering a conviction and or a sentence, being the only mind well vested with the facts before it as such it is natural conclusion and question for any appeal court to ask the question whether the trial court has applied its mind judiciously to the facts of the matter unless a sentence is shocking in its nature and deviates from the precedence”*. Such finding is not being the test to be applied when considering whether to grant bail pending appeal;

5) That the learned magistrate erred in finding that:

“*The appellant had an opportunity to show this court via evidence that it did not apply its mind and that the sentence is shocking in its nature”.* Such finding not being the test to be applied when considering whether to grant bail pending appeal.

6) That the learned magistrate erred in finding:

“*Whether the appellant deems his conviction and sentence fair should not be the issue but rather whether the court’s a quo’s conclusion is just in law*.” Such a finding not being the test to be applied when considering whether to grant Appellant bail pending appeal.

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[2] *S v Beyer* 2014(2) NR 414.
[3] *State v Lang* No. CA 53/2013.

7) That the learned magistrate erred in finding:

"*The applicant had a fair trial and was duly represented by seasoned counsel in the fraternity and at and no point was it pointed out by counsel or the state that there is serious irregularities or deviation from the facts and law by this trial court".* Such a finding not being the test to be applied when considering whether to grant bail, pending appeal.

8) That the learned magistrate erred in finding:

"*This court is of the opinion that it has made a decision completely independent and without influence based on the facts and law before it*." Such a finding not being the test to be applied when considering whether to grant bail, pending appeal.

9) That the learned magistrate erred in relying on the case of *Harry Simon v The State*[4], to refuse bail appellant bail pending appeal, whereas Simon's case did not deal with an application for bail pending appeal at all, but rather with an Appeal against his conviction on a charge of Culpable Homicide.

10) That the learned magistrate erred in finding:

"*This court did not follow its own mind without any substantiating arguments to support it."* Such finding being illogical, irrational, non-sensical and not the test to be applied when adjudicating an application for bail pending appeal, and a display of the muddled reasoning of the learned magistrate.

11) That the Learned Magistrate erred in not realizing what is meant by an Appeal is arguable, implies as a matter of logic that it is not manifestly doomed to failure. Accordingly that the court should rather lean in favour of the liberty of the subject by granting bail pending appeal.

12) That the learned magistrate erred in finding:

"... as in most instances all appeals are arguable for the simple fact that each court is required to apply its own mind to come to a just and fair conclusion as far as possible."- Such a finding not being the test to be applied when considering whether to grant Appellant bail, pending appeal.

13) That the learned magistrate erred in finding:

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[4] *Harry Simon v The State* 2007(2) NR 500.

'Whether or not that there is an inference with justice should this court at this stage grant bail is a matter that cannot be thrown in the face of this court as a right to appeal is a separate issue of that of the accused being duly and justly sentenced.' - Such a finding not being the test to be applied when considering whether to grant Appellant bail, pending appeal.

14) That the learned magistrate erred in finding:

"The accused has been justly and fairly convicted by this court and such sentence should be interfered with by an application of appeal where this court has not seriously deviated from the norm in respect of this offence". Such a finding being illogical, irrational non-sensical and not the test to be applied when adjudicating an application for bail pending appeal, and a display of muddled reasoning of the Learned Magistrate.

15) That the learned magistrate erred in finding:

"This is indeed a serious offence and this court is not of the opinion that it should allow the applicant his freedom pending an appeal process that has to walk its own course while the accused was fully of the possibility of this court imposing a custodial sentence, no accused has the right to be sentenced with the option of a fine as the sentenced imposed lies solely in the discretion of the court a quo with of course the guidelines of precedence set in law." Such a finding being illogical, irrational, non-sensical, not the test to be applied when adjudicating an application for bail pending appeal, and a display of the muddled reasoning of the Learned Magistrate.

16) The Learned Magistrate erred in refusing the appellant bail pending appeal despite the fact that the appellant has amply demonstrated that he has reasonable prospects of success on appeal and that his appeal is not manifestly doomed to failure more specifically since:

16.1) The Learned Magistrate herself found that he did not drive at excessive speed;

16.2 That the child was knocked over in his lane of travel;

16.3 That according to undisputed evidence of Chazney Cloete, the deceased attempted to cross the road, realised his mistake, attempted to turn around slipped and fell when the appellant drove over him;

16.4) The deceased ignored the pedestrian crossing and attempted to cross the road at a place where it was dangerous and inappropriate to him to do so;

16.5) The appellant could not have foreseen that the deceased would slip and fall and in that fashion end up underneath his car.

17) That the Learned Magistrate erred in refusing the appellant bail pending appeal without once applying her mind, as he should have, to whether another court might come to a different conclusion as regards appellant's conviction and sentence.

18) That the Learned Magistrate erred in refusing to grant the appellant bail pending appeal despite the fact that there was no urgent and pressing societal need why the appellant should serve his sentence now, and not after his appeal has been adjudicated.'

Submissions in support of the bail application

[5] Counsel for the appellant submitted that when applying for bail pending appeal, an applicant has to satisfy the court of two things, namely:

9) there is reasonable prospects of success on appeal and
10) that the appellant will not abscond in the event of his appeal being unsuccessful. Counsel referred to the case of *S v Williams,*[5] where Fieldsend CJ stated the following:

'Different considerations do, of course arise in granting bail after convictions from those relevant in the granting of bail pending trial.'

[6] Counsel further cited the case of *S v De Villiers and Another,*[6] where it was stated as follows:

'Further that the trial court had misdirected itself in refusing bail pending an appeal, on the sole ground that the appeal has no reasonable prospects of success. Bail pending an appeal ought not lightly be refused on this ground alone. No procedure existed in the magistrate to assess the possibility of another court reaching a different conclusion than his own. That assessment was a skill which not be acquired overnight. Therefore it might be in the interest of justice rather to grant bail pending appeal, except in the clearest of cases, if all other requirement for bail are satisfied.'

[5] *S v Williams* 19881(1) SA1170 [ZAD].
[6] *S v De Villiers and Another* 1999(1) SASV 267.

[7] We were also referred to the case of *S v Hudson,*[7] where the court introduced a lesser standard than reasonable prospects of success on appeal namely the appeal was not manifestly doomed to failure, in other words arguable. It was stated as follows:

'…the test is not whether the appeal will succeed, but a lesser standard namely whether the appeal was free from a predictable failure to avoid imprisonment.'

[8] In *S v Adrain,* [8] Cheda AJ followed and stated the principle as following:

'This therefore, as long as the appeal is not doomed to failure as it were, it is therefore arguable the court should in those circumstances grant bail to avoid prejudice to the appellant. A more liberal approach is welcome in our jurisdiction (*S v Beyer).*[9]'

[9] This court stated in *S v Bronco,*[10] that:

'A court should always consider suitable conditions as an alternative to the denial of bail. Conversely, where no consideration is given to the application of suitable conditions as an alternative to incarcerations, this may lead to a failure to exercise a proper discretion.'

[10] On perusal of authorities it is evident that Namibian courts have adopted the lesser standard referred to above.

Submissions in opposition to the bail application

[11] Counsel for the respondent referred to the case of *S v Hella*[11] where the court held as follows:

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[7] *S v Hudson* 1996(1) SACR 431.
[8] *S v Adrain* CA 53/2013 (22/0802013) 22 august 2013 at p5.5.
[9]. *S v Beyer* 2014(2) NR 414.
[10] *S v Bronco 2002(1) SACR 531 at 537.*

[11] *S v Hella (CA 50/2009) [2010] NAHC 178.*

'A court of appeal is customarily reluctant to interfere in the factual finding of the trial court, unless there is material misdirection on the facts. That court also held in *Kooper v S* that a court of appeal is generally reluctant to erode a trial court's discretion- such erosion could undermine the administration of justice.'

[12] In *S v Timotheus,*[12] this court referred with approval to *S v Barber* at 220 E-H, where Hefer J explained the implication and purport of s 65(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 magistrate because that would be unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this court 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.'

[13] In relation to the appellant's assertion in respect of first ground of appeal, this court was referred to the case of *S v McCoulagh,*[13] which was referred to in the *Beyer* matter, that the learned magistrate did not err on the basis of this ground because the appellant's appeal against conviction and sentence will most certainly be heard before expiry of his sentence.

The background

[14] The appellant was charged, convicted and sentenced on a charge of culpable homicide; in that upon or about the 24th day of July 2017 and at or near Keetmanshoop in the district of Keetmanshoop the accused did unlawfully and negligently kill a human being, to wit: Thorne James Nikodemus by running him over with a vehicle with registration number N78062W.

[12] *S v Timotheus 1995 NR 109 HC at 113 A-B.*
[13] *S v McCoulagh 2000(1) SACR 542 W at 549.*

[15] The evidence for the State was that the incident happened in the early morning at about 06h40 when the deceased was bumped while on his way to school. The evidence shows that the accused was driving in a street in Keetmanshoop. He stopped at a speed hump in the vicinity of schools, which hump also serves as a pedestrian crossing. Some of the school going children were serving on what they called ‘school patrol’. That is a group of four children manning the street at the speed hump with equipment displaying a stop sign, regulating traffic to stop and for children to safely cross the street. The evidence indicates that the accused came to a stop at the pedestrian crossing. Some children crossed safely. One learner was with the deceased. This learner crossed the road safely but the deceased did not cross and went back. Thereafter the street was opened for vehicles to have right of way. The vehicle of the accused proceeded according to children witnesses, at high speed. The deceased tried to cross the road at a place other than the pedestrian crossing and was bumped by the accused.

[17] None of the State witnesses observed the actual bumping but only heard the sound of the bump, looked that direction and saw the deceased under the motor vehicle when it drove over him and came to a standstill about 14 to 20 meters thereafter.

[18] The accused, in his testimony confirmed that he was driving the motor vehicle, came to a stop at the speed hump and thereafter followed another motor vehicle which turned right after oncoming motor vehicles had passed. He stated that there was no scholar patrol on the scene at the time of the incident. He stopped because there was another vehicle in front of him waiting for oncoming vehicle to pass and to turn right. He stated that he proceeded at a speed of between 35 to 40 km/h, felt that he drove over something and stopped. He stated that the speed hump is high and he had to drive slowly over it. He testified that he did not see the deceased as his attention was also on a number of other children, around 100, walking haphazardly and not crossing the street at the pedestrian crossing at the scene. He realized that he drove over the deceased and summonsed the police.

[19] The evidence further reflects that the children were aware of the pedestrian crossing to safely cross the street. The deceased was ran over in the left lane, the lane where the accused had right of way. The witnesses for the State could not tell at what speed the accused was driving, however, only stating that it was fast or that the speed was high. They could also not confirm or deny that there were other vehicles at the scene.

[20] Mr. McNally called a defense witness, also a learner at the time, who was with the deceased. She crossed the street with her brother and was alerted that the deceased was bumped. She opined that the deceased probably wanted to cross the street running, decided to turn back, slipped and fell. In the process his leg was caught under the wheel of the motor vehicle and the vehicle drove over him. In cross-examination, the witness clarified that she saw the deceased slipping and being dragged under the car. The deceased tried to evade the car. In the process, he slipped, leaned back and the car ran over him. She testified that the deceased tried to cross the street other than at the pedestrian crossing.

Bail pending appeal

[21] It is clear from decided cases that the discretion of granting bail to the applicant as long as the appeal is not doomed to failure and is therefore arguable, is to avoid undue pressure on the appellant who might serve the whole sentence which is eventually overturned on appeal. The facts of this matter pending appeal is distinguishable from the *Beyer* – case, where the appellant was charged with attempted murder and where the evidence clearly showed that the appellant made no attempt to kill or even harm the complainant and clearly had no intention to do so when he fired a shot from his gun. The approach in relation to bail pending appeal, however remains the same as was eloquently stated in *S v Adrain,*[14] where Cheda AJ stated the following:

> 'This therefore, as long as the appeal is not doomed to failure as it were, it is therefore arguable the court should in those circumstances grant bail to avoid prejudice to the appellant. The more liberal approach is welcome in our jurisdiction. (*S v Beyer).*

[14] *S v Adrain* CA 53/2013 (22/0802013) 22 August 2013 at p5.5.

[22] The court a quo, in this case, reasoned that despite the accident having occurred on the left-hand side of the road where the appellant had right of way, that he was negligent to proceed. The court took judicial notice of the fact that the learners have diminished capacity vis-à-vis the appellant, an adult licensed driver. The learned magistrate found that the appellant did not keep a proper lookout and that it was not safe for him to proceed in the manner that he did. She found that the speed of 30, 35 or 40 km/h while seeing many learners crossing in a haphazard manner that he travelled may not have been a reasonable speed. Thus, she convicted the appellant of culpable homicide and sentenced him to three years' imprisonment of which one year is suspended for three years on conditions.

[23] It is not for this court to adjudicate if the findings are justified or not, but issues to be adjudicated on by the court of appeal on the merits. We need to consider if the magistrate exercised her judicial discretion correctly or otherwise, 'if we are satisfied that the decision was wrong, in which event this court shall give the decision which in its or his opinion the lower court should have given.'[15]

[24] Although counsel of the appellant listed many grounds of appeal, in our view, they are intertwined and boils down to; that the magistrate did not apply her mind to consider the issue in accordance with crystalised principles applicable to the procedure of bail pending appeal. We are in agreement with this. It appears that the magistrate was more inclined to defend her judgment and orders to convict and sentence the appellant and not apply the principles of bail pending appeal. This is wrong and constitutes misdirection.

[25] We need to decide if there are prospects of success and on the more liberal approach, if the appeal is not doomed to failure and therefore not arguable. The court should in those circumstances where there are prospects of success and the appeal not being doomed to failure, grant bail to avoid prejudice to the appellant. We are of the view

[15] See: Section 65 of the CPA.

that the sentence imposed is another issue where another court may impose a different sentence considering the degree of negligence, if finding negligence in the circumstances. The case is not doomed to failure and otherwise arguable.

[26] It is further clear that the second leg of the test for bail pending appeal was successfully discharged by the appellant, namely that he is likely to prosecute his appeal if granted bail. The case emanated in 2017. The appellant was granted bail pending his trial and he never absconded and promptly attended court until the matter was finalized in March 2022.

[27] The discretion to grant bail and determine the amount vests in the court. In exercising its discretion judiciously, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. Since the fundamental consideration is the interests of justice, the court will lean in favour of the liberty of the applicant and grant bail where possible.[16]

[28] We find that; having considered the facts of the case and the principles applicable to an application for bail pending appeal that in the circumstances bail should be granted with conditions. The appellant testified that he is able to afford bail of N$10 000 to N$15 000.

[29] In the result:

1. The applicant's application for bail pending appeal is upheld.

2. Bail in the amount of N$10 000 is granted to appellant with immediate effect on the following conditions:

[16] See: *S v Barnard* 2019 (1) NR 78 (HC).

2.1 The appellant is to hand in all his travel documents to the investigating officer as soon as possible and should not apply for a new passport and travelling documents.

2.2 The appellant is to report to the office of the Namibian Police in Keetmanshoop, alternatively to the investigating officer, once a week between the hours 08h00 to 18h00.

2.3 If the appellant wishes to leave Keetmanshoop for any reason, he should inform the investigating officer in this regard prior to leaving.

2.4 The appellant is directed to present himself at court personally at the time that his appeal is heard and/or at the time the judgment in the appeal is delivered.

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H C January

Judge

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N N Shivute

Judge

APPEARANCES:

Applicant:	Mr. P. McNally
	Lentin, Botha & Van Den Heever
Respondent:	Mr. T. Itula
	Office of the Prosecutor General