REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

BAIL APPEAL JUDGMENT

Case No: HC-MD-CRI-APP-CAL-2022/00072

PHILLIPUS KARIGUB **APPELLANT**

versus

THE STATE **RESPONDENT**

Neutral citation: *Karigub v S* (HC-MD-CRI-APP-CAL-2022/00072) [2022] NAHCMD 616 (14 November 2022)

Coram: LIEBENBERG J *et* SHIVUTE, J
Heard: **17 October 2022**
Delivered: **14 November 2022**

APPEAL AGAINST REFUSAL OF BAIL

Flynote: Criminal Procedure – Bail Appeal against refusal by magistrate to release appellant on bail – Factors considered – State proved strong prima facie case – Appellant in defence offered mere denial – Seriousness of offence – Rape read with the

provisions of the Combating of Domestic Violence Act – Not in the interest of public and interest of justice to admit appellant to bail.

Criminal Procedure – Bail – Powers of court of appeal to interfere limited – Section 65(4) of the Criminal Procedure Act – No misdirection proved – Appeal court satisfied trial court exercised its discretion judiciously – Appellant failed to discharge onus on a balance of probabilities that he is a suitable candidate to be admitted to bail or that it will be in the interest of the public or interest of administration of justice to release him on bail.

Summary: The appellant in this matter is charged with rape of a minor child read with the provisions of the Combating of Domestic Violence Act. He unsuccessfully applied for bail at the magistrate's court sitting in Gobabis. The respondent opposed bail and called the investigating officer in support of its opposition. In refusing bail, the court a quo considered that the state has proved a strong case against the appellant. The appellant in his defence, did not address the merits of the case apart from offering a mere denial to the charges proffered against him. Although the appellant is not obliged to tender evidence before the court incriminating himself, situations may arise that require of the appellant, to a certain degree, to place evidence before court in order to refute the allegations of the state like in the present matter. After the court a quo considered the strength of the state case, the seriousness of the offence and the severe sentence that is likely to be imposed if convicted plus any other consideration of the relevant information placed before it correctly, it came to the conclusion that it will not be in the interest of the public or administration of justice to release the appellant on bail. The opinion that the appellant has failed to discharge the onus on a balance of probabilities that he is a suitable candidate to be admitted to bail or that it was in the interest of the administration of justice for him to be released on bail. Court of appeal is not convinced that the court *a quo* exercised its discretion wrongly. There is no legal basis for this court to interfere with that courts' discretion as permitted by section 65(4) of the Criminal Procedure Act.

ORDER

(a) The appeal is dismissed.

(b) The matter is removed from the roll and considered to be finalised.

JUDGMENT

SHIVUTE J (LIEBENBERG J concurring):

Introduction

[1] The applicant in this matter unsuccessfully applied for bail in the Magistrate's Court sitting at Gobabis. He is charged with rape of a girl under the age of 12 years, read with the provisions of the Combating of Domestic Violence Act 4 of 2003.

Grounds for objections to bail

[2] The following are the respondent's grounds for opposing bail:

(a) The seriousness of the offence.
(b) It is not in the interest of the administration of justice or in the interest of the public to release the applicant on bail.
(c) The state has a strong case.

The law relating to bail Appeals

[3] It is trite that this court may only interfere with the decision of the court a quo when it is satisfied that the decision was wrongly exercised. *S v Valombola* 2014 (4) NR 945 (HC) para 20. Section 65 (4) of the Criminal Procedure Act 51 of 1977 (CPA) provides the following in relation to an appeal against the refusal of bail by a lower court:

‘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.’

[4] The above test has been properly interpreted in *S v Thimoteus* 1995 NR 109 (HC) at 113 A – B, where the court referred with approval to *S v Barber* 1979 (4) SA 218 D at 220 E – H, where Hefer J explained the implication and purport of subsection 4 as follows:

‘It is a well-known fact that the powers of this Court are largely limited where that matter comes from 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…’

[5] It should also be emphasized that in an application of this nature, the applicant bore the onus to prove on a preponderance of probability that the court should in the exercise of its discretion admit him to bail. *S v Dausab* 2011 (1) NR 232 (HC). An applicant must specifically make out his own case and not necessarily rely on the perceived strength or weakness of the state’s case. *S v Pineiro* 1992 (1) SACR 577 (Nm) at 580. In so doing, the applicant is obliged to place before a court reliable and credible evidence in discharging this onus. See *Mathebula and the State* (431/09) [2009] ZASCA 91 (11 September 2019) at para 12.

Grounds of appeal

[6] The applicant's appeal is premised on the following grounds:

1. The court a quo misdirected itself in fact or law by overemphasising the seriousness of the nature of the offence against the facts before court particularly:

1.1 That the state failed to prove a prima facie case against the applicant.

1.2 The court a quo misdirected itself by applying a blanket approach of the seriousness of the offence of rape against the seriousness of this particular case.

2. The learned magistrate misdirected herself by finding that:

2.1 The state has established a strong case against the appellant and that the evidence placed before court is likely to prove that the applicant might have raped the victim, while no such evidence was placed before court.

2.2 The state has eye witnesses who witnessed the appellant raping the victim. Despite it being trite law that the term rape is a legal conclusion and the evidence of the investigation officer did not or the evidence in the state's possession does not corroborate a violation of section 2 of the Combating of Rape Act 8 of 2000 which defines what constitutes rape.

2.3 The learned magistrate misdirected herself by failing to undertake a proper inquiry as contemplated by section 61 of the Criminal Procedure Act.

3. The court a quo misdirected itself by finding that there is a high possibility for the applicant to interfere with the victim who was under his care, whilst the interference is not a ground to the objection raised by the state and while there is

no evidence on record corroborating that fear. The court further ignored the fact that the victim is not residing with the appellant but resides with one Katalina Tjirunga under the supervision of an unspecified social worker.

4. The Court a quo misdirected itself by finding that releasing the appellant on bail will prejudice the ends of justice by:

4.1 Ignoring the investigating officer's testimony during cross-examination that the appellant did not attempt to abscond and the appellant's evidence that he is willing to comply with bail conditions which the court may impose to curtail the state's fears of absconding.

5. The Court a quo misdirected itself by making a finding that the appellant is not a suitable candidate for bail and ignored the appellant's personal circumstances and the time he spent in custody prior to his bail application. The court further ignored that the Prosecutor General's decision is not yet ready because of an outstanding witness' statement to be taken from the witness who is under the social worker's care and the State's failure to indicate when the investigation is going to be completed.

6. The learned magistrate erred in law or fact by finding that it will not be in the interest of the administration of justice if the appellant was to be admitted to bail.

<u>State's evidence on the charges</u>

[7] The State in opposing bail called the investigating officer who testified that during March 2021 the victim, a 10 year old, girl was brought by her grandmother to the witness' office. The victim alleged that on different occasions she was raped by the accused. According to her, the incident took place between January 2020 to March 2021. It was alleged that the appellant went to the victim's grandmother and informed her that he will go with the victim to the farm where he was residing in order to take care

of her. After the appellant took the victim to the farm, one day whilst they were in a room, the appellant's girlfriend instructed the victim to remove her clothes and instructed her to sleep with the appellant on the ground. The appellant also instructed the victim to sleep with him in the presence of his girlfriend who was in the same room ironing.

[8] The second incident allegedly took place in the presence of two minor boys who had been sent to come and get the appellant to go and assist a certain grandfather on the farm. Upon their arrival at the appellant's place they found the appellant on top of the victim inside the house. The minor boys ran back to the grandfather and told him to come and see what the appellant was doing to the victim. The grandfather asked what the appellant was doing but the appellant did not say anything to him.

[9] Another incident allegedly took place at the white man's house where one of the witnesses found the appellant having sex with the victim in the dog's cage. The owner of that house was residing in South Africa. The witness ran to the grandfather to tell him that the appellant was still doing the same thing to the victim. It was further alleged that another incident took place again in the appellant's room where the appellant and the victim were found both naked by minor children who were on holiday at the appellant's place. They asked the appellant what he was doing and they came out of the room screaming.

[10] There is further evidence that the victim is now traumatized and she is receiving counselling from social workers. The victim in this matter is related to the appellant because the appellant is a brother to the victim's father. The grandmother believed the appellant would take care of the victim when he requested to go with the victim. The victim's parents cannot be traced. The victim is now residing with (another) grandmother in Gobabis from where the appellant took her. The investigating officer testified that there is an outstanding statement from an eye witness. She again testified that the appellant's girlfriend was arrested but has not yet appeared in court.

[11] It was the investigating officer’s testimony that the appellant was staying at his employer’s farm before he was arrested. However, she spoke to the appellant’s employer two months prior to the appellant’s application for bail and informed her that he would not want to stay with the appellant any more. The investigating officer further testified that she is opposed to the appellant to be granted bail even if it is coupled with conditions. In her view the appellant will not stand his trial and the victim will be traumatized seeing the appellant roaming around the street. The investigating officer had no idea where the appellant is going to stay as he was staying on the farm of his former employer and there is a strong possibility that the appellant may go and look for work and abscond. Society expects minor children to be protected from violent crimes including rape. There will be a public outcry by the society to see the accused back in the street. Even children will feel unprotected. The applicant is charged with rape. This offence is only triable in the High Court or Regional Court. If the applicant is found guilty he will be given a direct term of imprisonment.

[12] The issues to be decided are whether the appellant has placed sufficient information before the court for him to be released on bail and where section 61 finds application, has the appellant shown that the administration of justice and or the public interest allows his release on bail? The appellant testified that he has been a resident of Damara location in Gobabis for about four years. However, he could not remember the house number and the street name of the house where he was residing. However, before he was arrested he was staying on farm Hondeblaf that belonged to his employer. He was born at Stampert farm near the border of Botswana. His father was present in court and he suffers from tuberculosis. Before his arrest his uncle was caring for his father. The appellant was also looking after his father and took him to the farm to stay with him. The appellant has been in custody for one year and four months prior to his application for bail.

[13] The appellant owns a zinc plate house in Damara location in Gobabis. However, whilst he was on the farm his house was shifted by the Municipality to another place and this resulted in him not knowing where his current residence is. It was the

appellant's testimony that should he be released on bail he would stay on his employer's farm known as Hondeblaf. The appellant had no money however if he was to be granted bail he would pay bail through his employer who was willing to pay N$1000 for him. His employer had also paid contributions towards legal aid after they communicated with each other.

[14] The appellant is aware that the offence he is charged with is a serious one and he would stand his trial. He did not know what to comment on the interest of society or the administration of justice. He would not trouble the society if he is granted bail. He does not know the state witnesses or any investigations the state has against him. He knew the complainant as he was staying with her and she is his relative. He disputed having sexual intercourse with her. He urged the court to grant him bail coupled with conditions in order for him to go home and look after his sickly father. He also wanted to go and gather his property that was scattered.

[15] The appellant in this matter provided a mere denial to the charges proffered against him and he did not indicate the basis of his defence. In *S v Dausab* (CC38/2009) [2010] NAHC 90(20 September 2010) at para 23 the following was stated:

> ' While it may be correct that the accused is not compelled to address the merits during the bail application, depending on the circumstances of a particular case and the evidence proffered on the merits by the state, a decision by the accused not to address the merits may turn out to be fatal.'

[16] The appellant not having addressed the merits of the allegations against him, it is trite law that the respondent's version with regard to the strength of the state's case against the appellant remains uncontradicted.

[17] It was argued on behalf of the appellant in respect of the first ground that the state has failed to prove a prima facie case against the appellant because the investigating officer did not state that the appellant committed a penetration as defined

in section 2(1) of the Combating of Rape Act 8 of 2000. Furthermore, although the state led evidence that the alleged rape was committed on diverse occasions the charge does not state that it was indeed so. Again the investigating officer could not tell the exact year, months and the dates when these offences were committed. Therefore, the court a quo misdirected itself by applying a blanket approach of the seriousness of the offence of rape against the seriousness of this particular case.

[18] Concerning the seriousness of the offence, there is no doubt that the offence of rape is a serious one. The appellant himself also conceded that he was aware that rape is a serious offence. Furthermore, although when the appellant pleaded in terms of s 119 of the Criminal Procedure Act the charge only indicated that the offence was committed on a single occasion, there is evidence from the investigating officer that the evidence provided by the witnesses that was in her possession revealed that the offence was committed on diverse occasions as she was informed by the eye witnesses. I pause to State that the appellant only pleaded in terms of s 119 of Act 51 of 1977 and the Prosecutor General has not yet decided on the matter as to what charges and how many counts the appellant will face, and in which court he is going to be arraigned. The State still has the opportunity to add additional charges.

[19] The evidence provided to the investigating officer by eye witnesses was that the appellant was seen 'raping' the victim and he was also seen on top of the victim. There was a time when the appellant was found in a compromising situation when he and the victim were allegedly found naked. Although the word 'rape' which is a technical term was used, an inference may be drawn that the circumstances in which the victim and the appellant were found suggest that the appellant was having sexual intercourse with the victim. This court is alive to the fact that it is not the duty of the bail court to decide whether the accused is guilty or not as this will be done at the trial when the evidence is led through witnesses. At the stage of a bail application it is required of the State merely to show what evidence it has to its disposal to prove the charges proffered against the accused.

[20] The appellant has the onus to show on a balance of probabilities why he is a suitable candidate to be admitted to bail. In the present matter, the State led evidence alleging that it has a strong case and that if the appellant is convicted, he would be given a custodial sentence. It has been established through case law that the nature of the crime committed and the strength of the State's case are extremely relevant at the time bail is being considered.

[21] This court is also alive to the fact that, although the appellant is not obliged to tender evidence before the court incriminating himself, situations may arise that required appellant, to a certain degree, to place evidence before court in order to refute the allegations of the State that it has a strong case against him.

[22] The court a quo having considered the seriousness of the offence and the evidence before it, made a conclusion that the State has to its disposal evidence to show on a balance of probabilities through witness statements, that the State will prove the guilt of the appellant. This court, having considered the legal principles as stated earlier in this judgment is of the opinion that there has been no misdirection on the part of the court a quo to consider and conclude that the offence the appellant is charged with is serious and that the State has in its possession evidence showing on a balance of probabilities that it will prove the guilt of the accused. Therefore, it is our finding that there is no merit on the first ground.

[23] The arguments raised in respect of the second ground are similar to the arguments raised in connection with the first ground. These arguments were dealt with in respect of the first ground and it is not necessary to deal with them again except for the issue that the court a quo failed to conduct a proper inquiry as contemplated in section 61 of the Criminal Procedure Act. Counsel for the appellant argued that this criticism is based on the case of *Unengu v The State* (CA 38/2015) [2013] NAHCMD 202 (18 July 2013) at 7 unreported) where it is stated as follows:

‘When we talk of a serious crime, we are not talking merely of a label placed by the police on the alleged crime at the preliminary or investigative stage, we are talking of a crime which in substance is a crime. A fundamental part of the inquiry is to attempt to establish, at least prima facie, what is the nature of the alleged crime. This foundation of fact is crucial in deciding all the other issues, such as the possibility of absconding, of interfering with investigation, of committing further crimes, of interest of the public, the administration justice, the effectiveness of bail and the conduct of bail. The role and responsibility of the prosecutor or defence counsel in a bail application does not absolve the court from discharging its function and its role as administrator of justice, when the mechanism of prosecution and defence fails to function sufficiently to enable justice to be done.’

[24] Section 61 of the Criminal Procedure Act was substituted by section 3 of Act 5 of 1991 which deals with bail in respect of certain offences as follows:

’61 If an accused who is in custody in respect of any offence referred to in Part iv of Schedule 2 applies under section 60 to be released on bail in respect of such offence the court may, notwithstanding that it is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police refuse the application for bail if in the opinion of the court, after such inquiry as it deems necessary, it is in the interest of the public or the administration of justice that the accused be retained in custody pending his trial.’

[25] Although the appellant argued that the court did not conduct a proper inquiry he did not point out exactly what the court a quo failed to do. It has been established through the inquiry that there is a prima facie case against the appellant. The nature of the crime allegedly committed has also been established. Against this background, there is reason to believe that society will feel threatened by the presence of the appellant roaming the streets and the minor children will feel unprotected. Therefore, the court of appeal is of the opinion that a proper inquiry has been held. It follows that there is no merit on this grounds.

[26] The third ground of appeal is that the court a quo misdirected itself by finding that it is highly possible for the applicant to interfere with the victim who was under his care,

while interference is not a ground to object and there is no evidence on record corroborating the fear of interference and while the court ignoring the fact that the victim no longer resides with the appellant. Counsel for the appellant argued that there will be no risk of interference by the appellant with the victim as they will not be residing on the same premises when the applicant is released on bail. Furthermore, there was no evidence led that such possibility exists. Counsel for the respondent argued that, it is not disputed that the victim and the appellant are relatives. The court was therefore entitled to make a finding that it would not be in the interest of the administration of justice to release the appellant on bail.

[27] Counsel for the appellant correctly argued that it was not a ground to oppose bail that if the appellant is released on bail he would interfere with the victim or with other witnesses. The investigating officer never testified to such effect, neither was it put to the appellant through cross-examination. Although the court a quo relied on the issue of interference which is a subject to criticism because it may be prejudicial to the appellant as there was no evidence led in that regard, this was not the only reason on which the court based its decision for the refusal to grant bail. The circumstances of this matter justify the court to invoke the provisions of section 61 of the Criminal Procedure Act.

[28] At the pain of being repetitive, the appellant bears the onus of proof on a balance of probabilities. He must place sufficient information before the court in order for the court to make a proper assessment whether to grant bail or not. In the present matter, the appellant stated that he is a resident of Damara location for about four years. However, he does not know his residential address. Before his arrest, he was staying at farm Hondeblaf and if released on bail, he would stay on the farm and look after his sickly father. Furthermore, he stated that his father (who was on the court premises during bail application) was living on the farm at the time of the alleged incident. He did not call his father to support his proposition. Neither did he call his employer or any other people to confirm that he will stay on his employer's farm, despite the investigating officer's version that his employer said he would no longer allow the appellant to stay on

his farm. We are of the opinion that the appellant has failed to place sufficient information before the court that he is a suitable candidate to be released on bail.

[29] Furthermore, in terms of section 61 of the Criminal Procedure Act, the court may refuse the application for bail notwithstanding that the accused, if released on bail, the court is satisfied that it is unlikely that the appellant will abscond or interfere with any witness for the prosecution or with the police investigations, if it is of the opinion that, after such inquiry as it deems necessary, it is in the interest of the public or the administration of justice that the accused be retained in custody pending his trial.

[30] The court a quo considered that the state has a strong case against the appellant and that, if convicted, a substantial custodial sentence is likely to be imposed. The court further struck a balance between the interest of society and the liberty of the accused. It considered the seriousness of the offence charged and that the appellant failed to convince the court on a balance of probabilities that he should be admitted to bail. The court a quo had also considered that there is no guarantee that the appellant will indeed reside at Hondeblaf farm. The court, after a careful consideration of the relevant information placed before it, came to the conclusion that releasing the appellant on bail would be prejudicial to the ends of justice and that it will not be in the interest of the public or the administration of justice if the applicant was to be released on bail.

[31] This court having considered all the relevant considerations made by the court a quo, this court is of the opinion that the appellant failed to place sufficient information before the court that he is a suitable candidate to be admitted to bail, or that he had shown on a balance of probabilities that it was in the interest of the public or the administration of justice to be admitted to bail. It is further our considered view that the court a quo exercised its discretion judiciously. There is no basis in law for this court to interfere with the discretion exercised by the court a quo. It follows that these grounds of appeal also fail.

[32] In the result, the following order is made:

(a) The appeal is dismissed.

(b) The matter is removed from the roll and considered to be finalised.

N N SHIVUTE

JUDGE

J C LIEBENBERG

JUDGE

APPEARANCES:

THE STATE:	Mr. F.Nyau Office of the Prosecutor-General Windhoek
APPELLANT:	Mr. E.T.Shiikwa Directorate of Legal Aid Windhoek