REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CA 01/2013

In the matter between:

MICHAEL ONESMUS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Onesmus v The State* (CA 01/2013) [2013] NAHCNLD 22 (22 April 2013)

Coram: LIEBENBERG J and TOMMASI J
Heard: **15 April 2013**
Delivered: **22 April 2013**

Flynote: Criminal procedure - Bail - Appeal against refusal by magistrate to grant bail - High Court hearing appeal can only set magistrate's decision aside if it was clearly wrong.
Criminal procedure - Bail - Appeal against magistrate's refusal to grant bail - Fundamental rights in terms of Namibian Constitution - Right to fair trial and

presumption of innocence until guilt is proved - Such rights not absolute - Must be protection of subjects against criminals – Prima facie case established – Onus on applicant to show why he or she should be committed to bail – Section 61 – applicant must show why it would not be in public interest or administration of justice to retain him or her in custody.
Criminal procedure - Bail - Appeal against magistrate's refusal to grant bail - Factors taken into account on appeal – Court *a quo* considered all factors - Court not satisfied on balance of probability that magistrate's decision wrong - Appeal accordingly dismissed.

Summary: Appellant appealed against the refusal of bail by the magistrate's court, whilst on the same evidence admitting his co-accused to bail. The fundamental rights of the accused in respect of the right to a fair trial; the presumption of innocence until proved guilty and the protection of others against criminals, considered. The applicant bears the onus on preponderance of probability to show why he or she should be released on bail. Where the provisions of s 61 find application applicant must show that it would not be in the interest of the public and or the administration of justice to retain him or her in custody pending the trial.

ORDER

The appeal against the refusal of bail is dismissed.

JUDGMENT

LIEBENBERG J (TOMMASI J concurring):

[1] Appellant, together with five other co-accused, lodged their respective applications for bail in the magistrate's court for the district of Outapi which, only in respect of the appellant, was unsuccessful. He now appeals against

the court *a quo's* refusal to admit him to bail. Appellant then, as now, was represented by Ms *Mugaviri* whilst Mr *Matota* appears before us on behalf of the respondent.

[2] Although six grounds were noted in the appeal notice, some of these are intertwined and can be dealt with simultaneously (grounds 1 and 3) and (2 and 4). Grounds 5 and 6 will be considered separately.

[3] The grounds set out in paragraphs 1 and 3, in essence, revolve round the refusal of bail on the basis that the appellant has a previous conviction relating to the unlawful possession of a fire-arm, a factor said to have been over-emphasised at the expense of the appellant. Further, that the appellant on the present charges is 'a first offender' and that the magistrate failed to weigh the interests of the appellant against the administration of justice.

[4] Counsel for the appellant argued that the only distinction in the circumstances between the appellant and his co-accused is that he has one previous conviction and, for that reason alone, denied him bail. The contention is without merit and, as will be shown hereinafter, clearly fails to appreciate the magistrate's reasoning and findings made by the court *a quo* in the judgment given on the bail application.

[5] After summarising the evidence the learned magistrate gave a brief exposition of the legal principles applicable to bail matters. He was mindful of the onus being on the appellant to show, on a balance of probabilities, that it would be in the interest of justice to admit him to bail; that a balance must be struck between the protection of the liberty of the accused and the administration of justice; that a person is presumed innocent until proven guilty; and where the interests of justice will not be prejudiced, the court will lean in favour of the granting of bail. The court was further mindful of the provisions of s 61of the Criminal Procedure Act, 1977 (Act 51 of 1977) pertaining to an accused who is in custody in respect of any offence referred to in Part IV of Schedule 2, and who applies for bail. The charges preferred against the accused fall into this category. The section makes plain that even

though the court is satisfied that it is unlikely that the accused, when released on bail, will abscond or interfere with any witness or the police investigation, it *may* refuse an application for bail if satisfied, that it is in the interest of the public or the administration of justice, that the accused remains in detention pending the finalisation of the trial.

[6] In its assessment of the evidence, as far as it concerns the appellant, the court came to the conclusion that the accused 'has shown a high propensity to commit similar offences' and that his release would not be in the interest of justice where the State has succeeded in showing that a *prima facie* case has been established against him. The court has thus invoked the provisions of s 61. Did the court misdirect itself when exercising its discretion against the granting of bail to the appellant whilst, on the evidence adduced, admitted his co-accused to bail; and is there merit in the contention that it was only the previous conviction of the appellant that tipped the scales of justice against him?

[7] The appellant was an occupant in a vehicle driven by accused no 2 when stopped by the police as a suspect vehicle connected to a robbery committed at a shop which was also broken into. Locked up in the boot of this vehicle the police came upon the security officer who guarded the premises where the robbery took place. According to the investigating officer, Uutoni Hango (rank unknown), the arrest of the four remaining accused came as a result of information obtained from appellant and second accused. They were subsequently charged with robbery (with aggravating circumstances); housebreaking with the intent of committing a crime unknown to the State; kidnapping; and the unlawful possession of a fire-arm and ammunition in contravention of sections 2 and 33 of Act 7 of 1996.

[8] When cross-examined on the circumstances under which appellant and accused no 2 were arrested, appellant, after having been informed of his right against self-incrimination, elected not to answer questions pertaining thereto. The investigating officer's evidence in that regard – albeit hearsay (though admissible) – was thus not challenged by the appellant. On the contrary, it

was submitted on his behalf in the bail proceedings that 'it is not in dispute from cross-examination that the accused were arrested, *in the manner stated by the witness*' (the investigating officer). The officer further testified that the security guard was on duty where the breaking took place and that he had been robbed of his cellular phone and a fire-arm.

[9] It is against this background that the court *a quo* was satisfied that a *prima facie* case had been established against the appellant and the second accused. As for the remaining accused, the court correctly, in my view, made a distinction between their circumstances and that of the appellant and second accused (as far as it concerns the present charges); in that the first mentioned were arrested on information obtained from their co-accused (appellant and second accused) and are not otherwise connected to the commission of the crimes charged. The conclusion reached by the court *a quo* that a *prima facie* case has been made out against the appellant (and second accused) is supported by the evidence presented. I therefore find myself unable to fault the court *a quo's* reasoning when coming to this conclusion.

[10] It is common cause that the appellant has previously been convicted of a contravention under the Arms and Ammunition Act, 1996 for being in unlawful possession of ammunition. Currently he has three cases pending against him involving two charges of robbery (Oshakati and Tsumeb) and one charge of unlawful possession of a fire-arm (Ohangwena). He is on bail in respect of all three cases. This is indeed a relevant and important factor the court was entitled to take into consideration when weighing the interest of the public and the administration of justice against the appellant's right to liberty. The court, in view of the *prima facie* case established against him, having taken cognisance of the seriousness of the crimes for which he is now before court, as well as the pending cases where he faces similar charges, reached the conclusion that the appellant has shown a high propensity to commit similar offences; to release him on bail, would not be in the interest of justice. Appellant's counsel took issue with the court's finding and argued that the court misdirected itself in that the appellant as yet, has not been convicted on

those charges he is facing in the other cases and therefore, the court erred by relying thereon in its refusal of bail.

[11] Though it is correct to say that the appellant has not yet been convicted on the charges preferred against him in the (other) pending cases, the court *a quo* however did not misdirect itself and was entitled to take into consideration the fact that there was sufficient evidence against the appellant in these cases to put him on trial. Also, that it would appear in the absence of facts showing otherwise, that these crimes were committed whilst the appellant has been released on bail in the earlier cases. The similarity of these crimes – all being of serious nature – is another factor the court took into account. Although it might have been premature for the court *a quo* to say, at that stage, that the appellant has a 'high propensity' to commit similar offences before being convicted, his continued involvement in similar offences is a factor that cannot simply be ignored, as it encroaches upon the rights of others. In this respect it seems apposite to restate what has been said by this court in *S v du Plessis and another*[1] at 81B-D:

> 'It is apposite here to deal briefly with the continuous and, it seems, selective emphasis placed by some accused persons and their legal representatives on certain sections of the Namibian Constitution and certain fundamental rights such as `the liberty of the subject', `a fair trial' and the principle that an accused person is `regarded as innocent until proved guilty'.
> These very important fundamental rights are, however, not absolute but circumscribed and subject to exceptions.
> The particular right relied on must be read in context with other provisions of the Constitution which provide for the protection of the fundamental rights of all the citizens or subjects, which provides for responsibilities of the subject, for the maintenance of law and order, for the protection of the very Constitution in which the rights are entrenched and for the survival of a free, democratic and civilised state.' (My underlining)

[12] The charges the appellant is facing are indeed very serious and undoubtedly are likely to attract lengthy custodial sentences.[2] The learned

[1] 1992 NR 74 (HC).
[2] *S v Yugin and Others*, 2005 NR 196 (HC).

magistrate in the present instance relied on the wider powers provided for by s 61 (as substituted by s 3 of Act 5 of 1991) to refuse bail, and in the circumstances of this case, could not be faulted, in the exercise of his discretion, for giving effect to the provisions of the amending legislation, as this was clearly enacted to combat the serious escalation of crime. The court is now given wider powers and additional grounds for refusing bail where it involves serious crimes and those offences listed in Part (IV) of the Second Schedule of the Criminal Procedure Act, 1977.[3]

[13] It is clear from the learned magistrate's reasons that he did not only rely on the appellant's previous conviction as contended, but weighed it together with other factors that deserved consideration before coming to the conclusion that the interests of justice outweighs the appellant's interest. In my view the circumstances of the case justify the conclusion reached and there is no justification for this court to interfere with the court *a quo's* finding in that respect. The first and third grounds of appeal are thus without merit and stand to be dismissed.

[14] In the second and fourth grounds of appeal it is contended that the magistrate failed to state to what extent the interests of justice would be prejudiced should the appellant be admitted to bail; without having considered the prejudice the appellant would suffer when refused bail.

[15] A reading of the judgment will reflect that the magistrate, as mentioned, after due consideration of the factors relevant to the granting of bail – including the appellant's personal circumstances – came to the conclusion that it would not be in the interest of justice to admit him to bail. There was, in my view, no duty on the presiding magistrate in the present circumstances to specifically state the extent to which the interests of justice would be prejudiced if appellant were to be admitted to bail, as this is evident from the facts. As far as it concerns any prejudice the appellant will suffer when refused bail, appellant testified that he runs a barbershop in partnership with another person, and that he supports his two minor children; one brother; a

[3] *S v Aikela*, 1992 NR 30 (HC).

cousin; and a nephew, from the proceeds he manages from his business. Besides stating that he financially provides for these persons, no evidence was led as to the prejudice the appellant would otherwise suffer.

[16] It is trite law that the onus of proof in bail applications is upon the applicant to prove that bail should be granted[4]; and more so, where it is contended that the accused would be prejudiced if not admitted to bail and that it, in the circumstances of the case, would be in the interest of justice to admit the accused to bail. The magistrate did refer to appellant's personal circumstances in his reasons and remarked that appellant would be unable to meet his responsibilities due to his incarceration. What more was there to say if the appellant failed to lead any evidence about the prejudice he would suffer? The court, in exercising its discretion, must have regard to the evidence adduced and cannot be expected to speculate on issues crucial to the determination of bail. As mentioned, appellant had the onus of showing that it was not in the interest of justice to order his further detention.

[17] In the present case the appellant clearly failed to satisfy this requirement and his bold assertion that the magistrate failed to consider any prejudice the appellant would suffer, is thus without merit. On this ground the appeal must also fail.

[18] The fifth ground relates to an alleged failure on the magistrate's part to admit the appellant's co-accused to bail but not him, whilst they were all facing the same charges.

[19] There is no merit in this ground as the judgment clearly reflects that the magistrate did not only consider the charges they were facing, but also gave due consideration to the strength of the State case against each one of them by looking at their involvement in the alleged crimes committed and which differed markedly from that of the appellant and second accused; the accused persons' respective involvement in other pending cases before the courts; and lastly, the position of those accused who have previous convictions. The

[4] *S v Dausab*, 2011 (1) NR 232 (HC) at 235.

approach followed by the court *a quo* in its evaluation of the facts, and the conclusion reached in respect thereof, is beyond reproach and there is simply no legal basis on which this court would be entitled to interfere. It is only when the court on appeal is satisfied that the decision against which the appeal is brought is wrong, that it is permitted to intervene.[5] This court in *S v Timotheus*[6] confirmed that it is bound by the provisions of s 64 (4) when sitting as a court of appeal. The appeal, on this ground would thus not succeed.

[20] The period for which the accused has already been incarcerated at the stage of the bail hearing is indeed a factor the court has to take into consideration when deciding how prejudicial it might be for the accused, in the circumstances, to be kept in custody by being denied bail. In the present instance the appellant has spent four months in custody from the date of his arrest. This ground ties in with grounds 2 and 4 and there is no need to repeat what has already been stated when considering those grounds. Suffice it to say that because the period spent in custody was not specifically mentioned in the judgment, this does not mean to say that it was not given any consideration by the court in its evaluation of the evidence. I respectfully endorse what has been stated in *Paulus Nepembe v The State*[7] at p 12:

> *"[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' (see:* ***S v De Beer,*** *1990 NR 379 (HC) at 387I-J, quoting from* ***S v Pillay****, 1977 (4) SA 531 (A) at 534H-535G and* ***R v Dhlumayo and Others****, 1948 (2) SA 677 (A) at 706), …"*

[5] Section 64 (4) of Act 51 of 1977.
[6] 1995 NR 109 (HC).
[7] Unreported Case No CA 114/2003 delivered on 20.01.2005

[21] The learned magistrate in the end after due regard being had to all the circumstances of the case – particularly in view of appellant's pending cases (all of which serious and of similar nature to what he is currently facing) – found that it was not in the public interest or the administration of justice to admit the appellant to bail. The period spent in custody since his arrest is only one of several factors the court had to take into account. Even if the court *a quo* indeed misdirected itself by not taking this factor into consideration, I am not persuaded that that court, on the rest of the facts, would have come to a different conclusion.

[22] In the result, the appeal against the refusal of bail is dismissed.

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JC LIEBENBERG

JUDGE

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MA TOMMASI

JUDGE

APPEARANCES

APPELLANT	G Mugaviri Of Mugaviri Attorneys, Oshakati
RESPONDENT	L Matota Of the Office of the Prosecutor-General, Oshakati