



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI
BAIL APPEAL JUDGMENT**

CASE NO: HC-NLD-CRI-APP-CAL-2018/00002

In the matter between:

EDWARD KAVELA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Kavela v S* (HC-NLD-CRI-APP-CAL-2018/00002) [2018] NAHCNLD
88 (18 September 2018)

Coram: January J *et* Salionga AJ

Heard: 19 July 2018

Delivered: 18 September 2018

Flynote: Criminal procedure — Bail Appeal – Appellant a self-actor – no explanation for delay in filing notice of appeal Court entertained application – No prospects of success – Matter struck from the roll.

Summary: Appellant in this matter was charged in the magistrate court Oshakati on robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, Act 51 of 1977 (the CPA). He was charged with four co-accused who also faced the abovementioned charge. The appellant testified in the court below where he was represented. He is a self-actor in this court. He compiled comprehensive heads of argument. The notice of appeal was filed late with no explanation for the delay. This court nevertheless entertained the appeal and found that the appellant does not have prospects of success on appeal. Consequently the matter is struck from the roll and considered finalized.

ORDER

The matter is struck from the roll and considered finalized.

BAIL APPEAL JUDGMENT

January J (Salionga AJ concurring):

INTRODUCTION

[1] The appellant applied in the magistrate's court sitting at Oshakati for bail on 12 July 2017. Bail was refused. He is now appealing against the refusal of bail. The appellant and his co-accused are charged with robbery with aggravating circumstances in that on 29th September 2016 and at or near Dairy Market, Ongwediva in the district of Oshakati the accused did unlawfully and with the intention of forcing him into submission by force used violence or threats of violence against Absai Amakutuwa by beating her with a firearm and did unlawfully and with intent to steal certain goods, to wit: 1 x Samsung phone and cash N\$29 473.23 the property of or in the lawful possession of the said Absai Amakutuwa.

And that aggravating circumstances as defined in section 1 of the Criminal Procedure Act, Act 51 of 1977 are present in that on the occasion when the offence was committed, whether before, during or after the commission of the offence, the accused and accomplices did wield firearms to wit: pistols and inflicted grievous bodily harm to Absai Amakutuwa.

[2] The appellant is a self-actor (who represented himself) in this court and the respondent was represented by Mr Tjiveze. The appellant was represented in the court below by Mr Tsamaseb.

POINTS IN LIMINE

[3] The appellant filed his notice of appeal late. The ruling to refuse bail was delivered on 15 September 2017. The notice of appeal was filed on 18 October 2017. The appellant did not file an application for condonation and affidavit explaining the reasons for the delay. He however filed a letter indicating that he did comply with the rules of court. He was represented at the trial and I assume in his favor that the right to appeal was explained by his lawyer and that he might have complied with the rules of court.

[4] Mr Tjiveze, although raising the point, did not oppose that condonation should be granted and that the appellant may receive the benefit of the doubt. He submitted that there are no prospects of success in the appeal. Consequently this court entertained the appeal on the merits to decide if there are prospects of success.

MERITS

[5] The appellant was arrested with his co-accused persons on 29th September 2016 on their way to Ondangwa airport. The appellant testified in amplification of his bail application. He advanced the following reasons in the magistrates' court as to why he

should be released on bail: He is 39 years old; not married; has 2 children aged 16 years and 11 years old respectively; the children are schooling; they are not staying with the appellant but he is supporting them with their needs of buying school uniforms and daily necessities; he is unemployed; he only looks after his mother's cattle; he is staying with his mother and mentally ill sister at Ompumbu, Oshakati; his mother is old and the appellant takes care of her by selling cattle; he does not have previous convictions; he complains of bad conditions at Oluno Correctional facility as he is suffering from asthma and chest pains and is not attended to by wardens.

[6] He denies the charge and stated that he was coming from Oshakati as he was on his way to his uncle who summonsed him in Ondangwa. He stated that he got in a taxi at Select Service Station Ongwediva and did not know any of the co-accused before the incident. The appellant did not dispute that there was a robbery on the alleged date as he does not know about it. He denied that he ran away when the taxi was stopped by the police. He further denied to have seen items from the robbery in the motor vehicle.

[7] The State is opposing bail in the following grounds; '1) the propensity to engage in similar conduct-similar offences; 2) Not in the interest of the public or the administration of justice; 3) Accused persons may abscond.'

[8] The State called the investigating officer in the matter. He was not the arresting officer in the matter. He could thus not shed light on the circumstances of the arrest of the appellant apart from producing hearsay evidence that he gained from statements. Hearsay is admissible in bail applications but in the end a court must consider how much weight ought to be attached thereto.

[9] The investigating officer testified in the bail applications of the appellant and 4 other co-accused. He testified about pending cases against 4 co-accused involving robbery with aggravating circumstances, possession of an unlicensed firearm and ammunition, theft and possession of suspected stolen goods or property in different regions in Namibia. The investigating officer opined that the appellant and co-accused

may abscond thereby frustrating the finalization of the case and frustrating the administration of justice.

[10] He further testified that the case is serious; that the appellant with co-accused robbed a minimarket; that the police have CCTV footage where the appellant with his co-accused are reflected in during the alleged robbery. He testified that there is a strong case against the accused because firearms were used. The police allegedly had to chase the vehicle wherein the appellant and co-accused were in and had to intersect it. Allegedly the appellant and others ran away where after the appellant hid behind a container. He stated that almost 98% of the robbed items were recovered. He testified that these types of crimes are currently mostly committed by syndicates. Victims are traumatized and can seldom be taken for counseling. Lastly he stated that in most cases of robbery with aggravating circumstances, it is seldom that firearms are recovered. When released on bail accused may recover firearm and may continue with robberies.

[11] In cross-examination, the witness conceded that the appellant is a first offender and that he does not have any pending cases. He stated that he is objecting to bail because the case is serious. He stated that appellant may commit further offenses because it is a trend that such cases are on the increase. Accused persons in such cases usually commit again these offenses when granted bail. The witness conceded that he does not have proof that the appellant will commit other offenses when granted bail. The witness was just generalizing from his experience. He conceded that bail conditions may in certain circumstances be imposed but did not say that it could be done in the circumstances of the appellant. He conceded that the appellant is a Namibian citizen without travelling documents.

[12] The state opposed bail on the grounds that it was against public interest to grant the appellant bail; it is not in the interest of the administration of justice considering the evidence against them; the appellant may not stand his trial; he may commit similar offences as he has the propensity to commit robbery with aggravating circumstances.

[13] The learned magistrate refused bail for the reasons; that it would not be in the interest of the public and administration of justice to do so; the offence committed is serious; there is strong evidence against the appellant.

[14] The appellant in his notice of appeal set out the grounds of appeal as follows:

- '1. Contradiction;
1. Evidence in mitigation;
2. Witness in chief's testimony'

In his heads of argument he stated that the grounds of appeal are:

That the magistrate erred or misdirected herself/himself;

- i. In not judging the application on the totality of evidence
- ii. Did not consider the fact that the investigating officer's evidence was unreliable and based on speculation.
- iii. Did not consider the undisputed evidence that the Appellant provided the investigating officer with a fixed residential address
- iv. In not finding on the totality of evidence that the appellant proved that the interest of justice permits his release
- v. By not considering the facts that there is likelihood as in terms of section 60(4) of the Criminal Procedure Act, Act 51 of 1977 (the CPA)
- vi. Appellant has a family to maintain and several financial responsibilities and suffering from a medical condition.
- vii. By not evaluating the evidence but only summarized it without making any factual finding and inappropriate judgment
- viii. By finding: that there is no evidence indicating regarding those grounds being effected as set out in (v) but still refused bail
- ix. That the learned magistrate and the state's application of the interest of justice principles is bad in law.
- x. Erred in rejecting the principles laid down in *S v Acheson 1991 (2) SA 805 (Nm)*
- xi. By not granting bail to the Appellant...'

THE LAW

[15] Section 65(4) of the CPA provides that:

'(4) 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.'

[16] The powers of a court of appeal is thus limited where an appellant appeals against the refusal of bail by a lower court.¹

The interpretation and application of this subsection was succinctly dealt with by Hefer J in *S v Barber* 1979 (4) SA 218 (D) at 220E-H: J

'It is well known that the powers of this Court are largely limited where the 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.' (my underlining)

[17] The evidence of the recording of the appellant on CCTV in the mini market is indeed strong. Furthermore the appellant was found inside a motor vehicle with his co-accused and stolen items from the mini market. If convicted the appellant will have to serve a lengthy period of imprisonment. This may induce/cause that the appellant may abscond and not stand his trial.

[18] In addition, section 61 of the CPA empowers the court to refuse bail for certain offences.

'61 Bail in respect of certain offences

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

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 investigation, 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 or her trial.

[sec 61 substituted by sec. 3 of Act 5 of 1991]'

Robbery is listed as a crime in Part IV of Schedule 2 of the CPA.

[19] The learned magistrate in balancing the interest of justice against the deprivation of freedom of the appellant applied the proportionality test. She concluded that the interest of justice by far outweighs the interest of the applicant. I agree with the magistrate. I do not find any misdirection or error committed by the magistrate or that she exercised her discretion wrongly. The appellant does not have prospects of success on appeal. The appeal consequently stands to be struck from the roll.

[20] In the result:

The matter is struck from the roll and considered finalized.

H C January
JUDGE

I agree,

J T Salionga

JUDGE

Appearances:

For the Appellant:

Mr Kavela

Of Oluno Correctional Facility, Ondangwa

For the Respondent:

Mr Tjiveze

Of Office of the Prosecutor-General, Oshakati