REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

BAIL APPEAL RULING

Case No: HC-NLD-CRI-APP-CAL-2020/00062

SEBRON SHIVOLO **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Shivolo v S* (HC-NLD-CRI-APP-CAL-2020/00062) [2021] NAHCNLD 32 (26 March 2021)

Coram: SALIONGA J
Heard: **15 March 2021**
Delivered: **26 March 2021**

Flynote: Criminal Procedure – Bail – Appeal − Against magistrate's refusal to grant bail— Regulated by s 65 of Act 51 of 1977 – High Court hearing appeal can only set magistrate's decision aside if it was clearly wrong – Onus – Applicant bears the onus on preponderance of probability to show how the magistrate has erred and why he should be released on bail –The appellant failed to make out a case

Summary: This is an appeal against a decision of the learned magistrate at Tsumeb on 3 July 2020, refusing to release the appellant on bail pending his trial. He was charged on

three counts namely; Hunting of specially protected game; Possession of firearm without a license and Unlawful possession of ammunition.

The magistrate in the court a quo relied on section 61 of the Criminal Procedure Act in refusing the appellant bail.

The Appellant contends that, the concern that the he will re-offend or abscond is not real; or, if real, suitable bail conditions can be considered to deal with such concerns, including the concern that the appellant, if admitted to bail, will not be in the public interest.

The court *held* that: there was no misdirection by the court a quo and dismissed the bail appeal.

ORDER

---

1. The condonation application is granted.
2. The appeal against the refusal of bail is dismissed.
3. The matter is removed from the roll and regarded as finalized.

BAIL APPEAL RULING

SALIONGA J:

<u>Introduction</u>

[1] This is an appeal against a decision of the learned magistrate sitting at Tsumeb magistrate court on 3 July 2020, refusing to release the appellant on bail pending his trial.

[2] The appellant a 53 year old male was together with his co-accused charged with three counts i.e. count one: contravening section 26(1) read with sections 1, 26(2), 26(3), 85, 87, 89 and 89A of the Nature Conservation Ordinance No 4 of 1975 and 89A and further read with sections 89 and 250 of the Criminal Procedure Act 51 of 1977; that upon

or about 8 January 2020 he intentionally and illegally hunted two rhinos without being in possession of a license, The second count is unlawful possession of a firearm in contravention of section 2 read with section 1, 38(2) and 39 of the Arms and Ammunition Act 7 of 1996. The third count appellant was charged with unlawful possession of Ammunition in contravention of section 1, 38(2) and 39 of Act 7 of 1996.

[3] The Appellant was represented by Mr. Ngula (Mr. Hangula (sic)) at the formal bail application as well as at this hearing and the Respondent is represented by Mr Gaweseb.

Background

[4] The appellant, filed a formal bail hearing on 30 June 2020. The state objected to the granting of bail on the following grounds:

> '1.1 The State has a strong case against him;
> 1.2 There is a risk that the applicant will abscond;
> 1.3 If admitted to bail, the applicant will re-offend; and
> 1.4 That it is not in the public interest or in the interest of administration.'

[5] At this point in time I should mention that the bail hearing was set down to be heard on 10 March 2021. However counsel for the respondent who did not raise a point *in-limine* stated that, he received the heads the day of the hearing together with condonation application hence was not ready to proceed with the hearing. Mr Ngula on the other hand conceded that the appellant's failure to comply with the rules of the court was not wilful. It was due to medical reasons and human error. He submitted medical certificates as proof that he was sick and explained that indeed the heads were filed on time but his secretary failed to upload all the documents on e-justice. Respondent has not objected to the late filing of the documents and agreed that the matter be rolled over till the 15th of March 2021 for hearing.

Grounds of Appeal

[6] Appellant's grounds of appeal are that the learned magistrate erred in law and /or facts in ruling that the state has a strong case, that it is not in the public interest that the accused be granted bail, that the accused might interfere with investigations, that the appellant may abscond if granted bail and that the appellant has not satisfied the onus of demonstrating that in the circumstances he is a suitable candidate for bail.

[7] The state opposed the application of bail on the grounds as listed by the appellant in the heads of argument.

[8] Appellant testified at the formal bail application in the lower court that he has never been in Etosha National park, he furthermore was not found in possession of any firearms, has not hunted any rhinos or found in possession with any specially protected game products. He further testified that he was not arrested in Etosha, but at King Nehale after rendering transport services to a co-accused who was on his way to a cattle post and was to help him build thereafter. He is adamant that he was arrested on a public road close to where he had dropped of his co-accused, he was merely picking them up as requested and that he has been wrongly accused just because he provided transport.

[9] The state called the investigating officer who went at length to explain to the court why it would not be in the interests of the public and administration of justice to grant the appellants bail. Amongst others he informed the court that rhinos are endangered species, he gave the statistics of poached rhinos from 2014 to 2019 and that the Namibian tourism sector benefits greatly from the tourists that frequent the country to see the rhinos.

[10] Counsel argued that the magistrate erred in law and/or facts in finding that there is likely risk that appellant will abscond if granted bail that 'interest of the public and administration of justice would not be interest of the public to grant bail, that a prima facie has been established against appellant and it is a serious case and that candidate has not demonstrated to be a good candidate for bail.' Counsel argued that appellant testified that he is a Namibian citizen living in Oshakati. He is married with two children. He has no family or friends outside Namibia. He is employed as a driver for the mayor of Oshakati Town

Council and he is a pastor in his community. The appellant has never been in Etosha national Park, was not found in possession of any firearms, has not hunted any rhinos or found in possession of any specially protected game products. He was not arrested at Etosha but at King Nehale after rendering transport services to a co-accused who was on his way to a cattle post and was to help him build thereafter. It was counsel's submission that appellant further testified that he was honest and truthful to the court while testifying. That he had raised an alibi as he rendered transport assistance and intends to plead not guilty to the charges.

[11] Counsel argued that for the court to come at that conclusion that the appellant has not demonstrated to be a suitable candidate for bail and that he might abscond or that the state has a strong case or it will be contrary to public interest or the administration of justice if the appellant is granted bail, the trial court had wrongly analyzed the evidence.

[12] On the other hand counsel for the responded argued that the learned magistrate was not wrong by relying on s 61 of the Criminal Procedure Act, as amended, when concluding that it would not be in the public interest or that of the administration of justice to grant bail to the appellant. He referred this court to several case law to be applied in an application for refusal of bail by the lower courts.

[13] In hearing appeals against the lower court's refusal to grant bail, this court is guided by section 65 (4) of Act 51 of 1977 in the sense that the court shall not set aside the decision of the lower court unless the 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.

[14] In an application of subsection 4, I find the remarks by judge Hefer in *S v Barber*[1] which was cited with the approval in *S v Timoteus*[2] in formulating the powers of an appeal court in respect of bail convincing when he said that;

[1] *S v Barber* 1979 (4) SA 218 (D&CLD)
[2] *S v Timoteus* 1995 NR 109 (HC)

‘It is well known that the power 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 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.’

[15] It is common cause that a new Part IV was inserted in the Schedule listing a number of what the Legislature considers to be serious offences. Section 61 of the Act finds its application in the application for bail in respect of the offences appellant is charged with. It provides that;

‘If the accused who is in custody in respect of any offence referred to in Part IV of schedule 2 applies for bail 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 not abscond or interfere with any witness for the prosecution or with 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.’

[16] The said amendment was necessary to close the gaps or loopholes in the legal system for the proper administration of justice. The outcome of all this is that the courts are given more powers or wider discretion to refuse bail if the crime committed is one of those listed in Part IV of the second schedule. It is doubtless that the accused is charged with the offence listed under the said schedule which is serious in nature when one considers the penalty clause. It is also apparent from the court a quo’s judgment that the learned magistrate analyzed the evidence in its totality before concluding that applicant is not a good candidate for bail.

[17] It is worth noting that at page 591 the court a quo stated that a question of whether the court can still refuse bail in the circumstances where it has found that the Appellant is not a flight risk or will not interfere with State witnesses or the prosecution is

best answered by reference to section 61 of the Criminal Procedure Act as amended. Therefore it is not correct to argue that the magistrate relied on accused's risk of absconding in arriving at her decision.

[18] Notably from the judgment by the Magistrate and the heads of argument by the state it is crystal clear that section 61 of the Act was applied to this matter in refusing bail. The learned magistrate also reasoned that the charges the appellant is facing are serious, the appellant has a previous conviction for similar offences and that there was a prima facie case established in that appellant placed himself at the scene. In my view the court a quo was correct in finding that either the applicant was not aware of the commission of the offence and was merely assisting the contractor or he was an informer working on the instructions of accused 7; both cannot be true as he could not have been one in all.

Conclusion

[19] There is no doubt that the appellant is charged with serious offences and there is a link to the commission of the offence. The seriousness of any offence must be weighed against the presumption of innocence until proven guilty as enshrined in article 12(d) and the Right to liberty in article 7 of the Namibian Constitution. It has been stated that the purpose of bail is to strike a balance between the interests of society in that the accused should stand his trial and not interfere with the administration of justice.[3]

[20] It is evidently clear from the judgement of the court *a quo* that the magistrate relied on section 61 of the Criminal Procedure Act in refusing the appellant bail. In this regard this court will agree and endorse what January J had concluded in *Namweya v S*, a matter based on same or similar facts that;

> 'Considering that section 61 had to be invoked in this case the magistrate had to be satisfied that the offence was serious and listed in Part IV of Schedule 2 and that there was minimum evidence that linked the appellants to the commission of the offence in question. It is

[3] *Namweya v S (*HC-NLD-CRI-APP-CAL-2020/00051 [2020] NAHCNLD 170 (3 December 2020) at para 30

common cause that offences in terms of the Nature Conservation Ordinance are listed in Part IV of Schedule 2 for which both appellants are charged to have committed or as the evidence indicates conspired to commit. In his testimony, the Investigating Officer, painted a picture of a syndicate and the different levels upon which the applicants were operating. His evidence establish a link between the first appellant and the accused 1, 2 and 5 that were caught dehorning a rhino carcass[4].'

[21] With the aforesaid in mind; I cannot see how the magistrate have erred if regard is had to s 61 of Act 51 of 1977 (as amended by ss3 and 7 of the Criminal procedure Act, 1991 Act (5 0f 1991)). I find counsel's submission baseless and without merits more so where he failed to indicate in which way the magistrate erred. I am satisfied that the appellant failed to prove on a preponderance of probability that he is a good candidate for bail and further that he failed to show to this court how the magistrate misdirected himself.

[22] In the result the following order is made:

1. The application for condonation is granted
2. The appeal against the refusal of bail is dismissed.
3. The matter is removed from the roll and regarded as finalized.

J T SALIONGA

JUDGE

[4] *Namweya v S* (HC-NLD-CRI-APP-CAL-2020/00051[2020]NAHCNLD 170 (3 December 2020)

APPEARANCES:

THE APPELLANT:	Mr. N. Ngula Of Nicky Ngula Attorneys, Ondangwa
THE RESPONDENT:	Mr. T. Gaweseb Of Office of the Prosecutor General, Oshakati