REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

BAIL RULING

Case No: CC 1/2020

In the matter between:

SIMON FESTUS BUMES **1st APPLICANT**

KALOLA VAINO NINGENI **2nd APPLICANT**

v

THE STATE **RESPONDENT**

Neutral citation: S v *Bumes* (CC 1/2020) [2022] NAHCNLD 123 (18 November 2022)

Coram: KESSLAU AJ

Heard: **29 July 2022; 27-28 September 2022; 4 November 2022**

Delivered: **18 November 2022**

Flynote: Criminal procedure- Bail application – New facts – applications brought by way of affidavits- two legged test to be applied – facts should be new and secondly should be sufficient to displace the initial bail refusal – evidence considered against the backdrop of initial application.

Summary: The applicants brought bail applications on new facts after a refusal of bail in their initial applications. The charges all emanate from the alleged illegal hunting of two rhinos in the Etosha National Park. The applicants did not appeal the

Magistrate's refusal of bail. Their four co-accused were granted bail. The current bail application is brought by way of sworn affidavits where after they were cross-examined by the State. A supporting sworn affidavit by the mother of the second applicant was also submitted. The respondent presented *viva voce* evidence of the investigating officer, the maternal grandmother to first applicant's child and a family member of the second applicant.

Held: that once a bail application is heard and concluded, there can be no new bail application on the same facts unless new facts exist.

Held further: that new facts are facts that were non-existent during the initial bail hearing.

Held also: that when faced with an application for bail on new facts, a two legged test applies consisting of firstly asking the question if these so called new facts are indeed new and secondly, if it is indeed new facts, do they warrant/allow for the release of the applicant on bail.

Held finally: that in this matter new facts either did not qualify as new having been dealt with in the court a quo, alternatively were not sufficient to warrant the release of both applicants on bail.

ORDER

The application for bail on new facts is dismissed in respect of both applicants.

RULING

KESSLAU AJ:

Introduction

[1] The applicants brought a bail application on new facts by way of sworn affidavits where after they were cross-examined by the State. A supporting sworn affidavit by the mother of the second applicant was submitted. The respondent presented *viva voce* evidence of the investigating officer, the maternal grandmother to first applicant's child and a family member of the second applicant.

[2] Initially the two applicants unsuccessfully applied for bail in separate bail applications in the Outapi Magistrate's court. These applications were heard by the same Magistrate. The charges at the time against the two appellants and their six co-accused were Count 1- Contravening Section 26(1) of the Nature Conservation Ordinance 4 of 1975: Hunting of specially protected game; Count 2- Contravening section 4(1)(a) of the Controlled Wildlife Products and Trade Act 9 of 2008: Possession of 2 pairs of rhino horns; Count 3- Contravening section 50(1) of the Nature Conservation Ordinance 4 of 1975: Removal of game found dead and; Count 4- contravening section 2 of the Arms and Ammunition Act 7 of 1996: Possession of a firearm without a license.

[3] Several grounds for opposing bail were listed by the State however the court *a quo* refused bail for both the applicants on the basis of the seriousness of the offences, the propensity of the applicants to commit similar offences and the interest of public and administration of justice. The applicants did not appeal the Magistrate's refusal of bail, hence the findings of that ruling stand. Their four co-accused were granted bail.

[4] The matter has since been transferred to this court for trial. The charges all emanate from the alleged illegal hunting of two rhinos in the Etosha National Park. Counts relevant to the applicants, as per the Prosecutor-General's decision, read as follows:

Count 1- Contravening section 18(2)(a) of the Riotous Assemblies Act 17 of 1956: Conspiracy to illegally hunt specially protected game;

Count 2- Contravening section 26(1) of the Nature Conservation Ordinance 4 of 1975 as amended: Hunting of specially protected game;

Count 3 - Contravening section 26(1) of the Nature Conservation Ordinance 4 of 1975 as amended: Hunting of specially protected game;

Count 4- Theft;

Count 5 - Theft;

Count 6 - Contravening section 2 of the Arms and Ammunition Act 7 of 1996: Possession of a fire-arm without a license;

Count 7 - Contravening section 33 of the Arms and Ammunition Act 7 of 1996: Possession of ammunition;

Count 8 - Contravening section 32(1)(a) of the Arms and Ammunition Act 7 of 1996: Unlawfully supplying a firearm;

Count 9 - Contravening section 32(1)(b) of the Arms and Ammunition Act 7 of 1996: Unlawfully supplying ammunition;

Count 12 - Contravening section 4(1)(a) of the Controlled Wildlife Products and Trade Act 9 of 2008 as amended: Unlawful possession of controlled wildlife product;

Count 13 - Contravening section 4(b)(i) and (ii) of the Prevention of Organized Crime Act 29 of 2004: Disguising unlawful origin of property;

Alternatively to count 13- Attempting to defeat or obstruct the course of justice; Count 14 - Contravening section 4(1)(b) of the Controlled Wildlife Products and Trade Act 9 of 2008 as amended: Unlawful dealing in a controlled wildlife product and; Count 15: Contravening section 6(a) of the Prevention of Organized Crime Act 29 of 2004: Acquiring proceeds of unlawful activities.

The new facts

[5] The first applicant presented the following 'new facts':

a) His grandmother, who was caring for his child, passed on since the initial bail

application and he is the only one who can take care of the child.

b) Investigations have been completed, the Prosecutor-General has decided that the matter be trailed in the High Court and therefor there cannot be a fear that the applicant will interfere with the investigations. Furthermore that the concluded investigations have not uncovered any evidence to link the first applicant to the offences.

[6] Second applicant presented the following 'new facts':

a) His uncle passed away resulting in the business ventures of the said uncle not being taken care of and thus resulting in financial suffering of the family.
b) Investigations are now completed.
c) He was since acquitted on one of the four pending cases he had during the initial bail application.

Submissions by Applicants and Respondent

[7] Counsel for the applicants submitted that the new fact of the completed investigations, which fail to link the applicants to the offences, will result in an acquittal on these charges. Evidence is circumstantial in nature, based on telephone records and inadmissible admissions from co-accused which will only be admissible against the maker of such.[1] Therefore without the likelihood of a conviction the seriousness of the charges as reflected in the various penalty clauses should be disregarded.[2] The applicants are not disputing frequent telephonic contact with co-accused as per the MTC records however first applicant explained that, as a taxi driver, these are calls made to his customers and second applicant made these calls to search for missing cattle. As for the pending cases, it was submitted that the State has a 'tendency' to frequently arrest the applicants for similar offences. It was argued that the Magistrate should not have refused bail in the initial applications and that this court should come to the rescue of the applicants even if the new facts prove not to be sufficient to warrant a release on bail. It was also submitted that all their co-accused were granted bail in the matter.

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[1] *Gauorob v The State* (CA 16/2014) [2014] NAHCMD 214 (11 July 2014).
[2] *S v Yugin and others* 2005 NR 196 (HC).

[8] The Respondent submitted that the facts provided does not amount to new facts alternatively that it is unrelated to the reasons why bail was refused in the court *a quo*. Respondent further referred to the matter of *Wembondigna v S*[3] by submitting that the fact that their co-accused are on bail, does not necessarily entitle the applicants to bail. It was also argued that the bulk of the submissions by counsel for the applicants is aimed at requesting this court to adjudicate on the matter as if on trial, whilst that should be left for the trial court. Furthermore it was submitted that the court should follow a holistic approach when assessing and weighing the evidence for and against the applicants in this bail application. [4]

The Legal Principles

[9] It is well established in our law that when faced with an application for bail on new facts, a two legged test applies consisting of firstly asking the question if these so called new facts are indeed new and secondly, if it is indeed new facts, do they warrant/allow for the release of the applicant on bail.[5] In other words, do the new facts have relevance enough, to sway the pendulum in the favour of the applicants?[6] It is furthermore required of this court to consider such new facts against the backdrop of the evidence presented in the initial bail application in order to reach a conclusion. [7]

[10] The legal position in respect of bail on new facts was confirmed by Salionga J in *Sheelongo v S*[8] at para 10:

'It is settled law that once a bail application is heard and concluded, there can be no new bail application on the same facts unless new facts exist. I agree with what the Court stated in *S v Petersen 2008* (2) SACR 355 (C) Van Zyl J at page 371 para 57 that "When as in the

[3] *Wembondinga v S* (CA 27/2017) [2017] NAHCMD 202 (28 July 2017) par 23.
[4] *Miguel v The State* (CA 11/2016) [2016] NAHCMD 175 (20 June 2016) p20 par 51.
[5] *Wembondinga v S* (CA 27/2017) [2017] NAHCMD 202 (28 July 2017).
[6] *Lupalwezi v State* (CC 5 /2016) [2017] NAHCNLD 93 (19 September 2017).
[7] *Matali v S* (CC 17/2016) [2017] NAHCMD 295 (17 October 2017); *Doeseb v The State (CA 25-2015) [2015] NAHCMD 199 (25 August 2015); Kauejao v The State (CC 06/2014) [2014] NAHCMD 316 (29 October 2014); Emvula v S (HC-NLD-CRI-APP-CAL-2018/00042) [2020] NAHCNLD 31 (24 February 2020); Noble v State (CA 02/2014) [2014] NAHCMD 117 (20 March 2014).*
[8] *Sheelongo v S* (CC 16/2018) [2020] NAHCNLD 51 (8 May 2020); See also *Lichtenstrasser v S* (CC 9/2021) [2022] NAHCMD 28 (2 February 2022); *Noble v State* (Supra).

present case, the accused relies on new facts which have come to fore since the first, or previous, bail application, the court must be satisfied, firstly that such facts are indeed new and secondly they are relevant for purposes of new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it." Relying on the same facts to apply time and time again for bail amounts to an abuse of the proceedings.[9]

[11] In *Shekundja v S,*[10] Sibeya AJ (as he then was), defined new facts as facts that were non-existent during the initial bail hearing. He furthermore confirmed that subsequent bail applications on the same facts is prohibited.

[12] Regarding the fact that their co-accused were granted bail, I wish to echo what was said in *Kakurarume v S*[11] at par 12: 'The applicants also harboured an impression that they should be granted bail because their co-accused were granted bail. It is not that simple. Each applicant's bail application turns on its own merits in so far as it relates to the variables that affect the granting or refusal of bail'. Different circumstances surrounding applicants in bail often will result in a different outcome for each.

[13] Various of the offences faced by the applicants are listed in Part IV of Schedule 2 of the Criminal Procedure Act 51 of 1977 as amended (CPA) triggering the provisions of s 61 of the CPA.[12] The Magistrate made a value judgment when forming the opinion that, considering *prima facie* evidence against the applicants, it is in the interest of the public or the administration of justice that the accused be retained in custody pending their trial notwithstanding the fact that the court was satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness or with the police investigation.[13] The negative implications of poaching on society was also considered by the Magistrate.

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[9] *S v Ganeb* (CC 3/2016) [2018] NAHCMD 215 (17 July 2018).
[10] *Shekundja v S* (CC 19/2017) [2020] NAHCMD 339 (22 July 2020).
[11] *Kakurarume v S* (CC 6/2014) [2020] NAHCMD 532 (19 November 2020).
[12] PART IV (Sections 61) [PART IV inserted by Act 5 of 1991] Any offence under the Controlled Game Products Proclamation, 1980 (Proclamation AG. 42 of 1980). [The Controlled Game Products Proclamation 42 of 1980 has been replaced by the Controlled Wildlife Products and Trade Act 9 of 2008.] Any offence under the Nature Conservation Ordinance, 1975 (Ordinance 4 of 1975).
[13] *Noble v State* (CA 02/2014) [2014] NAHCMD 117 (20 March 2014); unreported case of *Charlotte Helena Botha v The State* CA 70/95 delivered on 20.10.1995.

[14] In *Mukwangu v S*[14] the reasoning that the protection of wildlife is of great concern to the Namibian and international society was confirmed. Additionally the Constitution in Article 95 dealing with the 'Promotion of the Welfare of the People' states that: 'The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following: . . . (l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; . . .'. Poaching of these natural resources could result in their extinction.

[15] The relevant penalty provisions, attached to the multitude of charges that the applicants are currently facing, allows for substantial fines and terms of imprisonment if convicted. It has been held in *Shaduka v S*[15] at para 27 that: 'where an accused has been charged with the commission of a serious offence, and that if convicted a substantial sentence of imprisonment would in all probability be imposed, that that fact alone would be sufficient to permit a magistrate to form the opinion that it would not be in the interests of either the public or the administration of justice to release an accused person on bail'.

[16] It is settled law that it is for the trial court to determine the admissibility and evidential value of the evidence presented. The accuracy of the totality of the evidence would not ordinarily be considered at this stage to determine the strength or weakness of the state case. [16] Bail is an inquiry which should not include the prejudging of issues that should be decided during the trial as it could result in adverse effects on the criminal process.[17] In this regard Parker AJ had the following to say in *Eichhoff v State*[18]*:*

'A bail hearing is not a trial. It is at the trial that evidence will be presented to the court for the trial court to determine the guilt or otherwise of the appellant. At the stage of the bail hearing the burden of the lower court was to consider the totality of the evidence placed before it in order to determine whether there is a prima facie case made against the appellant. And, so, whether the respondent would succeed in due course at the trial in proving conclusively the

[14] *Mukwangu v S* (HC-MD-CRI-APP-CAL-2022/00042) [2022] NAHCMD 605 (7 November 2022).
[15] *Shaduka v S* CA 119/2008 (unreported) delivered on 24.10.2008.
[16] *Shekundja v S* (CC 19/2017) [2020] NAHCMD 339 (22 July 2020).
[17] *S v Noble and another* 2019 (1) NR 206 (HC).
[18] *Eichhoff v State* (CA 26/2014) [2014] NAHCMD 154 (9 May 2014).

guilt of the appellant was not the concern of the lower court and it is not the concern of this court.'

[17] Considering that it was submitted that investigations has now been completed, it was stated in *Awaseb v S*[19] that *inter alia* a completed investigation does not address the issue of public interest or interest of the administration of justice and did not change the position that it is not in the public interest to release an applicant on bail. Additionally it was held that financial hardship is an ordinary consequences of detention.

[18] Lastly, I am mindful that the applicants are presumed innocent until proven guilty, however the fact that both applicants have similar pending matters cannot be ignored for purposes of bail. These alleged offences were committed whilst on bail in similar circumstances involving specially protected game. Such conduct can be regarded as the 'propensity to commit similar offences' in the determination of whether an accused is a good candidate for bail.[20]

Application of the law to the facts

[19] First applicant, during the initial bail application, argued that he should be granted bail to support his child who is living with his elderly grandmother. The 'new fact' is that his grandmother has since passed on. The first applicant under oath gave different names for the child, did not know the full birthdate and conceded that the child has been living for some time with the mother now. The State called the maternal grandmother who denied, and convincingly so, that the child has ever been living with the family of the first applicant or that he supported the child at any stage. The first applicant thus mislead the court *a quo* and this court on this aspect which entitles this court to draw an adverse inference regarding his character and his sincerity to take the court into his full confidence.[21] In any event the support of the child was dealt with during the initial bail application and to dress it in a slightly

[19] *Awaseb v S* (CC 8/2017) [2018] NAHCMD 128 (16 May 2018).
[20] *De Klerk v S* (CC 06/2016) [2017] NAHCMD 67 (09 March 2017); *S v Van Wyk* 2020 (4) NR 1022 (HC); *S v Gaseb* 2007 (1) NR 310 (HC); *Kennedy v State* (CA 23/2016) [2016] NAHCMD 163 (08 June 2016).
[21] *De Klerk v S* (CC 06/2016) [2017] NAHCMD 67 (09 March 2017).

different blanket does not make it a new fact.[22] There is thus no need to proceed to the second leg.

[20] Similarly the second applicant presented the 'new fact' that his uncle passed away resulting in the business ventures (a shop and some life stock) of the said uncle not being well taken care of and resulting in financial suffering for the family. In the initial bail application the same core reason was given when it was stated that his uncle is living in Windhoek and unable to tend to his business ventures and that the second applicant needed to assist. His mother, the sister of the deceased uncle, is too old to take care of property however there are other family members available to assist. Notably the late uncle's wife is still alive and, with assistance from their children, capable of taking care of their own affairs. Family members passing on is a constant part of human life whilst financial changes is an inevitable consequence of continued detention.[23] I find this to be a reshuffling of the same primary fact as before with an added surrounding circumstance and will not be entertained.

[21] Both applicants submitted that the investigations have since been completed, the Prosecutor-General has decided that the matter be trailed in the High Court and therefor there cannot be a fear that the applicants will interfere with the investigations and or witnesses. Even though this appear to be a new fact is does nothing to sway or tilt the decision in favour of the applicants as interference with witnesses was not a ground of opposing bail in the court *a quo* nor was it a reason why bail was refused. It is irrelevant to the question in hand.

[22] First applicant presented as 'new fact' the opinion that the concluded investigations have not uncovered any evidence to link him to the offences. From the evidence by the investigating officer in both the initial and this application it appears that the State is relying on circumstantial evidence in the form of MTC phone record which not only link the applicants to their co-accused but also indicate their locations at the time of making these calls. The investigating officer testified that the State will furthermore rely on admissions, a witness linking the first applicant to the supplying of the firearm and real evidence in the form of cash and the rhino

[22] *Wembondinga v S* (CA 27/2017) [2017] NAHCMD 202 (28 July 2017).
[23] *Doeseb v The State (CA 25-2015) [2015] NAHCMD 199 (25 August 2015); S v Ganeb (CC 3/2016) [2018] NAHCMD 215 (17 July 2018).*

horns. It might be the opinion of the applicants that they are not linked however that question will be answered by the trial court when ruling on the admissibility and evidential value of evidence.[24] The fact that the charges multiplied after the Prosecutor-General's decision was made is not an indication that the applicants are not linked to the offences, on the contrary, their situation has worsened since the first bail application. Furthermore the fact that the applicants are facing a *prima facie* case was considered by the court *a quo* and thus is not a new fact to be entertained.

[23] Second applicant has since the initial bail application been acquitted on one of his pending matters. Including the case before court, the applicant is left with three pending cases of a similar nature involving the alleged illegal hunting of specially protected game *to wit* rhino. Considering that he was on bail when collecting these cases, it does not reflect well on his conduct and to grant him bail will severely prejudice the administration of justice. Thus, even though being a new fact, it is not sufficient to tip the scale in favour of the applicant in order to justify his release on bail.

[24] Having considered the new facts as presented by the applicants, I conclude that they are either not new facts or if so, have failed to displace the basis on which the bail in the district court was refused.

[25] In the result it is ordered that:

> The application for bail on new facts is dismissed in respect of both applicants.

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E. E. KESSLAU

ACTING JUDGE

[24] *De Klerk v S* (CC 06/2016) [2017] NAHCMD 67 (09 March 2017).

APPEARANCES

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