



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

BAIL APPEAL RULING

Case No.: HC-NLD-CRI-APP-CAL-2023/00008

KUHATUMWA JOSUA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Josua v State* (HC-NLD-CRI-APP-CAL-2023/00008) [2023]
NAHCNLD 91 (04 September 2023)

Coram: SALIONGA, J et KESSLAU, J

Heard: 04 August 2023

Delivered: 04 September 2023

Flynote: Criminal procedure — Bail — Appeal against magistrate's refusal to grant bail — Section 65(4) Criminal Procedure Act 51 of 1977 — Appellate court must not set aside decision of lower court unless satisfied that decision is wrong – Appeal court found serious misdirection that vitiate the outcome — Appeal court granted bail with conditions.

Summary: The appellant was arrested for Rape in contravention of section 2 (1) (a) of the Rape Act, Act 8 of 2000, read with the provisions of Act 4 of 2003. He brought a

formal application for his release on bail before the magistrate sitting at Outapi magistrate's Court. After a hearing, the district court concluded that it was not in the administration of justice and the public interest to grant him bail. The court a quo also found that the families of the accused and or the complainant as well as the teachers at school are the most definite witnesses, with this set up it will be impossible to prevent contamination or interference with witnesses and that another factor is the seriousness of the offence which prima-facie links the accused directly to the crime committed. Looking at the manner in which the present crime was committed it is evident that this was a callous act in which a minor vulnerable victim had been raped by the accused. She then refused bail on these grounds.

Held: that the purpose of a bail enquiry is to assess whether the applicant is likely to stand trial and the focus is on the probabilities apparent from the relative strength or deficiency of the State's case. Definite findings on the merits or demerits of a case and or the defenses postulated are best left for the trial court.

Held further: that in bail enquiries, it is the duty of the court to conduct a full analysis on the issues in dispute to the extent of even calling the investigating officer if the interest of justice requires.

ORDER

1. The appeal succeeds.
2. The decision of the district court of Outapi under case number A454/2022 dated 20 February 2023 is set aside and substituted with the following order: That the appellant is granted bail in the amount of N\$ 2000 on the following conditions:
 - 2.1 That the appellant resides at a fixed address in Outapi/Onandjamba, which address must be furnished to the Investigating Officer, on the date of payment of bail and/or prior to being released on bail.

2.2 That the appellant shall not interfere directly or indirectly with any of the known witnesses.

2.3 That the appellant shall not leave the district of Outapi/Onandjamba without the prior permission of the Investigating Officer, which shall not be withheld unreasonably.

2.4 That the appellant shall report to the Outapi/Onandjamba Police Station, twice a week, on Mondays and Fridays between the hours of 08h00 and 20h00.

2.5 The appellant shall appear on the date and time which his case has been remanded, in the district court of Outapi.

3. The matter is regarded finalized and removed from the roll.

RULING

SALIONGA J (KESSLAU J Concurring)

Introduction

[1] This is an appeal by the appellant, Mr Kuhatumwa Josua, against the refusal of bail by the Magistrate sitting in the magistrate's court at Outapi.

[2] A 65 year old appellant was arrested on 20 November 2022 and was charged with Rape in contravention of section 2 (1) (a) of the Rape Act, Act 8 of 2000, read with the provisions of Act 4 of 2003 in which he is alleged to have raped the complainant.

[3] Aggrieved by the decision of the Magistrate to release him on bail, appellant lodged an appeal pursuant to s 65 (1) (a) of the Criminal Procedure Act 51 of 1977 (CPA) on the grounds set out in his notice of appeal. The appellant is represented in this appeal by Mr. Ndana and the respondent by Ms. Shigwedha.

Grounds of appeal

[4] The appellant assails the decision of the Magistrate both in fact and law on the various grounds as follows:

1. The learned Magistrate erred in fact and/or in law in finding that it will be impossible to prevent contamination or interferences with witnesses should he be released on bail.
2. The learned Magistrate erred on the fact and/or in law, by finding the seriousness of the offence prima facie links the appellant directly to the offence committed, by giving undue weight to the biased evidence of social workers and in the absence of evidence from the investigating officer stating what evidence they have in their possession linking the appellant to the commission of the offence.
3. The learned Magistrate erred on the fact and/or in law by finding that it would not be in the interest of administration justice that the appellant be admitted to bail, in circumstances where the complainant as well as the witnesses and police investigation could be protected and/or safeguarded by appropriate bail conditions.
4. The learned Magistrate erred on the fact and/or in law by not placing due consideration to the overriding provision of article 12 (d) of the constitution that all persons are presumed innocent until proven guilty in a Court of law when she made the findings that there is proper evidence before court in support of the view that there was a callous act in which a minor was raped by the appellant and that the appellant is a merciless criminal from whom public needs protection from.

Submissions by counsel

[5] Mr. Ndana on behalf of the appellant submitted that the learned magistrate in the court *a quo* misdirected herself on several aspects and that her decision to refuse to admit the appellant to bail is wrong and calls for this court's interference as provided for in section 65 (4) of the CPA. According to counsel, the court *a quo* disregarded relevant considerations in coming to its decision that it will be impossible to prevent contamination or interference with witnesses.

[6] Counsel specifically argued that in this application the State failed to call the investigating officer to lead evidence as to who the state witnesses are, whether those witnesses have already given their statements and whether there were any acts of actual interference or risk of the appellant interfering with the state witnesses.

[7] He further argued that as far as the appellant's access to the witnesses is concerned, it is on record that the complainant has been relocated to a village that is in Oshana region and about 100km away from the appellant's village. The only known witness, was the teacher whom the accused contacted on 17 November 2022 about the complainant's whereabouts, which was not contradicted and still stand. In his opinion there was no acceptable evidence to support the learned magistrate's finding of possible contamination or interference with witnesses by the appellant and for that reason that ground deserve to be dismissed because it was not proven.

[8] On the magistrate's finding that the seriousness of the crime *prima facie* links the appellant directly to the offence committed. Mr. Ndana submitted that in bail proceedings all what the state needs to do was to show on a balance of probabilities that the evidence will prove the guilt of the accused. He submitted that what is before court was only the evidence of a social worker as the investigating officer did not testify. He argued that in the absence of the evidence of the investigation officer stating whether evidence in their possession links the appellant to the commission of the offence it was not correct to place more emphasis on the evidence of social workers which could be biased.

[9] With regard to the magistrate's finding that it would not be in the interest of the administration of justice that the appellant be admitted to bail, counsel contended that the appellant testified that he will come back to court on remand dates and that he will stand his trial. He submitted that the interest of justice in this case favours the release of the appellant on bail and is therefore asking this court to release him on bail.

[10] Regarding the last grounds counsel, correctly argued that there is no evidence before court in support of the view that there was a callous act in which a minor was raped by the appellant and that the appellant is a merciless criminal from whom the public needs protection. It was counsel's submission that what served before court are two conflicting versions, that of a social worker placing the complainant at the centre of bail inquiry and that of the appellant denying to have raped the complainant. In making reference to *Boulter v The State*¹, counsel argued that it is irregular for the court to make a finding on appellant being a 'merciless criminal from whom the public needs protection' when he was not afforded an opportunity to address such allegations.

[11] To the contrary Ms. Shigwedha counsel for the Respondent submitted that, in terms of section 61 of the Criminal Procedure Act 51 of 1977 as amended bail can be denied when the court finds that it will not be in the interest of the public for an accused to be granted bail. Further submitted that it does not really matter whether accused will or will not interfere with witnesses and police investigation because the court is given wider powers to exercise its discretion by refusing bail even if accused is likely not to interfere with investigations. Counsel for the Respondent referred this court to *Nel v State*² where section 61 was found not to have contravened article 12 (d) of the Namibian Constitution. Therefore counsel submitted that the decision of the court *a quo* to refuse to admit the appellant to bail was correctly made and should not to be set aside. According to Ms. Shigwedha, the appellant's submissions do not have merit and prays that the appeal should be dismissed.

¹ *Boulter v S* (HC-MD-CRI-APP-CAL-2021-00045 [2021] NAHCMD 333 (15 July 2021))

² *Nel v State* (HC-MD-CRI-APP-CAL-2021/00052) [2021] NAHCMD 579 (9 December 2021)

The approach to bail and evaluation

[12] The law is very clear that a court of appeal may only set aside a decision of the lower court refusing bail, where such a decision was clearly wrong. The court of appeal is bound by the provisions of s 65(4) of the Criminal Procedure Act, Act 51 of 1977 and may only overturn the court *a quo*'s decision once satisfied that the court exercised its judicial discretion wrongly.

[13] In construing s 65(4), the High Court has over the years accepted the approach in *S v Barber*³ dealing with the identical wording of that provision in South Africa as follows:

'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.'

[14] Although not specifically stated in the ruling, it appears the magistrate refused bail mainly on s 61 of the CPA, supported by the conclusion that the court *a quo* was unable to prevent contamination or interference with witnesses. The court *a quo* also found that if appellant is released on bail, he intends to go back to his family home where his families (including the complainant) as well as the teachers at the nearby school are definite witnesses. Another factor considered was the seriousness of the offence *prima facie* linking the appellant directly to the offence committed. The court went further to state that though this incident might fall short from justifying an inference that the accused has a propensity to commit violent crime, looking at the manner in

³ *S v Barber* 1979 (4) SA 218 (D) 220

which the present crime was committed, it is evident that this was a callous act in which a minor vulnerable victim had been raped by the accused person. On this point I share the sentiments expressed in *Boulter v The State*⁴ where the court had warned against definite findings on the merits or demerits of a case and/or defence anticipated which were said to be best left for trial court. In this regard the magistrate's aforesaid finding is flawed and inconsistent with article 12 (d) of the Constitution.

[15] In bail enquiries, the trial court will be more equipped to assess whether the applicant is likely to stand trial. This can be done after a full analysis of the issues in dispute to the extent of even calling the investigating officer *mero motu* if the interest of justice demand/requires. (My own emphasis)

[16] In the matter before hand, the Appellant testified that he knows the complainant as a child that was brought to his house, raised and has been there for two years. The victim is related to his wife, because she is her aunt. On 16 November 2022 he reprimanded the victim of what she did and on 17th of November 2022 she went to school and never returned home. They sent another child from the neighbors to go look for her without success. They then tried to call the teacher about her where-abouts but the number was unreachable. Appellant then went with his wife at their neighbor's house trying to locate the victim and that is when they were told that the child was taken by people from the Ministry of Gender.

[17] They started looking for her on Friday and were only informed on Sunday that the social worker will bring the child and both appellant and his wife must be home when this happens. That the victim has since been relocated from their village to another village in another Region after the incident. Appellant relies on pension fund and the support he gets from his children. He thus wants to be granted bail in order to continue to take care of his home, livestock and field, as his wife is alone with minors and unable to manage everything on her own. He remained in custody until the date of hearing and is still in custody to date. He will plead not guilty to the charge against him.

⁴ *Boulter v S* (HC-MD-CRI-APP-CAL-2021-00045) [2021] NAHCMD 333 (15 July 2021)

[18] The appellant indicated his willingness to stand his trial; that he will not interfere with known witnesses or investigation and will abide to any conditions attached to bail. Appellant's evidence that he contacted a known witness who is a teacher in order to locate the child who did not return from school on 17 November 2022 was not challenged. It appears the magistrate made her finding that the appellant was not a good candidate for bail by heavily relying on the evidence of a social worker which is in itself a misdirection as the investigating officer did not testify in the matter before us. The court *a quo* apart from generalising the issue of public interest, was not supported by evidence to show that the appellant's release is prejudicial to the administration of justice.

[19] On the overall evidence presented in the court *a quo*, this court could not find tangible evidence to establish a likelihood that the appellant will endanger the safety of the public or any particular person or will commit a schedule 1 offence, or a likelihood that he will interfere with witnesses as the identity of the state witnesses are for now at best unknown to the appellant and that a list of witnesses is not provided to him. There is further no evidence that the release of the appellant will undermine or jeopardize the objectives or the proper functioning of the criminal justice system. No cogent evidence was presented that the release of the appellant will disturb the public order or undermine the public peace and security. The complainant who was hosted by the appellant has since relocated to another village far away from that of the appellant. A conspectus/summary of the evidence presented indicates that the appellant has passed the verge of establishing that the interests of justice warrant his release on bail. The decision of the Magistrate was clearly wrong, justifying an interference by this Court. It is also found that bail with stringent conditions in this regard will alleviate any fears and expectations the State might have.

[20] In the result, the order is made as follows:

1. The appeal succeeds.

2. The decision of the district court of Outapi under case number A454/2022 dated 20 February 2023 is set aside and substituted with the following order: That the appellant is granted bail in the amount of N\$ 2000 on the following conditions:
 - 2.1 That the appellant resides at a fixed address in Outapi/Onandjamba, which address must be furnished to the Investigating Officer, on the date of payment of bail and/or prior to being released on bail.
 - 2.2 That the appellant shall not interfere directly or indirectly with any of the known witnesses.
 - 2.3 That the appellant shall not leave the district of Outapi/Onandjamba without the prior permission of the Investigating Officer, which shall not be withheld unreasonably.
 - 2.4 That the appellant shall report to the Outapi/Onandjamba Police Station, twice a week, on Mondays and Fridays between the hours of 08h00 and 20h00.
 - 2.5 The appellant shall appear on the date and time which his case has been remanded, in the district court of Outapi.
3. The matter is regarded finalized and removed from the roll.

J T SALIONGA
Judge

I agree

E.E. KESSLAU

Judge

APPEARANCES

APPELLANT:

D Ndana
Of Jacobs Amupolo lawyers & conveyancers
Ongwediva

RESPONDENT:

V Shigwedha
Of the Office of the Prosecutor General
Oshakati