CASE NO.: CA 43/2012

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ELIAS P HANGOMBE **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: SMUTS, J

Heard on: 23 August 2012
Delivered on: 23 August 2012

EXTEMPORE JUDGMENT

JUDGMENT:

SMUTS, J: [1] This is an appeal from the Regional Court in Windhoek against the refusal to grant the appellant bail pending his trial on a charge of robbery with aggravating circumstances. It is alleged that he, together with his co-accused, robbed the complainant of U$145 000 in Windhoek.

[2] The notice of appeal against this refusal of bail was filed out of time. The appellant then also brings an application for condonation for that late filing. The State opposes that application only on the ground that the appeal does not

enjoy prospects of success and not on the basis of the explanation which was provided.

[3] I accordingly proceeded to hear argument on the merits of the appeal. At the time of the bail application, the appellant was 29 years old and a Namibian citizen. He testified that he lived at his parent's home in Katutura, although a year before his arrest it would appear that he spent most of his time staying over at his girlfriend's residence in Khomasdal.

[4] The robbery was committed on 3rd May, 2008. But he was arrested in November/December, 2011. He gave evidence at the bail application as did the investigating officer, Inspector Amakali. Bail was opposed on the ground that the appellant was likely to abscond.

[5] It emerged from Inspector Amakali's evidence that seven other accused were arrested in 2008 and had remained in custody pending the trial. He said that the appellant was implicated by a co-accused who had already pleaded guilty and had been sentenced. She was a certain Ms Elizabeth Shigwedha.

[6] According to her the appellant was part of the planning of the robbery and had driven the vehicle which had transported all the accused from the scene of the crime. This was according to Ms Shigwedha's affidavit.

[7] He also stated that the accused had established from her whether she could speak Portuguese. According to Inspector Amakali, Ms Shigwedha said that the robbery had been planned in a vacant house nearby the appellant's parents' residence. Ms Amakali had booked herself into the establishment where the robbery took place on the day before and had provided a remote control to the gate for the alleged robbers to flee from the scene and said that the appellant had driven the getaway vehicle. Inspector Amakali testified that in Ms Shigwedha's statement there was however only reference to a certain George, and not to the appellant by name. But he said the connection was given to him orally by her. Inspector Amakali also testified that the appellant's

cell number was no longer used after his co-accused were arrested and that there would be evidence at the trial that the appellant's cell number had been used to contacted Ms Shigwedha.

[8] In his evidence the appellant said that he had owned two taxis at the time of the robbery, but could not recall the names of the drivers used at that time. He denied any involvement in the robbery and said that he mostly stayed at his parent's house which was nearby Inspector Amakali's home and that the latter would have seen him at a nearby car wash over the period of time following the robbery and before his arrest.

[9] Certain important issues which were that referred to, namely that he was apparently referred to as George in Ms Shigwedha's statement and the evidence concerning the cell phone, were however never put by the prosecutor to the appellant in cross-examination.

[10] This was rightly criticised by Mr Namandje who appeared for the appellant. Ms Verhoef who appeared for the State correctly conceded that the prosecutor should have put these issues to the appellant.

[12] Mr Namandje referred me to the well-known authority of the *President of the RSA v The South African Rugby Football Union* 2000 (1) SA 1 (CC) from paragraph 61 to paragraph 65 in which the full court of the South African Constitutional Court restated the duties to cross-examine witnesses in respect of evidence within the knowledge of the cross-examiner. I do not propose to quote the full portion of the lucid exposition of the legal position in this regard in any detail. But I do want to point out that the duty to cross-examine and the rules relating to it are obviously not to be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case as was stated in that South African judgment.

[13] The object of cross-examination and its proper observance, although very important, should be considered in the full context of the facts. In this case

what is important is the incidence of the *onus* given the fact that an appellant seeking bail has the *onus* of establishing that it should be granted.

[14] It was pointed out by Ms Verhoef that the appellant who was represented in the bail application as well was in possession of Inspector Amakali's statement in support of the warrant of arrest for the appellant in 2008, where his aliases and the fact that he was known as George were referred to.

[15] She submitted that it was thus apparent to him to deal with this in his evidence-in-chief as he had done so in respect of the other allegations against him in connection with the robbery, but he did not do so. There is some weight to this submission in the context of all the facts.

[16] As far as the other issue is concerned relating to the cell phone, Ms Verhoef submitted that if that issue was canvassed in the docket which had been disclosed to the appellant, it was then open to the appellant to put those instructions to his counsel in the course of the bail application or he could have even applied to have the witness recalled to address those aspects of evidence. There was an entitlement on his part to make such an application.

[17] I do however regard that the failure to have put this aspect to be of some importance and that although it was open to the appellant to have taken these courses, I remain of the view that the prosecuting counsel should at least have addressed this issue and canvassed it in cross-examination with the appellant. But as Ms Verhoef submitted, the failure to have done so would not necessarily entitle the appellant to bail.

[18] I now proceed to further address that issue. Inspector Amakali said that he feared that the appellant would likely abscond. He had a warrant issued for his arrest in 2008. When he went to the appellant's parent's house where he apparently had stayed, the family members were rude and were distinctly unhelpful and disavowed any knowledge of the appellant and his whereabouts.

He thus did not go back there. The appellant was subsequently only arrested more than three years later, following information he had received from an informant.

[19] The Regional Magistrate refused bail. In her reasons provided shortly after the hearing of the application she had in fact stated that, there were two considerations which were prominent in her reasoning. The first was her statement that the appellant had failed to establish a defence which had reasonable prospects of success to the trial and then referred to his defence as a mere denial.

[20] Secondly she stated that in her judgment there was a likelihood that if the appellant were to be released on bail he would attempt to intimidate witnesses such as Inspector Amakali and others not known to him. Therefore it was in the interest of the public and the administration of justice not to allow the appellant to be released on bail. Mr Namandje rightly criticised this reasoning and submitted that they constituted misdirections.

[21] Ms Verhoef conceded that the test was not properly stated as one of establishing reasonable prospects of success in the trial and also correctly conceded that there had been no evidence that the appellant would intimidate any witnesses. Indeed this had at no stage even been suggested by Inspector Amakali.

[22] There was thus no basis for that conclusion and both these considerations constitute misdirections.

[23] Ms Verhoef however argued that the bail should not have been granted in any event. She referred me to section 61 of the Criminal Procedure Act as amended by Act 5 of 1991. She correctly contended that this amendment applied by virtue of the fact that robbery with aggravating circumstances is one of the crimes listed in the schedule.

[24] The test after all as set out in section 65(4) of the Criminal Procedure Act when hearing an appeal of this nature is that a court is not to set aside the decision refusing bail, unless the court is satisfied that the decision was wrong, in which event the court shall give a decision which in its opinion the lower should have given. The question is whether the decision to refuse bail was wrong or not. That is after all what is appealed against and not the reasoning given by the Magistrate.

[25] Even if there are material misdirections contained in the reaching of that conclusion, as occurred in this case, this court is still required to consider the question as to whether the decision itself was wrong and whether bail should have been refused or not and to do so in the context of section 61 in its amended form.

[26] Mr Namandje also criticised the approach of the State in relying heavily upon hearsay evidence. But, as was stressed in *State v Yugin and Others*[1], what the prosecution essentially has to do is not to prove the guilt of the accused, but rather to demonstrate through credible evidence the strength or apparent strength of its case. This is usually done through the mouth of an investigating officer.

[27] That is precisely what has occurred in this case. The outline of the case provided by the investigating officer dealt with a number of specific allegations against the appellant. This is unlike the instance relied upon by Mr Namandje where the case in question referred to a series of vague and unspecified allegations raised in the context of that bail application.

[28] The appellant was after all implicated by a co-accused in planning and participating in a robbery. This not only involved the planning of the robbery, but also in providing the getaway vehicle. Although the name of George was not put to him and his name did not appear in the statement given by the co-

[1] 2005 NR 196 (HC) at 200

accused, he would have been aware of it, but did not deal with this issue in his evidence.

[29] His evidence was also vague and evasive in respect of a number of material issues. He had said that he had stayed over at his girlfriend's place for much of the period preceding his arrest. At times he referred to this as more than a year. But on his own version he had mostly stayed there during that period which was three years. He was furthermore unable to provide the address of his girlfriend's residence where he had so regularly stayed. He could not provide an erf number, a street number or even a street name except to refer to the general vicinity as part of Khomasdal.

[30] He was also unable to provide the names of his taxi drivers at the time of robbery, although he mentioned that he had kept some records as to who drove taxis and that he maybe could still find them. These were not produced. Against this background of his evidence must be weighed the evidence of Inspector Amakali. He had looked for the appellant at his parent's home and he was told he was not there and that they did not know where he was.

[31] The appellant was eventually arrested elsewhere after a tip off by an informant. This had been three years after a warrant of arrest had been issued. Inspector Amakali was concerned that he would not stand trial and would abscond if released on bail. It would rather seem, as Ms Verhoef submitted, that the appellant was lying low after the arrest of his co-accused. I must take into account that there is a strong *prima facie* case against the appellant if Ms Shigwedha's evidence in implicating him is given and is corroborated by the cell phone records as was indicated by Inspector Amakali.

[32] I also take into account the seriousness of this offence, where a long term of imprisonment would probably follow a conviction. This court has recently stressed the severity and seriousness of robbery with aggravating circumstances[2]. Whilst there was no evidence of any intimidation of witnesses

[2] Negumbo Gaus v The State unreported 10/4/2012 High Court case No. CA 26/2009 at p2-3

or even a suggestion to that effect, the Magistrate clearly was misdirected in referring to this as a consideration involved in the refusal of bail. But when I consider the evidence as a whole, I am of the view that it shows that the accused is likely to abscond and not stand his trial. I stress that even if I were incorrect in reaching that conclusion, the evidence viewed as a whole would at least demonstrate a reasonable possibility that it may happen that the appellant would abscond. Given the seriousness of the charges levelled against him and the weight of the case against him, I am of the view that it is not in the interest of the administration of justice that the appellant be released pending the outcome of his trial or pending his trial.

[33] It would follow that the decision reached by the Magistrate to refuse bail, even though involving faulty reasoning, was not wrong and that bail should not have been granted. It therefore also follows that there are thus not in my view reasonable prospects of success in this appeal, despite the misdirection.

[34] For those reasons, because of the fact that I would not grant the appeal and do not consider that the Regional Magistrate was wrong in refusing bail, I am not inclined to grant condonation for the late filing of the Notice of the appeal for the reason that there are not reasonable prospects of success in the appeal. That is the conclusion I reach. Condonation for the late filing of the notice of appeal is accordingly refused and the appeal is struck from the roll.

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SMUTS, J

ON BEHALF OF THE APPELLANT **MR KAMANJA**

Instructed by: Sisa Namandje & Co. Inc.

ON BEHALF OF THE RESPONDENT **MS VERHOEF**

Instructed by: Office of the Prosecutor-General