



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL JUDGMENT

CASE NO.: CA 27/2017

In the matter between:

SERGE WEMBONDINGA

APPELLANT

And

THE STATE

RESPONDENT

Neutral citation: *Wembondinga v S* (CA 27/2017) [2017] NAHCMD 202 (28 July 2017)

CORAM: NDAUENDAPO, J and LIEBENBERG, J

Heard: 16 June 2017

Delivered: 28 July 2017

Flynote: Criminal Procedure – Appeal – Against refusal to admit appellant to bail in an application on new facts – Two legged test – Firstly, are there new facts – If yes, secondly, do these new facts warrant the release of the appellant on bail – Appellant clearly a foreign national – Nationality however not proven – Having no fixed assets in Namibia – Having relatives in Democratic Republic of Congo, United States of America

and Botswana – No permit indicating permission to leave the Osire refugee camp – The offence he is charged with is a serious offence – Court a quo not wrong in dismissing the application.

Summary: This is an appeal against the decision of the Magistrate Court, Windhoek, refusing to grant the appellant bail upon his application on new facts.

Held; the fact that the witnesses who had testified thus far have not implicated the appellant does not in itself mean, that the witnesses who are yet to testify will not either.

Held; the fact that the appellant's co-accused were admitted to bail, does not necessarily create an entitlement for the appellant to be admitted to bail. The court has a discretion to exercise and such discretion may not have the same result in respect of different accused persons, even those who are co-accused.

Held; the daughter of the appellant is not a new fact. In the first bail application he stated that she was one year old. There is therefore no need to proceed to the second leg of the enquiry.

Held; even if the medical condition were accepted as a new fact, it is not clear whether the appellant is not getting the treatment he requires nor whether he has informed the Correctional authorities of any grievance he may have regarding their failure to ensure he gets the necessary medical attention. It does not appear that the condition is so severe that the appellant cannot get the necessary treatment while in custody.

Held; the almost eight years the appellant spent in custody awaiting his trial is a new fact. However, in light of the fact that the appellant's nationality is not proven, the appellant having relatives in Democratic Republic of Congo, Botswana and the United States of America, has no assets nor a fixed address in Namibia, the seriousness of the offence with which he stands charged and the absence of a valid permit in terms whereof the appellant left the Osire refugee camp to work in Windhoek, the decision of the magistrate cannot be said to be wrong.

Held; the fact that the magistrate concluded without any good reason, that the trial would end at the next appearance was clearly misguided, however such optimism cannot in itself be reason to find that the dismissal of the application was wrong. Especially since his main concern was that, in light of what was before him, he was not convinced that the appellant would stand trial.

Held; in the absence of a permit authorizing the appellant to leave the Osire refugee camp to work in Windhoek, this court is not convinced that there was a permit to begin with. If that is the case, can the regulation of movement in and out of the refugee be trusted?

Held; admitting the appellant to bail on condition that he stays at the refugee camp and report to the camp administrator would appear an option, but this court is not convinced that that option would prevent the accused from absconding should he so desire, in which case, it cannot be guaranteed that his presence will be secured to stand trial.

Held; if the State has closed its case, the appellant may approach the trial court for discharge in terms of s 174 of the Criminal Procedure Act, 51 of 1977.

ORDER

In the result:

1. The appeal, against the dismissal to admit the appellant to bail on new facts, is dismissed.

APPEAL JUDGMENT

NDAUENDAPO, J (LIEBENBERG, J concurring):

Introduction

[1] This is an appeal against the refusal by the Magistrate at the Magistrate Court for the district of Windhoek, to admit the appellant to bail on a second bail application on 'new facts'. This court is now endowed with the duty to determine whether the magistrate

wrongly exercised his discretion when he dismissed the appellant's application. In other words, was the application based on new facts? If yes, did those new facts warrant granting the appellant bail?

[2] Mr. Amoomo argued on behalf of the appellant and Mr. Moyo on behalf of the respondent.

Brief factual background

[3] The appellant was arrested in May 2008 on charges of robbery. He then launched an application to be admitted to bail on 4 September 2009. This application was dismissed. On 5 December 2016 he launched a second bail application on what he alleges are new facts. This application was also dismissed on 13 December 2016. Disgruntled by this dismissal, he now appeals to this court.

The application on new facts before the court a quo

[4] The appellant's application was based on the following new facts in a nutshell:

- a) The appellant has been in custody for eight years and the matter is not yet finalized;
- b) He was not implicated by the complainant, who had already testified;
- c) The other accused who had been directly implicated had been granted bail;
- d) The accused's daughter is now grown and he wishes to be admitted to bail so as to assist his daughter and support her emotionally;
- e) The appellant suffers from a medical condition, called helicabacterybilon serology. This is a consequence of a motor vehicle accident which he had been involved in while in custody and being 'transported by the special force Namibian police'.

Appellant's evidence in the court a quo

[5] The appellant testified under oath, that he is 36 years old and is a national of the Democratic Republic of Congo, although no documentary evidence was adduced to this effect. Further, that he has refugee status in Namibia and has a nine year old daughter who lives at the Osire refugee camp with her mother, an Angolan national. (A form was adduced as evidence, which form the appellant filled out upon his arrival and registration

at the Osire refugee camp.) Further, that he has no travel documents, but holds a health passport in his name, which is with the correctional officers. He also testified, that he was involved in a motor vehicle accident while in custody and as a result now suffers from a medical condition called, helicabacterybilon serology. The appellant also testified that the trial in this matter had just started in 2016 and that he had been in custody since his arrest in 2008. Regarding his relatives he testified that he has two relatives in DRC, four in the United States of America and a daughter in Namibia. He has no fixed assets in Namibia. The appellant informed the court he needs to be admitted to bail to see a doctor and get medical attention and also to assist with raising his child. It appears from his testimony that he was aggrieved by the fact that his co-accused, who had been implicated by the witnesses who had testified thus far, were admitted to bail.

Respondent's evidence in the court a quo

[6] The State opposed the application. The following is clear from the evidence of the State. The risk of the appellant absconding was high as he had relatives in the United States of America, Botswana and DRC. Further, that the medical condition the appellant suffered was nothing more than constipation and that the appellant need not be released for that alone. Furthermore, that the appellant had no valid permit in terms whereof he left the Osire refugee camp and that the only document before the court was a form he filled out when he arrived at the refugee camp. Further, that as the appellant has no fixed assets in Namibia, there is no guarantee that he would stay in Namibia if released on bail.

[7] Regarding the offence itself, it was the evidence of the State that the complainant testified that the only way the other accused would have known where the money was, was if the appellant had told them as the appellant was the only one amongst them who knew where the money was kept. As such, the appellant's argument that he was not implicated by the complainant, cannot be correct. Further, that at the refugee camp, there are schools and food is provided and the child is with her mother. Basically, that the child is taken care of at the refugee camp.

[8] Furthermore, that the delay in the finalization of this case was mainly due to the postponements applied for by the appellant's co-accused persons. The fact that the investigating officer had not testified was also a ground of opposition of the application.

Court a quo's ruling

[9] The court found, that of the 'new facts' advanced by the appellant, only one was a new fact. It found that the eight years which the appellant spent in custody, half of which was as a trial awaiting prisoner, was a new fact. The court also found that most of the times the accused was present at court and ready to proceed, hence the delay in finalizing this matter cannot be attributed to him. However, due to the fact that the appellant has no documents, his nationality cannot be ascertained. The court reasoned that the appellant has refugee status in Namibia, but such refugee status is easy to get from any sympathetic country. In light of the fact, that his nationality is not established and him having relatives in USA and DRC, the court was not satisfied that if the appellant were to abscond after being released on bail, that the authorities would know where to find him. This concern weighed heavily on the court's heart. The court was convinced that the matter would be finalized at the next appearance and subsequently dismissed the application.

Powers of the court of appeal

[10] Section 65 (1) (a) of the Criminal Procedure Act, 51 of 1977, hereafter the Act provides that 'An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.' Section 65 (4) of the Act provides, that '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. [my emphasis]'

[11] It is clear, that this court now has to determine whether the decision of the learned magistrate was wrong.¹ Did the magistrate fail to exercise his discretion properly?

The Law

¹ *S v Miguel & Others* 2016 (3) NR 732 (HC) para. 17.

[12] 'It is trite law in bail applications that the onus of proof is on the applicant to prove on a balance of probabilities that bail should be granted'.² The appellant thus bore the onus of proving that in the circumstances of his case, there were new facts and that such new facts warranted his admission to bail. This is the test to be applied in bail applications on new facts.³

[13] The purpose of bail has and still is to ensure that the accused appears before court on the trial date. It is true, 'An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in Court. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice' [my emphasis].⁴ What this means is, that the magistrate must have been convinced by the appellant that the ends of justice would be better served, if he was released on bail. Does justice demand, that in the circumstances of this case, the appellant be admitted to bail? To answer this question, this court will have to consider the proceedings in the court a quo.

[14] After a reading of the bail proceedings on the new facts in the *court a quo*, I have found that the primary reason for the refusal to admit the appellant to bail was the risk of absconding and the consequent risk of the authorities' inability to trace the appellant. The magistrate noted that, despite the appellant's testimony that he is a national of DRC, there was no documentary evidence to substantiate this. Mr. Amoomo argued before this court, that the fact that the appellant does not have travel documents in itself must count in favour of the appellant's application. I must caution here, when one reads the ruling in context, it is clear, that the magistrate could only mean that the appellant had presented no documents, be it travel documents or otherwise to prove his nationality. I think, that is the proper context within which the relevant portion of the ruling should be understood. In light of that fact, the court was not convinced that if the appellant was to be released on bail and absconds while on bail, that the authorities would know where to begin their search. This reasoning of the court a quo surely cannot be faulted. In this regard, the court was not wrong to accept that the nationality of the appellant was not proven. All that

² *S v Miguel & Others* at para. 4.

³ *S v Mpofana* 1998(1) SACR 40 (TkHC) at 42.

⁴ *S v Acheson* 1991 (2) SA 805 at 822.

the court had before it was the appellant's say so and without more, he failed to discharge his burden.

[15] Furthermore, the magistrate was convinced that the trial of the accused person would be finalized at the next appearance. This optimism by the magistrate has not paid off, it appears that the trial has still not been finalized. It was wrong for the magistrate to conclude that the trial will be finalized at the next appearance without having determined how many witnesses still have to testify for the State and how many for the defence. All that the magistrate knew at that point or so it appears from the record, is that the trial had started and that five witnesses had already testified at that stage. However, such unexplained optimism which certainly warrants criticism, does not in itself render the decision of the magistrate to be worthy of being set aside. The issue of the appellant's unproven nationality still seems to sway the scale in favour of a decision not to grant bail. Therefore, the magistrate's optimistic conclusion carries little weight to convince this court otherwise. This court sternly expresses its dismay regarding the delay in this matter. It appears from the record, that the appellant's co-accused and the State contributed to this delay, however the court should have exercised control over the proceedings to ensure that unnecessary applications for postponements were not entertained. The unnecessary delay in the finalization of cases, especially where the accused persons are kept in custody pending the finalization of the same, is to be guarded against. Courts should especially in such cases, endeavor to finalize matters. This brings me to the duration spent by the appellant in custody.

[16] The magistrate correctly accepted that the period spent by the appellant in jail was a new fact. However, he found that, that new fact in itself did not warrant the release of the appellant on bail. Both counsel who appeared in this court, do not seem to know when this matter may be finalized.

[17] Mr. Amoomo argued that the appellant's co-accused were granted bail, some of whom were implicated by the witnesses who had already testified. According to him, the appellant who was not implicated thus far, is however denied bail. This he seems to suggest is not in the interest of justice. Mr. Moyo, argued, that just because the appellant had not yet been implicated, does not mean that the other witnesses who are yet to testify

will not implicate the appellant. The argument by Mr. Moyo is well founded. It would be a disaster, if our courts were to accept that if one accused is admitted to bail, the co-accused are by that fact automatically entitled to bail. In Namibia, there is no right to bail, however there is a right to apply for bail and such application is subject to the court's discretion. The court has a discretion to grant bail or not and such discretion may result in different conclusions in respect of different accused persons depending on the circumstances peculiar to each. In addition, it appears that the other co-accused are Namibian nationals with fixed addresses and that is why they were granted bail. I must point out here, that I am yet to find authority in terms whereof, an accused is automatically entitled to bail just because his co-accused are released on bail.

[18] The court asked Mr. Amoomo, whether the fact that the complainant did not implicate the appellant, means that the other witnesses who are yet to testify will not implicate him either? Mr. Amoomo replied, that because the complainant could not pin the appellant to the 'offence' and that the co-accused who pleaded guilty did not implicate him, the appellant should be granted bail. Mr. Moyo correctly submits that not all the evidence has yet been presented in this matter. It is at this stage thus premature to predict whether the appellant will or will not be implicated by the witnesses who are yet to testify. The appellant is also not entirely disarmed. Mr. Moyo suggested, that the appellant may apply for discharge in terms of s 174 of the Criminal Procedure Act, 51 of 1977 at the close of the State's case

[19] Mr. Amoomo argued that the accused's medical condition only came about after the appellant had been denied bail in 2005, however the magistrate failed to even mention it in his ruling. Further, the appellant also informed the court a quo that prison authorities do not take him to hospital on time and he needs to be released on bail to visit doctors. In *S v Mpozana*⁵ the following was said at 45F-G:

'One whose detention has been pronounced lawful and in the interests of justice cannot simply resort to a further bail application merely because he has been detained under inhumane and degrading conditions or on the ground that his right to consult with a doctor of his own choice

⁵ *S v Mpozana* 1998(1) SACR 40 (Tk) at 45f-g.

has been infringed. It is, however, available to such person firstly to apply to the prison authorities concerned and call upon them to remedy whatever complaints he/she has with regard to the conditions of his/her detention. Should the prison authorities fail to remedy such complaints, it is available to the detainee concerned either to challenge the detention before a court of law as being unconstitutional or obtain a court interdict to force the prison authorities to comply with the law. [my emphasis]'

[20] 'It is well known that the powers of this Court are largely limited where that 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.'⁶

[21] The magistrate cannot be faulted for finding that the child of the appellant is not a new fact. It indeed is not a new fact. The child was there when he applied for bail the first time and the inevitable consequence of human nature is that children grow up, whether their parents are incarcerated or not. Furthermore, the child is taken care of by her mother at the refugee camp.

Final Remarks

[22] The State has still not closed its case. To admit the applicant to bail, because he was not implicated by the witnesses who testified thus far, would be farfetched. It does not mean that the witnesses who are yet to testify will not implicate the appellant. It is also not clear, how this is a new fact which warrants the admission of the appellant to bail.

[23] The fact that the appellant's co-accused were admitted to bail, whether or not they were implicated by the witnesses who testified thus far, does not in any way entitle the appellant to be admitted to bail. Even if it were accepted that the fact that co-accused

⁶ *S v Timotheus* 1995 NR 109 (HC).

who had not previously been admitted to bail had now been so admitted is a new fact, this fact does not warrant the release of the appellant on bail.

[24] The daughter of the appellant is not a new fact. At the first bail application, it was the appellant's evidence that he has a one year old daughter. Thus it is not even necessary to proceed to the second leg of the test.

[25] This particular medical condition is new to the appellant's bail application. I must mention here, that during evidence in chief, the appellant when asked what the cause of his medical condition was replied that it was caused by the types of food he use to eat. It was only when his counsel asked about the motor vehicle accident, that the appellant linked the medical condition to the motor vehicle accident. The State during cross-examination suggested, that the medical condition is nothing more than constipation, the appellant's reply was not convincing that it was otherwise than suggested. It does not seem, that the medical condition is so severe, that he can only get the required treatment if admitted to bail. He can certainly get this treatment while in custody.

[26] The eight years spent by the appellant in custody whilst awaiting and duration of the trial, is certainly a new fact. It is certainly a fact that would ordinarily receive great consideration of the court. Especially since, the appellant is not the cause of the delay in the finalization of the trial and considering the presumption of innocence, however the challenges cannot be ignored. The object of admitting an appellant to bail, is that he could be back at court to stand trial on the appointed date. This can only be possible when it is known, where the appellant will be residing if released on bail. More than that, the court must be satisfied that even if he were a foreign national, that his nationality is known so that should he abscond, the authorities would know where to turn to ensure he stands trial. In this case, the appellant's nationality was not proven. It is not clear whether he was given the permit by the Osire camp administrator, to leave the camp to work in Windhoek. This permit, which the appellant says he was given, was not presented to court. If indeed, it is so, that he left the camp without authorization, how can a bail condition requiring him to stay at the camp be thought to be sufficient? If indeed, there was a permit, why did the appellant not present this to the court? At the very least, an affidavit deposed to by the

Osire camp administrator could have salvaged the situation. All this court has is the appellant's word.

[27] There is a real risk that if the appellant is admitted to bail and decides to abscond, the authorities would not be able to trace him to stand trial. The purpose of bail would then be defeated.

[28] It is clear the trial has commenced, it is suggested that should the appellant still be desirous of getting out of goal, he may apply for discharge once the State has closed its case.

[29] In closing, the trial court is advised to curb any unnecessary delays in this matter and ensure that the matter is finalized as soon as reasonably and practicably possible.

[30] In the result, the appeal is dismissed.

GN NDAUENDAPO

JUDGE

JC LIEBENBERG

JUDGE

APPEARANCES

COUNSEL FOR THE APPELLANT: KN Amoomo

Of Kadhila Amoomo Legal Practitioners, Windhoek

COUNSEL FOR THE RESPONDENT: E Moyo

Of Office of the Prosecutor General, Windhoek