

**REPUBLIC OF NAMIBIA**

**Reportable**



**IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**APPEAL JUDGMENT**

**CASE: HC-MD-CRI-APP-CALL-2018/00021**

In the matter between:

**RUDOLF GOWASEB**

**APPELLANT**

v

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Gowaseb v S* (HC-MD-CRI-APP-CALL-2018/00021) [2018] NAHCMD 369 (20 November 2018)

**Coram:** NDAUENDAPO J et SIBOLEKA J

**Heard:** 24 September 2018

**Delivered:** 20 November 2018

**Flynote:** Criminal Procedure – Bail – Appeal against refusal – charged with murder and attempted murder - Serious offences – Amendment - Act 7 of 1996 must be seen as expressing the concern of the legislature – the escalation of crime and ensuring that accused persons stand trial for serious offences - Magistrate correct in refusing bail as it was not in the interest of the public nor the administration of justice - Appeal dismissed.

**Summary:** The Appellant was charged with one count of murder, attempted murder, theft of a firearm in contravention of Arms and Ammunition Act 7 of 1996. The appellant applied to be released on bail and on 14 December 2017, the magistrate's court dismissed the application on the grounds, *inter alia*, that it was not in the public interest and administration of justice to release the accused on bail and there was a strong case against him. Dissatisfied with that, he appealed. The notice of appeal was filed out of time. Counsel filed an affidavit explaining the delay. There are two prerequisites that must be satisfied before a court can condone such delays. Namely; reasonable explanation for the delay and secondly, reasonable prospects of success on appeal. Prospect of success weigh heavily between the two prerequisites. Thus, if prospects are slim, reasonable explanation becomes secondary.

Held, that, the prevalence of violence in domestic relationships and the public outcry against it, justifies refusal.

Held, further, that appellant faces serious charges of murder and attempted murder and there is a strong case against him.

Held, further, that appellant has a previous conviction of attempted murder related to his previous girlfriend and has a propensity to commit crimes.

Held, that, it is trite that the objectives of the proper functioning of the criminal justice system, including the bail system are, *inter alia*, that accused persons should stand trial, should not interfere with witnesses, should not commit other crimes whilst on bail and so on.

Held, further that, there are no prospects of success on appeal and the appeal is dismissed.

---

### ORDER

---

The Appeal is dismissed.

---

### JUDGMENT BAIL APPLICATION

---

#### **NDAUENDAPO, J (SIBOLEKA, J concurring)**

[1] This is an appeal against refusal to be released on bail. The Appellant was charged with one count of murder, attempted murder and theft of a firearm in contravention of the Arms and Ammunition Act 5 of 1991. The appellant applied to be released on bail in the magistrate court of Otjiwarongo. On 14 December 2017 the application was dismissed. The appellant now aggrieved by that decision, appealed to this court.

#### **Point in limine**

[2] Judgment in the bail hearing was delivered on 14 December 2017 and the notice of appeal was filed on 29 January 2018 and thus out of time. Mr Isaacks on behalf of the appellant filed an affidavit explaining why the notice of appeal was filed out of time. In essence the legal representative alleges that, he was not present when the magistrate delivered judgment and did not have knowledge on what basis the

magistrate refused bail. The appellant instructed his legal representative to lodge the appeal on 14 December 2017. Mr. Isaacks went on leave. On 9 January 2018, he instructed his secretary to request the record from the clerk of court which was on a CD. He received the CD on 12 January 2018 and sent it to Tyro for transcription. The secretary followed up on 15, 17 January 2018. The record was received on 23 January 2018, the application was prepared and had to be delivered to the clerk of the court, Otjiwarongo on 25 January 2018 and served on 29 January 2018 with Registrar of the High Court. The condonation affidavit does not address the prospect of success on appeal. He merely states that there are prospect of success without saying why.

[3] In *Murangji v The State*<sup>1</sup> the court held that it is settled law that in order to succeed in an application for condonation two requirements need to be met. Firstly the appellant must provide a reasonable explanation for not filing the notice of appeal on time. Secondly the appellant must imperiously show that he has reasonable prospects of success on appeal.

[4] The Appellant is not absolved from the second requirement regardless of whether a reasonable explanation was furnished or not. The prospect of success on appeal is imperative. If the prospect of success at appeal are non-existent, it matters not whether the first requirement was reasonable or not, the appeal must fail.

Although the explanation is reasonable, there are clearly no prospect of success on appeal.

[5] Grounds of appeal

The grounds of appeal are stated as follows:

'1. That the Magistrate erred in law and/or fact that:

---

<sup>1</sup> *Murangji v The State* (CA 88/2013) [2013] NAHCMD 50 (14 February 2014) at para 7 – 9.

2. There is a strong case against the Appellant.
3. If released on bail that the Appellant would re-offend.
4. If released on bail the safety of the family members of the deceased would be prejudiced.
5. It is not in the public interest to release the Appellant on bail.'

[6] The appellant testified that he is 57 years of age, was born in Namibia and is a divorcee. He served in the Namibian Defense Force which took him to African countries on peace keeping missions. His father is from Malawi. He has ten children including three minor children under his care together with his parents and some family members. There is a previous conviction of attempted murder where a firearm was used. He was sentenced to eight years but was released earlier due to good behavior. He was awarded a tender in 2016 worth N\$2.8 million from the Ministry of Rural Development and Forestry which is on hold due funds shortage in government. He owns a shop which makes him +- N\$13 000 p/m on a good day. He employs two people at the shop.

[7] Chief Detective Officer Rooi Thomas Makwatikizo testified in opposition to bail. He opposed the application, mainly on the basis that the appellant is facing serious charges. He further testified that there are statements from witnesses who saw the appellant shooting the deceased. It was however ruled that he was ill-prepared and was not the Investigating Officer in the case.

[8] In refusing bail, the learned magistrate reasoned that there is a strong case against the appellant. He stated that the defence raised by the applicant of temporary insanity due to provocation or intoxication is difficult to prove in our court. He stated that the fact that the appellant testified that he remembers some incidents and others not, renders this defence a difficult one. His recollection extends to shooting at the victim while she was running away and the five shots were fired. The defense of temporary

insanity is not selective but is a complete. The presence of eye-witnesses makes the state's case very strong. Therefore, the fact that the offence is very serious stood as valid ground. The learned magistrate further reasoned that the applicant has a previous conviction of attempted murder and the chances of reoffending are high. The learned magistrate further reasoned that it was not in the public interest to admit the appellant to bail. The prevalence of violence in domestic relationships and the public outcry against it, justifies refusal. 'The applicant was convicted previously on the same type of offence he now faces. The court cannot be seen as being accommodating whereas there is public outcry as that amounts to sending wrong signals to society. It will make a mockery of the administration of justice as facts are compelling to refuse bail,' reasoned the learned magistrate.

#### Submissions by the appellant

[9] Counsel for the appellant argued that the respondent has to demonstrate through credible evidence the strength of the state's case. Counsel argued that the officer who testified in opposition to the granting of bail was ill prepared. The witness testified that it was a serious offence and that the appellant was seen by eye witnesses when he was directing the firearm to the deceased, shooting and then left the scene, counsel argued that evidence did not support a strong case against the appellant. Counsel further had issue with the finding by the magistrate that the appellant admitted firing 5 shots. He submitted that the appellant never admitted to shooting 5 shots. Although that may be correct, the appellant admitted that he shot the deceased whilst she was running away from him.

[10] Counsel further argued that 'it is submitted that because the learned magistrate used the yardstick of prevalence and dogmatic violent cases, and therefore there is an outcry against bail and therefore concluded it would not be in the public interest, that such a finding is flawed in law because using that yard stick it would mean that any

accused person, who is charged with an offence relating to domestic violence would be denied bail despite any other considerations.’ Counsel further argued that the previous conviction was 29 years ago and because of the time that has lapsed, it was wrong to find that the appellant had the propensity to commit that specific crime. Counsel further argued that there was no evidence of a protection order granted against the appellant in favour of the deceased and family members.

#### Submissions by respondent

[11] Counsel argued that there is a strong case against the appellant. He argued that the appellant never denied that he shot the deceased. His defence that he was intoxicated is very difficult to prove. He agrees with the finding by the magistrate that the appellant remembered some incidents and others not. He remembers that he shot at the victim whilst running away and afterwards drove approximately 240km to Khorixas in his state of intoxication. Counsel further argued that the appellant has a propensity to commit crimes as he has a previous conviction of attempted murder. Counsel further argued that it was not in the public interest to release appellant on bail.

[12] In *Endjala v State (CA 17-2016) [2016] NAHCMD 182 (24 June 2016) per: Ndauendapo J* the appellant in that case faced a charge of murder which fell within schedule 2 of part IV of the Criminal Procedure Act 51 of 1977 and thus within the ambit of section 61 of Act 51 of 1977. The section provides that “notwithstanding the fact that the accused has shown on a balance of probabilities that if he is released on bail he will not abscond or interfere with the State witnesses or the police investigation, the court may still refuse bail if the court is of the opinion that it is in the interest of the public or the administration of justice that the accused persons must remain in custody pending their trials.”

[13] In this regard *Parker J* stated as follows, in *S v Gaseb 2007(1) NR310 (HC)*, “Doubtless, the enactment of Act 5 of 1991 must be seen as expressing the concern of the legislature – the representative body of the Namibian people – at the escalation of crime and ensuring that accused persons stand trial for serious offences. Thus, the aim of the amendment to Act 51 of 1977 is to combat crime and to ensure the proper administration of justice, particularly in respect of serious crimes as enumerated in the new Part IV of Schedule 2 to Act 51 of 1977.

[14] *The upshot of all this is that the courts are given wider discretion to refuse bail if the crime committed is one listed in Part IV of the Second Schedule and if the interest of the public or the administration of justice will be served. The legislature has in the amendment to Act 51 of 1977 clearly announced that the offences in Part IV are serious crimes. The above-mentioned amendments to Act 51 of 1977 are, in my opinion, meant to serve the interest of the public and the administration of justice, and therefore the court must make a serious effort to give effect to their provisions.”*

[15] In *Lazarus Shaduka v The State, Case No: CA 119/2008 at para 27 Hoff, J* (as he then was) said the following: ‘Where an accused person has been charged with the commission of a serious offence, and that if convicted a substantial sentence of imprisonment will in all probability be imposed, 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 on bail, particularly in a case where apparently the police investigations into the matter had not yet been completed.’

[16] Murder is a very serious offence. The appellant in this matter admitted that he shot the deceased whilst running away. His defence of temporary insanity due to provocation or intoxication is difficult to fathom. As the magistrate rightly observed, how is it possible that the appellant does not remember shooting at the deceased, yet after the shooting he drove over 200km without causing an accident? There is therefore a



strong case against the appellant. The appellant has a previous conviction of attempted murder related to his previous girlfriend. Although that was 29 years ago, it still remains a conviction. Gender based violence has reached a crisis point in our country and it is the duty of the courts to ensure that justice prevail. Releasing the appellant on bail will not be in the interest of the administration of justice. In my respectful view the learned magistrate did not err in refusing bail. There is no doubt that the appellant will go to prison for a very long jail term, if convicted. For all those reasons, I am not persuaded that the learned magistrate was wrong in refusing to admit the appellant to bail.

In the result the appeal is dismissed.

---

N. G. NDAUENDAPO  
JUDGE

---

A. M. SIBOLEKA  
JUDGE

**APPEARANCES:**

ON BEHALF OF THE APPLICANT

MR. B. B. ISAACKS

Of Isaacks & Associates, Windhoek

ON BEHALF OF THE STATE

MR. M. OLIVIER

Of the Office of the Prosecutor-General,  
Windhoek