



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case No.: HC-MD-CRI-APP-CAL-2018/00079

GRANT BRANDON NOBLE
AZHAK DINATH

FIRST APPELLANT
SECOND APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Noble v S* (HC-MD-CRI-APP-CAL-2018/00079) [2019] NAHCMD
12 (5 February 2019)

Coram: SHIVUTE J

Heard: 24 January 2019

Delivered: 5 February 2019

Flynote: Criminal Procedure – Bail – Appeal against refusal by magistrate to admit appellants to bail – Appeal – Court should not set aside decision to refuse bail – Unless such appeal court satisfied that magistrate was clearly wrong.

ORDER

The appeal against the refusal to admit each appellant to bail is dismissed.

JUDGMENT

SHIVUTE, J

[1] The two appellants lodged an appeal against the refusal of bail by the magistrate sitting in Walvisbay Magistrate's Court. Before I proceeded with the merits of the appeal, counsel for the respondent applied for condonation for the late filing of heads of argument. The application was not opposed. The court found the respondent's explanation reasonable in the circumstance and granted the application. Again, counsel for the respondent raised points in limine in respect of the first appellant, however, the court found them to be unmeritorious and they were dismissed.

Summary of the facts

[2] The appellants were charged with a drug offence, dealing in cocaine contravening section 2 (c) read with sections 1, 2(1) and/or 2(ii), 8, 10, 14 and Part II of the Schedule of Act 41 of 1971 as amended. It is alleged that the appellants dealt in a dangerous dependence producing drug or a plant from which such a drug can be manufactured to wit 412 kg of cocaine powder containing more than 0.1 % cocaine calculated as cocaine alkaloid being - of cocaine to the value of N\$206 million. The offence is alleged to have been committed upon or about 15 June 2018 in the district of Walvisbay.

[3] The two appellants decided to enter into a joint venture to establish a close corporation business to generate an income. This business was registered as Zeeki Trading CC. Although it was the two appellants' idea to create the close corporation, when it was registered, the first appellant was the sole member. According to the first appellant, the reason why the second appellant was not registered as a member was because the second appellant owed other people money and the second appellant did not want his creditors to have a claim against the CC. He decided to be a silent partner. He was financing the CC by depositing money into the CC's account in order to pay the CC's expenses that included rental fees of the warehouse where the business was operating from and paying for the commodities to enable them to run the CC. The second appellant was the one who had the financial means to run the CC. The second appellant could deposit money in the CC's account and he could withdraw money from the CC's account as he pleased for his own benefit. He also had an ATM card for the CC's account. Whilst the first appellant on the other hand, had no financial means to run the company. Instead, they agreed that he should provide his labour to the CC. This evidence has not been challenged by the second appellant.

[4] It is common cause that the two appellants ordered the container with A4 printing papers through Zeeki Trading CC. The second appellant is the one who paid for the cost of the container that contained the A4 printing papers.

[5] However, when the container arrived at the harbour in Walvisbay, it was searched and it was alleged to have contained some cocaine powder apart from the A4 printing papers that were ordered. As a result of the finding of the alleged cocaine powder, the appellants were arrested and charged. Samples of the substance were taken to the Namibia Forensic Science Institute for preliminary analysis. Findings were that the electrochemical properties of the blocks of microcrystalline powder contained in NFE 19578 and NFE 12302 respectively presented with significant similarities with the electrochemical properties of cocaine hydrochloride. Furthermore, it was found to be possible that the exhibits provided and sealed contain cocaine hydrochloride, which as

well as its salts, esters and isomers and these are prohibited in terms of the relevant Namibian legislation.

[6] It is worth mentioning that only a small sample of the alleged prohibited substance was tested. The larger quantity had not yet been scientifically examined as investigations were still continuing. Other complicating factors were alleged to be the magnitude of the case and the consideration that the offence is alleged to have been committed outside Namibia. It is alleged that the contraband was imported from Brazil.

[7] The magistrate refused bail on the grounds that it would not be in the interest of the public or the administration of justice for the appellants to be released on bail.

Grounds of appeal

[8] The grounds of appeal may be summarised as follows:

1. The learned magistrate misdirected herself by exercising her discretion wrongly: by refusing to consider as part of the bail inquiry whether the appellants were properly charged for purposes of considering the strength of the state's case when regard is had to the allegation by the state that a legal persona imported the alleged cocaine and the lawfulness of the search conducted.
2. The learned magistrate wrongly found that the state had a strong case against the appellants' when the scientific result tendered did not support the charge preferred against the appellants to wit cocaine powder containing more than 0.1% calculated as cocaine alkaloid and the quantity confirmed was disproportionately less than what was alleged as found by the police; the appellants were charged in their personal capacity instead of section 332(5) of the Criminal Procedure Act 51 of 1977; the search warrant used to conduct the search was defective and invalid, therefore,

evidence obtained as a result of such warrant is of no value and it may not be admissible during the trial.

3. The learned magistrate unduly relied on the ground of the interest of the public or the administration of justice, despite having found that there is no possibility that the appellants if released on bail, will abscond or interfere with any witnesses for the prosecution or the police investigations.
4. The court erred by equating the notion of the interest of the public or the administration of justice to the following factors:
Placing undue reliance to the full gallery each time appellants appeared; the demonstration held against the granting of bail; the petition from the church and relying on the wider media coverage of the appellants' case.
5. The court erred by failing to rely on a testimony of the witness called by the state on the ground of public interest when he said he does not oppose the appellants to be admitted to bail.
6. The magistrate erred by not considering whether the imposition of appropriate bail conditions could address the prejudice arising from the interest of the public or the administration of justice.
7. The magistrate erred by making a finding that in all probabilities appellants face a substantial sentence of imprisonment when the maximum penalty appellants could possibly face as first time offenders is limited by legislation.
8. The court erred by not properly considering the evidence in light of the constitutional presumption of innocence.

9. The learned magistrate erred by failing to consider that the evidence presented in favour of the granting of bail carries more weight as opposed to the evidence against the granting of bail.

Appellants' Arguments

[9] Mr Wessels counsel for the first appellant and Mr Namandje assisted by Mr Amoomo counsel for the second appellant argued that the magistrate misdirected herself by not considering the validity of the charges in order to establish whether the state has prima facie evidence against the two appellants if due regard had to be given to the charge preferred against the appellants. Furthermore, the scientific report did not show that the alleged dangerous dependence producing drug contained more than 0.1% of cocaine, nor the presence of cocaine calculated as cocaine alkaloid.

[10] Criticism has also been levelled by counsel for the appellants that the magistrate erred by not making a finding regarding the lawfulness of the search warrant in order to determine whether the state has a strong case against the two appellants. Furthermore, the court could not have relied on the interest of the public or of the administration of justice to refuse bail because the state failed to adduce credible evidence. The evidence led would be inadmissible because, it was obtained through an invalid search warrant. It was counsel's argument among other things that the search warrant was invalid because, the police officer who made a declaration to the magistrate in order to obtain it declared that he received information under oath from the investigating officer about a container suspected to have contained drugs whilst such information was not received under oath. This fact has been conceded by the investigating officer. It was argued further that the search warrant lacks compliance with the basic requirements.

[11] Further criticism was levelled against the state by counsel for the second appellant, that the search was conducted before the search warrant was obtained.

[12] Counsel further argued that the court misdirected itself by not considering that the state does not have a strong case against the appellants since the appellants were charged in their personal capacity instead of s 332 (5) of the Criminal Procedure Act. Furthermore, Zeeki Trading CC through which the container was imported was not jointly charged. Again, it was argued that the second appellant was not supposed to be charged neither in his personal capacity nor in his official capacity since he was not a member of Zeeki Trading CC. He was merely a servant of the CC who provided finances to the corporation.

[13] It was an argument that the two appellants had no intention to deal in the substance that was sent together with the A4 printing papers since they were not there when the container was packed.

[14] With regard to the interest of the public or the administration of justice, it was argued on behalf of the appellants that it will not be in the interest of the public or the administration of justice to refuse bail where a magistrate has found that there is no possibility that the appellant will abscond or interfere with witnesses or investigations. Counsel further argued that where a court has found that the investigations and the prosecution are not in danger of hindrance, the interests of justice should favour a release of an accused on bail.

[15] It was again counsel for the second appellant's argument that the magistrate erred in refusing bail on the basis of interest of justice by placing undue reliance on the full gallery each time appellants appeared, the demonstration held against the granting of bail; the petition received from a church and the wide news coverage of the appellants' case. The fact that there is public outcry is not a bar to refuse bail.

[16] Counsel for the appellants further argued that the court misdirected itself by finding that if the appellants are convicted they may face a heavy sentence whilst there is a statutory mandatory sentence provided for by the Act. The magistrate failed to give due regard to the fact that the second appellant is a first offender.

[17] Counsel argued that the interest of the public or administration justice may not be prejudiced if bail is granted coupled with conditions.

Respondent's Arguments

[18] On the other hand, counsel for the state argued that issues regarding the validity of the search warrant, lawfulness of the search, the capacity in which the appellants are charged as well as the validity of the charge are not issues to be determined during bail inquiries but these are to be determined during the trial.

[19] Counsel further argued that the state had presented evidence that had established a prima facie case against the appellants. Concerning the argument whether the state would be able to prove the guilt of the appellants on the charges preferred against them, it is counsel's argument that the guilt of the appellants was not a concern of the court a quo at that stage.

[20] It was again counsel's argument that the appellants upon inquiry by the police officials admitted that it was their container. Furthermore, the appellants consented to the search of the container. Again, the appellants upon request by the officials broke the seal and opened the container for the search to be conducted. Therefore, it could not be argued that the search was unlawful to render the evidence to be inadmissible.

[21] Concerning the issue whether the cocaine powder that was found contains more than 0.1 % cocaine calculated as cocaine alkaloid counsel argued that this requires an expert to explain to the court. Such expert evidence can only be testified to at a trial.

[22] With regard to the argument that the court a quo misdirected itself in law by refusing bail after it has made a finding that the appellants are not a flight risk or will not

interfere with any witness or the prosecution, counsel argued that this is permissible in terms s 3 of Act 5 of 1991 which amended s 61 of the Criminal Procedure Act.

[23] Concerning the presumption of innocence as provided for by the Namibian Constitution, counsel argued that the magistrate was alive to that provision and she pronounced herself accordingly.

[24] Counsel on both sides provided this court with several authorities in support of their propositions which I have considered.

The approach to bail

[25] In *S v Gaseb* 2007 [1] NR 310 [HC], the court stated that:

‘In hearing an appeal against a lower court’s refusal to grant bail, this court is bound by s 65 [4] of Act 51 of 1977 in the sense that it must not set aside the decision of the lower court ‘unless such court or judge is satisfied that the decision was wrong...’

S v Timotheus 1995 NR 109 HC 113 A-B, the court stated the approach 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.

[26] I will decide this matter in the light of the above mentioned principles.

Validity of search warrant, lawfulness of search, the charge and capacity in which the appellants should be charged.

[27] As earlier stated, it was the appellants' argument that the court misdirected itself in not determining the above mentioned issues. Bail application is not a trial but an inquiry. The court *a quo* at this stage is tasked to have due regard to the evidence adduced before it as a whole and make a finding whether the state has established a prima facie case against the appellants. If these issues have to be decided during bail inquiry this may amount to the prejudging of the issues to be decided during the trial, which in turn may have adverse effects on the criminal process. The duty of the prosecution is to lead credible evidence establishing whether there is a prima facie case against each appellant. The prosecution led evidence that the two appellants ordered A4 printing papers through the CC that were packed in a container. However, when the container was searched cocaine powder was found. When tested it was found to have contained hydrochloride, as well as its salts, esters and isomers which are prohibited in terms of the relevant legislation.

[28] What is important at this stage is that the prosecution has established a nexus between the appellants and the container that was found with the substance. Whether the cocaine powder contained more than 0.1 % calculated as cocaine alkaloid, will have to be proved during the trial through expert evidence. The state has established a prima facie case that the cocaine powder contained substances that are prohibited by Namibian law. The esters, salts and isomers that were found to be part of the hydrochloride contained in the cocaine powder are prohibited substances as indicated in Part II of the Schedule. Section 1 of Act 41 of 1971 defines 'deal in' in relation to dependence producing drugs or any plant from which such drugs can be manufactured, as including performing any act in connection with the collection, importation, supply, transshipment, administration, exportation, cultivation, sale manufacture, transmission or prescription thereof.' In the light of such evidence, this court is not convinced that the court *a quo* misdirected itself by not pronouncing itself on the validity of the search warrant, whether the appellants were correctly charged or in which capacity they were charged.

[29] The learned magistrate carefully considered the evidence placed before her in its totality and arrived at the conclusion she made. This court has no reason to interfere with the court a quo's decision in this regard as it is of the opinion that it exercised its discretion correctly.

Interest of the public or the administration of justice

[30] The learned magistrate refused bail on the ground that it will not be in the interest of the public or the administration of justice for the appellants to be released on bail despite her finding that the appellants were not a flight risk or that they would not interfere with any state witness or the prosecution. She stated in her judgment that the public interest outweighs the interest of the appellants to resume their lives on the outside. It is not a form of anticipatory punishment, or an infringement on the presumption of innocence. She has properly taken into account the magnitude of the case and its possible impact on the public and the administration of justice.

[31] There is no specific definition for the phrases 'public interest' or 'the interest of the administration of justice'. However, public interest has its roots in our legal system and inspires the administration of justice. Our courts held that these concepts need to be given a comprehensive interpretation.

The court's view of the interest of the public comes into account where there has been a public outcry or indignation over the commission of certain types of offences or in respect of a particular case *S v Du Plessis & Another* 1992 NR 74 at 82.

[32] If the court finds that there is a prima facie case made against the accused person, the court would be entitled to refuse bail even if there is a remote possibility that an accused would abscond or interfere with state witnesses or with police investigations.

See *Noble v The State* (CA 02/2014) NAHCMD 117 delivered on 20 March 2014.

[33] Another consideration to be given to the refusal of bail in the interest of the public or the administration of justice is that the court is of the opinion that the prosecution has led evidence to establish a prima facie case against the appellants, and that the appellants were found with a large quantity of prohibited substance, for which if convicted a heavy sentence is likely to be imposed, that factor alone suffices to permit the magistrate to make a finding that it will not be in the interest of the public or administration of justice to admit the appellants to bail.

This is in line with what was held in *Solomon Hlalele and Others v The State* CA 89/95 HC, unreported, delivered on 20/10/1995.

[34] The question of whether the court can still refuse bail in the circumstances where it has made a finding that the appellant is not a flight risk or will not interfere with the state witnesses or the prosecution, is best answered by reference to section 61 of the Criminal Procedure Act as amended by s 3 of Act 5 of 1991 which provides that:

'If an accused who is in custody in respect of any offence referred to in Part IV of Schedule 2 applies under section 60 to be released on bail in respect of such offence, the court may, notwithstanding that it is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police investigation, refuse the application for bail if in the opinion of the court, after such enquiry as it deems necessary, it is in the interest of the public or the administration of justice that the accused be retained in custody pending his or her trial.'

[35] The appellants are charged with the offence listed in Part IV of Schedule 2 of Act 51 of 1977. Therefore, s 61 as amended may be applied.

[36] Concepts of 'in the public interest or administration of justice' have a comprehensive meaning accorded to them. It may include the safety of the accused. It is not a punishment, it is part of the process to enable the proper functioning of the administration of justice. The court may also grant bail if it is of the opinion that the

interest of the public or the administration of justice will be better served if the accused persons are released on bail. The interest of the public or administration of justice may also not be served if the appellants are to be denied bail where circumstances justify it.

[37] The court having considered the totality of the evidence presented before the court a quo, the reasons provided by the magistrate for the refusal of bail and the arguments presented before this court, this court does not find any misdirection on the part of the magistrate by refusing to grant bail especially when she gave due regard to the magnitude of the case, the incompleteness of the investigations, the effect the drugs have on the public and the allegation that the dangerous dependence producing drugs came from outside Namibia.

[38] As to the presumption of innocence, the court was alive to this factor. The detention of the appellants does not infringe the appellants' constitutional rights to liberty as there are limitations to these fundamental rights as provided for in Article 7 and 11 of the Namibian Constitution.

[39] It is safe to conclude that this court finds no reason to interfere with the magistrate's discretion as it was not wrongly exercised.

[40] In the result the court makes the following order.

The appeal against the refusal to admit each appellant to bail is dismissed.

NN SHIVUTE
Judge

APPEARANCES:

1ST APPELLANT:

Mr Wessels
Of Stern & Barnard, Windhoek

2ND APPELLANT:

Mr Namandje
Of Sisa Namandje Inc, Windhoek

RESPONDENT:

Mr Kanyemba
Of the Prosecutor-General, Windhoek