

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2019/00034

In the matter between:

NELSON ANTONIO

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Antonio v S* (HC-MD-CRI-APP-CAL-2019/00034) [2019] NAHCMD
184 (29 May 2019)

Coram: MILLER AJ

Heard: 20 May 2019

Delivered: 29 May 2019

Released: 12 June 2019

Flynote: Appellant charged with attempted murder, contraventions of the Arms and Ammunition and Act, Act 39 of 1996 and malicious damage to property – Applied for bail – Bail was refused because interest of the administration of justice overweigh the interest of the accused, justice will demand that a man who empties a magazine of 15 rounds on people be kept in custody pending his trial and personal

circumstances of the appellant are of little consequence. Held personal circumstances of the appellant are always important considerations and can never be described as being of little consequence – Held: wrong to describe in general terms that a man who empties a magazine of 15 rounds on people be kept in custody pending his trial – Magistrate decision to refuse bail set aside – appeal succeed.

ORDER

In result the following orders are made:

- a) The appeal succeeds and the order of the Magistrate refusing to admit the appellant to bail is set is aside.
- b) The Appellant is granted bail in the amount of N\$10 000, on condition that the appellant attends all dates upon which his trial is set for.
- c) The appellant must report every Monday and Friday between the hours of 06H00 and 20H00 to the Namibian Police at the Rundu Police Station.
- d) The Appellant should not leave the Local Authority of Rundu without notifying the Investigating Officer in writing.
- e) The Appellant shall not in any way interfere with any of the State Witnesses or tamper with any State evidence.
- f) The appellant does not apply for the issue of a passport or any other travel documents until the finalisation of his trial.

JUDGMENT

MILLER AJ:

[1] The appellant is an adult male whose age is reflected on the charge sheet, in the Magistrate's Court as being 44 years of age. He is currently in custody and is facing charges of attempted murder, contraventions of the Arms and Ammunition and Act, Act 39 of 1996 and Malicious Damage to Property.

[2] During the course of the proceedings before the Learned Magistrate the appellant asked to be admitted to bail. A lengthy hearing ensued and at the conclusion of the hearing the Learned Magistrate refused the application to admit the appellant to bail. It is against that order that an appeal was lodged to this Court.

[3] Sitting as a Court of Appeal I do not have an unlimited discretion to interfere with the Lower Court's decision to grant or refuse bail. I am bound by the provisions of Section 65 (4) of the Criminal Procedure Act no.51 of 1977 and can only overturn the Court a quo's decision once I am satisfied that the Court exercised its judicial discretion wrongly.

[4] In a matter of *Thulasithas and Others v The State* (80/2009) delivered on 26 November 2009, unreported, His Lordship Mr Justice Damaseb said the following: "As an Appellate Court we can only set aside a decision refusing or granting bail if we are satisfied that it was wrong. It is settled that that means that the decision to grant bail is in the discretion of the Court conducting the bail enquiry. It is a discretion not to be interfered with lightly especially not on the basis that we think we would have made a different decision if we sat at first instance. We are to interfere only if the discretion was wrongly exercised. And it is wrongly exercised if the Court took into account irrelevant considerations disregarded relevant considerations, applied the law wrongly or got the facts plainly wrong".

[5] The Appellant at the time of his arrest was employed as a lecturer at the University of Namibia's campus in Rundu. He has no previous convictions. During the course of a ruling that the Learned Magistrate made a conclusion of the application, the Learned Magistrate expressed herself as follows: "a close scrutiny will reveal that the interest of the administration of justice outweighed (**sic**) the interest of the accused in this matter. Justice will demand that a man who empties a magazine of 15 on people be kept in custody pending his trial." The Learned Magistrate also in dealing with the personal circumstances of the appellant described the personal circumstances of the Appellant as of little consequence.

[6] In my view both the statements by the Learned Magistrate amount to material misdirections. The personal circumstances of the appellant are always important considerations and can never be described as being of little consequence. It may well be that in appropriate cases the personal circumstances of the appellant when weighed up against other competing circumstances, may be afforded less weight but to describe it as being of little consequence is clearly wrong.

[7] Moreover it is wrong to describe in general terms that a man who empties a magazine of 15 rounds on people be kept in custody pending his trial. The seriousness of the offence is only one of several considerations which the Court must take into account when applying its mind to the question whether or not the accused should be admitted to bail.

[8] Again the seriousness of the offence may in certain circumstances outweigh the personal circumstances of the accused according to the demands of the case. But it is wrong to hold that the mere fact that he emptied a magazine of 15 rounds on people meant automatically that he be kept in custody. Ms Esterhuizen who appeared for the State submitted in argument that it may well be that the Magistrate had expressed herself poorly. The fact of the matter is that I can only go by what the Magistrate records herself and it is not for me to try and impute a different version other than that which the Magistrate herself stated. It follows that I am satisfied that the misdirections on the part of the Magistrate has the result that the order of the Magistrate refusing to grant the appellant bail should be set aside.

[9] In result the following orders are made:

- g) The appeal succeeds and the order of the Magistrate refusing to admit the appellant to bail is set aside.
- h) The Appellant is granted bail in the amount of N\$10 000, on condition that the appellant attends all dates upon which his trial is set for.
- i) The appellant must report every Monday and Friday between the hours of 06H00 and 20H00 to the Namibian Police at the Rundu Police Station.
- j) The Appellant should not leave the Local Authority of Rundu without

notifying the Investigating Officer in writing.

- k) The Appellant shall not in any way interfere with any of the State Witnesses or tamper with any State evidence.
- l) The appellant does not apply for the issue of a passport or any other travel documents until the finalisation of his trial.

K MILLER
Acting Judge

APPEARANCES

APPLICANT:

B Isaacks

Isaacks & Associates, Windhoek

RESPONDENTS:

Esterhuizen

Prosecutor General, Windhoek