

REPUBLIC OF NAMIBIA

Not reportable



IN THE HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

CASE: HC-MD-CRI-APP-CAL-2018/00072

In the matter between:

ELIFAS AMUTENYA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Elifas v S* (HC-MD-CRI-APP-CAL-2018/00072) [2019] NAHCMD 249 (19 July 2019)

Coram: LIEBENBERG J *et* SHIVUTE J

Heard: 14 JUNE 2019

Delivered: 19 JULY 2019

Flynote: Criminal Procedure – Bail – Appeal against refusal – Charged with robbery with aggravated circumstances, attempted murder, and possession of a firearm without a license – Serious offences – Discretionary powers of court hearing application – Section 61 Criminal Procedure Act, 51 of 1977 as amended – 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 together with two other accused with robbery with aggravated circumstances, attempted murder and possession of a firearm without a license in contravention of s 2 read with section 1, 38(2) and 39 of Act 7 of 1996, as amended. On 27 July 2018 the appellant and his co-accused applied to be released on bail, and on 29 August 2018 the magistrate's court refused the application on the grounds that it was not in the public interest and administration of justice to release the appellant on bail. Dissatisfied with the outcome the appellant appealed to this court on the grounds set out in his notice of appeal.

Held, that in an appeal against a magistrate's court's refusal to admit an appellant to bail such appellant must satisfy this court that the magistrate exercised his discretion wrongly.

Held, further, that appellant faces serious charges which, upon a consideration of the facts and the appellant's 4-year suspended sentence following a conviction in 2017 on robbery with aggravating circumstances, justified the refusal of bail in the interest of the administration of justice.

Held, further, that the nature and gravity of the manner in which the offences are alleged to have been committed, resulting in the death of a person during a cross-fire with the police in an area frequented by people, warranted a refusal of bail on grounds of public interest.

ORDER

The Appeal is dismissed.

JUDGMENT AGAINST THE REFUSAL OF BAIL

LIEBENBERG, J (SHIVUTE, J concurring)

Introduction

[1] This is an appeal against the refusal by Magistrate Nyazo, presiding in the Magistrate's Court for the district of Windhoek, held at Windhoek, Katutura on 27 July 2018; 03, 23, 28 and 29 August 2018, to admit the appellant, as second accused in the court a quo, to bail.

Offences

[2] The appellant, together with his two co-accused, were charged with the following offences, namely:

- (a) Robbery with aggravated circumstances as contemplated in section 1 of Act 51 of 1977.
- (b) Attempted murder
- (c) Possession of a firearm without a license in contravention of s 2 read with section 1, 38(2) and 39 of Act 7 of 1996, as amended.

The offences preferred against the accused are listed in Part IV of Schedule 2 of the Act to which s 61 of the Criminal Procedure Act is applicable.

Proceedings a quo

[3] The essence of the appellant's evidence can be summarized thus: He is an unmarried Namibian national with no travel documents, being a father of three children of whom one, an adult female, lives with him in Windhoek. He earns an income of approximately N\$ 700 per month from rendering assistance at his nephew's shebeen. He admitted during cross-examination that he was convicted of robbery with aggravated circumstances during 2017. The appellant further admitted during cross-examination that he was somewhere in the vicinity where the robbery occurred when he was arrested on 05 March 2018, the date on which the offences are alleged to have been perpetrated.

[4] The investigating officer testified, amongst others, that he personally saw the three accused persons, including the appellant, running behind the building where the robbery happened. A successful objection to the introduction of CCTV footage, in the form of a photo or photos, prevented the investigating officer from tendering evidence placing any of the accused persons at the scene of crime. He testified about an ensuing chase, a cross-fire wherein one suspect was killed, and the events leading up to the arrest of the appellant within proximity of the place where the alleged robbery took place. He further testified that the appellant was convicted of robbery during 2017 and given a four year suspended sentence. He claims that he personally knows the appellant since before the incidents giving rise to the present charges went largely unchallenged.

[5] In refusing all three applicants' applications for release on bail the learned magistrate found that, whilst the appellant did not constitute a flight risk nor a risk of interference with investigations or witnesses, release on bail would not be in the interest

of the administration of justice or in the public interest. The magistrate's refusal was expressly premised upon his opinion as contemplated in the wider discretionary powers and grounds for refusing bail as contemplated in section 61 of the Criminal Procedure Act, 51 of 1977, as amended.

[6] It is trite law in this jurisdiction that an applicant has the onus to establish the basis justifying the granting of bail.¹

Grounds of appeal

[7] On 12 September 2018 the appellant noted an appeal against the magistrate's refusal to admit him to bail, enumerating the following grounds:

- '1. The learned magistrate erred in finding that due to the manner in which the alleged offences were committed, the Appellant is not entitled to bail whilst it was not proven that the Appellant contributed in any way in which the alleged offences were committed.
2. The learned magistrate erred in finding that it is not in the best interest of the administration of justice for the Appellant to be released on bail despite the following:
 - a. The state failed to prove that they have a prima facie strong case against the Appellant;
 - b. The state failed to link the Appellant directly to the commission of the offense; and
 - c. The state further conceded during cross-examination that there is no direct link on the second and third charges against the Appellant.
3. In applying section 61 of the Criminal Procedure Act, the learned magistrate failed to consider the strength of the state case, prejudice and adverse continued detention of the Appellant on his employment and family.

¹ *S v Du Plessis and Another* 1992 NR 74 (HC).

4. The learned magistrate therefore failed to properly and wholly consider the question of bail particularly given the appellant's constitutional presumption of innocence until proven guilty and thus did not satisfactorily exercise a discretion when he turned down the appellant's bail application.'

Submissions on appeal

[8] In summary, Mr. *Enkali* for the appellant submitted in his written heads of argument, amplified during oral argument, thus: (a) the appellant was not found to have contributed to the commission of the alleged offences as the state did not place appellant on the scene of crime; (b) the magistrate was criticized for failing to distinguish on the facts between the accused persons' various degrees of alleged participation in the commission of the offences in question; and lastly, (c) the magistrate failed to exercise his discretion properly and had inadequate regard to the appellant's relevant constitutional rights.

[9] Mr *Moyo* for the respondent contended that the magistrate correctly exercised his discretion with due regard for the facts placed before the court and, in consequence, correctly rejected the application on the grounds set out in s 60 of the Criminal Procedure Act, 51 of 1977. He argued that the seriousness of the charges featured as a prominent theme which was correctly taken into account in refusing the appellant's application for release on bail.

Test on appeal

[10] Counsel for the appellant and respondent are in agreement on the applicable test and legal principles in bail appeals. Appellant's counsel invited this court, on application of such test and principles, to interfere with the decision of the court a quo. This court, with reference to the test on appeal, considered in the context of the appellant's grounds set forth and as argued at the hearing of this case, proceeds to determine this

matter. The onus is on the appellant to persuade this court that the magistrate has exercised his discretion wrongly.

[11] In *S v Timotheus* 1995 NR 109 HC this court at 113A-B referred with approval to the case of *S v Barber* 1979 (4) SA 218 (D & CLD) at 220E-F where Hefer J 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.'

First ground of appeal – failure by state to prove appellant's involvement

[12] It is trite that proof of complicity in the commission of crime is necessary in the context of trial where determination of guilt is at issue. As a protective mechanism against wrongful conviction the presumption of innocence determines that the prosecution must prove an accused's guilt beyond a reasonable doubt. Bail applications on the other hand² confine itself to a determination of whether the interests of justice permit release³ and as such, whether the jurisdictional grounds for a refusal of bail in the manner contemplated in s 61 of the CPA, as amended, are in the opinion of the court, present.

[13] Appellant's counsel, correctly in my view, does not challenge the jurisdictional ground upon which the learned magistrate refused bail. The qualm appears to reside in the contention that the public interest ground becomes irrelevant because, so it was

² See *Yugin v S* 2005 NR 200 (HC).

³ See *S v Khoaseb* (CC 05/2011) [2012] NAHC 78 (09 March 2012).

argued, the prosecution failed to prove appellant's complicity in the offences. It thus becomes necessary to determine whether the magistrate correctly formed the opinion that it was in the public interest that the appellant be denied release on bail.

[14] The learned magistrate reasoned that, with regard to the evidence, there was probable cause for the arrest of the accused persons, including the appellant. The evidence which was before the magistrate, relevant to the public interest ground, can be summarized as follows: (a) the investigating officer saw the appellant exiting the business premises where the robbery took place and thereafter running behind a certain building; (b) a cross-fire ensued between the police and the suspects; (c) a person was shot dead in the process; (d) the appellant was arrested in the vicinity of the place where the robbery allegedly occurred; and (e) the uncontroverted evidence that the appellant, in as recent as 2017, was convicted of robbery with aggravated circumstances and was given a four-year suspended sentence. It bears mention that the court a quo was faced with the evidence of the investigating officer and that of the appellant as regards identification.

[15] The appellant denied that he was present at the business premises at the time when the incident occurred. Given the undisputed evidence by the investigating officer that he personally knows the appellant from past brushes with the law, including the conviction in 2017, he positively identified the appellant who, in the company of his co-accused, ran out of the business premises where the alleged robbery is said to have been committed. The investigating officer thus identified the appellant as amongst one of those who fired shots at the police during the ensuing chase, and that he assisted in the arrest of the appellant near the place where the alleged crimes were said to have been committed.

[16] The cumulative effect of the evidence of the investigating officer referenced hereinabove undoubtedly, and reasonably, established a strong prima facie case against the appellant.

[17] Having prima facie established a link between the appellant and the alleged offences perpetrated, the learned magistrate correctly considered the violent manner in which the crimes were committed as a valid ground for determining whether it would be in the public interest to admit the appellant to bail.⁴ It is untenable to argue that the learned magistrate exercised his discretion wrongly when, upon a consideration of the evidence referenced at paras. 14 – 16 *supra*, he held that it was not in the public interest to admit the appellant to bail. The magistrate's exercise of discretion on this ground cannot be faulted. It must follow that this ground of appeal is, with deference to counsel for the appellant, ill-conceived and inherently without merit, and so it fails.

Second ground of appeal – inadequate evidence to support a refusal of bail on interest of administration of justice ground

[18] Appellant's counsel contends that the learned magistrate erred in finding that it is not in the best interest of the administration of justice for the appellant to be released on bail. This ground of appeal may be disposed of with reference to this court's reasoning under the first ground of appeal and, importantly, the nature of the charges faced by the appellant. The state's prima facie case against the appellant has already been addressed earlier in this judgment.

[19] This Court in the matter of *Lazarus Shaduka v The State, Case No: CA 119/2008* at para 27 as per Hoff, J (as he then was) held: '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

⁴ See *Timotheus Josef v The State* Case No CA 63/95 delivered on 22.08.1995.

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.’

[20] The uncontroverted evidence is that the appellant at present has a recent previous conviction and a four year suspended sentence following a conviction on a charge similar to that in the present matter, i.e. robbery with aggravating circumstances. This is without doubt a relevant consideration at the stage of a bail application.⁵ It must of necessity dawn on the appellant that a conviction on these very serious charges may result in the imposition of a lengthy custodial sentence. These facts in itself would have been sufficient for a finding that it would not be in the interests of either the public or the administration of justice to release the appellant on bail pending finalization of his trial. It follows that the magistrate in our view correctly formed the opinion, and judicially exercised his discretion, when he came to the same conclusion. This second ground of appeal is equally without merit.

Third ground of appeal – failure to properly apply section 61 of the CPA

[21] Counsel for appellant reasons that the magistrate, in applying s 61 of the CPA, failed to have regard to the strength of the state’s case; the prejudice and adverse consequences which continued detention of the appellant on his employment and family.⁶ It immediately becomes necessary to refer to the provisions of s 61 of the CPA in order to determine whether the argument of the appellant’s counsel is well founded. I hasten to add, nonetheless, that the rejection of the appellant’s first two grounds of appeal is effectively dispositive of this third ground as it was already shown that the learned magistrate correctly relied on the two jurisdictional facts of s 61 of the CPA in rejecting the applications for release on bail.

⁵ See *S v Patel* 1970 (3) SA 565 (WLD) at 568B-C.

⁶ See *Noble v State* (CA 02/2014) [2014] NAHCMD 117 (20 March 2014) where a similar ground was unsuccessfully relied upon.

[22] Section 61 of the CPA provides: '[i]f 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 inquiry 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.'

[23] Appellant's evidence during the bail application was conspicuously silent on prejudice to his employment and the well-being of his family. To the contrary, appellant's evidence was that it was better if he himself were to attend to the shebeen as opposed to his nephew recruiting somebody else as he is a family member. No evidence was tendered to the effect that continued incarceration would leave his dependents in absolute despair. Additionally, his own evidence was that his nephew also assists his adult child. The appellant's daughter and her baby will clearly not be left destitute in the absence of the appellant. The thrust of the argument advanced was that there was no one to look after the baby if the mother were to work in the shebeen. Juxtaposed with the interest of society this is a consideration which is significantly outweighed by more compelling factors such as the seriousness of the crime and the interests of the administration of justice and the public interest. In any event, the thrust of the evidence, correctly in our view, entitled the learned magistrate when balancing these competing interests to hold that it would not be in the interests of the administration of justice to release the appellant on bail. This ground of appeal must therefore fail, and so it does.

Fourth ground of appeal – failure to have due regard to the presumption of innocence

[24] A common theme invariably presented in this court exercising its appellate jurisdiction is that the court *a quo* failed to have due regard to the particular appellant's constitutional right to be presumed innocent. Unsurprisingly, it seldom, if ever, is rooted

in meaningful argument identifying the exact relevance and consequence of the presumption for bail proceedings in the context of s 61 of the CPA.

[25] Appellant's counsel contends that the learned magistrate failed to properly exercise his discretion consequent upon his failure to have regard to the appellant's constitutional right to be presumed innocent until proven guilty. This court in the matter of *Nepembe v The State*⁷ at p. 12 held:

“[No] judgment can ever be ‘perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered’ (see: *S v De Beer*, 1990 NR 379 (HC) at 387I-J, quoting from *S v Pillay*, 1977 (4) SA 531 (A) at 534H-535G and *R v Dhlumayo and Others*, 1948 (2) SA 677 (A) at 706), ...”

[26] Counsel's argument furthermore fails on two scores: (a) it loses sight of the constitutional provision which sanctions pre-trial detention, and (b) the application for release was decided upon a determination, not of probable guilt, but rather whether s 61 of the CPA permitted continued detention. Having correctly found that the provisions of s 61 find application in this instance and the court exercising its discretion in accordance thereto, it can barely be said that the appellant was not afforded a fair bail hearing. It follows that this ground of appeal, too, must fail.

Conclusion

[27] In the result, we are not persuaded that the learned magistrate exercised his discretion wrongly when refusing the appellant bail. The appeal is accordingly dismissed.

⁷ Unreported Case No CA 114/2003 delivered on 20.01.2005.

JC LIEBENBERG
JUDGE

NN SHIVUTE
JUDGE

APPEARANCES:

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