



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

APPEAL JUDGMENT

Case no: HC-MD-CRI-APP-CALL-2018/00075

In the matter between:

BRIAN ELIASE KAPUNDA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Kapunda v S* (HC-MD-CRI-APP-CALL-2018/00075)
[2019] NAHCMD 52 (15 March 2019)

Coram: NDAUENDAPO J

Heard: 01 February 2019

Delivered: 15 March 2019

Flynote: Criminal Procedure – Appeal against refusal of bail – Appellant charged with drug offence – Serious, Prevalent – Not in the public interest to admit appellant to bail – Outcry by community against drug dealing – Magistrate was not wrong to refuse bail – Appeal dismissed.

Summary: The appellant was charged with dealing in cannabis. He applied to be released on bail arguing that he needed to be released so that he could attend to his businesses to generate income to support his five children. The state opposed bail on the basis that it was a serious and prevalent offence and that it was not in the interest of the administration of justice to release appellant on bail. The magistrate refused bail on the basis that in his opinion it was not in the interest of justice to release appellant on bail. He appealed on the basis that his personal circumstances were not taken into account, the value of cannabis was minimal and that it will be in the interest of the public for him to be admitted to bail.

Held, that the court of appeal is bound by the provisions of s 65(4) of the Criminal Procedure Act, Act 51 of 1977 and may only overturn decision if it is wrong.

Held, further, that the court was not wrong to refuse bail. Appeal dismissed

ORDER

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

JUDGMENT

NDAUENDAPO, J

Background facts

[1] The appellant was refused bail by the magistrate's court, Omaruru. Disenchanted with that decision, he now appeals against the refusal to be admitted to bail.

[2] The appellant was charged with contravening section 2(a) read with sections 1, 2(i) and or 2(ii), 8, 10, 14 and part 1 of the schedule Act 41 of 1971. The allegations being that on or about 13 April 2018 at a house number

2040 in Omaruru district, he wrongfully and unlawfully dealt in a prohibited dependence producing drug to wit 5 full parcels and 1 half parcel weighing 1175 grams of cannabis valued at N\$11 750.

[3] The state opposed bail on the grounds that: (a) the charge is serious, prevalent and the investigations were incomplete (b) fear that should he be released on bail he will commit similar offence(s) as he has a previous conviction for drug dealing and (c) not in the public interest that he be released on bail.

[4] The appellant testified during the bail hearing that he was 33 years old, single and a father of 5 minor children from different women. He testified that he was maintaining the children who were staying with their mothers in different towns. He could, however, not provide proof of any deposit slip or e-wallet payments as claimed. He was a businessman who generated income from 3 businesses: (a) restaurant, (b) barbershop and (c) driving school. No proof of income by way of bank statements were provided to the court to show that he indeed generated his income from those businesses. He has a previous conviction for dealing in cannabis which was 3 years old. He testified that cannabis that was found in the pocket of his trouser was for safe keeping for a customer who had left it at his barbershop by accident. He knew it was cannabis. The house where the other cannabis was found was not his house and he denied having had the key to the house, whereas Constable Detective Johannes, the investigating officer, testified that when they arrived at the house it was locked and they could not enter. It was only later that the appellant unlocked the house with keys and 'cannabis' was found in the room belonging to his co-accused because her work uniform was found in there. According to Constable Johannes appellant admitted that the cannabis was his.

The learned magistrate refused bail on the basis that it will not be in the interest of the public or administration of justice to grant bail to the appellant.

Grounds of appeal

[5] The grounds of appeal are stated as follows:

- '1. The Honourable Magistrate erred in fact and in law to refuse the application of the appellant for bail, after an enquiry was held.
2. The Honourable Magistrate failed to adequately take into account:
 - 2.1 The personal circumstances of the appellant;
 - 2.2 The value involved and the proportionality of such value in relation to the charge and the public interest alleged.
 - 2.3 The Honourable Magistrate failed to attach weight to the submissions as well as cited authority, indicating that the appellant is an eligible candidate for bail and that it will be in public interest for appellant to be granted bail.'

Appellant's submissions

[6] Counsel argued that as regard the businesses from which he generated income, he was informed that the driving schools as well as the barbershop are not registered in Omaruru and therefore the 'presiding officer erred in finding that due to lack of documentary proof, the appellant failed to satisfy the court that he indeed owns a barbershop. As far as the restaurant business is concerned, counsel argued that the business was registered but the fitness certificate had expired and it was not renewed. Counsel argued that albeit the short-comings in the appellant's ability to produce all necessary proof, the crucial facts were not disputed that the appellant has five children, who have to be maintained and one of the sources of income is the restaurant and the alleged illegality of operating without a licence could be cured. Counsel argued that appellant must generate income to maintain his children and his grandmother and considering the importance of education and the young age of the appellant and the obligations towards his 5 children it is submitted that the presiding officer erred in ruling that it is in the public interest to refuse bail to the appellant.'

[7] Counsel further argued that the state does not have strong case against the appellant. The cannabis that was found in a plastic bag in his pocket was left at his barbershop by a customer and he just picked it up for

safekeeping for the customer. He further argued that the cannabis which was found in a house of a third party, has nothing to do with him as it was not his property nor was he staying there. Counsel argued that to justify public interest, the state must have a strong case against the accused to justify the need of overlooking the accused's rights and emphasise public interest. Counsel further argued that it is inevitable that from the testimony of the appellant and his personal circumstances and the merits of the case, denying him bail and taking his future away is against public policy.

[8] As far as s 61 of the Criminal Procedure Act is concerned, counsel referred this court to the case of *Julius Damaseb v The State*¹ where it was held that 'the crucial criteria, in terms of s 61 as amended, is the opinion of the presiding officer whether it would be in the interest of the public or the administration of justice to refuse bail.' But such discretion cannot be overemphasized so as to disregard the appellant's right. Counsel argued that such discretion should be exercised reasonably.

Respondent's submissions

[9] Counsel argued that the learned magistrate was not wrong by relying on s 61 of the Criminal Procedure Act, as amended, when concluding that it would not be in the public interest or that of the administration of justice to grant bail to the appellant, because.

'(a) firstly, the court did not find that it was likely that the appellant may abscond as it was not one of the grounds the state relied on in opposing bail. Without that finding, section 61 becomes applicable as it defines how the court may proceed from there which is that, it may still refuse bail to the accused if it deems it to be in the public interest or the administration of justice to retain the accused in custody pending trial, notwithstanding the finding that the accused is not a flight risk.

(b) Secondly, the appellant is in custody in respect of an offence referred to in part iv of Schedule 2 (of the Criminal Procedure Act) in that he is accused of dealing in dependence-producing drugs which fact then makes the said section 61 applicable. As was held in the matter of *Gurirab v Government of the Republic of Namibia* and

¹ *Julius Damaseb v The State* (CC 38/2009 or 2010 NAHC 122 at 34).

others , the jurisdictional requirements for the application of section 61, which requirements were all met in this case, were at least threefold, namely that:

- (i) the accused must be in custody;
- (ii) such custody must be in respect of any offence referred to in Part iv of Schedule 2 of the Criminal Procedure Act and,
- (iii) he or she must apply for his or her release on bail.'

[10] Counsel referred this court to *Shaduka v State*², where Hoff J stated:

'Since the enquiry is now wider a court will be entitled to refuse bail in certain circumstances even where there may be a remote possibility that an accused will abscond or interfere with the police investigations. The crucial criterion is thus the opinion of the presiding officer whether it would be in the interest of the public or the administration of justice to refuse bail.'

[11] Counsel further argued 'that the learned magistrate took note of the fact that a group of members of the Omaruru community demonstrated in front of that court in condemnation of this specific crime committed in this case, and objecting to the granting of bail to the appellant in this matter. The investigation officer handed up copies of a register of complaints made by members of the community at the Omaruru police station in which a certain person who deals in drugs by the name "Move" who happens to be the accused features prominently as an exhibit forming part of the record of the proceedings. We respectfully submit that had the learned magistrate released the appellant on bail, it would have undoubtedly induced a sense of shock and disbelief amongst, not only to the Omaruru community but throughout the country.'

The approach to bail

[12] The law is very clear that a court of appeal may only set aside a decision of the lower court refusing bail, where such a decision was clearly wrong.

² *Shaduka v State*, CA 119/2008, unreported judgment of the High Court, delivered on 24 October 2008.

[13] The court of appeal is bound by the provisions of s 65(4) of the Criminal Procedure Act, Act 51 of 1977 and may only overturn the court *a quo's* decision once satisfied that the court exercised its judicial discretion wrongly. In *Thalasithas and 2 others v The state*³, Damaseb JP held that ...'we are to interfere only if the discretion was wrongly exercised and it is wrongly exercised if the court took into account irrelevant consideration, disregard relevant consideration, applied the law wrongly or got the facts plainly wrong.'

The magistrate's reasons considered

[14] The learned magistrate reasoned that taking into account the personal circumstances of the appellant the court must also bear in mind the interest of the public and the society at large. He reasoned that in terms of s 61 of the Criminal Procedure Act, Act 51 of 1977 (as amended) bail may be refused if in the opinion of the court it is in the interest of the public or administration of justice and in his opinion it was not in the interest of the public or administration of justice to admit the appellant to bail.

[15] In this particular case the appellant testified that he generates income from his 3 businesses and he needed to be admitted to bail in order to attend to them. However, the learned magistrate noted that not a single bank statement of the businesses were produced to substantiate the version of the appellant, moreover nor was proof of registration of the barbershop or the driving school provided. If indeed, the appellant was deriving income from those businesses the burden was on him to provide proof and the learned magistrate was therefore not wrong in dismissing his testimony that he needed to be admitted to bail in order to attend to his businesses to generate income.

[16] The learned magistrate also reasoned that the charges faced by the appellant were serious, the appellant has a previous conviction for similar offences and that there was a public outcry against granting bail to those accused of dealing and or possession of drugs and in this particular case

³ *Thalasithas and 2 others v The state*, 80/2009 delivered on 20 March 2009.

members of the community were demonstrating against granting bail to the appellant. Having regard to the testimony of the Constable Detective Johannes, the investigating officer, who testified that indeed drug dealing and possession of drugs are on the increase in Omaruru and worst that drug dealers are using school children to sell and or carry drugs, in my respectful view the learned magistrate was not wrong to opine that it will not be in the public interest or administration of justice to admit the appellant to bail.

In the result, the appeal against refusal to admit appellant to bail is refused.

N G NDAUENDAPO
JUDGE

APPEARANCES:

APPELLANT:

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RESPONDENT:

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