



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

**JUDGMENT**

Case no: HC-MD-CRI-APP-CAL-2020/00014

In the matter between:

**FARES WAANDJA**

**APPELANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Waandja v S* (HC-MD-CRI-APP-CAL-2020/00014) [2020] NAHCMD 251 (24 June 2020)

**Coram:** MILLER AJ

**Heard:** 24 June 2020

**Delivered:** 24 June 2020

**Reasons:** 6 July 2020

**Flynote:** Criminal Procedure – Bail – Appeal against the Magistrate’s Court decision to do not grant bail – Section 65(4) of the Criminal Procedure Act 51 of 1977 – The decision of the court *a quo* not to grant bail should not be set aside if the court is not satisfied that the decision is wrong – Magistrate found it not to be in the interest of

the administration of justice for the accused to be admitted to bail – This court is not persuaded that the discretion was exercised wrongly – Appeal is dismissed.

**Summary:** The appellant is facing charges of rape, indecent assault and assault with intent to do grievous bodily harm – He applied for bail, which was refused in the Magistrate’s Court – The magistrate invoked section 61 of the Criminal Procedure Act, No. 51 of 1977, thereby refusing bail on the ground that it is not in the interest of the public or the administration of justice for the accused to be admitted to bail – The appellant lodged an appeal in terms of section 65(1) of the Criminal Procedure Act, No. 51 of 1977. The court found that it is bound by section 65(4), and concluded that it is not satisfied that the decision of the magistrate is wrong – Hence the appeal is dismissed.

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### ORDER

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1. The appeal is dismissed.
2. The matter is removed from the roll and is considered finalized.

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### JUDGMENT

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MILLER AJ:

[1] This is an appeal against a decision of the Magistrate of Windhoek, who refused to grant bail to the appellant. The appeal is brought in terms of section 65 of the Criminal Procedure Act, No. 51 of 1977.

[2] The respondent opposes the appeal.

[3] The appellant was arraigned in the Magistrate’s Court on the following offences:

Count 1 – Indecent Assault read with the provisions of the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003).

Count 2 – Indecent Assault read with the provisions of the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003).

Count 3 – Rape read with the provisions of the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003).

Count 4 – Rape read with the provisions of the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003).

Count 5 – Assault with intent to do grievous bodily harm read with the provisions of the Combating of Domestic Violence Act, 2003 (Act No. 4 of 2003).

[4] In the court *a quo*, the respondent objected to the granting of bail on the following grounds:

- (a) The serious nature of the offences that the appellant is charged with;
- (b) Public interest and the administration of justice;
- (c) Pending investigations and the possibility that the applicant may interfere with police investigations and/or witnesses; and
- (d) There is a strong case against the appellant.

[5] On the ground that the charges against the appellant are serious and that the State has a strong case against the appellant, the magistrate stated that in bail proceedings the State is not obliged to prove its case against the accused, all it needs to do is to show on a balance of probabilities that the evidence in its possession, usually in the form of witness statements and other documentary evidence, will prove the guilt of the accused. The magistrate concluded that the prosecution has done the aforesaid

in this matter. The magistrate narrated the evidence that the investigating officer, Sergeant Haindongo and the social worker presented before court in her ruling. The magistrate stated that the appellant has agreed to the seriousness of the charges he is facing. The magistrate also stated that 'in considering the applicant's evidence, being a denial of guilt, against the strength or apparent strength of the State's case, there appears to be a real likelihood that the State will succeed in proving its case in respect of all 5 counts as he further does not dispute count five for the assault, merely justifying the reason why he assaulted the victim'.

[6] The investigating officer, Mr Haindongo and the social worker narrated the nature of the police investigations to the magistrate, and testified that the doctor confirmed the version of the victim that when she had a vaginal discharge subsequent to the alleged rape, the appellant took her to the doctor. The magistrate stated that the appellant's witness (his wife) found the victim with sexually transmitted disease (STDs) tablets. The magistrate found that this version is not disputed by the appellant, including the version of the social worker that the appellant informed or misled his wife as to the reason why he took the victim to the hospital.

[7] The magistrate found that the offences preferred against the accused are listed in Part IV of Schedule 2 of the Criminal Procedure Act 51 of 1977, which makes section 61 of the Criminal Procedure Act 51 of 1977 applicable to the application by the appellant. The magistrate acknowledges that the broader scope of section 61 of the Criminal Procedure Act 51 of 1977 was enumerated in order to curb the serious escalation of crimes and the escalation of accused persons evading the course of justice by absconding, hence the legislature gave the court wider powers and additional grounds to refuse bail in cases involving serious crimes, by amending that section.

[8] The magistrate noted that the charges that the appellant is facing are read with the Combating of Domestic Violence Act No. 4 of 2003. He stated the fact that the victim in this matter is the biological daughter of the appellant is undoubtedly a crucial factor when it comes to considering the granting of bail to an accused charged with an offence involving violence, especially when it is gender based and aimed at vulnerable persons in the community. The magistrate also stated that the appellant would continue

to reside in the house where the victim is likely to return from the safe house where she is attended to by social workers.

[9] On the ground that the investigations are at an early stage and that the State fears that the accused may interfere with the investigations, the magistrate found that the conduct of the appellant prior to the arrest does not portray a likelihood of interference but that there was actual, direct and indirect interference through the appellant's witness as well as the Executive Director of the Ministry of Gender Equality and Child Welfare. The social worker testified that the appellant went to see the Executive Director of the Ministry of Gender Equality and Child Welfare and the supervisor of the social worker to convince them that the victim is lying. The magistrate also found that the appellant informed Junior Waandja who is a state witness to avoid the victim, given the allegations.

[10] In considering whether it is in the interest of the public or the administration of justice for the accused to be granted bail, the magistrate stated that the court has to look at the circumstances under which the crime was committed and whether the public must be protected against a dangerous offender<sup>1</sup>; whether there has been a public outcry over the commission of the crime committed, and whether the public interest is an important factor in deciding the granting of bail<sup>2</sup>.

[11] After discussing the evidence presented before her in relation to those factors, the magistrate concluded that, after taking into account all the evidence, she is not persuaded that the accused has shown on a balance of probabilities that it would be in the interest of the administration of justice that the appellant be admitted to bail, pending finalization of his trial. The magistrate further stated that the provisions of Section 61 are accordingly invoked and that no amount of bail or conditions attached thereto will curb the State's fear, particularly that of interference, given the domestic relationship. For those reasons the magistrate refused bail.

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<sup>1</sup> *Timotheus Josef v The State*, Case No. CA 63/1995 delivered on 22 August 1995.

<sup>2</sup> *Charlotte Helena Botha v The State*, Case No. CA 70/1995 delivered on 20 October 1995.

[12] The magistrate relied upon the case of *Shaduka v The State*<sup>3</sup> in which Hoff J stated that:

'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.'

[13] The appellant is appealing against the decision of the magistrate on the following grounds:

- (a) The Learned Magistrate erred in law and/or fact by finding that the State has strong evidence on all the charges the appellant is indicted. The Learned Magistrate materially misdirected herself in law and/or facts by pre-judging the case and finding that there is a likelihood that the State will succeed in proving its case in respect of all five counts preferred against the appellant without credible *prima facie* evidence. The Learned Magistrate clearly had no authority to make a finding on the innocence or guilt of the appellant. That is the duty of the trial court. This misdirection is fatal.
- (b) The Learned Magistrate erred in law by finding that all the offences against the appellant are listed in Part IV of Schedule 2 of the Criminal Procedure Act 51 of 1977 as amended and invoking section 61 to be applicable to all the offences.
- (c) The Learned Magistrate materially misdirected herself when she concluded and made a finding that the appellant indirectly and directly interfered with police investigations in the absence of any credible evidence.
- (d) The Learned Magistrate erred in law and/or fact by failing to consider and objectively attach sufficient weight to the evidence of the appellant by

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<sup>3</sup> *Shaduka v The State*, CA 119/2008, unreported judgment of the High Court, delivered on 24 October 2008.

concluding that granting bail to the appellant will prejudice the interest of the administration of justice. The Learned Magistrate erred in law and/or fact in finding that the appellant failed to prove on a balance of probabilities in terms of section 61 of the Criminal Procedure Act 51 of 1977 as amended that he is a suitable candidate to be granted bail and that granting him bail will be in the interest of the public.

- (e) General grounds: The Learned Magistrate erred in law by attaching weight and relying on hearsay evidence that was fervently challenged and disputed by the appellant.
- (f) The Learned Magistrate materially misdirected herself in law and/or facts by failing to consider and imposing stringent bail conditions on the appellant to alleviate any fears the State have from the appellant.
- (g) The Learned Magistrate erred in law and/or facts by accepting and relying on the evidence of the investigating officer and the social worker and such evidence was never put to the appellant in cross-examination to answer and/or comment on it.

[14] Mr Muchali who appeared on behalf of the appellant argued that the appellant proved that he is a suitable candidate for bail. He argued that the magistrate erred by finding that 'there appears to be a real likelihood that the State will succeed in proving its case in respect of all five counts as he further does not dispute count five for the assault merely justifying the reason why he assaulted the victim'. He added that, a bail application is not a trial, and therefore a comment on the likelihood of conviction is not the purpose of bail application. By making such a comment, Mr Muchali submitted that the magistrate pre-judged the matter, thereby misdirecting herself. He also argued that the magistrate invoked section 61 of the Criminal Procedure Act 51 of 1977, without specifying the specific offence. He submitted that the magistrate should have specified the offences he is referring to, instead of generalizing. Mr Muchali further submitted that no evidence of any form of interference with the police investigations was presented. He argued that the magistrate erred by making a conclusion in the absence of such

evidence. He said that there is no such credible evidence, and the magistrate relied upon hearsay evidence which was challenged. He submitted that the appellant proved that he is a suitable candidate for bail, and asked that the appeal be upheld and bail be granted to the appellant.

[15] Mr Muchali submitted that in the case of *Lukas v State*<sup>4</sup>, Parker AJ stated in para 10 that:

'I am alive to the proposition that in a bail application the court ought to strike a balance between the presumption of innocence of the applicant (the accused) and her right to personal liberty on the one hand and interests of society on the other.'

[16] Mr Muchali further submitted that in the case of *Salom v S*,<sup>5</sup> Salionga J, stated as follows:

'The abovementioned reasoning was a misdirection as it amounts to prejudging the issues to be decided during the trial. In deciding whether or not the applicant is a good candidate for bail, the court has to strike a balance between the interest of society and the liberty of the applicant. In doing so each case has to be considered in context and based on the circumstances of each case's own merits.'

[17] Mr Lisulo who appeared on behalf of the respondent argued that section 61 of the Criminal Procedure Act 51 of 1977, is applicable in respect of the count of rape. The State argued that the magistrate was correct in her interpretation and application of the law to the matter, and therefore her decision should stand. Mr Lisulo argued that the principle established in the case of *S v Barber*<sup>6</sup> should be taken into consideration in deciding this matter because the principle laid down therein is not in conflict with any law of Namibia. In that case, the court made the following remarks:

'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

<sup>4</sup> *Lukas v S* (CC 15/2013) [2013] NAHCMD (13 November 2013).

<sup>5</sup> *Salom v S* (HC-NLD-CRI-APP-CAL 2019/00019) [2019] NAHCNLD 111 (10 October 2019).

<sup>6</sup> *S v Barber* 1979 (4) SA 218 (D) at 220.



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.'

[18] Mr Lisulo submitted that the appellant is deprived of his right to liberty in accordance with the procedures established by law, and that when considering an application for bail, the court should strike a balance between two competing interests, being the liberty of the appellant, and the State's requirement that the appellant stands his trial and the administration of justice or interest of society be safeguarded from frustration.

[19] Mr Lisulo further submitted that the court should also consider the notion that the accused is presumed to be innocent until proven guilty. He submitted that although as a general proposition the presumption of innocence operates in favour of an accused despite a strong case against the accused, this should not be over-emphasized, and he added that the truism is that bail is non-penal in character. In support of this submission, Mr Lisulo relied upon the case of *S v Yugin and Others*<sup>7</sup> in which the court stated as follows:

'The relevance of the seriousness of the offence charged lies in the sentence which will probably follow upon a conviction. If the probable sentence is one of a substantial period of imprisonment, then there is obviously a greater incentive for the accused to avoid standing trial than if the probable sentence is an affordable fine. As I have said, the seriousness of the offence charged and the type of sentence it will probably attract are not of themselves determining factors. The next factor to be considered is the likelihood of conviction on such a charge. In considering this factor the court must perform a balancing act. It must balance in the scales the evidence adduced by an accused, which will usually be a denial of guilt, against the strength or apparent strength of the case which the prosecution says it will present at the trial. The result of this balancing act will play an important part in determining whether an accused may or may not decide to be a fugitive from justice, rather than stand his trial. The bail application is not, of course, the trial itself. It is not the occasion when the prosecution has to

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<sup>7</sup> 2005 NR 196 (HC) at p. 200B.

prove the guilt of the accused. What it has to do is to demonstrate, through credible evidence, the strength or apparent strength of its case. This it will usually do through the mouth of the investigating officer, and that is what happened in the present case.'

[20] Section 65(4) of the Criminal Procedure Act 51 of 1977 provides as follows:

'The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.'

[21] In *S v Timoteus*<sup>8</sup> the court cited with approval of the dictum in *S v Barber*<sup>9</sup> where Hefer J, said the following:

'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/she 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 view are, the real question is whether it can be said that the magistrate, who had the discretion to grant bail, exercised that discretion wrongly.'

[22] Having discussed the ruling of the magistrate and the submissions of the appellant and the respondent, and taking into consideration what was said in the case of *S v Timoteus*,<sup>10</sup> I will then proceed to determine whether or not the decision of the magistrate is wrong.

[23] Section 61 of the Criminal Procedure Act 51 of 1977<sup>11</sup> provides as follows:

'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

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<sup>8</sup> 1995 NR 109 (HC).

<sup>9</sup> 1979 (4) SA 218 (D & CLD).

<sup>10</sup> 1995 NR 109 (HC).

<sup>11</sup> Amended by s 3 of Act 5 of 1991.

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.’

[24] The offence of rape preferred against the accused is listed in Part IV of Schedule 2 of the Criminal Procedure Act 51 of 1977; therefore the magistrate was correct to invoke this section.

[25] In the unreported judgment of *Matias Nafuka v The State*.<sup>12</sup> at para 29 the court concluded as follows:

‘The court in the exercise of its discretion has to consider all the relevant facts and circumstances placed before it before coming to the conclusion that the release of the accused will not jeopardise the interests of justice. It is clear from the judgment that all circumstances were duly considered by the court *a quo* and despite having found that the appellant has satisfied “all requirements” for bail, it was not persuaded that the appellant, in a case as the present where the victim is a minor child, and the setting of the case in an atmosphere of domestic violence, should be admitted to bail. Specific regard was had to the interest the public had in cases where the rights of women and children were disregarded and the need for the courts to protect same to the maximum. The court was clearly of the view that this was an instance where the provisions of s 61 had to be invoked, and that an injustice would be done to admit the appellant to bail; also, that no meaningful amount of bail or conditions attached thereto would deter the appellant from giving effect to his earlier threats. Regard being had to the circumstances of this case, I find myself unable to fault the magistrate’s reasoning and the conclusion he came to.’

[26] In the case of *Timotheus v The State*,<sup>13</sup> Strydom JP stated the following:

‘In such instances the letting out on bail of a person who is accused of a callous and brutal murder creates an impression that the public is at the mercy of such criminals and neither police nor the courts can effectively protect them. Consideration such as the interest of justice

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<sup>12</sup> Case No. CA 18/ 2012.

<sup>13</sup> NmHC 22/08/1995.

may, if there is proper evidence before the court, lead to the refusal of bail even where the possibility of abscondment or interference is remote.’

[27] Taking into consideration the nature of the charges that the appellant is facing as they were described by the magistrate in her ruling, I find that the principles established in the cases of *Matias Nafuka v The State*<sup>14</sup> and the case of *Timotheus v The State*<sup>15</sup> are also applicable to the present case, but noting that the appellant is facing charges of rape, indecent assault and assault with intent to do grievous bodily harm to his minor daughter, but not murder. In her ruling, the magistrate has also reasoned in conformity with these principles.

[28] In refusing bail, the magistrate considered the interest of the administration of justice. I am not persuaded that the discretion was exercised wrongly. By finding that it would not be in the interest of justice to release the appellant on bail, the magistrate did not misdirect herself. The court is not satisfied that the decision of the magistrate is wrong, and therefore will not set aside the decision against which the appeal is brought. Consequently, the appeal is dismissed.

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K Miller  
Acting Judge

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<sup>14</sup> Case No. CA 18/ 2012.

<sup>15</sup> NmHC 22/08/1995.

APPEARANCES:

APPELLANT: J Muchali  
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RESPONDENT: D M Lisulo  
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