REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CRI-APP-CAL-2022/00032

In the matter between:

SAM MATIAS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Matias v S* (HC-MD-CRI-APP-CAL-2022/00032) [2022] NAHCMD 330 (4 July 2022)

Coram: Usiku J *et* January J
Heard: **13 June 2022**
Delivered: **4 July 2022**

Flynote: Criminal Procedure – Bail – Appeal against refusal by magistrate to admit appellant to bail - In defence appellant gave a bare denial – Onus not discharged by appellant – Evidence of state – Analysis when asking whether prima facie case shown –

Various factors to be taken into account – Not in the interest of public and of administration of justice to permit appellant to bail - Appeal dismissed.

Summary: The appellant was charged in the Walvis Bay Magistrate's Court, on counts of murder, robbery with aggravating circumstances and attempted robbery. The appellant applied to be admitted to bail, which bail application was subsequently refused. Aggrieved by the ruling of the lower court, he lodged this appeal.

Held – that the appellant admitted to having been in the vicinity of the scene, close enough for him to observe the deceased who was in the company of a his girlfriend being attacked by accused one (1).

Held further – that the fact that the girlfriend of the deceased may have been too traumatized to go into detail as to what happened on that evening does not take away the fact that she has placed the appellant on the scene.

Held - for purposes of a bail enquiry, it was sufficient for the investigating officer to testify on the previous conviction of the appellant. Taking into consideration the fact that the appellant himself admitted to having been charged with that offence. *Held furthermore* the respondent correctly submitted that given the fact that bail applications are urgent, the state may not have had sufficient time to prepare adequately.

Held that – The allegations of robbery are very similar to the allegations in the current matter the appellant is facing, this tend to demonstrate the same modus operandi. Held further that on the appellant's own admission that he has a pending theft charge shows that he has a tendency to commit similar offences.

Held further - The learned magistrate was correct in refusing to grant bail on the ground that it will not be in the interest of the public or the administration of justice for the

appellant to be released on bail. *Held furthermore* that the appellant has prima facie demonstrated a propensity to be charged with theft related matters and that he has further demonstrated a violent disposition in perpetuating the alleged offences.

Held that - the learned magistrate correctly found that the respondent has prima facie shown a pattern of deviant behaviour on the part of the appellant. Held further that he has properly taken into account the magnitude of the case and its possible impact on the public and the administration of justice.

Held furthermore – that the appeal court has no reason to interfere with the court a quo's decision in this regard as it is of the view that it was exercised judiciously and correctly. This court finds no misdirections and therefore no reason to interfere with the magistrate's discretion. Appeal dismissed.

ORDER

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1. The appeal against the refusal to admit the appellant to bail is dismissed.
2. The matter is regarded finalised and removed from the roll.

APPEAL JUDGMENT

Usiku J (January J concurring)

[1] The appellant was charged in the Walvis Bay Magistrate's Court on counts of, murder, robbery with aggravating circumstances and attempted robbery. The appellant applied to be admitted to bail, which application was subsequently refused. Aggrieved by the ruling of the lower court, lodged this appeal.

[2] The appellant is represented by Ms Klazen and Ms Ndlovu represented the respondent.

Grounds of appeal

[3] The appellant raised three grounds of appeal in his Notice of Appeal. These grounds are as follows:

'1. The learned magistrate erred in law and or facts when he ruled that the state made out a prima facie case against the appellant and thereby denying the appellant bail.
2. That the learned magistrate erred in law and facts when he ruled that the state proved a previous conviction against the appellant.
3. That the learned magistrate erred in law and facts when he ruled that;
3.1 the appellant has demonstrated a propensity to commit crimes of violent nature;
3.2 the appellant has shown a propensity to be charged on theft cases;
3.3 the appellant has shown a pattern of deviant behaviour;
3.4 the appellant if released may be charged again.'

[4] The respondent opposed the appeal.

Objections to bail

[5] The respondent objected to the granting of bail in the court a quo on the following grounds:

5.1 That it is not in the interest of the administration of justice to release the accused on bail because the accused is likely to abscond.

5.2 Fear of re-offending.

Background

[6] On the eve of 4 June 2021 the appellant and his co-accused' were consuming alcohol at a bar in Walvis Bay. Later that night the appellants and his companion decided to move to another bar, known as Johana's place. The appellant testified that some of the co-accused' were walking in front but he and James Jeremia who is now accused no. 7 were behind the rest. He later saw the co-accused attacking the deceased who was with his girlfriend. Applicant testified that he was with accused no 7, James Jeremia when he saw accused no.1 assaulting the deceased. He later learned that accused no. 1 had stabbed the deceased. Appellant and James Jeremia immediately got into a taxi and left the crime scene. Appellant testified that the reason why they fled the crime scene was because the deceased's girlfriend shouted asking "why did you stab the person?" Applicant further testified that they fled the crime scene because they did not want to be connected to the robbery or to whatever the co-accused had done.

[7] On the other hand the respondent avers that the appellant and his co-accused whilst acting in common purpose allegedly committed the crime of murder, robbery and attempted robbery. The applicant and his co-accused descended on the deceased and his girlfriend. The co-accused' allegedly searched the deceased girlfriend for valuables to no avail. They together allegedly surrounded the deceased, searched him and appropriated his belt as well as his cell phone. Thereafter, one of the co-accused, whom the applicant identified as accused no. 1 allegedly stabbed the deceased. The deceased died the following day.

[8] The investigating officer, Rachel Shivanda, testified that a group of nine suspects attacked the deceased who was walking with his girlfriend at knife point. The suspects searched the girlfriend but did not find anything on her, whereafter the suspects surrounded the deceased, searched him, took a Samsung cell phone valued at N$ 2 999 and a polo belt valued at N$ 700 Namibian dollars. She testified that the appellant was linked to the case by his co-accused, one Naftali Junias. It was further her testimony that an eye witness confirmed that the appellant was seen in the vicinity close

to the crime scene. Another witness confirmed that all the suspects including the applicant took part in the alleged robbery and attempted murder.

[9] The investigating officer further testified that the appellant should be denied bail on two grounds: firstly that granting bail will not be in the interest of justice or in the administration of justice to grant bail due to the fact that the appellant is likely to abscond when released on bail. Secondly, there is a fear that the appellant might re-offend. The investigating officer further testified that the appellant has a previous conviction of theft, Walvis Bay CR 105/01/2017 and he has a pending case Tutaleni CR 53/02/2021 for robbery. She testified that whilst the matter of Tutaleni CR 40/12/2019 was still ongoing, the applicant was granted bail and whilst on bail he re-offended and it is when he was charged with yet another the case of Tutaleni CR 53/02/2021 of robbery. The appellant and his co-accused are facing serious charges which have attracted a lot of public interest. She testified that the deceased was a police officer. The matter of Tutaleni CR 40/12/2019 was only provisionally withdrawn because one of the accused in that matter went missing, however, the matter could be placed back on the roll once the mission accused has been re-arrested.

[10] The investigating officer testified about an eye witness one Mr Frans Kamashongo who saw the appellant and his co-accused on the street near the crime scene of the incident.

Issue for determination

[11] Whether the court a quo err in refusing to grant the appellant bail?

Appellant's submissions on appeal

[12] It was contended that the state has not proved a prima facie case against the appellant. He contends that the state relies on a co-accused's testimony to link him to the crime. The appellant submitted that a co-accused's evidence is admissible only as

an admission against its maker. Appellant further contends that the state did not present warning statements to the court.

[13] Further avers that the state relies on a witness that saw the accused in that vicinity close to the crime scene. During cross examination, it was established that this witness named, Mr Frans Kamashongo saw the applicant and others on the day of the incident, at a street away from the incident and that he left them there The court a quo therefore erred when it took this into account and ruled against the applicant's bail. Appellant further avers that another attempt to establish a prima facie case was when the investigating officer testified that there was another witness who allegedly saw them all participating at the scene. This witness was the girlfriend of the deceased who was with him. However the girlfriend is said to have been too traumatized to tell what she saw. How then was a prima facie case established?

[14] The appellant's claim is that the charges against him is false and that he will be acquitted. The reason being that the court unduly gave weight to what the co-accused might come and say at the trial, at the expense of the appellant's own evidence on the merits, and it is trite, that admissions of co-accuseds' in warning statements are only admissible in evidence against the maker. The appellant further take issue with the fact that no previous convictions were handed up during the proceedings in the bail application. The court a quo therefore erred in finding that the respondent has on a balance of probabilities shown that the appellant has a previous conviction of theft identified as Walvis Bay CR 105/01/2017. That conviction was disputed by the appellant.

<u>That the learned Magistrate erred in law and or facts when he ruled that:</u>

<u>The appellant has demonstrated a propensity to commit crimes of violence</u>

[15] The appellant admitted that he has one pending case CR 53/02/2021. However, no evidence has been led in that case. He submitted that it is trite law that an applicant

may be denied bail on his or her first offences even if his criminal record is clear but this depends on the circumstances of each case. The appellant confirmed that he was granted bail in CR 53/02/2021 indeed bail can be denied on a first case. However, in light of no prima facie evidence adduced in the current matter the appellant should not be anticipatorily punished.

The appellant has shown a propensity to be charged on theft cases

[16] The appellant maintained that he has no previous conviction. He was merely charged with theft. The magistrate in the court a quo therefore erroneously ruled that the appellant has a propensity to be charged. That operates in the face of Article 12 (1) (*d*) of the Namibian Constitution which provides that; All persons shall be presumed innocent until proven guilty. A propensity to be charged does not prove a propensity to commit crimes but convictions do. The law must be just; hence the presumption of innocence.

A pattern of deviant behaviour and the likelihood to commit similar offences

[17] The appellant avers that the magistrate erred when he stated that the respondent has prima facie shown a pattern of deviant behaviour on the part of the appellant because the appellant is an ex-convict for the offence of theft. He denied any previous conviction and argued that the state did not prove same, hence there was no previous conviction handed up during the bail proceedings. The appellant further avers that it is trite law that no adverse effect can be drawn from matters that were withdrawn.

[18] The appellant avers that the magistrate erred when he ruled that the appellant if released on bail may commit another similar offence. The appellant submitted that he was not afforded a meaningful summary of facts or a charge sheet of the charge levelled against him in this case. He further avers that it was wrong for the magistrate to have concluded that he may be charged with another similar offence in the absence of any evidence to substantiate such allegations.

Respondent' submissions

Ad ground 1

[19] The respondent submitted that the lower court was correct in finding that the respondent had made out a prima facie case against the appellant. The allegations are that the appellant committed the offences he is charged with in common purpose with his co-accused. Therefore, the admissions and implication by his co-accused are relevant at this stage. Where there is evidence that a co-accused may implicate the appellant and that should also be considered. There is evidence that the co- accused 1 and 4 have already implicated the appellant.

[20] The investigating officer Rachel Nathaniel Shivanda's testimony is that apart from the co-accused 4, Naftali Junias implicating the appellant, another witness Frans Kamashongo saw the applicant in the vicinity. Appellant did nothing to stop the attack on the deceased. The investigating officer further testified that the girlfriend of the deceased said that all eight (8) of the accused were there. The appellant himself admits to having been in the vicinity of the scene, close enough for him to see that the deceased who was in the company of a lady was being attacked by accused one (1). He admitted to have been in the company of accused five (5) Alex Matias who was found with the belt belonging to the deceased. A co-accused James allegedly indicated to the investigating officer that the appellant was present at the scene. The fact that the girlfriend of the deceased may have been too traumatized to go into detail does not take away the fact that she placed the appellant at the scene, thus corroborating his co-accused Naftali Junias and James.

Ad ground 2

[21] The respondent submitted that the investigating officer testified that the appellant had a previous conviction of theft and gave a detailed account of the case including the

case number as well as the sentence handed down. The appellant despite having initially denied being charged and being convicted of such an offence, under cross examination, admitted that he remembered that he was charged with that offence.

[22] The respondent further submitted that whilst it would have been desirable for the state to prove the previous conviction in the usual way, including the handing over of the certificate of previous convictions, for the purposes of a bail enquiry, it was adequate for the investigating officer to testify on such previous convictions without necessarily handing up the previous convictions. The appellant himself admitted to having been charged with that offence. Given the fact that bail applications are urgent in nature, the state may not have had sufficient time to prepare adequately.

Ad ground 3.1

[23] The investigating officer testified that the Appellant has a pending case Tutaleni CR 53/02/2021 for robbery. She testified that the appellant was alleged to have hit the complainant with an iron bar and then robbed him of cash money and a cell phone. These allegations are very similar to the allegations he is currently facing, that is the same modus operandi.

[24] The respondent further submitted that it is incorrect to argue that the refusal to grant bail is being used as a form of anticipatory punishment against the appellant. The evidence by the investigating officer placed sufficient details on record to prove a prima facie case having been established against the appellant. Respondent further submitted that, the present alleged charges the appellant is facing were committed whilst the appellant was on bail another case being Tutaleni CR 53/02/2021. The investigating officer testified whilst on bail for Tutaleni CR 53/02/2021 the appellant was also charged with a case of assault with intent to commit grievous bodily harm under Tutaleni CR 40/12/2019.

Ground 3.2 and 33

[25] The respondent submitted that whereas the certificate of the previous conviction on the charge of theft may not have been produced in court, the appellant admitted to having been charged with that offence. He did not deny that he was convicted and sentenced on that charge. This admission of the theft charge in itself shows that he has a propensity to commit similar offences. Therefore the court a quo was correct to take into account the appellant's pending cases.

[26] While it is true that the right to the presumption of innocence as per Article 12(1)(*d*) of the Constitution is important, it is submitted that it is not the only determining factor. Hence the presumption of innocence is not absolute. The court a quo was correct to make the finding that the appellant has shown a pattern of deviant behaviour in that he already has a previous conviction of theft and a pending case of robbery, and is correctly being charged with the offences of murder and robbery respectively.

Ad Ground 3.4

[27] The respondent further argued that by refusing the appellant bail, the court a quo correctly took into consideration the possibility of the Appellant being charged with another similar offence. The appellant well acquainted with the charges that he is facing when he made his first appearance in court on 8 June 2021. The investigating officer testified on the allegations levelled against the appellant during the bail application proceedings.

[28] The respondent further submitted that the investigating officer testified that the appellant and his co-accused are seen as dangerous in their community. The case has a public interest because the appellant is seen as a violent person within the community. The investigating officer testified that a bar owner approached him requesting her to stop the appellant from going to his bar.

[29] With regards to the question, whether granting bail is in the interest of the public or the administration of justice. The respondent submitted that in its reasons for the ruling, the court a quo was mindful about the seriousness of the offence the appellant is charged with. The court was therefore satisfied and correctly found that the appellant may commit a similar offences if admitted to bail. It was therefore not in the interest of the public or the administration of justice for the appellant to be released on bail.

[30] The respondent further submitted that it is clear from the learned magistrate's reasons that he did not only rely on the appellant's previous conviction as contended, but weighed it together with other factors that deserved consideration before coming to the conclusion that the interests of justice outweigh the appellant's interests. The circumstances of the case justify the conclusion reached and there is no justification for this Honourable Court to interfere with the court a quo's finding in that respect.

[31] The respondent furthermore submitted that in casu there is nothing that warrants the interference with the learned Magistrates' decision by the Supreme Court. In fact, there is nothing on the record from which it can be concluded that the court-a-quo took into account irrelevant considerations, disregarded relevant considerations and applied the law wrongly or got the facts plainly wrong. In the circumstances, the respondent prays that the appellants' appeal against the court a quo's refusal to grant him bail be dismissed.

The applicable legal principles

[32] In *S v Gaseb*[1] 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…'

[1] *S v Gaseb* 2007 [1] NR 310 [HC].

[33] Similiarly in *Lazarus Shaduka v The State*[2] Hoff J at para 27, stated with regards to the seriousness of the offence:

'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 interest of either the public or the administration of justice to release an accused on bail...'

This court will decide this matter in the light of the above mentioned principles.

[34] 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 appellant. The duty of the prosecution is to lead credible evidence establishing whether there is a prima facie case against the appellant.[3] The prosecution led evidence that the appellant and his co-accused are perceived to be dangerous in the community of Walvis Bay. The appellant has demonstrated a violent disposition based on the allegations contained in three cases which the appellant is still facing.

[35] In the matter of Tutaleni CR 40/12/2019, the appellant allegedly hit a security guard who worked at a bar with a brick. According to the investigating officer, the security guard allegedly attempted to assist a lady whose phone was being robbed by the appellant. The security guard allegedly lost two teeth as result of the alleged assault. In the matter of Tutaleni 53/02/2021, after the appellant was released on bail in the matter of Tutaleni CR 40/12/2019, he was allegedly jointly charged with a co-accused with robbery. In which they allegedly appropriated a wallet containing cash in the amount of N$ 14 000 and a cell phone valued at N$ 6000.

[36] Lastly, the appellant conceded during his bail application in the court a quo that he was charged with theft. The case number under which he was charged is Walvis Bay

[2] *Lazarus Shaduka v The State*, case no: CA 119/2008.
[3] *Noble v S* (HC-MD-CRI-APP-CAL-2018/00079) [2019] NAHCMD 12 (5 February 2019).

CR 105/01/2017. According to the investigating officer's testimony the appellant was charged with stealing a levi jean valued at N$ 695. The appellant was subsequently convicted and sentenced on the theft charge. Although the appellant denied the previous conviction of theft he conceded to being charged for theft.

It is important at this stage to note that the prosecution has established a nexus between the appellant and the crimes which was allegedly committed on 4 June 2021.

Discussion

[37] The appellant admitted to having been in the vicinity of the scene, close enough for him to see that the deceased who was in the company of a lady (alleged to be his girlfriend) was being attacked by accused one (1).[4] The appellant also admitted to being in the company of accused five (5) Alex Matias who was found with the belt belonging to the deceased.[5] The respondent correctly submitted that the fact that the girlfriend of the deceased may have been too traumatized to go into detail does not take away the fact that she placed the appellant at the crime scene.

[38] For purposes of a bail enquiry, it was sufficient for the investigating officer to testify on the previous conviction of the appellant. Taking into consideration the fact that the appellant himself admitted to having been charged with that offence. The respondent correctly submitted that given the fact that bail applications are urgent, the state may not have had sufficient time to prepare adequately.

[39] The pending case of Tutaleni CR 53/02/2021 involves the appellant charged with for robbery. The investigating officer testified that the appellant was alleged to have hit the complainant with an iron bar and then robbed him of cash money and a cell phone. The allegations of robbery are very similar to the allegations the appellant is correctly facing, this demonstrates the same modus operandi.

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[4] See page 55 and 57 of the record of proceedings.
[5] See page 58 of the record.

[40] The appellant's own admission that he has a pending theft charge shows that he has a tendency to commit similar offences. The court a quo did not err to have taken into account the appellant's pending cases when arriving at its decision to refuse bail. The learned magistrate refused bail on the ground that it is not in the interest of the public or the administration of justice for the appellant to be released on bail. In his judgment he stated that it is in cases such as this, that a scale of balancing the right to liberty and that of public interest operates against the appellant. Further stating that the appellant has prima facie demonstrated a propensity to be charged with theft related matters and that he has further demonstrated a violent disposition in perpetuating the alleged offences.

[41] The learned magistrate further found that the respondent has prima facie shown a pattern of deviant behaviour on the part of the appellant. The magnitude of the case and its possible impact on the public and the administration of justice was properly taken into account.

[42] It is the court's view that 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.[6]

[43] In the matter of *Noble v The State*[7] the court held:

'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.'

[6] *S v Du Plessis & Another* 1992 NR 74 at 82.
[7] *Noble v The State* (CA 02/2014) NAHCMD 117 delivered on 20 March 2014.

The onus of proof lies on the applicant. In other words even where the case for the state is not necessarily based on the strongest of evidence or shows less than a prima facie proof, this does not automatically discharge the onus on the applicant.[8]

Conclusion

[44] 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, does not find any misdirection on the part of the magistrate for refusing to grant bail especially when he gave due regard to the magnitude of the case, the completeness of the investigations and the seriousness of the charges levelled against the appellant.

[45] The learned magistrate carefully considered the evidence placed before him in its totality and arrived at the conclusion he 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 was correctly exercised.

[46] In the result the following order is made:

1. The appeal against the refusal to admit the appellant to bail is dismissed.
2. The matter is regarded finalised and removed from the roll.

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D N USIKU

Judge

[8] *Charlotte Helena Botha vs State* CA 70/95 p.25.

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H C JANUARY

Judge

APPEARANCES

APPELLANT:	Ms T Klazen Directorate of Legal Aid, Swakopmund
RESPONDENT:	Ms Ndlovu Office of the Prosecutor-General, Windhoek