

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 1/2018

In the matter between:

JACO KENNEDY

APPLICANT

And

THE STATE

REPOUDENT

Neutral citation: *Kennedy v State* (CC 1/2018) [2023] NAHCMD 551 (7 September 2023)

Coram: TOMMASI J

Heard: 2 and 21 August 2023

Delivered: 7 September 2023

Flynote: Criminal Law – All bail applications — Court to balance the need to preserve the liberty of individuals presumed innocent until proven guilty on one hand

and the interest of the public and the administration of justice on the other hand — Bail on new facts — Whether the applicant adduced new facts (i.e. which did not exist at the hearing of an earlier bail application(s) – If indeed, court to consider both new and old and decide on the totality of those facts whether or not the applicant can be released on bail with conditions, if any.

Summary: The applicant applied in the district court to be released on bail pending his criminal trial, which application was dismissed. The applicants brought an application in this court to be released on new facts but that application was dismissed. The applicant now renews his application to be released on bail on new facts.

Held, that the preliminary prerequisite for release on new facts is that such facts must be new and facts both old and new must be considered in order to determine whether the applicant ought to be released on bail. The application by the applicant to be released on bail, is dismissed.

ORDER

The applicant's application to be released on bail is dismissed.

JUDGMENT

TOMMASI J:

Introduction

[1] The applicant brought an application on new facts, launched on 17 July 2023 for the court to release him on bail pending trial which commenced on 7 April 2021. The applicant testified under oath.

[2] The application is opposed by the respondent. The respondent did not call any witnesses in rebuttal.

[3] The following are the grounds of the bail application:

1. Time spent in custody since last bail ruling on 17 July 2020 impacting the following:

- (a) Changes in personal circumstances;
- (b) Expert witness fees;
- (c) Relocated employment offer;
- (d) Stealthy encroachment on fair trial rights under Article 12 of the Constitution;
- (e) Invasion of dignity and self-worth under Article 8 of the Constitution.

2. Likelihood of time in custody prolonged due to –

- (a) Pending s 158A of the Criminal Procedure Act 51 of 1955 (the CPA) constitutional challenge (Case No: HC-MD-CIV-MOT-GEN-2022/00266);
- (b) Handwriting expert witness searched by the State.

3. Diminished *prima facie* case and propensity in respect of the following –

- (a) Ms Sara Boois trial court evidence of 7 March 2022;
- (b) Medical practitioner's opinion on J88 medical report on 31 December 2015;
- (c) Passing of Dr Ludik and coming into operation of s 17, 21 and 25 of Electronic Transactions Act 4 of 2019.

4. Eroded risk of interference with witnesses and or complainant.

5. Petition by members of the public.

[4] This issue for determination by this court is whether the facts stated by the applicant are indeed new facts. If that question is answered in the affirmative, the next question is whether, on the totality of the facts both old and new, the applicant must be admitted to bail.

Bail application held in 2016 by Magistrate Kubersky

[5] In light of the fact that the court must consider both old and new facts, it is considered expedient to re-state the old facts as per the reasons provided by the district court. They are as follows:

Personal Circumstances

[6] At the time of the bail application, the applicant's wife was employed at Air Namibia. He testified that he maintains four minor children, two of whom were under the age of ten. He also maintains his mother as his brother was in no position to financially assist his mother. He is a director of Oops Group International, but there are other people employed in running it, although he is involved in the strategic direction of the company. The court was not satisfied that the applicant has discharged the onus to prove that his dependants and his business will suffer prejudice if he is not released on bail. The magistrate concluded that it would not be in the interest of justice to admit the accused to bail based on his personal circumstances.

Strength of the State's case

[7] The applicant testified that he went to a night club in Khomasdal on 30 December 2015 with his cousin. He dropped off his cousin and went to Spar to withdraw money. He thereafter, drove home. His wife took the keys of the car at around 06h00, the morning of 31 December 2015. He then went to his neighbour and they continued drinking until about 08h00. His neighbour was out of town and was unable to testify. He

denied knowing the complainant and that he was with her the morning of 31 December 2015.

[8] The State called the complainant, her friend, Sara Boois, and the investigating officer, Ms Nangolo to testify. Ms Nangolo testified that there was a strong case because the complainant provided them with the car registration number of the applicant as well as his cell phone number. At that time the rape kit was taken but not yet sent. She considered the account of the complainant as to how the rape took place and the fact that both she and her friend were able to take down the registration number of the vehicle.

[9] The magistrate took into consideration some inconsistencies in the testimony of the State witnesses but, citing authority, concluded that contradictions *per se* do not lead to the rejection of the witnesses' evidence. She concluded that, on a preponderance of probability, the applicant was involved in the commission of the alleged offence also taking into consideration his failure to call witnesses who were available to confirm his alibi. She concluded that the applicant has been charged with a serious offence and if convicted, a substantial sentence of imprisonment would in all probability be imposed. She found that this fact alone would be sufficient to permit her to form the opinion that it would not be in the interest of the public or the administration of justice to release the applicant on bail.

[10] The magistrate considered the complainant's testimony regarding several calls received from people she did not know. She considered the fact that the complainant felt threatened and scarred as she did not know the people calling her and she felt they could hurt her at any time. The court was satisfied that there was interference with the complainant and linked it to the applicant.

[11] The magistrate considered that it was a gender based violence offence, which is a serious problem in Namibia. She considered the fact that there was another similar matter pending although it might be premature for her to say that the applicant has a

propensity to commit similar offence before a conviction. She, nevertheless, concluded that his continued involvement in these similar cases is a factor which cannot be simply ignored.

[12] The magistrate considered the argument relating to the applicant's constitutional rights but concluded that these rights are not absolute but circumscribed and subject to exceptions. The magistrate concluded further that his rights should be read in context of other provisions of the Constitution, which provide for the protection of fundamental rights of all citizens or subjects.

[13] The magistrate concluded thus:

'Having applied the proportionality test of the interest of justice against the deprivation of the accused personal freedom, I have come to the conclusion that the interest of justice by far outweighs the interest of the applicant. Thus the interest of justice will be prejudiced if the accused is released on bail because he is likely to commit further offences, interfere with the investigations and hinder the safety of the complainant.'

Bail application on new facts delivered on 17 July 2020

[14] The new facts presented at this applicant was following aspects:

- (a) The health of the applicant;
- (b) New evidence in the form of social media communications between the applicant and the complainant which came to light after the bail application in the district court.
- (c) The employment offer received by the applicant.

[15] This court found that:

- (a) The offence is serious and that it is similar in nature to the offence the applicant had bail on;

(b)The applicant blatantly lied to the district magistrate that he was not in any way involved with or in the presence of the complainant when he admitted during this hearing that they had consensual sex. The court found that the existence of a *prima facie* case against the applicant remained as well as the concern that he has the propensity to commit similar offences;

(c) The copy of a WhatsApp message indicated that it was sent by the complainant to the applicant on 31 December 2015. It therefore, existed at the time the first bail application was heard and no plausible explanation was given as to why it was only discovered much later;

(d)That the State proved that there was interference by the applicant in that he called and sent text messages to the complainant;

(e) The court was not in a position to determine whether the printed copies of Facebook communications constituted *prima facie* evidence of the existence of communication between the applicant and the complainant. The court concluded that this ought to be determined during trial;

(f) This court concluded that despite the medical condition of the applicant and employment opportunity and the offer for strict bail conditions that it would not be in the interest of the proper administration of justice to admit the applicant to bail.

The current bail application

Changed Personal Circumstances

[16] The applicant mentions that he has been in custody for seven years and that this has negatively impacted his personal circumstances. His wife, who was employed by

Air Namibia, has now been retrenched. His family is now without any income. His absence from his household adversely affected the minor children psychologically. He testified that the previous employment offer still stands although it has been modified slightly.

[17] The respondent submits that these allegations are unsubstantiated and there is nothing to show that the children are psychologically impacted as this is just the opinion of the applicant. Ms Nyoni, counsel for the respondent (referred to as the State), argued that his obligation to maintain his children was considered in the first bail hearing and the fact that they would be suffering is not a new fact. Citing the case of *Nel v State*¹ she argued that even if it is considered to be new facts, his personal circumstances and the financial hardship of his family are not relevant.

[18] The fact that the effluxion of time brought about changes in the circumstances of the applicant is apparent. His wife lost her employment and the children are older. The impact of the applicant's lengthy absence in the lives of his children does not require a psychologist report. It is not hard to imagine that this would in fact negatively impact their well-being. This court is not entirely unmoved by the plight of the applicant's wife and children, but it has the duty to balance the interest of the applicant with that of the administration of justice. In *S v Gustavo*,² the court held that the rule of law, a foundational principle of our Constitution and the principle of accountability inherent in our constitutional values require the State to prosecute those who transgress the law without fear or favour in order to uphold and protect the constitution itself. It held that the interest of the public is served by the State addressing serious crime and the scourge of corruption within the operation of the rule of law.

[19] In *S v Ali*³ that court had the following to say:

¹ *Nel v State* (HC-MD-CRI-APP-CAL-2021/00052) [2021] NAHCMD 579 (9 December 2021).

² *S v Gustavo*, SA 58/2022 delivered on 2 December 2022.

³ *S v Ali* 2011 (11) (1) SACR 34 (EP).

'[20] Financial loss is an inevitable consequence of the incarceration of any gainfully employed person. In the present case, the evidence does not go so far as to prove that, straitened as their circumstances may be, the appellant's dependants will starve if he is not released to fend for them.'

[20] The above is the unfortunate reality. The court, although mindful of the personal circumstances of the family of the applicant, must uphold the public interest and the administration of justice.

Stealthily encroachment on fair trial rights and likelihood of time in custody to be prolonged

Delay as a result of the Constitutional Challenge

[21] The applicant initiated a constitutional challenge on 16 June 2022, and same is pending before the High Court under case number HC-MD-CIV-MOT-GEN-2022/00266. The pleadings therein were closed on 21 June 2023, and a case management conference report was to be filed in terms of rule 71 on or before 16 August 2023. The matter was postponed for a case management hearing on 21 August 2023.

[22] The constitutional challenge was triggered by the State's application in terms of s 158A of the Criminal Procedure Act, for the court to order that special arrangements be made for the complainants to testify. The applicant opposed this application, but the court granted the application of the State. Special arrangements were made for these two witnesses to testify, but before they could do so, the above constitutional challenge was brought on notice of motion. The result of this application was that the testimony of these two complainants could not proceed pending the outcome of the application. The applicant foresees that this would delay the matter even further as he envisioned that he may, depending on the outcome, take the matter on appeal. Naturally, this would also prolong his pre-trial incarceration. The applicant's counsel's contention is that the Constitution provides that any person who feels aggrieved may challenge a law under Article 25 of the Constitution.

Handwriting expert searched by the state

[23] During the previous bail application, a report by Dr Ludik was referred to. He seemingly identified the handwriting on a statement supposedly written by the complainant, to be that of the applicant. Dr Ludik passed on in June 2022, two years after the last bail application. In an affidavit dated 12 January 2023, seven months after this information was known to the State, the Prosecutor General indicated that she intends to obtain the services of another handwriting expert for the trial. Counsel for the applicant argued that it is now 13 months since the passing of Dr Ludik and the respondent is yet to enlist the service of a handwriting expert. He argued that it is unknown how long it will take the Prosecutor General to enlist the service of another expert witness. He submitted that it is logical that, upon the applicant receiving the respondent's report, the applicant may call upon his own expert witness in rebuttal. This would naturally delay the matter and further prolong the incarceration.

[24] The State provided the court with a long list of exhibits which is intended to prove that it is the applicant who is delaying the finalisation of the matter. Since the last bail hearing, there has been an application for a motivated docket index and the trial proceeded when this application was refused. When the two complainants were due to testify, an application was brought to make special arrangements to be made for them to testify. This was opposed but the application was nevertheless granted. This led to the current constitutional challenge of s 158A of the Criminal Procedure Act. Despite an undertaking that the trial would proceed in respect of the other witnesses, an application was brought for the recusal of the State Prosecutor. Ms Nyoni stressed that there was no delay in commencing with and proceeding with the trial once the interlocutory applications were dealt with. It is not disputed that the State led the evidence of witnesses when the opportunity presented itself and only stopped when faced with another interlocutory application by the applicant.

[25] The criminal trial has commenced and there has been various interlocutory applications brought by the applicant which caused or is causing a delay in the prosecution. Much of this delay was as a result of the applicant exercising his rights guaranteed under the Constitution. The applicant has every right to bring interlocutory applications and to challenge the constitutionality of statutory provisions but the natural consequences thereof is that it takes time for these interlocutory matters to be decided. The inevitable delay in the finalisation of this constitutional challenge will provide the State with ample opportunity to obtain a new handwriting expert and to timeously disclose the report of the findings to the applicant in order for him to obtain a rebuttal expert witness, if necessary.

[26] The length of the applicant's pre-trial incarceration and the delay in finalising the trial remains a concern for this court. A period of seven years pre-trial incarceration is disturbing but the court is mindful that there has been no tardiness by the State to prosecute. The delay is furthermore, not only prejudicial to the applicant, but also to the State as the delay impacts on the memory of witnesses and some witnesses may no longer be available to testify.

[27] The launching of a constitutional challenge and the resultant delay it may cause is undoubtedly a new development in the trial and this new fact must be considered against the totality of all the facts whether the court ought to admit the applicant to bail.

[28] In the *S v Gustavo*⁴, the court stated the following:

'The fact that the trial would be more protracted because of the joinder could not of its own (together with the completion of the investigation) have had an impact on the earlier refusal of bail by reason of it being in the interest of the public or administration of justice to decline it.'

Expert Evidence and offer of employment and impact on his self-worth

⁴ See footnote 2 above.

[29] It was further submitted by applicant's counsel that the lengthy pre-trial incarceration and his inability to earn an income is now encroaching on his right to a fair trial. He requires the services of a medical doctor practicing in Gansbaai, South Africa, to give her expert testimony in respect of the evidence of the State expert witness, Dr Kapupa, who testified in the criminal trial on 14 July 2022. She may also challenge the medical report compiled by Dr Kampungu. The applicant produced a quotation for the service of Dr Kotze. She requires a deposit for her traveling and accommodation. The remainder of her invoice may be paid later. The Directorate of Legal Aid, according to the applicant, only pays once the invoice is submitted. The applicant indicates that he would be able to pay the deposit and his legal representation if he is permitted to work.

[30] He maintains that his pre-trial incarceration infringes on his right in terms of Article 12(1)(d) of the Constitution which provides that:

'All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.'

[31] Counsel for the applicant submits that the applicant's continued incarceration stealthily encroaches on his right to adequately prepare for and to present his defence in terms Article 12(1)(e) of the Constitution. Due to his wife's retrenchment and his continued incarceration, it is impossible to generate the funds necessary to pay for the expert fees. The State, in contrast, has a tremendous advantage over the applicant due to their vast financial resources for purposes of trial. The applicant's testimony, so he argues, would carry less weight against the State's medical expert simply because he is not a medical expert.

[32] He further argues that the interest of justice does not only mean conviction, but also acquittal and such involves a process where the court must be able to receive all relevant information and or evidence before passing a judgment. Therefore, it is in the

interest of justice that the applicant be released on bail to enable him to secure the services of medical expert who can test the two medical experts of the respondent.

[33] The applicant testified that around the end of August and early September 2022, the owner of 318 Accounting Executives offered him a changed or altered terms of employment opportunity. At first glance, this may not appear to be a new fact as it was raised in the previous bail application. However, it is submitted that this factor together with change in personal circumstances, the loss of employment by the applicant's wife, the need to pay for the expert witness, makes this a new fact and an important one for that matter. It will provide the applicant with an immediate opportunity to pay for his medical expert and care for his minor children.

[34] It is the testimony of the applicant that his inability to care for his children and pay an expert witness due to his long incarceration against the mighty financial arm of the respondent leaves him undignified and questioning his self-worth. The Constitution guarantees right to dignity under Article 8. In amplification of his case, the applicant referred to *Stimela and Another v The State*⁵ in Botswana, and *S v Acheson*.⁶

[35] Ms Nyoni argued that the issue of expert witnesses surfaced in the previous bail application and pointed out that there is absolutely nothing placed before this court regarding this issue and the onus is on the applicant to substantiate the new facts. She submitted that the employment offer is not a new fact. She argues that the applicant is deprived of personal liberty in accordance with procedures established by law and in this regard she refers this court to case law commenting on the limitations of constitutional rights.

[36] The applicant places great reliance on the following statement by Dingake J in the matter of *Setimela and Another v The State*:

⁵ *Stimela and another v The State* 2011(92) BLR 1081 HC (21 December 2011).

⁶ *S v Acheson* 1991 NR 1 (HC).

'It seems clear to me that a prison environment may not be necessarily conducive to preparing one's defence. Prosecution is in some respects similar to a boxing match. It would seem ex-facie unfair that one of the contestants in the boxing match should remain chained whilst the other is free to roam freely in search of evidence that can nail the chained contestant without the said contestant being granted the opportunity to do likewise. The principle of equality of arms suggests that as much as practically possible the protagonists (accused and State) must be afforded equal opportunities to gather evidence that may support their respective cases. The court as a neutral umpire, must as much as possible try to place the parties at par so that justice may be done.' [my emphasis]

[37] The State relies on *S v Du Plessis and Another*⁷ where O'Linn J, as he then was, stated the following:

'It is apposite here to deal briefly with the continuous and, it seems, selective emphasis placed by some accused persons and their legal representatives on certain sections of the Namibian Constitution and certain fundamental rights such as "the liberty of the subject", "a fair trial" and the principle that an accused person is "regarded as innocent until proved guilty".

These very important fundamental rights are, however, not absolute but circumscribed and subject to exceptions.

The particular right relied on must be read in context with other provisions of the Constitution which provide for the protection of the fundamental rights of all the citizens or subjects, which provides for responsibilities of the subject, for the maintenance of law and order, for the protection of the very Constitution in which the rights are entrenched and for the survival of a free, democratic and civilised state.' [my emphasis]

[38] Ms Nyoni referred this court to the matter of *Pienaar v The State*⁸ where Mainga JA makes reference to the fact that Article 11 of the Constitution of Namibia sanctions arrest and detentions, provided it is not arbitrary and that Article 7 protects personal liberty but provides further for an exception when liberty is deprived according to the procedures established by law.

⁷ *S v Du Plessis and another* 1992 NR 74 (HC) at 81.

⁸ *Pienaar v The State* Case SA13/2016 (Delivered on 13 February 2017).

[39] In *S v Gustavo*⁹, the court held that, in dealing with applications for bail, a court engages in a balancing exercise – by balancing the need to preserve liberty of individuals presumed innocent until proven guilty and the interest of the due administration of justice on the other hand. In the latter regard, relevant considerations are the seriousness of the offence, the strength of the State's case as well as whether the accused will stand trial, and the likelihood of interference with the investigation and witnesses. By engaging in this balancing process, the courts exercise discretion to decide whether a person in custody awaiting trial should or should not be released.

[40] The case relied upon by the applicant in this regard is a foreign case. As can be seen there is ample authority, in this jurisdiction, to guide this court. This is not to say that the principles enunciated therein is at variance with the approach in this jurisdiction, but practitioners should be careful when citing foreign case law with a different statutory framework, which bears on the subject matter. The petitioners before that court furthermore placed evidence before it which, *prima facie*, supports their claim of innocence. This factor greatly persuaded that court to admit the petitioners to bail.

[41] It is my considered view that the incarceration of the applicant is lawful and the infringements complained of are unfortunately a natural outflow of such incarceration. It is not a new fact, but the extent to which his incarceration is impacting on his right to secure witnesses is a factor this court must weigh against the interest of the public or the administration of justice.

Diminished prima facie case and propensity in respect of the following

[42] The applicant indicated that Ms Boois gave her testimony on 7 March 2022 and the applicant obtained a medical opinion on the J88 (medical report) of the complainant. He submitted that in addition to the passing of Dr Ludik and the coming into operations of the Electronic Transactions Act 4 of 2019 (sections 17, 21 and 25) greatly diminishes

⁹ See footnote 2 above.

the strength of the State's case, and consequently the applicant's propensity to commit similar offences.

[43] Counsel for the applicant kick started this aspect with reiteration that it is not the position of the applicant that rape is not a serious offence. The contention by the applicant's counsel is that even convicted offenders are granted bail. In amplification, counsel referred to the case of *Vincent Kapumburu Likoro v S*,¹⁰ where the appellant was granted bail in the High Court pending his appeal to the Supreme Court. He faced charges of rape and sentenced to ten years imprisonment.

[44] Counsel for the applicant argued that, as it stands, Ms Boois and Dr Kambungu are the main witnesses in respect of the rape charge in this case against the applicant.

Medical Evidence

[45] For some reason, Dr Kapupa testified on the report by Dr Kambungu and drew conclusions of forceful penetration, whereas Dr Kambungu did not. Counsel for the applicant submitted that there is a need for a professional medical practitioner to fill the void left by Dr Kambungu. The applicant produced a medical opinion by a medical expert, Dr V Morkel, regarding the medical report compiled by Dr Kambungu. The report was obtained in response to the testimony of Dr Kapupa.

[46] Ms Nyoni had some difficulty in understanding the arguments of applicant's counsel and I must say that it is rather confusing. It is not clear why Dr Kapupa testified on the medical report compiled by Dr Kambungu. It can, however, be discerned that the applicant is of the view that, given the expert opinion of Dr Morkel, which would be produced in his defence, the State would not be able to prove that physical force was used by the applicant during the sexual act. Counsel for the applicant argued that the medical opinion of Dr Morkel substantially diminishes the case of the State and strengthens the case of the applicant.

¹⁰ *Vincent Kapumburu Likoro v S* SCA 19/2018 (12 April 2022).

Testimony of Ms Boois

[47] The applicant's counsel pointed out that neither Ms Boois nor the complainant testified before the magistrate when the complainant sent the text message of being raped. The complainant informed the investigating officer, Ms Nangolo, that on 31 December 2015 at 07h00, she was standing near Woermanbrock Supermarket, in Otjomuise, and around that time she got into the applicant's vehicle.

[48] Counsel for the applicant further submitted that Ms Boois' testimony is that she received a text message from the complainant by 06h45 on 31 December 2015 saying: 'Help I am being raped'. She testified that the complainant told her that she was able to send a text message behind her back while the applicant was on top of her busy raping her. He submitted that there was a discrepancy in her testimony and the report of the complainant made to Ms Nangolo. He refers to the time given by the complainant to the investigating officer (by 07h00) and the testimony of Ms Boois (06h45) and argues that the text message sent by the complainant, in terms of this evidence, was sent before the complainant even got into the vehicle of the applicant and therefore, before the time the complainant was raped.

[49] Another point raised by the applicant's counsel is that the complainant and Ms Boois indicated that the text messages were still on the cell phones during the bail application, whereas Ms Boois, during trial, indicated that both her cell phone and the text messages cannot be produced.

[50] The applicant's counsel submitted that Ms Boois testified that the applicant gave his cell phone number and that he dropped the complainant off at her work. He argues that these acts are inconsistent with the acts of a violent rapist. He submitted that there is no evidence of coercive circumstances or that the complainant was unlawfully detained by the applicant. The applicant's position is that this is a new fact which diminishes the *prima facie* case of the State.

[51] Ms Nyoni submitted that it can be clearly discerned from the transcript which was handed into evidence that:

- (a) The complainant and Ms Boois were supposed to get a taxi together to work.
- (b) The complainant got a lift and proceeded ahead of her.
- (c) The complainant sent her text message asking for help stating that she was being raped at the side of Vaalhuis.
- (d) The complainant later sent her a text message asking her to stand outside because the person who raped her was driving her to work and she wanted this witness to take down the registration number of the vehicle.
- (e) Ms Boois was standing outside when the complainant was dropped by a white Mercedes Benz and she took down the registration number.
- (f) She observed the complainant crying when she got out of the vehicle.
- (g) The complainant told her that she wanted to go make a report.
- (h) Ms Boois accompanied her to the police station at Katutura.
- (i) Ms Boois confirmed that to her knowledge the complainant could send a text message on her phone without looking at it.
- (j) Ms Boois testified that she was able to use her Samsung phone without looking at it.
- (k) Ms Boois in cross-examination pointed out the communication between the complainant and herself.

[52] Ms Nyoni argued that the attempt to say that the evidence of the witness Ms Boois, diminishes the *prima facie* case is a fallacy. She submitted that this court, in the previous bail application, found that the *prima facie* case against the applicant remains and consequently, the concern that the applicant has a propensity to commit similar crimes also remains. She argued that the finding that there is a likelihood that the applicant, if released on bail would commit similar crimes, was not made in a vacuum.

[53] It must be emphasised that it is not the duty of this court to determine the guilt or innocence of an accused. This court, in order to consider whether or not to admit the applicant to bail, must consider the strength of the State's case. The fact that Ms Boois already testified and that there are some discrepancies between her testimony and the statement made by the complainant to the investigating officer and any other discrepancies challenges her credibility as a witness. The credibility and the absence of the phone and copies of the text messages which are no longer available must be assessed by the trial court after considering the evidence given by that witness in relation to the evidence as a whole. This court cannot reach a conclusion that the *prima facie* case is diminished by considering the testimony of only one witness, particularly when the complainant has not yet testified.

[54] The medical report clearly states that there are no injuries noted. This is a neutral fact. It may operate in favour of the applicant but that would largely depend on the evidence as a whole. This court, without the benefit of all the evidence, cannot conclude that this evidence diminishes the *prima facie* case against the applicant. There is *prima facie* evidence by the complainant that physical force was applied and that she was unlawfully detained.

Passing of Dr Ludik and coming into operation of the Electronic Transaction Act 4 of 2019

[55] The applicant's counsel submitted that this court indicated that the social media communications are of a technical nature and that it would be best left for the trial. He submitted that the Electronic Transaction Act 4 of 2019 came into operation on 20 May 2020 by which time the applicant already testified in his previous bail application. According to him sections 17, 21 and 25 of this Act gives legal effect or recognition to the Facebook inbox conversations between the applicant and the complainant, in particular the conversation of September 2017. The opinion given by Dr Ludik about the Facebook account of the complainant cannot be relied on by the State, given the fact of his demise.

[56] Ms Nyoni reminded the court that it admitted the Facebook messages into evidence but noted that the veracity thereof was disputed. She submitted that it is not a new fact and that the applicant's attempt to invoke the provisions of the Electronic Transaction Act 4 of 2019 cannot make them a new fact.

[57] The sections of the Electronic Transaction Act 4 of 2019 referred to gives guidelines for the legal recognition of data messages (s 17), original information (s 21) and the admissibility and evidential weight of data messages and computer evidence (s 25). The Facebook messages provided to the court, in the previous bail application, was admitted but found wanting for lack of authentication. The court already expressed itself in this regard and the provision of the Electronic Transaction Act 4 of 2019, if anything, confirms this court's ruling that it is best left for the trial court to determine whether the printouts would be admissible if regard is had to the provisions of s 25 (4) which reads as follow:

'(4) A data message made by or on behalf of a person in the ordinary course of business, or a copy or printout of or an extract from such data message **certified to be correct**, is admissible in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organisation or any other law or the common law, as evidence of the facts contained in such record, copy, printout or extract against any person, if-

(a) an affidavit has been made by the person who was in control of the information system at the time when the data message was created;

(b) the facts stated in the affidavit justify a finding on the reliability of the manner in which the data message has been generated, stored or communicated;

(c) the facts stated in the affidavit justify a conclusion on the reliability of the manner in which the integrity of the data message was maintained; and

(d) the facts stated in the affidavit justify a conclusion on the manner in which the originator of the data message has been identified if the identity of the originator is relevant to a matter in dispute.'

[58] It is my considered view that the commencement of the Electronic Transaction Act 4 of 2019 reinforces rather than changes the court's view that the admissibility and authenticity of these messages should be determined by the trial court.

[59] The court's initial finding that there is a strong *prima facie* case against the applicant remains. This is the second offence of this nature which the applicant has been charged with.

Eroded risk of interference with witness or complainant

[60] The applicant's counsel argued that Ms Boois made no allegation of interference by the applicant. There is also no further evidence of any interference for the last three years by the complainant although he had access to cell phones provided by the Correctional Services under supervision. He also testified that he has access to a telephone system at Windhoek Correctional Services called Telio. He is allowed to upload his own airtime and he can make calls during the day.

[61] The applicant's counsel argued that in terms of s 60 of the Criminal Procedure Act, the respondent ought to obtain a statement from the complainant to gauge her attitude about this bail application. He pointed out that the State failed to call the complainant and or the investigating officer to establish if she still objects to the bail application. This according to the applicant's counsel, is prescribed by law and failure to comply therewith ought to be seen favourably to the applicant's cause. The applicant has, for seven years, not attempted to interfere with the complainant and must be allowed to redeem himself. Convicted offenders are given opportunity for redemption. In this regard counsel referred the court to *S v Bennet*¹¹ where the court held the following:

'It appears to me that, as applicant thus far not interfered with investigation, the proper approach should be that, unless the state can state that there is a real risk that he will merely may, there does not appear to be a reasonable possibility of such interference.'

¹¹ *S v Bennet* 1976 (3) SA 562 (C) 655G-H.

[62] Ms Nyoni argued that there was never any issue with the applicant interfering with Ms Boois and that the court found that there was proven interference with the complainant. She holds the view that the evidence of Ms Boois in fact strengthens the case against the applicant.

[63] Section 60A of the Criminal Procedure Act, indeed provides for the rights of a complainant in bail applications. It requires that a complainant be notified of her rights and that she be informed of the date and time of the first appearance of the accused in court and of her rights in respect of the proceedings. This clearly has application to the bail proceedings at or after the first appearance of the court. In this matter, the complainant not only attended the first proceedings but testified. This court is satisfied that the complainant has made her position clear when it comes to the release of the applicant on bail.

[64] The fact that there has been no further interference, unfortunately, does not mean that the initial interference must be ignored. The cell phone usage availed to the applicant is supervised and it would be easily tracked if there are allegations of interference. No such supervision would be available once the applicant is released on bail.

Petition by members of the public

[65] The applicant submitted a petition by members of the public calling for his release. The respondent did not dispute that the group are members of his family and friends.

[66] Ms Nyoni urged this court to disregard this petition which was signed by the wife, family and friends of the applicant.

[67] This court cannot simply disregard the petition since it represents the sentiments of those close to the applicant. Their concerns must, however, be weighed against the

interest of the public and the administration of justice. This requires of the court to look at a broader audience and not only the interest of those that are close to the applicant.

[68] In conclusion, having considered the totality of the facts placed before me, both old and new, the court is of the considered view that it would not be in the interest of the public and the administration of justice to release the applicant on bail.

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

The applicant's application to be released on bail is dismissed.

M A TOMMASI
Judge

APPEARANCES

PLAINTIFF: B Isaacks
 Of Isaacks & Associates,
 Windhoek

RESPONDENT C Nyoni
 Of Office of the Prosecutor General,
 Windhoek.