

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

BAIL APPEAL JUDGMENT

Case No.: HC-NLD-CRI-APP-CAL-2019/00041

In the matter between:

WILLIAM GAESEB

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Gaeseb v S* (HC-NLD-CRI-APP-CAL-2019/00041) [2019] NAHCNLD 134 (02 December 2019)

Coram: NAMWEYA, AJ

Heard: 29 October 2019

Delivered: 02 December 2019

Flynote: Criminal Procedure – Bail – Appeal against magistrate’s refusal to grant bail – High Court hearing appeal can only set magistrate’s decision aside if it was clearly

wrong – *Onus* – Applicant bearing *onus* on preponderance of probability to show why he should be released on bail – Magistrate’s decision not wrong – Appeal dismissed.

Summary: Criminal Procedure–Bail Appeal against the magistrate’s refusal to grant bail in terms of s 65 of the Criminal Procedure Act 51 of 1977–the appellant having failed to show on a balance of probability why he should be released on bail. That being the case, the court found that the magistrate’s decision not wrong – Appeal dismissed.

ORDER

The appeal is accordingly dismissed.

JUDGMENT

NAMWEYA AJ,

[1] The appellant together with his co-accused brought a formal bail application on 01 March 2019 in the Tsumeb magistrate’s Court where he stood charged on one count of housebreaking with intent to steal and theft and count two of robbery.

[2] The State opposed the application on grounds that the applicant (accused) has a propensity to commit similar offences and that it would not be in the interest of the public nor the administration of justice. After evidence was led by the applicant on one hand and the respondent, the court a quo declined to admit the appellant to bail on 10 April 2019. Being dissatisfied with the magistrate’s refusal to grant him bail the applicant filed his notice of appeal.

[3] The appellant raised the following grounds of appeal:

‘1. The state and investigator officer has fail and error the law with their unnecessary lies and refuge for me to be handed over the copies notes or bail application court order for me to attach it with my notes of appeal bail application.

2. The state has also fail and error the law as she refuse also with the copies of disclosures for me to not find out the truth as their proceed bail application out convineable evidence in this matter, I accuse person don't know about the court order to find out about the truth of my points abd truth of this matter but I will state what iseen and hear in Tsumeb magistrarte , I feel lift out of criminal procedures and Namibian constitution of fair trial.

3. The I.O of this case has give his statement before magistrate that state, I William Gaeseb have four pending cases and compliments of this matter does not want me to be granted bail becaz I am apparently danger to public.all this allegation that I.O give is all lies.

4. The I.O don't have any proof that the public dimostrate against me. The I.O as fail with his investigation and authoritative. The state prosecutor for me to be postpone far seven month between reach November while this matter is all done with investigation’.

The law

[4] Appeals with regard refusal to bail are regulated by s 65 of the Criminal Procedure Act 51 of 1977 which states:

‘(1)(a) Accused who considers himself aggrieved by the refusal by a lower court to admit to bail or by the imposition by such court of a condition of bail ... may appeal against such refusal or imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting’.

In terms of ss (4) ‘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 the judge shall give the decision which in its or his opinion the lower court should have given’.

[5] Van Niekerk J stated in *S v Zemburuka* 2008 (2) NR 737 HC at 738 paragraphs 4 and 5 as follows;

'There is ample authority which emphasises the requirement of clear and specific grounds of appeal and the importance of a proper notice of appeal (see eg S v Horne 1971 (1) SA 630 (C) 631H - 632A; S v Khoza 1979 (4) SA 757 (N) 758B; S v Wellington 1990 NR 20 (HC) (1991 (1) SACR 144) 22G - 23A; S v Kakololo (case No CA 42/2001, unreported, delivered 15 November 2002); S v Kahunga and Another (case No CA 57/2002, unreported, delivered on 18 November 2004). In each case the appeal court would have to interpret the notice of appeal to assess its compliance or otherwise with the requirements set by the law.

In this case, the letter was clearly written by a lay person without assistance of a lawyer. I do not think that an overly fastidious and technical approach should be followed in the circumstances of this case in considering whether it is a notice of appeal. I think justice will be served if the court rather seeks, if possible, to interpret the letter in a manner upholding its validity as a notice of appeal so that the merits of the matter may be dealt with and the appeal may be disposed of. While the letter is not couched in the form and language that a properly drawn notice of appeal should be, the substance of the letter is clear – the accused appeals against sentence because he feels aggrieved by the fact that a sentence of direct imprisonment was imposed.'

Appellant's submissions

[6] The appellant in his very brief submissions stated that he simply wanted to be released on bail due to his medical condition and wanted the investigating officer to provide him with the bail proceedings as stating in his notice of appeal.

Respondent's submissions

[7] Mr Andreas in his submissions stated that it has not been demonstrated that the court a quo exercised its judicial discretion wrongly or

injudiciously. The court of appeal will only interfere if the court acted fide or did not apply its mind.

[8] He submitted further that the learned magistrate in her ruling further expressed herself that:

‘...having considered the evidence and the arguments, it seems to me that the fear that the applicants might commit further crimes is a relevant factor when considering whether bail should be refused on the basis that it is in the interest of the public or the administration of justice that the accused be retained in custody pending his trial. It is evident before this court that the applicants started off with offence of theft and migrated to a more serious offence of housebreaking with intent to steal and theft. The court should weigh the personal circumstances of the applicant as well as the interest of society to determine whether he is fit to be granted bail. It is quite obvious that the applicants have a thread of cases behind them and nothing in their personal circumstances proved that they will not commit similar offences’.

[9] He finally submitted that the appellant has shown a high propensity to commit similar offences’ and that his release would not be in the interest of justice and there is no reason for the appeal court to interfere with the ruling of the trial court.

[10] The Appellant’s brief submissions stating that he simply wanted to be released on bail due to his medical condition and wanted the investigating officer to provide him with the bail proceedings as stating in his notice of appeal is no way a clear ground of appeal as required by Rule 67(1) of the Magistrate’s Court rules. Even if we take it to be noteworthy for the reasons that appellant is lay and could not craft his grounds as required by law, one cannot lose sight that the appellant did not made mention or pointed out of any misdirection or that the court a quo exercised its judicial discretion wrongly or injudiciously. The court of appeal will only interfere if the court acted fide or did not apply its mind.

[11] The rules provide in simple and unambiguous language that the appellant must lodge his notice of appeal in writing in which he must set out “clearly and specifically”

the grounds on which the appeal is based. The purported grounds which the appellant relies on are no grounds at all and his submissions in this court are rather another application of appellant to be released on bail by this court. The requirements as set out in rule 67(1) of the Magistrates Court rules have not been met.

[12] Even if I extend our hand to assist the appellant (as I did) and accept that his grounds of appeal or his submissions in court are noteworthy and can be considered on appeal, the process of bail proceedings and the reasons of the magistrate in court a quo are candidly clear and compelling for this court not to interfere with the ruling of the trial court. In her ruling, the magistrate illustrated and applied her mind on the legal principles related to bail. She also narrated to what was proven on the balance probabilities that; there is fear that the applicants might commit further crimes, as appellant has propensity to commit similar crimes; the basis that it is in the interest of the public or the administration of justice that the accused be retained in custody pending his trial is a relevant factor when considering whether bail should be refused or not. She further stated that evident before the court proved that the applicants started off with offence of theft and migrated to a more serious offence of housebreaking with intent to steal and theft. She also weighed the personal circumstances of the applicant as well as the interest of society to determine whether applicants are fit to be granted bail. It was obvious to her that the applicants having a thread of cases behind them and nothing in their personal circumstances proved that they will not commit similar offences, she denied the applicants bail.

[13] The appellant did not make any reference to anything as to where the magistrate did wrong or misdirected herself on. Basically, appellant's grounds are senseless and cannot be adjudicated on.

[14] In the end, this court concluded that the court a quo exercised its judicial discretion judiciously. The court of appeal will only interfere if the court acted fide or did not apply its mind and that is not the case in this case.

[15] In the result the appeal is dismissed.

M Namweya

Acting Judge

APPEARANCES:

FOR THE APPELLANT:

W Gaeseb

Of Tsumeb Police Station Holding Cells,
Tsumeb

FOR THE RESPONDENT:

J Andreas

Office of the Prosecutor-General, Oshakati