

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

BAIL APPEAL JUDGMENT

CASE NO: HC-NLD-CRI-APP-CAL-2019/00006

In the matter between:

AINA SIKWAYA

APPELLANT

v

THE STATE

RESPONDENT

Neutral citation: *Sikwaya v S* (HC-NLD-CRI-APP-CAL-2019/00006) [2019] NAHCNLD
47 (9 May 2019)

Coram: JANUARY J et SALIONGA J

Heard: 26 March 2019

Delivered: 09 May 2019

Flynote: Criminal procedure — Bail Appeal – Appellant represented – No direct evidence of a strong *prima facie* case – Strong circumstantial evidence – No prospects of success – Appeal dismissed.

Summary: Appellant in this matter stands charged in the magistrate's court of Oshakati on a charge of murder. The appellant, a witness on her behalf and the investigating officer testified in the bail application in the court *a quo*. The appellant intends to plead not guilty. She alleges that it must have been the brother of the deceased that murdered him. She testified that the deceased assaulted her. The brother of the deceased came to her rescue. According to her, the deceased produced a knife whereupon she ran a distance away. The brother to the deceased called her back. She saw the deceased in a pool of blood. The brother handed a knife to her to be handed to the police. After her arrest and upon being charged she did not inform the police of this but admitted that she stabbed the deceased because the brother told her that he cannot take responsibility, because he allegedly had another pending case against him. There is no direct evidence indicating that there is a strong *prima facie* case but strong circumstantial evidence to prove same. There are no prospects of success on appeal. The appeal is consequently dismissed.

ORDER

The appeal is dismissed.

BAIL APPEAL JUDGMENT

JANUARY J (SALIONGA J concurring):

Introduction

[1] The appellant was arrested on 6 April 2018 on a charge of attempted murder. On 9 April 2018, she made her first appearance in the magistrate's court of Oshakati. The charge was however thereafter on 23 May 2018 amended to murder as the victim died in the meantime.

[2] On 28 August 2018, a formal bail application was brought in the magistrate's court of Oshakati. It was dismissed on 10 September 2018. The magistrate found amongst others:

'That the applicant will likely interfere with the State witnesses, given that the applicant's interest cannot outweigh that of the public even with the evidence by the witness of the applicant.'

[3] The appellant is appealing against the refusal to grant her bail.

[4] Ms Amupolo, representing the appellant, states four grounds of appeal submitting:

'That the learned magistrate erred on grounds of fact and/or law by finding that there were signs of interference with State witnesses due to the fact that the appellant made allegations against the first State witness; that the learned magistrate erred on grounds of fact and/or law by finding that there was a prima facie case shown and that this is not a ground of objection to bail; that the learned magistrate erred in fact and/or in law by over-emphasizing the seriousness of the offence against the personal circumstances of the appellant in denying the appellant bail.'

[5] The respondent represented by Mr Andreas opposed the granting of bail on the following grounds; a) Public interest; b) Seriousness of the offence; c) Applicant may interfere with witnesses.

The merits

[6] The appellant testified under oath. She was 18 years old at the time of the bail application. She identified her identity document and a full birth certificate in court. She was born in Oshakati at Uukwanduudhi in Namibia. She was in grade eight at the time. Her mother is alive but her father passed away. The appellant has no children. She has 2 siblings. Her mother receives a disability grant from which the appellant also survives.

The appellant was staying in Onampila before her arrest. She was staying in the deceased's house while attending school. She intends to plead not guilty.

[7] She testified that the deceased and his brother were quarreling a lot whilst she was staying with them. It seems both of them wanted her as a girlfriend. On the day of the incident, the appellant came with the deceased's brother to Oshakati to have a haircut. After that they went to a bar where there was a party. The deceased was consuming alcohol with his friends there. They thereafter decided to go home.

[8] On their way home with the deceased's and his brother a quarrel ensued whereupon the deceased slapped and kicked the appellant on to the ground and continued kicking her. The brother of the deceased allegedly came to the rescue. Allegedly the deceased produced a knife. The deceased was removed from the appellant and she ran a far distance away. The brother of the deceased called the appellant back and handed the knife to her to hand to the police. The appellant believes that it is the deceased's brother that killed the deceased. The appellant was allegedly in a relationship with the brother of the deceased. She stated that the deceased also wanted her as a girlfriend.

[9] The brother of the deceased, Thomas, allegedly denied that he could take the blame for the matter and offered to pay the deceased prior to his death to withdraw the case. The appellant applied for bail because she wants to continue schooling. She is now afraid of Thomas.

[10] In cross-examination, the appellant conceded that murder is a serious offence. She informed one of the investigating officers that she is the one who stabbed the deceased because Thomas told her to say that. The appellant also told the investigating officer that she stabbed the deceased after she had beaten him with a bottle. If granted bail the appellant stated that she will stay away from Thomas and keep a distance between them.

[11] Ms Amupolo called a second witness who knows the appellant and raised her together with the mother. This witness testified that the appellant grew up as an obedient child and was schooling at Onampila combined school. The witness did not know that that appellant was cohabiting with Thomas. The witness stated that if granted bail, the appellant may be accommodated in Walvis Bay. This witness did not have much knowledge of the appellant and knows very little about her.

[12] The respondent called the investigating officer. He stated that he has an objection against the granting of bail on grounds of seriousness of the offence, the public interest and once released appellant may interfere with witnesses. The witness testified that the appellant is directly linked to the case. The evidence of eye witnesses to the fight implicates the appellant. The appellant also told the witness that she was threatened by her boyfriend (Thomas) to say that she committed the offence.

[13] The witness testified that one of the witnesses is the appellant's boyfriend, the other witness is a neighbor and there is a possibility that she may interfere with witnesses. Furthermore the crime is serious and the community is of the view that bail should not be granted as appellant is a stranger to their village.

The law

[14] Section 65(4) of the Criminal Procedure Act (herein CPA) provides that:

'(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 judge shall give the decision which in its or his opinion the lower court should have given.'

[15] The powers of a court of appeal is thus limited where an appellant appeals against the refusal of bail by a lower court.¹

¹ *S v Timotheus* 1995 NR 109 (HC) at 113A-B.

The interpretation and application of this subsection was succinctly dealt with by Hefer J in *S v Barber* 1979 (4) SA 218 (D) at 220E-H:

'It is well known that the powers of this Court are largely limited where that 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 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.' (my emphasis)

[16] The evidence by the investigating officer is scanty and mostly hearsay. Murder is indeed a serious offence and I agree with the magistrate that if there is a conviction it may attract a lengthy period of imprisonment. In my view the magistrate was also correct that the appellant may interfere with witnesses. One of them was her boyfriend and the other a neighbour. She has already implicated the boyfriend and it is likely that they will frustrate the course of justice. It is at this stage also not clear if the appellant has a fixed address. A witness who was called on appellant's behalf only stated that the appellant may be accommodated in Walvis Bay. No fixed address was provided.

[17] In addition section 61 of the CPA empowers the court to refuse bail for certain offences.

'61 Bail in respect of certain offences

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 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.

[sec 61 substituted by sec. 3 of Act 5 of 1991]

Murder is listed as a crime in Part IV of Schedule 2 of the CPA.

[18] The learned magistrate in balancing the interest of justice against the deprivation of freedom of the appellant applied the proportionality test. She concluded that the interest of justice by far outweighs the interest of the applicant. I agree with the magistrate. I do not find any misdirection or error committed by the magistrate or that she exercised her discretion wrongly. The appellant does not have prospects of success on appeal. The appeal consequently stands to be dismissed.

[19] In the result:

The appeal is dismissed.

H C January

Judge

I agree,

J T Salionga

Judge

Appearances:

For the Appellant:

Ms Amupolo

Of Amupolo & Co Inc., Ongwediva

For the Respondent:

Mr Andreas

Of Office of the Prosecutor-General, Oshakati