CASE NO: CA 46/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

DUDLY OCHURUB **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **DAMASEB, JP *et* MAINGA, J**

Heard on: 04 July 2008

Delivered on: 04 July 2008

APPEAL JUDGMENT

DAMASEB, JP [1] This is an appeal against a magistrate's refusal to grant the applicant bail. He is accused of raping a 20 year old married woman in that he, using a knife and a broken bottle, threatened the complainant into submission and had sex with her against her will in a riverbed. He is a 19 year old school leaver, unemployed and lives with his

sister and her husband. He denies the charge of rape and pleads alibi which was backed up under oath by his sister.

[2] The bail was opposed on the grounds that he would, if released, interfere with witnesses and that the complainant fears for her life if he is released because of the threats he allegedly made to her while allegedly raping her. It was also said that the investigation has not yet been completed. The fear of interference is based on an allegation the investigating officer, one Hafeni, says was made to her by the complainant's mother to the effect that after the accused was arrested, his then lawyer, Mr Murorua and the sister of the appellant, went to the complainant's mother's home and asked her that the complainant withdraw the case. The appellant said he was not present and did not instruct his lawyer or sister to take that action.

[3] Complainant's sister, one Xoagoses, testified that indeed she went with Mr Murorua to complainants' mother's home and that the lawyer went there to ask if the complainant could accompany him to the police station to identify the appellant. The complainant said she was at home when this visit took place but said that she never heard the conversation. The complainant's mother was never called to verify the allegation of interference and Hafeni's testimony is therefore hearsay. I am unable to find on the record any evidence that the appellant interfered with the witnesses or that he would interfere with the police investigation. The magistrate's finding that the accused interfered with the complaint and that he might interfere with the police investigations was therefore unsound because it was not supported by the evidence.

[4] As I already said, one of the grounds on which bail was opposed was that the investigation had not yet been completed. The investigating officer said under oath that she needs 2 – 3 months to complete the investigation, including investigating the appellant's alibi. The application for bail was heard and refused on 15 April 2008. Today is 4 July 2008 – i.e. less than 3 months since the application was refused. The magistrate also relied on the ground that the investigation had not yet been completed in refusing bail. (See record p.67) He was however wrong to conclude that bail could not be considered in future if circumstances changed.

[5] I accept that the appellant took the view that appeal was the only avenue open to him in view of the magistrate's conclusion that bail would not be considered at any stage in the future. As I said, the magistrate was plainly wrong in that regard. The appellant would be entitled to approach the magistrate's court if there is a change in circumstances that justifies his being admitted to bail – such as that the investigation had been finalised in the meantime or that the evidence on the docket shows that the state's case is not as strong as it is made out to be.

[6] In *S v Brown* 2004 (8) NCLP 1, paragraph 19, a judgment by myself and Silungwe J concurring it is stated:

> "It is settled law that this Court's powers are limited when sitting as a Court of appeal against a magistrate's refusal to grant bail. The exercise of the magistrate's discretion in a bail application is one this Court is not to interfere with lightly; especially not on the basis that it holds a view different from that which the magistrate formed based on the evidence that was led before him or her. It is only if that discretion had been wrongly exercised that this Court would be free to interfere."

[7] In terms of s61 of Act 51 of 1977:

> "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."

[8] Considering that the appellant's defence is an alibi, which is backed up by his sister who had been part of an attempt to get the complainant (at the very least) to exonerate the appellant, I cannot say that the magistrate was wrong in coming to the conclusion that before the investigation is completed, it would not be in the interest of the administration of justice to admit the applicant to bail at the time the application was made. The appellant had failed to show that the magistrate was wrong in coming to that conclusion.

[9] In the result the appeal is dismissed.

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DAMASEB, JP

I agree

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MAINGA, J

ON BEHALF OF THE APPELLANT: **MR B ISAACKS**

INSTRUCTED BY: **ISAACKS & BENZ INC.**

ON BEHALF OF THE RESPONDENT: **MRS S MILLER**

INSTRUCTED BY: **OFFICE OF THE PROSECUTOR-GENERAL**