"SPECIAL INTEREST"

CASE NO.: CA 80/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

SATHEESKUMAR THULASITHAS	**1ST APPELLANT**
PARARASANINGAM SARANGA	**2ND APPELLANT**
ABDUL KADER JAMAL	**3RD APPELLANT**

and

THE STATE	**RESPONDENT**

CORAM: **DAMASEB, JP *et* VAN NIEKERK, J**

Heard on: 20 November 2009
Delivered on: 20 November 2009
Reasons released on: 26 November 2009

BAIL APPEAL

DAMASEB, JP: [1] This is an appeal against the magistrate's refusal to grant the appellants bail. After hearing oral argument, we made an order dismissing the appeal and advised that our reasons would follow. The following are our reasons.

The test on appeal

[2] As an appellate court we can only set aside a decision refusing or granting bail if we are satisfied that it was wrong. It is settled that that means that the decision to grant bail is in the discretion of the court conducting the bail inquiry. It is a discretion not to be interfered with lightly- especially not on the basis that we think we would have made a different decision if we sat at first instance. We are to interfere only if the discretion was wrongly exercised: And it is wrongly exercised if the court took into account irrelevant considerations, disregarded relevant considerations, applied the law wrongly or got the facts plainly wrong.[1]

The grounds of appeal

[3] It is complained that the magistrate wrongly found that it is in the interest of the administration of justice that the appellants be retained in custody pending trial. The second complaint is that the court wrongly found that the appellants failed to prove they are not a flight risk. Then there is a general complaint about the unreliability of the State's witnesses and that the State failed to prove that it had a strong case against each appellant. The notice of appeal also complains that the court failed to have regard to the fact that the investigation had taken too long to be finalised. In respect of the third appellant it is said that the court wrongly found- against the weight of the evidence- that he was involved in criminal activities in Kenya.

Factual background

[1] *S v Timotheus* 1995 NR 109 (HC) at 113 A-B; *Hans Jurgen Koch v S*, unreported, CA 111/02 at 7-10; *S v Brown* 2004 (8) NCLP 1at 9, Para 19

[4] The three appellants in the order they are cited above, are respectively 1st, 3rd and 5th accused in the main case. They were treated in their bail applications in the court a quo as applicants 1, 2 and 3. They are appellants 1, 2 and 3 in this appeal.

[5] The appellants were arrested on 7 August 2007. The first two appellants were arrested at or near a Bank Windhoek ATM in Katutura. The third appellant was arrested at the Hosea Kutako International Airport upon his arrival in Namibia and after it was established that he was in telephonic contact with the co-accused from which it was established that he was going to arrive in Namibia. The State's case against them in essence is that they are part of a syndicate that made fake ATM cards which were then used to fraudulently withdraw money in Namibia from the accounts of British residents.

[6] Evidence collected by the police and Bank Windhoek shows that Namibia is being used by a group of people to defraud people living in a foreign country by using fake ATM cards of a local bank. There was a surveillance operation conducted since the suspicion was formed as a particular ATM at Katutura's Black Chain was targeted. This led to the arrest of all the appellants on 7 August 2007- one because he was found with incriminating material at the ATM, the other when he came to pick up the latter; and both because incriminating material were found in their lodgings at a guesthouse ; the third person because he maintained telephonic contact with one of the implicated persons and upon arrival in Namibia was found with equipment suited for use in the furtherance of the criminal enterprise which constituted making fake ATM cards and making unauthorised withdrawals from the accounts of unsuspecting foreigners holding cards from their banking institutions.

[7] All three appellants testified in support of their respective bail applications. All three were born in Sri Lanka. The first appellant has since acquired British nationality and holds a British passport. His parents live in Britain. He came to Namibia on holiday in March 2007 and was arrested on 7 August of that year. The second appellant testified that his family lives in Sri Lanka. He came to Namibia in July 2007 on holiday and was arrested on 7 August of that year. He said he was a student in Singapore. The third appellant testified that he is a businessman living in Singapore. He had been to Namibia before when he met first appellant (introduced to him by an acquaintance in London) who asked him to buy for him a money counting machine in Dubai and bring it to Namibia. They all denied involvement in the fraud the State accuses them of. They said they did nothing criminal and intend to stand their trial and to pay substantial amounts of bail. They are prepared to surrender their passports and to be subjected to reporting conditions.

[8] The State called two witnesses in opposition to the bail application. The first witness was James Simasiku Mungawa of the Namibia Police and the responsible investigation officer. He testified that the State has a strong case against the accused all of whom have no ties to Namibia and hailing from jurisdictions that either have no extradition treaty with or no diplomatic presence in Namibia. He testified that the Namibian side of the investigation was completed but that he still requires Interpol's assistance to obtain some statements from the British witnesses. According to Simasiku, the allegations against the appellants relate to credit card fraud involving them withdrawing money using cloned cards from accounts of people in the UK through Namibian banks. Simasiku testified that second appellant was arrested at the Katutura Woerman Brock Shopping Centre in the early morning of 7 August 2007. He had a lot of money and different ATM cards on him when the arrest took place. The first appellant was arrested when he came to pick up

second appellant; while the third appellant was arrested at the HKI airport with equipment believed to be destined for use in furtherance of the criminal enterprise.

[9] After the arrest of first and second appellants, the duo were taken to where they lodged at a guesthouse in Suiderhof and the police retrieved from their rooms a laptop, blank and cloned ATM cards, a machine suited for making cards; and substantial sums of money, in total about N$920 000-00. Some of these cards had the Bank Windhoek colour or logo on them.

[10] Simasiku said he is in possession of statements of some UK residents who were defrauded by the appellants and that they will come and testify at the trial. Simasiku testified that surrendering a passport is not a guarantee against absconding. He cited an example of a Nigerian who surrendered a passport and fled the country and never stood trial.

[11] Upon his arrest, third appellant had with him a bill counting machine and some ultraviolet lighting equipment suited to check if money is counterfeit.

[12] The second witness for the State was Josef Mafwila, employed as a forensic investigator by Bank Windhoek. He is a former police officer. His responsibilities include uncovering fraud against the employer and making criminal complaints to Police on behalf of the Bank. He came to know first and second appellants in August when they were arrested as already described by Simasiku. He also came to know third appellant when he was arrested at HKI airport. He described the events leading up to the arrest as follows:

> "Can you tell the Court as to what was the reason why you arrested them? --- There were some funny credit cards that were retrieved from our ATM machines as from March. As a result of that I initiated an operation with the Crime Investigation Unit so that we can try to apprehend the people who were fabricating these cards. That is how it came that on; let us say the 6th, before the 7th, the operation started on the 6th and then the Accused persons were arrested early morning hours of the 7th."

[13] Mafwila testified that the Bank Windhoek ATM cards found upon the arrest of the appellants were fake but contained genuine information of British residents. A lot of money and lot of cards (20-30 cards) were found. These cards contain information of foreigners and he has a list of those people. Pictures were taken at arrest of items found on the first and second appellants. He corroborated Simasiku that at the guesthouse where first and second appellants lodged, they found equipment that was used to make the fake cards. He described them as follows:

> "---There were some scanning device. There was another machine that was dyeing the colour of Bank Windhoek on the cards. There were blank cards, just which plastic cards, which does not have any information on it. On that other machine which is dyeing the cards there were some cards also, I think maybe 17 of them, i am not sure but it must be there, that had already been dyed one side with the colour of Bank Windhoek. On the other side was still white. So, they were still on the slot."

[14] When asked what his impression was of what he saw he added:

> "According to me, the only decision that I came upon that this was a very big syndicate. We got documents that contained stolen information, whereby it is PIN number of a card and the PIN number as well on that document. Every on the cell phones of the Accused persons, that information was there whereby stealing information in the UK, just "Sms" you the PIN number of that card, the PIN number. There is also a security code, three numbers that is behind the card. If you get that one, you can load that information, download it on another card, you can use it. That information was also found. That on its own, it is clear enough to say that this was a syndicate that was busy with fraudulent

> activities. And the fact that they are using the Bank Windhoek logos and Bank Windhoek, what does it say? --- Yes, it is fraud on its own. Because Bank Windhoek does not use unknown people who stays in guesthouse, we have big companies that have those type of tenders. Where it is in South Africa, we send out things there and then they are done, but in Suiderhof at a guesthouse. At a guesthouse? --- Yes."

[15] Mafwila, whom the court found to be a credible witness, said about N$40 000 was found on the first and second appellants upon arrest. His investigation showed that since March 2007 an amount of about N$1,4 million had been withdrawn with fake cards and that attempts had been made to withdraw a further about N$2,8 million. He added that the fraud placed the reputation of Bank Windhoek in jeopardy as people felt that Bank Windhoek cards are easily faked. Mafwila confirmed that in his previous experience as a police officer, foreigners on bail who had surrendered passports had absconded. He stated that the fact that one of the suspected fraudsters is out on bail and had not absconded is no guarantee that once all of them are out on bail, they would all not abscond. Significantly, he added in a case like this, there is really no knowing if these people really are who they say they are, and the risk of flight is accordingly very high.

The judgment of the court a quo

[16] Having received the evidence in support and in opposition to the bail applications, the learned magistrate very punctiliously recited the evidence, set out the law applicable - in particular the tests that she had to apply when considering whether or not to grant bail. In her very carefully reasoned judgment the learned magistrate made credibility findings[2]

[2] She pointed to the contradictions in the evidence of the State witnesses on just how much money was found on the accused persons, and the actual extent of the fraud. She also stated that Simasiku left a poor impression on her as he was evasive and showed bias. On the contrary she found Mafwila as credible and having given a proper account of the status of the investigation. She found that, as the bulk of the witnesses were not local and their identities were unknown to the appellants, it was highly unlikely that they would interfere with the witnesses or the investigation.

and concluded that there was no danger of interference with the police investigation then underway if the appellants were let out on bail.

[17] Next, the Court considered if the appellants represented a flight risk if allowed out on bail. In this connection the magistrate reminded herself of the fact that no implicit reliance should be placed merely on the *ipse dixit* of the appellants that they will not abscond.[3] The magistrate found that the amount involved in the alleged fraud was very high and that a long term imprisonment was inevitable if convictions eventuate. The magistrate then made reference to the strength of the State's case against the appellants based on the evidence so far gathered. The magistrate was alive to the fact that surrendering passports by the appellants was no guarantee they would not flee if admitted to bail- also having regard to the fact that the evidence points to them being part of an organised syndicate which would acquire duplicate passports with great ease. The magistrate also reminded herself that the absence of extradition agreements with the countries of origin of at least two of the appellants might impede their being returned to face trial. Based on these considerations, the magistrate was satisfied that the appellants represent a flight risk if allowed out on bail.

[18] The court did not end there: The magistrate next considered if it was in the interest of the administration of justice[4] if the appellants were allowed out on bail. She relied on two crucial circumstances to answer that question in the negative: she concluded that because the investigation had both a national and international dimension, Namibia's

[3] She relied on *S v Hudson* 1980 (4) SA 145 (D) 148. The same approach was taken by this Court in *Shephard Khowa and two others v The State* , unreported, delivered 19/9/94, at p5)

[4] Section 61, Act 51 of 1977, authorizes a court –even if satisfied that that it is unlikely that the accused if admitted to bail would abscond or interfere with witnesses for the state or with the police investigation –to refuse bail if satisfied after inquiry that it is in the interest of the administration of justice that the accused be retained in custody pending trial.

criminal justice system was at stake; requiring special care being taken not to prejudice the investigation if one of the suspects absconds while on bail as such a likelihood of prejudice exists where several suspects are involved and some do not stand trial. The court attached no weight [5] to the fact that one of the suspects is out on bail and had not absconded- a circumstance relied on by the appellants to buttress their case that they would not abscond if admitted to bail. Similarly, the court was not influenced by Mafwila's assertion that Bank Windhoek's reputation had been tarnished in the eyes of the banking public. The Court was concerned instead with the potential prejudice to the criminal justice system if the appellants abscond while on bail. The learned magistrate may have misdirected herself in ignoring the fact that the Bank's reputation had been damaged. In my view this allegation is indeed relevant when considering the seriousness of the charges against the appellants and the potential sentences to be imposed because, if proved, it would constitute an aggravating factor. It is also relevant when considering the interest the Bank has, as a complainant or affected party in the case, that the accused should stand their trial. These considerations make up part of the myriad of factors which have a bearing on the potential prejudice to the effectiveness and credibility of the criminal justice system. However, any misdirection on this score operated in favour of the appellants and cannot serve to upset the magistrate's ultimate finding that it is in the interest of the administration of justice that bail be refused.

[19] The magistrate was not in the least impressed with the appellants' evidence. She said:

[5] What weight a court attaches to factors in support or opposition of bail is in the discretion of the court hearing the bail application. Appellate interference is only justified if the court took into account irrelevant considerations or failed to have regard to relevant considerations.

> "Applicants 1 and 2 were consistent in their testimony but did not leave striking impression on the court. Their bare denials of especially the confiscated items of which pictures were taken left the court in doubt. Applicant 3 did not strike the court as being credible at all as his testimony was quite inconsistent. All 3 applicants seemed very evasive of questions which could simply be answered with yes or no answers but it seemed to the court's mind that there were just too many aspects or questions asked by the prosecution which they did not know.''

Having considered the totality of the record, I find no misdirection in this finding. Besides, the magistrate is the one who saw the witnesses and was best placed to make such a credibility finding.

Was the magistrate wrong in refusing bail?

[20] The net effect of the State's case against the three appellants, who now appeal to this court against the magistrate's decision denying them bail, is this: first and second appellants were arrested at the ATM. They were found with large sums of money and instruments which undeniably could facilitate the commission of the crime for which they were arrested. The third appellant was arrested upon arrival at the airport in circumstances which lead to a very reasonable inference that he assisted the other accused in the commission of the offences as he was found with equipment which could facilitate the commission of such an offence.

[21] The evidence is clear that this crime has international ramifications and that there is a very strong likelihood that an international syndicate is in operation, regrettably using Namibia as one destination from which fraud is being perpetrated on people in another country. At least two of the people who, *prima facie*, are implicated in this criminal enterprise come from jurisdictions with which Namibia has no extradition agreement.

The complaint against the magistrate's decision in respect of the third appellant is based on the following passage in the judgment:

> "It appears that applicant 3 (third applicant) is linked to various international fraud cases, Kenya specifically was mentioned, where a warrant of arrest was outstanding reflecting his name on it, where the same modus operandi was used.''

This ground of appeal is based on a serious misreading of the judgment. What is clear to me is that the magistrate was at that point summarising Simasiku's evidence. It is probably inelegantly worded but cannot be interpreted as her factual finding on the issue. Besides, she had specifically mentioned that she did not find Simasiku a credible witness, not least I think because of his evasiveness on this issue during cross-examination.

[22] In my summary of the evidence I have highlighted the State's case against the appellants at this stage. It supports the conclusions arrived at by the court *a quo*. I only need add: Great store is being placed on behalf of the appellants by the fact that one of them was already granted bail and did not abscond. Mafwila meets this argument, and in my view it has merit: the possibility that she remains in the country until all are out on bail is one not to be scoffed at. The State established that other foreigners, similarly situated, had absconded in the past. Significantly he added that they cannot be certain of the appellants' true identities.

[23] Mr Namandje in argument argued that the refusal of bail in the present case will send out the message that no foreigner will ever be admitted to bail. Nothing could be farther from the truth. First it does not accord with the practice of our courts: Foreigners

have and do get bail. The facts of the present case explode Mr. Namandje's argument: one of the appellants' foreign co-accused was granted bail by the district court and is out on bail. As it happens, it is that fact that the appellants rely on to buttress the argument that they are not a flight risk. The fact that an applicant for bail is a foreigner is a factor (like any other) which a court may take into account in considering whether or not he or she represents a fight risk if admitted to bail.[6] In this case the magistrate found that that fact, together with others, pointed to the appellants as a flight risk. I cannot fault her in coming to that conclusion.

[24] There is no basis for interfering with the exercise of the magistrate's discretion. I discern no relevant misdirection by the magistrate either in the way she applied the law, or in the way she approached the evidence. It is for these reasons that we came to the conclusion that the appeal has no merit.

DAMASEB, JP

I agree.

[6] See for example the approach taken by this Court in the *Shephard Khowa* case (supra) where Frank J said at p5 "The fact that they are foreigners, that there is no extradition treaty with South Africa, that they have no ties with this country and that Namibia has long and porous borders were indeed weighty factors to be considered by the Magistrate. This was even more so as the Appellants in all probability faced direct sentences of imprisonment if convicted."

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VAN NIEKERK, J

ON BEHALF OF THE APPELLANTS: MR S NAMANDJE

INSTRUCTED BY: **SISA NAMANDJE & CO**

ON BEHALF OF THE RESPONDENT: MRS A LATEGAN

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