CASE NO.: CA /20

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GERHARD KARIHAB **APPELLANT**

versus

THE STATE **RESPONDENT**

CORAM: **SHIVUTE J *et* SIBOLEKA J**

Heard on: 2010 May 4

Delivered on: 2010 June

APPEAL JUDGMENT

SIBOLEKA, J:

[1] Accused appeared in the District Magistrate Court of Swakopmund on two charges namely:

- Possession of uranium in contravention of the Mineral Act 22 of 1992, and
- Theft.

[2] He pleaded not guilty to all charges and after trial he was convicted on the first charge and sentenced to N$5000,00 or twelve (12) months imprisonment.

[3] Appellant now appeals against both conviction and sentence. The matter was argued before this Court on the 12th of April 2010. Adv. Kasuto appeared for the appellant and Adv. Jacobs for the respondent. This Court appreciates their valuable contribution in this regard.

[4] In 2003 someone gave a note to Moses Skrywer to get him uranium at Rossing. Moses Skrywer started making inquiries and in the same year he eventually came to know the appellant through a certain Frans Herman.

[5] Moses Skrywer gave a note he got from the buyer regarding what he was looking for. On this note were the letters U8 + U2 respectively. When the appellant looked at the two notes he said to Skrywer the buyer was looking for uranium.

[6] Apart from a note written U8 + U2 which turned out to be powder, there was also a note for the liquid. Appellant told Moses Skrywer that the liquid usually accompanies the powder.

[7] Whenever Moses Skrywer went to meet the appellant at his house, he was always in the company of Frans Herman.

[8] The arrangement between Moses Skrywer, Frans Herman and the appellant was that once the stuff was bought, the three men would then divide the money among themselves. Moses Skrywer had already been arrested, convicted for possession of uranium and sentence to:
N$15.000,00 or twelve (12) months imprisonment. He volunteered to help the police to crack down all those who were dealing with uranium.

[9] All of the three men used to go into the appellant's garage and there Skrywer would get the alleged uranium.

It was during one of such visits that Moses Skrywer alerted the police stormed the appellant's garage where they were sitting resulting in the matter now before Court.

Adv. Kasuto raised the following shortcomings in the findings of the Court below:

[10] It is the appellants contention that from the day of his arrest on the 24th of November 2004 when the alleged uranium was removed from his garage, he does not know what happened to the stuff. No evidence was placed before Court *a quo* to explain the chain of events from the time the police took the alleged uranium, up to when it was tested by the expert.

[11] The Court *a quo* was also not told where the stuff was kept or stored, by whom, and under what conditions. What happened to the stuff after it was impounded by the police up to the time of the alleged testing. Who handed the stuff to the expert for testing. The Court *a quo* was not informed in how many hands the alleged uranium had passed before it eventually found its way to the testing expert. This link so argued Adv. Kasuto has not been established before the Court *a quo* in order to be subjected to scrutiny and cross examination by the appellant's counsel.

[12] Therefore, argued Adv. Kasuto in the light of the above it cannot be said with certainty whether the stuff alleged by the expert to be uranium before the Court *a quo* was the same stuff that was removed (impounded by the police) from the appellants garage at the time of his arrest on the 24th of November 2004.

Furthermore, so argued Adv. Kasuto, it is not known whether from the time the alleged uranium was impounded and taken away by the police up to time of testing it was not tampered with to the detriment of the appellant. It was also alleged by Adv. Kasuto no preventative measures were taken, amongst others sealing the containers in the presence of the appellant to avoid contamination that could possibly be caused by nature, storage, or by somebody adding uranium to the stuff which originally have had none.

[13]

conclusion of arguments we dismissed the application for appeal against the District Magistrates refusal to grant bail to the appellant and indicated then that reasons for the ruling would be given at a later stage. These are the reasons.

[2] At the hearing Mr. Mbaeva appeared for the appellant instructed by the Legal Aid Directorate and Adv. Small for the respondent. Both of them filed very helpful heads of argument.

[3] On the 17th of June 2009 the appellant and two others were brought before the District Magistrate, Windhoek on a charge of robbery. Appellant was refused bail while his co-accused, 2 and 3 were released on N$10.000,00 bail each. Represented by Mr. Isaacks, he lodged a formal bail application on the 25th of June 2009, which was dismissed on the 17th of July 2009, and he now appeals against the Magistrate's refusal to grant him bail.

[4] In a nutshell the ruling of the Magistrate for refusing bail was stated as follows:

> "If an accused who is in custody in respect of an offence referred to in part 6 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 accused if released on bail will abscond or interfere with any witness for the prosecution or the police investigation refuse the Application for bail …….if in the opinion of the Court it is in the interest of the Public or the administration of justice that the accused be retained in custody pending his trial."

[5] According to appellants counsel the presiding Magistrate was wrong and had misdirected herself in holding that it was in the public interest and that of the administration of justice to refuse bail to the appellant. He based his argument on the fact that no demonstrations were organized and the public did not generally rally behind the security companies. Therefore, argued appellant's counsel, he does not understand why a person who would most likely be acquitted on the charge; would not abscond nor interfere with the administration of justice be retained in custody until his trial.

[6] I will now look at the allegations against the appellant in this matter.

[7] Appellant worked for Group 4 Security Namibia, Andimba Toivo ya Toivo Street, Southern Industrial Area, Windhoek as a Base Security Officer, Cash in Transit, in charge of the firearms section. He was a supervisor of the security guards taking care of the company premises twenty four hours round the clock.

[8] On the 20th of May 2009 appellant allegedly brought two male persons to the premises and instructed security officers at the entrance not to book them in the check list or entrance register because according to him, the two men were police officers who were in his company and as such it was not necessary for them to enter their particulars in the register. The entrance security guard could not refuse entrance to the two strangers because they were in the company of his senior officer (the appellant) in this matter.

[9] The appellant, so argued the respondent, being a senior security officer at the time he so acted, was aware that all unpermitted persons accessing the no go zone at the security guard duty room have to enter their particulars in the occurance book, but nonetheless instructed that the two strangers with him should not enter their particulars in the security register. Appellant took the two men into the box control room (strongroom – safe), where he told the security guard on duty that they were police officers. He later told the two men that the name of the security guard on duty in the strong room was Tobias Nanyeni.

[10] On the day of the robbery and while the appellant was on duty a security guard inside the duty room went to the toilet leaving his firearm in the drawer. When he came back to his guarding post he saw the appellant immerging there from and his firearm was nowhere to be seen. This firearm was found after the robbery at the scene where appellant's uncle (Claudius Stuurman) also a suspect in this matter, had committed suicide.

[11] During the robbery the two strangers who were earlier on brought by the appellant on the security company premises and introduced as police officers were identified among the robbers. More so, one of them was asking about Tobias Nanyeni, a name that was given to the two strangers by the appellant during an unauthorized entry to the security company's no go zone before the incident.

[12] Other allegations leveled against the appellant are:

12.1 Before the incident the appellant was seen driving his uncle (Claudius Stuurman)'s bakkie.

12.2 It is that same vehicle which was later found on the security company premises loaded with some bags of stolen money on the day of the robbery.

12.3 On Wednesday 20 May 2009 the appellant allegedly brought two strangers on the security company's no go zone, and showed them the safe where the money was kept. On Sunday 25 May 2009 of that same week the premises were robbed and money stolen from the said safe.

12.4 On the day of the alleged robbery appellant removed a credited sim card from his official cell phone and replaced it with a new one from where he received messages and made contact with his uncle (Claudius Stuurman). This move could be safely seen as aimed at avoiding detection.

12.5 The appellant's uncle, who was also a suspect on this matter had implicated the latter in his suicide letter (note).

12.6 It is interesting to note how the appellant tried to play down his involvement in this alleged offence by insisting to the police that his uncle be arrested immediately. He even offered to be released so that he himself can arrest his uncle and bring him to the police station.

12.7 After the incident an sms message from a South African cell phone was found on appellants cell phone printout requesting money from him.

[13] From the above it is clear that there are indeed allegations which connect the appellant to the robbery at the complainants premises.

[14] Section 3 of the Criminal Procedure Amendment Act, Act no. 5 of 1991 reads:

> "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."

[15] O'Linn, J as he then was remarked about the above amendment in *S v Du Plessis and Another* 1992 NR 74 at 82G:

> "The amending legislation was obviously enacted … giving the Court wider powers and additional grounds for refusing bail in the case of serious crimes and offences listed in the new part IV of the second schedule of the Criminal Procedure Act 51/77."

[16] In my view it is therefore not necessary that there should have been a public demonstration and outcry against the suspected robbers of the security company. The Court has a general duty to protect society against serious crimes such as robbery. It is usually difficult to apprehend the suspects and also not easy to get eye witness who saw it unfolding because of imminent risk to the lives of those who find themselves at the scene, and immediate surroundings. This is undoubtably the aspect which goes to the core of

the society's interest and that of the administration of justice in seeing suspected suspects apprehended and where necessary denied bail.

[17] In sum I found no misdirection in the judgment of the Court *a quo* entitling this Court to interfere with the decision and the appeal is dismissed.

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SIBOLEKA J

I agree.

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VAN NIEKERK J

ON BEHALF OF THE APPELLANT: **MR. MBAEVA**

INSTRUCTED BY: **LEGAL AID**

ON BEHALF OF THE RESPONDENT: **ADV. SMALL**

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