



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI
JUDGMENT**

Case no: CA 3/2017

In the matter between:

ERASMUS ANGUWO

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Anghuwo v S* (CA 3-2017) [2017] NAHCNLD 20 (14 March 2017)

Coram: TOMMASI J and JANUARY J

Heard: 10 March 2017

Delivered: 14 March 2017

Flynote: Criminal Procedure — Bail—Order of court to decline bail until investigations are complete—Such order not rendering the proceedings untermiated — Order may be appealed against.

Refusal on ground that there are indications that appellant may interfere with witnesses — Opinion of investigating officer carries weight —Such opinion ought to be premised on facts given by investigating officer — Direct evidence not required — Magistrate had no such facts and her decision premised

merely on the appellant's involvement — Such application of discretion wrong — Court therefore substitute order with order that court ought to have given.

Summary: The appellant's application for bail was declined in the district court until the investigation is complete. The court held that such an order was not permissible and that the magistrate's reasoning for declining the application was not premised on opinion of the investigating officer but on the evidence of the appellant's involvement in the commission of the offence. It was held that the magistrate applied her discretion wrongly and the court made such an order as the magistrate ought to have given.

ORDER

JUDGMENT

TOMMASI J (JANUARY J concurring):

[1] The appellant herein appealed against the magistrate's refusal to grant bail. The appellant is charged with 5 other co-accused. He is charged with hunting of specially protected game in contravention of s 18(1)(b) and s26(1) of the Nature Conservation Ordinance, 4 of 1975.

[2] The appellant was arrested on 13 December 2016 and he applied for bail on 20 December 2016. On 6 January 2017 the learned magistrate made the following ruling: "Decline the application until the investigations are finalized."

[3] The court *mero moto* raised the issue whether the matter was appealable given the apparent hybrid nature of the order given. It was not clear whether the ruling made was a final. Both counsel addressed the court and the court ruled that the order by the court *a quo* is subject to an appeal in terms of the provisions of s65 of the CPA. What follows are the reasons for that ruling?

[4] Ms Nghiyoonanye, counsel for the respondent, submitted to the court that the order by the learned magistrate was open ended and the magistrate had not yet taken a final decision. She submitted that this court should not entertain the matter but should remit it to the district court for the learned magistrate to give a final decisions. Ms Kishi, counsel for the appellant, submitted that the magistrate, in terms of the powers given in terms of section 60 of the Criminal Procedure Act had to decide whether to grant bail or refuse it. She submitted that the learned magistrate was not permitted to refuse bail or to defer the granting thereof. She submitted that the appellant, has a right to appeal against the magistrate's refusal to grant bail until the investigation. She submitted that her order was wrong and as such the appellant has the right to appeal such a decision once same is made.

[5] Ms Nghiyoonanye, referred this court to *Rossouw v Commercial Bank of Namibia and Others*, an unreported Supreme Court case, which was cited with approval in *Handl v Handl* 2008 (2) NR 489 (SC) at page 492-493, para 13 where Shivute CJ states the following:

“In any event, for a decision to be a 'judgment or order' appealable without leave, it must have three attributes. First, the decision must be final in effect and not susceptible to alteration by the court of first instance. Secondly, it must be definitive of the rights of the parties, ie it must grant definitive and distinct relief. Lastly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.”

[6] It is well established that: “ In general a superior court should be slow to intervene in uninterminated proceedings in a court below and should confine the exercise of such powers to rare cases where grave injustice might otherwise result or where justice might not by any other way be attained.”¹ The question is whether

¹ In *National Housing Enterprise v Beukes and Others* 2015 (2) NR 577 (SC) Garwe AJA at paragraph 20

this is un-terminated proceedings and whether it was permissible for the learned magistrate to refuse the release of the appellant until further investigations are completed.

[7] Section 60 of the CPA provides for an accused to apply for bail and that court may release the accused on the clerk of court or the condition that he accused pays an amount determined by the. The accused, once the application is heard, is entitled to know whether or not the court is going to release him on bail. If the court refused to grant bail, the accused is entitled, in terms of the provisions of s65 of the CPA, to appeal that decision. Section 65(1)(a) provides that: “ An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail ...may appeal against such refusal ...”

[8] A court may release the accused and attach conditions to his release but it is unheard of for a court to refuse the release an accused on certain conditions. The ruling by the magistrate was wrong in that the learned magistrate was not permitted to leave matters hanging in the air, so to speak, but was required to give a decision whether or not to release the appellant. This court regarded the order of the magistrate as a refusal to release the appellant on bail and consequently ruled that the order made by the court *a quo* is subject to an appeal in terms of the provisions of s65 of the CPA.

[9] Section 65(4)of the CPA provides that this court shall not set aside the decision to refuse bail, unless this court is satisfied that the decision was wrong, in which event the court shall give the decision which in its opinion the lower court should have given. In *S v Barber* 1979 (4) SA 218 (D) at 220E-H, Hefer J states the following:

‘it is well known that the powers of this Court are largely limited where the 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.’

[10] The appellant was charged with hunting of specially protected game in contravention of s26 of the Nature Conservation Ordinance 4 of 1975. S26 (3)(a) provides that a person is liable upon conviction of this offence to a fine not exceeding R200 000 or to imprisonment for a period not exceeding twenty years or to both such fine and such imprisonment if such offence relates to the hunting of any elephant or rhinoceros. The appellant was charged together with 5 other accused. His co-accused were arrested 2 days prior to his arrest. They were charged, in addition to hunting of specially protected game, with a number of other charges such as carrying a fire-arm into a nature reserve/game park; entering and residing in a game park without written permission; and unlawful possession of a fire-arm and ammunition. The investigating officer testified that no animal was killed. The seriousness of the offence with which the appellant is charged is apparent.

[11] The appellant testified under oath in support of his application. He is employed by the Ministry of Agriculture and Forestry and he is living with and taking care of his parents who are pensioners. He also takes care of his three children who are attending school. He feared that he would lose his employment if he does not return for work and he would be unable to pay his debts. He is suffering from HIV/AIDS and his health was monitored by a private medical practitioner after he nearly succumbed to the disease. He follows a prescribed diet and has to take his medication as prescribed. He was allocated a Government Vehicle (duty vehicle) which he gave to someone else to drive. He was charged with corruption for having done so and he was granted bail in the sum of N\$5000.00. He did not dispute that his duty vehicle was found near Etosha National Park. It appears the hunting of specially protected game and the corruption charges are grounded on the same facts. He was previously arrested for having failed to stop at a road block.

[12] The investigating officer informed the court that they found the duty vehicle of the appellant near Etosha National Park. The appellant was not in the vehicle but he was informed that the appellant had sent the person(s) they

found at the vehicle, to collect those persons whom the appellant had dropped off earlier. Shoeprints revealed that the persons who were dropped off, entered Etosha National Park. His investigation further revealed that these persons were carrying a fire-arm. He testified that they are involved in a war in that they are dealing with a syndicate and a black market. He testified that he needed time to take further statements and he feared that the appellant may interfere with his investigation if granted bail.

[13] The learned magistrate was satisfied that the appellant would not abscond and that his health situation was not unique. The learned magistrate declined to release the appellant on bail on the single ground that he might interfere with witnesses. She stated the following: 'We have heard of an allegation that it was accused who gave the vehicle (GRN) to be used in the committal of the offence, and the allegations are that he was among the people who went to drop other people. This is an indication that the possibility of accused to interfere cannot be ruled out.'(sic)

[14] The learned magistrate did not rely on s61 which gives her wider powers to refuse bail. The magistrate, in the exercise of her discretion refused bail premised on the evidence of the appellant's involvement which to her was an indication that his interference could not be ruled out.

[15] The first ground of appeal states that the magistrate erred when she refused to grant the appellant bail on the ground that he would interfere with police investigations which was not yet finalised. The second ground makes reference to the magistrate's failure to consider attaching conditions to minimise the risk of interference. The 3rd ground criticises the magistrate's finding that the appellant is a flight risk. The learned magistrate made no such finding and this ground is without merit. The appellant's 5th ground of appeal is equally without merit in that the learned magistrate made no finding that the appellant would commit further offences. The remaining ground of appeal deal with the learned magistrate failure to attach proper weight to health of the appellant; and the possibility that he may lose his employment.

[16] The crisp question for determination by this court is whether the learned magistrate exercised her discretion wrongly when she concluded that:

- (a) there were indications that the appellant would interfere with police investigations; and
- (b) the accused's health condition as "general" which other who are like the appellant, live with in custody.

[17] I shall first deal with the latter aspect. Although I hold the view that the appellant's health condition cannot be equated with the other inmates as each person's health condition is unique, I cannot say that the magistrate was wrong in this respect. The magistrate considered this factor and was satisfied that the appellant, if he required medical care, could obtain same by reporting it to the station commander. I also agree with Ms Nghiyoonanye, submission that the appellant may enforce his right to proper medical care whilst in custody.

[18] The fact that the appellant is at risk of losing his employment, does not solely depend on his incarceration. The appellant admitted that he would face disciplinary action for having used his duty vehicle in an unauthorised manner. The learned magistrate did not make any reference to this issue but it may be inferred that this factor was not given much weight. I cannot fault the learned magistrate for not attaching much weight to this possibility given the fact that the learned magistrate was expected to balance the interest of the appellant against the interest of the administration of justice.

[19] The real issue is with the magistrate's conclusion that the appellant would interfere with the police investigation. Ms Nghiyoonanye submitted that the magistrate did not exercise her discretion wrongly when she concluded that there is a possibility that the appellant may interfere with the police investigation. She referred this court to *S v HLONGWA* 1979 (4) SA 112 (D) where Howard J, at pages 113-114 J & A stated as follow:

"And, depending on the circumstances, the court may rely also on the investigating officer's opinion that the accused will interfere with State witnesses if released on bail, even though his opinion is unsupported by direct evidence."

In that case the investigating officer testified of a previous conviction for obstruction and indicated that one of the witnesses was living with the wife of

the accused. Although there was no direct evidence to support the testimony of the investigating officer, the court relied on the opinion of the investigating officer.

[20] In *S v Acheson* 1991 NR 1 (HC), Mahomed AJ, at page 20, stated the considerations which the Court takes into account in deciding whether there is a reasonable likelihood that, if the accused is released on bail, he will tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or distorted, involves an examination of other factors such as:

- “(a) whether or not he is aware of the identity of such witnesses or the nature of such evidence;
- (b) whether or not the witnesses concerned have already made their statements and committed themselves to give evidence or whether it is still the subject-matter of continuing investigations;
- (c) what the accused's relationship is with such witnesses and whether or not it is likely that they may be influenced or intimidated by him;
- (d) whether or not any condition preventing communication between such witnesses and the accused can effectively be policed.”

[21] *S v Du Plessis and another* 1992 NR 74 (HC) at 83G-J per O'Linn J stated as follow:

“The opinion of the investigating officer on questions such as whether or not it is likely that the accused will abscond, or interfere with State witnesses, or with the investigation, as distinguished from facts placed before Court, should also carry some weight.

When the Court has an opinion of the investigating officer which is in conflict with that of the attorney-general on those points, the Court should bear in mind that even if the investigating officer plays the dominant role in the actual investigation, the prosecutor-general is entrusted with the final decision as to the planning of the prosecution's case against the accused.

However, it is obvious that the Court is the final arbiter on the question of whether bail is to be granted or not and may not allow the mere ipse dixit of

the prosecutor-general or the investigating officer or both, to be substituted for the Court's discretion.”

[22] It follows that the court may attach some weight to the opinion of the investigating officer that the appellant would interfere but in the final analysis she has to exercise her discretion in a judicious manner i.e upon the evidence which was adduced.

[23] The investigating officer in this instance was of the opinion that the appellant would interfere. The difficulty however is to determine why he holds this opinion. He testified that they are in a war and that they are dealing with a syndicate and a black market. My understanding is that the investigating officer was of the opinion that the appellant formed part of organised criminal enterprise (syndicate) and an underground economy (black market). This averment, on its own, is not sufficient for the court to conclude that the appellant would interfere or tamper with the police investigation. The court had to consider what his relationship was with this organisation and how that would translate into possible interference. He furthermore indicated that he still needed to take statements of witnesses but was not willing to state what their relationship was with the appellant. All he was prepared to say was that the appellant knows who the witnesses are as he was part of the incidents. If the appellant knew who the witnesses were, there could have been no harm to indicate to the court what their relationship was with the appellant and why he believed there is a possibility that he would interfere.

[24] The court is entitled to refuse the release of the appellant even if there is only a remote possibility that he would interfere but there must be evidence, which need not be direct evidence, which supports his opinion that the appellant would interfere. The fact that he gave his vehicle to commit a crime and dropped people near the scene of a crime makes him complicit. This is not evidence which *per se* supports the opinion of the investigating officer that the appellant would interfere with the investigation.

[25] The learned magistrate had to consider the facts upon which the investigating relied to conclude that there is a possibility that the appellant

may interfere with the police investigation. The investigation officer gave no such evidence. The learned magistrate, in the absence thereof, found that his involvement was support for a conclusion that there is a possibility that the appellant would interfere with the police investigation. This was a wrong application of the learned magistrate's discretion and her decision to refuse the appellant's release on this ground was wrong.

[26] Having said this, this court takes cognisance of the fact that the nature of the offence committed, the number of persons arrested with the appellant, and the difficulty law enforcement officers have in detecting these offences. This court, being alive to the concerns raised by the investigating officer, gives an order which the court ought to have given.

[27] The appellant is granted bail in the sum of N\$10000.00 on the following conditions:

1. He is not allowed to leave his residential town without being authorised to do so by the investigating officer which permission shall not unreasonably be withheld.
2. He is prohibited from making any contact with any of the witnesses or to interfere with the investigation herein.

M A TOMMASI
JUDGE

HC JANUARY
JUDGE

APPEARANCES:

FOR THE APPELLANT

Ms Kishi
Dr. Werder, Kauta & Hoveka Inc.

FOR THE RESPONDENT

Ms Nghiyoonanye
Prosecutor General Office
Oshakati