CASE NO: A 14097

JOSE BRUTO GARCES -vs- LANA FOUCHE & 3 OTHERS

STRYDOM J.P. et MTAMBANENGWE J et HANNAH J

1997/11/21

CRIMINAL PROCEDURE

Bail - An accused can bring an application for bail at any time within the 48 hours period following his arrest. - Further, he is not limited to bringing such an application during normal court hours. - In a case of real urgency he can bring it outside such hours and if the public prosecutor refuses to attend the magistrate should obtain all necessary information from the arresting/investigating police officer.

CASE NO. A 1

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOSE BRUTO GARCES	**APPLICANT**

versus

LANA FOUCHE	**FIRST RESPONDENT**
MR ROSSOUW	**SECOND RESPONDENT**
TANJA CARSTENS	**THIRD RESPONDENT**
THE PROSECUTOR GENERAL	**FOURTH RESPONDENT**

CORAM: STRYDOM, J.P. et HANNAH, J. et MTAMBANENGWE, J.

Heard on: 1997.10.27

Delivered on: 1997.11.21

JUDGMENT:

HANNAH. J.: This case raises the question whether an arrested person has a right to apply for bail during the forty-eight hour period following his arrest and, if he has, whether his application, if urgent, must be heard outside normal court hours. The case conies before us in the following way.

On 22nd May, 1997 at about 5 pm the applicant was arrested by police at Walvis Bay on suspicion of receiving or being in possession of stolen fishing equipment worth approximately N$4000,00. The applicant, who is forty-eight years of age, is the managing director of a fishing company and suffers from two ailments. He has a skin disease which is aggravated by stress and kidney stones which require him to avoid cold and damp conditions. An attempt by a colleague to arrange for the police to bail the applicant was unsuccessful as was an attempt made by an attorney. The attorney then contacted a local magistrate who indicated his willingness to hear a bail application. However, it would appear that the magistrate was of the view that for such a hearing to take place it was essential for a public prosecutor to be in attendance. Attempts were then made by the applicant's attorney to obtain the attendance of a public prosecutor but without success. The position is that public prosecutors have been instructed by the Prosecutor-General that they do not have to entertain bail applications after normal court hours. It is left to their discretion whether they do so or not. And so we see in the affidavit of one of the public prosecutors who was approached that evening the statement that he will only attend an after hours bail application if he is convinced that good reasons for urgency exist such as illness.

Failing in his bid to obtain the attendance of a public prosecutor at a bail application hearing the applicant's attorney then arranged for an urgent application to be brought in the High Court. This application was heard late in the evening and a rule was issued calling upon the respondents to show cause why, *inter alia,*

1. **First, second and third respondents should not be ordered to immediately convene a court to be held at the Magistrate's Court, Walvis Bay;**

2. **First, second and third respondents should not be ordered as soon as a court is convened to entertain the bail application by the applicant.**

The orders were made to operate as interim interdicts with immediate effect and the result was that at some time after midnight a court was convened at Walvis Bay and the applicant was released on bail of N$5000,00. The applicant now seeks confirmation of the rule while the respondents seek its discharge.

In his answering affidavit the Prosecutor-General opposes the confirmation of the rule on the following grounds: (1) The relevant legislation does not permit voluntary bail applications to be brought before the compulsory first appearance of an arrested person in the magistrate's court; (2) Article 11(3) of the Constitution is not applicable to bail applications; (3) to compel a public prosecutor to attend to bail applications after hours would be in conflict with the Labour Act 6 of 1992; and (4) certain practical and financial problems make it impracticable to have public prosecutors working outside normal hours. However, before considering these grounds of opposition I will first address the question whether the relief sought by the applicant was the correct relief.

The relief sought was based on the supposition either that public prosecutors convene

lower courts or that a lower court cannot be convened for the hearing of a criminal matter without the presence of a public prosecutor. Mr Frank, who appeared for the applicant with Miss Vivier, was asked at the outset of the hearing whether this could possibly be so and he conceded that it could not. In his submission public prosecutors do not convene the courts in which they appear and a court may be held whether a public prosecutor appears or not. The effect of Mr Frank's concession is, of course, rather disastrous for the applicant's case because, if it was correctly made, it means that the wrong relief was sought. What should have been sought was an order against the magistrate requiring him to hold a court regardless whether a public prosecutor attended. Mr Frank sought to overcome this difficulty by seeking to amend the relief sought by substituting "attend" for "convene" in prayer 1 and "attend" for "entertain" in prayer 2 but this does not meet the problem that the relief is sought against the prosecutors and not the magistrate.

However, the Attorney-General and Mr Miller, who appeared for the respondents, did not accept that the concession by Mr Frank was correctly made. Their stance was that for a magistrate's court to convene in a criminal matter a prosecutor must be present though they were unable to point to any statutory provision which requires this to be so. Mr Miller did refer the Court to section 5 of the Criminal Procedure Act 51 of 1977 which permits a presiding officer to appoint a competent person to conduct a prosecution if there is no public prosecutor but I do not consider that that provision provides an answer to the question. Obviously, if there is no prosecutor present at a criminal trial to put the charge to an accused and present the prosecution case no trial can take place and section 5 is concerned with that situation. It by no means follows

that because there is no prosecutor present when an application for bail is brought that a magistrate cannot sit and enquire into the matter.

The answer to the question under consideration is to be found, I think, in the Magistrate's Courts Act 32 of 1944. Section 12 (1) of that Act provides:

> "(1) A magistrate -
>
> (a) may hold a court, provided that a court of a regional division may only be held by a magistrate of the regional division.
>
> (b) shall possess the powers and perform the duties conferred or imposed upon magistrates by any law for the time being in force..."

There is nothing in the subsection limiting the right of a magistrate to hold a court although as a matter of fairness and justice a magistrate, having decided to hold a court, would obviously give the State the opportunity to have a public prosecutor present. And in a situation such as we are dealing with in the present case, if the public prosecutor refuses to avail himself of that opportunity the magistrate, again as a matter of fairness and justice, would no doubt seek to inform himself about the case by calling on the investigating or arresting officer to provide all necessary information. In fact in England during the 1960's and 1970's (I do not know the current practice) bail applications were dealt with in this very way as a matter of routine. No one would appear on behalf of the State. The arresting or investigating officer would go into the witness box and state whether bail was objected to or not. If it was then

reasons would be given. I can see nothing objectionable to this happening in this country should the need arise. It follows from the foregoing that I am of the view that the concession made by Mr Frank was correctly made and, as the wrong relief was sought, the rule must be discharged.

Considerable argument was devoted by counsel to the four grounds of opposition to the application set out in the Prosecutor-General's answering affidavit and as it is important that these matters be determined I shall deal with them. The first two grounds can be dealt with together.

Article 11 of the Constitution provides:

> "(1) No person shall be subject to arbitrary arrest or detention.
>
> (2) No persons who are arrested shall be detained in custody without being informed promptly in language they understand of the grounds for such arrest.
>
> (3) All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer."

The Article sets out rights conferred on, and enjoyed by, every person who is subject to arrest and the Article, in my view, clearly finds its place in the Constitution solely for the benefit of such persons and not for the benefit of the State. Article 11 (3) does not, in my view, confer a right on the State to detain a person in custody for 48 hours at its whim if it is reasonably practical to bring that person before a magistrate at an earlier point in time. Section 50(1) of the Criminal Procedure Act, to which I now turn, and other provisions in the Act dealing with bail must be read in the light of the foregoing.

Section 50(1) provides:

> "(1) A person arrested with or without warrant shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant, and, if not released by reason that no charge is to be brought against him, be detained for a period not exceeding forty-eight hours unless he is brought before a lower court and his further detention, for the purposes of his trial, is ordered by the court upon a charge of any offence or, if such person was not arrested in respect of an offence, for the purpose of adjudication upon the cause for his arrest: Provided that if the period of forty-eight hours expires -"

It is unnecessary to set out the fairly lengthy proviso which details the circumstances in which the forty-eight hour period may be extended.

Section 50(3) provides:

> **"Nothing in this section shall be construed as modifying the provisions of this Act or any other law whereby a person under detention may be released on bail or on warning or on a written notice to appear in court."**

The argument of the Attorney-General is that the detention of an accused person during the forty-eight hour period following his arrest is expressly authorised by section 50(1) and no provision exists, either expressly or by necessary implication, which enables a court to determine a shorter period within which the accused must be brought before it for the purpose of a bail application or otherwise. Therefore, if a court cannot order that an arrested person be brought before it within the first forty-eight hours of arrest, there remains no means in law by which that person can himself as of right approach the court to issue such an order so as to enable him to apply for bail. Put shortly the submission made on behalf of the respondents is that there is no mechanism in our law by means of which an accused facing criminal proceedings can bring himself before the court; he is brought before the court by the State which is *dominis litis.*

With great respect I cannot accept this argument. I agree with Kotze J when he said in *Twayie and Another* **v** *Minister of Justice and Another* **1986 (2) SA 101 at 103 that section 50 (1) deals with the maximum time that may expire prior to appearance before a court and not with the minimum time that must expire prior to an application for bail being brought. The Attorney-General submitted that this case and subsequent**

cases were wrongly decided because the Court overlooked the fact that section 50 does not contemplate an appearance in court. Once it is accepted that the detention in terms of section 50 need not necessarily be followed by an appearance in Court, so the submission goes, it must likewise be accepted that an accused cannot demand from the moment of his arrest that he be brought before a court and charged especially when at that stage no appearance is contemplated. I find this submission not only rather subtle but if it is right it gives rise to the absurd situation that a person unfortunate enough to be charged with an offence will be taken before a court where he can apply for bail where as a person fortunate enough not yet to be charged and who may never be charged cannot. The answer to the submission is, in my opinion, to be found in section 50 (3). That subsection makes it clear that the provisions of section 50 (1) do not affect the other provisions of the Criminal Procedure Act "whereby a person under detention may be released on bail" and, in my view, the question whether an accused who is in custody is entitled to bail before the forty-eight hour period has elapsed must be answered by reference to those other provisions and not by reference to section 50 (1). See ***Svdu Preez*** **1991 (2) SACR 372 (Ck). One such provision is contained in section 59(1) which reads:**

> **"(1) (a) An accused who is in custody in respect of any offence, other than an offence referred to in Part 11 of Schedule 2, may, before his first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, if the accused deposits at a police station the sum of money determined by such police**

official."

It is clear from this provision that, depending on the offence for which an accused is arrested, he can obtain bail at his own instance prior to the expiration of the forty-eight hour period. Indeed, in terms of this provision he can apply for, and may obtain bail, immediately after his arrest.

Another such provision is contained in section 60 (1) which reads:

> "(1) An accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in a superior court, to that court, to be released on bail in respect of such offence, and any such court may, subject to the provisions of section 61, release the accused on bail in respect of such offence on condition that the accused deposits with the clerk of the court or, as the case may be, the registrar of the court, or with a member of the prisons service at the prison where the accused is in custody, or with any police official at the place where the accused is in custody, the sum of money determined by the court in question."

I disagree with the Attorney-General's submission that this provision is not caught by the words "the provisions of this Act ... whereby a person under detention may be released on bail" as contained in section 50 (3). The words used are very wide and I disagree that they should be construed so as to refer only to section 59(1). In my

view, the Legislature realised that there was a danger of an argument being mounted such as that advanced on behalf of the respondents and expressly went out of its way in section 50 (3) to ensure that nothing in section 50 is to be construed as modifying the rights of an accused to apply for bail. That view is reinforced by my earlier comments concerning Article 11 (3).

As for section 60 itself I respectfully agree with Kotze J when he said in *Twayie's case (supra)* **at 104 J - 105D:**

> **"The choice of words was in my view only an unfortunate one to distinguish cases mentioned in section 59 .... from the cases mentioned in section 60. It did not, in other words, intend to determine that voluntary bail applications ... could not be brought prior to a first appearance in a lower court... The words 'first appearance' thus refer not only to the first compulsory appearance in terms of section 50 but also to a first appearance at own request. It is not only to more serious offences under section 60 but also the minor section 59 cases where police officers refuse to grant bail. It will be a nonsense to interpret section 60 in such a manner that one accused is entitled to bail prior to his first appearance while an identical accused who committed exactly the same offence must wait for his first compulsory appearance in the lower court before he can get bail. This conclusion is also supported by section 72 (release on warning instead of bail) which is not linked to a 'first appearance' in a lower court."**

(Counsels' translation: and they must take responsibility for grammatical short

comings.) My conclusion therefore is that an arrested person is entitled, on his own initiative, to bring a bail application within the forty-eight hour period.

Argument was also presented on the question whether an arrested person is limited to bringing a bail application only during normal court hours. However, much of the argument falls away in view of the conclusion I have already reached that an arrested person can, on his own initiative, bring a bail application before the 48 hour period has elapsed. What is of importance, in my view, is that we are dealing with the liberty of the individual. There is nothing in the Criminal Procedure Act which limits an arrested person's right to apply for bail only during normal court hours and to my mind justice dictates that in an appropriate case that person should have a right to apply for bail outside normal hours. *Twayie's* **case** *(supra); S* **v** *Du Preez* **(supra). The Attorney-General's response to this was to refer to, and rely on, section 32(2) of the Labour Act 6 of 1992 which provides:**

> **"No employer shall require or permit an employee to work overtime otherwise than in terms of an agreement concluded by him or her with the employer and provided such overtime does not exceed three hours on any day or ten hours during any week ..."**

The Attorney-General submitted that the Prosecutor-General cannot legally compel a prosecutor to conclude an agreement for the purpose of overtime work and cannot legally compel a prosecutor to perform overtime work without an agreement. I agree with this submission. But, as pointed out earlier in this judgment, a magistrate's court

can be held without a prosecutor in attendance. If a bail application is so urgent that it needs to be held outside normal court hours and the local prosecutor's concern with justice is so little that he declines to attend on the ground that his normal working hours are from 08h00 to 5h00 and he is not prepared to work overtime then let justice be done without him. Let the magistrate seek the assistance of a police officer to inform him of the facts and circumstances of the case. I cannot envisage a situation where a judicial officer would adopt such a stance and I note that in the present case the magistrate was prepared to sit.

I must emphasise, however, that real grounds for urgency must exist before a court will hear a bail application outside normal court hours. This is a matter which must be decided by magistrates on a case by case basis.

For reasons given earlier the applicant sought the relief against the wrong parties and the rule must, therefore, be discharged. However, the respondents do not seek an order for costs.

Accordingly, the rule is discharged and no order is made as to costs.

HANNAH, J.

I agree.

STRYDOM, J.P.

I agree.

MTAMBANENGWE,/A:J.