REPUBLIC OF NAMIBIA **NOT REPORTABLE**

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

BAIL APPEAL RULING

Case no: CA 35/2016

In the matter between:

AMBROSIUS MATHEUS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: Matheus v The State (CA 35/2016) [2016] NAHCMD 167 (13 June 2016)

Coram: USIKU J

Heard: **23 May 2016**
Delivered: **13 June 2016**

Flynote: Criminal Procedure – Appeal against refusal to grant bail – S 65 of the Criminal Procedure Act 51 of 1977 – High Court should only interfere if the decision of the magistrate is wrong.

Summary: Criminal Procedure – Bail appeal against the magistrate's refusal to grant bail in terms of s 65 of the Criminal Procedure Act 51 of 1977. In his notice of appeal the appellant relied on the following grounds:

That the learned magistrate erred in law and/or fact in the following respects:

(a) He did not accord due weight to all the personal circumstances of the appellant.

(b) That the appellant suffered from a stroke in 2012 and as a result he cannot use his right hand side without first having taken medication, he also has to get massaged, otherwise his foot start dragging. The medical care is not available whilst the appellant is in custody.

(c) The appellant has been refused and/or unassisted in obtaining medical attention whilst in custody.

(d) The appellant has a problem with his eyes that he was prescribed doctor's glasses and his eyes start itching when he is not wearing glasses. The glasses were confiscated in custody.

(e) The appellant was remorseful. He will not abscond and that if the court impose bail conditions he will adhere to them.

(f) The appellant testified that he would not interfere with state witnesses whose statements have all been taken.

1. That the learned magistrate misdirected himself in law by ruling that the facts in the *Valombola v State* (CA 93/2013) NAHCMD 279 delivered on 9 September 2013 were similar to the circumstances of the appellant.

2. The learned magistrate erred in law and/or fact failing to take into consideration the merits of the "defence" raised by the appellant during his testimony.

3. The learned magistrate erred in law by concluding that the appellant occupies an influential position in the community hence he could easily tamper with witnesses.

4. The learned magistrate erred in concluding that appellant has not proved that his business would suffer if he was not released on bail.

5. The learned magistrate erred in finding that the appellant will abscond by over relying on the opinions of the investigating officer as opposed to the factual evidence given.

6. The learned magistrate did not properly deal with the inquiry that is necessary to make when applying the provisions of s 61 of the Criminal Procedure Act 51 of 1977 and Act 5 of 1991.

ORDER

The appeal is dismissed.

BAIL APPEAL RULING

USIKU J

[1] The appellant who faces one count of murder applied for bail in the magistrate's court for the district of Keetmanshoop. He was represented by Mr Le Lange.

[2] After hearing evidence, the magistrate dismissed the application on the grounds that it was not in the interest of justice that the appellant be released on bail

invoking the provisions of s 61 of the Criminal Procedure Act 51 of 1977 as amended.

[3] Aggrieved by this refusal by the magistrate to grant bail, the appellant now appeals against that refusal of the magistrate to release him out of bail.

[4] It is important to note that Ms Husselmann who appeared on behalf of the respondent had raised a point in *limine* which she has since abandoned.

[5] The appellant is represented by Mr Nambahu. Both counsel filed written heads of arguments on which they expanded during oral submissions.

In their heads of argument the appeal grounds are enumerated as follows:

(1) Not according due weight to the personal circumstances of the appellant.

(2) Failure to consider merits of the defence raised by the appellant.

(3) The fearing of influencing of or tempering with state witnesses and/or investigations.

(4) Abscondment and

(5) Public interests

[6] It is common cause that appeals with regard to refusal to bail are regulated by s 65 (1) which states;

"1 (a) Accused who consider himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition [1] by such court of a condition of bail… may appeal against such

[1] *Criminal Procedure Act 51 of 1977 s 65 (1)*

refusal or imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting;

(b) The appeal may be heard by a single judge

(c) …"

[7] Ss 4 thereof provides that the court or judge hearing the appeal shall not set aside the decisions against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion should have given.

[8] Basically the appellant has attacked the trial court for having failed to give adequate weight to his personal circumstances, most importantly the fact that his health has been failing him, and there appear not to be sufficient medical care in detention whilst awaiting the finalization of his trial. With regard to the appellant's [2] medical condition, the court held in *Peter Itai v S* CA 13/2010 at page 5 which was cited with approval in [3] that in so far as accused does not receive proper medical attention whilst in detention, he has other legal remedies at his disposal and in general, bail is not a remedy for actions and omissions of the prison authorities my own emphasis.

[9] Both the appellant and the investigating officer has testified that the latter had been receiving treatment whilst in custody. This court in the absence of any proof that the trial court erred on the facts and misdirected itself on the application of the law, is therefore unable to see on what legal basis this court sitting as a court of appeal, would be entitled to interfere with the refusal of bail by the *court a quo*.

[10] It is clear from the reasons provided by the *court a quo* that there has been no misdirection on the facts by the *court a quo*, and therefore the presumption is that the conclusion reached by that court is correct, as it could only be reversed where the court of appeal is convinced that it is wrong.

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[2] *See S v Gaseb 2007, 1 NR 310, S v Timoteus 1995 NR 109 (HC).*

[3] *S v Van Wyk 2005, SACR 41 (SCA)*

[11] In *S v Shaduka* CA 119/2008 delivered on 24 October 2008, the court held "Since the inquiry is now wider, a court will be entitled to refuse bail in certain circumstances even where there may be remote possibility that an accused will abscond or interfere with the police investigations. The crucial criterion is thus the opinion of the presiding officer whether it would be in the interest of the public or the administration of justice to refuse bail."

[12] When applying the aforesaid principles to the present facts of the case, I have no doubt that when coming to the conclusion to refuse the appellant's bail the *court a quo* acted correctly.

[13] As a result, I make the following order:

The appeal is dismissed.

DN USIKU

Judge

APPEARANCES

APPELLANT:	Mr Nambahu
	Nambahu & Associates
RESPONDENT:	Ms Husselmann
	Of the Office of the Prosecutor-General, Windhoek