RABI LUCAS
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 23 February 2018

Bail application

Applicant in person
Mrs *S fero*, for the respondent

FOROMA J: This is an application for bail pending appeal.

The applicant was convicted by a Provincial Magistrate at Chipinge on three counts of stock theft as defined in s 114 of the Criminal Law [Codification and Reform] Act [*Chapter 9:23*].

The brief allegations against the applicant which he denied were that on 18 February 2012 the applicant in the company of a co-accused who was acquitted, stole eleven cattle. It was alleged that the applicant and his co-accused proceeded to a grazing area in Mutandahwe grazing area where they stole the cattle.

The cattle belonged to different complainants as a result three counts were preferred against the applicant. On count one it was stock theft of three cattle, count two six cattle, count three two cattle and one was unaccounted for.

The applicant was apprehended while herding seven cattle, the other five cattle were recovered allegedly after a foiled ambush on the acquitted co-accused. The applicant was convicted on all counts but in respect of seven cattle. He was sentenced to 70 years imprisonment of which 20 years were suspended on condition of good behaviour on 14 June 2012.

Aggrieved by both the conviction and sentence the applicant, who was legally represented by then noted an appeal to this court on 21 June 2012. The appeal reference is case number CA 568/12. The appeal is still pending determination.

Six grounds of appeal against conviction are set out in the notice of appeal which raise three issues that there was no evidence to prove stock theft against the applicant, that the applicant gave a reasonable explanation for his possession of the stolen seven cattle and that the court *a quo* fell into error when it acquitted his co-accused.

In respect of the sentence three grounds of appeal are set out as follows:

> "1. The appellant avers that the sentence imposed by the court *a quo* is too excessive and induces a sense of shock.
> 2. The court *a quo* failed to consider special circumstances advanced in favour of the appellant and went on to wrongly impose the minimum mandatory sentence in the circumstances.
> 3. The court *a quo* erred in failing to give real judicious notice to appellant's strong mitigatory factors."

On 1 January, 2018 the applicant filed this application for bail pending the determination of his appeal.

The applicant believes he has prospects of success both on the conviction and sentence and that he is unlikely to abscond given such prospects.

The respondent opposed the application. It was submitted by the State Counsel that there are no prospects of success on appeal against conviction. This was so because the trial court's decision was premised on the credibility of witnesses which findings are unlikely to be interfered with on appeal. Further to that it was submitted that the applicant was found in possession of seven cattle which had been stolen from the various complainants and failed to account for such possession.

In respect of sentence State Counsel's written submissions were that the sentence was in line with similar cases but no reference was made to such cases. In her oral submissions the State counsel was at pains to support the trial magistrate's approach in sentencing the applicant per beasts as opposed to sentencing per count.

In an application such as this the law is settled on what the court has to consider in coming up with a decision that is in the interest of justice.

The principles as set out in *Mungwira* v *The State* HH 216/10, *S* v *Dzawa* 1998 (1) ZLR 536 and *S* v *Tengende and Others* 1981 ZLR 445 (s) referred to by both parties are applicable. They include the prospects of success, the likehood of abscondment in light of the gravity of the offence and the sentence imposed, the likely delay before the appeal is heard and the right of an individual to liberty.

Section 115 (c) (1) (b) of the Criminal Procedure and Evidence Act places the onus on the applicant to prove on a balance of probabilities that, it is in the interests of justice for him to be released on bail.

Counsel for the state submitted that there are no prospects of success on appeal since the case turned out on credibility of witnesses which is within the realm of the trial court and can only be interfered with on appeal where there is a serious misdirection, relying on *Chimbwanda* v *Chimbwanda* SC 28/02.

In *casu* it was not in dispute that the applicant was found herding the seven cattle. According to a witness he initially gave two explanations as to such possession. The charges the applicant was convicted on sets out three counts of stock theft, three cattle on count one, six cattle on count two and two cattle in respect of count three.

The trial magistrate found the applicant guilty in respect of seven cattle, it is unclear how many counts those seven cattle constitute. This is so because there were three counts with three complainants.

The failure by the magistrate to clearly set out the counts that he found the applicant guilty of is a clear error. This is has a direct impact on the sentence.

I note in passing a very disturbing lack of attention to detail in this case. The charge sheet before the trial magistrate has the applicant as accused one and the co-accused as accused two. The state outline has the applicant as accused two and the co-accused as accused one. Such inconsistent citation has its obvious confusion that it brings about and attention to detail is encouraged.

As indicated by both parties the case turns out on the credibility of witnesses. The applicant's explanation in so far as his possession of the cattle takes centre stage. It is not this court's prerogative to decide on the appeal, per se but to just consider the prospects of success on appeal. The trial magistrate did not accept the explanation and I do not believe that decision can be impugned. The only lingering issue could be the conviction on three counts of stock theft in respect of seven cattle where there was no evidence how many of the seven cattle were included in each of the counts. That is a technicality that may not necessarily justify upsetting the conviction.

In respect of the sentence, clearly the magistrate fell into error. The magistrate's sentence was per beast. There was no legal basis for such an approach. As it were it resulted in a ridiculous sentence of seventy years.

In the judgment the magistrate related to the minimum sentence of nine years imprisonment and a maximum of twenty five years. The sentence is as provided for in s 114 (2) (e) of the Criminal Law (Codification and Reform) Act.

A reading of that section does not imply that the sentence should be per beast. State counsel attempted to justify the approach and referred to the case of *S* v *Huni* 2009 ZLR (2) 432. KUDYA J in that judgment held that where there are no special circumstances an accused person found guilty of stock theft must be sentenced to an effective mandatory minimum sentence of nine years for each count.

In that case the accused had been convicted on more than one count of stock theft. The trial magistrate treated the counts as one for sentence. On review it was held that, the approach defeats the legislative intention to effect a minimum sentence per count.

The principle drawn from that case which is apposite herein is that the proper approach to sentencing in such cases is to sentence an accused in respect of each count and not per beast.

It is this court's considered view that there are high prospects that the sentence may be interfered with in *casu*. This means there are prospects of success.

The presence of prospects of success directly link to the likelihood to abscond. The applicant's appeal has taken long to be heard. He was convicted in 2012 and this is 2018, he has served almost six years. If there is a likelihood that the sentence may be interfered with, coupled with the years served he is unlikely to abscond.

The delay in having the matter heard has prejudiced the applicant.

From the foregoing the applicant has discharged the onus placed on him by the law. Therefore the application must succeed.

Accordingly the following order is made.

1. The application for bail pending appeal be and is hereby granted.
2. The applicant is hereby, admitted to bail pending appeal of case No CA 568/12 on the following conditions.
    (i) He deposits $100 with the clerk of count, Chipinge Magistrate Court.
    (ii) He resides at Plot 109 Mount Selinda, Chipinge, until the appeal is determined.
    (iii) He reports at Mandere Police Station, every last Friday of each successive month between 6 am and 6 pm, pending the determination of the appeal.

National Prosecuting Authority, respondent's legal practitioners