HB 272//18
HCB 195/18

EDGAR NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 25 OCTOBER & 1 NOVEMBER 2018

Appeal against refusal of bail

S. Mawere for applicant

K. Jaravaza for respondent

MAKONESE J: The applicant is a self employed peasant farmer aged 43 years. He is facing one count of stock theft in contravention of section 114 (2) (a) of the Criminal Law (Codification and Reform) Act (Chapter 9:23). The state alleges that sometime in August 2018 and at Section 3 grazing lands, Mazunga, Beitbridge, the applicant stole 40 beasts belonging to one Gift Mudau.

The applicant appeared before a magistrate at Beitbridge on the 5th October 2018. An application for bail presented on behalf of the applicant was refused by the magistrate, who ordered that he be remanded in custody. Aggrieved by this decision, the applicant noted an appeal to this court in terms of section 121 (1) (b) of the Criminal Procedure and Evidence Act (Chapter 9:07). A statement in compliance with Rule 6 (1) of the High Court of Zimbabwe (Bail) Rules, 1991 was filed with the Registrar on 12th October 2018. A statement in response was filed by the respondent. I heard the appeal on 25th October 2018 and reserved judgment.

In refusing the application for bail pending trial, the magistrate in the court *a quo*, conceded that the applicant had a constitutional right to bail in accordance with the provisions of section 5 (1) (d) of the Constitution of Zimbabwe (Amendment No. 20), 2013. The learned magistrate indicated that in certain instances, compelling circumstances may exist that justify pre-trial incarceration. After analyzing the merits of the application for bail, the magistrate

concluded that a combination of the strength of the state case and the seriousness of the offence militates against the granting of bail. Further, in the view of the magistrate, the applicant had not denied that the stolen cattle were found in his possession. The applicant had gone on to brand some of the beasts with his own brand mark. The applicant argued that his brand mark had been taken away from him during the investigation of the case, suggesting that some other person may have branded the beasts in question. Bail was denied as the magistrate considered that there was risk of abscondment, regard being had to the strength of the state case and the likelihood of the accused fleeing in order to avoid standing trial. This court was advised that there was no possibility of abscondment as the applicant had surrendered himself to the police.

The general principles that govern the granting or refusal to bail, to an applicant, pending trial are now well settled in our law. The basic principle is that the court must strike a balance between the liberty of the applicant and the smooth administration of justice. This proposition was laid out in *Aitken and Anor* v *AG* 1992 (1) ZLR 249 (S).

The second consideration is that an applicant for bail is presumed innocent until proven guilty. The courts generally lean in favour of the applicant. Where however, the case against the applicant appears strong and there is likelihood of a conviction, leading to a lengthy custodial sentence, the court is inclined not to grant bail in the interests of the due administration of justice. See *S* v *Foure* 1913 (1) SA 100 (D).

The state has strongly opposed the application for bail, indicating that the applicant's accomplice has already been convicted and sentenced. There is a likelihood that the conviction of the applicant's accomplice may induce the applicant to abscond. The applicant contends that the burden of proving that there are compelling reasons against the granting of bail lies on the state. It is my view that the fact that applicant's accomplice was sentenced and convicted is a compelling reason to deny bail. The applicant does not dispute that the accomplice has implicated him in the commission of the offence. The applicant does not deny that stolen beasts were found in his possession. Further, and more crucially, the applicant branded some of the beats with his own brand mark. The magistrate's finding that the seriousness of the offence and

the strength of the state case constituted sufficient grounds for refusing the granting of bail cannot be faulted, particularly considering that accused branded some of the stolen beasts with his brand mark.

I do not find any misdirection in the reasoning of the magistrate in the court *a quo*. The interests of the applicant have to be balanced against the interests of justice.

In the result, and for the aforegoing, the appeal against the refusal of bail is hereby dismissed.

Morris-Davies & Co, applicant's legal practitioners
National Prosecuting Authority, state's legal practitioners