

TAFADZWA CHOKOTO

And

CLAYTON PEDISAI

And

TAPIWA MANO

versus

THE STATE

HIGH COURT OF ZIMBABWE  
ZISENGWE J  
MASVINGO, 6 & 11 October 2023

*G. Chidawanyika*, for the applicants  
*Ms M. Mutumhe*, for respondent

### **Bail appeal**

### **Ex-tempore judgment**

ZISENGWE J: This is a brief ex-tempore judgment dealing with the appeal brought by the three appellants against the refusal by the Magistrates Court sitting at Gweru (the court a quo) to admit them to bail pending their trial.

The three appellants are currently lodged in custody after being arrested on stock theft charges, i.e., contravening Section 114(2)(a) of the Criminal Law (Codification and Reform) Act

*[Chapter 9:23]*. The allegations against the three are captured in the charge and amplified in the state outline attached to this appeal.

The nub of the charge is that on August 23, 2023, at Plot 6, Grassmeat, Gweru, the three appellants acting in concert stole six bovine beasts belonging to the complainant, Emma Hwandi. According to the state outline, they stole the cattle from the complainants' homestead, where they were penned, and then drove them to the 1<sup>st</sup> appellant's plot, namely 75 Ngamo, Gweru, where they proceeded to slaughter two beasts whose carcasses were transported to the 1<sup>st</sup> appellant butchery in Gweru.

The state further alleges that the three appellants were arrested following information received by the police, which led to the recovery of one of the stolen bests and the hides of the two slaughtered beasts.

In the wake of their arrest and subsequent detention, the three accused persons unsuccessfully moved for their release on bail. Their application for bail was preceded by complaints presented before the magistrate of having been assaulted by the police in the course of and subsequent to their arrest.

The application for bail pending trial was opposed by the state. The risk of abscondment, which in turn was predicated on the seriousness of the offense (and the heavy sentence likely to be imposed upon conviction), and the relative strength of the case for the state were cited by the state as the main reasons for opposing bail. Further, it was averred by the state that the 1<sup>st</sup> and 2<sup>nd</sup> appellants resisted arrest and were only arrested with canine assistance, thus evincing a clear intention to abscond. As for the third appellant, it was the state's contention that he too supplied false details of his name, address, and age, a fact indicative of his intention not only to mislead the officials and evade a standing trial but also to cover his tracks in respect of another pending criminal matter.

As for the relative strength of the state case, it was the state's position that the evidence against the three appellants was overwhelming and watertight. In this regard, it was averred by the state that not only were the accused found in possession of me of the stolen beasts but also the hides of the slaughtered beasts, where brand marks had been tempered with.

Secondly, the likelihood of interfering with witnesses and investigations was cited as the reason for opposing bail, with the interference coming in the form of intimidation of potential state witnesses. Seemingly as a harbinger of such ignoble intentions, the state alleged that one of the accused actually proceeded to threaten the investigating officer.

Further, it was the States' contention that the first appellant was ill-suited for bail given that he had a previous conviction on a charge of unlawful possession of a carcass. According to the state, in that case, the first appellant assaulted the police officer who was attempting to arrest him before making a good escape. He then allegedly disposed of the carcass in question.

Thirdly, the state opposed bail on the basis of the trio's propensity to commit similar offenses, as evidenced by pending cases against each of them, whose reference details were furnished.

The safety of the appellant's homestead was cited as yet another reason for the opposition to bail, it being alleged that the community was incensed and fed up with the appellant's alleged criminal ways and that the first appellant's homestead was set ablaze in the wake of their arrest.

In response to the states' assertions, the applicants, through counsel, attacked each of the four grounds of opposition to bail. Regarding the safety of the appellants, it was contended that the safety of applicants to bail is not one of the recognized factors for opposing bail; it is the safety of the community that is considered, so the argument went. Further, it was argued that in any event, the second appellant did not render at the house that was torched..

Regarding the risk of interfering with witnesses, it was argued that no cogent evidence was presented to substantiate such an apprehension of interference.

The appellants counterarguments to their alleged vigorous attempt to resist arrest were that they could not have conceivably attempted to do so given that they were arrested by heavily armed police officers who had dogs for the mission.

Regarding the states assertion that the case for the state was overwhelming, it was the appellants contention that the evidence so relied upon had not been availed to the count, more so because there were no eyewitnesses to the alleged crime.

They also attacked the identification of the cattle by the complainant, principally on the basis that the cattle had no distinctive brand mark and that the landmark relied upon by the state

was a common landmark used throughout the Midlands province. According to the applicants, the substantial evidence relied upon by the state did not amount to much and was unlikely to lead to a conviction.

By way of their defense, the appellants averred that one Courage Mashege, who is still at large, is the one who sold accused 1 the beasts, which the complainant claimed to be hers. It was therefore argued that the state case was palpably weak and therefore that the corresponding incentive to abscond was virtually non-existent. Emphasis was placed on the presumption of innocence, which operates in applicants further at this stage, and ultimately that the state had failed to show compelling reasons justifying the refusal of bail.

The key considerations that weighed on the court's mind as demonstrated by its judgment were the following: first, the propensity to commit similar offenses, as evidenced by the first appellant's 'previous conviction relating to the lawful possession of carcasses and his co-accused's pending cases of a similar nature. Secondly, the relative strength of the case for the state, particularly in light of the fact that the first appellant was found in possession of one beast and the two ludes, which were positively identified by the applicant.

Thirdly, the fact that the 1<sup>st</sup> and 2<sup>nd</sup> appellants attempted to flee was a fact that was indicative of his intention to abscond. As for the third appellant, the court *a quo* found against him that he had supplied false particulars, it too being pointed at the desire to evade standing trial.

Ultimately, the court *a quo* found that the granting of bail was inimical to the interests of justice and therefore dismissed the application.

Aggrieved by that outcome, the three appellants mounted this present appeal the grounds of appeal were couched in the following terms:

1. The Magistrate erred in denying the appellants bail pending trial when there were no compelling reasons submitted by the respondent justifying the appellants continued detention. The State merely preferred allegations which were not backed by any evidence to qualify as cogent reason to deny bail, therefore the magistrate erred in denying bail on the basis of allegations in cogent reasons is required by law.
2. The Magistrate erred and misdirected himself in finding that there is a strong call against the appellants and that therefore the appellants are likely to abscond. In view of

the circumstance's nature of the States' evidence, there is no strong call against the applicants which would induce the appellants to flee.

3. The Magistrate erred and misdirected herself in denying bail on the basis that appellants have the propensity to commit further crimes, but there was no evidence that encibiliated appellants propensity to commit further crimes while on bail.

In amplification of the above grounds the appellants filed relatively lengthy submissions attacking the decision of the *court a quo*.

The appeal stands sternly opposed by the state, whose argument was that there was no discernible misdirection on the part of the court *a quo* in arriving at the decision it did. The recovery of the stolen beast at the 1<sup>st</sup> appellants plot, coupled with the inherent seriousness of the offense (and the heavy penalty likely to be imposed), were cited as the main inducements for appellants to abscond.

The previous convictions relating to the 1<sup>st</sup> appellant and the 2<sup>nd</sup> and 3<sup>rd</sup> appellants pending stock theft charges were given as *indicia* of the likelihood on their part to commit similar offenses in the future.

It must be stressed right from the onset that the decision whether or not to grant bail involves an exercise of discretion on the part of the court in the first instance. Authority abounds for the principle that an appeal court should not lightly interfere with the trial court's exercise of discernible misdirection. That would be the case, for instance, if the trial court acts upon a wrong principle or disregards relevant facts or factors that it ought rightly to have considered, or conversely, if it allows its decision to be influenced by the same extraneous or irrelevant consideration. None of these can legitimately be levelled against the court as *aquo*.

The allegations of the absence of "cogent evidence" supporting the refusal to grant bail cannot be sustained. The invitation such as the one extended by the appellants to elevate a bail application to a trial on the merits must be resisted.

Regarding the strength of the state case, what the state is required to show is a skeletal outline of the evidence at its disposal, which it intends to lead at the main trial. A bail application is not a drip rehearsal of the trial on its merits. Much ado was made about the identification of the cattle; it was alleged that there is a real possibility of a false or mistaken identity of the same. There

is no substance to those allegations. Cognition takes place in the subconscious. A person in the shoes of the complainant is surely capable of identifying her beasts or the hides thereof. There also appears to be a contradiction on the part of the appellants. On the one hand, they claim that the beasts were sold to the first applicant by the fugitive Courage Machege, yet in the next breath, they seek to impugn the complainant's identification of the cattle. One would perhaps be swayed by the argument that they innocently purchased the cattle from Courage, unbeknownst to them, which was the source of the beasts.

The court *a quo* cannot therefore be faulted in its assessment of the potential evidence against the appellant and the likelihood of a conviction ensuing, hence their motivation to take light.

Equally convincing is the argument that the accused's conduct at the time of their arrest suggests an unwillingness on their part to submit to due process and their risk of attempting to subvert the investigation and interfere with witnesses.

In my final analysis, therefore, I find that the appeal lacks merit, and accordingly, the appeal is dismissed.

ZISENGWE J