

GEORGE KABANDA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 9, 15, 16, 22 & 23 November, 2016

Bail application pending trial

Applicant in person
N Mazvimbakupa, for the respondent

CHITAPI J: The applicant applies for bail pending trial. The State opposes the application. The applicant is charged with an accomplice namely Amos Chingwaru. They face 4 counts of Stock theft as defined in s 114 of the Criminal Code [*Chapter 9:23*]. In count 1 they are alleged to have stolen 2 cattle belonging to the complainant. It is alleged that between 19 and 20 May, 2016 at night they acted with two other accomplices still to be arrested, opened the complainant's cattle pen, stole the two cattle, slaughtered them about a kilometre away from complainant's homestead and took the carcasses away with them in a motor vehicle. Nothing was recovered. The value stolen is U\$700.00.

In count 2, the applicant and his accomplices are alleged to have stolen two cattle from another complainant at night between 26 and 27 May, 2016. The two cattle were similarly slaughtered some 700metres away from the complainant's homestead and the applicant and his accomplices took away the carcasses in a motor vehicle and nothing was recovered. The value of the stolen cattle was put at US\$1 300.00. Nothing was recovered.

In count 3, the applicant and his accomplice in the company of 2 other accomplices still at large are alleged on the night of 31 May, 2016 to have opened the complainant's cattle pen, stole two cattle and slaughtered them about a kilometre from the complainant's homestead. They are alleged to have taken away the meat in their vehicle and nothing was recovered. The vehicle in which they had carried the meat was involved in an accident. They allegedly fled the accident scene. They thereafter hired a breakdown vehicle to tow the

damaged vehicle with the meat. Local people who had gathered at the accident scene stopped the applicant and his accomplices from towing the vehicle. The value of the stolen cattle was put at US\$1 600.00 with nothing recovered.

In count 4, the applicant and his accomplice are alleged to have stolen one cow belonging to the complainant between 1800hrs on 26 May, 2016 and 27 May, 2016 at 6-00am when the offence was discovered. The applicant, his co-accused and two other named accomplices still at large allegedly opened the complainant's cattle pen and drove out the cow which they slaughtered and took away the meat. They are alleged to have cut off the hind legs of the cow. The State outline alleges that nothing was recovered and the value of the cow is put at US\$600.00.

In all the counts, the applicant and his accomplices who included the arrested one and the two still at large allegedly used the same *modus operandi* of opening the complainant's cattle pens at night. Thereafter they drove the stolen cattle away for some short distance, slaughtered them and carried away the meat. They allegedly used a Honda Fit vehicle belong to Amos Chingwaru the co-accused to ferry the meat. The thefts occurred within the Beatrice area resettlement plots.

The investigating officer, - Sergeant Mapaya deposed to an affidavit giving reasons for opposing the admission of the applicant to bail. He deposed that the applicant admitted to having committed the offence charged and disclosed his accomplices two of whom are still to be arrested. The investigating officer stated further that the applicant and his accomplices used a Honda Fit borrowed from a co-accused Amos Chingaru to carry the carcasses of the stolen and slaughtered beats. He also stated that he was investigating two other stock theft cases within the Beatrice area where the same *modus operandi* was employed as in the charges preferred against the applicant. He suspected the accused to be linked to the two offences.

In outlining the other reasons for opposing bail, the investigating officer averred that the offences faced by the applicant were grave in nature and attracted a lengthy prison term. The seriousness of the offence and the likely lengthy sentences if convicted would act as an inducement on the applicant to abscond. The further ground advanced in the affidavit was that the prosecution evidence was solid and not mere allegations. It was alleged as well that the applicant could interfere with investigations and conceal or destroy evidence as accomplices Sign and Vitalis Mutinhiri were still at large. The investigating officer then

listed 8 other reported cases of stock theft reported at Beatrice Police Station which the police were still investigating with the applicant as one of the suspects.

The applicant in his submission alluded to the fact that his co-accused Amos Chingwaru had been admitted to bail on 17 June, 2016 by a judge of this court. He sought to argue that he should not be the exception. He also submitted that only two witnesses had testified and that his trial had commenced before the Magistrates Court on the 4 counts. He stated that no evidence so far led had linked him to the offences. He also stated that the other witnesses were not forthcoming. On outstanding cases being investigated, the applicant submitted that the allegations were unfounded. He said that he denied leading the police to his co-accused or any recovered exhibits. He submitted that he did not have previous convictions and was not predisposed to committing further offences. He further stated that with no evidence led at trial linking him to the offence he had no reason to abscond if admitted to bail. The applicant argued that he could only be held in custody without contravening his rights under s 50 (d) of the Constitution if the State demonstrated compelling reasons to justify his detention without bail. In his submissions, there were no compelling reasons advanced by the State and the presumption of innocence operated in his favour.

The State counsel adopted the investigating officer's affidavit in opposing bail. She submitted on the authorities of *Makumba v S C 30/04* and *Aitken & Anor v Attorney General* 1992 (1) ZLR 249 that the main considerations in application for bail pending trial are

- (i) whether the applicant will stand trial in due course
- (ii) whether the applicant will interfere with investigations or temper with witnesses
- (iii) whether the applicant will commit an offence (s) whilst on bail
- (iv) other considerations which a court may deem good and sufficient.

State counsel submitted in her response that evidence against the applicant was overwhelming as carcasses of a stolen ox were found in a vehicle which the applicant had borrowed from his accomplice. The State also feared interference with investigations on outstanding cases and submitted that the applicant had shown a propensity to commit further offences.

After hearing submissions, I directed the State counsel to get the investigating officer to explain how the applicant was arrested and how he was linked to the offences in precise

terms since the affidavit produced before me was rather generalized. I also asked the State counsel to file further submissions on why the State considered that it was in the interests of justice to deny the applicant bail when his co-accused had been granted bail. A supplementary State response was filed by the State to which the investigating officer attached another affidavit explaining how the applicant was arrested. He deposed that the applicant was involved in an accident using his accomplice's car. There was stolen meat in the vehicle. The applicant phoned his father reporting the accident. The applicant and his accomplices then left the vehicle at the accident scene. The applicant's father then made a follow up with the police. The police attended the accident scene but the applicant and his accomplices had fled from the scene. Surrounding police stations were radioed to be on the lookout for the applicant. He was arrested by police Mahusekwa and referred to Beatrice Police for further investigations. The applicant then indicated to the police who his accomplices were. Amos Chingwaru was then arrested and two other accomplices are still at large.

The State counsel submitted that the co-accused Amos Chingwaru had been admitted to bail because although he was the owner of the vehicle, he had loaned it to the applicant for the applicant's use and was not in charge of the vehicle on the day that it was involved in an accident. It was submitted that the applicant is the one who had been driving the motor vehicle. I asked the applicant for his response to the allegations in the supplementary bail statement. He denied that there was meat in the vehicle although he admitted that he had charge of the vehicle when it was involved in an accident. He said that when he went to tow the vehicle, there were locals surrounding the vehicle. The meat was not in the vehicle but a few metres from the accident scene off the road. He said that he ran away from the locals.

There is an important consideration in this matter. The applicant is now in the midst of a trial. Section 50 (d) of the Constitution which the applicant seeks to rely upon as entitling him to bail in the absence of compelling reasons covers a situation where an accused is arrested pending trial or a charge. Since the applicant is now on trial the provisions does not come into play. The power to admit an applicant to bail after he has appeared in court and before sentence is imposed is provided for in s 116 of the Criminal Procedure & Evidence Act. An important consideration in my view in a case where bail is sought during an ongoing trial would be the nature and strength of the evidence led in the trial court. This can only be assessed by having the transcript of proceedings being availed for consideration. I do not have such transcript and the applicant has not filed it. The other problem or challenge which

will present itself would be to anticipate the nature or strength of any further evidence still to be led by the State or by the applicant. A bail application made in the course of a trial which is ongoing before an inferior court would necessitate a judge where an application has been made before the completion of the trial, having to review ongoing proceedings and giving an opinion and ruling thereon especially on the strength of the State case because in an application for bail where trial has commenced, this consideration is very relevant in determining whether bail pending completion of the trial should be granted.

Counsel for the State did not address me on the aspect of the impact of the fact that the applicant's trial has commenced and is still to be completed. It is my view that apart from considering the evidence so far led in the trial, I would still have to consider the other matters relevant to whether or not bail should be granted. Another important factor to consider is the impact of s 115C of the Criminal Procedure & Evidence Act wherein the State is required to show on a balance of probabilities the existence of compelling reasons why bail should not be granted pending conviction.

The applicant appears to be forum shopping. In terms of s 116 (b) the applicant could have applied for bail before the magistrate before whom his trial is ongoing. Section 117 A (1) also provides that an accused can apply for bail to the magistrate before whom he or she is appearing as long as the matter is not a Third Schedule offence in respect of which a magistrate cannot admit an applicant to bail without the consent of the Prosecutor General. Stock theft as defined in s 114 of the Criminal Law Codification & Reform Act is not listed under the Third Schedule list of offences. It appears to me that the correct procedure is for the applicant to apply for bail to the magistrate before whom he is appearing and if his application is refused, he can approach this court on appeal or review. Accordingly I would dismiss the application as being non suited. If I am wrong in holding that the application is non-suited, the application still stands dismissed on the basis that there is no record of the trial proceedings which has been attached to the application. Either way the application not having been determined on the merits, the applicant is not bound by the rule requiring him to show changed circumstances before he can petition the court for bail henceforth.

National Prosecuting Authority, respondent's legal practitioners