HB 65/17
HCA 162/16

SOUL DUBE

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 2 DECEMBER 2016 & 23 MARCH 2017

Bail Application

H. Shenje for the appellant
N. Ngwenya for the respondent

TAKUVA J: This is an application for bail pending appeal. The applicant was convicted of one count of stock theft in contravention of section 114 (2) (a) of the Criminal Law (Codification and Reform) Act Chapter 9:23 [the Act] after a full trial. No special circumstances were found and he was sentenced to 9 years imprisonment. Dissatisfied with both conviction and sentence, he now applies for bail pending appeal.

The facts are that both the applicant and the complainant reside in Mphoengs under Chief Tshili. During the month of July 2015 the applicant found a brown ox belonging to the complainant at Phumula Dam a popular drinking place for animals. The beast had a UʎE on its left thigh, two white spots on its face, and two straight cuts on the left ear. The applicant drove the beast to his home where he branded it with his SDU mark 3X on the right thigh, right neck and right stomach. He also put a chain around the ox's neck.

On 3 July 2015 complainant noticed that his brown ox had been branded SDU which she knew to be applicant's brand mark. She made a report to the police leading to the applicant's arrest. The beast was recovered.

Applicant admitted taking the ox at Phumula Dam. He claimed that it belongs to his wife who had inherited it from her brother. He alleged that this ox together with many others came from Maninji area and they all bore the band UTN on the left shoulder. In 2012, this particular

beast and others went missing until July 2015 when applicant saw it at the dam and took it home. Upon its recovery, applicant claimed to have observed the original UTN mark on it. He stated that he then branded it with the mark SDU with the consent of his wife. He denied seeing complainant's UʎE brand anywhere on the beast.

Applicant's defence was rejected and he was convicted and sentenced to the mandatory minimum sentence of 9 years imprisonment. He noted an appeal against both conviction and sentence on the following grounds:

"1. The court *a quo* erred and seriously misdirected itself in finding on the evidence that the beast did not have a tempered UTN mark.
2. The court *a quo* erred, and therefore misdirected itself in finding on the evidence, that the beast belonged to the complainant on account of the brand 'UYE' having been marked on the said beast ahead of the appellant's brand 'SDU'.
3. The court *a quo* generally erred in finding on the evidence that the state had proved its case beyond reasonable doubt.

AD Sentence

4. Assuming that the conviction was proper, which is disputed, the court *a quo* erred in finding on evidence before it that there were no special circumstances …"

In his application for bail pending appeal, it was contended on his behalf that he has very good prospects of success on appeal in that the beast had UTN on its left shoulder which the complainant tempered with by superimposing UY on it. For that reason the applicant's defence was reasonably possibly true. It was further submitted that it is in the interests of justice that the applicant be admitted to bail pending appeal.

Respondent opposed the application on the ground that there are virtually no prospects of success on appeal, in that during the inspection *in loco*, there was no evidence to substantiate the existence of the mark "UTN" on the ox's left shoulder. What was observed were the letters 'UY' with no evidence whatsoever that the letter "T" was erased or distorted. The complainant's brand mark (UʎE) was clearly visible, so were the ear marks. Also clearly visible was the applicant's own brand mark which was said to be fresher than the complainant's.

Further, Ms *Ngwenya* for the state contended that applicant's version could not possibly be believed because he said he did not check to see if the beast already had any brand mark since he believed it to be his. If that is what he did, so the argument went, he did not even see his wife's brand mark which is "UTN". If he did not see that crucial mark hen how did he identify the ox as his wife's?

The Law

Section 123 of the Criminal Procedure and Evidence Act, Chapter 9:07 provides the power to admit a person to bail pending appeal or review.

The approach in an application for bail pending appeal is that the onus is on the applicant to show that justice will not be endangered and that there are reasonable prospects of success on appeal – see *S* v *Manyange* 2003 (1) ZLR 21 (H).

In *S* v *Williams* 1980 ZLR 466 (A) it was emphasised that the proper approach should be towards allowing liberty to persons where that can be done without endangering the interests of justice. The court has to balance both the likelihood of the applicant absconding and the prospects of success which two factors are interwoven in that the less likely the prospects of success are, the more inducement there is on applicant to abscond.

In *S* v *Manyange supra*, the principle was put thus: "It is trite that bail is a matter for the discretion of the court. In exercising its discretion, the court considering an application for bail pending appeal must be satisfied that there are reasonable prospects of success on appeal and that the granting of bail will not endanger the interests of justice."

While discussing the principles of bail pending appeal or review, John van der Berg in his book *Bail A Practitioner's Guide* Third Edition Juta 2012 states at pages 215 – 16 that:

> "The primary consideration in an application for bail pending appeal or review is whether the accused will serve his sentence if released on bail and should his appeal or review fail; the risks of the accused interfering with the investigation or influencing witnesses will have fallen away. The court will naturally take into account the increased risk of abscondment in view of the fact that the accused has been convicted and sentenced to a term of imprisonment, and is not merely awaiting the outcome of his trial. Also, a stark change of circumstances is the fact that the presumption of innocence has, by this state ceased operating in the accused's favour. Thus, the severity of the sentence imposed will be a decisive factor in the court 's exercise of its discretion whether or not to grant bail and as to the amount of bail to be considered, for the notional temptation to abscond which confronts every accused person becomes a real consideration once it is known what the accused's punishment entails."

Application of the Law to the facts

Prospects of success on appeal against conviction exist where such conviction is demonstrably suspect. *In casu*, this is far from the case in that the applicant has dismally failed to show reasonable grounds upon which he believed or concluded that the beast belonged to him and his wife. On his admission he did not look for the original brand mark i.e. UTN on the ox. Not only that, again on his own admission, he did not bother to look for any other brand marks on the beast. It is a fact that the ox in issue had complainant's brand mark on the left hind leg and clear ear cuts on both ears. How applicant missed all these marks has not been satisfactorily explained. Be that as it may, the question that boggles the mind is, in the absence of the mark UTN on the beast, how did he identify it as his? Applicant feebly tried to provide an explanation by speculating that the complainant tempered with the UTN by inserting UY on the left front shoulder.

However, even this belated spin does not wash for the following reasons; Firstly, UY is not UTN. Secondly, there was no evidence upon inspection in loco of any erasure of the letter N or interference or distortion of the letter T on the skin. Thirdly, it is surprising that the applicant is alleging that someone tempered with the UTN mark when the beast has always been in his custody from the time he took it. If the tempering occurred before he recovered the ox then he should have noticed it upon recovery. If it was done after his arrest, why would that person if it

was the complainant put those two letters? Whoever did that wanted to distort the identity of the beast by creating some doubt as to its ownership.

Applicant should have verified that the beast indeed belonged to his wife by examining the ox in search of the UTN mark. He did not do so. Applicant's conduct was grossly unreasonable in my view. Such gross unreasonableness may be taken into account in determining whether or not his mistake or belief was genuine. In my view applicant's mistake was certainly not a real mistake but an artificial one. He acted insincerely and dishonestly. Surely if the beast had been missing for 2 ½ years, why did he ignore a brand mark and ear marks on it? Why did he not report his findings on this beast to the police or at the very least ask the owner of the herd it was in about the origin of the brand mark and ear marks. Why re-brand it without police clearance? In any case I find it hard to believe that after confining this ox for purposes of branding, applicant would still fail to notice a brand mark on its left hind leg, the same side he claims the UTN should have been.

For these reasons, I find that there are no reasonable prospects of success on appeal against conviction.

As regards sentence, the court *a quo* found no special circumstances as warranting a departure from the imposition of a mandatory minimum sentence. Mr *Shenje* who appeared for the applicant during the trial and in these proceedings, submitted that special circumstances should have been found since applicant's mistake was genuine. I am not convinced that on the evidence this would have been a proper finding. I say so because the applicant was not acting in good faith. Also, his evidence on the number of cattle his wife inherited and the number that subsequently got lost is unconvincing in that there are numerous contradictions between his evidence and his wife's together with that of the worker who drove them. In the circumstances, I am of the view that the applicant's prospects of success on appeal against sentence are non-existent.

The likelihood of abscondment

Mr *Shenje* argued that the fact that the applicant is a 60 year old man who has faith in his defence would eliminate the risk of abscondment. I disagree, applicant faces a heavy penalty that is likely to induce him to abscond. In the absence of special circumstances, applicant faces a nine year jail term and he now knows this. The entire application has no merit.

Accordingly, the application is hereby dismissed.

Shenje & Company, appellant's legal practitioners
The National Prosecuting Authority, respondent's legal practitioners