



**CASE NO.: CA**

**29/2011**

**IN THE HIGH COURT OF NAMIBIA**

In the matter between

**SHAUN ROSS**

**APPELLANT**

**versus**

**THE STATE**

**RESPONDENT**

**CORAM: SIBOLEKA, J**

**Heard on: 2011 July 18**

**Delivered on: 2011 August 09**

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**APPEAL JUDGMENT: (BAIL)**

**SIBOLEKA J:**

[1] This is an appeal against the Magistrates Court's refusal to grant bail to the appellant.

[2] In the Court *a quo*, bail was opposed on the following grounds:

- The seriousness of the matter
- Interference
- Bail was previously granted to accused and offences were committed during that period
- The prevalence of offence of stock theft
- Number of cases: - 18
- Fear of absconding
- Strength of the State's case
- Public interest
- Further investigation will be interfered with if accused person is released on bail.

Mr. Uanivi appeared both in the Court *a quo* and in this Court for the appellant, Mr. Maronedze for the respondent. This Court is indebted to both counsel's valuable contributions in this regard.

The appellant's main heads of argument does not set out the grounds of appeal indicating points in law or fact if any where the Magistrate has misdirected himself in refusing bail.

In his testimony the appellant said he was born in 1978, and finished his school at Cosmos High School in Windhoek. His passport had already been taken by the police. He owns a house in Swakopmund another one in Windhoek and a big truck, Scania the value of all his property is ± N\$500,000.00. He is a Manager at Klein Spitzkop Transport where he earns N\$5,000.00 per month after deductions. He is a farmer, digs stones which he sells to tourists. He has three farm workers, a truck driver , a secretary, and a domestic worker.

His business is down since his arrest and his elderly parents are taking care of his property. His mother had a heart attack last year, such that she is not of much assistance. He has three children aged 12, 6 and 3 years respectively and they reside with his mother. He is single, but wants to get married, and his three children require to be taken to school. His trucks drive out of the country, but he does not do so because he personally does not have any business or family ties outside Namibia. In custody he sometimes assists with work outside the Police Cells and sometimes he is left unattended. He was released on bail of N\$5,000.00 in 2009 on condition he did not interfere with the investigation. He was re-arrested in 2011 for one case only, and from there other cases came up when members of the community were given notice by the traditional leader to come at his farm and identify

their animals. This they did on skin colour and birthmark without any proof of ownership.

He testified that he never made or tried to make contact with the investigation officer or any of the witnesses on the matter. Whenever he has credit he only calls his parents.

He said there was no demonstration against him on this matter and neither was he threatened by any member of the public should he be released. He was also never approached by any member of the print media on that score. He however read a newspaper report where the investigating officer, Uirab allegedly gave information and told members of the community to come to Court and demand that he not be released on bail. He will plead not guilty to all the charges, because all the animals that were identified belong to him and he has proof to that effect.

The claims against him are about animals that disappeared between 2008 and 2009 without indication of the dates. According to him all these claims started after his re-arrest, and he wonders why the claimants did not make any reports to the police at the time of losing the cattle. According to the appellant that is how he came up with 18

cases involving more than 60 cattle, and there are altogether 15 complainants still unknown to him.

At that stage his health was well, but he has a heart problem as a diabetic person. He injects himself with insulin and in a "To whom it may concern letter" his doctor confirmed that he also has blood pressure which could be worsened by overcrowding, cigarette smoking and smoke inhalations. In my view the contents of this letter has been taken care of since the appellant was transferred to Arandis. This was confirmed by the investigation officer in his evidence during the bail application. The appellant will be allowed free access to the recommended food supplies brought by his relatives. The prescribed foods are a cup of skimmed milk, whole wheat, butter, and juice for breakfast. He testified that he is unable to eat recommended foods because there is nothing in custody where he is. There he is given porridge and kitchens are dirty and full of cockroaches all over. According to him they don't have a non smoking cell, and generally cells are dirty and overcrowded. He feels dizzy, is sweating and is being treated as if he has no rights. I must mention here that the appellant's right to freedom was affected when he was re-arrested on fresh stock theft charges.

He said he has 4 to 5 stock theft cases in Khorixas where he was granted N\$6,000.00 bail.

He further testified that he wanted to be granted bail because of his business. Two of his employees are married and want to be paid. Those in the transport business only want to do business with him and not his parents. His mother did not go to Parama Hospital in South Africa because he could not provide her with money. His children are being teased around at school, and should this Court consider bail in his favour, he is able to afford N\$5,000.00 and has no objection to any conditions.

Jefrey Uirab testified in opposition to the granting of bail in his capacity as the investigating officer. According to him the cases relating to the appellant that he investigated were at an early stage. He feared that the same would be interfered with if the appellant was released on bail. He stated that when the appellant's brand iron mark was confiscated by the police, he made two more for himself, something which according to this police officer should not have been done. He testified that stock theft is high at Usakos and surrounding areas which according to him negatively affects community members who largely depend thereon. He is investigating five stock theft cases against the accused and ten at Usakos. Appellant has three stock theft cases in

Khorixas for which he had been granted bail. He stated that there is a public outcry by community members requesting that the police should protect their animals. As part of their work with communities, police officers are thus allowed to attend such meetings.

He denied ever organizing mass protests against the appellant being granted bail. According to him such an exercise is not allowed. He testified that he has a strong case against the appellant. He further stated that he went to Veterinary offices at Omaruru but could not find any record of the accused's stock book or registration. According to this officer all stock bought at auction pens are registered and the same is done when they arrive at the buyers farm. This record is then availed to the Veterinary offices.

This officer testified that complainants used to come and make reports about their stolen animals and entries were made in the Police Occurrence Book. Copies thereof were later attached to the dockets. When Head Office gave them a go ahead to allow members of the public to come to the appellant's farm to see if they could identify their animals, that was done. He said it was only after animals were identified by their respective owners that cases against the appellant were opened. This witness testified that the appellant was not denied

access to medication, and that if that was the case he did not report it to the Station Commander in order to be sorted out.

According to him Police Cells at Usakos are very small and that is why some inmates are transferred to Arandis where there is more space.

In cross-examination this officer confirmed that the appellant has five cases at Karibib, and 20 stock theft complainants from Omaruru, Karibib, and Usakos. According to him it will not be in the interests of justice to release the appellant on bail.

In his oral arguments before Court Mr. Uanivi said medical prescriptions from the doctor were handed into the Court *a quo* during the bail application. According to this counsel these related to the appellants diabetic condition and needs, but perusal of the record from the Lower Court only has a 'to whom it may concern letter'. The appellant's evidence in chief and cross-examination does not mention or refer to any medical document handed into Court. This also seems to be the case from the following questions posed by Mr. Uanivi to the investigation officer.

At page 40 of the record in the Court *a quo*

Q: Accused 1 applies for bail because his health condition is worsening – tell the Court what is the procedure of accused in

custody to receive proper health treatment and a strict diet?

A: Is true that we don't give special food – but if there is a special diet – accused can make an application to be transferred to where his doctor is and for a special diet.

Q: Such application can be made through a letter.

A: If he has proof of a special diet he can give to the Station Commander to act on it.

Q: On 2 March 2011 that if such diet prescriptions arrive – arrangements can be made?

A: Correct.”

From the above it is unlikely that other medical documents relating to the appellant's diabetic condition were handed in during the bail hearing.

In addition to the above here is how the appellant sketched the reason for his desire to secure a release on bail, on page 18 of the Court *a quo's* record:

“I want to be granted bail because of the business – two of my employees are married and they want to be paid. And as for the transport business they want to do business only with me and not my parents. My under-

lining

My parents health is deteriorating and my mother was supposed to be in SA at Parama Hospital but she couldn't go as I couldn't provide her with money.” My underlining

The appellant clearly emphasized the deteriorating health of his parents and the state of his business as the reason why he wanted to be released on bail, instead of his heart problem and 'blood pressure'.

The appellant conceded during cross-examination that he was already on bail when fresh allegation of stock theft were made against him. The learned Magistrate in the Court *a quo* referred to this aspect in his reasons for refusing bail. This is an unhealthy state of affairs that operates against the appellant. In my view he is expected to know that he runs a risk of not easily convincing the Court to be reconsidered for bail after his re-arrest. It is also interesting to note that the same allegations of stock theft were again leveled against him while on bail.

Section 3 of Act 5 of 1991 reads:

“3 The following section is hereby substituted for section 61 of the principal Act:

61. If an accused who is in custody in respect of any offence referred to in Part IV of Schedule 2 applies under section 60 to be released on bail in respect of such offence, the Court may, notwithstanding that it is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police investigation, refuse the application for bail if in the interests of the public or the administration of justice that the accused be retained in custody pending his or her trial.” My own underlining.

I agree with the reasoning in the authorities cited by Mr. Uanivi and in my view the Magistrate’s decision is within the rationale expressed therein. One of such cases is the unreported judgment of *Timotheus v The State*, delivered on 22 August 1995 where Strydom, JP as he then

was stated that:

“Considerations such as public interest may, if there is proper evidence before the Court, lead to refusal of bail even where the possibility of abscondment or interference is remote.”

I am unable to find fault or a misdirection in the reasoning of the Magistrate for refusing bail. The appellant had already been granted bail but did not behave properly, and as a result new allegations of stock theft resurfaced again. In my view the justice system could easily be seen not to care for what the appellant is allegedly doing to other people’s animals. I also agree with the reasoning of the Magistrate that sugar diabetes is treatable. The investigation officer testified that he is not aware of any report relating to refusal for the appellant to access any form assistance from his relatives and no report in that regard has been made to the Station Commander.

In the result I make the following Order:

1. The appeal fails.
2. The appellant’s relatives must be allowed free access to the appellant whenever they bring the basic needs he requires, this includes food and medication.
3. The appellant must be taken for medical attention if he so requests, and this must be attended to without fail.

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**SIBOLEKA, J**

**COUNSEL ON BEHALF OF THE APPLICANT:**

**MR.**

**UANIVI**

**INSTRUCTED BY:**

**LEGAL**

**AID**

**COUNSEL ON BEHALF OF THE RESPONDENT: ADV.**

**MARONDEDZE**

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