



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
APPEAL AGAINST BAIL REFUSAL**

CASE NO.: CA 55/2017

In the matter between:

KAVII MUMBANGO

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Mumbango v S* (CA 55/2017) [2017] NAHCMD 215 (09 August 2017)

CORAM: SIBOLEKA J

Heard on: 31 July 2017

Delivered: 09 August 2017

Flynote: Criminal law – Appeal against Magistrate’s refusal to grant bail – Real question, can it be said that Magistrate who has discretion to grant bail exercised that discretion wrongly – The facts show that is not the case – Appeal dismissed.

Summary: Appellant, a stock theft suspect granted bail pending finalization of his case. In the meantime and while still on bail serious fresh allegation of theft of 44 cattle valued N\$250 000 caused his arrest. Allegations on both matters shows the same modus operandi which is the placing of his ear tags and brand marks on suspected stolen cattle.

Held: In view of the circumstances of this matter I am unable to find fault in the manner in which the Magistrate in the Court a quo exercised his discretion refusing to release the appellant on bail.

Held: The appeal is dismissed.

ORDER

The appeal is dismissed.

JUDGMENT

SIBOLEKA J:

[1] The appellant and three others are facing the charge of alleged theft of 44 livestock valued at N\$250 000. This appeal judgment is only in respect of the appellant, accused 3 on the main trial. At the time he launched a formal application for bail, the matter had not taken yet been pleaded to. It is the Magistrate's refusal to release him on bail that is appealed against.

[2] The grounds are as follows:

'(i) In considering the investigator's statement that the appellant tried to interfere with

evidence;

- (ii) That the Investigator's testimony was not put to the Appellant;
- (iii) That there was no credible evidence supporting public interest/administration of Justice;
- (iv) That the court did not weight public interest and the personal circumstances of the Appellant; and
- (v) Stating that the Appellant ought to have learnt a lesson from his pending stock theft cases.'

[3] From the evidence placed before the Court below by the appellant and the investigation officer during the application for bail, the facts of the matter are briefly as follows:

[3.1] It is a requirement, according to the appellant that all animals brought at the Auction Kraal for sale must have brand marks and ear tags. Animals belonging to Uatavi Kamandoora, a very well known person to him did not comply with the above sale requirements.

[3.2] At the request of Kamandoora, the appellant availed his own brand marks and ear tags to be placed on Kamandoora's animals. Leonardville police found these particulars on suspected stolen cattle and arrested him. The understanding between the appellant and Kamandoora was that after the sale of the animals the appellant would be given money to buy new ear tags replacing his that were placed on Kamandoora's animals. In his bail application the appellant offered to pay N\$10 000.

[3.3] The appellant conceded in his evidence during the bail hearing that he has another pending stock theft case, but according to his belief, he will not be convicted thereon. He also wanted to attend to the burial of his wife.

[4] Sidney Cloete testified that he is the investigation officer. The facts are that the appellant had a pending stock theft case whereon he was granted bail.

He was still on bail pending the finalization of that matter when fresh allegations related to the theft of 44 cattle valued at N\$250 000 was reported, triggering his arrest on the matter now before Court.

[4.1] Investigations showed that the appellant used the same modus operandi in the alleged two cases of stock theft. The appellant's ear tags and brand marks were used on twenty of the 44 suspected stolen cattle. Among these animals one cow died at the auction kraal at Monica Farm. The remaining twenty three cattle were taken to Farm Brandell in Omaheke.

[4.2] According to the officer when the appellant realized that the police could be behind him, he instructed his workers to chase the alleged stolen animals deep into the forest, where they removed the complainant's ear tags and burnt them. These ear tags were replaced by the appellant's own ear tags and brand marks. The cheque for the transportation of the alleged stolen animals was made out in the appellant's name in both cases. This was done because the appellant told the truck driver the animals belong to him, and that his co-accused were merely his workers. The proceeds were divided between the appellant and his co-accused.

[5] Among the authorities relied on by both counsel, and in particular the basis on which the appellant's counsel in this matter persuaded this court to interfere with the Magistrate's refusal to grant bail to the appellant is the matter of *Charlotte Helena Botha v The State*¹ and he quoted the following:

'The legal convictions of the community, in my view, will hold that an accused person should not be released on bail in the situations ... provided there is prima facie proof against such person that he or she has committed the type of serious crime ... and is therefore in the opinion of the Court, a potential threat to the victims or to other innocent members of society or is perceived by them on reasonable grounds to be such a threat'.

¹ Charlotte Helena Botha v The State Case No. CA 70/95 delivered on 20 October 1995.

[6] In the matter before this court the appellant is in agreement and it is in fact his own evidence in the bail proceedings that it was him who on the request of a certain Kamandoora, his co-accused no. 1, proceeded to provide his own ear tags and brand marks to be placed on the suspected stolen cattle. This happened, according to the investigation officer after the appellant had asked his co-accused to remove and burn the original ear tags of the complainant on the said animals. This was the same method the appellant had used in the first pending stock theft case whereon he was released on bail.

[7] It is my considered view that in the circumstances of this case, if the trial Magistrate had granted bail to the appellant that move would have created a legitimate fear in the minds of the victims (cattle owners) that such crimes may be repeated even if there is no proof that that would be the case.

[8] It is further my considered view that a perception that the police and the Courts are unable and unwilling to protect the community would have been appropriate if bail was granted. This, would be the case because the community and the public out there would clearly have seen that a suspect who is on bail need not behave. They would have observed that it did not matter even if he is arrested on fresh allegations similar to those on which he has already been granted bail, he will continuously be released on bail and nothing would happen to him.

[9] Mr Uanivi's argument that no consistency was applied in the Magistrate's ruling to refuse bail is in my view misplaced because each matter has to be decided on its facts.

[9.1] His further argument that the investigation officer's evidence whereon the Magistrate relied not to grant bail was not put to the appellant at the time the prosecution cross-examined him, is also not an issue because the appellant is in

agreement with the main allegation in this stock theft case, namely that he provided his own ear tags and brand marks to be placed on the alleged stolen cattle.

[10] In view of the above, I don't find fault in the Magistrate's refusal to grant bail to the appellant.

[11] In the result I make the following order:

The appeal is dismissed.

A M SIBOLEKA
Judge

APPEARANCES

APPELLANT

Of

V. Uanivi

Uanivi Gaes Inc, Windhoek

RESPONDENT

Of

H. Muhongo

Office of the Prosecutor-General, Windhoek