IRIMAYI MURINGA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 11 FEBRUARY AND 10 MARCH 2022

Bail Application

S. Mawere, for the applicant
K.M. Guveya, for the respondent

MOYO J: This is an appeal against the decision of a Magistrate refusing the appellant bail pending trial. The applicant faces a charge of stock theft as defined in section 114 of the Code.

The first ground of appeal is that the learned Magistrate misdirected herself in finding that there were compelling reasons to deny applicant bail due to speculations and unfounded beliefs that if he is released on bail, he is likely to be harmed by the Gwanda Community. The 2nd ground of appeal is that the learned Magistrate misdirected herself by disregarding the fact that applicant is presumed innocent until proven guilty. The 3rd ground of appeal is that the learned Magistrate misdirected herself by failing to consider the possibility of imposing conditions to allay the state's fear of appellant interfering with evidence. The 4th ground is that the court did not give due weight to the fact that the appellant had surrendered himself to the police.

In her ruling in the bail application, the court *a quo* dealt with numerous factors some of which are subject of this appeal. On the aspect of fear of attacks by the community the learned Magistrate clearly erred. Hence the first ground of appeal has merit.

However, a pertinent point raised by the learned Magistrate in her ruling is the following at page 2 of the ruling:-

> "The court must not be blind to the fact that the applicant is facing a serious offence accompanied by overwhelming evidence. The Form 242 alleges that the applicant was found with the three slaughtered cattle in his kraal by the villagers. The accused's footwear was found at the scene by the villagers. The defence counsel, although he is not obliged could have proffered the applicant's defence which would make him want to stand trial regardless of the overwhelming evidence against him."

It is trite that in an application for bail, the court is enjoined to consider all factors in the court record. Whilst the other findings by the trial court especially on the anger by the members of the public are not founded, the aspect of the evidence and the failure by the applicant to profer a defence to the charges are pertinent. For at the centre of the determination of a bail application, the court in assessing the compelling reasons if any, and the likelihood to abscond, is enjoined to look at the strengths and weaknesses of either the state or defence case and is allowed to infer the risk to abscond from such circumstances.

In the case of *Jongwe* v *State* SC 62/02 the Supreme Court held that in assessing the risk to abscond in an application for bail, the court should be guided by the following:-

a) the character of the charges and the penalties which in all probability would be imposed if convicted.
b) the strength of the state case.
c) the assurance that the accused person intends to stand trial.

In the case of *Ndlovu* v *State* 2001 (2) ZLR 261 (H), it was held that it is desirable for the accused person to disclose his or her defence and not merely make bold assertions that he is innocent. Although the presumption of innocence operates in accused's favour at this stage, the mere fact that the state case is *prima facie* strong (because of the allegation that the accused was found with the 3 slaughtered beasts at his kraal, and that the villagers could identify his footprints, surely it was then desirable for the applicant to explain that in his bail statement and show that the state case is not as strong as it seems and that in fact he does have a defence which will encourage him to stand trial and thus minimise the risk to abscond. In the Jongwe case (*supra)* it was held that in assessing the risk to abscond, the court looks into the ordinary motives and fears that sway human nature.

I find that the Form 242 alleging that the applicant was found with the slaughtered beasts at his kraal and that his foot prints were identified by villagers, is indeed a factor in

determining the strength or weakness of the state case, warranting that a response should have been made indicating if that was never so. I find that the learned Magistrate's finding

on the state case being *prima facie* strong and on the failure by the applicant to at least intimate his defence to be in line with the reasoning in the Jongwe case (*supra)* cannot be. The risk to abscond can be inferred on the seriousness of the offence, the *prima facie* strong state case, and the failure to intimate a defence by the accused.

At the core of such an application is the assurance that an applicant to bail will not abscond and thus jeopardise the interests of justice. I hold the view that the learned Magistrate did not misdirect herself on the part regarding the evidence, the *prima facie* strong state case and the accused's unstated defence. Stock theft is a serious offence that carries with it a mandatory minimum custodial sentence of 9 years imprisonment in the absence of special circumstances. I thus do not find any fault with the learned Magistrate's reasoning in that regard.

I accordingly dismiss the appeal against the refusal of bail by a Magistrate.

Morris-Davies & Co, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners