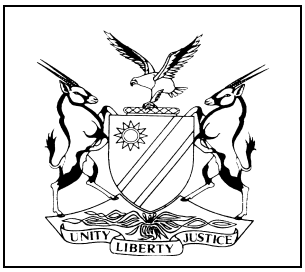


SUMMARY

Case No.: CA 80/2008

ONESMUS VALOMBOLA

versus

THE STATE

Heard on: 2008 September 4

Delivered on: 2008 September 4

PARKER, J *et* NDAUENDAPO, J

Criminal Law - Theft of stock and possession of stock in terms of the Stock Theft Act (Act No. 12 of 1990), as amended, are two different offences with different penal sanctions.

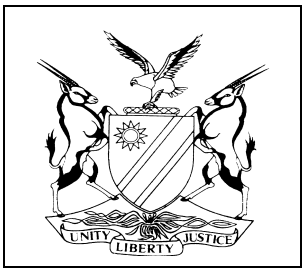
Criminal law - Possession of stock provided for in s 2 of Act 12 of 1990 and penal sanction therefor in s 15 – Sections 2 and 15 have never been amended by Act 19 of 1993 or Act 19 of 2004 – Possession of stock not one of the offences under Part IV of Schedule 2 to Act No. 5 of 1991 for purposes of bail.

Criminal Procedure - Bail – Appeal against magistrate's refusal to grant bail – High Court bound by s 65 (4) of Act 51 of 1977 – High Court should only interfere if decision was wrong – One of the circumstances tending to show magistrate exercised judicial discretion wrongly is where magistrate misdirected

herself or himself, e.g. where decision is based on incorrect interpretation of the applicable provision of a statute magistrate is applying.

Criminal procedure - Bail – When be granted – Court entitled to grant bail where in circumstances of case interests of justice will not be prejudiced – Court finding magistrate's decision wrong and further that interests of justice will not be prejudiced if bail granted.

Evidence - Witnesses – No party in proceedings has property in a potential witness – Court finding that appellant did not interfere with State witness when a person gave evidence for appellant as there was no credible evidence that the State had earlier asked that person to give evidence and appellant knew about it.



CASE NO.: CA 80/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ONESMUS VALOMBOLA **Appellant**

versus

THE STATE **Respondent**

CORAM: **PARKER, J *et* NDAUENDAPO, J**

Heard on: 2008 September 4

Delivered on: 2008 September 4

JUDGMENT:

PARKER, J.:

[1] This is an appeal against a decision of the learned magistrate at Eenhana on 12 June 2008, refusing to release the appellant on bail pending his trial.

[2] After we have heard oral submissions from Mr. Namandje, counsel for the appellant, and Mr. Marondedze, counsel for the State, we upheld the appeal and ordered

that the appellant be released on bail on conditions that (1) he must pay N$2,000.00, and (2) he must not interfere with police investigations or State witnesses. We said then that we would give our reasons later; these are the reasons.

[3] The appellant was charged with contravening s 2 of the Stock Theft Act, 1990 (Act No. 12 of 1990) (the principal Act): this is very significant. He has not been charged with theft of stock (as the learned magistrate appeared to think), as I shall demonstrate shortly. Section 2 of Act 12 of 1990 provides:

> Any person who is found in possession of stock or produce in regard to which there is reasonable suspicion that it has been stolen and is unable to give satisfactory account of such possession, shall be guilty of an offence.

[4] It is also worthy to note that none of the two amendments to Act No. 12 of 1990, i.e. the Stock Theft Amendment Act, 1993 (Act No. 19 of 1993) and the Stock Theft Amendment Act, 2004 (Act No. 19 of 2004) affects s 2 of Act No. 12 of 1990. That is to say, s 2 of Act No. 12 of 1990 has never been amended since the passing of the principal Act.

[5] We accept as good law the decision in *S v Branco* 2002 (1) SACR 531 at 533a, approving *S v Smith and another* 1969 (4) SA 175 (N) at 177E-F, that -

> The court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby.

We are also bound by the decision of this Court in *Mylene Swanepoel v The State* Case No. CA 91/2004 (Unreported) at p. 3 that in terms of s 65 (4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (CPA), this Court will not interfere with the judicial discretion exercised by the learned magistrate in refusing bail unless it is satisfied that the decision

was wrong. Furthermore, in *S v Pineiro and others* 1999 NR 18 at 21E-G, it was said by this Court, *per* Frank, J that:

> The overriding principles guiding an application of this kind are succinctly set out by Du Toit *et al* in *Commentary on the Criminal Procedure Act* and, in his notes to s 60 thereof at 9-8B, the following is stated:
>
> > 'In the exercise of its discretion to grant or refuse bail, the court does in principle address only one all-embracing issue: Will the interests of justice be prejudiced if the accused is granted bail? And in this context it must be borne in mind that, if an accused is refused bail in circumstances where he will stand his trial, the interests of justice are also prejudiced.
> >
> > Four subsidiary questions arise. If released on bail, will the accused stand his trial? Will he interfere with State witnesses or the police investigation? Will he commit further crimes? Will his release be prejudicial to the maintenance of law and order and the security of the State? At the same time the court should determine whether any objection to release on bail cannot suitably be met by appropriate conditions pertaining to release on bail. (See generally *S v Bennet* 1976 (3) SA 652 (C).)'
>
> The principles are also set out in more detail in a judgement of this Court in *S v Acheson* 1991 (2) SA 805 (Nm) at 821E–823E.

[6] The principles set out in the authorities are borne in mind in deciding the present appeal.

[7] Mr. Namandje submitted that the learned magistrate misdirected herself in certain respects and therefore the conclusion reached was wrong. It has been said that one of the circumstances which may lead a court of appeal to conclude that the learned magistrate has exercised his or her discretion wrongly is when his or her conclusion is vitiated by misdirection. (*Swanepoel* supra at p. 4)

[8] In my opinion, the most significant misdirection is that the learned magistrate concluded that "due to the seriousness of the crime and the punishment thereof there is a likelihood that accused may not stand trial. That this conclusion weighed heavily on the mind of the learned magistrate is borne out indubitably by the fact that in articulating her

reasons for refusing to release the appellant on bail, the learned magistrate stated, "If convicted of this offence, in terms of section 14 (a)–(b) Act 19/04 the appellant will face a mandatory sentence of 30 years." This is misdirection on the law and the facts. The penal sanction attached to a contravention of s 2 of the principal Act, which, as I have said above, has never been amended, is contained in s 15 of the principal Act; and s 15, too, has never been amended. Section 15 provides:

> Any person who is convicted of an offence under this Act *for which no penalty is otherwise provided* shall be liable to a fine not exceeding R (N$) 4 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment. (My emphasis)

[9] No penalty has been provided specifically for an offence under s 2 of the principal Act within the meaning of s 15, and therefore the penal provision in s 15 applies to s 2. For this reason, the magistrate misdirected herself when she said that the offence with which the appellant is charged is serious because it carries the mandatory sentence of 30 years' imprisonment, and therefore it was likely that the appellant would abscond if released on bail. On this point, it would appear the learned magistrate accepted holus-bolus the evidence of the investigating officer without making sure the investigating officer was correct on the law. The investigating officer testified:

> My reservation is that if accused found guilty of this offence will be sentenced to 20 or 30 years imprisonment because of that and may abscond.

Mr. Marondedze also, with respect, did not fare better; for also misread the law on the point when he submitted:

> Further the Appellant's all pending cases of stock theft involve cattle. Therefore in each case the penalty provisions of the enabling act call for a period of imprisonment of not less than twenty (20) years in the event of convictions …

[10] The penalties provided for under s 14 of the principal Act, as amended by s 2 of Act No. 19 of 2004, apply only to offences referred to in s 11 (1), (b), (c) or (d) of the principal Act.

[11] In my opinion, this misdirection must weigh heavily in the consideration of the present appeal, particularly when this court considers whether or not the learned magistrate exercised her judicial discretion wrongly. The reason is that in her judgment, the first of the three issues that the learned magistrate considered was: "Will accused stand his trial if granted bail". In this regard, in my view, where the exercise of judicial discretion is premised on wrong interpretation and application of a statutory provision, the decision made must indubitably be wrong.

[12] In this connection, I do not find *S v Soabeb and others* 1992 NR 280, which Mr. Marondedze referred to me, of any real assistance on the point under consideration. In *Soabeb* the accused were charged with *theft* of stock; in the present case the offence with which the accused is charged is *possession* of stock. The definition of the proscription of the offence of theft of stock under Act 12 of 1990, as amended, is different from that of the offence of possession of stock under Act 12 of 1990. More important and relevant for the purposes of bail is the fact that while theft is an offence mentioned in Part IV of Schedule 2 to the Criminal Procedure Amendment Act, 1991 (Act No. 5 of 1991), possession of stock in terms of Act 12 of 1990 is not mentioned. Doubtless, the last differentiation shows that in the eyes of the law for the purposes of bail, possession of stock is not a serious offence, compared with theft of stock.

[13] Another significant misdirection involve the second issue which the learned magistrate considered, namely, "will the interest of the administration of justice be

prejudiced if accused (is) granted bail." The learned magistrate found that if the appellant was released on bail, he would "jeopardize the interest of justice" because, according to her, the investigating officer testified "that accused has previous conviction of stock theft in 2005." This is palpably wrong. I have no doubt in my mind that the learned magistrate's decision was influenced in no small measure by her reference to the appellant's previous conviction, which did not exist, because it was considered as an item under the second issue in her judgment and reasons therefor.

[14] Apart from the misdirections I have already dealt with, there are other considerations which I now turn to.

[15] The record shows that the appellant has three pending cases under Act No. 12 of 1990, as amended. It is not clear whether these are theft of stock or possession of stock cases. Be that as it may, this is the talisman, apart from other considerations, that Mr. Marondedze relied on in his argument that the learned magistrate's decision not to grant bail should be confirmed by this Court, because, according to him, it is not in interest of the administration of justice to allow the appellant out on bail more particularly that a prima facie case had been established against the appellant.

[16] The evidence shows that the appellant maintained that he had told the one who wanted to sell the cattle to him that he would buy them only if there were documents for the cattle. This testimony is confirmed substantially by Mwanyangapo (the go-between in the proposed sale) thus (verbatim):

> Hangula told me that he is selling cattle. I told him accused (appellant) also want to buy cattle with documentation. Accused was at Oshakati that time … Spoke to accused telephonically. … Accused said he want to buy those cattle provided they have proper documentation. I conveyed that to Hangula. … When the cattle were taken to accused

> home (by Hangula) accused was in Oshakati. There were agreement to buy if there were documentation. When the cattle were taken to accused house accused was in Oshakati.

[17] It must be remembered that Mwanyangapo's evidence that there was "agreement to buy if there were document" stood un-demolished at the close of the appellant's case. From the evidence, we do not, with the greatest deference, accept Mr. Marondedze's submission that a prima facie case had been established against the appellant if regard is had to the definition of the proscription of the offence set out in s 2 of Act 12 of 1990, which contains the following elements, all of which must be proved to secure a conviction: (1) "possession of stock", (2) "regard to which there is reasonable suspicion that it has been stolen", and (3) the accused "is unable to give a satisfactory account of such possession". There is no prima facie proof on the record of the elements in (2) and (3).

[18] In her written judgment, the learned magistrate appeared to have accepted the State evidence that the accused would interfere with police investigations and State witnesses, based solely on the evidence of Constable Kashihakumwa, the investigating officer; and the basis of the investigating officer's contention appears in the following passage taken from his examination-in-chief-evidence(verbatim):

> The investigations are still incomplete I believe if granted bail accused will interfere with the investigation as accused still communicate with possible state witness.

[19] From the evidence, as I see it, the reason why the investigating officer testified that the appellant would interfere with police investigation is that the appellant had communicated with Mwanyangapo "that is how he came today to testify for accused (appellant)." This aspect was also part of Mr. Marondedze's submission. I know of no rule of law – and none was referred to me – that parties to proceedings have property in potential witnesses, that is, persons who the parties are only contemplating to call to give evidence in support of their cases. Thus, in a criminal trial if an accused has no knowledge

that Y is a State witness, there is nothing preventing the accused calling Y as his witness. In the instant case, there is no credible evidence that before Mwanyangapo testified for the appellant, the appellant had been informed by the State that Mwanyangapo had been asked to give evidence for the State. The investigating officer's other reason was that it would take three weeks to remove the "exhibits" (i.e. cattle) from the appellant's farm. But that was on 12 June 2008. We, therefore, take it that the exhibits are secure with the Police, and therefore the accused is not able to interfere with the exhibits. In my view, therefore, the concern that the appellant will interfere with police investigations is not real; or, if real, suitable bail conditions can be considered to deal with such concerns, including the concern that the appellant, if admitted to bail, will interfere with State witnesses.

[20] For all the above reasons, in my opinion, the decision of the learned magistrate to refuse to release the appellant on bail was wrong. In the circumstances of the case, the interests of justice will not be prejudiced if the appellant is released on bail. The concerns raised can appropriately be addressed by suitable conditions.

[21] In the result, we have decided that the appeal should succeed, and we make the following orders:

(1) The appeal is upheld.

(2) The decision of the learned magistrate refusing to release the appellant on bail is set aside and the following order is put in its place:

(a) The appellant is granted bail in the amount of N$2,000.00.

(b) The appellant must not interfere with police investigations or State witnesses.

_____
Parker, J

I agree.

_____
Ndauendapo, J

ON BEHALF OF THE APPELLANT:	Mr. S. Namandje
Instructed by:	Sisa Namandje & Co
ON BEHALF OF THE STATE:	Adv. E.E. Marondedze
Instructed by:	The Office of the Prosecutor-General