

JIMSTONE REGIMENT

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 8 & 14 JULY 2022

Bail Application

M.Nyika, for the applicant

N.Katurura, for the respondent

MAKONESE J: This is an application for bail pending trial. Applicant is facing a charge of unlawful possession of raw ivory in contravention of section 82(1) of the Parks and Wildlife (General Regulation SI 362/1990) as read with section 128 of the Parks and Wildlife Act (Chapter 20:14). The applicant denies the charges and avers that he has been wrongly implicated. The State opposes this application for bail on the basis that there are compelling reasons for applicant's continued detention.

Factual Background

The State alleges that on the 22nd April 2022 at around 2030 hours, detectives from Minerals Flora and Fauna Unit received information to the effect that the applicant was in possession of ivory and was using a Toyota Gaia Registration Number ABP 0075. A team comprising of police officers and parks and wildlife rangers was set up. They conducted surveillance around Hwange town. The applicant and his co-accused were spotted near OK shop, Hwange. The police detectives approached the applicant and his co-accused and identified themselves. Applicant was found seated at the back seat of the vehicle with a bag. His co-accused was behind the steering wheel. The police officers conducted a search. They recovered one piece of ivory. The police recovered two ivory pieces behind the rear seat of the vehicle. Applicant and his co-accused were asked to produce a permit for the possession of the ivory but failed to do so. They were immediately arrested. The ivory was taken to

Zimpost Hwange for verification. The ivory pieces were weighed and their weight was recorded as 2,295 kilograms.

Submissions by the Applicant

Applicant denies the allegations. In his bail statement applicant avers that he is a suitable candidate for bail. His defence is that on the day in question he was asked by his friend, only referred to as Matters, to deliver a parcel at OK Hwange on his behalf as he was busy on the day and was going out of town. He was told that he would give the parcel to one Rodrick. After finishing his shift at work applicant went home and took the bag with him. He never bothered to check the contents of the bag. He then boarded a Toyota Gaia which then stopped at OK Hwange. While they were there some people approached them and asked to conduct a search of the motor vehicle. The ivory was found. Applicant and his co-accused were immediately apprehended upon failure to produce a permit to possess the ivory. He was surprised to know that Rodrick was a police officer and that he had been trapped. Applicant states that he was not aware that there was ivory in the bag. He did not have the intention to possess the ivory nor was he in control of it. He further avers that he was trapped by State agents and will apply for an order for the records for the services provider Econet and Telone to prove his communications with Matters, Rodrick and their colleagues who trapped him.

During oral submissions, *Ms Nyika*, appearing for the applicant submitted that the applicant had no knowledge of the existence of the ivory and that he had been sent by one Matters. She further explained that the absence of an affidavit by Matters confirming the applicant's story is because he could not be located. She argued that if the applicant was to be admitted on bail, he would be able to locate the said Matters who could exonerate him from the charges. It is highly unlikely that Matters would come to court and implicate himself in the unlawful possession of raw ivory. That is if Matters does in fact exist. The police failed to locate him.

Submissions by the State

The state opposed this application on the basis that applicant is facing a serious offence. Applicant admits that he was found in possession of ivory. He had physical control of the raw ivory and it is on that basis that the state contends there is a strong *prima facie* case against the applicant. The State avers there is a high possibility that the state will secure the

conviction of the applicant. Applicant faces a mandatory sentence of 9 years imprisonment in the event of conviction. Applicant is likely to abscond to avoid standing trial. Applicant has no proffered any recognizable defence to the allegations. He has advanced a bogus defence and is therefore, not a suitable candidate for bail.

During oral submissions, *Mr Katurura*, appearing for the respondent, argued that applicant failed to tender an affidavit by the said Matters to support his story.

Analysis of the law

The law relating to bail pending trial is now well established in our jurisdiction. In terms of Section 117(1) of the Criminal Procedure and Evidence Act (Chapter 9:07),

“A person who is in custody in respect of an offence shall be entitled to be released on bail at any time after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody”

Section 50(1) (d) of the Constitution of Zimbabwe (Amend No 20) 2013, provides that an arrested person must be released unconditionally or on reasonable conditions pending his trial unless there are compelling reasons for his continued detention. This means that in an application for bail, the court must exercise its discretion to grant, bail where there are no compelling reasons.

Bail will not be granted where in all probability applicant’s release on bail will pose a real and substantial threat to the interests of justice. In applications for bail pending trial, the general principle is that the interests of justice must not be endangered by an accused person’s release on bail. An applicant seeking to be admitted on bail must tender a defence that is recognized at law.

In this particular case, the said Matters has not tendered into the record an affidavit confirming the applicant’s story. If indeed, Matters was the real owner of the ivory he would have laid a claim over the ivory, if his possession of the ivory was legal.

In an application of this nature, it is of paramount importance that when an applicant is seeking to be admitted to bail pending trial, a reasonably probable defence be placed before the court in applicant’s bail statement. A probable defence at law is one that is reasonably

probable to any ordinary man of right thinking person. See; *Tshuma v State* HB 130/22. A defence must not be far-fetched and unbelievable. See also *S v Ndlovu* 2001(2) ZLR 26.

Where the applicant's conviction is almost certain the court is less likely inclined to grant bail to an accused person unless it is in the interests of justice to do so.

In *Jongwe v The State* SC-62-02, the court indicted that:

"...because the prospects of conviction, and upon conviction the imposition of a long prison term, indeed even the death penalty is real, the temptation for applicant to abscond if granted bail is irresistible."

Disposition

In assessing bail in this matter the court must consider that the applicant was found in physical possession of raw ivory. The State has established a *strong prima facie* case against the applicant. The explanation in so far as possession by the applicant cannot be said to be reasonably possible true. Applicant's defence amounts to a bare denial. He is facing a very serious charge. There is a high probability that the state will secure a conviction. The possibility of the applicant facing a lengthy prison term upon conviction will certainly induce him to abscond.

For the foregoing reasons, the application for bail pending trial is hereby dismissed.

Macharaga Law Chmbers, applicant's legal practitioners

National Prosecuting Authority, respondent's legal practitioners