

**JONAS MULEYA**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 28 JULY 2022 & 4 AUGUST 2022

**Application for bail pending trial**

*B. Mandire* for the applicant  
*Ms. Ngwenya* for the respondent

**DUBE-BANDA J:**

1. This is an application for bail pending trial. The applicant is charged with the crime of contravening section 82(1) of the Statutory Instrument 362 of 1990 as read with section 128(b) of the Parks and Wildlife Act [Chapter 20:14] “Unlawful possession of ivory.” It being alleged that on the 4<sup>th</sup> June 2022 the applicant in the company of an accomplice who is at large was found in possession of unmarked ivory.
2. In support of his bail application applicant filed a bail statement and a supporting affidavit. The applicant contends that it is in the interest of justice that he be released on bail pending trial. He resides at Mpande Village, Chief Sitaudze, Zezani, Beitbridge. He is a family man, married with four children. He has no link abroad and does not have valid travelling documents. He says he has no means to sustain himself outside the country. He has no previous conditions nor any pending case against him.
3. The applicant disputes that he committed the offence he is charged with. He denies having been in possession of ivory. It is averred that on the day of his arrest he was coming from number 19 Zezani Area where he had spent the rest of the day drinking beer. On his way to his residence and at the outskirts of number 19 Zezani, he says he heard a commotion from a motor vehicle which was fifty metres in front of him. He then heard gun shots from the motor vehicle. He says out of fear he started to run away, and the police eventually arrested him and alleged that he was part of the

people whom they had been chasing. He was then charged with possession of unmarked ivory. The applicant contends that he was never part of the people who were being chased by the police neither does he know their identity. The ivory was not recovered from him. He saw it when he was taken to the police vehicle.

4. This application is opposed. The respondent contends that there are compelling reasons justifying the refusal to release the applicant on bail pending trial. It is contended that the police received a tip-off that the applicant was in possession of ivory which he was selling. The police pretended to be buyers. It is contended further that the police lured him to a vehicle on the pretext of negotiating a price. He produced the ivory and the police detectives identified themselves as police officers. The applicant attempted to flee. He was arrested after the police fired warning shots.
5. The fundamental principle governing the court's approach to bail applications is to uphold the interests of justice. The court must take into account the factors set out in section 117 of the Criminal Procedure and Evidence Act [Chapter 9:07] and try to strike a balance between the protection of liberty of the individual and the administration of justice. In our law persons are presumed innocent until their guilt has been proved. Whenever the interests of justice will not be prejudiced by pre-trial release the courts should lean in favour of liberty and grant release on bail. See: Prof. Feltoe *Magistrates' Handbook* (Revised 2021) 76.
6. The general principles on bail were set out in *S v Smith and Another* 1969(4) SA 175 at 177E-178A as follows:

The general principles governing the grant of bail are that, in exercising the statutory decision conferred upon it, the Court must be governed by the foundational principles which is to uphold the interests of justice; 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.

7. These principles have been formulated and expressed in varying fashion, but basically the court's task is to balance the reasonable requirements of the State in its interest in the prosecution of alleged offenders with the requirements of our law as to the liberty of the subject.
8. It is on the basis of these legal principles that this bail application must be viewed and considered.
9. This application is opposed on the grounds that if released on bail the applicant will abscond and not stand his trial. In deciding whether flight is likely and in the absence of concrete evidence of a predisposition to abscond, account must be taken of a number of factors which common experience have shown might influence a person either to stand trial or abscond. See: Prof. Feltoe *Magistrates' Handbook* (Revised 2021) 77. When assessing the risk of an applicant for bail absconding before trial, the court will amongst other factors be guided by the following: the gravity of the charges and the severity of penalties which would be likely to be imposed if convicted; the apparent strength or weakness of the State case. See: *S v Jongwe* 2002(2) ZLR 209(S), *S v Chiadwa* 1988(2) ZLR 19 (S), *Aitken & Anor v A-G* 1992(1) ZLR 249 (S).
10. The right to be presumed innocent is a non-derogable right and subsists until conviction by a competent court. Notwithstanding the fact that the applicant has placed before court his defence to the allegations, on the facts of this case and for the purposes of this application I accept that the State has a strong *prima facie* case against the applicant and thus the likelihood of a conviction is very high. He was found in possession of the ivory. The combination of a strong *prima facie* case and high likelihood of a conviction and a long prison term might induce the applicant to abscond and evade justice. Upon conviction he is likely to be sentenced to a long prison term i.e. 9 years imprisonment. I also factor into the equation that upon arrest he attempted to flee and the police had to fire warning shots to subdue him. He has already exhibited an inclination to abscond. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

11. Taking all the evidence into consideration and weighing that evidence against the applicant's defence and personal circumstances, together with the submissions made on his behalf, I hold the view that the administration of justice will be prejudiced if the applicant is released on bail.
  
12. On a conspectus of the facts and all the evidence placed before court, I am of the view that it is not in the interests of justice that applicants be released on bail pending trial.

In the result, I order as follows:

The application for bail be and is hereby dismissed and applicants shall remain in custody.

*Masawi & Partners*, applicant's legal practitioners  
*Prosecutor-General's Office*, respondent's legal practitioners