HENRY REZA
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHITAPI
HARARE, 16 September 2021

**Bail pending appeal – Reasons for judgment**

*F Murisi*, for the applicant
F *Kachidza*, for the respondent

CHITAPI J: I dismissed this application for bail pending appeal No. CA 825/19 on 24 March 2020. I have been requested by the applicant to provide a fully clothed judgment incorporating the reasons for the dismissal of the application. These are they.

The applicant was convicted by the magistrate sitting at Chinhoyi for contravening s 82(1) of the Parks & Wildlife Regulations S.I 362/90 as read with s 128(5) of the Parks & Wildlife Act [*Chapter 20:14*]. The applicant was convicted on 16 December 2019. Consequent on his conviction, the applicant was sentenced to the mandatory minimum sentence provided for the contravention of the statute quoted in the absence of a finding of the presence of special circumstances in the commission of the offence.

The details of the charge on which the applicant was convicted were that on 1 December 2018, at Stand 5442 Hull Road, Chinhoyi, the applicant was arrested by the police who found him in unlawful possession of two elephant tusks without a permit or licence issued in terms of the Parks & Wildlife regulations aforesaid. The further facts alleged in the State outline were that police details attached to the CID Minerals, Flora and Fauna Unit received a tip off that the applicant was in possession of elephant tusks for which he was looking for potential buyers. The

police detectives acting on the tip off proceeded to Stand 5442, Hull Road, Chinhoyi, where the applicant whom they had contacted whilst posing as potential buyers had directed them to.

On arrival at 5442 Hull Road, around 1930 hours, the police team acting as potential buyers as aforesaid met with the applicant and his colleague called Nefta Charlie. Having expressed their interests to buy the property, the applicant in furtherance of the transaction proceeded into the company offices thereat and emerged carrying a 50 kg white sack and a scale. The applicant charged the undercover policeman $200 *per* kilogram as the sale price for the two elephant tusks which he removed from the sack. The police persuaded the applicant and Nefta Charlie to find an alternative weighing place and scale. The applicant and Nefta Charlie agreed to go into the car which they did not suspect to be a police car. The police team then drove the vehicle to the police station without the applicant and his accomplice immediately noticing the police intended destination. On arrival into the grounds of the police station, a scuffle between the applicant and his accomplice on one hand and the police on the other hand ensued. The applicant's co-accused Nefta Charlie managed to escape. The applicant was apprehended. The elephant tusks and the pocket scale which the elephant had intended to use to weight the tusks were recovered. The tusks were subsequently weight. They weighed 8.095 kilograms and had a value of $2023.75.

At his trial which followed the arrest, the applicant pleaded not guilty. He was legally represented by counsel. In the defence outline, he stated that him and his unnamed brother operated a carpentry business at 5442 Hull Road, Chinhoyi Industrial Site, in Chinhoyi. Around 6.00 pm, the applicant's alleged accomplice Nefta Charlie arrived at the applicants' work place.

The applicant averred in the defence outline that he did not see Nefta Charlie's actual arrival but only after Nefta Charlie had already arrived. The applicant stated that Nefta Charlie was a frequent visitor at 5442 Hull Road because he used to be hired by the applicant and his brother to perform piece jobs. He would also visit just to while up time when he had no work to do. The applicant averred that he was busy working on a pool table at the time that Nefta Charlie greeted the applicant and thereafter Nefta Charlie went to a shed within the yard after advising the applicant that he was waiting for some people. The applicant denied that he ever communicated with police before his arrest.

The applicant averred that after he finished work for the day and was about to leave for his home, Nefta Charlie then advised the applicant that he was expecting some people whom he was waiting for and that the people were driving. He offered that upon the arrival of the people, they could drop the applicant in the City Centre where he intended to go. He averred that he decided to sit in the shed and await Charlie Nefta's visitors. Whilst he sat in the shed, it was then that he saw a sack. He suspected that he sack belonged to Nefta Charlie. He outlined in his defence outline that as he waited with Nefta Charlie for the expected vehicle, Nefta Charlie, received a phone call following which he went outside the perimeter fence before returning a few minutes later as a twin cab motor vehicle drove into the premises. He outlined that Nefta Charlie then picked up his sack from the shed. The applicant averred that he did not know what the sack contained. Nefta Charlie then loaded the sack in the vehicle and invited the applicant to get into the vehicle to be dropped in town.

The applicant further averred that the vehicle was being driven by a white man who was in the company of another passenger. The vehicle was driven towards the town centre before the driver turned into the Chinhoyi Central Police Station whereupon the vehicle being stopped, Nefta Charlie jumped out of the vehicle and escaped. The applicant was arrested. He averred that he did not attempt to escape. The applicant challenged the State to produce proof that he communicated with the police or would be buyers by phone. I must point out that having read through the State outline, there was no allegation that the applicant was in telephonic communication with the police. The evidence of the arresting details were that the telephone communications were between them and the applicant's accomplice Nefta Charlie.

The applicant's defence was therefore one of innocent association. He was caught in the middle of transaction which he did not have knowledge of. On p 30 of the record, the trial magistrate properly identified and understood the applicants defence. He stated as follows:

> "It is on this background that accused allege (sic) that the deal and possession of the ivory was exclusively Charlie's business and he was not aware of the ivory's presence and the ensuing deal. He only boarded the vehicle as it offered him free transport into town, where he would in turn board lifts or public transport to his house in the location."

The material evidence of State witnesses was to the effect that the applicant was the one who was selling the ivory. It was the applicant who upon the arrival of the police produced the

sack with ivory from an office and brought it to the vehicle. It was not the applicant whom the informer and police were in telephonic communications with. The applicant's friend Nefta Charlie was the one fronting the applicant in the wooing of a buyer for the ivory. The issue which had to be determined was whether or not the applicant was an innocent victim of circumstances.

The trial magistrate reached a balanced judgment in which he was properly directed on the issues for determination. He noted that the applicant did not challenge the State evidence that it was him who collected the sack with ivory from an office. I did not upon reading the applicant's evidence find any challenge to the state evidence in that regard. The applicant was therefore taken to have accepted this evidence and could not therefore detach himself from the sack. He was identified with the sack. In this regard the trial magistrate noted as follows on p 36 of the record in his judgment:

> "Therefore if accused and the defence knew very well that the sack was merely under the shed and never in an office, it was treacherous to their case to let the averment that it came from the office unchallenged. This was the very issue between the state and the accused and could not be allowed to slip away unchallenged there is foundation for drawing adverse inferences."

The was properly directed. The trial magistrate also dealt with the issue of discrepancies in the evidence of the witnesses regarding where the weighting of the ivory was to be done as part of the sale transaction. One state witnesses said that the weighing was by agreement with the accused to be done at the show ground. Another witness said that the weighing was to be done at Orange Groove. The trial magistrate found that the discrepancy did not go to the root of the matter which was whether the applicant was in possession of the ivory or was a victim of circumstances in a case of innocent association. The discrepancy as found by the trial magistrate was of no great moment. The trial magistrate was also properly directed that the court had to consider the surrounding circumstances of the case and probabilities. He also properly held that there was no rule that holds that police evidence should be treated differently from the other evidence and that court had to exercise the ordinary caution which it exercises in relation to evidence of every interested witness in a case. I agree that the bar on evidence assessment is not lifted any higher because a witness is a police officer.

The trial court was not satisfied that the applicant was truthful in his evidence. The applicant stayed in Chikonohono which was in a different direction from the Town Centre. The

trial magistrate found that the applicant had no reason to nor did he advance any reason for wanting to get into town after work as opposed to proceeding to his home directly. The trial court was in my view justified to find that the applicant was untruthful on the nature of his association with the arresting team. There was no plausible explanation given for the applicant to finish work and wait until 7:00 p.m. and then travel into town away in a different direction from home. The trail court was in my view and upon a reading of the evidence and probabilities justified to conclude that the applicant was in possession of the sack of ivory contrary to his spirited denial. The applicant was properly convicted.

As regards sentence, the applicant was sentenced to the mandatory minimum sentence of 9 years imprisonment in the absence of special circumstances. There were no special circumstances surrounding the commission of the offence. The applicant did not advance any. He averred that he was not the mastermind in the possession and sale of the ivory. The evidence on the contrary was that he was in fact the chief offender who possessed and kept the ivory waiting for buyers to be identified. The trial court also properly noted that the fact the applicant did not benefit from the offence was not a special circumstance. Where a person engages in an unlawful enterprise hoping to gain from it, then there are two possibilities being that he will gain from the unlawful enterprise or lose out if the deal or enterprise fails. In *casu* the long arm of the law caught up with the applicant. It is anomalous in such circumstances to seek the courts sympathy on the argument that there was no gain that accrued to the applicant.

In the bail pending appeal application which I dismissed, the applicant in his grounds of appeal averred firstly that the trial court erred in drawing an adverse inference upon the applicant's failure to challenge the state evidence that he is the one who collected the sack with ivory from an office and brought it to the police vehicle. It was averred that the totality of the applicant's' evidence showed that the applicant denied that he carried the sack and had knowledge of it. This ground of appeal has no substance. The simple issue is that the evidence was not refuted and the non rebuttal was considered together with other evidence as proving the state case beyond a reasonable doubt.

Secondly, it was contended that the trail court erred to conclude that the applicant possessed the ivory in the absence of a notice of seizure of receipt of the ivory having been issued in the

name of the applicant. It is difficult to appreciate this ground of appeal unless the applicant's case was that the sack contained something else other than the ivory charged. The affidavit of the identification, weighting and value of the ivory was admitted in evidence by consent. The issue of what the sack contained did not fall for determination as it was common cause. The recording of the exhibit and notice of seizure are administrative issues which are of no great moment unless the identity of the ivory was in issue.

Thirdly, it was averred that the court erred to dismiss the applicant's explanation that his involvement was innocent in that he required a lift into town. This aspect of the evidence was dealt with in detail and the improbabilities of the explanation considered. There was no misdirection by the trial magistrate in dismissing the applicant's explanation as false.

Fourthly, it was averred that the trial court should not have relied on police evidence because police were possibly motivated by malice since the applicant's alleged accomplice had fled from justice. This ground of appeal pertains to a criticism which the trial court dealt with in great depth and justified its findings on the reliability of the police evidence. The ground of appeal fails to consider that evidence is considered in its totality and malice is not inferred in the air. It must be established by objective facts from which an inference of malice is drawn.

Fifthly, it was alleged that the trial court being faced with police evidence versus the applicants' evidence should have sought other features of evidence to tilt probabilities in favour of the state. The trial court as a fact actually considered objectively the probabilities of the case. Contrary to what the applicant alleged in the ground of appeal, there were no "material contradictions" which the court had to contend with. The alleged contradictions were peripheral to the question of whether the applicant was in possession of the sack with ivory. The trial court noted them. There was no misdirection committed by the trial court in relation to this proposed ground of appeal.

The same applies to sentence. The proposed ground of appeal was very generalized. It was alleged that the cumulative effect of the appellants' mitigatory circumstances and the circumstances of his participation should have been regarded as constituting special circumstances. The trial court properly considered the circumstances of the commission of the offence and held that there were no special circumstances. The applicant was not just in possession of the ivory but

was attempting to sell it. His moral blameworthiness was very high and in such circumstsnces, the finding that there were no special circumstances was beyond reproach.

Having considered the record of proceedings, the notice of appeal, the submissions of counsel and the law on bail pending appeal, I was satisfied for reasons I have outlined that the proposed appeal was destined for predictable failure. There are virtually no prospects of success against both conviction and sentence. The offence is serious and the long sentence which the applicant is statutorily required to serve will act as an incentive for abscondment if the applicant is bailed. The applicant did not motivate the court to hold that the risk of abscondment was remote. He only stated that because he did not attempt to abscond upon arrest and that he believed in the prospects of his appeal succeeding, he would not abscond. He needed to do more than that. He did not offer any security nor motivate his ties with the court's jurisdiction.

In relation to the likely delay in the hearing of the appeal, the applicant relied on the judgment in *Hollington & Anor* v *State* B 751/00 wherein GWAUNZA J (as she then was) acknowledged that there were delays in the processing of appeals. The position espoused 20 years ago cannot be said to be still applicable without facts alleged showing this position to still obtain. There are now two appeal courts which sit three times a week and there is a general improvement in the disposal of appeals. In any event having found that that the proposed appeal is doomed to predictable failure, the weight of this ground wanes significantly.

It was for the stated reasons that I dismissed the applicant's application on the turn.

*Murisi & Associates,* applicant's legal representatives
*National Prosecuting Authorities,* respondent's legal representatives