HB 96/18
HCB 43/18

LAIMON NYONI

And

INNOCENCIA SIWELA

And

TIMOTHY HUNDUZA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 14 MARCH & 12 APRIL 2018

Bail application

D. Abrahams, B. Sansole & T. Runganga for the applicants
Ms S Ndlovu for the respondent

TAKUVA J: This is an application for bail pending trial. The brief circumstances are that the applicants are facing a charge of contravening section 82 (1) of Statutory Instrument 362/90 as read with section 128 (1) (b) of the Parks and Wildlife Act Chapter 20:11 as amended by section 11 of the General Laws Amendment Act No. 5/2011 that is being "found in possession of raw unmarked ivory". The allegations being that on the 23rd of February 2018 following a "tip off" applicants were intercepted by police along the Bulawayo- Gwanda Road near Umguza bridge lay-bye. A search was conducted and a black bag containing 2 ivory tusks was recovered from the boot of the car driven by the 1st applicant. The 2nd and 3rd applicants were passengers in that car a Toyota Corolla Sprinter registration number ACJ 9619. The three were immediately arrested and charged as indicated above after failing to produce a licence or permit to possess the ivory.

The two pieces were examined by officials in the Department of Parks and Wildlife Management who confirmed that they were pieces of unmarked unregistered elephant tusks weighing 9kg and valued at US$2 250,00.

In his application for release on bail, 1st applicant contended that he is a 50 year old man ordinarily resident at house number 20136 Pumula South, Bulawayo. He is self-employed as a fish monger specializing in supplying kapenta fish to processors in Bulawayo. He is the sole breadwinner to his wife and 3 minor children.

As regard the 2nd applicant it was contended that she is an unemployed single mother of three minor children who is a tenant at house number 6532 Gwabalanda, Bulawayo. She lives on vending all sorts of wares.

The 3rd applicant is a male adult aged 45 years residing at 321 Mataga Growth Point, Mberengwa who is employed as a bus driver. He is married and has 7 children who all look upon him for their sustenance.

In respect of all the applicants, it was submitted that the State has a weak *prima facie* case against them in that all of them lacked knowledge of the presence of elephant tusks in the car. The episode, as described by the applicants is somewhat interesting if not incredible. It goes like this. On 23rd February 2018, 1st applicant was driving a Toyota Corolla Sprinter Vintage registration number ACJ 9619 on his way to Zvishavane. Worried about fuel expenses, he decided to pick up a few passengers that were headed in that direction. As a result, he stopped at Max's Garage where he picked up some passengers comprising an unidentified male adult in "his early 30s" as well as the 2nd and 3rd applicants. These passengers were unknown to each other.

The unidentified man who was putting on a khaki pair of trousers and a shirt normally put on by game rangers had some luggage that consisted a "non-descript black bag". On the way this "khaki man" who was constantly on his mobile phone was overheard demanding payment before delivering and was complaining that whoever he was talking to has "delayed" him that is why he was going to Zvishavane where there are "better offers" for his "things". He then advised the other party to meet him on the way. The 1st applicant gave him the description of the car and its registration number.

When they passed a lay-bye the "khaki man" requested to stop in order to meet some people. After 1st applicant stopped the vehicle, the "khaki man" alighted and walked away looking for a hidden place to relieve himself. Suddenly a silver car approached and stopped in front of the applicant's car. Two men approached the 1st applicant's car pointing guns at the occupants. At that point the "khaki man" started running away for his dear life. The police officers then searched the vehicle and recovered the ivory in the kaki man's luggage. The 1st applicant then told the police officers that the bag belonged to the "khaki man" who was by then visible still running away but they did nothing except arresting the applicants.

All the applicants contended that they will stand trial if released on bail and that they will not interfere with investigations or temper with state witnesses and evidence. They are all of fixed abode with not previous convictions. As regards the 3rd applicant it was contended that he suffers from type 2 diabetes. First and 3rd applicants are willing to surrender their travel documents.

The respondent opposed the application on the following grounds.

1. Applicants are facing a serious crime which upon conviction attracts a mandatory sentence of 9 years imprisonment. This is likely to induce them to abscond trial if granted bail;
2. The evidence against them is overwhelming leading to a high probability of a conviction.
3. There is a likelihood of the applicants committing similar offences as they are believed to be part of a poaching syndicate;
4. The 1st applicant provided a false residential address to the police;
5. The 1st and 2nd applicants know each other prior to the commission of this crime in that the 2nd applicant is customarily married to 1st applicant's brother one Greaters Nyoni who is also the registered owner of the vehicle driven by 1st applicant on the day in question;
6. Applicants have failed to discharge the onus cast upon them in terms of section 115C of the Criminal Procedure and Evidence Act Chapter 9:07 (the Act) to show on a balance of probabilities that it is in the interests of justice for them to be released on bail.

The law

It is trite law that the discretion to grant bail rests in the court which must in exercising that discretion strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. Generally, bail should not be refused unless there are compelling reasons for believing that the applicants will fail to observe the conditions of his or her release. See *S* v *Benatar* 1985 ZLR 205 (HC); *S* v *Makamba* 2004 ZLR 367; *S* v *Biti* 2002 (1) ZLR 115 (H);

The Constitutional Right to Bail

In terms of section 50 (1) (d) of the Constitution of Zimbabwe a person who has been arrested on any charge, must be released unconditionally or on reasonable conditions pending a charge or trial unless there are compelling reasons justifying their continued detention. On a literal interpretation the section places the onus to prove or show the existence of compelling reasons on the State – see *S* v *Munsaka* HB 55-16 and *Peter Chikumba & Anor* v *State* HH -90-14.

Section 117 of the provides some entitlement to bail by a person in custody. It states

"117 ENTITLEMENT TO BAIL

(1) Subject to this section and section 32, 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.
(2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established—
(a) Where there is a likelihood that the accused, if he or she were released on bail, will—
    (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
    (ii) not stand his or her trial or appear to receive sentence; or
    (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
    (iv) undermine or jeopardise the objectives or proper functioning of the criminal justice system, including the bail system;
    or

(b) -----.
(3) In considering whether the ground referred to in –
(a) -----.
(b) Subsection (2) (a) (ii) has been established, the court shall take into account—
(i) the ties of the accused to the place of trial
(ii) the existence and location of assets held by the accused.
(iii) the accused's means of travel and his or her possession of or access to travel documents;
(iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefore;
(v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee;
(vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;
(vii) any other factor which in the opinion of the court should be taken into account;
(c) ------
(d) ----
(e) -----
(4) In considering any question in subsection (2) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely—
(a) the period for which the accused has already been in custody since his or her arrest;
(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
(d) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
(e) the state or health of the accused;
(f) any other factor which in the opinion of the court should be taken into account.
(5) ----.
(6) notwithstanding any provision of this Act, where an accused is charged with an offence referred to in –
(a) Part 1 of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing the matter shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that exceptional circumstances exist which in the interests of justice permit his or her release;
(b) ----."

In applying these principles to the present case it must be noted that a contravention of s128 of the Parks and Wildlife Act, Chapter 20:11 is one of the offences listed in the Third Schedule to the Act. This means that section 115C (2) (ii) of the Act applies to the applicants *in casu*.

The section provides:

"115C Compelling reasons for denying bail and burden of proof in bail proceedings

(1) In any application, petition, appeal, review or other proceedings before a court in which the grant or denial of bail or the legality of the grant or denial of bail is in issue, the grounds specified in section 117 (2), being grounds upon which a court may find that it is in the interests of justice that an accused should be detained in custody until he or she is dealt with in accordance with the law, are to be considered as compelling reasons for the denial of bail by a court.
(2) Where an accused person who is in custody in respect of any offence applies to be admitted to bail –
    (a) before a court has convicted him or her of the offence –
        (i) the prosecution shall bear the burden of showing, on a balance of probabilities, that there are compelling reasons justifying his or her continued detention, unless the offence in question is one specified in the Third Schedule;
        (ii) the accused person shall, if the offence in question is one specified in –
            A. Part 1 of the Third Schedule, bear the burden of showing on a balance of probabilities that it is in the interests of justice for him or her to be released on bail unless the court determines that in relation to any specific allegation made by the prosecution, the prosecution shall bear that burden.
            B. …
            (b) …" (my emphasis)

In an effort to discharge this onus, the applicants challenged the investigating officer's allegations in his affidavit in the following manner.

(a) The investigating officer stated in his affidavit that the 1st applicant had provided a false residential address being house number 23108 Pumula South, Bulawayo. He went there in order to verify this address but to his surprise, he established that the applicant was unknown at the house which belonged to Elliot Mapfumo.

The Investigating Officer spoke to one Christopher Mapfumo at that house who provided his identity particulars and cellphone number as 0775723802. In rebuttal, applicants filed an affidavit from a Christopher Mapfumo whose identity number is the same with the one supplied by the Investigating Officer. He claimed to be a resident of 23108 Pumula South, Bulawayo. More importantly he claimed to be 1st applicant's cousin brother and that at no time did he speak to any police officer dealing with 1st applicant's case involving ivory. Finally, he stated that 1st applicant resides at 20186 Pumula South, Bulawayo. Although in his affidavit he stated the last two digits of his national identity numbers as 63, his national registration document shows the correct number as 67. There is no doubt therefore that the Investigating Officer listed Christopher Mapfumo's correct national residential number i.e. 23108 Pumula South. The 1st applicant also filed a fiscal tax invoice in the name of L. Nyoni of 20136 Pumula North as proof of his residential place. The question that remains unanswered is where did the Investigating Officer get the address for house number 23108 Pumula South from if not from the 1st applicant? Could it be that he just picked it from the air? If he did, the coincidence of finding 1st applicant's cousin brother at that address is not only remarkable but extraordinary and strange. Perhaps what is more surprising and has not been explained is how and where did the Investigating Officer obtain Christopher Mapfumo's correct particulars including his cell number? These are the real issues that applicants failed dismally to explain. The issue is not whether or not 1st applicant resides at 20136 Pumula South, Bulawayo, it is who gave the Investigating Officer his address as 23108 Pumula South?

On the evidence on affidavits from both sides, I conclude that the 1st applicant was less than candid with the Investigating Officer as regards his residential address. He dishonestly gave the Investigating Officer a false address for reasons best known to himself. If indeed Christopher Mapfumo signed exhibit 1, then he was certainly prepared to perjure himself because of its patent falsity.

The second effort in rebuttal was directed at the Investigating Officer's conclusion that the 1st and 2nd applicants are not only known to each other, but are related in that the 2nd applicant is customarily married to 1st applicant's brother one Greaters Nyoni, the owner of the

car 1st applicant was driving. The 1st and 2nd applicants strongly refuted this by producing a marriage certificate showing that Greaters Nyoni is married in terms of Chapter 5:11 to one Nonhlanhla Tshuma. The marriage was solemnized on 23rd day of August 1997. Again in my view applicants missed the point completely. An affidavit from Greaters Nyoni denying any relationship with 2nd applicant who is described as an "unemployed single mother of three minor children" would have taken applicants' case a step further. Additionally the paternity of her minor children remains a mystery. Accordingly, the alleged relationship has not been sufficiently rebutted, leaving the state's *prima facie* case strong in that proof of this relationship totally destroys their defence.

First applicant conceded that the motor vehicle in issue belongs to his brother Greaters Nyoni. He produced as proof, exhibit 3 a registration book for the Toyota Sprinter.

It goes without saying that the applicants are facing a serious offence that attracts a mandatory prison term of 9 years in the absence of a finding of special circumstances - see section 11 of the General Laws Amendment No. 5 of 2011. As I stated in *Webster Nyaruviro* and *Max Bloomton* v *The State* HB 262-17, "in assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge the more severe the sentence is likely to be. In *S* v *Nichas* 1977 (1) SA 257 (c) it was observed that if there is a likelihood of heavy sentences being imposed, the accused will be tempted to abscond. Similar sentiments were expressed in *S* v *Hudson* 1980 (4) SA 145 (D) 146 in the following terms;

> "The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country."

Quite clearly, the real possibility of a severe sentence enhances any possible inducement to the accused to flee. The Supreme Court in *S* v *Jongwe* 2002 (2) ZLR 209 (S) held that in judging the risk of abscondment, the court ascribes to an accused "the ordinary motives and fears

that sway human nature." Further, the court held that the critical factors the court must take into consideration when assessing the risk of abscondment are:

(i) The nature of the charges;
(ii) The severity of the punishment likely to be imposed upon conviction; and
(iii) The apparent strength and weakness of the state case.

In the present case, the 1st and 2nd factors are given. As regards the third the state case is strengthened by the fanciful and fictitious defence presented by the applicants in a bid to show lack of *mens rea*. As I lamented in the *Webster Nyaruviro* case *supra*, it is unhelpful for the accused persons in a bail application to give the court a work of popular fiction where the "owner" of the contraband always disappears from the scene upon being confronted by the police. What is mysterious is why in the circumstances in casu the police failed to arrest the "khaki man"? In my view, the reason is that he is just an imaginary man invented by the applicants. This is why the arresting officers who were acting on information from an informer did not arrest this so-called "khaki man".

In the result, the applicants have failed to discharge the burden of showing on a balance of probabilities, that it is in the interests of justice for them to be released on bail.

Accordingly, the application is hereby dismissed.

Tanaka Law Chambers, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners