JAMES TAPOKA

And

SPENCER MHARADZA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 3 May 2023 & 18 May 2023

Application for bail pending trial

T. Runganga, for the applicants
K.M. Guveya, for the respondent

DUBE-BANDA J:

[1] This is a bail application pending trial. The applicants are charged with the crime of contravening s 45(1)(a) as read with s 128(1)(a) of Parks and Wildlife Act [Chapter 20:14] as amended by General Laws Amendment No. 5 (148/11) "Hunt a specially protected animal (Rhinoceros). It being alleged that on 14 July 2022 and at Bubye Valley Conservancy, the applicants one or both of them unlawfully hunted and killed a black rhinoceros which is a protected species using a 315 rifle in contravention of the Act.

[2] The applicants are charged with an offence referred to in Part 1 of the Third Schedule offence. An arrested person is generally entitled to be released on bail if a court is satisfied that there are no compelling reasons to refuse bail, however the reverse applies where a person has been charged with a Part 1 Third Schedule offence. From the aforesaid provision, it is clear that a court is obliged to order an accused's detention where he stands charged with a Part 1 Third Schedule offence and a court will only be empowered to grant bail in those instances provided the accused can advance exceptional circumstances why he should be released. The standard of proof is on a balance of probabilities. This is what s 115C(2)(a)(1) as read with 117(6)(a) and Part 1 Third Schedule (7) of the Criminal Procedure and Evidence Act [Chapter 9:07] envisages.

[3] In support of this application, the applicants first filed a bail statement. At the tail end of the oral submissions, Mr *Runganga* sought leave to file affidavits of evidence in support of the application. I permitted the filing of such affidavits with the rider that should such affidavits

raise issues that require further argument, I would advise the parties accordingly. The perusal of the affidavits shows that they were filed as a matter of form not substance, just to create a façade of compliance with the requirement to adduce evidence.

[4] In the very brief and identical affidavits filed by the applicants, they aver that they were arrested following confessions and indication made by Prince Mudenda and Greaters Nyoni. That in their warned and cautioned statements they admitted to the offences because of assaults perpetrated on them by the police. And that their co-accused Greaters Nyoni has since been admitted to bail.

[5] In their bail statement and submissions by Counsel the applicants contend that the interests of justice permit their release on bail pending trial. It is contended further that the State does not have a strong *prima facie* case in that there is nothing that links the applicants to the commission of this offence. Counsel argued that the fact that the police did not hold an identification parade, that there are no eye witness and that the applicants were not found in possession of the gun used in the commission of the offence shows that the State case is weak. Counsel argued further that the applicants were implicated by one Prince Mudenda, who is alleged to have killed the Rhinoceros. It was argued further that the confessions can only be admissible evidence if their admissibility is proved in a trial within a trial. The applicants dispute that they were present when the Rhinoceros was killed, and that they got a share from the proceeds of the sale of the horns.

[6] Mr *Runganga* argued that the investigations are complete, because statements have been recorded from the witnesses and this eliminates the risk of interference. Further it was argued that the fear of abscondment can be eliminated by ordering the applicants to report at a police station pending the finalization of this matter. It is contended further that the applicants notwithstanding the amount of evidence against them are innocent until proven guilty and therefore the argument that if convicted they will face a long term of imprisonment is immaterial.

[7] This application is opposed. The thrust of the opposition is that it will not be in the interests of justice to release the applicants on bail because they are a flight risk. The respondent contends that the applicants are facing a serious charge and the likely penalty upon conviction will be a long term of imprisonment. It is contended further that there is strong evidence linking the applicants to the commission of this offence, and that no stringent reporting conditions may allay the State's fears of abscondment.

[8] In support of its opposition the respondent relied on the affidavit of the investigating officer. In the affidavit it is averred that the applicants were arrested at their work place i.e., Bubye Valley Conservancy, Beitbridge where they were employed as game scouts. They were employed to protect the Rhinoceros which they killed. Their other two accomplices are at large. They admitted during investigations that indeed they were involved in the commission of this offence. The warned and cautioned statement have been filed of record. The matter is ready for trial. One Greaters Nyoni is also facing similar allegations and is still to appear with the applicants at the Beitbridge Magistrates' Court. He was released on bail for a similar charge at the Plumtree Magistrates' Court.

[9] It is trite law that bail is a right enshrined in the Constitution, and that bail proceedings must be looked at through a constitutional lens.

[10] In a Part 1 Third Schedule bail application, the accused has a clear and definite obligation to persuade the court that he is a proper candidate for admission to bail that he is a proper candidate for admission to bail. The empowering provision places a burden or an *onus* on an accused to satisfy the court by way of evidence and on a balance of probabilities that exceptional circumstances exist which, in the interests of justice, permit his release on bail. Before a court may grant bail to a person charged with a Part 1 Third Schedule offence it must be satisfied, upon an evaluation of all the factors that are ordinarily relevant to the grant or refusal of bail, that circumstances exist that warrant an exception being made to the general rule that the accused must remain in custody.

[11] There is no definitive or exhaustive list of what constitutes 'exceptional circumstances' in the context of this provision. Each case has to be dealt with according to its merits. Exceptional circumstances do not mean that they must be circumstances above and beyond. In fact, ordinary circumstances, present to an exceptional degree, may lead to a finding that the release on bail is justified. See: *S v Rudolph* 2010 (1) SACR 262 (SCA) para 9. In *S v Petersen* 2008 (2) SACR 355 (C), para 55 the court said that generally speaking "exceptional" is indicative of something unusual, extraordinary, remarkable, peculiar or simply different.' It was of the view that there are 'varying degrees of exceptionality' and that this depends on the context and the particular circumstance of the case under consideration. See: *S v Bruintjies* 2003 (2) SACR 575 (SCA).

[12] The evidence of the investigating officer and the submissions by State Counsel were mainly about the seriousness of the charge and the strength of the State case. It is trite law that the primary reason for these factors is to establish an inducement to abscond and not stand trial – *S v Nichas* 1977 (1) SA 257 (C), *S v Hudson* 1980 (4) SA 145 (D); *S v Vermaas* 1996 (1)

SACR 528 (T). In other words, in assessing the risk of flight the courts may properly take into account not only the strength of the case for the State and the probability of a conviction but also the seriousness of the offence charged and the concomitant likelihood of a severe sentence. The reason for this traditional approach is that the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond.

[13] The first inquiry is whether the State has a strong *prima facie* case against the applicants? It is clear that according to the investigating officer the first applicant is linked to the offence by his own warned and cautioned statement and the statement of one Prince Mudenda. The second applicant in his warned and cautioned statement says he was not present at the time the Rhinoceros was killed however he received his share from the proceeds of the sale of the horn.

[14] It is trite law that in bail applications the fact that a statement has not been proved to have been voluntarily will not lead to its exclusion from the body of the evidence, nor will the customary trial within a trial be held to determine the voluntariness thereof. The reason for this approach in practice is the high degree of relevance of a statement to the assessment of bail risks, i.e., in establishing the incentive to abscond, to interfere with witnesses, etc. In general, it becomes a matter of weight and not admissibility.

[15] On the overall facts of this case it appears to me that indeed the State has a strong *prima facie* case against the applicants. I juxtapose this with the trite principle that an accused cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice. See: *S v Acheson* 1991 (2) SA 805 (Nm) at 822 A – B, at para [14].

[16] The applicants are facing a serious offence, and if convicted the prospects of them receiving long terms of imprisonment is real. See: *S v Jongwe* SC 62/2002. Indeed, they have no doubt about this prospect because their accomplice Prince Mudenda who has since been convicted has been sentenced to nine (9) years imprisonment. This in my view increases the risk of abscondment which no stringent conditions may allay.

[17] Although the applicants say they were born and bred in Zimbabwe, they are family men, and have no means and capacity to abscond, I take view the that on the facts of this case there is a real probability that they may skip the country or may simply disappear off the radar.

[18] The applicants also say that their accomplice one Greaters Nyoni has been admitted to bail. It a principle of the law that applicants for bail pending trial who are jointly charged, should normally be treated in the same manner with regard to bail matters. However, they can

be treated differently if such differentiation is justified. In this case, the applicants have not made a case to be released on bail on the basis of this principle. According to the affidavit of the investigating officer this Greaters Nyoni has not appeared in court in respect of the offence that the applicants are facing. He was released on bail on a matter in which he is not jointly charged with the applicants. Therefore, this principle of similar treatment has no application in this case. Again, this matter is ready for trial, it was first set down for 28 April 2023, the court was not informed as to what happened on that date. However, what is clear is that the matter is ready for trial.

[19] Finally, I am unable to conclude that the State's case against the applicants is non-existent, or that it is subject to some serious doubt. Furthermore, the seriousness of the offence, the strong *prima facie* case against them, and the possible sentences militate against releasing the applicants on bail. I am not persuaded that the interests of justice permit the release of the applicants on bail. For the foregoing considerations, I am not satisfied that applicants have established the presence of exceptional circumstances that, in the interest of justice, permit their release on bail pending trial. The cumulative effect of these facts constitutes a weighty indication that bail should not be granted.

In the result, I order as follows:

The bail application be and is hereby dismissed.

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