SILAS CHINAKA
versus
THE STATE

HIGH COURT OF ZIMBABWE
SIZIBA J
MUTARE, 19 June 2025 & 24 June 2025

APPLICATION FOR BAIL PENDING APPEAL

Mr *C. Ndlovu,* for the applicant
Ms *T.L Katsiru,* for the respondent

SIZIBA J:

1. The applicant seeks bail pending appeal in terms of s 123 (1) (b) (ii) of the Criminal Procedure and Evidence Act [*Chapter 09*:*07*]. He stands convicted of the crime of unlawful possession of ivory or a trophy of a specially protected animal in contravention of s 82 (1) (b) as read with s 128 of the Parks and Wildlife Act [*Chapter 20*:*14*]. He was convicted of the said offence on 16 May 2025 and on 23 May 2025 he was slapped with a minimum mandatory sentence of 9 years imprisonment by the Magistrates Court in Mutare. He has raised an array of complaints against both conviction and sentence and he has petitioned this court to grant him bail pending appeal mainly on the alleged basis that his appeal enjoys reasonable prospects of success and that he will abide by the proposed bail conditions pending the determination of his appeal by this court.

PROCEEDINGS IN THE LOWER COURT

2. The record of proceedings reflects that the applicant was indeed dragged before the lower court facing the charge mentioned above. The facts alleged in the state outline were that on 15 May 2025, the detectives in the Criminal Investigations Department of Minerals, Flora and Fauna Unit in Mutare were tipped that the applicant was advertising or looking for buyers for two elephant tusks. They then lured the applicant telephonically to Nyanga turn off along Harare-Mutare highway posing as buyers. The applicant turned up for the supposed deal driving a Honda fit motor vehicle which was

carrying the said trophy. He was caught *flagrante delicto*. This was the day when he lost his liberty. He was arrested and made to appear in court the following day.

3. The record of proceedings further reflects that on 16 May 2025, the applicant was made to answer for his actions and that he pleaded guilty to the said charge. He also admitted all the facts narrated in the outline of the state's case without any variations. He confirmed that he had no defense to proffer to the charge. He was accordingly found guilty of the aforesaid crime but then, whether the facts which the applicant admitted were true or not may now be a story for another day in court as there was a sharp turn of events that same afternoon when Mr *Gwizo*, a legal practitioner, turned up to advise the trial court that on Monday 19 May 2025, an application was going to be made to change applicant's plea from that of guilty to that of not guilty.

4. On Monday 19 May 2025, Mr *Chinzamba*, a legal practitioner, appeared on applicant's behalf and made submissions in the application for change of plea. The reason proffered for the change of plea was that upon his arrest, the applicant had been lured to plead guilty so that he would be just slapped with a fine by the court and pay such fine and be liberated to resume his day - to - day business without any further stresses or inconveniences. He was then made wiser, so it is alleged, after his conviction by the prison officers who schooled and disillusioned him that his fate was a 9 year jail term. He then resolved to engage a legal practitioner to defend himself. Mr *Ndlovu* strongly submitted that this explanation for the applicant having chosen to plead guilty so as to 'quickly get over it' in a supposedly less serious criminal allegation was reasonable and not an out - of – this - world experience as it is done by many people especially on traffic cases. Indeed every case should be taken on its own merits and the trial court retains a discretion on assessing the reasonableness of an accused person's explanation to change his or her plea which discretion must be exercised judicially in line with the established legal principles.

5. The trial court did not entertain any doubt that the applicant's plea of guilt was properly tendered. It dismissed the application for the change of plea mainly on the basis that the applicant's explanation was false, illogical, not genuine and improbable.

The trial magistrate questioned why the applicant would have wanted to pay a fine if he had been innocent. The trial court further reasoned that the applicant's responses to the essential elements were unequivocal and not consistent with someone who could deny the charge. The court also held that from the facts, there was no *bona fide* defense to the charge.

6. After the dismissal of the application for the change of plea, what then followed thereafter was that the applicant was given a chance to address the court on special circumstances. His legal practitioner's response is recorded as follows:

"*We have nothing to submit on special circumstances*"

7. After the trial court's further inquiries on the applicant's personal circumstances and mitigating factors, it then sentenced the applicant to 9 years imprisonment.

THE APPLICATION BEFORE THIS COURT

8. The application for bail pending appeal is premised on the allegation that the court below erred in convicting the applicant and also sentencing him to a mandatory minimum sentence of 9 years imprisonment. In terms of the grounds of appeal, the first contention is that the court *a quo* erred in dismissing the application for change of plea when the applicant had proffered an explanation that was reasonably true. The second ground of appeal is to the effect that the court *a quo* erred in failing to explain the mandatory minimum sentence at the onset of the trial. The third and final attack to the conviction was that the court erred in convicting the applicant when the state had failed to specifically prove that what the applicant was in possession of was ivory.

9. Regarding sentence, the court *a quo* was criticized for its failure to conduct an inquiry on special circumstances when the applicant's legal practitioner had abdicated his role by declining to address the court on special circumstances. It was contended further that the sentence imposed was unconstitutional.

SUBMISSIONS BY COUNSEL

10. Mr *Ndlovu* submitted that the conviction of the applicant was improper as the explanation proffered by the applicant in his bid to change the plea was reasonable. He

further submitted that the trial of the applicant had been unfair because of the failure by the trial court to explain the minimum mandatory sentence from the onset of the trial. His view was that after the applicant's then legal practitioner had declined to address the court on special circumstances, it was incumbent upon the court to make such inquiry on the existence or otherwise of special circumstances. His submission was also that exhibits such as elephant tusks can only be confirmed by expert evidence. Mr *Ndlovu* did however concede that in terms of the concerns raised by the applicant in the grounds of appeal, a success of his appeal would not warrant an outright acquittal but a remittal of the matter for a trial *de novo*.

11. On the other hand, *Ms Katsiru*'s position was that the trial in the court below was fair. She submitted that both the conviction and the sentence were proper. She said that the court could not be expected to have delved into special circumstances after the applicant's lawyer had indicated that there were no such special circumstances. She took the view that the explanation given by the applicant for seeking to change the plea was unreasonable and that if he is released on bail pending appeal, he will abscond due to the seriousness of the offence.

THE LAW AND ITS APPLICATION

12. There is no presumption of innocence to a convict who has been found guilty by a trial court when considering his or her application for bail pending appeal. See *Phiri* v *The State* HB 146/24. Furthermore, the onus is upon the applicant in an application for bail pending appeal to convince the court that his release on bail will not defeat the course of justice and this onus is to be discharged by demonstrating that the appeal has prospects of success and that the applicant will not abscond if granted bail pending appeal. See *Hlabangana and Others* v *The State* HB 101/22.

13. An application for change of a plea is premised upon the provisions of s 272 of the Criminal Procedure and Evidence Act [*Chapter 09:07*] which reads thus:

*"**272 Procedure where there is doubt in relation to plea of guilty***
If the court, at any stage of the proceedings in terms of section two hundred and seventy-one and before sentence is passed—

(a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or

(b) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or

(c) is not satisfied that the accused has no valid defence to the charge;

the court shall record a plea of not guilty and require the prosecution to proceed with the trial: Provided that any element or act or omission correctly admitted by the accused up to the stage at which the court records a plea of not guilty and which has been recorded in terms of subsection (3) of section two hundred and seventy-one shall be sufficient proof in any court of that element or act or omission."

14. The settled legal position in this jurisdiction is that an accused person who wishes to change a plea of guilty to that of not guilty is required to give a reasonable explanation why he had pleaded guilty in the first place. He has no onus to discharge. Put differently, he is not required to prove anything. The trial court can only dismiss such application for change of the plea if satisfied that the explanation proffered by the accused person is beyond reasonable doubt false. See *S* v *Matare* 1993 (2) ZLR 88 (SC), *Dube and Another* v *The State* HB 168/23.

15. Since an accused person bears no onus to prove the truthfulness of his explanation, it follows that a court cannot therefore lightly dismiss his explanation without a proper inquiry especially if his allegations or explanation imputes wrongful treatment or undue influence by the police. The court should not just pass by such allegations by an accused person without making a proper inquiry and a determination. See *Chikwashira* v *The State* HH 282/14. If it is admitted by the State representatives that the accused was indeed wrongly influenced or coerced to plead guilty by the police, then such would suffice as a reasonable explanation why he pleaded guilty and the plea must, of necessity, be altered to that of not guilty and the case should go on trial. If, on the other hand, the State representatives are in denial that such alleged mischief occurred, then the court should adopt an inquisitorial approach or hear evidence and make an informed decision whether such mischief occurred that would tend to vitiate the

accused's plea of guilt. In *Mutunwa and Another* v *The State* HH 104/08 where the appellants had wished to change their plea on the basis of complaints against the police, at p 3 of the cyclostyled judgment, the court remarked as follows:

> *"This court takes the firm view that once such allegations were raised, it was incumbent upon the trial magistrate to immediately conduct an enquiry into such allegations. It was certainly not competent for the magistrate to simply adopt a casual approach and dismiss the application without even hearing the application from the appellants themselves.*
>
> *The attitude exhibited by the Magistrate was tantamount to riding roughshod over the constitutional rights of the appellants who were entitled to a fair trial before an impartial court. Such conduct on the part of the Magistrate was unacceptable and was fatal to the proceedings."*

16. Furthermore, the other pertinent consideration is whether the court in an application for change of plea should delve into the merits of the accused person's defense and the unequivocal manner in which the accused would have admitted the elements of the crime during the plea taking stage. The answer is simple. Such aspects should not be considered mainly for two reasons. Firstly, no reliability and value should be placed on information or admissions which may have been tainted by duress or undue influence by a court of law. The second reason is that it is pre mature for a court of law to assess the merits of an accused's defense before his or her trial and hence it would be wrong to refuse him or her to change his or her plea at that stage on this basis of having no defense to the charge as it would be a violation of not only his or her right to a fair trial but also of his or her right to be presumed innocent until proven guilty. In *Chikwashira v The State* (*supra*) at p 4 of the cyclostyled judgment, the court also expressed the following sentiments:

> *"It is clear that the trial magistrate fell into error when he delved into the merits of the appellant's case in order to determine whether his application for a change of guilty plea ought to succeed. The question was not whether appellant's case, as explained by his counsel during submissions in the hearing, carried with it any prospects of success. The issue remained whether he had put forward an explanation for the guilty plea which, in the circumstances, was beyond reasonable doubt false."*

17. In both cases of *Mutumwa and Another v The State* (supra) and *Chikwashira* v *The State* (*supra*), the appellate court assumed its review powers and quashed both the conviction and sentence and remitted the cases for a trial *de novo* before a different

magistrate. In the matter at hand, the trial court not only failed to make a proper inquiry before dismissing the application for the change of plea after the applicant had raised serious allegations against the police but it also fell into the error of straying into the merits of the applicant's defense before any line of defense was presented before it. It based on the potentially misleading admissions made by the applicant during plea recording and on the unequivocal nature of his plea of guilt. There is, therefore, some prospect of success therefore on the appeal to the extent that may warrant a remittal of the case for a trial *de novo* before a different magistrate by the appellate court.

18. The applicant is attacking the proceedings of the court *a quo* mainly on the basis of alleged procedural irregularities. The trite position at law is that this court will not quash any conviction or sentence in its review powers unless there is a substantial miscarriage of justice in terms of s 29 (3) of the High Court Act [*Chapter 07*:*06*] which provides thus:

"(3) No conviction or sentence shall be quashed or set aside in terms of subsection (2) by reason of any irregularity or defect in the record or proceedings unless the High Court or a judge thereof, as the case may be, considers that a substantial miscarriage of justice has actually occurred."

19. In my view, whilst the failure by a trial court to explain both the special circumstances and the minimum mandatory sentence on the onset of the trial was irregular, such irregularities alone may not be so grave as to amount to a substantial miscarriage of justice unless there are other additional considerations which tend to exacerbate the situation to render the trial completely unfair.

20. The applicant's intended appeal also raises an important question as to whether or not the State is required to prove that the items which the applicant was in possession of were elephant tusks by way of scientific or forensic means even in a case where the accused was pleading guilty or acknowledging that he was in possession of such alleged trophy. Perhaps this view is motivated by the fear of prejudice to an accused person in the event that both an accused person and the state agents and even the court may be mistaken in the true nature of the item concerned without expert evidence.

However, there is no legal provision in this jurisdiction that generally mandates a court to require such expert evidence of confirmation of an exhibit in each and every case where there is an admission on the part of an accused that he or she was in possession of the exhibit concerned. At law, such evidence would be not only irrelevant but superfluous. It is the denial of the nature of the exhibit by an accused person that should trigger the need for the production of such scientific or forensic evidence by the State in a bid to prove its case beyond reasonable doubt. If there is an admission of unlawful possession by an accused as was the case in this matter, then there would be no relevance in adducing evidence to prove what is common cause.

21. Section 252 of the Criminal Procedure and Evidence Act [*Chapter 09:07*] forbids the production of irrelevant evidence that does not prove or disprove any fact in issue. It provides as follows:

> *"**252 Inadmissibility of irrelevant evidence***
> *No evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact at issue in the case which is being tried."*

22. This understanding is further buttressed by the provisions of s 278 (1) of the Criminal Procedure and Evidence Act which provides for the admissibility of expert affidavits in certain cases where such affidavits are relevant as follows:

> *"**278 Admissibility of affidavits in certain circumstances***
> *(1) In any criminal proceedings **in which it is relevant to prove**—*
>
> *(a) any fact ascertained by an examination or process requiring knowledge of or skill in bacteriology, chemistry, physics, microscopy, astronomy, mineralogy, anatomy, biology, haematology, histology, toxicology, physiology, ballistics, geography or the identification of finger-prints, palm-prints or footprints or any other knowledge or skill whatsoever;*
>
> *(b) any opinion relating to any fact ascertained by an examination or process referred to in paragraph (a);*
>
> *a document purporting to be an affidavit relating to any such examination or process and purporting to have been made by any person qualified to carry out such examination or process who in that affidavit states that such fact was ascertained by him or under his direction or supervision and that he arrived at such opinion, if any, stated therein shall, on its mere*

production in those proceedings by any person, but subject to subsections (11) and (12), ***be prima facie proof of the fact and of any opinion so stated.*** *"* (Emphasis added)

23. Section 314 of the same Act is also relevant in this aspect as it provides for admissions of facts by an accused person or his or her legal practitioner as follows:

> *"**314 Admissions of fact***
> *(1)* ***In any criminal proceedings the accused or his legal representative or the prosecutor may admit any fact relevant to the issue and any such admission shall be sufficient evidence of that fact.***
> *(2) If he considers it desirable for the purpose of clarifying the facts in issue or for obviating the adduction of evidence on facts which do not appear to be in dispute, the judge or magistrate may, during the course of a trial and on application by the prosecutor, the accused or his legal representative ask the accused or his legal representative or the prosecutor, as the case may be, whether any fact relevant to the issue is admitted in terms of this section.*
> *[Subsection amended by section 28 of Act 9 of 2006.]*
> *(3) Subject to this Act, an accused who is not represented by a legal practitioner shall be warned that he is not obliged to make any admission."* (Emphasis added)

24. In view of the above provisions of the law, there would be nothing amiss if an accused person is convicted of unlawful possession of elephant tusks without expert evidence proving the nature of such exhibits where an accused admits having been in possession of such exhibits as alleged by the State. I do not therefore see any prospects of success of the appeal along this line of argument.

25. The applicant's grounds of appeal against sentence are hopelessly without merit. He cannot complain that the court *a quo* did not assist him on the inquiry on special circumstances when in fact his own legal practitioner who had taken instructions from him to represent his best interests and rights in court confirmed before the trial court that he had nothing to say on special circumstances. In fact, the record shows that the learned trial magistrate even tried his best to make inquiries along the appellant's personal circumstances before sentencing him even if he was legally represented.

26. What comes out clearly in this matter is that the prospects of success in the applicant's appeal against conviction may exist only to the limited extent that the appeal court may remit the case for a trial *de novo* before a different magistrate due to the reservations that I have pointed out above in relation to the manner in which the trial court rejected the applicant's application for the change of his plea.

27. The final inquiry therefore is whether the interests of justice would be served by admitting the applicant to bail pending appeal. He has already admitted to have committed a very serious offence which carries a minimum mandatory sentence of 9 years imprisonment where there are no special circumstances. It is on record that his desire to change the plea was motivated by his realization of the seriousness of the charge and the severity of the punishment after he had been lured to take it lightly and admit. I agree with the submissions made by State counsel that if he is to be released pending the appeal, he may be tempted to abscond by the prospect of a severe punishment in the event that the appeal fails. The situation would have been different if there was a prospect of the applicant being discharged and acquitted by the appeal court. There is no such prospect in respect of this matter.

28. In view of the above considerations, the applicant's application for bail pending appeal lacks merit and it is accordingly dismissed.

Gonese & Ndlovu, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners