CREVEN BANDA

Versus

THE STATE

HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO, 19 and 25 June 2020

Bail pending trial

B. Ndove, for the applicant
K. Ndlovu, for the respondent

DUBE-BANDA J: This is an application for bail pending trial. Applicant is facing a charge of "unlawful possession of raw ivory of elephant" as defined in section 82(1) of the Parks and Wildlife Regulations S.I. 362/1990 as read with section 128 (1) (b) of the Parks and Wildlife Act [Chapter 20:14]. It is alleged that on the 24th May 2020 and at a bus terminus at Makwika Village, Hwange, the accused unlawfully possessed eight raw unmarked pieces of ivory weighing 9 405 kilograms without a permit.

The allegations from which the charge arises is set out in the State Outline. It says on the 24th May 2020, members from the Zimbabwe Republic Police (Z.R.P.) and the Zimbabwe Parks and Wildlife Authority were on a motorized joint patrol at Madumabisa, Hwange, received information that there was a person who was in possession of elephant ivory in Makwika village, Hwange. The applicant was found and the blue bag he was carrying was searched, it was found to be containing ivory. The ivory was weighed and had a total mass of 9 405 kilograms valued at US1 598 85. It is alleged that applicant had no permit to possess such ivory. He was then arrested.

It is contended that applicant is not a flight risk. He is a person of fixed abode, he resides at House No. N2 Lusumbami Village, Hwange. He does not have a passport. He is a family man with three children who are of school going age and is responsible for the welfare of his wife and children. He owns a chicken business and is a coach of Hwange Football Club.

It is further submitted on behalf of the applicant that he is innocent and is confident of an acquittal as the bag which contained the ivory did not belong to him, he was a victim of a trap set up by the owners of the bag.

The bail application is opposed. The prosecution contends that there are compelling reasons to refuse to admit applicant to bail pending trial. It contends that the state has a strong *prima facie* case against the applicant, and that the strength of the state's case coupled with the attendant mandatory penalty of 9 years imprisonment on conviction, makes him a flight risk.

The investigating officer deposed to an affidavit in support of the opposition to admit applicant to bail. He says applicant was found in possession of a blue bag on his lap containing eight pieces of unmarked raw elephant ivory without a permit. The severity of the sentence on conviction makes him a flight risk.

Section 116 (1) of the Criminal Procedure and Evidence Act [Chapter 9:07] empowers a court to admit an accused person to bail pending trial.

In the light of the principles of the presumption of innocence and the right to liberty, pre-trial incarceration is an exception rather than the norm. It is within the context of that exception that the law accepts that persons suspected of having committed crimes may forfeit their personal freedom pending trial. Therefore, the *onus* is on the prosecution to show that there are cogent reasons that support the contention that applicant is not a good candidate for admission to bail pending trial. The prosecution must show that the release of applicant on bail, will jeopardise the interests of justice and the proper functioning of the criminal justice system, which demands that a suspect reasonably suspected to have committed an offence known at law, must appear and stand trial to answer to the charge and allegations levelled against him.

To discharge the *onus* of showing that an accused is not a good candidate for admission to bail pending trial, the prosecution can rely on one or more of the grounds specified in section 117 of the Criminal Procedure and Evidence Act.

The contention by the prosecution is that the applicant is a flight risk, therefore, this application turns on the risk of abscondment by the applicant. Section 117 (2) (a) (ii) of the Criminal Procedure and Evidence Act [9:07] provides that:- The refusal to grant bail and the detention of an accused in custody shall be in the interests of justicewhere 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— not stand his or her trial or appear to receive sentence.

Section 117 (3) (b) (iv) and (v) of the CPA Act provides in considering whether the ground referred to in subsection (2) (*a*) (ii) has been established, the court shall take into account— the nature and gravity of the offence or the nature and gravity of the likely penalty therefor; and the strength of the case for the prosecution and the corresponding incentive of the accused to flee.

In this jurisdiction and other enlightened jurisdictions, the seriousness of the charge, standing alone, is not a cause to refuse to admit an accused person to bail pending trial. This is so, because, no matter the seriousness of the charge, the presumption of innocence still operates in favour of the accused. See *Mlilo v The State* HB 49 / 18. There must be something more than the mere seriousness of the charge, for the court to refuse to admit an accused to bail.

In 1991, the High Court of Namibia in the case of *S v Acheson* 1991 (2) SA 805 Nm, set out some factors to which regard must be had when dealing with the question of bail. The key consideration is whether or not the accused will return to court if released and ultimately whether they will stand trial.

It has repeatedly been held that in assessing the risk of flight, courts must take into account not only the strength of the case for the prosecution and the probability of a conviction, but also the seriousness of the offence charged and the concomitant likelihood of a severe sentence. The obvious reason of this approach is that the expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the applicant to abscond. In *S v Nichas* 1977 (1) SA 257 (C) 263G-H, the court said if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. In *S v Hudson* 1980 (4) SA 145 (D) 164H, the court held that the expectation of a substantial sentence of imprisonment would undoubtedly provide incentive to the accused to abscond and leave the country. In *S v C* 1995 SACR 639 (C) 640H, it was said that whilst the possibility of absconding is always a very real danger, it remains the duty of the court to weigh up carefully all the facts and circumstances pertaining to the case.

In *Aitken & Another v Attorney-General* 1992 (1) ZLR 249 (S), the court set out how the court should assess the risk of abscondment. It was held:

> "In judging this risk the court ascribes to the accused the ordinary motives and fears that sway human nature. Accordingly, it is guided by the character of the charges and the penalties which in all probability would be imposed if convicted; the strength of the State case; the ability to flee to a foreign country and the absence of extradition facilities; the past response to being released on bail; and the assurance given that it is intended to stand trial.

> It is quite clear from the above remarks that the critical factors in the above approach are the nature of the charges and the severity of the punishment likely to be imposed upon conviction and also the apparent strengths and weaknesses of the State case."

See *S v Jongwe* SC 62/2002.

It is common cause that applicant was found in possession of the ivory which is subject to the charge he is facing. This, the applicant does not dispute. His contention is that "the blue bag does not belong to him, and that a trap was set by the owners of the bag, and he was unaware of it. He did not act in common purpose with the owners of the bag containing eight pieces of ivory."

Applicant's contention is that the "bag does not belong to him." Applicant is missing the point, he is not facing a charge of ownership, but of possession. It is not about "belonging" or "ownership," it is about "possession." "Ownership" and "possession" are two distinct legal concepts, with different elements. These concepts cannot be used interchangeably. The prosecution says the bag was found on his lap, and the police officers asked to search it which permission was given. It is alleged that he was in physical detention of the bag. The prosecution contends that at law, the applicant was in possession of the bag containing ivory. This is what applicant has to contend with, and address.

The prosecution argues that it has a strong *prima facie* case against the applicant. On conviction, the offence he is facing attracts a mandatory imprisonment of nine years, unless the court find the existence of special circumstances surrounding the commission of the offence. It is contended that in view of the prosecution case and the likely penalty on conviction, there is a real live risk, that upon admission to bail, applicant will abscond and not appear to stand trial. I agree.

The court accepts that applicant is a family man, a business person, and couch of a football team. Important consideration by any measure, however on the factual matrix of this case, these pale into insignificance when juxtaposed with the seriousness of the offence, the likely penalty on conviction and the likely motive to abscond and not attend trial.

Notwithstanding the strength of the prosecution's case, the presumption of innocence still operates in favour of applicant. The law accepts that in some exceptional circumstances, an accused person, might be kept in custody pending trial. This is one of such cases.

In *Simplicity Ndlovu v The State* HB 75 / 07, this court said the practice has shown that in some bad cases, stringent bail conditions may be sufficient to allay the court's fears of

the possibility of the accused compromising the ends of justice by failing to avail himself for trial. However, this obviously well informed and rich practice is not full proof that guarantees a determined accused from avoiding trial if he chooses to.

Our country's boarders are so porous that one can almost move in and out of the country without detection, if one were to exit through unrecognised points scattered all over our borders. See *Simplicity Ndlovu v The State (supra).*

All in all, it must be understood that while there is absolutely no guarantee of what a person is going to do after release on bail, the question of bail is decided on a balance of probabilities based on the evidence before court in any given matter. Further, each case is decided on its own merits, on a case by case basis. There is no one shoe fits all.

This court is empowered by the statutory provisions and the jurisprudence developed in this jurisdiction and in the region, to refuse to admit an accused to bail where the risk of abscondment is real and live.

Disposition

In conclusion, I find that the state has discharged the *onus* of showing that there are compelling reasons to refuse to admit the applicant to bail at this stage. I underscore that it is not in the interests of justice to admit the applicant to bail pending trial. In the result: the application to admit applicant to bail pending trial is refused.

Ndove and Associates, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners