

**BISHOP MWEMBE**

**Versus**

**THE STATE**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 6 MAY 2022 & 12 MAY 2022

**Application for bail pending trial**

*T. Moyo* for the applicant  
*K.M. Moyo* for the respondent

**DUBE-BANDA J**

1. This is an application for bail pending trial. Applicant is being charged with two counts, in count 1 he is charged with the crime of contravening section 45(1) of the Parks and Wildlife Act [Chapter 20:14) as read with section 128(b) of the same Act. It being alleged that on the 19<sup>th</sup> April 2022, he unlawfully had in his possession six pangolin trophy scales weighing 200 grams.
2. In count 2 he is charged with the crime of contravening section 45(1) (b) of the Parks and Wildlife Act [Chapter 20:14. It being alleged that on the 19<sup>th</sup> April 2022, he unlawfully had in his possession two python skins measuring 1, 62 meters and I, 67 meters each.
3. In support of his bail application applicant filed a bail statement and a supporting affidavit. In the bail statement he contends that it is in the interests of justice that he be released on bail pending trial. In his supporting affidavit he is denying the charges he is facing. His defense is that he did not know what was contained in a sack that was on the side of the road near to where he was standing because he found it there. He went close to the sack as he suspected that it belonged to a fellow villager who could have been waiting for transport.
4. His evidence is that when he got to the sack, and before he opened to see its contents, two men arrived. They introduced themselves as police officers. They asked to search the sack.

He advised the policers that he did not know who the owner of the sack was nor its contents. The police officers opened the sack and observed two python skins and scales of pangolins. The police accused him of being the owner of the sack, which he denied. He was arrested and forced to confess that it was his sack.

5. The release of the applicant on bail is opposed. It is contended that there is a strong *prima facie* case against him and he is a flight risk. In support of its opposition, respondent contends that applicant was found in possession of a trophy of a specifically protected animal and upon conviction he is likely to get a severe sentence of 9 years and that alone may induce him to abscond and not stand his trial. It is said there is overwhelming evidence against the applicant. It is contended that in his extra curial statement he admits that he was found in physical possession of the trophy and the python skin. It is argued that the State has a strong *prima facie* case against the applicant.
6. The fundamental principle governing the court's approach to bail applications is to uphold the interests of justice. The court must take into account the factors set out in section 117 of the Criminal Procedure and Evidence Act [Chapter 9:07] and try to strike a balance between the protection of liberty of the individual and the administration of justice. In our law persons are presumed innocent until their guilty has been proved. Whenever the interests of justice will not be prejudiced by pre-trial release the courts should lean in favour of liberty and grant release on bail. See: Prof. Feltoe *Magistrates' Handbook* (Revised 2021) 76.
7. This application is opposed on the grounds that if released on bail, the applicant will abscond and not stand his trial. In deciding whether flight is lightly and in the absence of concrete evidence of a predisposition to abscond, account must be taken of a number of factors which common experience have shown might influence a person either to stand trial or abscond. See: Prof. Feltoe *Magistrates' Handbook* (Revised 2021) 77. When assessing the risk of an applicant for bail absconding before trial, the court will be guided by the following: the gravity of the charges and the severity of penalties which would be likely to be imposed if convicted; the apparent strength or weakness of the State case; applicant's ability to flee to a foreign country, whether he has contacts in the foreign

country who will offer him sanctuary and the absence of extradition facilities in that country; whether he has substantial property holdings in Zimbabwe and his status in Zimbabwe, that might mean he would lose so much if he absconded that flight is unlikely; whether he has substantial assets abroad; if he was previously released on bail, whether he breached the bail conditions; and the assurance given that he intends to stand trial. See: *S v Jongwe* 2002(2) ZLR 209(S), *S v Chiadwa* 1988(2) ZLR 19 (S), *Aitken & Anor v A-G* 1992(1) ZLR 249 (S).

8. In *casu* count 1 is grave and very serious and if convicted the applicant will likely be sentenced to a nine year prison term. This by any standards is a severe penalty. What remains to be considered is the apparent strength or weakness of the State case. In his evidence he says the police officers arrested him just before he opened the sack. The respondent contends that he was in physical control of the sack. This is the sack that contained six pangolin trophy scales and two python skins. Mr *Moyo* counsel for the applicant argued that the concept of possession comprises of two elements: the physical control over the *res* in question and the element of *animus*, i.e. intention to exercise control over the thing. See: *S v Smith* 1965 (4) SA 166.
9. According to facts of this case *prima facie* applicant was in physical control of the sack. This is the sack that contained six pangolin trophy scales and two python skins. In his unconfirmed warned and cautioned statement applicant admits that he was found in possession of two python skins and six pieces of pangolin scales without a permit. Mr *Moyo* argued that such evidence is inadmissible in bail proceedings. It can only be admitted if it meets the requirements of section 256 of the Criminal Procedure and Evidence Act [Chapter 9:07], i.e. if shown that it was made freely and voluntarily.
10. The admissibility of extra-curial statements in criminal trials is regulated by section 256 of the CP & A Act. In bail applications, the fact that an extra-curial statement has not been proved to have been voluntarily made will not lead to its exclusion from the body of evidence, nor will a trial-within-a-trial be held to determine the admissibility of such statement. The reason for this approach in practice is the high degree of relevance of such statements to the assessment of bail risks. See: Berg *Bail a Practitioner's Guide* (3<sup>rd</sup> ed)

121. The jurisprudence is that a warned and cautioned statement is admissible in bail proceedings, even if it is unconfirmed.

11. In deciding this bail application I factor into the equation applicants extra-curial statement. For the purposes of this bail application, I take the view that the State has a strong *prima facie* case against the applicant. I say so because the sack containing the offending articles was found in his physical control, and that in his warned and cautioned statement he admitted having been in possession of the offending articles without a permit.
12. I have found that the applicant is facing a grave and serious offence and if he is convicted he is likely to be sentenced to a nine year prison term. Further the State has a strong *prima facie* case against the applicant. What exercised my mind is whether such an applicant may be released on bail pending trial?
13. Mr *Moyo* argued that there is no chance of applicant absconding and evading his trial. This argument is anchored on the following: that he is 28 years old; married to two wives, he is an unsophisticated villager; he is a traditional man; he has no means to uproot himself from Zimbabwe and establish himself in another country; he has no contacts in any other country who may give him sanctuary; he has no passport nor any other travel document; and at arrest he co-operated with the police. On the facts of this case these facts presents a weighty consideration in favour of granting bail.
14. In *casu* the only factors that might stand between the applicant and release on bail are the gravity of the charges and the severity of penalties which would likely be imposed if convicted, and the apparent strength of the State case. All the remaining factors mentioned *supra* applicable in assessing the risk of abscondment support release on bail. In *S v Madzokere & Ors* 2011 (2) ZLR 1 (H) the court said the seriousness of the charge an applicant is facing is not on its own enough to refuse bail.
15. Pre-trial incarceration cannot be used anticipatory punishment. If he is guilty he would be punished when convicted and sentenced in terms of the law. In *S v Acheson* 1991 (2) SA 805 (Nm) at 822 A – B, at para [14]. Mahomed J said the following:

An accused person 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.

16. A decision to refuse bail must not be taken lightly. In appropriate cases the presumption of innocence might operate in favour of bail even where there is a strong *prima facie* case against applicant. Each case should be considered on its merits. The main purpose of pre-trial detention is to secure his presence in order that he may be tried. The facts of this case do now indicate that applicant may abscond and not stand his trial. The facts of this case increase my confidence that he would stand trial if he were to be released on bail. The court should always grant bail where possible and should lean in favour of the liberty of the accused provided that the interests of justice will not be prejudiced.
17. Therefore, upon careful consideration of all the facts and the circumstances based on the evidence on record pertaining to the case herein, weighing up the interests of justice against the right of the accused to his personal freedom, I am satisfied that interests of justice permit his release on bail pending trial. There is no likelihood that he will attempt to evade his trial. In the circumstances applicant is released on bail pending trial.

In the result, applicant is released on bail on the following conditions:

- i. That he deposit a sum of RTGS20 000. 00 with the Registrar of the High Court, Bulawayo.
- ii. That he resides at his own homestead at Chibondo village, Chief Binga until the finalization of this matter.
- iii. That he reports once every Fridays between the hours of 6:00 hours and 18 hours at Zimbabwe Republic Police, Binga.
- iv. That he does not interfere with witnesses or investigations of this matter.

*Ncube Attorneys* applicant's legal practitioners  
*National Prosecuting Authority*, respondent's legal practitioners