

NONGERAYI FREEMAN

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 4 MAY 2022 & 12 MAY 2022

Application for bail pending appeal

T. Dzipe for the applicant
T. Maduma for the respondent

DUBE-BANDA J

Introduction

1. This is an application for bail pending appeal. Applicant and his co-accused were convicted after a full trial by the Regional Magistrate sitting at Bulawayo on the 21st January 2022, on one count of contravening section 45(1) (b) as read with section 128(b) of the Parks and Wildlife Act [Chapter 20:14], as amended in section 11 of the General Law Amendment 5/2011 (possession of specially protected animal trophy – pangolin carcas). They were sentenced to the minimum mandatory imprisonment of nine years. Aggrieved by both conviction and sentence, applicant noted an appeal to this court. The appeal is pending under HCA 07/22.

Submissions of the parties

2. Applicant contends that he has reasonable prospects of success on appeal. It is argued that the trial court *erred* and misdirected itself in rejecting and dismissing the evidence of applicant's co-accused to the extent that it exonerated applicant from the offence. Further it is submitted that the court *a quo* misdirected itself in finding that applicant had knowledge of the existence of the pangolin skin inside the plastic bag. The contention is that although the applicant was in direct physical control of the bag, the

bag was non-transparent and he was arrested immediately after it was placed in his physical control by the owner. The court *a quo* is further criticised for having convicted applicant on the basis of circumstantial evidence, when the description of the suspects given to the police by the informer, might have been referring to one Pendulo who is said to have escaped at arrest. It is contended that the trial court misdirected itself in convicting the appellant on the basis of inadmissible hearsay evidence given to the police witness by an informer. It is disputed that applicant acted with *mens rea* when he exercised physical control of the bag that contained the pangolin skin.

3. Regarding sentence it is argued that the trial court misdirected itself in finding that there were no special circumstances warranting the imposition of a sentence other than the minimum mandatory sentence.
4. Mr *Dzipe* counsel for the applicant submitted that if released on bail pending appeal, applicant will not abscond. He is a part time lecturer at the University of Science and Technology (NUST), in Bulawayo. He is also a private tutor. He was released on bail pending the finalisation of his trial, and did not abscond. It was submitted that he attended court without fail until he was convicted and then sentenced on the 26 January 2022.
5. This application is opposed. According to Mr. *Maduma* counsel for the respondent applicant's appeal has no reasonable prospects of success. It was argued that the reasoning of the trial court could not be faulted. It was further contended that applicant has no arguable case, and that the State managed to prove its case beyond a reasonable doubt.

The legal principles

6. In *S v Gomana SC 166 / 2020* it was held that the purpose of exercising discretionary power vested in the court in terms of s 123 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] is to secure the interest of the public in the administration of justice by

ensuring that a person already convicted of a criminal offence will appear on the appointed day for his/her appeal or review. It is for that reason that the Act provides, that upon sufficient evidence being led to justify it, a finding that a convicted person is likely not to appear for his/her appeal or review when released on bail is a relevant and sufficient ground for ordering his/her continued detention pending appeal or review.

7. Bail pending appeal is not a right. An applicant for bail pending appeal has to satisfy a court that there are grounds for it to exercise its discretion in his favour. In the case of bail pending appeal the proper approach is that in the absence of positive grounds for granting bail, the application will be refused. The applicant having been found guilty and sentenced to imprisonment is in a different category to an applicant seeking bail pending trial. See: *Mutizwa v The State* SC 13/20, *S v Tengende & Ors* 1981 ZLR 445 (S) 447H – 448C.
8. The main factors to consider in an application for bail by a person convicted of an offence are twofold: Firstly, the prospects of success on appeal in respect of both conviction and sentence. Secondly, the likelihood of abscondment. Other factors to bear in mind are the right of the individual to liberty and the delay before the appeal can be heard. See: *S v Gomana* SC 166 / 2020.
9. It has been held that considerations of reasonable prospects of success on the one hand, and the danger of the applicant absconding on the other, are inter-connected and have to be balanced. Furthermore, that the less likely the prospects of success on appeal, the more inducement there is on an applicant to abscond. It is also emphasised that in every case where bail after conviction is sought the *onus* is on the applicant to show why justice requires that he should be granted bail. See: *Mutizwa v The State* SC 13/20, *S v Williams* 1980 ZLR 466(S), *Chivhayo v The State* SC 94/05.
10. It is on the basis of these legal principles that this application must be viewed and considered.

Does the applicant have prospects of success on appeal?

11. The trial court made the following factual findings, that applicant and his co-accused knew each other from 2019. That on the 4th August 2021, applicant's co-accused had a sack containing a pangolin skin, as he walked in the company of applicant towards Munyoro Shops. While walking the co-accused suddenly handed the sack containing the pangolin skin to the applicant. The co-accused returned home to collect a mask. When the police pounced they arrested applicant who was in possession of the pangolin skin which was in the sack. The applicant and his co-accused had no licence or permit to be in possession of the pangolin skin. A Zimbabwe Parks Ecologist confirmed that the recovered skin was for a pangolin. In conclusion, the trial court found that the applicant was in actual possession of the pangolin skin when he was arrested.
12. Mr *Dzipe* argued that the trial court misdirected itself in rejecting and dismissing the evidence of applicant's co-accused to the extent that it exonerated applicant from the offence. The co-accused told the trial court that applicant was never the owner of the pangolin skin. He even asked the court to release applicant because he was not the owner of the skin.
13. Counsel's submission loses sight of the fact that applicant was convicted and sentenced for the crime of unlawful possession, not ownership of the pangolin skin. It is not about ownership, it is about possession. Ownership and possession are two distinct legal concepts, with different elements. These concepts cannot be used interchangeably. Therefore, the attempt by the co-accused to exonerate applicant in the commission of this offence is of no consequence.
14. The gravamen of the applicant's contention against the judgment convicting and sentencing him largely depends on factual findings and evidentiary issues. It was submitted that the trial court misdirected itself in finding that applicant had knowledge of the existence of the pangolin skin inside the plastic bag. The contention was that although the applicant was in direct physical control of the bag, the bag was non-transparent and he was arrested immediately after it was placed in his physical control

by the owner. Cut to the bone the submission was that applicant had no knowledge of the contents of the bag.

15. The trial court found that the applicant was in actual possession of the pangolin skin when he was arrested. He was carrying the sack that contained the skin. The court relied on the definition of possession provided in *The State v MPA* 2014 (1) ZLR @ 572 and found that applicant was in possession of the skin. In *The State v MPA* the court said :

Where a person is charged with a crime involving the element of animal “possession” it is critical to recognise that the legal definition of “possession” is much broader than the common definition. At law, a person has possession of something if the person knows its presence and has physical control of it or has the power and intention to control it. A person may have sole possession or joint possession. A person who has direct physical control of something on or found around his person is the in actual possession of it. It means he has actual possession of it.

16. On the basis of the evidence on record this finding by the trial court is unlikely to be vacated on appeal.
17. Applicant’s counsel submitted that the trial court convicted applicant on the basis of circumstantial evidence, and the inadmissible hearsay evidence given to the police witness by an informer. I do not agree. A reading of the entire record shows that the trial court relied on the evidence of the police to convict the applicant.
18. Counsel disputed that applicant acted with *mens rea* when he exercised physical control of the bag that contained the pangolin skin. The trial court addressed this issue, and in my view its finding is unlikely to be disturbed in appeal.
19. The regional magistrate took into account all factors surrounding the offence before convicting the applicant. There are, therefore, no reasonable prospects of success on appeal against conviction.

20. Regarding sentence counsel submitted that the trial court misdirected itself in finding that there were no special circumstances warranting the imposition of a sentence other than the minimum mandatory sentence. On the facts of this case, it is unlikely that the trial court's finding on special circumstances would be vacated. I take the view that applicant has no prospects of success against sentence.

Whether or not the applicant is likely to abscond in view of the gravity of the offences and the sentence imposed?

21. The applicant argues that he is not going to abscond as he was on bail pending trial. He abided by the bail conditions until he was convicted and sentenced to a term of imprisonment.

22. In my view, the applicant has a high probability of absconding considering the gravity of his offence and that he has no reasonable prospects of success on appeal. The principle that the lesser the prospects of success the higher the risk of abscondment is applicable in this case. In *S v Kilpin* 1978 RLR 282 (A), it was pointed out that a court may well consider that the brighter the prospects of success, the lesser the likelihood of the applicant to abscond and *vice versa*. The applicant was sentenced on 26 January 2022. The long term of imprisonment he is serving might induce him to abscond. He has experienced the rigours of imprisonment for over three months. He still has a long way to go as he was sentenced to an effective 9 years in prison. The remaining sentence is likely to cause him to abscond if he is released on bail pending appeal. He is a flight risk.

Disposition

23. In the absence of reasonable prospects of success on appeal, and the high probability of absconding the right of the individual to liberty and the delay before the appeal can be heard recede to the background.

24. In the circumstances of this case I am satisfied that it is not in the in interests of justice that applicant be released on bail pending appeal.

In the result, applicant's application for bail pending appeal be and is hereby dismissed.

Morris-Davis & Co. applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners