

LIASON MUDIMBWA

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 12 & 26 MAY 2022

Bail Application

Ms M. Nyika for applicant
T.M. Nyathi respondent

MAKONESE J: This is an application for bail pending trial. Applicant is facing one count of possession of raw ivory without a permit in contravention of section 82(1) of the Parks and Wildlife Regulations SI 362/1998 as read with section 128 (1) (8) of the Parks and Wildlife Act (Chapter 20:14), and a further count of possession of a firearm without a licence in violation of section 4(1) of the Firearms Act (Chapter 10:09). The applicant denies the allegations and avers that he has been wrongly implicated. The application for bail is opposed by the state on the grounds that there is overwhelming evidence against the applicant and that he is a flight risk.

Background facts

On the 27th of April 2022 at around 15:00 hours, police officers received information to the effect that six suspects, including the applicant were in possession of ivory and firearms and had established a base in bushes along the Dete-Binga road near Gwayi bridge. A crack team comprising police detectives from the Minerals, Flora and Fauna Unit and Parks intelligence Officers was set up. The team conducted surveillance around the area where the suspects were located. At around 18:00 hours on the same day applicant and his associates were spotted along the Dete-Binga road each carrying elephant tusks. The police detectives approached the applicant and his colleagues and identified themselves. Applicant and his co-accused were asked to produce permits authorizing them to possess raw ivory. They failed to do so. The applicant and his co-accused were found in possession of unlicensed firearms, an AK 47 and a point 375 rifle as well as 25 rounds of ammunition. The applicant and his co-accused failed to give a satisfactory explanation for their possession of

the firearms and raw ivory. The total number of elephant tusks recovered was 10. Applicant and his co-accused were arrested and taken to court for initial remand. They were remanded in custody. This application is motivated by the applicant's desire to secure his release on bail pending his trial.

Submissions by the applicant

Applicant denies the allegations. In his bail statement applicant avers that he is a suitable candidate for bail. His defence is that he went to Zambezi River on a fishing expedition on the day in question. Applicant wanted to fish and procure relish for his family. At the river he found other people fishing and he joined them. Suddenly, some Zambian nationals crossed the river with a boat. The Zambians off-loaded goods from their boat. Applicant together with his co-accused realized that the Zambians were off-loading ivory tusks and applicant and his colleagues sort to flee. Applicant was unlucky. He was apprehended and was made to carry the ivory together with one of the co-accused.

Applicant was made to walk to an unknown destination. At that stage they were confronted by the police and arrested for the possession of raw ivory. Applicant denies that he was in possession of a firearm and was not in effective and voluntary possession of the ivory.

Applicant avers that he is of fixed abode and has no intention to abscond if granted bail.

Submissions by the State

The state submits that there are compelling reasons of applicant's continued detention pending his trial. Applicant is not denying that he was found in possession of ivory. He admits that he had physical control of the raw ivory. On that basis the state contends that the state has a strong *prima facie* case against the applicant. The state avers there is a high possibility that the state will secure the conviction of the applicant. In the event of a conviction, the accused faces a mandatory sentence of 9 years imprisonment. Applicant is likely to flee than attend his trial. The defence proffered by the applicant is fanciful and amounts to a bare denial.

Analysis

In an application of this nature, the court seeks to strike a balance between the liberty of the individual, who is presumed innocent until proven guilty by a court of competent jurisdiction and the overall interest of the administration of justice. When in all probability applicant's release on bail is likely to pose a real and substantial threat to the interests of justice, bail will not be granted. The overriding principle in applications for bail pending trial is that the interests of justice must not be endangered by an accused person's release on bail. There is need for an applicant to proffer a recognizable defence at law. In this particular case the defence proffered by the applicant sounds more like a fiction story from a movie set than a real defence. In instances where the applicant's conviction is almost certain the court is less likely inclined to grant bail to an accused person. See *Jongwe v The State* SC-62-02.

In terms of section 50(1) (d) of the Constitution of Zimbabwe, an arrested person must be released unconditionally or on reasonable conditions pending his trial unless there are compelling reasons for his continued detention.

I am satisfied that the state has a strong *prima facie* case against the applicant. There is a high probability that the state will secure a conviction. The possibility of the applicant facing a lengthy prison term upon conviction will certainly induce him to abscond.

In the result, and for the foregoing reasons, the application is hereby dismissed.

Mhaka Attorneys c/o Macharaga Law Chambers, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners