NAMATAI LUFU NDLOVU
versus
THE STATE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 12 SEPTEMBER 2017 AND 28 SEPTEMBER 2017

Bail Application

Z C Ncube for the applicant
Ms S Ndlovu for the respondent

MOYO J: This is an application for bail pending trial. The applicant is charged with the offence of possessing raw ivory without a permit in contravention of section 82 (1) of the Parks and Wildlife Act Regulations 362/90 as read with section 128 (b) of the Parks and Wildlife Act Chapter 14 as amended by section 11 of the General Laws amendment No. 5/11.

The allegations against the applicant are that on 19 August 2017 along the Victoria Falls-Bulawayo road, he drove a motor vehicle namely a Subaru Sedan registration number AND 1294 to a bushy area near CBZ stands in Chinotimba Township Victoria falls and he then concealed two elephant tusks. He was caught in this act by the police.

The state has opposed the application. The applicant resides in Victoria Falls and is unemployed. The applicant does not tell us much about his personal circumstances although the defence counsel submitted that he is married with two children. The defence counsel submitted that trial for this matter had been scheduled for 31 August 2017, it was postponed to 11 September 2017 but it could not take off as the accused person wanted to first await the outcome of this application. The applicant avers that the charges are trumped up against him to settle old scores.

In a case of this nature the court has to look at whether there are indeed any compelling reasons to deny the accused person bail. That is, to say is there a danger that the interests of justice will be compromised by the admission of the accused person to bail? It is common cause that applicant is awaiting judgment in a charge somewhat related to the issue of wildlife since it is to do with the possession of cyanide.

It is also common cause that this matter is ready for trial. The charges that applicant faces are serious in nature, likely to have a sentence of a lengthy term of imprisonment once convicted. From the form 242, whilst the presumption of innocence, operates in accused's favour on pre-trial bail matters, there are eye witnesses lined up to testify against the accused. That on its own means that the state has a strong *prima facie* case against the accused person. The accused person submits that these are trumped up charges meant to get back at him because of the failure by the police to pin him down on the previous charges. I find this submission hollow because, the applicant is awaiting judgment in that matter and until a verdict is pronounced by the magistrate concerned no one can claim victory in those proceedings. The applicant further submits that the reasons why the learned magistrate is delaying with the judgment is that he could not be pinned down. Again, I find this a baseless submission in that only the magistrate knows why the judgment is outstanding. In any event, it is a fact admitted by both parties that the learned magistrate was transferred. Again, I do not see the reason why the magistrate would fail to pronounce a judgment simply because the state failed to prove a case against an accused, as obviously in such a case an accused will have to be acquitted and the learned magistrate would not ordinarily have issues with that since the dispensation of justice is not about the conviction of accused persons. It also entails their acquittal where the facts exonerate them. The accused's potential defence leaves the strong *prima facie* case by the state hanging over his head.

Central to the determination of such matters is the interests of justice. The court must take into account various factors in striking a balance between the protection of the liberty of an individual as enshrined in section 50 (1) and the proper administration of justice. Refer to the case of *Malunjwa* v *S* HB 34/03 wherein it was held that in bail applications, the court must strike a balance between the interest of society (that applicant should stand trial and and that there should be no interference with the administration of justice), and the liberty of an accused person (who, pending the outcome of his trial is presumed innocent).

It has been held that in deciding whether flight is likely, account must be taken of a number of factors which common experience has shown influence a person either to stand trial or to abscond per G Feltoe in the *Judges' HandBook* at page 29.

In *Jongwe* v *S* SC 62/02, a decision of the Supreme Court, the former Chief Justice, CHIDYAUSIKU CJ, as he then was, held that the most critical factors are the nature of the charges and the likely penalty and the severity of the punishment likely to be imposed upon conviction and also the apparent strengths and weaknesses of the state case. In *S* v *Ndlovu* 2001 (2) ZLR 261 it was held that it may be desirable for an accused to disclose his defence and not merely make a bald statement that he is not guilty of the offence.

It was further held in that case that such a defence is of great, and often decisive importance in the exercise of the court's discretion.

The factors that I have taken into account in this matter are that

1. The accused is awaiting judgment in an offence that is somewhat related to the current charges. He is thus facing fresh charges whilst awaiting finalization of another matter.
2. The state seems to have a strong *prima facie* case as there are eye witnesses in the matter
3. The accused's defence does not reveal any weaknesses in the state case.
4. The likely penalty that the accused might get if convicted is a lengthy imprisonment term.

Coupled with a strong *prima facie* case, obviously is an inducement to abscond.

An additional factor, which would have no weight on its own but if taken cumulatively with the ones I have already mentioned would sway the court otherwise than to grant bail is that, the accused is already standing trial in this matter.

I would thus not be persuaded to exercise my discretion in applicant's favour for the aforesaid reasons.

The application for bail is accordingly dismissed.

Ncube and Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners