

GODKNOWS MASHAME
versus
THE STATE

HIGH COURT OF ZIMBABWE
FOROMA J
HARARE, 16 February 2018

Bail Pending Appeal

C Mugabe, for the applicant
F Kachidza, for the respondent

FOROMA J: This is an application for bail pending appeal. The applicant was charged with contravening section 45 (1) (a) of the Parks and Wildlife Act, [*Chapter 20:14*] as read with section 11 of the General Laws Amendment Act 5/2011 more particularly unlawful hunting of a specially protected animal (rhinoceros). On the 11th of November 2017, the applicant was convicted and sentenced to 12 years imprisonment. The allegations against the applicant which he denied were that on the 24th day of December and at Buby Valley Conservancy Beitbridge District, the applicant unlawfully hunted a specially protected animal, that is to say he hunted and killed a young female black rhinoceros without lawful authority (count one). In respect of count two, it was alleged that the applicant on the 24th day of December 2016 and at Buby Valley Conservancy Beitbridge District, the accused hunted a specially protected animal, that is to say accused hunted and killed an adult female black rhinoceros without lawful authority. The accused person was not represented at the trial. Not satisfied with the ruling, the applicant who was now legal represented, filed a notice of appeal against both conviction and sentence on the 23rd of November 2017 under CA 737/17. This appeal awaits allocation of a set down date.

The applicant filed comprehensive grounds of appeal against both conviction and sentence. As regards conviction, the grounds were stated as follows:-

1. The court *a quo* erred at law by convicting the appellant on the basis of circumstantial evidence notwithstanding the existence of the following apparent facts:-
 - a) That the appellant's defence of alibi was not challenged.

- b) That documents showing the alleged ecocash transactions at Beitbridge could not be located.
 - c) The ecocash agent that allegedly dispensed monies to the appellant could not be located.
 - d) That no witness could be located and availed at trial to positively confirm communication with the accused from the 8th of December 2017 until the arrest of the accused, yet information such as names and addresses of people that communicated with the user of Econet number 0777179487 during the material time had been availed and supplied to the police.
 - e) None of the duly registered firearms recovered from the accused has (sic) been employed in the commission of the offence.
2. The court *a quo* erred at law by accepting the GPS evidence in convicting the appellant despite the existence of the following:-
- a) Inconsistences on how the GPS was recovered.
 - b) It was proved that GPS usual place of origin which had been assumed to be the home of the accused was in fact a light industrial area or low density suburb in Kwekwe and not the appellant home in Mbidzo, a high density suburb of Kwekwe.
 - c) That GPS coordinates did not necessarily translate to the location of the accused as demonstrated by extra territorial coordinates in Mauritius, and Mozambique yet no record existed of the appellant having travelled to those areas, coupled will coordinates at Beitbridge Police station at a time when the appellant evidently (was) not in Beitbridge.
3. The court *a quo* erred at law by rejecting the appellant's version that the cellphone was stolen yet none of the three handsets that used the Econet line were ever recovered from the appellant.
4. The court *a quo* erred at law by convicting the appellant despite evidence that the offence was committed by three people.
5. The court *a quo* erred at law in rejecting the appellant's defence which defence was in all material aspects probable and believable.

In respect to sentence, the grounds of appeal were framed as follows:

6. The court *a quo* erred at law by paying lip service to the mitigatory factors.
7. The sentence imposed induces a sense of shock.

The relief sought in the appeal is that the judgment of the magistrate court be set aside and replaced with an order that the applicant be found not guilty and acquitted.

On the 8th of December 2017, the applicant filed an application for bail pending appeal. The respondent opposed the application in the main concentrating on the fact that although the conviction was on the basis of circumstantial evidence, the following facts supported the conviction:- The applicant's cellphone a Nokia model was found about one kilometre from where one of the dead animals was found; that when the police went to the place of residence of the applicant, he initially resisted search and when he finally agreed for a search to be conducted, the police found 3 fire arms and 7 rifles in the applicant's dining room: that in applicant's bedroom a hunting torch and yellow GPS was recovered. Upon down loading the GPS, it revealed that applicant had visited Bubi Conservancy. The respondent also relied on use of the applicant's cellphone line for the period from 4 to 29 December 2016 and in particular from 22 – 29 December 2016 and also that the applicant had used Eco-cash and it was not possible for one to cash out money without an I.D. and a PIN (personal identification number). As against sentence, the respondent averred that the sentence does not induce a sense of shock. At the hearing respondent's counsel re-emphasised the grounds for opposing bail as outlined in their response. Counsel for the state also stated that the crime carries a mandatory sentence of nine years and given this and other factors, the chances of applicant absconding if admitted to bail were high.

In the application, applicant's counsel relied on the decisions in *S v Kilpin* 1978 RLR 282 (A); *S v Williams* 1980 ZLR 466; *S v Benator* 1985 (2) ZLR 205 (H) and *S v Dzawo* 1998 (1) ZLR 356 (S) without outlining particular aspects of the cases though the submission was to the effect that the interests of justice will not be prejudiced if the applicant is admitted to bail.

At the hearing, counsel for the applicant re-emphasised the grounds of appeal and further stated that the conviction was based on circumstantial evidence but an inference of guilt was not the only one that could be drawn.

The principles in relation to an application for bail pending appeal in terms of s 123 (1) (b) (ii) of the Criminal Procedure and Evidence Act [*Chapter 9:07*] have been set out by the courts (this being an application for admission to bail pending determination of an appeal pending in the High Court from the decision of the magistrate convicting and sentencing the applicant). As observed by CHITAPI J in *Chikwizu v The State* HH-396-17 at p 5, a convicted person is no longer presumed innocent. Therefore the provisions of s 50 (1) (d) of the Constitution no longer apply. The onus to prove that it would be in the interests of justice to award bail lies on the applicant. (See s 115 C (2) (b) of the Criminal Procedure and Evidence Act [*Chapter 9:07*]). The overarching principle is that an applicant who is able to demonstrate on a balance of probabilities that his appeal enjoys prospects of success is unlikely to abscond and is likely to present himself to clear his name. In *Mungwira v The State* HH 216/10 the principles were stated as follows;

“As in all applications of this nature, the court has a discretion to grant or decline the relief sought. In a case where the application relates to bail pending appeal, the court will be guided by the following principles:

- i) prospects of success on appeal
- ii) likelihood of abscondment in the light of the gravity of the offences and the sentence imposed.
- iii) likely delay before the appeal is heard
- iv) right of an individual to liberty.

In the present application, both counsel for the applicant and the respondent relied on the first ground although counsel for the respondent went on to emphasize the risk of abscondment.

The main question to consider is this – what does an applicant who applies for bail pending appeal have to show in relation to prospect of success? This question is critical since the court in which the bail application is made is not sitting as an “appeals” court in respect of the conviction and sentence. The courts have interpreted prospects of success to mean, a “reasonably arguable case.” See *S v Tengende* 1981 ZLR 445.

The respondent properly averred that the conviction was based on circumstantial evidence. I find that the court *a quo* carefully considered the issue of circumstantial evidence as laid out in *S v Bloom* 1939 AD 188 @ 202-3. The applicant failed to satisfactorily explain how his Nokia Cellphone was found in the conservancy. There is no evidence that the applicant reported his cellphone as being lost or stolen. The applicant denied that he owned a GPS and sought to suggest

that it had been planted in his bedroom by the police. It would have been a different matter had he agreed that he was the owner but that someone else could have used the GPS. The applicant's outright denial of being the owner of the GPS which according to expert evidence was tracked from his house to the conservancy points out to the likelihood of him being the owner. The assertion by the applicant's counsel that there were three people who most likely committed the offences does not exclude the applicant from being one of the three. Although mindful of the fact that cashing out money through Ecocash can be done by someone other than the owner of the line as long as they have the PIN, the applicant was unable to point out to anyone to whom he had entrusted his PIN with. Instead, his was a bare denial.

I find that the magistrate exercised his discretion judiciously and therefore I conclude that there are no prospects of success on appeal. Even if I am wrong, the courts have held that in serious cases, bail pending appeal can be refused even where there is reasonable prospect of success: See *S v Williams* 1980 ZLR 466 (AD) where it was held that:

“But it was putting it to highly to say that bail should only be granted where there was a reasonable prospect of the appeal succeeding. On the one hand, in serious cases even where there was a reasonable prospect of success on appeal bail should sometimes be refused, notwithstanding that there is little danger of the convicted person absconding.”

The counts that the applicant has been convicted of are serious. Risk of absconding pending appeal is very high. This brings me to the issue of the sentence. Section 5 of the General Laws Amendment Act No. 5 of 2011 (the Act) repealed s 128 of the Parks and Wildlife Act [*Chapter 20:14*] and substituted it with a special penalty for certain offences. Section 128 (1) (a) relates to the unlawful killing or hunting of rhinoceros or any other specially protected animal specified by the Minister responsible by a Statutory Instrument. The sentence for a first conviction is imprisonment for a period of not less than nine years s 128 (b) (i). The proviso states that upon conviction a convicted person can satisfy the court that there are special circumstances which justify the imposition of a fine on an amount specified in a notice published under s 104 (2) or four times the value of the ivory or any trophy or to imprisonment for a period not exceeding five years or both such fine and imprisonment. The court that hears the matter should record the facts relating to the special circumstances. If no special circumstances are found, the effective sentence in the case of a first conviction is nine years or more and eleven years or more in the case of a second conviction. (Section 128 (2) (a) (b). Although both counsel for the applicant and respondent did

not address the issue of special circumstances, I note from the record of proceedings that the magistrate did not canvass the issue. This may well be a factor in the applicant's favour but the sentence that can be imposed if a court finds special circumstances includes a term of imprisonment not exceeding five years. In the event that no special circumstances are found, the sentence is nine years or more. In the circumstances the remedy would be for the matter to be remitted to the court *a quo* for an inquiry on special circumstances. I find that failure to consider special circumstances is not fatal to the respondents opposition to bail pending appeal and it is also not prejudicial to the applicant. It is in the interests of justice that applicant prosecutes the appeal whilst in custody.

In the result, the application for bail pending appeal is dismissed.

Lunga Attorneys, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners