

EVERISTO KAMONE
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 13 December 2017

Bail Application

Applicant in person
Mrs S. Fero, for the respondent

MUREMBA J: On 13 December 2017, I heard the applicant's application for bail pending appeal and dismissed it in an *ex tempore* judgment. I have now been asked for the written reasons thereof and these are they.

On 29 September 2016 the applicant appeared in the Magistrates Court sitting at Mutare facing a charge of unlawfully possessing a specially protected animal, namely a pangolin in contravention of s 45 (1) (b) as read with s 128 of the General Laws Amendment Act (GN 148/2011) of the Parks and Wildlife Act [*Chapter 20:14*]. In short, the applicant in the company of 4 accomplices had approached a police officer who was disguised as a potential buyer with the intention of selling two live pangolins. The applicant was actually carrying one of the pangolins. They got arrested. The applicant pleaded guilty to the charge and was convicted.

The offence carries a minimum mandatory sentence of 9 years imprisonment if there are no special circumstances surrounding the commission of the offence. The applicant was invited to furnish special circumstances in order to escape the mandatory sentence. When he made his submissions the court *a quo* ruled that what he had proffered did not constitute special circumstances and went on to sentence him to 9 years imprisonment.

The applicant then noted an appeal against both conviction and sentence. Since the appeal is still pending, he then filed the present application for bail pending appeal. His first ground of appeal against conviction is that he admitted to the essential elements of the offence because the trial magistrate did not properly enquire from him as an unrepresented accused if

he understood the implications of such admissions. The applicant's further ground is that the trial magistrate did not ask him if he knew that a pangolin is a specially protected animal. The applicant stated that as a result, his conviction was improper.

The law governing bail pending appeal was enunciated in *S v Dzawo* 1998 (1) ZLR 536 (SC) A as twofold,

“First, the likelihood of abscondment. See *Aitken & Anor v Attorney-General* 1992 (1) ZLR 249 (S) at 254F. Second, the prospects of success of an appeal in respect of both conviction and sentence. See *S v Williams* 1980 ZLR 466 (A) at 468G-H; *S v Mutasa* 1988 (2) ZLR 4 (S) at 8D; *S v Woods* S-60-93 (not reported at pp 3-4); *S v McGowan* 1995 (2) ZLR 81 (S) at 83E-H and 85C-E. Other factors to bear in mind are the right of the individual to liberty and the potential length of the delay before the appeal can be heard.”

In *casu* it was my considered view that the applicant's grounds of appeal against conviction do not carry any prospects of success. In *S v Kwainona & Ors* 1993 (2) ZLR 354 (SC) it was held that,

“Even where a person has been convicted on the basis of a guilty plea he may still appeal against that conviction. Such an appeal will be treated as an application for change of plea. But such an appeal will only be entertained in exceptional circumstances. It will only be entertained if the words used by the accused when pleading guilty indicate that he was raising some defence which could legitimately be raised in defence of the charge.” (My emphasis)

The record of proceedings in the present matter shows that after the applicant had pleaded guilty, the trial magistrate canvassed all the essential elements of the offence in a proper manner. The applicant was asked if he was found in possession of a pangolin and he said yes. He was asked if he had a licence or permit authorising him to possess a pangolin and he said no. He admitted that he knew that it was unlawful to possess a pangolin. He further stated that he had no right to possess the pangolin and that he had no defence to offer to the charge. With these questions and answers, the trial court cannot be faulted for convicting the applicant. There is nothing in the answers that were given by the applicant that indicates that he was raising some defence which warrants interference of the conviction by the appeal court. Asking the applicant if he knew that a pangolin is a specially protected animal is not an essential element of the offence. Even if this question had been asked, the answer thereof would not have affected the verdict. I was not convinced that the trial court did not do its duty properly towards the applicant who was unrepresented because the applicant was jointly charged with 4 other unrepresented accused persons of which 3 pleaded not guilty to the charge. If others could deny the charge, nothing barred the applicant from doing the same.

Against sentence, the applicant's ground of appeal is that the trial magistrate did not adequately explain the meaning of special circumstances. He stated that had this been properly explained he would have explained that he was merely carrying the animal as an agent of Joyce Nyaguze (the first accused who also admitted to the offence and was convicted) who was the owner and was selling the animal and was to pay him for carrying the animal. The record of proceedings shows that the trial magistrate explained that the charge the applicant had been convicted of carries a minimum mandatory sentence of 9 years imprisonment unless there are special circumstances which are peculiar to the commission of the offence which prompted him to commit the offence. The applicant and Joyce Nyaguze were asked if they understood the explanation and each one said yes. Joyce Nyaguze was the first to explain that she had committed the offence in order to raise money for school fees for her children. The applicant then went on to say he had committed the offence to get money for school fees. The fact that the applicant managed to come up with such an explanation means that he had understood the explanation by the trial magistrate. At that juncture nothing stopped the applicant from explaining that he had been carrying the pangolin for and on behalf of the first accused who was the owner. There is no explanation why he chose to say he had committed the crime in a bid to get money for school fees. To make matters worse, during mitigation he was specifically asked why he committed the offence and he went on to say that he was trying to earn a living. Despite being given a second chance to explain his possession of the pangolin, the applicant did not say anything about carrying it on behalf of Joyce Nyaguze. It would appear that this explanation about the pangolin belonging to Joyce Nyaguze was an afterthought.

In light of the foregoing, I was not satisfied that the appeal had some good prospects of success and naturally the higher the prospects of success on appeal, the less likely a convicted person may be tempted to abscond and *vice versa*. I denied the applicant's application because there was a great risk that the applicant would abscond the prosecution of his appeal in light of the gravity of the offence and the sentence imposed.

National Prosecuting Authority, respondent's legal practitioner