HB 262-17
HCB 122-17
XREF CRB 1454A-B-17

WEBSTER NYARUVIRO
and
MAX BLOOMTON
versus
THE STATE

HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 28 JULY 2017 AND 31 AUGUST 2017

Bail Application

N Sithole for the 1st applicant
B Sengweni for the 2nd applicant
Ms N Ngwenya for the respondent

TAKUVA J: The background facts are as follows: On 12 July 2017, the applicants were aboard a Nissan Nadia registration numbers ADP 1529, owned and driven by the first applicant. The vehicle was parked at Bradfield Shopping Centre for a considerable time. Meanwhile, police officers from Minerals and Border Control Unit received information from an informer that there was ivory in that car. They were also given its precise location and the number of occupants. A team of officers then drove to the scene where they observed the car pulling out of the shopping complex with two occupants. They pursued it along Hillside Road into Weir Avenue where it stopped. Police officers approached the car and identified themselves after which they requested to search the vehicle. That search resulted in the recovery of two (2) ivory tusks in the boot stashed in the spare wheel compartment. This was after the first applicant had unlocked the vehicle boot. A body search conducted on the second applicant resulted in the recovery of a Weiheng portable electronic scale from his right trousers pocket.

Upon their failure to produce a licence or permit to possess the ivory the two were arrested. The ivory was taken to the Department of Parks and Wildlife Management for verification. The total weight of the ivory is 13kg with a length of 108cm each. It is valued at US$2210-00.

On these facts the applicants were charged with contravening section 82(1) of SI 362/90 as read with section 128 (b) of the Parks and Wildlife Act [Chapter 20:14] as amended by section 11 of the General Law Amendment No. 5 of 2011, that is being found in possession of two pieces of raw ivory. Applicants were placed on remand in custody, hence this application.

In support of his application for release on bail, it was contended that first applicant is a family man who owns a house in Cowdray Park in Bulawayo. He is self-employed, aged 49 years and operates his own registered "taxi" to and from Burnside. Although he is a holder of a valid travelling document, he has no means of establishing himself anywhere outside the jurisdiction of this court. In any event, he is prepared to surrender the passport as part of any conditions for his release on bail.

As regards the second applicant, it was contended that he is a 46 year old vegetable vendor, married and is a tenant at house number 11368 Cowdray Park Bulawayo. He has lived a clean life this far and is strongly attached to the jurisdiction of this court. Despite being a holder of a Zimbabwean passport and cross border traveller, he has no means of establishing himself elsewhere. Finally, it was submitted that he is a good candidate for bail who is prepared to surrender his travelling documents to the authorities in exchange for his liberty.

In respect of both applicants, it was suggested that the state has a weak *prima facie* case against them in that both were not aware that there were two tusks of ivory in the boot of the car. First applicant's version is that on the day in question, he was operating his pirated taxi travelling to Burnside. Most of the passengers disembarked just after trade fair grounds and he remained with two passengers including the second applicant. The other passenger caused him to stop at Bradfield shopping centre and "disappeared." He suspects that the contraband belongs to this anonymous passenger.

The respondent opposed the application on the following grounds:

(1) There are compelling reasons warranting the continued incarceration of the applicants.

(2) There is a strong *prima facie* case against the applicants

(3) The applicants are likely to abscond if granted bail pending trial.

The Law

The discretion to grant bail and determine the amount rests in the court. In exercising its discretion, the court must seek to strike a balance between protecting the liberty of the individual and safeguarding the proper administration of justice. As the fundamental consideration is the interests of justice, the court will lean in favour of liberty and grant bail where possible, provided the interests of justice will not be prejudiced by this. Put differently, bail should not be refused unless there are sufficient grounds for believing that the accused will fail to observe the conditions of his release.

Section 117 of the Criminal Procedure and Evidence Act [Chapter 9:07] establishes a general entitlement of an accused person to bail pending trial. Its relevant provisions are as follows:

"117 ENTITLEMENT TO BAIL

(1) Subject to this section and section 32, a person who is in custody in respect of an offence shall be entitled to be released on bail at anytime after he or she has appeared in court on a charge and before sentence is imposed, unless the court finds that it is in the interests of justice that he or she should be detained in custody.
(2) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established—
(a) Where there is a likelihood that the accused, if he or she were released on bail, will—
    (i) endanger the safety of the public or any particular person or will commit an offence referred to in the First Schedule; or
    (ii) not stand his or her trial or appear to receive sentence; or
    (iii) attempt to influence or intimidate witnesses or to conceal or destroy evidence; or
    (iv) undermine or jeopadise the objectives or proper functioning of the criminal justice system, including the bail system;
    or
(b) -----.
(3) In considering whether the ground referred to in –
(a) -----.
(b) Subsection (2) (a) (ii) has been established, the court shall take into account—
    (i) the ties of the accused to the place of trial
    (ii) the existence and location of assets held by the accused.
    (iii) the accused's means of travel and his or her possession of or access to travel documents;
    (iv) the nature and gravity of the offence or the nature and gravity of the likely penalty therefore;

(v) the strength of the case for the prosecution and the corresponding incentive of the accused to flee;
(vi) the efficacy of the amount or nature of the bail and enforceability of any bail conditions;
(vii) any other factor which in the opinion of the court should be taken into account;

(c) ------
(d) ----
(e) -----

(4) In considering any question in subsection (2) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely—

(a) the period for which the accused has already been in custody since his or her arrest;
(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
(d) any impediment in the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
(e) the state or health of the accused;
(f) any other factor which in the opinion of the court should be taken into account.

(5) ----.

(6) notwithstanding any provision of this Act, where an accused is charged with an offence referred to in –

(a) Part 1 of the Third Schedule, the judge or (subject to proviso (iii) to section 116) the magistrate hearing the matter shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the judge or magistrate that exceptional circumstances exist which in the interests of justice permit his or her release;
(b) ----."

A contravention of s128 of the Parks and Wildlife Act is one of the offence listed in the Third Schedule to the Criminal Procedure and Evidence Act.

In applying the provisions of section 117 of the Act, it is apparent that both applicants are Zimbabwean nationals resident in Cowdray Park Bulawayo. Both are family men and first applicant owns the house he lives in. The second applicant is a tenant. They both hold valid travelling documents.

In assessing the risk of abscondment, the established approach is for the court to assess this risk by first assessing the likely degree of temptation to abscond which may face the accused. To do this, one must consider the gravity of the charge because quite clearly, the more serious the charge, the more severe the sentence is likely to be. In *S* v *Nichas* 1977 (1) SA 257 (C) it was observed that if there is a likelihood of heavy sentences being imposed the accused will be tempted to abscond. Similar sentiments were stated in *S* v *Hudson* 1980 (4) SA 145 (D) 146 in the following terms;

> "The expectation of a substantial sentence of imprisonment would undoubtedly provide an incentive to the accused to abscond and leave the country."

In other words, the possibility of a severe sentence enhances any possible inducement to the accused to flee. See also *Aitken* v *AG* 1992 (2) ZLR 249 and *Norman Mapfumo* v *The State* HH 63/2008.

In the present case, the applicants face a very serious offence in that it attracts a mandatory prison term of 9 years in the absence of a finding of special circumstances – see section 11 of the General Law Amendment No. 5 of 2011.

The other relevant factor to be considered is the relative strength of the state's case against the accused on the merits of the charge and therefore the probability of a conviction. It stands to reason that the more likely a conviction, the greater will be the temptation not to stand trial. Despite being the fulcrum of the application, this factor must be considered together with other factors in the case.

In *casu*, the applicants' defence or version is that they were not aware of the presence of the ivory in the boot of a car driven by the first applicant. According to the first applicant, the two tusks could have been placed there by a "passenger" who then abandoned it after learning that the police were hot on his heels. The second applicant claims he was just a passenger who had paid to be driven to Burnside. I find these versions to be strange and not believable at all. What sort of passenger would leave his tusks in the boot in circumstances where he could have simply walked away with them. We are not told that the "passenger" bolted out of the car at a police road block or that the car was suddenly surrounded by police officers and the anonymous passenger evaded arrest.

In this regard, I agree with Ms *Ngwenya* for the respondent when she stated that:

> "It is highly improbable that a "passenger" would stash his "parcel" in a spare wheel compartment of this car. The manner in which the tusks were hidden under the mat in the spare wheel compartment only leads to the inference that it was the applicants who had hidden the tusks there. If at all the parcel was left by this unknown person then one would have reasonably expected that person to simply place it in the boot."

Indeed, one can add that, since it is this so-called passenger who asked to be dropped off at Bradfield Shopping Centre, he must have known that the place was safe. If so, why not simply remove his tusks? Further, according to the arresting officer, the first applicant opened the car boot using the ignition key. The question then becomes how did the passenger place the contraband in the boot without first applicant's knowledge?

As regards the second applicant, his version is stranger than fiction. To start with, he does not even explain what he was doing in Burnside when he lives several kilometres away in Cowdray Park. He does not explain why he was seated in this car that was parked along Weir Avenue in Burnside. It should be stated that the second applicant's legal practitioner rather belatedly and upon being probed by the court, unconvincingly submitted that the second applicant was visiting his relative in order to collect some medication since he is a diabetic patient. The actual destination was not divulged, so was the identity of the relative. Second applicant admits being found in possession of a scale which he claimed to be a tool he uses when selling vegetables. What I find strange is that he would move around with this scale minus the vegetables. The only commodity found in that car which required to be weighed before sale is the ivory. Therefore second applicant's possession of a scale in the circumstances is a relevant factor to be considered.

For these reasons I take the considered view that the self-evident seriousness of the offence and the apparent strength of the case against both applicants may well induce them to abscond. I also find that both applicants have failed to lead evidence which is satisfactory to show that exceptional circumstances exist, which, in the interests of justice permit their release.

Accordingly, the application is dismissed.

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