FREDRICK NDLOVU

Versus

THE STATE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 25 & 28 OCTOBER 2021

Application for bail pending appeal

K. Ngwenya for the applicant
T. Muduma for the respondent

MAKONESE J: This is an application for bail pending appeal. In its written response, the state opposed the application. In oral submissions the state indicated that the application was no longer opposed. After hearing argument I reserved judgment on this matter.

These are the reasons for my ruling on this matter.

On the 27th August 2021, appellant was convicted by the Magistrates' Court sitting at Victoria Falls on one count of contravening section 82 (1) of the Parks and Wildlife Regulations 262/1990 as read with section 128 (1) (b) of the Parks and Wildlife Act (Chapter 20:14), that is to say unlawful possession of raw ivory. Applicant was sentenced to the mandatory 9 years imprisonment. Aggrieved with the conviction and sentence the applicant noted an appeal with this court. Applicant now seeks bail pending his appeal.

Factual background

It is common cause that cut pieces of ivory were recovered from the applicant, in a black satchel. According to state witnesses who testified at the trial, Assistant Inspector Tapera Chimucheka and Nancy Mugari, information was received to the effect that there was a person called Fredrick Ndlovu who was selling raw ivory at the Lupinyu business area of Victoria Falls. A trip was arranged and Inspector Chimucheka was accompanied by Mugari. She was in constant communication with the applicant. Applicant confirmed that he was in possession of the ivory. The two witness pretended that they were interested in buying the ivory. They drove to the business centre and on arrival they located the applicant. Mugari requested the applicant to show them the pieces of ivory.

Applicant removed the two pieces of ivory from a black satchel and handed them over to Mugari. Applicant indicated that he was selling the pieces of ivory at US$200 each. The price was negotiated down to US$150 each. Applicant was handed US$100 notes (fake).

Applicant then went into one of the shops looking for change. Whilst in the shop, the witnesses introduced themselves as police officers. Applicant was immediately arrested and escorted to the police station. This version of events was corroborated by the two witnesses.

In his defence, the applicant testified that the black satchel was not his. He told the court that he had been given the satchel by one Sydney Nkomo for safe keeping. Applicant alleged that at the time he was given the satchel he was seated and drinking beer when Sydney handed the satchel to him as he was going to the bush to relieve himself. Applicant indicated that Sydney informed him that if he delayed in coming back he would give the owner of the satchel applicant's phone number to a certain lady who would call him so that he (applicant) would leave the satchel by the main road.

The trial magistrate in the court *a quo* rejected the applicant's version of events as false. The court found that applicant had both physical and legal possession of the pieces of ivory at the relevant time. The court did not accept applicant's version that applicant was given the satchel by someone else.

One cannot find any fault with the factual findings of the court *a quo.* There are no material variations in the evidence of the state witnesses. The variation referred to by the applicant's legal practitioner, *Mr K. Ngwenya*, relate to discrepancies in the amounts the ivory was said to be sold for. Even if Tapera Chimucheka said US$120 and Nancy Mugari said US$150 that contradiction does not affect the fact of physical and mental possession that the state was required to prove. I must point out that on appeal, findings of fact are guided by the principle that in the absence of demonstrable and material misdirection by the court *a quo*, the findings of fact are presumed to be correct and will only be disregarded if the received evidence shows that such findings were clearly wrong. See; *Smith* v *Smith* SC-50-20: *Hama* v *National Rlys of Zimbabwe* 1998 (1) ZLR 664 (S) and *Reserve Bank of Zimbabwe* v *Granger & Anor* SC-34-01.

The law relating to bail pending appeal

The law relating to applications for bail pending appeal is now well established. The right to a person's liberty until proven guilty extends to an

accused person who has been convicted and sentenced. The right of an accused who has been convicted, to be admitted to bail pending his appeal has certain limitations. In general a person who has filed an appeal against conviction and sentence or indeed against sentence only may, in appropriate cases be granted bail pending his appeal. The court has a wide discretion whether to refuse or grant bail. Bail will be granted where the appeal carries some prospects of success. The applicant must demonstrate that if granted bail, the interests of the administration of justice will not be endangered.

See *S* v *Kilpin* 1978 RLR 282 A; *S* v *Williams* 1980 ZLR 466; *S* v *Chikumba* HH-23-17.

The common thread that runs through these cases is that the greater the prospects of success, the court is more likely to exercise its discretion in favour of the applicant. Where reasonable prospects of success on appeal exist the applicant should be granted his liberty pending the hearing of his appeal.

On the facts on record, the applicant does not have reasonable prospects of success. The defence he proffered to the charge is clearly false. The trial court *a quo* did not err in its assessment of the evidence. The applicant indicated in mitigation that there were no special circumstances surrounding the commission of the offence.

In the result, and accordingly the application is hereby dismissed.

T. J. Mabhikwa & Partners, applicant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners