MUNYARADZI SAMU
and
TENDAI CHAUMA
versus
THE STATE

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 15 April 2021 & 23 April 2021

Bail Pending Trial

E. Mangezi, for the applicant
S. Masokovere, for the respondent

MUSITHU J:

INTRODUCTION

The applicants herein applied for bail pending trial following their arrest on a charge of contravening section 82 (1) of Statutory Instrument 362/1990 as read with section 128(1) (b) of the Parks and Wildlife Act.[1] The charge criminalises the "unlawful possession of unmarked raw ivory". The applicants were arrested on 31 March 2021, and appeared at Harare Magistrates Court on 1 April 2021. Because of the nature of the offence which attracts a minimum mandatory sentence of nine years unless special circumstances exist, the applicants were advised to apply for bail at the High Court. The Magistrates Court has no jurisdiction to grant bail in relation to this offence because it is a Part 1 Third Schedule offence as outlined in section 115C (2)(a)(ii) of the Criminal Procedure and Evidence Act[2] (the Act). The applicants seek their admission to bail on the following conditions:

"IT IS ORDERED THAT:

1. 1st and 2nd Applicant be and are hereby admitted to bail pending trial.
2. 1st and 2nd Applicants be and are hereby ordered to pay the sum of $2000.00 each to the Clerk of Court, Harare Magistrates Court as bail deposit.
3. 1st Applicant shall continue residing at Tsonga Village, Chief Goronga, Nyamapanda, Mudzi and the 2nd Applicant shall continue residing at Mudzimu Village, Chief Goronga, Nyamapanda, Mudzi until the matter is finalized.
4. 1st and 2nd Applicant are ordered to report at Nyamapanda Police Station every Friday between 06:00hours and 18:00 hours.
5. Applicants are ordered not to interfere with any State witnesses, investigations and evidence until the matter is finalized."

[1] [*Chapter 20:14*]
[2] [*Chapter 9:07*]

The application was fervidly opposed by the respondent.

BACKGROUND

The charge as set out in the summary jurisdiction reads as follows:

> **"**Charged with the Crime of **Contravening section 82(1) of Statutory Instrument 362/1990 as read with section 128(1)(b) of the Parks and Wildlife Act, Chapter 20:14 *"Unlawful Possession of unmarked raw ivory"***
> In that on the 31st day of March 2021 and at Mbare Musika, opposite Engen Service Station, along Ardbennnie Road, Harare MUNYARADZI SAMU and TENDAI CHAUMA, one or both of them unlawfully possessed unmarked ivory whilst not being holders of a licence in terms of the Act, that is to say MUNYARADZI SAMU and TENDAI CHAUMA unlawfully possessed 2.45 kilograms of four unregistered or unmarked ivory valued at ZWL$34 569.00 stashed in a blue jean trousers inside which was in a black and grey satchel in contravention of the said Act."

In their application, the applicants contend that when they were found in possession of the ivory, they were unaware that they were carrying ivory, and neither did it belong to them. They claimed to have been handed a bag when they boarded a motor vehicle travelling to Harare by a certain person who instructed them to hand over the bag to a certain Tawanda in Mbare, Harare. When they enquired about the contents of the bag, they were informed that it contained pieces of wood used to manufacture furniture. They did not know that the bag actually contained ivory which had been cut into pieces. It was at the police station that they were informed that the bag contained ivory. Applicants also submitted that they fully cooperated with the police following their arrest. For that reason, they averred that it would be far-fetched to suggest that their admission to bail would endanger public safety.

On the risk of abscondment, applicants contended that they were not holders of valid Zimbabwean passports and they did not intend to abscond if released on bail. They were born and bred in Zimbabwe and never had a life outside the country. The first applicant stated that he is married, with one child who is one year old. He also takes care of his aged mother who is seventy years old. Although not formally employed, he occasionally does small jobs such as tile layering earning on average US$50 in a good month. On the day of his arrest, he claimed to have travelled to Harare in search of menial jobs. The first applicant also claims to own a rural homestead in Tsonga Village, under Chief Goronga, Nyamapanda, Mudzi. He owns one cow. He had never been arrested before.

The second applicant is also married with 4 children. The eldest is a girl aged 18 years who recently completed her secondary school education. The second born is also a girl aged 14. She is in grade 6. The third born is a boy aged 12, also in grade 6. The last born is a girl aged 8 and in

grade 2. The second applicant also looks after a sister living with albinism. All these people look up to the second applicant for sustenance. He is not formerly employed, but claims to survive on odd jobs. On the day of his arrest, he also claimed to have been travelling to Harare in search of menial jobs. He owns a rural homestead and two goats. The second applicant owned up to a previous conviction for assault, for which he was sentenced to community service by the Mutoko Magistrates Court.

Both applicants submitted that they would stand to lose more if they absconded. They were prepared to stand trial and clear their names. The respondent was challenged to adduce evidence on affidavit which suggested that applicants were likely to abscond if admitted to bail. The applicants had no contacts or business interests outside the country. The applicants admitted that they were facing a very serious offence. They however argued that the seriousness of the offence was not a bar to their admission to bail. They cited the cases of *S* v *Murambiwa*[3] and *Ian Makone v State*[4] to advance this point. They were prepared to abide by any conditions to be imposed by the court in the interests of justice. The applicants urged the court to consider that the presumption of innocence worked in their favour at this stage. They still retained their fundamental right to liberty until proven guilty.

The applicants also submitted that the risk of interference with witnesses was too remote to contemplate. The witnesses were police officers. The case was brought to court on a full docket, implying that the witness statements had been recorded. Applicants also contended that the risk of committing similar offences while on bail were equally remote. The second applicant disclosed his past conviction for assault. That conviction did not necessarily make him an untrustworthy character. The respondent needed to advance cogent reasons from which, in the absence of rebuttal by the applicants, a reasonable inference could be drawn that the applicants were not good candidates for bail.

In its written response, the respondent attached the affidavit of the Investigating Officer, Shekwani Abraham. He expressed his position on bail as follows:

> "…… On the 31st day of March 2021, the Detectives from CID Minerals, Flora and Fauna Unit, Harare arrested the accused while in actual possession of 2,450 kgs of raw ivory.
> I am now opposing bail for the following reasons:-
> 1. The state has got a strong case against the accused person who were found in actual possession of the elephant tasks by witnesses who can attest to that.

[3] SC 62/92
[4] B 493/07

2. The offence the accused person is facing is a serious one which calls for a minimum mandatory sentence of 09 years upon conviction which can induce the accused to flee upon being granted bail…."

In the written response, the respondent averred that the fundamental consideration in granting bail was that of upholding the interests of justice. The court must endeavor to strike a balance between safeguarding the right to liberty on one hand, and the interests of justice on the other. The court was referred to the authority of *AG* v *Phiri*[5]. Respondent further averred that the court must consider whether the accused person would stand trial, or whether he would conduct himself in a manner that was likely to compromise the ends of justice. In considering the risk of abscondment, the respondent urged the court to take into account the seriousness of the offence and the punishment likely to be imposed in the event of a conviction.

Respondent further submitted that it had a strong *prima facie* case against the applicants. Applicants were facing a strict liability offense in respect of which the State was only required to prove the *actus reus.* According to the respondent, the state of mind was not necessary a prerequisite. The onus shifted to the accused person to prove it in the event that it constituted a defense. Respondent further submitted that in *casu*, possession was not being denied, and for that reason there was a strong case against the applicants. The realization that a sentence of 9 years imprisonment was hanging over their heads would motivate the applicants to abscond.

THE BRIEF ORAL SUBMISSIONS

In their oral submissions, counsel did not materially depart from their written submissions. For the applicants, Mr *Mangezi* reiterated that the seriousness of the offence and the fact that the respondent claimed that it had a strong *prima facie* case did not constitute compelling reasons to deny applicants bail. The presumption of innocence was in favour of granting applicants bail. Counsel submitted that the applicants had no motive to abscond. They had not resisted arrest and had cooperated with the police. Mr *Mangezi* further submitted that the mere fact that the offence carried a minimum mandatory sentence of 9 years did not necessarily translate to a sentence of 9 years in the event of a conviction. Counsel urged the court to find that the interests of justice would not be compromised by the admission of the applicants to bail.

In response, Ms *Masokovere* for the respondent submitted that the seriousness of the offence and the severity of the punishment, coupled with the strength of the State case were factors likely to induce applicants to abscond. She further submitted that in *casu*, the State was only

[5] 1987 (1) ZLR 33 E-F

required to prove possession. The reasons given by the applicants in explaining their possession of the bag with the ivory were far from convincing. She urged the court to dismiss the application.

THE LAW

In terms of section 115C (2), of the Act, where an accused person is in custody in respect of an offence applies to be admitted to bail before he has been convicted of that offence, then the State shall bear the burden of showing on a balance of probabilities, that there are compelling reasons justifying his or her continued detention. There is a caveat though. The offence must not be one of those specified in the Third Schedule to the Act. Compelling reasons are set out in section 15(C)[6] of the Act as read with s 117(2) thereof[7]. These were articulated by MAFUSIRE J in *Chipetu* v *State*[8].

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[6] "**115C Compelling reasons for denying bail and burden of proof in bail proceedings**
(1) In any application, petition, motion, appeal, review or other proceeding before a court in which the grant or denial of bail or the legality of the grant or denial of bail is in issue, the grounds specified in section 117(2), being grounds upon which a court may find that it is in the interests of justice that an accused should be detained in custody until he or she is dealt with in accordance with the law, are to be considered as compelling reasons for the denial of bail by a court.
(2) Where an accused person who is in custody in respect of an offence applies to be admitted to bail—
(*a*) before a court has convicted him or her of the offence—
(i) the prosecution shall bear the burden of showing, on a balance of probabilities, that there are compelling reasons justifying his or her continued detention, unless the offence in question is one specified in the Third Schedule;
(ii) the accused person shall, if the offence in question is one specified in—
A. Part I of the Third Schedule, bear the burden of showing, on a balance of probabilities, that it is in the interests of justice for him or her to be released on bail, unless the court determines that, in relation to any specific allegation made by the prosecution, the prosecution shall bear that burden;
B. Part II of the Third Schedule, bear the burden of showing, on a balance of probabilities, that exceptional circumstances exist which in the interests of justice permit his or her release on bail…."

[7] **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 any time 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 jeopardise the objectives or proper functioning of the criminal justice system, including the bail system; or
(*b*) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine public peace or security.

[8] HMA 06/17 at pages 3-4 where he said:
"Thus, in every bail case, the task is to try and strike a balance between the interests of the accused and the interests of justice: see *Attorney-General v Phiri*[8] and *S v Biti*[8]. ……..Sometimes it is not easy to reach this equilibrium. On the one hand, until proved guilty, a person arrested for any crime is still entitled to his freedom. On the other hand, that person must be tried. If he is found guilty, it is in the interests of justice that he be punished and rehabilitated.
Guidelines have been formulated by both case law and legislation to try and help the courts reach this state of equilibrium in any given case. Each case depends on its own set of facts. Some guidelines assume greater importance in some cases than do others in other cases.
The legislature, in sub-section [2] of s 117 of the Criminal Procedure and Evidence Act, *Cap 9:23*, has laid down a number of such guidelines. The consideration whether or not the accused will stand his trial is elaborated on in subsection [3]. In considering whether, if released on bail, there is a likelihood that an accused will not stand trial, the court is directed to take a number of

With the above principles in mind, I now turn to consider the submissions of the parties herein.

THE ANALYSIS

The offence for which applicants seek to be admitted to bail is specified under paragraph 7, Part 1 of the Third Schedule to the Act. At this stage, the State is not required to adduce on a balance of probabilities, compelling reasons justifying the applicants' continued detention. Instead, it is the applicants who bear the burden of showing, on a balance of probabilities, that it is in the interests of justice that they be released on bail. Section 117 (6)(a) provides that:

> "(6) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to in—
> *(a)* Part I 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" (Underlining for emphasis).

The use of the phrase "exceptional circumstances" is instructive. This is so because ordinarily it is the respondent that is reposed with the onus to justify pre-trial incarceration of an accused person. The shifting of onus was deliberate in my view. The Third Schedule offences by their nature attract long periods of imprisonment in the event of a conviction. For that reason, it is my respectful view that the general approach is to deny bail to an applicant facing a Third Schedule offence unless he or she is able to demonstrate that it is in the interests of justice that they be admitted to bail pending their trial.

In *casu* bail was opposed primarily on two bases, that is, the strength of the State case, and the seriousness of the offence which would likely induce the accused to flee once granted bail. It was incumbent upon the applicants to place before the court, evidence that would allay the respondent's fears irrespective of the seriousness of the offence. In *Kondo & Ano* v *State*[9], CHITAPI J had this to say about an applicant who finds himself in this position:

> "The applicants in this case did not provide any evidence to demonstrate that it is in the interests of justice that they be admitted to bail. For example they simply stated that they are of fixed abode and are not a flight risk. Evidence connotes the placing facts before the court which indicate that what is being alleged is true. If a person for example said that he owns a car that is not evidence. If he

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factors into account. They include the nature of the offence or the nature and gravity of the likely penalty. They also include the strength of the case for the prosecution and the corresponding incentive on the accused to flee.
The legislature did not pretend to have listed all the possible guidelines that may be relevant in any given case. It was left to the courts to develop them further. The court is enjoined to take into account any other factor which, in its opinion it considers should be taken into account. Taking a cue from this, the courts have said no single factor is considered in isolation. For example, the nature of the offence, the strength of the State case and the gravity of the likely penalty, are all very important. But none of them is decisive or conclusive by itself: see *Fletcher Dulini Ncube* v *State*[8]."

[9] HH 99/17

> produces the car and documents showing that the car is his that is evidence. The applicants could also have deposed to sworn depositions of their assertions in order that the court may attach weight to them. It is to be observed that where the State bears the onus of satisfying the court that bail be not granted or where it seeks to demonstrate compelling reasons, it invariably produces an affidavit by the investigating offer. The reason for this is because sworn testimony or evidence carries more weight than unsworn statements. I will proceed in my determination of the application on the basis that the applicants elected to simply make statements in support of their bail application despite the provisions of s 117 (6) (a) of the Criminal Procedure & Evidence which require that the applicant charged with a Part 1 Third Schedule offence should adduce evidence to motivate his application and satisfy the court or judge of the existence of such circumstances exceptional or otherwise as permit his release on bail in the interests of justice.[10]

The respondent placed before the court evidence in the form of an affidavit by the investigating officer. On their part, the applicants made the usual generalised averments that they were family men with family responsibilities; that although not formerly employed they made a living through piece jobs. They allayed the risk of absconding by averring that they had no interests outside the country, and were not holders of any travel documents.

As noted by counsel for the respondent, it is how the applicants explained possession of the bag which contained the ivory that was disquieting. They did not deny possession of the ivory at all. Instead, in their application they alleged that *"they had only been handed the bag when they boarded a certain vehicle travelling to Harare by a certain person who had instructed them to hand the bag to a certain Tawanda in Mbare, Harare. When they quizzed him on what the bag contained, they were advised that the bag contained pieces of wood which were used in the manufacturing of furniture*."[11] The person who handed them the bag was not identified. It is not clear whether that person was known to them or not, and what made him or her entrust them with that bag. It is also not clear why they did not check the contents of the bag before they accepted responsibility to deliver it, just to be sure they were carrying the correct merchandise.

Although the applicants are not required to set out their defence to the charge at this stage, they are however expected to allege facts without proof thereof which raise a *prima facie* cognisable defence if established without rebuttal by the respondent at trial. An applicant must take the court into his confidence by giving an honest account of events instead of a bare denial. Having been found in possession of the ivory, applicants were expected to give an explanation which negatived the intention to commit the offence. For instance, they were reasonably expected

[10] At pages 6-7
[11] Paragraph 9 page 4 of the application.

to identify the person who gave them the bag for onward transmission to the alleged Tawanda in Mbare. That ought to have been the easiest thing to do.

It is highly unlikely that applicants were just given a bag by a stranger and failed to ask for his identification. Further it is reasonable to expect them to have insisted on verifying the contents of the bag with that stranger just in case they were being entrusted with some proscribed merchandise. They had nothing to lose in making those basic enquiries, and being candid and forthright with the court by volunteering that information. Their failure to do so made their account highly improbable. In *Munsaka & Another* v *State*[12], MABHIKWA J had the following to say about possession and the concomitant state of mind:

> "In the South African case of *State* v *Smith* – 1965 (4) C P D 166 per CORBETT J, the court pointed out the importance of distinguishing between mental element necessary to establish possession and the guilty state of mind constituting *mens rea.* The onus to establish possession is on the state. The onus to establish the absence of *mens rea* is on the accused, unless an enactment provides that *mens rea* is an element of the offence. Where both the physical and mental element (animus) constituting custody and possession have been established, the onus of negativing *mens rea* rests upon the accused……"[13]

The nature of the offence and the question of onus reposed on the applicants in an application involving a Third Schedule offence appears to have eluded the applicants' counsel. He proceeded on the premise that section 50 of the Constitution impelled the court to release applicants on bail unless the respondent showed that compelling reasons existed for their continued incarceration.[14] According to the applicants' counsel, the use of the word "must" in paragraph (d) of section 50 (1) of the Constitution implied that in the absence of compelling reasons to deny bail, then the court had no discretion but to grant bail. Though this point was not argued before me, I still would not agree with counsel's interpretation of the law for two reasons.

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[12] HB-04/20 at page 9 of the judgment.
[13] See also *S v Mpa* 2014 (1) ZLR 52 (H)
[14] **50 Rights of arrested and detained persons**
(1) Any person who is arrested—
(*a*) must be informed at the time of arrest of the reason for the arrest;
(*b*) must be permitted, without delay—
(i) at the expense of the State, to contact their spouse or partner, or a relative or legal practitioner, or anyone else of their choice; and
(ii) at their own expense, to consult in private with a legal practitioner and a medical practitioner of their choice;
and must be informed of this right promptly;
(*c*) must be treated humanely and with respect for their inherent dignity;
(*d*) must be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention; and
(*e*) must be permitted to challenge the lawfulness of the arrest in person before a court and must be released promptly if the arrest is unlawful.

Firstly, a reading of section 50 (1)(a)-(e) in the context of the other subsections of the same section shows that section 50(1)(d) is concerned with an arrestee who is yet to appear before a court of law. The interpretation ascribed to section 50(1)(d) by applicant's counsel would render section 50(6) nugatory.[15] In my view, it is section 50(6) that deals with an accused applying for bail following their placement on remand. After all, it is not by coincidence that section 50(1) refers to *"any person who is arrested"*, while section 50(6) refers to *"any person who is detained pending trial"*. The issue of contrasting the provisions of section 50 (1)(d) and section 50(6) was considered by CHITAPI J in the *Kondo & Another v State*[16]. I am aware of judgments of this court which have interpreted this provision differently[17]. I however fully associate myself with the *dicta* by CHITAPI J in the *Kondo* judgment. It may be necessary for this apparent conflict to be put to rest through a judgment which specifically addresses this issue.

Secondly, the bail regime is dealt with under part IX to the Act. That part deals with compelling reasons for denying bail and the burden of proof; power to admit to bail; entitlement to bail; conditions of recognisance, amongst other issues. Bail applications involving accused persons charged with Part 1 Third Schedule offences are dealt with in terms of section 115C as read with section 117 of the Act. Section 115C (2)(a)(ii), places the burden on an applicant to show on a balance of probabilities that it is in the interests of justice for him to be released on bail. Whether or not the transposition of the burden of proof in respect of bail applications involving Third Schedule offences is unconstitutional is perhaps an argument for another day. For now it remains the law unless there is a challenge to its constitutional validity. It must also be borne in mind that the right to liberty is not absolute.[18] The onus is not on the State to adduce compelling reasons to deny bail in respect of a Third Schedule offence as applicant's counsel seems to suggest. An application for bail under Part 1 of the Third Schedule is *sui generis*. It is a no plain sailing task so to speak. It places a huge burden on an applicant.

Having considered the totality of the circumstances of this matter, the submissions by counsel, and the affidavit of the investigating officer, this court finds it difficult to jettison the

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[15] Section 50 of the Constitution states: (6) Any person who is detained pending trial for an alleged offence and is not tried within a reasonable time must be released from detention, either unconditionally or on reasonable conditions to ensure that after being released they—
(*a*) attend trial;
(*b*) do not interfere with the evidence to be given at the trial; and
(*c*) do not commit any other offence before the trial begins.
[16] *Supra* at page 3 of the judgment.
[17] See also *Munsaka v State* HB 55/16 and *Chipetu v State* HMA 06/17
[18] See *Mupfumira v State* SC 71/19 at page 16

respondent's fears as illusory. The court is satisfied that the applicants failed to discharge the onus on them to show on a balance of probabilities that it is in the interests of justice that they be admitted to bail at this stage.

DISPOSITION

Accordingly it is ordered that:

The application by the applicants for bail pending trial in case No. CRB HREP 2813-14/21 is hereby dismissed.

Mangezi, Nleya & Partners, applicants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners