

HEWIT EDWIN
and
PRETORIUS HERBERT JOHN
and
BLIGNAUT HENRICK JOHANNES
versus
THE STATE

HIGH COURT OF ZIMBABWE
MAWADZE J
HARARE, 19 & 21 October 2015

Bail Appeal

T Mpofu, for the appellants
S Fero, for the respondent

MAWADZE J: This is an appeal against the decision of the magistrate stationed at Beitbridge Magistrates Court in which the appellants' application for bail pending trial was dismissed on 12 September 2015. The appellants approached this court in terms of s 121 of the Criminal Procedure and Evidence Act [*Chapter 9:07*] as read together with r 6(1) of the High Court of Zimbabwe Bail Rules 1991.

All the three appellants are facing three counts which are as follows:

Count 1 : Contravening section 189 (1) of the Criminal Law Codification and Reform Act [*Chapter 9:23*] as read with s 24(1)(4)(a) of the Immigration Act [*Chapter 4:02*] in that on 11 September 2015 and along Limpopo River, near Nottingham Estate Beitbridge each of the appellants intending to commit a crime of Contravening s 24(1)(4)(a) of the Immigration Act [*Chapter 4:02*] or realising that there was a real risk or possibility that such a crime may be committed, unlawfully attempted to depart from Zimbabwe for South Africa at or along Limpopo River near Nottingham Estate, Beitbridge which is not a point of exit.

In count 2 this charge relates to Contravening s 59 (2)(b)(5) of the Parks and Wildlife Authority that on 10 September 2015 and between Hwange and Beitbridge, one or more of the appellants unlawfully removed 29 sables from Hwange to Limpopo River, near Nottingham Estate Beitbridge without a permit issued in terms of the Act.

In count 3 the charge is contravening s 188(1) of the Criminal Law (Codification and Reform Act) [*Chapter 9 : 23*] as read with s 182 (1) of the Customs and Exercise Act [*Chapter 23 : 02*] which relates to conspiracy to smuggle in that on 11 September 2015 between Hwange and Limpopo river near Nottingham Estate Beitbridge each of the appellants or one of them unlawfully entered into an agreement to bring about the commission of the crime smuggling or realising that there was a real risk or possibility that this the agreement may bring about the commission of the said crime, entered into an agreement to unlawfully smuggle 29 sables from Zimbabwe to South Africa.

In count 1 the penalty provision is a fine not exceeding level 6 or imprisonment not exceeding 1 year or both and the same goes for count 2. In count 3 the penalty provision a fine not exceeding level 14 or three times the value of duty payable whichever is greater or 5 years imprisonment or both.

All the three appellants are South African citizens. The first appellant is 40 years old and resides at No 223 Weeflake Estate, Hartbeesport North West Province in South Africa. He is a qualified Engineer and is the Chief Executive Officer at Capital Africa Steel located at No 53 Andries Street in Johannesburg, South Africa. The second appellant is also 49 years old and resides at No 10 Villa Franet, Allansias Pretoria South Africa. The state alleges he is not employed but he alleges he is employed as a car salesman in Pretoria South Africa. The third appellant is 41 years old and as per his state papers he resides at No 13 Archbbses Street Secunda, Mpumalanga in South Africa and is employed at Hope Farm Kwedoeskop Limpopo South Africa. The third appellant gave his residential address as Karoobuilt 144, Waterberg District Limpopo South Africa. It is not clear why the third appellant's residential address is not the same as per the state papers and what the third appellant states.

The broad allegations by the state are that on 8 July 2015 the first appellant bought 50 sables for us\$150 000 from Zambia and imported them into Zimbabwe between 14 July and 20 July 2015 and took them to Msuma Ranch or Bushman Safaris in Hwange. It is the state case

that on 10 September 2015 the appellants acting in connivance removed 29 sables from Msuma Ranch in Hwange to Beitbridge without a permit issued in terms of the Parks and Wild Life Act [Chapter 20:14]. It is alleged the appellants only had a Department of Veterinary “Movement of Animal Permit” Number 678641P acquired by the first appellant which authorized the movement of the animals from Msuma Ranch in Hwange to Sondela Safaris in West Nicholson. The appellants were using three motor vehicles, two being Toyota Land Cruisers towing caravans and the one being a Toyota Hilux also towing a caravan to transport the said animals from Hwange to Beitbridge. The 29 sables are valued at US\$435 000. It is further alleged that on 11 September 2015 the appellants and their accomplices attempted to illegally export the 29 sables from Zimbabwe to South Africa at or along Limpopo river near Nottingham Estate in Beitbridge but failed to do so as they got stuck on the Limpopo river bed. It is further alleged that the appellants intended to depart from Zimbabwe to South Africa using a place which is not a port of exit. This led to the arrest of the appellants and the seizure of the 27 Sables (as two had died) and the said motor vehicles.

In the court *a quo* the appellants submitted that they were not aware that they did not have a valid permit but believed the permit they had was proper. In fact the appellants submitted that they had hired an agent who had assured them that everything was in order and that this is the same agent who led them to the river (presumably Limpopo River) not knowing that their conduct was unlawful until the time of the arrest. The appellants said it is at that stage that the said agent fled. The totality of the submissions by the appellants before the court *a quo* is that they were misled by the unnamed agent.

In relation to their personal circumstances the first appellant submitted that he is a cancer patient who is undergoing treatment and also suffers from high blood pressure. He claimed ownership of the two of the three motor vehicles they were using which were seized by the state. The second appellant indicated that he too suffered from high blood pressure. Both the second and third appellants said they were employed by the first appellant. All the appellants indicated that they are persons of means who own property in South Africa. They all offered to stay with one Andrew Nott of Nottingham Estate in Zimbabwe if they are admitted to bail and report as frequently as possible to the nearest Police station until the matter is finalised. The appellants submitted before the court *a quo* that they have no intention not to stand trial and that there is an

extradition treaty between Zimbabwe and South Africa. The appellants believe that no duty was payable in respect of the sables and that the offences they are facing are not of a very serious nature.

On the other hand the state opposed bail on the basis that the appellants were trying to exit Zimbabwe through an illegal point and that they are facing serious offences. The state contended that the appellants who are foreigners are likely to abscond and that while in South Africa they will be difficult to locate. The investigating officer who testified indicated that he had not seen or visited the place along Limpopo River where the vehicles of the appellants allegedly got stuck.

In dismissing the appellants' application for bail pending trial the court *a quo* stated that the appellants were likely to abscond as they were arrested while trying to leave Zimbabwe through an illegal point. The court *a quo* took the view that the appellants who are foreigners are likely to flee from Zimbabwe once admitted to bail and would not stand trial. The court *a quo* was not impressed by the defence of the appellants that they were misled by an agent and believed that the state case is strong.

In their grounds of appeal the appellants submitted the court *a quo*'s ruling is afflicted by many serious misdirections by failing to consider the following,

- i) that the appellants were not caught trying to cross the Limpopo River
- ii) that there was no evidence placed before the court *a quo* that the appellants would not stand trial if admitted to bail more so in view of their assets which were seized by the state
- iii) that the extradition treaty between Zimbabwe and South Africa would ensure that appellants would not evade the long arm of the law
- iv) that the offences for which the appellants are being charged are not serious and attract option to pay fines
- v) that the state case in all three counts is patently weak and bogus. In count 1 the appellants deny that they had crossed the border or were in the process of doing so. In count 2 appellants state that they were misled by an agent that the permit they had was valid and in count 3 that the smuggling charge does not make sense as the sables were zero rated and that customs duty was therefore not payable

vi) that the personal circumstances of each of the appellants were not considered especially the health of the first and third appellants and that the second and third appellants were drivers merely hired by the first appellant

vii) that there are no special circumstances militating against the release of the appellants on bail who are professionals in South Africa and persons of means.

It is the contention of the appellants that the findings by the court *a quo* are grossly unreasonable in their defiance of logic and should therefore be interfered with. In addition the appellants submitted that they provided alternative local accommodation and undertook to abide by any necessary conditions which may be imposed. All in all the appellants submitted that the interests of justice would not be harmed if they are admitted to bail. The appellants offered to pay US\$ 5 000-00 per person if allowed to go back to South Africa or US\$1 000 if they were allowed to reside at Nottingham Estate in Zimbabwe, report at any such Police Station as many times as may be required and enter into any such recognizances which may be deemed desirable.

In terms of s 50 (1) of the Constitution of Zimbabwe any accused person who is arrested must be released unconditionally or on reasonable conditions pending a charge or trial unless there are compelling reasons justifying the continued detention of such a person. Further in deciding whether there are compelling reasons justifying the denial of bail reference should be made to the provisions of s 117 of the Criminal Procedure and Evidence Act[Chapter 9:07]

In an appeal of this nature it is the decision of the court *a quo* which should be attacked. See *S v Malunjwa* 2003 (1) ZLR 275 (H). Further the appeal of this nature is an appeal in the narrow sense as was stated in *S v Ruturi* HH 26/03 as follows;

“An appeal to the High Court against the decision of the Magistrate is an appeal in the narrow sense and the decision will be interfered with only if the Magistrate committed an irregularity or misdirection or exercised his discretion so unreasonably or improperly as to viciate his decision.”

It is common cause that the appellants are South African citizens. I am alive to the fact that the mere fact that the appellants are foreigners cannot be the sole basis or reason to deny them bail. It is a factor that the court *a quo* was to consider with the other relevant factors especially their conduct as foreigners in order to ensure that they would stand trial.

I find no misdirection on the part of the court *a quo* that the appellants are not proper candidates to be admitted to bail as they were deemed to be flight risk. The nature of the offence

the appellants are facing in count 1 militates against the admission of them to bail as they are likely to abscond. The fears expressed by the State are not ill founded as the appellants were allegedly caught trying to leave Zimbabwe through an illegal point of exit. I am not persuaded by the defence proffered by the appellants at this stage that they were misled by an agent. The appellants are quite sophisticated persons who knew that it was illegal to attempt to leave Zimbabwe through a place which is not properly designated. They would not need an agent to know that they were supposed to cross back into South Africa through the Beitbridge border post. The fact that the investigating officer did not visit the scene the appellants were arrested is neither here nor there. The allegation by the state is that appellants were arrested along Limpopo River after their motor vehicles had got stuck in the river bed. The suspicion therefore is well founded that the appellants wanted to avoid the legal point of exit for reasons only the appellants can explain. It was therefore proper for the court *a quo* to find that the appellants who allegedly attempted to leave Zimbabwe for South Africa are likely to abscond if granted bail. Such a finding cannot be said to be unreasonable. No reasonable court would repose its trust in the appellants in such circumstances. What would stop the appellants to flee from Zimbabwe using an undesignated point if admitted to bail? The mere existence of an extradition treaty between Zimbabwe and South Africa in my view would not be guarantee that the appellants would stand trial in Zimbabwe.

I am inclined to agree with the findings of the court *a quo* that the state case especially in respect of count 1 and count 2 is very strong. The conviction of the appellants in respect of count 1 and count 2 at this stage is very likely. The fact that the second and third appellants were hired by the first appellant as drivers is an issue now raised on appeal. In respect of count 2 I find it strange that the appellants would not know that they did not have a valid permit. In any case they should have simply inquired from the proper authorities. In respect of count 1 as already said the appellants would not need an agent to know that the legal point of exit from Zimbabwe is the Beitbridge border post.

I am satisfied that granting bail to the appellants at this stage is prejudicial to the proper administration of justice. The fact that the appellants would not submit themselves to the jurisdiction of the courts in Zimbabwe is well founded. I therefore find no misdirection in the decision of the court *a quo* to deny the appellants bail.

In the result the appeal by the appellants is dismissed for lack of merit.

Tshakalisa Legal Practitioners, appellants' legal practitioners
National Prosecuting Authority, respondent's legal practitioners