

ASHTON MLILO  
**versus**  
THE STATE

HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 26 FEBRAURY 2018 AND 1 MARCH 2018

### **Bail Application**

*Ms B Dube* for the applicant  
*Ms N Ngwenya* for the respondent

**MATHONSI J:** The 26 year old applicant of Montrose 3 Village in Esigodini is facing a rape charge as defined in s65 of the Criminal Law [Codification and Reform] Act [Chapter 9:23]. It is alleged that on 3 February 2018 at a bushy area in Mtshingwe Filabusi he met the 13 year old complainant who was in the company of her brother. He threatened the two of them with a knife before dragging the complainant to the bush where he raped her once.

The accused was arrested five days later on 8 February 2018 after he had confronted the complainant's parents at their home denying the charge and also attempting to confront the complainant at her school. He says after those encounters he voluntarily handed himself over to the police at Filabusi. He has now approached this court seeking his release on bail pending trial maintaining that he believes in his innocence as shown by the fact that after learning of the allegations of rape leveled against him at a church prayer meeting he took it upon himself to approach the complainant's family to inquire about the allegations. Finding no joy he had then informed his mother about the accusations before the two of them approached the police. He is therefore not a flight risk.

The applicant states that he does not possess a passport, has no travel history and is an unsophisticated village young man who has spent all his life in Filabusi. If his proximity to the complainant is any source of bother to the state, he offers to relocate to Bulawayo where he proposes to reside at No 47036/13 Mpopoma Township with his maternal relatives.

The bail application is opposed by the state on essentially two grounds namely that the applicant is facing a serious charge and if convicted he is likely to be sentenced to a lengthy term of incarceration. As a result that will motivate him to abscond. Secondly the state fears that the applicant is likely to interfere with witnesses if released on bail as shown by the fact that when he learnt of the allegations of rape he had attempted to confront the complainant and her family. In my view those are not valid reasons for opposing bail.

It should be borne in mind that the release of an accused person on bail pending trial is now a constitutional requirement because section 50 (1) (d) of the Constitution provides that an arrested person must be released unconditionally or on reasonable conditions, pending a charge or trial unless there are compelling reasons justifying their continued detention. It is true that in terms of section 115C of the Criminal Procedure and Evidence Act [Chapter 9:07] the burden of proving entitlement to bail pending trial falls squarely on the shoulders of an applicant facing a Third Schedule offence and rape is one such offence.

In terms of section 117 (2) of the Act it is a compelling reason to deny bail where the accused person is a flight risk or his likely to interfere with witnesses or evidence. However before denying bail on those grounds the court must be satisfied that indeed such a risk exists. The state cannot succeed in contesting bail by merely raising those grounds without pointing to any evidence suggesting propensity to abscond or to interfere with witnesses.

In the present case, it is common cause that the applicant was arrested five days after the alleged offence. Although he is a local villager, who was always available and could even afford to attend church prayers and visit both the complainant's home and school, he was not arrested until he handed himself over to the police. It is also common cause that a rumour was doing the rounds that the applicant was accused of rape which rumour even reached the applicant's ears.

If indeed the applicant had a propensity for abscondment he would have escaped the moment he heard the rumour. He did not. Instead he approached the complainant's family seeking to understand where the rumours emanated from. When he found no joy, it again did not occur to him to abscond. Instead he confided in his mother and together they approached the police. In my view that is not conduct consistent with a person who is a flight risk. By the same token his behaviour does not point to a person who may be said to be bent on interfering with

witnesses. To me it suggests that he was more concerned about his innocence and the rumour may have shocked him. It is for that reason that he went to the police.

The other ground for opposing bail, namely that the applicant is facing a serious charge, cannot, on its own, be sufficient ground for denial of bail. The courts have granted bail to accused persons facing even more serious charges. Apart from that, sight must not be lost to the fact that this is an application for bail pending trial. In that regard the presumption of innocence still operates in the applicant's favour. In other words, no matter how serious the charge may be, the applicant is presumed innocent until proven guilty by none other than the state.

I also appreciate that the applicant has offered to relocate to Bulawayo pending trial in order to avoid any likelihood of an encounter with the witnesses who are based in Filabusi. Such a condition therefore atones for the fears of interference with witnesses. I am therefore satisfied that the applicant has discharged the onus of showing an entitlement to bail pending trial.

In the result, it is ordered that;

1. The applicant be and is hereby admitted to bail pending trial on the following conditions:
  - (a) He deposits \$100-00 with the Assistant Registrar of the High Court.
  - (b) He resides at number 47036/13 Mpopoma Bulawayo until the finalization of the trial.
  - (c) He does not interfere with witnesses.
  - (d) He reports once a week on Mondays at Western Commonage Police Station between 0600 hours and 1800 hours.

*Mathonsi Ncube Law Chamber*, applicant's legal practitioners  
*National Prosecuting Authority*, state's legal practitioners