

MVIKEZI NCUBE  
and  
KHUMBULANI NCUBE  
and  
BUSANI NDLOVU  
and  
THE STATE

HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 31 MARCH AND 2 APRIL 2015

### **Bail Application**

*Mr Shenje* for the applicants  
*Mr W. Mabhaudhi* for the respondents

**MAKONESE J:** The applicants are facing allegations of contravening section 93(1)(a) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], kidnapping in that on 9 March 2015, one or all of them unlawfully forced Edwin Makusha into their car, a Renault Scenic, registration number TRF 509 GP and drove him to Magwegwe, and then to Solusi, thereby depriving him of his freedom of movement. It is further alleged that on the same day along Solusi road, the accused persons assaulted the complainant with a log all over the body several times. As a result of injuries sustained in the assault, the complainant sustained injuries and was hospitalized at Mpilo Hospital.

In their application for bail pending trial the applicants deny kidnapping the complainant. In his bail statement the second applicant states as follows:

“The second applicant offered to fuel the car for this trip and it was on this condition that he facilitated the trip from Magwegwe to the city centre. The second applicant was now driving the vehicle. Upon arriving in town, the second applicant left first applicant and two others drinking at a bottle store. He then came back in the company of the now

complainant, who was, then unknown to first applicant. The six then embarked on a joy ride around town in the company of the now complainant, passing through Magwegwe, Nkulumane, and Pumula suburbs where second applicant had an altercation with the complainant ----.”

It is clear that second applicant took complainant from his work place at MIP Motors, corner Fort Street and Fifth Avenue. The applicants are not disclosing to the court the circumstances under which complainant ended up in the motor vehicle. If the complainant went on a joy-ride of his own free will and without any undue pressure being brought upon him why would he allege that he was kidnapped? If the complainant was a willing participant why was he assaulted? While it is true that the presumption of innocence operates in favour of the applicants they must proffer some form of defence to the allegations. The applicants do not have to prove their defence. They must show that they have a defence which is credible and which at the trial state would stand as a defence. A bare denial of the allegations tends to show that the applicants do not have a defence at all. The second applicant does not explain how the complainant found himself in the motor vehicle. If he volunteered to join the accused persons in the joy-ride, then this must be stated clearly. In his oral submissions, *Mr Shenje*, appearing for all the applicants stated that the circumstances leading to the complainant boarding the motor vehicle are not entirely clear. I pointed out to *Mr Shenje*, that this is not a sufficient explanation where the state has made specific allegations to the effect that complainant was abducted at his workplace and a demand was made that he would only be released if an amount of US\$250.00 had been paid to accused persons by complainant’s employer.

The state has opposed the granting of bail on the following grounds:

- a) A trial date has been agreed by consent for 7 April 2015.
- b) The second applicant is based in South Africa and therefore the risk of abscondment is high.
- c) The offence is serious and any conviction is likely to result in the imposition of a custodial sentence.
- d) There is overwhelming evidence against the accused persons.

It is not in dispute that the applicants were all present throughout the commission of the offence from the time of the kidnaping and assault until the time of their arrest. The first applicant facilitated by providing a vehicle. The money in question was allegedly owed to second applicant by complainant's employer. The evidence against all three applicants is strong and in the event of a conviction the likelihood of a custodial sentence is a real possibility. The object of the alleged kidnaping was to extort money from the complainant's employer. The complainant was held against his wish by his captors for no reason. The complainant has no reason to lie against the accused persons. There is reasonable fear that the applicants may be enticed to abscond to avoid trial if granted bail. On a balance of probabilities the applicants have not demonstrated that they are suitable candidates for bail. See the cases of *S v Biti* 2002 (1) ZLR 115, *Aitken and Another v The Attorney General* 1992 (1) ZLR 249 (S) and *S v Tsvangirai* HH 92/03.

I do accept that the seriousness of the offence, and the fact that a trial date had been set are factors that would justify a refusal of bail. I have taken into consideration the other relevant factors such as the strength of the state case, and the fact that the applicants are tendering a bare denial to the allegations against them. I have considered the fact that the granting of bail would, in the circumstances serve as an inducement for the applicants to abscond. It is usually the case that where an accused person has no defence to the allegations, he is more likely to be induced to abscond. Where an accused has a defence to the allegations, he is more than likely to stand trial rather than abscond.

In the result, the application for bail is hereby dismissed.

*Shenje and company*, applicants' legal practitioners  
*National Prosecuting Authority*, the state's legal practitioners