

MALYOTI KATENGA JAMU v THE PEOPLE (1981) Z.R. 99 (S.C.)

SUPREME  
CULLINAN,  
4TH  
(S.C.Z. JUDGMENT NO. 31 OF 1980)

COURT

DECEMBER,

1980

B.P.J.S.

Flynote

Criminal law and procedure - Bail - Application to be granted - Whether discretionary - Whether Supreme Court can deal with bail applications.

Criminal law and procedure - Appeal - Application for leave to appeal before the Supreme Court - Refusal by a Supreme Court Judge.

Whether Applicant entitled to have his application determined by the full court.

Headnote

This is an application for bail pending appeal under s. 22 of the Supreme Court of Zambia Act. The applicant was convicted of unlawfully doing grievous harm by the subordinate court and was sentenced to one year's imprisonment with hard labour. On appeal to the High Court, the learned Appellate Judge dismissed the appeal increasing the sentence to two year's imprisonment with hard labour. The applicant applied for leave to appeal to the Supreme Court; but his application was refused by a judge of the Supreme Court. Application was then made on the same day to the full court for leave to appeal. The issue before the court was whether or not the learned appellate judge had exercised his powers under s. 336 of the Criminal Procedure Code.

**Held:**

- (i) The High Court may admit the appellant to bail, or if it does not so admit him, direct him to be treated as an unconvicted prisoner pending the determination of his appeal or his application for leave to appeal as the case may be.
- (ii) In criminal matters if any judge of the Supreme Court refuses an application, the person making the application shall be entitled to have his application determined by the full court.
- (iii) The applicant's application to the full court for leave to appeal therefore is an application *ex debitis justitiae*. The determination of his application for leave to appeal to the court is therefore pending.
- (iv) The Supreme Court may deal with a bail application only where the High Court has refused to admit an appellant to bail under s. 336 of the Criminal Procedure Code.

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- (v) The power to admit an applicant to bail under s. 336 of the Criminal Procedure Code is clearly discretionary. Therefore the learned appellate judge's decision left no room for any such discretion as he decided that the application was not properly before him.

**Legislation referred to:**

Supreme Court Act, ss. 4, 22.

Criminal Procedure Code, Cap. 160, ss. 324; 336.

For the applicant: J. Chimbelu; Chimbelu and Company.

For the respondent: F. Bruce Lyle, State Advocate.

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Judgment

**CULLINAN, J.S.:** delivered the order. This is an application for bail pending appeal under section 22 of the Supreme Court of Zambia Act. The applicant was convicted of unlawfully doing grievous harm, by the Subordinate Court of the second class for the Lusaka District on 18th May, 1979, and was sentenced to one year's imprisonment with hard labour. On appeal to the High Court on the

24th July, 1980, the learned appellate judge dismissed the appeal, increasing the sentence to two years' imprisonment with hard labour. The applicant applied for leave to appeal to the Supreme Court on 5th August, 1980. That application was refused by a judge of the Supreme Court on 28th August, 1980. Application was then made on the same day to the full court for leave to appeal.

On 25th November, 1980, the applicant applied to the High Court for bail pending appeal. The record indicates that submissions were made by the learned counsel for the applicant Mr Chimbelu in the matter of the court's jurisdiction to deal with the application. Having listened to such submissions, the learned appellate judge observed that the application before him :

" . . . presupposes that there is an appeal pending to the Supreme Court. The facts in this case are that the applicant had applied for leave to appeal before a Supreme Court judge. That application was not granted. The issue is therefore whether the applicant can be regarded as being on an appeal. His application for leave to appeal having been rejected I find that there is no appeal pending. What is pending is an application to the Supreme Court sitting as a full court to decide whether or not to allow the applicant to appeal. Until such permission is granted the applicant cannot be said to have lodged an appeal. This is laid down under the provisions of Section 324 (2) of the C.P.C. which states that in cases where an appellate court refuses an application made under subsection (1) the appeal entered in support of the application shall be deemed never to have been entered. In this case I am satisfied that the application is deemed never to have been entered. Consequently this application is not allowed. Application is dismissed."

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The provisions of s. 324 of the Criminal Procedure Code apply, as I see it, to the procedure for application to appeal out of time from a decision of a subordinate court to the High Court and do not apply to the present application. The High Court's jurisdiction in the matter can be found in the provisions of s. 336 of the Criminal Procedure Code, which reads in part as follows:

"336. (1) The High Court may, if it deems fit, on the application of an appellant from a judgment of that Court and pending the determination of his appeal or *application for leave to appeal* to the Supreme Court in a criminal matter -

(a) admit the appellant to bail, or if it does not so admit him, direct him to be treated as an unconvicted prisoner pending the determination of his appeal *or of his application for leave to appeal*, as the case may be;" (The underlining is mine.)

In the present case the learned appellate judge seemingly was of the opinion that an appeal or indeed application for leave to appeal had not been entered. Section 336 gives the High Court the power to deal with an application for bail pending the determination of an application for leave to appeal to the Supreme Court. As the learned appellate judge had very correctly observed, the applicant's application for leave to appeal to this court had initially been refused by a single judge of the court. Section 4 of the Supreme Court of Zambia Act, however, in part provides as follows:

"4 (1) A single judge of the Court may exercise any power vested in the Court not involving the decision of an appeal or a final decision in the exercise of its original jurisdiction but-

(a) in criminal matters if any judge of the Court refuses an application for the exercise of any such power, the person making the application shall be *entitled* to have his application determined by the Court;" (The underlining is mine.)

It will be seen from the above provisions that where a single judge of the court refuses an application for leave to appeal, the applicant shall be entitled to have his application determined by the full court. The applicant's application to the full court for leave to appeal therefore is an application *ex debito justitiae*. The determination of his application for leave to appeal to the court is therefore pending. That being the case the learned appellate judge had jurisdiction under s. 336 of the Criminal Procedure Code to deal with the present bail application.

The Supreme Court or a single judge therefore, may deal with a bail application, under the

provisions of s. 22 of the Supreme Court of Zambia Act, only where:

" . . . the High Court has, in the exercise of its powers under section three-hundred and thirty-six of the Criminal Procedure Code, refused to admit an appellant to bail . . . "

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The question arises as to whether or not the learned appellate judge has exercised his powers under s. 336 of the Criminal Procedure Code. I have carefully perused the record before me. As I have indicated, the submissions before the learned appellate judge went to jurisdiction only, and it is quite clear that his comments and his decision were equally and solely directed to jurisdiction. Nowhere were the merits of the application considered. The application was dismissed solely on the basis that the learned appellate judge decided that he had no jurisdiction in the matter. The power to admit an applicant to bail under s. 336 of the Criminal Procedure Code is clearly discretionary. The learned appellate judges decision left no room for any such discretion as he decided that the application was not properly before him. As I see it therefore, the appellate judge has not exercised his powers under s. 336 of the Criminal Procedure Code and accordingly I have no power to deal with the present application. I direct however that the application be placed before the appellate judge so that he may now exercise his powers under s.336 of the Criminal Procedure Code.

Application referred back

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