

ROSEMARY CHILUFYA v THE PEOPLE (1986) Z.R. 32 (S.C.)

SUPREME  
SAKALA,  
27TH MARCH, 1986  
(S.C.Z. JUDGMENT NO. 8 OF 1986)

COURT  
J.S.

Flynote

Criminal Law and Procedure - Bail - Bail pending trial - Whether Supreme Court has jurisdiction.

Headnote

The applicant was charged with infanticide and was committed to the High Court for trial. Her application to the High Court for bail pending trial was refused. She applied to the Supreme Court seeking to be admitted to bail pending her trial.

**Held:**

For the Supreme Court to have jurisdiction in such matters the following must be the circumstances:

- (a) The High Court must have exercised its powers under section 336 of Cap. 160; and
- (b) The applicant must be an appellant whose appeal is pending before the Supreme Court.

For the Appellant: A.M. Wood, D.H Kemp and Co.  
For the Respondent: R. Balachandran, Senior State Advocate.

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Judgment

**SAKALA,**

**J.S.:**

This is an application supported by an affidavit in which the applicant is seeking to be admitted to bail pending her trial. The affidavit discloses that the applicant who has been in custody since October, 1985, was on 3rd December, 1985, committed to the High Court for trial for the offence of infanticide. On 18th December, 1985, she applied to the High Court at Kitwe to be admitted to bail pending her trial. In a reserved ruling delivered on 28th January, 1986, the High Court Commissioner refused to grant the application on the ground that the offence of infanticide is on the same footing as the offence of murder. The learned commissioner held that murder being a non bailable offence so was infanticide. I will revert to this finding later in this ruling. The application however is not before me by way of an appeal, but even if that would have been the case the provisions of Order 59/1/8 of the Supreme Court Practice (1985 edition) state in very clear terms that no appeal lies against the refusal by a judge in chambers to grant bail in criminal proceedings.

The Supreme Court Act itself also seems to suggest that this application is not competent before this court. On behalf of the respondent Mr Balachandran argued and submitted that this court has no jurisdiction to entertain this application as Section 22 of the Supreme Court Act, the only section empowering the Supreme Court to entertain applications for bail, refers only to an application by a person

who has been convicted by the High Court and whose application for bail pending appeal has been refused by the High Court in terms of Section 336 (1) of the Criminal Procedure Code. He pointed out that in the instant case the applicant is awaiting her trial. There has been no conviction yet and there is no appeal against conviction.

Mr Wood appearing for the applicant agreed with the submissions by Mr Balachandran but contended that the offence was a bailable one.

The issue raised in this application is whether this court has jurisdiction to entertain an application of this nature. Section 22 of the Supreme Court Act Cap. 52 making provisions as to bail reads as follows:

"22 (1) Where the High Court has, in exercise of its powers under section three hundred and thirty-six of the Criminal Procedure Code, refused to admit an appellant to bail or to postpone the payment of any fine imposed upon him, the Court may, if it deems fit, on the application of the appellant, and pending the determination of his appeal or application for leave to appeal to the 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; and
- (b) Postpone the payment of any fine imposed upon him."

There are two conditions precedent to the exercise of the jurisdiction conferred by this section. These are; the High Court must have exercised its powers under Section 336 of the Criminal Procedure Code and refused the application. Secondly the applicant must be an appellant whose appeal is pending for determination before the Supreme Court. The applicant in the present application has not been convicted of any offence and is not an appellant in any appeal.

It follows that in terms of Section 22 Cap. 52 this court has no jurisdiction. The application is misconceived and accordingly refused.

Before leaving this application I would like to make certain observations on the learned Commissioner's ruling. The learned Commissioner refused the applicant's bail on the reasoning that infanticide is same as murder and murder being a non bailable offence so was infanticide. I am unable to agree with the learned Commissioner. According to our Criminal Procedure Code all offences are bailable except treason, murder and offences under State Security Act if so certified by the Director of Public Prosecution (See Section 123 (1) (4) of the C.P.C. Cap. 160). With greatest respect therefore the learned Commissioner was wrong to equate infanticide with murder. As a matter of practice females charged of infanticide have been released on bail. The learned Commissioner rightly observed that infanticide is an offence committed as a result of disturbance of the mind caused by the stress of the birth. In my opinion this is all the more reason for

releasing on bail an accused facing such a charge to avoid further disturbance of the mind which could be brought about by anxiety likely to be caused by a long custody period.

It is therefore my sincere hope that when the case comes up for trial, the trial court will be readily disposed to reconsider the issue of bail if raised again. But in the light of the fact that the accused has been in custody since October, 1985 it is imperative, in the interest of justice that the trial be expeditiously undertaken.

Application Dismissed.

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