LANTON, EDWARDS AND THEWO v THE PEOPLE (1998) S.J. 30 (S.C.)

SUPREME COURT
NGULUBE, C.J., SAKALA, AG. D.C.J., AND LEWANIKA, J.S.
28TH JULY, 1998
(S.C.Z. JUDGMENT NO. 9 OF 1998 (54))

Flynote
Criminal Law - Bail - Offence under the Narcotic Drugs and Psychotropic Substances - Whether bailable

Headnote
The appellants were charged with the offence of improting narcotic drugs under the Narcotic Drugs and Psychotropic Substances Act, Cap.96. They applied for bail in the Subordinate Court but the application was denied on the ground that importation of drugs was a cognisable offence; an appeal to the High Court was unsucceful hence a further appeal on the matter to the Supreme Court

Held:
(i) The importation of drugs is not a cognisable offence and is therefore bailable
(ii) The Supreme Court has no power to admit to bail where there is no appeal from a conviction from a lower court

For the appellants: Mr N Mofya of Mofya Chambers and Ms N A Sharpe of Mopani Chambers

For the people: Mr J Mwanakatwe, Principal State Advocate

Judgment
SAKALA, ACTING, D.C.J., delivered the judgment of the Court.

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This is an appeal against a ruling of the High Court at Livingstone refusing the appellants' application for bail pending trial before a subordinate court at Livingstone. The refusal was on the ground that the offence under the Narcotic Drugs and Psychotropic Substances Act, Cap.96 is not bailable.

The brief facts of the appeal are that the three appellant's were charged with the offence of importation of Narcotic Drugs, contrary to Section 7 of the Narcotic and Psychotropic Substances Act, Cap 96 of the Laws of Zambia. The particulars of the offence were that, the appellants, on 23rd May,1998, at Livingstone in the Livingstone District of the Southern Province of the Republic of Zambia, jointly and whilst acting together with other people unknown, did import into Zambia 3.2 kg of Morphine without lawful authority. The appellants' application for bail pending trial was refused by the Subordinate Court at Livingstone. The appellants, unsuccessfully, applied for bail to the High Court, hence the present appeal.

In dealing with the application, the learned High Court Judge considered the provisions of Section 43 relating to bail, to determine whether the appellants had been charged with a bailable offence.

The High Court correctly observed that no bail can be granted when a person is charged with a cognisable offence. The High Court also observed that drug trafficking and drug manufacturing are cognisable offences in terms of Section 23 of the Act for purpose of the Criminal Procedure

Code. The learned Judge considered a judgment of a brother Judge at Lusaka in which bail was granted for an offence under the same Act on the ground that the offence in that case was not cognisable and therefore bailable. After examining the term "trafficking" as defined under the Act, the court concluded that the offence of importation was covered under the definition of trafficking. The court further examined Regulation 2 of the Narcotic and Psychotropic Substances (trafficking) Regulations that provides quantities of narcotic drugs which constitute trafficking. The court found that the quantity of 3.2 kg, allegedly imported by the appellants,was far in excess of the minimum quantity that constitutes trafficking under the Act and concluded that importation of 3.2 kg of morphine was "an offence under the Act in the circumstances" suggesting that it was committed in connection with buying or selling. The court held that the offence of importation was a cognisable offence under section 23 as it relates to trafficking. After making a comparison of our Law with that of the English Drug Trafficking Offences Act of 1986, the learned Judge found that the English Law was persuasive and declined to follow the decision of his brother Judge at Lusaka. He concluded that the offence of importation was cognisable offence and not bailable.

Mr Mofya on behalf of the appellants pointed out that the appeal was in connection with the interpretation of the Narcotic Drugs and Psychotropic Substances Act, Cap. 96 as understood by both the High Court and the Subordinate Court. The gist of Mr Mofya's submission was that the appellants were charged with the offence of importation and not with the offence of trafficking. He contended that while the offence of trafficking is a cognisable offence under the Act and therefore bailable.

On behalf of the State Mr Mwanakatwe at first supported the conclusion of the

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lower court. But when his attention was drawn to the fact that under our law the offence of trafficking carries a heavier penalty than the offence of importation and that the two are covered by two different sections of the Act, and further that the definition of trafficking does not include importation, he quickly conceded and properly indicated that he did not support the lower courts' findings. To complete the back ground of the case it must be mentioned that the state did not object to the application for bail when the matter was before the High Court at Livingstone.

At the outlet, we must make it clear that our understanding of this appeal is not that the appellants are renewing their application for bail before us. But that their appeal; is confined to the only issue of the High Cour's finding that the offence of importation of narcotic drugs under the Act is a cognisable offence and therefore not bailable. As the appellants are still standing trial before the Subordinate Court, this Court has no power to consider the application for bail pending trial as there is no conviction yet and therefore no appeal before us. (See the case Oliver John Irwin v The People, Supreme Court of Zambia judgement No. 4 of 1993). We wish also to point out that there is nothing wrong or improper for the learned High Court Judge to have made reference to the English Law on the matter.

The issue for determination in the present appeal is whether the offence of importation of drugs contrary to Section 7 of the Act is a cognisable offence and therefore not bailable. We have considered the relevant provisions of the Act. We take note that Section 6 provides for the offence of trafficking which carries a penalty of 25 years. On the other hand, the offence of importation under Section 7 carries a penalty of 20 years, while the offence of possession under section 8 carries a penalty of 15 years imprisonment. It is significant to observe that the offence of importation carries a lesser penalty than trafficking and falls under a different section. While the English Act specifically defines Drug Trafficking to mean, among others importation of controlled drugs, this is not the case with our Law here in Zambia. Indeed the quantities imported by the appellants may be in 30 excess of the minimum quantities prescribed by our Act such that they could have been charged under Section 6 but the appellants were not charged with trafficking. We are satisfied that under the Act the offence of importation is not the same as the offence of trafficking and therefore not a cognisable offence. The finding by the High Court that the offence of importation of narcotic drugs under

Section 7 of the Act is a cognisable offence was in view a misdirection. We therefore hold that importation of drugs is not a cognisable offence.

Accordingly, for the reasons given this appeal is allowed. But as we said in the Irwin Case, this Court has no power to admit to bail where there is no appeal from a conviction from a lower court. It is therefore, regrettable that the Court cannot do what the lower courts can do. As the lower courts did not consider that the bail could be granted for the offence of importation of drugs, we direct that, if bail is required, the lower courts would be perfectly entitled to entertain a fresh application for bail pending trial. To that extent this appeal is allowed.

Appeal allowed
