

ARCHANA ARTIKA AND RENUKA DEVI v STATE (AAU033B of 2011)

COURT OF APPEAL — CRIMINAL JURISDICTION

5 CALANCHINI AP, CHITRASIRI and BASNAYAKE JJA

16, 21 March 2012

10 **Bail — appeal against refusal of application for bail — jurisdiction of Court of Appeal — domestic trafficking in children — selling minors for criminal purpose — substantial risk of influencing victim — Bail Act ss 3, 17(3) — Court of Appeal Act ss 6, 21, 21(3), 23(4), 33(2), 35, 35(1) — Schedule of Crimes to the Domestic Violence Decree.**

15 The appellants appealed against a decision of the High Court refusing an application for bail. The appellants were awaiting trial on charges of domestic trafficking in children and selling minors under the age of eighteen for criminal purposes.

Held –

20 (1) It is important to distinguish appeal proceedings that are concerned with bail in the High Court from the power given to a single Judge under s 35(1) of the Court of Appeal Act (the Act) to admit an appellant to bail. An appeal to the Court of Appeal under s 21(3) of the Act is by way of rehearing on the papers. As a result, the Court of Appeal is required to apply the provisions in the Bail Act that relate to an application by an accused person for a grant of bail pending his trial in the High Court.

25 (2) The High Court correctly concluded that the maximum sentences for the offences with which the appellants were charged provided an inducement or incentive for the appellants to abscond. The High Court was also correct in finding that there was a substantial risk that the victim may be influenced so far as her evidence was concerned.

(3) There was no error in the decision of the High Court, and nothing put before this Court by either appellant was sufficiently compelling to warrant granting the appeal.

30 Appeal dismissed.

Appellants in person.

T Qalirauci for the Respondent.

35 [1] **Calanchini AP.** This is an appeal against a decision of the High Court (Madigan J) refusing an application for bail made by the Appellants.

[2] The Jurisdiction of the Court of Appeal to determine the appeal is given pursuant to s 21 (3) of the Court of Appeal Act Cap 12 (the Act) which states:

40 “(3) *The Court of Appeal may, if it gives leave, entertain an appeal from the High Court against the grant or refusal to bail, including any conditions or limitations attached to a grant of bail, upon the application either of the person granted or refused bail or of the Director of Public Prosecutions.*”

[3] Whether it is the State or the accused who brings the application, there are three essential components to the jurisdiction. First, the proceedings are appeal proceedings. These proceedings do not constitute an application bail. That has already happened in the court below. Secondly, it is the Court of Appeal that determines the appeal. Pursuant to s 6 of the Act the Court of Appeal is ordinarily duly constituted if it consists of not less than three judges. A single judge cannot determine an appeal that is brought before the Court of Appeal under s 21.

50 Thirdly, leave is required. The jurisdiction to grant leave is given to the Court of Appeal under s 21 (3). However, pursuant to s 35 of the Act, a single judge of the

Court of Appeal may exercise certain specified powers of the Court of Appeal including the power to give leave to appeal.

[4] In these proceedings it is appropriate for the Court to determine whether leave should be granted, and if so, then proceed to determine the appeal at the same time. The powers of the Court are set out in s 23 (4) of the Act as follows:

“On an appeal against the grant or refusal of bail, including any conditions or limitations attached to a grant of bail, may confirm, reverse or vary the decision of the High Court.”

[5] It is important to distinguish these appeal proceedings that are concerned with bail in the High Court from the power given to a single Judge under s 35 (1) to admit an appellant to bail. This is an original jurisdiction vested in the Court under s 33 (2) of the Act which states:

“(2) The Court of Appeal may, if it sees fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.”

[6] The original jurisdiction or power is vested in the Court of Appeal but may be exercised by a single judge of the Court.

[7] The distinction between the two jurisdictions is re-enforced by the provisions of the Bail Act. The matters that a court must take into account when considering the granting of bail to a person who has appealed against conviction or sentence are set out in s 17 (3) of the Bail Act. Furthermore, the presumption in favour of the granting of bail is displaced where the person has been convicted and has appealed against the conviction.

[8] On the other hand an appeal to the Court of Appeal under s 21 (3) of the Act is by way of re-hearing on the papers. As a result the Court of Appeal is required to apply the provisions in the Bail Act that relate to an application by an accused person for a grant of bail pending his trial in the High Court.

The decision at first instance.

[9] On 2 March 2011 the High Court delivered a ruling on an application for bail pending trial by the two Appellants. The applications were refused. The Appellants were and still are awaiting trial in the High Court on charges of domestic trafficking in children and selling minors under the age of 18 for criminal purposes.

[10] The learned judge noted that although the offences with which the Appellants are charged were not listed on the Schedule of Crimes to the Domestic Violence Decree 2009, he was satisfied that the offending conduct must be classified as domestic violence.

[11] He then concluded that as a result of the amendments to s 3 of the Bail Act 2002 the presumption in favour of bail was rebutted. He also noted that the maximum penalty for a domestic trafficking conviction was 25 years and for selling a minor for sex was 12 years.

[12] The learned judge correctly, in our opinion, then concluded that these sentences provided an inducement or incentive for the Appellants to abscond. Perhaps more significantly, as the victim was only 14 years old, being the daughter of the Appellant Devi and the sister of the Appellant Artika, there was a very real prospect that the victim may be influenced or interfered with so far as her evidence was concerned.

The grounds of appeal.

[13] The Appellants have both filed appeals against the decision. The grounds of appeal are set out in their letters dated 8 April 2011.

5 [14] The Appellant Devi claims that the learned Judge appears to have determined the question of guilt. She states that she intends to plead not guilty. The Appellant also claims that although the offences may be serious, those charged with murder, treason or rape are also on bail. Devi also states that any risk of interfering with the victim as a witness can be dealt with by strict bail conditions.

10 [15] The Appellant Artika raised similar grounds of appeal in her letter.

The present appeal

15 [16] When the proceedings were called on for hearing, the Appellants appeared unrepresented. Although the Legal Aid Commission is acting for the Appellants in the High Court trial, it would appear that the Commission did not extend assistance for these appeals. The Appellants indicated to this Court that they would represent themselves.

20 [17] In her submission to this Court the Appellant Devi submitted that she was 46 years old and lives with her 46 year old husband in Nadi. Her principal submission was that she is a sick lady who will be admitted to the Colonial War Memorial Hospital on 26 March for surgery on 29 March 2012. However Devi did admit that all the arrangements for hospitalisation and surgery had been made whilst she was on remand and with the assistance of prison staff.

25 [18] The Appellant Artika is 25 years old. She stays with her husband aged 68 of four years at Lomolomo. Her principal ground for seeking bail was that her husband “*has pressure and urinary problems.*” There was no medical evidence produced to support the claim that her 68 year old husband was in ill-health. The Appellant identified her husband in the court room. He appeared to be well and healthy. The Appellant produced a January 2011 prescription for medication which had been handed to her by her husband.

30 [19] I am unable to see any basis for granting the appeal as there does not seem to me that the learned Judge had made any error in his decision. Furthermore nothing that was put before the Court by either Appellant was sufficiently compelling for me to consider the appeal should be granted.

[20] Counsel appearing for the State informed the Court that the trial is listed for hearing on 10 April 2012 as a reserve fixture. If it does not proceed on that day then the trial will be listed for hearing in May 2012.

40 [21] The victim who is now a little older is currently in the care of the Department of Social Welfare residing in a hostel in Domain. There is a certain amount of freedom of movement for the girls and there is access to telephone communication. The risk of influencing the victim therefore remains substantial.

[22] Under all the circumstances I consider that the appeals should be dismissed.

45 [23] **Chitrasiri JA.** I agree with the reasons and decision of Calanchini AP.

[24] **Basnayake JA.** I agree with the reasons and decision of Calanchini AP.

Orders of the Court:

50 The appeals are dismissed.

Appeal dismissed.