2/98; [1997] VSC 45

SUPREME COURT OF VICTORIA

DIRECTOR OF PUBLIC PROSECUTIONS (Cwth) v ABBOTT

Gillard J

11 August, 23 September 1997 — (1997) 97 A Crim R 19

BAIL – TWO CHARGES – POSSESSION OF HEROIN LESS THAN 30 GRAMS – ATTEMPTED POSSESSION OF MORE THAN 30 GRAMS OF HEROIN – ACCUSED TO SHOW CAUSE ON FIRST CHARGE AND EXCEPTIONAL CIRCUMSTANCES ON SECOND – BAIL GRANTED ON EACH CHARGE – STATEMENT OF REASONS NOT INCLUDED IN THE ORDER – EFFECT OF ORDER – OBSERVATIONS AS TO IRRELEVANT FACTORS ON QUESTION OF "EXCEPTIONAL CIRCUMSTANCES" – SENTENCING PRINCIPLE OF PARITY – WHETHER APPLIES IN BAIL APPLICATIONS – WHETHER MAGISTRATE IN ERROR IN GRANTING BAIL: *BAIL ACT* 1977, SS4(2)(aa)(ii), (iii), 4(4)(cb); *CUSTOMS ACT* 1901 (CTH), S233B(1)(ca).

A. was charged with two offences under s233B(1)(ca) of the *Customs Act* 1901 namely, possession of less than 30 grams of heroin and attempted possession of more than 30 grams of heroin. Upon application, a magistrate granted bail on both charges but in relation to the first charge, did not include in the order a statement of reasons for granting bail. Upon appeal—

HELD: Appeal allowed. Order granting bail quashed. Bail revoked.
1. As both charges involved a traffickable quantity of heroin, the court was required to refuse bail. However, in relation to the first charge, if the accused showed cause why his detention in custody was not justified, the magistrate, on granting bail, was required by s4(4) of the *Bail Act* 1977 ('Act') to include in the order a statement of reasons for making the order. As the magistrate failed to comply with this requirement, the order granting bail was a nullity.

2. In relation to the second charge, the accused was required to show that exceptional circumstances existed which justified the grant of bail. The phrase "subject to sub-s (2)(aa)" does not preclude the operation of s4(4)(cb). Accordingly, if the accused established that exceptional circumstances existed to justify the grant of bail, the magistrate was still bound to comply with the obligation to include in the order a statement of reasons for making the order.
***DPP v Spiridon* [1989] VicRp 31; (1989) VR 352, not followed.**

3. The sentencing principle of parity between co-offenders is relevant to an application for bail under the Act. It must be established that things are equal as between co-accused. In other words, where other things are equal, applicants for bail should receive the same decision; where other things are not equal, the bail applications may be dealt with differently. However, it would be rare for the principle to have any relevant weight in bail applications because the circumstances invariably at all levels of determination are peculiar to the particular applicant. Finally, a manifestly wrong decision to grant bail cannot be used as a basis for the application of the parity principle in another bail application.
***R v Tiddy* (1969) SASR 575, applied.**

4. Factors which are not relevant to the question of "exceptional circumstances" are:
- **the likelihood of the applicant answering bail**
- **the imposition of strict conditions involving close supervision**
- **the provision of a surety.**

5. In the present case, considering the relevant factors in total, including the nature of the offence, they did not constitute exceptional circumstances justifying the grant of bail. Accordingly, the magistrate was in error in granting bail.

GILLARD J: [1] This is an appeal by the Commonwealth Director of Public Prosecutions ("the appellant") pursuant to s18A of the *Bail Act* 1977 ("the Act") against an order made by Her Worship Ms Cotterell on 4 July 1997 at the Melbourne Magistrates' Court, whereby she granted bail to Stephen Zade Abbott ("the respondent") on conditions. [*After describing the parties to the application, His Honour continued*]... **Charges:** On 3 June 1997, the respondent was arrested by the Australian Federal Police and charged with one charge of possession of heroin contrary to s233B(1)(ca) of the *Customs Act* 1901. On 6 June 1997 he was charged with a further offence of attempting to possess heroin contrary to s233B(1)(ca) of the *Customs Act* 1901.

On 29 May 1997, a heroin drug courier was intercepted at the Melbourne Airport. A decision was made by the Federal Police to continue with the delivery of the heroin. Accordingly, the amount of heroin, which in total was 420.9 **[2]** grams, was divided into two samples, namely, one of 23.6 grams and the balance of 397.3 grams. The delivery was the 23.6 grams sample and the balance was retained by the Federal Police. On 3 June 1997, at 11.07 a.m., the respondent, accompanied by three young persons entered a room at the Terrace Pacific Inn Hotel in Spencer Street, Melbourne. An amount of $3,000 was paid to the courier of the heroin who handed it over and the four accused were arrested by members of the police upon departing the hotel room. The heroin was analysed and found to contain pure heroin to the extent of 64.5% so that the respondent is charged with obtaining possession of a net quantity of 15.22 grams of pure heroin and is further charged with attempting to obtain possession of 256.25 grams of pure heroin. The quantity of heroin involved is of some importance when consideration is given to s4(2)(aa)(ii) and (iii) of the Act.

Bail Applications

On 19 June 1997, the respondent made application for bail before Her Worship Ms Cotterell at the Melbourne Magistrates' Court. He was represented by Mr H. Wilcox of counsel. Evidence was given by the informant. Evidence was given by a Mr Tran Long of 15 Doullie Avenue, Bass Hill in the State of New South Wales who stated that he had known the respondent for eight years and he was prepared to provide accommodation for him as well as supervise him. It appeared Mr Long was a friend. The learned magistrate refused bail, finding that the respondent had failed to show exceptional circumstances as required by the Act. On 4 July 1997, the respondent made another application to the learned magistrate. Again he was represented by Mr H. Wilcox of counsel. On this occasion the learned magistrate held that there were new facts or circumstances which had arisen since the last application and accordingly she had jurisdiction to hear the further application, as required by s18(4) of the Act. The court heard evidence from the respondent's uncle, Zaphyr Karamologlou, to the effect that the respondent had resided with him at 17 Bennison Road, Hinchinbrook in the State of **[3]** New South Wales for some months prior to the date of the alleged offences and if granted bail the respondent could live there. Further, Mr Karamologlou gave evidence he was prepared to be a surety for the respondent in the sum of $25,000 which was the extent of the equity in his property at Hinchinbrook. He also gave evidence that he was living in a defacto relationship with the respondent's aunt, Deanne Abbott, who is a member of the New South Wales Police Force. The informant did not call any evidence because the magistrate indicated that the evidence given on 19 June was still fresh in her mind. The magistrate then indicated she would grant the respondent bail with conditions. [*After setting out the conditions of bail and dealing with a preliminary objection, His Honour continued*]...**[4]**

Obligation to give reasons

Section 4(4)(cb) of the Act provides that where a person is charged with an offence under section, *inter alia*, 233B(1) of the *Customs Act* as amended in relation to a commercial or traffickable quantity of narcotic goods, a court shall refuse bail unless the person shows cause why his detention in custody is not justified. The sub-section goes on to provide that where the court grants bail—"(i) if constituted by a judge or a magistrate, shall include in the order a statement of reasons for making the order." The respondent is charged with being in possession of a quantity of heroin, it is accepted that it is a traffickable quantity of narcotic goods and accordingly s4(4)(cb) applies. With respect to the charge of attempting to possess heroin, being an amount in excess of 30.0 grams, it is also accepted it was a traffickable quantity and prima facie s4(4)(cb) applies. I interpolate to observe that because the traffickable quantity exceeded 30 grams s4(2)(aa)(ii) and (iii) apply so that the respondent as applicant for bail had to satisfy the court with respect to that charge that exceptional circumstances existed which justified the grant of bail. I will deal hereafter with the question whether both sub-sections could apply.

I should also say that as a result of a recent amendment to the Act, s4(2)(a)(a)(iii)(iv) and (v) have been repealed. It therefore follows that from **[6]** 1 September if the quantity of the drug is a commercial or traffickable one an applicant for bail must prove exceptional circumstances irrespective of the quantity – see *Sentencing and Other Acts (Amendment) Act* 1997 S48(a)(i) and (ii). It follows that in respect of both offences, if s4(4)(cb) applied to both, since the magistrate granted bail she was obliged to include in the order a statement of reasons for making the order. A certified extract was annexed to the affidavit of Bill Polychronopolous sworn 30 July 1997. There is nothing in the document which explains why the magistrate granted bail. It follows that

there has been a breach by the magistrate of the obligations set out in s4(4)(cb) of the Act and accordingly, the order is of no effect and should be quashed. I refer to the decision of Beach J in *DPP v Sehevella*, (unreported, 12.1.1997) where his Honour at p7 referring to s4(4) said –

> "The Act makes it mandatory for a judge or magistrate sitting in Court or chambers to include in such an order a statement of his reasons for making the order. The magistrate clearly has not done so in the present case and, in my view, the order he made on 23 November is therefore a nullity."

I agree with his Honour's view of s4(4). The learned magistrate appears to have made one order granting bail in respect of both charges. I do not know from the material whether she determined each application separately as required by s4(2)(aa)(ii) and (iii) and s4(4)(cb)(i) or (ii) of the Act. Counsel informed me that the obligation to give reasons under s4(4)(cb) only applied to the possession charge and not to the attempt to possess heroin because s4(4)(cb) did not apply to the attempting to possess heroin charge because of the phrase - "subject to sub-section 2(aa)" in that sub-section. In support of that proposition I was referred to the decision of Hampel J in *DPP v Spiridon* [1989] VicRp 31; (1989) VR 352. At p357 his Honour, after setting out parts of s4 of the Act went on to say this -

> "In the context of the present case, it is clear that sub-s(2) requires a person charged with offences of trafficking and possession of heroin which involve an amount of a drug greater than 30 grams to show exceptional circumstances which justify release on bail. These provisions deal with the most serious offences and understandably require the applicant to discharge a most stringent onus. If bail is granted, then curiously and I think by **[7]** oversight, no requirement is imposed on the magistrate or a judge to state reasons. It is only in sub-s(4) which deals with drug offences involving lesser quantities that such a requirement exists where bail is granted. Under that sub-section a person charged with an offence under sub-s(4)(ca) involving less than 30 grams of heroin must discharge the onus of showing that his detention in custody is not justified. Sub-section (4)(ca) is expressed to 'subject to sub-s(2)(aa)'. The sub-sections deal with two different situations. One, under sub-section (2)(aa) where the amount of the drug is over the prescribed minimum quantity. The other under sub-s(4)(ca) where the drug is not over the prescribed quantity."

His Honour was dealing with a charge under s4(4)(ca) but his comments are apposite to a charge under s4(4)(cb). I respectfully disagree with his Honour's reasoning. Both s4(2)(aa)(ii) and (iii) and s4(4)(cb) apply to the charge of attempting to possess heroin. Section 4(2)(aa) applies because the quantity of heroin exceeds 30 grams. I interpolate to note that as a result of the recent amendment to the Act, the application of s4(2)(aa) does not depend upon a particular quantity. Now the quantity is irrelevant. However, the operation of s4(4)(cb) is made subject to the operation of sub-s(2)(aa). It is clear that in the present circumstances an applicant for bail has to establish exceptional circumstances. If he did that, it would follow that he has satisfied the requirements of s4(4)(cb). The legislature has imposed a more stringent test under s4(2)(aa). If the applicant fails to establish exceptional circumstances then he does not obtain bail.

But the phrase "subject to sub-s(2)(aa)" does not preclude the operation of s4(4)(cb). It still applies and if the applicant establishes exceptional circumstances it would follow that he has established that his detention in custody is not justified, but the judicial officer is still bound to comply with the obligation set out at the end of s4(4)(cb). In other words the operation of s4(4)(cb) is subject to the operation of sub-s(2)(aa) but does not preclude the former's operation. It follows that the judicial officer shall include in the order granting bail a statement of reasons for making the order. This construction avoids the absurd result that if the applicant establishes the requirements of s4(2)(aa) i.e. exceptional circumstances, the judicial **[8]** officer does not have to state the reasons but has to do so if he shows his detention is not justified. It follows that both offences had to be considered under s4(4)(cb) and one of the requirements is that if bail is granted the Magistrate shall include in the order a statement of reasons for making the order. The Magistrate has failed to do so and accordingly the order is of no effect. On that ground alone the order should be quashed. It follows that the respondent is not bailed.

However, at the hearing neither party challenged the ruling of Hampel J and both counsel proceeded on the assumption that it was only in relation to the possession charge that the reasons had to be recorded. It was therefore accepted that the court would quash the order insofar as it granted bail on that charge. It was in that context I raised with counsel the power that the Court had under s18A(6) of the Act to consider the application for bail as if the application had been made before the Court. Miss King QC opposed that approach on the ground that it would be unfair

to her client because not all the materials that were before the Magistrate were set out adequately in the affidavits before this Court. Mr Robinson on behalf of the appellant did not press me to make an order in respect of the charge of possession of heroin and accordingly the only order I will make is that the order granting bail by the Magistrate on 4 July 1997 in respect of that charge is quashed. Miss King QC indicated that the respondent would apply to a Magistrate for bail in respect of the charge. Because of the recent amendment he would now have to show exceptional circumstances.

Charge of Attempting Possession

As both parties proceeded on the basis that the Magistrate was not required to state her reasons for making the order in respect of this charge in the order I now proceed to consider the appeal against the granting of bail. The **[9]** respondent as the applicant had to establish exceptional circumstances justifying the grant of bail. The only evidence before me of the reasons why the Magistrate granted bail is set out in paragraph 12 of the affidavit of Bill Polychronopoulos sworn 23 July 1997. It reads:

> "12. "The court indicated that Mr Karamologlou's preparedness to put up his entire equity in his property as surety, constituted exceptional circumstances which had to be made out by the respondent in accordance with s4(2)(aa) of the *Bail Act* 1977."

Whether or not the Magistrate gave other reasons I am not in a position to say. No argument was put to me that as a matter of law she should have given more detailed reasons and that her failure to do so was an error of law which vitiated the order granting bail. In my opinion the reason given by the learned magistrate is not an exceptional circumstance. The provision of a surety is a condition imposed to ensure the accused will answer his bail. It is not relevant to the issue of "exceptional circumstances". Because I am uncertain whether I have all the reasons why the learned magistrate granted bail, I propose to consider whether the decision is so unreasonable or plainly unjust that it can be inferred her discretion miscarried. I wish to re-iterate that it is the obligation of counsel at any hearing where the proceeding is not recorded to take a note of reasons given for a decision and in appropriate circumstances to request the judicial officer to expand or explain any reasons which are given. It is unsatisfactory that the court is left in a position where it is uncertain as to whether reasons were given or what they were.

Any person accused of an offence is entitled to bail. That is the general rule laid down by s4(1) of the Act. However, that right to bail is abrogated in certain circumstances. One of those circumstances is where a person was charged with an offence inter alia under s233B(1) of the *Customs Act* as amended and in force for the time being "in relation to a traffickable quantity of narcotic goods within **[10]** the meaning of that Act and the offence is alleged to involve 30.0 grams or more of heroin." In those circumstances bail shall be refused – "Unless the court is satisfied that exceptional circumstances exist which justify the grant of bail." The quantity requirement has been repealed. It is well established that an applicant for bail has the burden of proving the "exceptional circumstances" and it is a heavy burden. However, that is not the end of the inquiry. The Court shall refuse bail if it is satisfied that <u>there is</u> an unacceptable risk if the applicant is released on bail that he would commit one or more of the prohibited acts set out in s4(2)(d) - for example, failure to answer his bail, commit an offence while on bail or interfere with a witness. The factors that must be weighed up in considering the question of an unacceptable risk, are set out in s4(3) of the Act. It is noted that the Court must consider all relevant matters and that the list of specified risks set out in that sub-section, is not exhaustive.

Mr Robinson says that taking into account the strength of the Crown's case, the participation by the respondent in a serious offence, the respondent's prior convictions and bad character, in particular his violent disposition, the fact that this alleged offence occurred whilst he was on parole, that he had left the State of New South Wales in breach of his parole conditions, and considering what could be said in his favour, there were no grounds for holding that the respondent had satisfied the onus which rested upon him of establishing exceptional circumstances. Further he submitted that there were unacceptable risks that he would fail to surrender himself to answer bail, he may commit other offences whilst on bail and may interfere with witnesses. Accordingly he submitted that the respondent had not satisfied the matters set out in s4(2)(d) of the Act. He said that in all the circumstances the decision was so manifestly wrong the learned Magistrate must have misdirected herself and accordingly her discretion had miscarried.

Miss King QC submitted that it was on the appellant to show that the discretion had miscarried. Accordingly she submitted it was not necessary for her client to show there were sufficient facts which could amount to exceptional **[11]** circumstances. However, I pointed out to her that for the purposes of argument, it was necessary for her to identify what factors there were which could justify a conclusion that there were exceptional circumstances in order to test the appellant's argument. Miss King QC referred to what Vincent J said in *Re the Matter of Application for Bail by John Denis Maloney*, an unreported judgment delivered 31 October 1990. His Honour pointed out that it was not possible to identify as a matter of general definition what situations were covered by exceptional circumstances. His Honour went on to say this:

> "A number of decisions which have been handed down by judges in this court, however, make it clear that such circumstances may exist as a result of the interaction of a variety of factors which of themselves might not be regarded as exceptional. What is ultimately of significance is that viewed as a whole, the circumstances can be regarded as exceptional to the extent that, taking into account the very serious nature of the charge to which they are applicable, the making of an order admitting the person to bail would be justified."

Miss King QC emphasised that although one may catalogue facts which should be taken into account to determine whether there are exceptional circumstances nevertheless in the final analysis the Court must consider the total factors in deciding the issue. I do not doubt for one moment that in the end a Court must consider the totality of factors put forward and consider the question whether in all the circumstances they are exceptional. However, I am of the opinion for the purposes of argument it is necessary to identify the factors which are put forward as constituting exceptional circumstances consider each of them and then answer the final question, namely, do they amount to exceptional circumstances? This is an important exercise so that the court can determine whether an alleged matter is relevant to the issue of exceptional circumstances. As I pointed out to Miss King QC, in the light of the Magistrate's reasons and bearing in mind the matters which were raised before her, the **[12]** conclusion was that she had misdirected herself and her discretion had miscarried accordingly.

Miss King QC identified the following factors which she said in total constituted exceptional circumstances and which justified the making of the order by the Magistrate. They were –

> (i) two out of the three co-accused had been granted bail and there should be parity of bail between co-accused;
>
> (ii) that the respondent was a young person aged 20;
>
> (iii) that he was able to reside in the home of his aunty and the surety, the aunty was a member of the police force in New South Wales and that the conditions under which bail had been granted were such that there was no real question of him failing to attend to answer bail;
>
> (iv) what was offered by the surety was his only asset and that shows the faith the surety had in the respondent and him answering his bail;
>
> (v) that in all the circumstances the offence was not at the end of the most serious in relation to attempting possession of heroin.

Miss King QC also pointed out that the prior convictions of the respondent save for the robberies related to offences committed when he was very young. I do accept that. However, the convictions for robbery were serious especially as violence was used on at least one occasion. On the question of parity the affidavit evidence established that two out of the other three co-accused had been granted bail and no appeal was made against the orders. Judy Pauline Hui, was granted bail some time after 3 June 1997 and her bail application was not opposed. The other co-accused Huy Bao Huynh was granted bail on 17 June 1997. His application was opposed but bail was granted. There is no evidence as to the fate of the other co-accused.

In support of this proposition that parity of bail is a relevant factor to take into account in determining exceptional circumstances, Miss King QC referred the Court to a decision of Coldrey J in the *Matter of Donald Stuart Browne-Kerr*, an unreported decision delivered on 10 August 1993. In that case His Honour was dealing with an application for bail by an applicant who was charged with trafficking and conspiracy to traffick in cannabis. He had to show cause under s4(4)

of the Act. His Honour at p3 said this –

> "What troubles me in this case is the fact that the co-accused Malcolm Browne-Kerr, who on the material before me is in a situation virtually indistinguishable from the applicant, has been granted bail in these matters. Whilst parity is not a concept which must inevitably transpose into a bail context, there is, in my view, a *prima facie* requirement that like cases are not treated unequally." [My emphasis].

His Honour made the comments in a context of considering the unacceptable risk factors as required by s4(2)(d) of the Act. But at p4 he took the requirement into account as a fact relevant to the show cause issue under s4(4). He said –

> "Ultimately, the factors of parity, the applicant's current family situation and the probable ancillary effect of that on his conduct, together with and to a lesser extent, the apprehended delay in the resolution of these matters, cause me to conclude, but I must say not without some hesitation, that sufficient cause has been shown to justify the grant of bail upon stringent conditions."

Given that there are different issues to consider depending on whether s4(2)(d) or s4(4) is being considered what his Honour said related to the exercise under s4(4). The question is whether the "parity factor" is relevant to a bail application? I have assumed that the alleged parity factor is similar to the principle applied in sentencing. The rationale for the principle and its application were discussed by the High Court in *Lowe v R* [1984] HCA 46; (1984) 154 CLR 606; 54 ALR 193; (1984) 58 ALJR 414; 12 A Crim R 408. At p623 Dawson J with whom Wilson J agreed said –

> "There is no rule of law which requires co-offenders to be given the same sentence for the same offence even if no distinction can be drawn between them. Obviously where the circumstances of each offender or of his involvement in the offence are different then different sentences may be called for. But justice should be even-handed and it has come to be recognized both here and in England that any difference between the sentences imposed upon co-offenders for the same offence ought not be such as to give rise to a justifiable sense of grievance on the part of the offender with the heavier **[14]** sentence or to give the appearance that justice has not been done." [My emphasis]

After referring to the English approach his Honour had this to say at p623 –

> "The decisions in this country do not appear to be quite as restrictive as this but on any view the interference of a court of appeal is not warranted unless the disparity is such that the sentence under appeal cannot be allowed to stand without it appearing that justice has not been done. The difference between the sentences must be manifestly excessive and call for the intervention of an appellate court in the interests of justice."

In applying the parity factor the first step for the court to take is to consider whether there are such similarities between the two offenders that the same sentence is called for. Gibbs CJ in the above case at p609 said this –

> "It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence, have to be taken into account." [My emphasis]

Recently the High Court considered the principle in *Postiglione v R* [1997] HCA 26; (1997) 189 CLR 295; (1997) 145 ALR 408; (1997) 94 A Crim R 397; (1997) 71 ALJR 875; (1997) 15 Leg Rep C1. The Court re-affirmed the principle stated in *Lowe v R ibid*. At p878 Dawson and Gaudron JJ said –

> "The parity principle upon which the argument in this Court was mainly based is an aspect of equal justice. Equal justice requires that like should be treated alike but that, if there are relevant differences due allowance should be made for them. In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances. If so, the notion of equal justice is not violated."

Later their Honours said –

> "However, the parity principle, as identified and expounded in *Lowe v The Queen*, recognises that

> equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to a 'justifiable sense of grievance.'"

The rationale for the principle is based on equal justice so that as between co-offenders there should not be a marked disparity which gives rise to a "justifiable sense of grievance." But as the High Court has emphasised the principle only **[15]** applies if "like can be treated alike". There must be such a degree of similarity between the co-offenders that they should be treated equally. The same sense of grievance leading to the appearance of injustice could result from the different treatment of co-accused on applications for bail. To that extent I am prepared to hold that the principle is relevant to the questions of exceptional circumstances as required by s4(2)(a) and (aa), the question of the applicant showing cause why his detention in custody is not justified under s4(4) and also in relation to the enquiry concerning unacceptable risk factors required by s4(2)(d) of the Act. However, in my view it would indeed be rare for the principle to have any relevant weight in bail applications because the circumstances invariably at all levels of determination are peculiar to the particular applicant.

In my opinion the principle can apply but it must be established that things are equal as between the co-offenders. The principle was stated in these terms by the South Australian Court of Criminal Appeal in *R v Tiddy* (1969) SASR 575 at 577 –

> "Where other things are equal persons concerned in the same crime should receive the same punishment; and where other things are not equal a due discrimination should be made."

Quoted with approval by McHugh J in *Postiglione v R ibid* at p882. Adapting that for a bail application the principle can be stated – where other things are equal applicants for bail should receive the same decision; where other things are not equal the bail applications may be dealt with differently. In my opinion a manifestly wrong decision to grant bail could not be used as a basis for the application of the parity principle in another bail application.

I now turn to the evidence concerning the co-accused. The respondent's solicitor, David Tonkin, in an affidavit sworn 28 July 1997, deposed –

> "I am informed and verily believe the co-accused July Pauline Hui was granted bail some time after 3 June 1997 and that her bail application was not opposed by the Crown. I am also informed and verily believe that she is charged with similar offences. The **[16]** co-accused Huy Bao Huynh was granted bail in the Magistrates' Court at Melbourne on 17 June 1997. His application was opposed by the Crown. His charges are similar to those of the respondent. Further, prior convictions of Huy Bao Huynh are similar to the prior convictions of the respondent with the exception that the respondent has no drug related convictions."

A copy of the prior conviction record of Huy Bao Huynh was exhibited. He is aged 21 years and at the age of 14 commenced his career in crime and for the following seven years has been in and out of court. The nature of his offences are stealing, receiving, illegal use of a motor vehicle, assault, and robbery in company, all before he turned the age of 17 years. Since reaching adulthood, he has been charged and sentenced for supplying and possession of drugs and was sentenced to a period of imprisonment. He was charged on 2 March 1997 with malicious wounding and assault occasioning bodily harm. Mr Polychronopoulos swore in an affidavit of 30 July 1997 the reasons why the said Huy Huynh was granted bail. It appears that his paternal grandmother who had raised him was undergoing heart surgery and there was a risk she may die. Evidence was also given that the accused might take his own life if deprived of the last opportunity to see his grandmother.

I have no other information relating to the two co-accused who have been bailed and I do not know the fate of the third co-accused. Given those circumstances I do not see how the parity factor could apply here. There are three other co-accused. Two have been granted bail. Details in relation to one have been given but not the other. The reasons why the bail application of Ms Hui were not opposed were not given. The court does not know the facts concerning the third co-accused who has not been bailed. The similarities between the respondent and Huy Bao Huynh relate to their age and their prior criminal history and their apparent involvement in the present case. However, the respondent was involved in this offence whilst on parole and in breach of an obligation to remain in the state of New South Wales. **[17]** Finally, I am by no means satisfied

that the decision to grant bail to Huy Bao Huynh was appropriate in the circumstances. All told it is my opinion that the parity factor does not apply here.

In my opinion the question of the likelihood of the applicant surrendering himself in answer to his bail, the imposition of strict conditions in circumstances where it is probable he will be closely supervised and will answer his bail are facts which are not relevant to the question of exceptional circumstances. See *Zoeller v Federal Republic of Germany* [1989] HCA 67; 90 ALR 161; 45 A Crim R 349; (1989) 64 ALJR 137. They are matters to be taken into account when the Court considers the question of whether there are unacceptable risk factors under s4(2)(d). In my opinion the fact that a surety is prepared to put up his life savings is also not an exceptional circumstance. The Legislature has made the courts approach in drug offences to bail quite clear. A person accused of a serious drug offence under the *Customs Act* is not entitled to bail unless it is established that there are exceptional circumstances which exist justifying the grant of the bail. The Legislature in its wisdom has imposed a very heavy test. It is not for the Court to question that wisdom. It may be in cases such as the present that the heavy stringent test or onus placed upon an applicant for bail is not appropriate. However, that is not a matter for me.

Further the recent amendment to the *Bail Act* reinforces the resolve of the Legislature to combat drug crimes and underlines the heavy burden that rests on applicants for bail. I agree that the alleged offence is not at the serious end of the spectrum and that is a factor to be weighed up. I do not accept that his age of 20 years at the time of the application is a matter of any real weight when considering exceptional circumstances. In considering all relevant factors in total, they do not constitute exceptional circumstances.

I am satisfied the learned magistrate erred in failing to record the reasons for granting bail in respect of both charges. I accept that the appellant must prove error. I am also satisfied that he has established error in relation to the reasons given by the Magistrate. But proceeding on the basis that she did give other reasons, taking into account all the facts as set out in the affidavit material and **[18]** exhibits no reasonable Magistrate in my view could have, applying the strict test under the Act, come to the view that there were exceptional circumstances entitling the respondent to bail. In my opinion the appellant has established error, and accordingly the order granting bail should be quashed. The orders I propose to make are –

(i) Appeal allowed against the order made by Magistrate Cotterell in the Melbourne Magistrates' Court on 4 July 1997 granting bail to Stephen Zade Abbott in respect of two alleged offences with which he was charged under the *Customs Act* 1901.

(ii) That the said order is quashed.

(iii) The bail is revoked.

(iv) The respondent Stephen Zade Abbott is committed to prison to await his trial.

APPEARANCES: For the appellant: Mr N Robinson, counsel. DPP (C'wth), Solicitors. For the respondent: Miss E King QC with Mr HG Wilcox, counsel. David Tonkin & Associates, Solicitors.
