13/06; [2006] VSC 158

SUPREME COURT OF VICTORIA

R v MOKBEL & MOKBEL

Gillard J

21, 24, 29 March, 19, 26 April 2006 — 199 FLR 176

CRIMINAL LAW – BAIL – ACCUSED RELEASED ON BAIL WITH ONE SURETY IN THE SUM OF $1 MILLION – ACCUSED FAILED TO ATTEND COURT – ACCUSED FAILED TO OBSERVE A CONDITION OF BAIL – "HAS FAILED" – MEANING OF – COURT TO DECLARE THAT BAIL FORFEITED AND ORDER THAT THE SURETY PAY THE AMOUNT UNDERTAKEN - SURETY SHOULD BE GIVEN NOTICE BEFORE ANY ORDER IS MADE – SURETY SHOULD BE PERMITTED TO CONTEST OR MAKE SUBMISSIONS IN RELATION TO ANY DECLARATION OR ORDER MADE – IN DEFAULT OF PAYMENT OF THE AMOUNT ORDERED THE SURETY TO BE IMPRISONED UP TO TWO YEARS – COURT TO DETERMINE THE PERIOD OF IMPRISONMENT IN DEFAULT OF PAYMENT – SUCH PERIOD MUST BE COMMENSURATE WITH THE AMOUNT OF THE UNDERTAKING – PERIOD OF TWO YEARS FIXED IN THE EVENT OF DEFAULT: *CROWN PROCEEDINGS ACT* 1958, s6(1), (4).

1. Once a Court is satisfied that an accused person has failed to observe a condition of bail, the Court is bound to declare that the bail be forfeited, and order that the surety pay the amount undertaken, that in default payment can be exacted by seizing and selling the property of the surety, and that in default in whole or in part, the surety be imprisoned for a term not exceeding two years. In other words, the undertakings given by both the accused and the surety are self-executing and the Court is obliged to make the declaration and the orders. S6(1) of the *Crown Proceedings Act* 1958 ('Act') requires the Court to make the declaration and the orders once it is satisfied that a person has failed to observe a condition of the bail. The Court has a discretion to allow time to pay and the period of imprisonment in default is a matter of discretion.

2. The law demands that notice be given to a party before any order is made affecting the interests or rights of the party, and although it is clear that in certain circumstances an application may be made *ex parte*, the general rule should be that notice should be given unless, of course, there are circumstances justifying an order being made *ex parte*. Orders made under s6(1) are fairly draconian and even though s6(4) enables the surety to return to court to contest any declaration or order made, as a general rule, notice should be given to the surety before an order is made under s6(1). This is because there are matters of some importance which a surety should be permitted to contest or make submissions in relation to, before orders are made against him or her. There is no doubt that any order made affects a surety's rights and interests. The surety may place evidence before the Court which requires further investigation before the Court hears the application. It is apparent from s6(3) that an order could be made *ex parte* and there may be circumstances which would require that course to be taken. For example, the surety's whereabouts are unknown or there is good reason why the order should be made in his or her absence. The Court, in order to protect the Crown's position, can use its power to grant an injunction to preserve a situation until the hearing. A surety must have the opportunity to be heard on a number of issues which affect his or her interests.

3. On one view of s6(1) of the Act, all the Crown has to prove is that the accused failed to attend and hence is in breach of a condition of bail. On the other hand, another interpretation would be that a person does not fail to observe a condition of bail unless the failure is the result of a deliberate act on the part of that person. In other words, there must be an element of fault. Accordingly, if an accused person was killed or injured and hence could not attend court, or was detained against his will, it could not be said that he failed to observe a condition of the bail. What the Crown has to prove is a question of interpretation of the phrase "a person has failed to observe a condition of bail". What does the phrase "has failed" mean in the context of the section and the Act?

4. There is no doubt that the Court must be satisfied of the proof of a fact, namely, that an accused has failed to observe a condition of bail. Like any other fact, it must be proven to the satisfaction of the Court and the standard of proof is on the balance of probabilities. As a general rule of law the law is concerned with proof of fault before an adverse order is made. There are exceptions but the law does not compel the impossible. If proof of fault was necessary, the quantum of proof will depend upon the circumstances of each case. In most cases the mere failure to attend may be sufficient. The surrounding circumstances may very quickly establish that it was a deliberate act.

5. In the event of failure by a surety to pay the sum ordered to be forfeited, the Court is empowered to imprison the surety for a term not exceeding two years. As a general rule, the greater the sum the longer the period of imprisonment. The period of imprisonment in default of payment must be commensurate with the amount of the undertaking. Whilst the period of two years' imprisonment is an inadequate period when the undertaking to pay a sum fixed as high as $1 million, in the present case the Court fixed the period of two years' imprisonment in the event of default.

GILLARD J:

1. These are applications by the Crown in the right of the Commonwealth and the Crown in the right of the State, for declarations that the bail granted to the prisoner be forfeited and for orders that the amount undertaken by the surety in each of two proceedings be paid to the Court forthwith.

2. The prisoner, Antonios Sajih Mokbel ("the prisoner"), was arrested on 24 August 2001 and charged with the offence of being knowingly concerned in the importation into Australia of a prohibited import, namely narcotic goods consisting of not less than a traffickable quantity of cocaine, which arrived in Australia on 6 November 2000, contrary to paragraph 233B(1)(d) of the *Customs Act* 1901. Upon arrest, he was remanded in custody and on 7 September 2001, he was granted bail by a magistrate on a number of strict conditions. The Crown appealed against the grant of bail and Cummins J, on 1 October 2001, allowed the appeal and the prisoner was remanded in custody.

3. During 2002 the prisoner made a number of applications to this Court for bail. Kellam J heard two applications for bail, and on the second occasion his Honour observed that there was a real possibility of inordinate delay occurring before the hearing of the committal proceeding and that in those circumstances the prisoner may establish exceptional circumstances. His Honour put the Crown on notice that the stage may be reached that the delay would result in the grant of bail.

4. In addition to the Commonwealth charge, the prisoner was charged by the State Police on 24 August 2001 with a number of serious charges relating to the trafficking of drugs in a commercial quantity. He was arrested as a result of those charges and remanded in custody. The applications for bail in 2002 were in respect to both the Commonwealth and State charges.

5. On 4 September 2002, Kellam J granted the prisoner bail having been satisfied that there were exceptional circumstances because of the indefinite delay. The conditions were onerous. A surety of $1 million was required. The accused was required to report twice daily to a local police station. The delay in holding the committal in both proceedings was because some members of the former Victorian Drug Squad, who were to be witnesses in both proceedings, were under investigation in respect to allegations of corruption.[1] His Honour fixed a surety in the same sum in respect of the bail granted in both sets of charges, and noted that there was one surety, namely Mrs Renate Mokbel, who was joint surety in respect to both prosecutions. The amount of the undertakings was therefore $1 million total for both proceedings. Whilst each set of charges was treated separately for the purposes of bail and was the subject of separate orders, it has been accepted by both the Commonwealth and State DPPs that the present applications deal with one person, who is the surety in each case and who undertook to pay a total sum of $1 million in respect to both proceedings. Accordingly, if orders are made in each proceeding, the total sum to be paid is $1 million and the default provision in respect to imprisonment is up to two years.

6. There was an inordinate delay between 4 September 2002 and the committals. The Commonwealth committal took place in November 2004. Up to that time, the prisoner had complied with the strict conditions imposed by the order granting bail. He honoured his bail undertaking by appearing at the committal proceeding. On 26 November 2004, a magistrate committed the prisoner for trial and bail was again fixed subject to strict conditions. The magistrate required the prisoner to attend the Supreme Court at Melbourne on 1 March 2005 or as otherwise directed by the Court, on his own undertaking, and with one surety in the sum of $1 million. He was to reside at certain premises in Southgate, was bound to surrender any passport he held, was bound not to attend at any point of international departure, and not to make contact with any witness. He was bound to report each Monday, Wednesday and Friday at a local police station. On that day, the prisoner signed an undertaking of bail for appearance at trial and the surety, Mrs Renate Lisa Mokbel of 11 Downs Street, Brunswick, signed the undertaking as surety. She is the prisoner's

sister-in-law, being the wife of his brother. She also swore on that day an Affidavit of Justification by Surety to Undertaking, and a number of documents were supplied to the Registrar of the Magistrates' Court purporting to show her interest in a piece of real estate at 11 Downs Street, Brunswick. The order for bail was extended from time to time. On 24 August 2005, I fixed the trial date for 26 October 2005 and ordered that the accused was to continue on bail on the same conditions until that date.

7. The committal in respect of the State charges was heard at the beginning of 2005 and on 15 February 2005 the prisoner was committed for trial on three counts of trafficking in drugs. The magistrate released him on bail, conditioned to appear before the Supreme Court at Melbourne on 3 May 2005, with one surety of $1 million and subject to a number of conditions. This bail was also extended from time to time. In the course of the directions hearings conducted by me in mid to late 2005, it was agreed between the Director of Public Prosecutions (Victoria) and the prisoner's lawyers that the State trial should take place after the completion of the Commonwealth trial. During 2005, it was stated from time to time by counsel for the Director of Public Prosecutions (Victoria) that it was anticipated that the prisoner would plead guilty to three counts of trafficking in a drug of dependence. Despite these indications, counsel for the prisoner did not commit the prisoner to a plea of guilty, but observations were made suggesting that he would plead guilty to the three charges. On 29 March 2006, the DPP (Victoria) filed a presentment in the Court alleging three counts of trafficking in a drug of dependence during the period between 13 October 2000 and 27 December 2000.

8. In October 2005, the prisoner was charged by the Commonwealth police with a number of additional drug charges. He was remanded in custody and a magistrate on 23 November 2005 released the prisoner on bail in respect of those charges. In the meantime, the prisoner honoured his obligation to attend the Supreme Court on the date of the trial, namely 26 October 2005, although it has to be said that he was, at that stage, in custody in relation to the additional Commonwealth charges. I remanded him in custody. I had earlier vacated the trial date and fixed 1 February 2006 for the hearing of the Commonwealth charge. The State charges were adjourned to that date.

9. As the prisoner had answered his bail on 26 October 2005, application was made to extend the existing bail, which I heard on 29 November 2005. By this date, a magistrate had ordered that the prisoner be admitted to bail in respect of the new Commonwealth charges. I extended bail in the Commonwealth proceeding on conditions, namely, that the prisoner attend at the Supreme Court of Victoria on 1 February 2006, reside at a certain address, report twice daily to the officer in charge at the South Melbourne Police Station, not contact directly or indirectly any Crown witness, surrender any passports and not seek to obtain one, not attend at any point of international departure, and not contact the four men involved in the importation. The Court also imposed a curfew between 10.00pm and 7.00am each night. He was bailed on his own undertaking with one surety in the sum of $1 million.

10. The bail in relation to the State charges was also extended on the same conditions.

11. On that day, the prisoner attended before the Deputy Prothonotary of this Court, and signed the undertaking of bail, and the surety Mrs Mokbel signed the document acknowledging receipt of the notice setting out the obligations of the prisoner concerning the conditions of his bail and the consequences of his failure to comply with the conditions. She further undertook "to pay to the Prothonotary the amount of bail specified on the back of this form in the event that the defendant fails to observe a condition of bail". The undertaking of bail was that she would pay the amount of $1 million. The undertaking was signed in relation to both the Commonwealth proceeding and the State proceeding.

12. The trial was mentioned on 31 January 2006 and was adjourned to 7 February 2006 at the request of defence counsel. The prisoner attended the hearings. Bail was continued on the same conditions, until further order. The jury was empanelled on Monday, 13 February 2006 and the trial commenced. The prisoner had for a period in excess of three years and four months complied with the conditions of bail and had attended every Court hearing. The continuation of bail at the commencement of the trial is the usual order absent any application to revoke the bail.

13. The Crown called some fifty witnesses and the defence called three. The prisoner did not give evidence. At the end of the Crown case, a submission of no case was made on behalf of the prisoner. The application was rejected. During the course of the defence case, a late application was made to adduce evidence concerning the effect of the law of the United States of America on the passage of the parcels containing the cocaine through that country. The defence failed to persuade the Court of what was the relevant American law at the time. Despite this, an application was made at the end of the defence case that the jury be directed to acquit the accused. That application also failed. The defence case closed on Thursday, 16 March 2006, and the prosecutor, Mr D. Parsons SC commenced his address. The following day, application was made by the Crown to revoke the prisoner's bail. The Crown did not place any material before the Court in support of the application, other than to observe that the Crown case was a strong one. After hearing submissions, the Court stated that bail would be revoked at the end of counsel's addresses. This was anticipated to be the following Tuesday. Friday, 17 March 2006 was the twenty eighth day of the trial, and the prisoner had strictly complied with all conditions of his bail. Nothing was placed before the Court to suggest that he would not continue to honour his undertaking. There is no fixed practice as to when bail should be revoked during the course of a criminal trial. The question is left to the discretion of the presiding judge. Experience shows that the revocation could take place at any time from the end of the Crown case up to verdict. I interpolate to observe that since the verdict, the Court has been apprised of a number of matters which were relevant to the question of bail continuing. I refer in particular to the revelation that the Victorian Police were investigating Mr Mokbel's alleged involvement in a "Gangland" murder and had made a decision to arrest him in respect to the crime.

14. On the morning of Monday, 20 March 2006, the Court was informed at 10.30am that the prisoner was missing and had not been seen since 5.00pm the previous evening, when he reported to the South Melbourne Police Station. On that day, a warrant to arrest the prisoner was issued by the Court. The trial continued and on 28 March 2006, the jury brought in a verdict of guilty. The Court sentenced the prisoner on 31 March 2006 to 12 years' gaol and fixed a minimum period of nine years before the prisoner was eligible for parole.

15. In the meantime, the Crown in the right of the Commonwealth applied for a declaration and orders pursuant to s6(1) of the *Crown Proceedings Act* 1958 ("the Act"), and on 24 March 2006 the application was adjourned until the following Wednesday, 29 March 2006. The Court granted an injunction restraining the surety from in any way dealing with her real estate or the shares in a company called J.R. Mokbel Pty Ltd.

16. On 29 March 2006, the Crown in the right of the State of Victoria filed a presentment in the Court in relation to the three State charges and the Court ordered, pursuant to s26(2) of the *Bail Act* 1977, that a warrant be issued for the apprehension of the prisoner. The Crown in the right of the State of Victoria also sought an order against the surety pursuant to s6(1) of the Act. Both applications were adjourned to 19 April 2006.

17. Section 6 of the Act provides for a two hearing process. The first hearing pursuant to s6(1) requires the Crown to prove that the accused person failed to observe a condition of bail. Once that is proven, certain consequences follow by reason of the provisions of the sub-section. It provides:

> "(1) Where a court is satisfied that a person has failed to observe a condition of bail the court shall declare the bail to be forfeited and shall order that the amount undertaken by the surety or sureties to be paid to Her Majesty in the event of such a breach be paid to the proper officer of the court forthwith or within such time as the court allows and that in default of payment of that amount in accordance with the order that the amount be obtained by seizing and selling the property of the surety or sureties and in default, in whole or in part, that the surety or sureties be imprisoned for the term (not exceeding two years) fixed by the order."

18. If the Court is satisfied of the failure to observe the condition of bail, then the Court shall—

> (i) declare the bail to be forfeited
> (ii) order that the amount undertaken by the surety be paid to Her Majesty by payment to an officer of this Court forthwith or within such time as the Court allows;
> (iii) that in default of payment of that amount it be obtained by seizing and selling the property of

the surety; and
(iv) in default in whole or in part that the surety be imprisoned for a term not exceeding two years fixed by order.

19. In my opinion, once the Court is satisfied that an accused person has failed to observe a condition of bail, the Court is bound to declare that the bail be forfeited, and order that the surety pay the amount undertaken, that in default payment can be exacted by seizing and selling the property of the surety, and that in default in whole or in part, the surety be imprisoned for a term not exceeding two years. In other words, the undertakings given by both the accused and the surety are self-executing and the Court is obliged to make the declaration and the orders. In *R v Baker*,[2] Gowans J, dealing with the then s5 of the Act as amended, held that the Court was obliged to make the necessary orders in accordance with the provisions of the section. His Honour held that he had no discretion in the matter and was obliged to make the orders under the section. In my opinion, s6(1) requires the Court to make the declaration and the orders once it is satisfied that a person has failed to observe a condition of the bail, although the Court has a discretion to allow time to pay, and further the period of imprisonment in default is a matter of discretion.

20. The second hearing is found in s6(4) of the Act. The sub-section permits a surety, within a 28 days' period after the order is made or brought to the surety's attention, to apply to the Court "to vary or rescind the order on the ground it would be unjust to require him to pay the amount undertaken to be paid having regard to all the circumstances of the case". The Court may vary or rescind any order made. Mr Lasry QC, who appeared for Mrs Mokbel, informed the Court that in the event of orders being made under s6(1), his client would make an application to the Court pursuant to that sub-section. The applicable principles were discussed in *Re Condon*[3] and *Re Melincianu*.[4]

21. Regulations have been made under the Act which prescribe the forms to be used in respect of forfeited recognizances and breach of bail. See *Crown Proceedings Regulations* 2002 SR No.2/2002. Regulations have also been made under the *Bail Act* 1977 which prescribe the forms to be used for the purposes of the *Bail Act* 1977 – see *Bail Regulations* 2003 (No. 1 of 2003). There were earlier Regulations – see *Bail Regulations* 1992 No. 177.

22. The Court required the Crown in both applications to give notice to the surety of the applications made pursuant to s6(1). The surety has been represented throughout by solicitors, and Mr Lasry has appeared on her behalf at the hearings.

23. Orders made under s6(1) are fairly draconian and even though s6(4) enables the surety to return to court to contest any declaration or order made, in my opinion, as a general rule, notice should be given to the surety before an order is made under s6(1). I say that because there are matters of some importance which a surety should be permitted to contest or make submissions in relation to, before orders are made against him or her. There is no doubt that any order made affects a surety's rights and interests. The first matter is whether the Court is satisfied that the accused person has failed to observe a condition of bail. The second matter is the period of imprisonment, if declarations and orders are made, and whether the surety should be given any time in order to pay the amount of the undertaking, and if so, what amount of time. Finally, and importantly, the Court must consider whether the application should be adjourned to enable further investigation to be carried out. The surety may place evidence before the Court which requires further investigation before the Court hears the application. It is apparent from s6(3) that an order could be made ex parte and there may be circumstances which would require that course to be taken. For example, the surety's whereabouts are unknown or there is good reason why the order should be made in his or her absence. The Court, in order to protect the Crown's position, can use its power to grant an injunction to preserve a situation until the hearing.

24. The law demands that notice be given to a party before any order is made affecting the interests or rights of the party, and although it is clear that in certain circumstances an application may be made *ex parte*, in my view the general rule should be that notice should be given unless, of course, there are circumstances justifying an order being made *ex parte*. The Full Court in *O'Sullivan v Long*[5] held that a surety should not be judged to pay the sum of the surety or to be subject to a warrant of distress until the person was given opportunity to be heard. In that case,

the Court was dealing with s16 of the *Justices Act* 1915. The Court noted that the decision was not in accordance with the practice which had been followed for many years, and that it also could cause considerable inconvenience in the lower court, but as the learned Chief Justice said:

> "That is a matter with which Parliament can deal if it is desired."

25. I do not believe that inconvenience will result if notice has to be given and the interests of the Crown can be protected by an interlocutory injunction. A surety must have the opportunity to be heard on a number of issues which affect his or her interests.

26. The Court raised the question: What does the Crown have to prove before the declaration and orders are made under s6(1)? On a literal interpretation of the sub-section, the mere failure to attend at court would invoke the jurisdiction to declare that the bail be forfeited and an order that the surety pay the amount to the proper officer of this Court. Indeed, that may have been the approach taken by Crockett J in *Re Condon*.[6] In that case, the accused failed to answer a charge of armed robbery and Crockett J ordered the surety to pay the sum of $5,000 and in default of distress, imprisonment for 12 months. Application was then made on behalf of the surety to vary or rescind the amount pursuant to the then equivalent of s6(4). His Honour,[7] having dismissed the application, observed that the reason why the accused failed to answer his bail may have been due to him being murdered. His Honour observed that the material which he had looked at indicated "that it is not beyond the bounds of possibility that such a fate may have befallen Garry and his non-attendance at Court would possibly be due to his untimely death." His Honour noted that if later it was ascertained that that was so, it would be a basis for setting aside the order he had earlier made dismissing the application for relief, but by then it would be too late. His Honour was assured by counsel for the Crown that there would be a gratuitous refund of the forfeited security if that was the position, although his Honour's order could not be set aside.

27. It is not possible to ascertain from the report of his Honour's reasons, that he was aware of the possibility of the accused person dying when he made the order forfeiting the security at the first hearing. It is open to infer that the information suggesting an untimely death was placed before the Court on the second application. His Honour adverted to the question of adjourning the second hearing but declined to do so in the circumstances.

28. On one view of s6(1), all the Crown has to prove is that the accused failed to attend and hence was in breach of a condition of bail. On the other hand, another interpretation would be that a person does not fail to observe a condition of bail unless the failure is the result of a deliberate act on the part of that person. In other words, there must be an element of fault. Accordingly, if an accused person was killed or injured and hence could not attend court, or was detained against his will, it could not be said that he failed to observe a condition of the bail. What the Crown has to prove, in my opinion, is a question of interpretation of the phrase "a person has failed to observe a condition of bail". What does the phrase "has failed" mean in the context of the section and the Act?

29. There is no doubt that the Court must be satisfied of the proof of a fact, namely, that an accused has failed to observe a condition of bail. Like any other fact, it must be proven to the satisfaction of the Court.

30. In *The King v Frank Smith*,[8] the defendant was convicted of stealing a motor car and was discharged conditionally upon entering into a recognizance of £50 to be of good behaviour for two years. Some months later the defendant was brought up for sentence on an allegation that he had broken his recognizance. On appeal an issue arose whether it had been proven that he had broken his recognizance. The Court said:[9]

> "Where a defendant is brought up on an allegation that he has broken his recognizance, he cannot properly be sentenced unless the allegation of fact is proved, and it must be proved as any other allegation of fact is proved in a criminal court. It must be supported by the sworn evidence of witnesses for the prosecution and the defendant must be allowed to cross-examine these witnesses and also give evidence himself and to call witnesses to give evidence on his behalf."

31. In my opinion, the Crown has to prove that the accused has failed to observe a condition of bail, and that fact has to be proven like any other fact in a proceeding. It is noted that the Court

in the *Smith* case appeared to state that the standard of proof was beyond reasonable doubt. In the later case of *R v Marlow JJ; ex parte O'Sullivan*,[10] the Court held that where it was alleged that there was a failure to fulfil a recognizance to keep the peace, the procedure for forfeiture was begun by a complaint and was a civil process, and accordingly the standard was on the balance of probabilities. In my opinion, the present proceeding is analogous to a civil proceeding and this is clear from the fact that Part I of the Act is concerned with the recovery of debts and property by the Crown. Further, by reason of s18, Her Majesty is entitled to full costs in all cases in which "a plaintiff in any civil proceeding between subject and subject would be entitled thereto". Mr Lasry did not submit to the contrary and indeed conceded that the standard of proof would be on the balance of probabilities.

32. The word "failed", like so many words of our language, has a variety of meanings which depend upon the context in which it is used. A person bailed is obliged to comply with the terms of the bail, the most important of which is to attend at the place and on the date specified. The conditions of the undertaking in this case are that the accused must appear on the date specified at a time before the Supreme Court of Victoria at Melbourne and then surrender himself and not depart without leave of the Court, and as often as leave is given, return at the time appointed by the Court and again surrender himself.[11] The word "failure", depending on the context, may mean that a person does not fail to observe a condition unless that person has a capacity to comply with the condition. As a matter of common sense, it could hardly be said that a person failed to attend at a particular place on a particular date if that person was dead.

33. In *Ingram v Ingram*,[12] Jordan CJ said:

> "The meaning of the word 'fail' depends upon the context in which it is found. In some contexts it may mean simply the omission to do the thing in question, irrespectively of any reason which may have existed for his not doing it: [authorities quoted]. In other cases it may mean an omission to do the thing by reason of some carelessness or delinquency on his part, but not omission caused by impossibility for which the person in question is not responsible: ... In other cases, it may mean omission to do the thing, but so that omission caused by impossibility arising from some causes is included and from others is excluded."

34. It is trite to observe that what the words "has failed" mean must be determined giving effect to the purpose of the Act and, after considering the words in context, taking into account the Act as a whole. The object of statutory construction is to determine what Parliament intended. The primary source of the intention is the words used, construed in their normal and natural meaning, in context and after considering the statute as a whole. Statute requires a court to promote the purpose or object underlying the Act in preference to a construction that would not promote that purpose or object. See s35(a) *Interpretation of Legislation Act* 1984. In *Project Blue Sky Inc v ABA*[13] four members of the High Court said:[14]

> "However, the duty of a court is to give the words of the statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of the legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

35. It is observed that the consequences of a literal or grammatical construction are matters that are relevant to the Court's task. One consequence of a literal application of the words would be that if the person bailed was dead, the Court would nevertheless be bound to make the declaration and orders under s6(1) even though there was no fault on the part of either the accused person or the surety. It is arguable that that would be an absurd result and one not intended by Parliament. On the other hand, the absurd consequences could be overcome by application being made under s6(4), and accordingly the opportunity to have a second hearing would overcome any absurd result.

36. In *Marcusson v Southern Shipping Co*,[15] the High Court was concerned with a provision in the *Excise Act* of the Commonwealth which provided that if a person failed to keep safely goods which have been entrusted to him by Customs, the person was obliged to pay to the Commonwealth an amount equal to the amount of unpaid excise duty. In that case, excisable goods on which excise had not been paid were delivered to a carrier at a wharf and, pending being loaded aboard

a ship, were placed in a store which was then locked and the keys were lodged in the Customs office. Subsequently, the goods were stolen from the store and it was accepted by Customs that they were not stolen by the body responsible for their safe keeping. The question arose whether in the circumstances the body concerned had failed to keep the goods safely. In the circumstances it was held that the carrier was liable. McTiernan J[16] discussed the word "fails". His Honour said:

> "'Fails' is a word with various meanings. I think that in s60 its appropriate meaning is that the person concerned is to be liable if he comes short of keeping the goods safely, that is preserving them from loss or damage. The word 'fails', in my opinion, is not strong enough to impose upon the person concerned so onerous a duty as that of avoiding the unavoidable. The plaintiff's contention would mean that it does. *Lex non cogit ad impossibilia.* [The law does not compel the impossible.] Paragraph (a) should be read subject only to that presumption."

(Emphasis added).

37. As a general rule the law is concerned with proof of fault before an adverse order is made. Of course there are exceptions. But the law does not compel the impossible.

38. In my opinion, there are countervailing arguments of substance concerning the meaning and application of the words "has failed to observe a condition of bail". The question is, does the Crown have to prove that the breach was deliberate? In the circumstances it is unnecessary for me to answer the question because in any event, the Crown has placed evidence before the Court which has not been contested by other evidence, and which proves on the balance of probabilities that the absence of the prisoner on 20 March 2006 was the result of a deliberate act. Further, the Court raised with counsel the issue, and counsel had not had the opportunity of fully considering and researching the issue. In the circumstances I will briefly note some of the arguments:

- A literal construction not involving proof of fault may lead to an absurd result;
- However any absurd result may be overcome by a further application under s6(4);
- What the words mean must depend upon the context and the purpose of the statutory provision. The meaning will vary according to the context;
- The law is usually concerned with fault and does not compel the impossible;
- The difficulties involved in the Crown adducing evidence of fault militates against an interpretation based on fault. On the other hand, the Crown would only be expected to adduce such evidence as it could in all the circumstances and the mere absence of suspicious circumstances may be sufficient to prove fault on the part of the accused;
- A literal application without proof of fault would mean that a surety would be the subject of a penalty even though it was impossible for the surety to comply with his or her obligations;
- The purpose of the undertaking given by a surety and the consequences which flow from that undertaking are to ensure that the surety takes steps to ensure that the accused attend at trial. The undertaking of the surety and the consequences of a failure are intended to act as a deterrent to the accused absconding. These purposes are not defeated if the failure of the accused to attend results from something beyond the control of the accused, such as death or kidnapping.

39. In my opinion, if proof of fault was necessary, the quantum of proof will depend upon the circumstances of each case. In most cases the mere failure to attend may be sufficient. The surrounding circumstances may very quickly establish that it was a deliberate act.

40. The principal obligation of a surety is to ensure that the accused person bailed honours his obligation to appear at the trial. The failure to do so exposes the surety to a financial penalty, which in certain circumstances may be substantial, and in default of payment, a period of imprisonment, which may be up to two years. By giving an undertaking, the surety obliges himself or herself to honour it.

41. The informant, Federal Agent Ragg, gave evidence relevant to the question of whether the prisoner had failed to observe a condition of bail by absconding. In addition to the evidence called, there are a number of factual matters which have been established relevant to the exercise. As the presiding judge at trial, I was able to observe the witnesses and appraise the evidence and, in my opinion, I am entitled to take into account that experience in considering whether the Crown has proven on the balance of probabilities the failure to observe a condition of bail. Of course I was obliged to reveal my views to the parties and I did so. I find that the following facts have been established:

- The prisoner failed to attend his trial on 20 March 2006, and there is no evidence that he is dead, has suffered an injury precluding him from attending at Court or is being detained against his will;

• The prisoner failed to attend at a point in the trial when all evidence had been adduced, the Crown prosecutor had addressed the jury for a day and a half, and it was evident that the Crown case was indeed compelling. This would have been obvious to the prisoner's counsel and, in the normal course of events, would have been conveyed to the accused;
• The submissions of no case and a directed acquittal failed and when coupled with the compelling Crown case, the prisoner's chances of acquittal were extremely slim.
• Conclusionary evidence given by Mr Ragg prior to the charge was to the effect that, based upon information he had, it was his belief that the accused had absconded. It was submitted by the Crown that the failure of defence counsel to cross-examine Mr Ragg at the time should be taken into account, but in my view it should not. The interests of the surety are different to those of the accused and the failure of the accused's counsel to cross-examine could not in any way be used against the surety;
• The surety has not placed any evidence before the Court on this application. Through her counsel, she has informed the Court that she will make an application pursuant to s6(4) of the Act in the event of an order being made under s6(1), and that she does not wish at this stage to place any evidence before the Court;
• Federal police have interviewed the prisoner's family members, including the surety and known associates, and their enquiries revealed that the said persons had no idea where the prisoner was or why he failed to attend. No-one was able to assist the police in locating the prisoner and no-one has reported to the police a concern for his safety;
• Enquiries of a variety of informers, including registered informers, did not disclose any information that the prisoner had been murdered or was being held against his will;
• Information was received that the prisoner had transferred quantities of cash in the order of $20 million overseas in the past three years and that he was in possession of a number of false passports;
• Further information gathered by the Australian Federal Police leads to the conclusion that the prisoner is residing in an overseas country, which is known to the police but which, at this stage, is not disclosed, and that he departed Australia unlawfully during a period of approximately 14 days after 20 March 2006;
• It was the opinion of senior officers of Victoria Police that if the prisoner had been the victim of a "Gangland" killing his body would have been found shortly after his murder;
• The prisoner had been named by an informant as being involved in a contract "Gangland" murder, and a statement to that effect had been made available to the prisoner. It is believed that the prisoner was aware of the contents of the statement on Tuesday, 14 March 2006 and that he believed he was about to be arrested by Victorian police;
• That Australian Federal Police were told on Friday, 17 March 2006 that Victorian police proposed to arrest the prisoner and charge him with being involved in the murder.

42. I am satisfied that the Crown has proven on the balance of probabilities that the prisoner, Antonios Mokbel, failed to observe a condition of bail by absconding and failing to attend the trial on Monday, 20 March 2006. It follows that the Court must order that the $1 million undertaken to be paid by the surety, Mrs Mokbel, be paid to an officer of this Court. The Court has power to give time to pay and it seems appropriate in the circumstances, bearing in mind that the surety's assets comprise her residential property, that she be given time to pay the amount. According to the Affidavit of Justification by the surety, she has real estate consisting of a dwelling house at 11 Downs Street, Brunswick, and it has a value in excess of $1 million. The evidence attached to that affidavit reveals that the property is registered in the name of a company called J.R. Mokbel Pty Ltd. The surety is the sole director and shareholder of that company. Mr Lasry has informed the Court that if an order is made under s6(1) then the surety will make an application under s6(4), and that application must be made within 28 days of the making of the order. By reason of s6(6), the surety is obliged not less than 28 days before the hearing of the application to serve on a person a true copy of the application. Section 6(7) empowers the Court to stay the operation of the order made. I propose in the circumstances to grant her 31 days in which to pay the said sum. This will enable her to make application within 28 days and to apply for a stay.

43. That then brings me to the question of the period of imprisonment in the event of Mrs Mokbel failing to pay the $1 million. The Court is empowered to imprison the surety for a term not exceeding two years.

44. The criminal justice system in this country dates back to the First Fleet. Our early settlers brought with them a criminal justice system that went back many centuries in England. A feature of the English criminal justice system was the right of an accused to be released on bail pending his or her trial. In cases of treason, bail could only be granted by the Secretary of State or a judge of the King's Bench Division, but in felony cases it was a matter for the local justices' discretion. In relation to misdemeanours, the justices did not have a discretion when the preliminary examination was completed, and were bound to release the accused upon the latter finding adequate bail.

Indeed, the *Bill of Rights* of 1689 provided that excessive bail was not permitted, that is, that the conditions of bail should not be set to deter the release of the accused pending trial. The right to bail goes back in English and Australian law for centuries. The right is enshrined in s4(1) of the *Bail Act* 1977.

45. An important and essential part of the bail system was the provision of a surety. The surety undertakes to ensure that the accused appears at his trial. That is the prime obligation. The procedure of releasing a person into the custody of a surety goes back over many hundreds of years. In 2 *Hawkins Pleas of the Crown*, Chapter 15, s3, the learned author stated the effect of granting bail, namely, that it was not to set the accused free but to release him from the custody of the law and to entrust him to the custody of his sureties, who were bound to produce him to answer on his trial at a specified time and place.

46. As stated, the right to bail has been recognised from time immemorial. In *R v Badger*[17] Lord Denman CJ said:[18]

> "The law is clear, and is as old as the statute of Westminster the First, 3 ed. 1 c 15. Lord Coke in his commentary upon that statute (2 Inst 191) says that 'to deny a man plevin that is plevisable, and thereby to detain him in prison, is a great offence, and grievously to be punished'. And Lord Hale in 2 Pl Cr p.135 Part II, c 15 adopts the same remark: 'and Hawkins (Part 2, c 15, s 13(b) speaks of refusals of bail as an indictable offence. Blackstone referring (4 Com c 22, p.297) to the ancient statutes, the Habeas Corpus and Bill of Rights, calls it 'an offence against the liberty of the subject.' If then, such refusal took place from improper motives, it might be treated as a criminal offence and made subject to an indictment information."

47. Although an accused had a right to obtain bail, it was a matter for the person to whom application was made to determine whether or not bail should be granted, and if so, on what condition. In considering the question, the prime consideration was whether there was a likelihood of the accused failing to appear at his trial. Relevant to that exercise was the gravity of the charge, the strength of the case against the accused, and the financial position of the accused. Further, the likelihood that the accused may attempt to interfere with witnesses. But what was vital to the whole exercise was the availability of a person or persons who were prepared to act as surety for the accused. In respect to a surety, it was necessary to consider whether the surety was independent of the accused and understood and appreciated his or her obligations.

48. The word "bail" has two meanings. One meaning is the temporary relief from imprisonment on finding sureties or security to appear for trial. This is the modern meaning. This goes back to 1768. But the second meaning is the security so given, that is, the person or persons who became sureties. This is traceable back to 1495. See *Shorter Oxford English Dictionary*.

49. The learned authors Pollock and Maitland, in *History of English Law*, Volume 2, at p585, summarised the position in England prior to 1275 as follows:

> "The law was gradually growing less favourable to release. In one passage Bracton repeats Glanvill's words:- 'if a man has been appealed or indicted of any felony, other than homicide, he is usually replevied.' In another passage we find a far severer doctrine:- 'the man who has been taken for high treason is absolutely irreplevisable; the man who has been taken for any crime which is punished by death or mutilation will hardly be able to exhort from the King the privilege of being released on bail.' The records of practice seem to show that some sheriffs were only too glad to dismiss prisoners from custody. Then in 1275 one of Edward I's momentous statutes, after accusing the sheriffs both of retaining those who were, and releasing those who were not, replevisable, and after admitting that the law about this matter had never been precisely determined, proceeded to lay down rules which correspond rather with Bracton's severer doctrine than those with his more lenient doctrine, and these statutory rules became the law for the coming centuries."

50. Sureties were very important to the granting of bail. Early English law pointed to an ancient and extremely rigorous form of suretyship, which rendered the surety liable to suffer the punishment that was hanging over the head of the released accused if the accused failed to attend. And although in the early days the undertaking to forfeit a sum was indeed rare, in later centuries it became the norm. See *ibid* at pp589-90.

51. The right to bail has continued throughout the centuries. The ancient right was recently

restated by the Privy Council in *Hurnam v State of Mauritius*.[19] In that case, their Lordships referred to the jurisprudence on the European Convention "which recognises that the right to personal liberty though not absolute ... is nonetheless a right that is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention. The European Court has clearly recognised five grounds for refusing bail (the risk of the defendant absconding; the risk of the defendant interfering with the course of justice; preventing crime; preserving public order; and the necessity of detention to protect the defendant; ... but it has insisted that a person must be released unless the State can show that there are 'relevant and sufficient reasons' to justify his continued detention. ... As put by the Law Commission in its report paragraph 2.28 'Detention will be found to be justified only if it was necessary in pursuit of a legitimate purpose or ground'."

52. There is always a risk when a person is granted bail pending a trial, or where bail is continued in the course of a trial, that the accused may abscond. Every week in this State, many persons are given bail subject to conditions which vary from case to case. Sometimes bail is granted on the undertaking of the accused person himself or herself, or on the undertaking of the accused and that of a surety or sureties. The object of imposing conditions is to minimise the risk that the accused person will abscond. The greater the risk, the stricter of conditions.

53. In this case, the prisoner was granted bail in respect to two separate criminal proceedings. Conditions were imposed. One was the requirement of a surety in the sum of $1 million. The importance of the undertaking by the surety cannot be overstated. The Court, once it grants bail, is not in a position to supervise obedience to the order and conditions. It relies upon a surety or sureties to perform that task. In that sense, the surety acts as both the eyes and ears of the Court. The surety undertakes the duty to ensure that the principal, that is, the accused, honours his undertaking to the Court to appear at trial and to attend each day of the trial. The obligation was stated by Lord Alverstone CJ, speaking for the Court in *The Queen v Porter*,[20] when his Lordship said:

> "It is in the interests of the public that criminals should be brought to justice, and, therefore, that it should be made as difficult as possible for a criminal to abscond; and for many years it has been held that not only are [sureties] responsible on their recognizance for the due appearance of the person charged, but that, if it comes to their knowledge that he is about to abscond, they should at once inform the police of that fact."

54. Section 9 of the *Bail Act* 1977 deals with sureties. Section 5 of the *Bail Act* 1977 deals with conditions of release on bail. Section 5(1) obliges the Court to consider the release of an accused person on bail in a particular sequence, and concludes that the Court "shall not make the conditions for his entry into bail any more onerous for the accused person than the nature of the offence and the circumstances of the accused person appeared to the Court to be required in the public interest." This adopts the requirement of the ancient Bill of Rights. A surety must be at least 18 years of age, must not under any disability and must be worth not less than the amount of the bail. Under s21, where a surety fears the accused will not appear, the surety may apprehend the person bailed and take steps to bring him or her before a court. Under s23, a surety may seek to be discharged from liability as a surety.

55. The surety must be independent and undertake a real obligation. This means that the surety must put his or her money at risk. Hence, by reason of s31 of the *Bail Act*, it is a criminal offence for a person to indemnify a surety, and an agreement by which an accused undertakes to indemnify a surety constitutes a conspiracy to effect a public mischief.[21] It is vital that a surety understands the obligation of his or her undertaking, and the obligation requires the surety to ensure that the accused honours his or her undertaking to attend the trial.

56. In addition to the undertaking given by the surety, the amount of the undertaking is fixed to provide a disincentive to the accused to abscond. The amount of the surety exerts a pressure on the accused to honour his undertaking. It was described as "the real pull of bail" by Lord Widgery CJ in *R v South Hampton Justices, ex parte Corker*,[22] where his Lordship said:

> "The real pull of bail, the real effective force that it exerts, is that it may cause the offender to attend his trial rather than subject his nearest and dearest who have gone surety for him to undue pain and discomfort."

(Quoted in *R v Uxbridge Justices ex parte Heward-Mills*.[23])

57. The amount of $1 million is an extremely large amount and was fixed no doubt to minimise the risk that the prisoner might abscond. The period of the imprisonment in default of payment or part thereof is up to two years. There are no criteria specified in the section to guide a court in determining the period. As this is the first application in a two application procedure, the efforts made by the surety to ensure the appearance of the accused will not normally be placed before the Court on this application and any question of the blameworthiness of the surety is unlikely to be the subject of any evidence or submission. Mr Lasry made it clear that his client would not give any evidence in this application and that in the event of an order being made, his client would cause to be issued an application under s6(4). Given that there is no evidence placed before the Court on this application of the efforts made by the surety to ensure the accused's compliance with his undertaking, in my opinion, the period of imprisonment is to be determined by the amount of the sum to be estreated. As a general rule, the greater the sum, the longer the period of imprisonment. The period of imprisonment in default of payment must be commensurate with the amount of the undertaking.

58. The amount fixed by the judicial officers in the past on all occasions has been $1 million. This by any standard is an extremely large sum and represents as high a sum as any required in this State. The amount was fixed to deter the accused from absconding and to encourage the surety to diligently take steps to ensure that the accused complied with his undertaking. It cannot be overstated that if a surety has any doubts or concerns about the accused's compliance with his undertaking, the surety is entitled and indeed obliged to inform the authorities and, if thought appropriate, to be relieved of the obligations as a surety.

59. The period of two years' imprisonment has been the maximum since 1977 and, in my view, is an inadequate period when the undertaking to pay a sum is fixed as high as $1 million. The Court invites Parliament to consider increasing the period, bearing in mind that the purpose of the default provision is to encourage both the accused and the surety to comply with their undertakings. In *Re Condon, supra*, Crockett J in 1972 ordered the payment of the recognizance of a surety, being $5,000, and in default of distress ordered imprisonment for 12 months. Making allowances for the change in value of money, this translates today to 12 months' imprisonment for default of a payment substantially less than $200,000. In my opinion, the appropriate period of imprisonment for default of distress in each application is two years' imprisonment. As the surety has been treated as a joint surety for both proceedings, the total period for imprisonment in respect of both applications is two years in the event of default.

60. Subject to any submissions by counsel, I propose to make the following declaration and orders in each application:

A. The Court declares that the bail be forfeited.

B. The Court orders that –

> (1) The Surety Renate Lisa Mokbel pay the amount of $1,000,000 to the proper officer of the Court at Melbourne within 31 days after the date of this order; and
>
> (2) In default of payment of the amount in accordance with the order the amount be obtained by seizing and selling the property of the said Surety; and
>
> (3) In default of seizure and sale of property, in whole or in part, the Surety be imprisoned for a period of two years; and
>
> (4) This order will operate and apply concurrently with the order made this day in the Commonwealth/ State of Victoria application pursuant to s6(1) of the *Crown Proceedings Act* 1958 so that the surety Mrs Renate Lisa Mokbel is obliged to pay in total $1,000,000 and in default of distress serve a total of two years' imprisonment, in respect of both proceedings.

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[1] See *Mokbel v DPP (No. 3)* [2002] VSC 393; (2002) 133 A Crim R 141.
[2] [1971] VicRp 87; [1971] VR 717.
[3] [1973] VicRp 40; [1973] VR 427.
[4] [2005] VSC 89; (2005) 155 A Crim R 76.
[5] [1920] VicLawRp 41; [1920] VLR 182.
[6] [1973] VicRp 40; [1973] VR 427.

[7] At p433.
[8] [1925] 1 KB 603.
[9] At p606.
[10] [1984] QB 381; [1983] 3 All ER 578; [1984] 2 WLR 107.
[11] See the undertaking of bail signed by the prisoner on 29 November 2005.
[12] (1938) 38 SR (NSW) 407 at p410; 55 WN (NSW) 163.
[13] [1998] HCA 28; (1998) 194 CLR 355; 153 ALR 490; (1998) 72 ALJR 841; (1998) 8 Leg Rep 41.
[14] At p384.
[15] [1962] HCA 20; (1962) 107 CLR 279; [1962] ALR 758; 36 ALJR 15.
[16] At p763.
[17] [1843] EngR 358; (1843) 4 QB 468; 114 ER 975.
[18] At p977 of the ER.
[19] [2005] UKPC 49; [2005] 2 AC 423; [2005] 2 All ER 86; [2006] 1 WLR 857 at 867; [2005] 1 All ER (Comm) 393; [2005] All ER (D) 236.
[20] [1910] 1 KB 369 at 373.
[21] See *R v Porter, supra.*
[22] (1976) 120 SJ 214.
[23] [1983] 1 All ER 530; [1983] 1 WLR 56 at 59.

APPEARANCES: For the Crown: Mr D Parsons SC, counsel. Commonwealth DPP, Office of Public Prosecutions Victoria. For Antonios Sajih Mokbel: No appearance. For the Surety Mrs Renate Lisa Mokbel: Mr L Lasry QC, counsel. Chiodo & Madafferi, solicitors.
