32/81

SUPREME COURT OF VICTORIA

HAMILTON, Shirley Margaret, An Application for Bail by

Starke J

12 May 1981

BAIL - ACCUSED COMMITTED FOR TRIAL AND BAILED - ACCUSED FAILED TO APPEAR AT TRIAL - SUBSEQUENTLY ARRESTED - APPLICATION FOR BAIL - ACCUSED REQUIRED TO SHOW CAUSE - CAUSE NOT SHOWN - ACCUSED FAILED TO SATISFY COURT THAT HER FAILURE TO APPEAR AT TRIAL WAS DUE TO CAUSES BEYOND HER CONTROL: *BAIL ACT* 1977, S4(2)(c).

STARKE J: *[After setting out the facts of the application for bail, His Honour continued]* ... The Crown opposes the application pursuant to two provisions of the *Bail Act*, namely, s4 ss2(c) and s4 ss(b). I propose only to deal with ss2(c). This provides, "notwithstanding the generality of the provisions of ss1 ... was due to causes beyond his control".

Mr Hartnett has submitted that the test is a subjective one and if, looking at the thing subjectively, the person applying failed to appear due to causes beyond his control, then the section is satisfied. He conceded, that the burden on the balance of the probabilities is on the applicant to show that her failure to appear on the 15th of September was due to causes beyond her control.

Before I turn to that question, the real purpose of the application is to allow her to properly prepare her defence and this is put in two ways. It is said firstly she being in Fairlea and Hamilton being in Pentridge that there is no opportunity for them to consult with one another. This is no doubt true, but that can be overcome without too much difficulty through the services of a solicitor. Secondly, it is said that there are documents which are now held by the police and which they wish to see for the purpose of preparing their defence. I understand the police are preparing or have prepared photocopies of these documents and they will be handed to the solicitor for the applicant this afternoon. In some cases, of course, the ability of an applicant to consult documents would be of very great importance where the documents are so numerous or of such a nature that they could not be taken to Pentridge or Fairlea and it is essential that the applicant be released from custody in order to be able to go through such documents with her or his legal advisers.

I cannot believe nor has it been really suggested to me that there are voluminous documents in existence which it is necessary to consult in order to meet a relatively simple charge of this nature. These considerations only arise if I have a discretion in the matter and it is my opinion that the words of the Act are clear English words to be construed in their usual English meaning. I agree with Mr Hartnett that the test is a subjective one, and I look to see if there was any cause or causes here beyond the applicant's control. Clearly, in my opinion, as a matter of language there were none. She would no doubt be under stress in the light of the acts of violence which had taken place over the years, but they had happened many of them a couple of years ago and were nothing new. The question of whether they thought they were getting a bail hearing from Chief Judge Whelan is another matter but that again does not create the sort of fear in a person's mind that makes them unable to attend court or makes it possible for me to say it was beyond her control to attend court. The real fact of the matter is that she failed to go to court because she considered that her chances of an acquittal before the learned Chief Judge were minimal.

By saying that, I do not accept that the learned Chief Judge had given any cause for that belief, but I am prepared to accept that it was genuinely held by both her and Hamilton, but it does not and obviously cannot amount to a cause beyond her control for attending court. The question of possible domination by her husband was raised by me in the first place. However, I think that Hamilton himself indicated that she was a woman of independent mind and Mr Hartnett frankly said that if he put her in the box and asked her that is what she would say. It was further suggested that because Hamilton is in gaol serving another sentence, and cannot get bail, it is unlikely that she would fail to attend at a trial on this occasion. It is further said in support of that conclusion that a senior sergeant of police said as much in recent lower court proceedings.

The Crown, I think, concede that that is so. I might say that I am not impressed with the concession nor the statements by the applicant that she will not skip her bail a second time. The best evidence to make a court doubt that a person will attend his or her trial is the fact that when charged with the very offence he or she has already failed to attend. In this case, of course, it does not come down to a question of discretion. In my opinion I have no discretion because the applicant has failed to satisfy me that her failure to attend at the County Court was due to causes beyond her control, but even if I had a discretion, I would have without hesitation rejected this application on general principles because not only did she fail to answer bail, but over a period of many months tacitly at least defied the authorities to capture and try her.

In those circumstances she may reflect that her present position has been brought about entirely by herself. She deliberately and I think really without much influence from stress took the decision that she would attend for her trial. It may be said with some justice that she was trying to select the judge who would try her. When one deliberately defies the law in such a way, one must expect to have the consequences which flow from that conduct fall upon them. In these circumstances, in my opinion, this application is hopeless and must be refused.

APPEARANCES: Mr Carleton appeared on behalf of the Crown. Mr Hartnett appeared on behalf of the Applicant.
