**07/08; [2008] VSC 4**

**SUPREME COURT OF VICTORIA**

# *GRAY v DPP*

**Bongiorno J**

**16 January 2008**

**BAIL – AGGRAVATED BURGLARY – REVERSE ONUS ON ACCUSED – DELAY – ACCUSED MAY SPEND MORE TIME IN CUSTODY AWAITING TRIAL THAN PROBABLE SENTENCE – RELEVANCE OF *CHARTER* RIGHTS AS TO BAIL GENERALLY INCLUDING DELAY – PARITY IN BAIL APPLICATIONS – WHETHER ACCUSED'S CONTINUED DETENTION JUSTIFIED: *BAIL ACT* S4(4)(c); *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES*, SS21, 25.**

**1. Sections of the *Charter of Human Rights and Responsibilities* ('Charter) require persons accused of crime to be tried without reasonable delay and released if that does not occur. Therefore, the provisions of the *Charter* are highly relevant to the question of bail. The inability of the Crown to provide a trial as required by the *Charter* must have an effect on the question of bail. It would be difficult to argue that a trial which may well be not held until after the applicant had spent more time in custody than he is likely to serve upon a sentence would be a trial held within a reasonable time. The only remedy the Court can provide an accused for a failure by the Crown to meet its *Charter* obligations in this regard (or to ensure that it does not breach those obligations so as to prejudice the applicant), is to release the accused on bail.**

**2. The principle of parity is normally associated with sentencing and it is inapt to apply it to the grant of bail unless it is intended to convey that like cases should be treated alike. But the examination of the available facts required in a bail application makes any attempt at realistic comparison with an alleged co-offender somewhat difficult.**

**3. In the present case, having regard to the question of delay and other matters affecting the accused, the accused established that his continued incarceration was not justified and therefore was released on bail.**

**BONGIORNO J:**

1. Kelly Michael Gray has been charged with a number of indictable offences arising out of an incident which is alleged to have occurred on 4 November 2007 at Swan Hill in which one Carl Slee was assaulted in his own home by someone wielding a baseball bat or similar weapon. It is alleged that the perpetrator of the assault was Gray and that he was accompanied by a co-accused, Matthew Savage.

2. After police inquiries reached a point at which charges could be formulated and laid, Gray and Savage were charged with a number of offences including aggravated burglary. Savage was released on police bail; Gray was remanded in custody. He was subsequently refused bail by a magistrate in the Kerang Magistrates' Court on 10 December and now applies to this Court for bail pending his committal hearing which is yet to be fixed for hearing in the Mildura Magistrates' Court. A committal mention has, however, been fixed for 5 February 2008.

3. Since Gray has been in custody, further police inquiries have resulted in additional charges against him being either laid or contemplated in respect of separate events which are alleged to have occurred before 14 November 2007, including a charge of being in possession of an unregistered firearm, a .38 calibre pistol.

4. The evidence which implicates Gray in the aggravated burglary and offences associated with it comes from the victim, Slee, who says that Gray identified himself to him immediately prior to striking him six or seven times with the baseball bat. He also provides some evidence of identification from a photoboard, as does another witness, who was, apparently, nearby at the time. A relatively distinctive jacket worn by Gray was also identified by witnesses – a motorcycle jacket with the word "Prospect" on it: an alleged reference to Gray's aspiration to become a member of the Bandidos motorcycle gang.

5. Gray was originally interviewed on 16 November 2007 by police, in which interview he declined to comment on the aggravated burglary allegations, declined to provide a body sample for DNA testing purposes, and declined to participate in an identification parade. He was released without charge on that day. On 24 November police phoned Gray and asked him to attend at Swan Hill police station. He didn't do so and was subsequently arrested on 7 December in Swan Hill.

6. Because of the charge of aggravated burglary which Gray faces, s4(4)(c) of the *Bail Act* 1977 requires him to satisfy this Court that his continued detention in custody pending his further court hearings is not justified if he is to be granted bail. In other words, the presumption in favour of bail for an accused person in custody is displaced where he faces a charge of aggravated burglary: a charge which will be made out against Gray if the Crown proves the case it asserts against him.

7. The applicant puts forward a number of grounds which he argues establish that his continued detention is not justified. First, he points to a long period since his only serious prior criminal conviction – for assault occasioning actual bodily harm in Adelaide in 1995, for which he was sentenced to two years gaol. This conviction arose out of a cowardly assault on a woman, directed by Gray, in circumstances of intimidation. But it was 13 years ago. His other prior convictions which are of traffic offences are of no account in the current circumstances.

8. Secondly, he points to the delay that is likely to be experienced before this matter is finalised. His counsel reported on inquiries made on Gray's behalf of the Mildura County Court to the effect that a trial would be likely to be listed in about October or November of this year. How likely it is that such trial would actually take place then cannot be determined.

9. The Crown was of little real assistance to the Court on this question either – an unfortunate situation which is entirely unsatisfactory. It might be thought not unreasonable that the Crown should be able to provide accurate information to the Court as to the number of trials pending in the Mildura County Court, their estimated duration, the judicial resources likely to be available to the County Court at Mildura to hear them, and any other relevant information which might permit this Court to make some intelligent estimate of when this case is likely to be finalised. Such information should be provided as a matter of course in every bail application, at least where delay is likely to be a significant matter as it obviously was always going to be in this case. In the absence of accurate information, the Court is thrown back on an educated guess as to when a case will be heard. Whether an accused person should or should not be granted bail should never depend upon a guess by the judicial officer determining the question, no matter how experienced that judicial officer might be.

10. This situation is the more unsatisfactory in light of the requirement of those sections of the *Charter of Human Rights and Responsibilities* which require persons accused of crime to be tried without unreasonable delay and released if that does not occur.[1] Although neither counsel mentioned the *Charter* in his or her submissions and no argument based on its provisions was put, either by the applicant or by the Crown, the provisions referred to would appear to be highly relevant to the question of bail – not only because of the specific reference in s21(5)(c) to the consequence of unreasonable delay, namely, release of the prisoner, but also because of the guarantee of trial without unreasonable delay conferred by s25(2)(c). Counsel for the Crown dismissed the *Charter* as being irrelevant to the question of bail. She referred to the prohibition against arbitrary arrest and detention[2] but did not advert to the provisions referred to above nor to their possible interaction with s21(3) – the provision which prohibits deprivation of liberty other than according to law.

11. Resorting to the best estimate this Court can make, based on what counsel has said as to the County Court circuits in Mildura this year, it could not be said, at least at this stage, that this matter will be finalised before the end of 2008. There is yet to be a committal date set and, as already observed, there is no evidence before the Court as to the County Court list of cases awaiting trial in Mildura. Having regard to the seriousness of the offence itself, the relatively minor injuries suffered by the victim and the antecedents of the applicant (even including his prior conviction for assault), it is by no means certain that the applicant will not have served more time in gaol on remand than he would be required to serve under any sentence imposed by the County Court if he is not granted bail. In this regard, I consider the estimate by Counsel for

the Crown that he would be likely to receive a minimum sentence of two years imprisonment as being at the very upper end of any reasonable range, although, of course at this stage, any such estimate is of necessity, somewhat speculative.

12. That a person may serve more time on remand than his ultimate sentence is a significant matter on any consideration of bail at common law. It is of even greater significance now in light of the existence of the *Charter* and the provisions to which I have referred. If the *Charter* in fact guarantees a timely trial, the inability of the Crown to provide that trial as required by the *Charter* must have an effect on the question of bail. It would be difficult to argue that a trial which may well be not held until after the applicant had spent more time in custody than he is likely to serve upon a sentence would be a trial held within a reasonable time. The only remedy the Court can provide an accused for a failure by the Crown to meet its *Charter* obligations in this regard (or to ensure that it does not breach those obligations so as to prejudice the applicant), is to release him on bail – at least the only remedy short of a permanent stay of proceedings.[3]

13. Thirdly, the applicant suggested that the Crown case was not strong. For obvious reasons, it is generally inappropriate for a court to canvass the strength of the Crown case on a bail application. However, having regard to the identification evidence which appears to exist, whatever might be its perceived deficiencies, there is certainly a case against Gray to be considered by a jury. Whether it is accepted is, of course, a matter for that jury.

14. Fourthly, the applicant points to the fact that his co-accused was granted bail by police without objection. He says the principle of parity applies.

15. The principle of parity, as such, is one normally associated with sentencing. It is inapt to apply it to the grant of bail unless in doing so all that is intended to be conveyed is that like cases should be treated alike – a fundamental requirement of the rule of law of which the principle of parity in sentencing is but one example. That is what Gillard J meant by his reference to equal treatment in *Abbott*.[4] But the examination of the available facts required in a bail application, ranging from the circumstances of the offence to the personal circumstance of the alleged offender, his associations, employment, family responsibilities and much more (usually on very sparse evidence), make any attempt at realistic comparison with an alleged co-offender somewhat difficult. This is particularly so where only one of those parties is before the court, and that known of the other, is of necessity, limited. In any event, in this case, as the informant said in his evidence, the principal difference between the applicant and his co-accused is the serious, if now somewhat old, prior conviction which the applicant has for a not dissimilar offence. There is nothing in the parity point.

16. Fifthly, the applicant claims that there is no real risk of his fleeing the jurisdiction. For present purposes, that proposition may be accepted. It appears not to have been seriously contested.

17. Sixthly, the applicant submitted that there is no risk of his re-offending or of his interfering with witnesses. The Crown points to the alleged action of the applicant's co-accused as they both left the scene of the assault and to his association with the Bandidos motorcycle club as evidence to the contrary. There is little else. The informant's suspicions with respect to the applicant's likelihood of offending or of his intimidating witnesses may be well founded, but there is little tangible evidence of any kind to support those suspicions at this stage.

18. Taking into account all of these matters, and in particular the delay which may well attend the finalisation of this case, the Court is satisfied that the applicant has established that his continued incarceration is not justified. He will be released on bail.

19. Having regard to the impecuniosity of the proposed surety there will be no requirement for a surety, but there will be strict conditions. There will be a condition that the applicant not go within 100 kilometres of the Swan Hill post office other than to travel directly to Mildura for the purposes of this case. Otherwise, the conditions will be the usual conditions of not approaching or attempting to approach, either directly or indirectly, any Crown witness other than the informant; not to associate with the co-accused, Savage; to reside at 10 Jarmin Street, Echuca; not to change his place of residence without notifying the informant; to report daily between the hours of 8 a.m.

and 8 p.m. to the Officer-in-Charge of the Echuca police station or his nominee; not to attend any points of international departure; to surrender any passport, *et cetera*.

20. I considered the submission of Counsel for the Crown concerning a special condition that the applicant not associate with members of the Bandidos motorcycle gang. However there is insufficient evidence as to the malevolent nature of that organisation before the Court to enable such a condition to be imposed. In the circumstances there will not be any such condition.

---

[1] Sections 21(5)(b) and (c) of the *Charter of Human Rights and Responsibilities* 2006 ("the Charter").
[2] Section 21 (2) of the Charter
[3] See *Martin v Tauranga* District Court (1995) 2 NZLR 419, at 425 per Cooke P; (1994) 1 HRNZ 186; *R v Morin* [1992] 1 SCR 771; (1992) 71 CCC (3d) 1; (1992) 12 CR (4th) 1.
[4] (1997) 97 A Crim R 29.

**APPEARANCES:** For the applicant Gray: Mr M Gumbleton, counsel. Mike Wardell & Associates, solicitors. For the respondent DPP: Ms S Borg, counsel. Office of Public Prosecutions.

---