20/07; [2007] VSC 76

SUPREME COURT OF VICTORIA

O'REILLY v DPP

Curtain J

19, 21 March 2007

BAIL – APPLICATION FOR – APPLICANT MUST SHOW CAUSE WHY DETENTION IN CUSTODY NOT JUSTIFIED – ACCUSED CHARGED WITH OFFENCES INCLUDING KIDNAPPING, AGGRAVATED BURGLARY AND INTENTIONALLY CAUSING SERIOUS INJURY – BAIL PREVIOUSLY REFUSED – APPLICANT TO SHOW NEW FACTS AND CIRCUMSTANCES – CO-ACCUSED GRANTED BAIL – SUGGESTION THAT CROWN CASE NOT STRONG – DELAY – BAIL REFUSED: *BAIL ACT* 1977, S4(4)(c).

1. The fact that a co-accused has been granted bail (or not granted bail) is not a new fact or circumstance. Each application for bail must be decided on its own facts and circumstances. It cannot be the case that where another judicial officer has decided that a grant of bail is appropriate in the case of one applicant, it must therefore be appropriate in the case of another, even allowing for more favourable differences in this applicant's antecedents and presentation.

2. A judge expressing remarks at a preliminary hearing, which remarks are at variance with the assessment of the case made by other judicial officers cannot amount to a new fact or circumstance.

3. Although a delay in bringing the matter to trial may be considerable, such delay does not convert the unacceptable risk that the applicant, if released on bail, would interfere with witnesses or otherwise obstruct the course of justice, into an acceptable risk.

CURTAIN J:

1. On 12 August 2005 the applicant Raymond Joseph O'Reilly was arrested and charged with offences of, *inter alia*, affray, kidnapping, false imprisonment, aggravated burglary, intentionally causing serious injury and unlawful assault.

2. The offences arose out of an incident, said to have occurred in the Rue Bar at the Ivanhoe Hotel on 25 June, 2005, where it was alleged that the accused, in the company of two others, all of whom were dressed in Hells Angels Motorcycle club colours, attended at the bar and there assaulted one, Brendan Schevella. A scuffle then ensued and the security staff at the hotel removed Schevella from the premises. He was grabbed by the assailants and forced along a walk-way and down to a ramp which led to a car park. All the while he continued to be assaulted and at one point, was lifted up by his feet and was held upside down over the railing of the walk-way. Hotel staff attempted to intervene and security staff heard one of the offenders tell another that if they got closer, to shoot them and as this was said, witnesses described one of the offenders as appearing to reach into the back of his pants, as though searching for a firearm, but none was produced. Nonetheless, this conduct was sufficient to cause the security staff to retreat. Schevella was then forced down the ramp to the rear car park and at the base of the ramp he continued to be assaulted, it is alleged, by the applicant and two other accused, Hinton and Petersen. A car then driven by one, Smith, drove into the car park and Schevella was forced into it and driven away in the company of the offenders.

3. The Crown allege that Mr Schevella was driven to the Hells Angels Clubhouse in Lipton Drive, Thomastown, and there held against his will and tortured over the course of some four to five hours. The next time Mr Schevella was seen was when he was driven by a friend to the Austin hospital where he presented with a partially amputated small left toe, a broken nose, severe bruising and swelling to the face, head, back and torso. He was admitted to hospital and remained there for several days. The police were subsequently called but Mr Schevella refused to cooperate with them.

4. The police nonetheless conducted a covert investigation, that is, unknown to both Mr

Schevella and Mr O'Reilly and ultimately Mr O'Reilly and his co-offenders were arrested. The applicant made a no comment record of interview and has been remanded in custody since.

5. The applicant applied for bail initially on 17 August 2005, before a Magistrate, His Honour Mr Mornane, who refused bail and the applicant then appealed to His Honour Justice Osborn who, on 6 September 2005, again refused bail. The committal in respect of these offences was completed on 1 June 2006 and at that point, as I understand it, Mr Smith was discharged and the co-accused, Mr Petersen, who had previously been admitted to bail by order of Her Honour Magistrate Hannan as she then was, was remanded in custody. On 23 November 2006 the applicant again applied to this Court for bail which was refused by His Honour Justice Mandie.

6. On 15 December 2006 Mr Petersen was again admitted to bail by Her Honour Judge Hannan, as she had then become, and in January 2007 the co-offender, Mr Hinton, was refused bail by Her Honour Judge Millane.

7. Mr O'Reilly now applies for bail pursuant to s4(4)(c) of the *Bail Act* 1977, on the grounds that new facts and circumstances have arisen since bail was refused by Justice Mandie and that the applicant by reason of delay, as well as other factors, has shown cause why his detention is not justified.

8. Mr Dane QC, who appeared on behalf of the applicant, relied generally upon the affidavits in support of the application sworn by Theo Magazis, on 26 February 2007 and 15 March 2007, and the exhibits thereto and the affidavit of David Barlow, sworn 16 March 2007 and various certificates and a reference from the catholic chaplain at Port Phillip Prison which were tendered on the application as Exhibit 1. Ms Helen Trevithick, the applicant's partner, also gave evidence on the application.

9. The new facts and circumstances are said to be two-fold. First, the co-accused Mr Petersen has been granted bail and second, the trial judge, His Honour Judge Chettle, has made comments suggesting the Crown will have difficulties in their proofs.

10. Mr Dane QC submitted that Mr Petersen was the Sergeant of Arms of the Motorcycle Group and as such was the enforcer, he had more significant prior convictions than the applicant, he was on bail when the offences were committed and whilst he has been at liberty, no witnesses have been interfered with. In these circumstances, where the applicant presents with more favourable antecedents than Mr Petersen, his grant of bail amounts to a new fact or circumstance in the applicant's case. As to His Honour Judge Chettle's comments, Mr Dane QC submitted that this suggests that the Crown case is not as strong as has been previously asserted in all other bail applications.

11. Mr Dane QC submitted that these new facts and circumstances, together with the delay between the arrest and the trial commencing on 22 October 2007, taken with the applicant's ties to the community including his partner of nine years standing, their five year old son, the applicant's responsibilities towards a daughter aged eight who resides with the applicant and his partner every second weekend and the occasional school nights, his partner's depression and the ill health of other family members and the offer of employment with Mr Barlow, are sufficient to establish that the applicant has shown that his detention is not justified.

12. The Crown opposes the application on the basis that no new fact or circumstance has been shown, that the applicant has failed to show cause and that there is an unacceptable risk that the applicant may commit further offences, not present for trial, and/or intimidate witnesses, should he be released on bail.

13. The Crown relies upon the affidavit of Jason Ong sworn on the 14 March 2007 and the exhibits thereto, and the evidence of Detective Senior Constable Hatton, the informant in this matter. Mr Elston SC on behalf of the Crown submitted that the grant of bail to Mr Petersen is not a new fact or circumstance pertaining to Mr O'Reilly. As to His Honour Judge Chettle's comments, the Crown submits that they were made in a mention and based on a summary of the Crown case and as such, could not be said to be a comment on the quality of the evidence in support of the Crown case. Therefore, the Crown submitted, there was nothing new in the material which

would negate those matters which justified the refusal of bail on three previous occasions.

14. I am satisfied that the fact that a co-accused has been granted bail is not a new fact or circumstance pertaining to the applicant. Each application for bail is decided on its own facts and circumstances and it can not be the case that where another judicial officer has decided that a grant of bail is appropriate in the case of one applicant, it must therefore be appropriate in the case of another, even allowing for more favourable differences in this applicant's antecedents and presentation. Indeed, another co-offender, Mr Hinton, has subsequent to Mr Petersen's successful bail application, been refused bail and again, that must have no bearing on the status of the application before me. There is nothing in the material before me which is any different from the material which was placed before Mr Justice Mandie, or indeed placed before Mr Justice Osborn, although I accept that Mr Justice Osborn came to the view that a *prima facie* case had been made out but refused bail on the basis of unacceptable risk of a failure to surrender for trial and of interference with witnesses.

15. As to the comments made by His Honour Judge Chettle, be that as they may. As the case has been outlined in the affidavits placed before the Court and as summarised in the ruling of His Honour Justice Osborn, I do not share Judge Chettle's view. Not only have Justices Osborn and Mandie come to the view that the Crown case is strong, so much is conceded by Mr Sheales who appeared on behalf of the applicant at the previous bail application. Likewise, Justice King in dealing with an appeal from the grant of bail to Mr Petersen by Magistrate Hannan, as she then was, described the case as strong and clearly Magistrate Patrick, who presided over the committal, regarded the evidence of sufficient cogency to commit the applicant for trial. In any event, His Honour Judge Chettle's comments appear to relate to two counts only on the proposed presentment. I do not accept that a judge expressing remarks at a preliminary hearing, which remarks are at variance with the assessment of the case made by other judicial officers and with the concession made by counsel for the applicant on another occasion, can amount to a new fact or circumstance.

16. Accordingly I am not satisfied that any new fact or circumstance has been demonstrated.

17. As to the show cause, Mr Dane QC principally relied upon the delay in the matter coming on for trial, the accused having been in custody since the 12 August 2005 and the matter being listed for trial on 22 October 2007, with pre-trial hearings preceding that, to commence on 30 July 2007. Mr Dane QC has submitted that such delay is unacceptable and creates an adverse perception of the administration of justice if the applicant, upon conviction, is released a short time after the sentence is imposed by reason of the period of pre-sentence detention. Further Mr Dane QC submitted that the issue of delay must mitigate any question of unacceptable risk.

18. Mr Elston SC further submitted, as I understand it, that if the applicant had shown cause then nonetheless, there was an unacceptable risk that the applicant would commit further offences whilst on bail, fail to present for trial, or would interfere with witnesses if released on bail. As I understand his submission, the Crown was principally concerned with the latter. Mr Elston relied upon:

> (1) The insidious nature of any such influence or interference with witnesses, that by its very nature witnesses will not complain of it if they are subjected to it.
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> (2) That a number of witnesses are patrons of the Ivanhoe Hotel, they live locally and if the applicant is released he is able to identify the witnesses having observed them at the committal and it is difficult to protect witnesses who may be simply walking the streets and come into contact with the applicant. Further, if the applicant were released, once that became known to others, that could of itself give rise to fear and intimidation in witnesses.
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> (3) That no surety can, in reality, protect against the risk of interference to witnesses in a way that, say, the surety can ensure the applicant's attendance at trial.
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> (4) That the applicant on at least one occasion has engaged in an assault which has not been reported. To this end, Detective Senior Constable Hatton gave evidence and a DVD was played where Detective Senior Constable Hatton identified the applicant assaulting another person. No complaint was made to the police and none of the witnesses to that incident made a statement to the police. Thus it was submitted that the applicant personally, or by his association with the Hells Angels Motorcycle group,

has the capacity to intimidate witnesses because it has occurred in the past.

(5) That the issue is one of assessment of risk, it does not require that, that risk crystallise into an offence.

19. In reply, Mr Dane QC submitted:

(1) That the Hells Angels Motorcycle group could, if it choose, exert whatever influence it wished, whether Mr O'Reilly is in custody or not.

(2) That there is no evidence that any witness has been interfered with and no evidence that any witness has been interfered with in particular, since Mr Petersen's release.

(3) That there was ample opportunity for witnesses to be interfered with between the alleged offence and the arrested of the applicant, a period of some 47 days. This, it appears, has not occurred and did not prevent the police from obtaining statements from witnesses.

(4) That the applicant's prior convictions are modest and of some antiquity, and as such, suggest that he is not a person likely to seek to interfere with witnesses and in any event, to do so would be to risk a greater penalty than that which may be imposed for the substantive offences.

(5) That the witnesses have made their statements and given evidence at the committal, thus there would be no point in seeking to interfere with them as this stage because their evidence could still be used in a trial pursuant to the provisions of the *Evidence Act* 1958.

20. I am satisfied, on the material placed before me, that the police are justified in their concerns for the welfare and safety of a number of the witnesses. Mr Elston SC has advised that over 100 witnesses may be called, 40 or 45 of whom were in the hotel that night. At least 20 or so of those witnesses gave evidence at the committal from a remote witness location and without disclosing their names. The presiding Magistrate, Her Honour Miss Patrick, who observed the witnesses over the duration of the committal came to the view that a number of witnesses were afraid and to quote her from page 39 of the transcript:

> "That fear continued across a range of people from the more vulnerable to the more robust witnesses, numbers of whom clearly through their own personal knowledge and association hold a view that members of the Hells Angels club, and these people in particular, had the ability and capacity to put pressure on them in a frightening way and they were concerned about that".

Her Honour went on to say that:

> "A number of witnesses seemed to be intimidated by the events of what occurred on the night of this incident".

21. Her Honour there raises a telling point, that the very nature of the alleged offences and the fact that the perpetrators were wearing club colours so as to clearly identify themselves as members of the Hells Angels Motorcycle group, is of itself intimidatory and indeed, one might conclude that the wearing of colours was done for exactly that purpose. Mr Justice Osborn in his ruling made that same point and I agree with it, that the very nature of the charged acts demonstrates the violence of a continuing and intimidatory nature such as to give rise to a real risk of intimidation of witnesses in this case.

22. Further Detective Senior Constable Hatton gave evidence as to the incident shown on the DVD said to have occurred at the Diamond Creek Hotel in April 2005, where subsequently no witness co-operated with the police. I am satisfied that this suggests that despite the applicant's modest prior criminal history, he has engaged in acts of violence in circumstances where by reason of his presence, or his alleged association with the Hells Angels or both and in that regard I note that he was seen to be wearing a Hells Angels T-Shirt in the DVD, no co-operation with police has been forthcoming.

23. In this case Mr Schevella has not made a statement to the police detailing the events of the night and has not co-operated with them. An application pursuant to s56 of the *Magistrates' Court Act* 1989 was unsuccessful. Mr Justice Osborn, in his ruling, observed that the position adopted by Mr Schevella was, as a matter of probability, more likely the product of fear of further injury and this again demonstrates the capacity of either the applicant, or his associates to

generate such fear and intimidation which could be said to amount to interfering with witnesses and obstructing justice.

24. It is no answer to say that the applicant's associates could interfere with the witnesses irrespective of whether the applicant is in custody or not. That may well be so, but the applicant's associates do not have the same self-interest in the outcome of the trial which the applicant does. They will not have to pay the penalty if he is convicted and they do not have the means to positively identify the witnesses as the applicant does, he having observed them during the course of the committal. Likewise, to say that statements and depositional material can go before the court if a witness is not available, is to shut the gate after the horse has bolted. Equally, to say that no-one would risk a greater sentence by interfering with the witnesses is to deny the reality of the situation. It does not require the commission of an offence, such as an assault or the like, to give effect to intimidation or interference; a gesture or a verbal threat can be just as effective.

25. It is proposed that at the trial the Crown will apply to enable a number of witnesses give their evidence in circumstances which will ensure their anonymity and as I understand it, such an application will be opposed. In these circumstances, where witnesses are still desirous of remaining anonymous, it suggests that their fear has not abated by reason of the effluxion of time.

26. As to the submission that if the accused is convicted and sentenced to a period of time commensurate with his pre-sentence detention, such release shortly thereafter sentence adversely affects the public's perception of the administration of justice. If such a situation came to pass it would only be as a result of the proper application of the provisions of the *Sentencing Act* 1991 and it follows, that any perception on behalf of the community would be formed in ignorance of the law and would be erroneous.

27. As to the issue of delay, there is no doubt that although due process has been followed and the matter has processed through the criminal justice system without impediment, it is nonetheless a very long time for a person presumed at law to be innocent, to await trial in custody and it is a matter of real concern that the applicant has had to wait so long for his trial.

28. Nonetheless, in these circumstances I am satisfied that there are no new facts and circumstances and that the applicant has not shown cause as to why his detention is not justified. In my view, although the delay is considerable and is regrettable, such delay does not convert the unacceptable risk that the applicant, if released on bail, would interfere with witnesses or otherwise obstruct the course of justice, into an acceptable risk, and accordingly the application is refused.

APPEARANCES: For the Crown: Mr Elston SC, counsel. Office of Public Prosecutions. For the accused O'Reilly: Mr C Dane SC, counsel. Theo Magazis, solicitors.
