

38/13; [2013] VSC 412

SUPREME COURT OF VICTORIA

DPP v BASIC

Beach J

9 August 2013

CRIMINAL LAW – BAIL – CONDITIONS FIXED BY MAGISTRATE AFTER COMMITTAL FOR TRIAL – WHETHER CONDITIONS OF BAIL WERE INSUFFICIENT – ACCUSED REQUIRED TO REPORT TO POLICE THREE TIMES PER WEEK – SUCH CONDITION SUSPENDED TO ALLOW ACCUSED TO TRAVEL TO CROATIA FOR A FAMILY WEDDING – WHETHER DIFFERENT ORDER SHOULD HAVE BEEN MADE: BAIL ACT 1977, s18A.

HELD: Appeal allowed. Magistrate's bail order set aside. Accused released on different conditions not including travel outside Australia.

1. The charges the accused faced were serious ones and if convicted, there was a real prospect that he would be sentenced to a not insignificant term of imprisonment.

2. If the accused was permitted to travel to Croatia, then, notwithstanding the fact that he had previously answered his bail and complied with bail conditions, there was a not insignificant risk that he might not answer bail in respect of the charges with which he had been committed for trial. Further, the material disclosed that attempting to extradite the respondent from Croatia might be problematic.

3. Having regard to the seriousness of the charges upon which the accused had been committed, the Magistrate correctly ordered reporting to the police three times a week and the surrendering of the respondent's passport. This was not a case to then permit the accused to travel out of Australia and away from the supervision entailed in the reporting condition. The order made by the Magistrate permitting this to occur was, in the language of the authorities in this area, manifestly the wrong order to make.

BEACH J:

1. On 5 August 2013 at the Melbourne Magistrates' Court, following a committal, the respondent was granted bail on charges of:

- trafficking in a commercial quantity of cocaine;
- possessing a drug of dependence, namely amphetamine;
- possessing a drug of dependence, namely stanozolol;
- possessing a general category handgun that was not registered;
- possessing cartridge ammunition;
- possessing a mobile telephone jammer;
- recklessly dealing with \$76,750 being proceeds of crime;
- dealing with \$76,750 suspected of being proceeds of crime; and
- possess proceeds of crime.

2. In granting bail, the Magistrates' Court imposed a number of conditions, including two sureties fixed in the amount of \$100,000 each; a residential condition; reporting to police three times a week; the surrendering of passports and other travel documents; a prohibition on leaving Australia, or attending any points of international departure; not associating with any co-accused; and not travelling to New South Wales. However, the Court was persuaded that the operation of the bail conditions imposed should be suspended for the period between 10 and 27 August 2013 to enable the respondent to travel to Croatia with his father for the purpose of attending a family wedding (the wedding of the respondent's father's first cousin's son). The order of the Magistrates' Court, if undisturbed, would permit the respondent to collect his passport from the Registrar of the County Court today, so as to go overseas tomorrow.

3. Pursuant to s18A of the *Bail Act* 1977, the Director of Public Prosecutions has appealed to this Court in relation to the suspending of bail conditions to enable the respondent to travel to

Croatia. The DPP contends that the Magistrate erred in law in granting the respondent's application without hearing any evidence in support of the application, and that the Magistrate "was manifestly wrong in finding that if permitted to travel to Croatia, there was not an unacceptable risk the respondent would fail to surrender himself into custody in answer to this bail".

4. Section 18A(1) of the *Bail Act* permits the Director of Public Prosecutions to appeal to this Court against an order granting bail if the Director is satisfied that the conditions of bail are insufficient, or the decision to grant bail contravenes the Act, and also that the Director is satisfied it is in the public interest to appeal. Section 18A(6) of the Act provides:

On an appeal under this section, if the Supreme Court thinks that a different order should have been made, the Supreme Court must set aside the order that is the subject of the appeal and, without limiting the powers of the Supreme Court with respect to bail, conduct a fresh hearing in relation to the grant of bail to the respondent.

5. The principles governing this appeal are set out in the Court of Appeal's decision in *DPP (Cth) v Barbaro*.^[1] In that case, the Court said:

As Forrest J noted, the nature of the appeal was explained by the Full Court in *Beljaev v DPP (Vic) and DPP (Cth)*:

"It is not essential that the Director should be able to show an error of law in the narrow sense, although of course if error of law were demonstrated this Court would be obliged to substitute its own view of the order which should have been made. It is also open to the Director to show that in all the circumstances of the case the order was manifestly the wrong order to make even though it is not possible to point to any other identifiable error in the process by which the authority granting bail arrived at the order made.

In other words, the Director is not in our opinion, confined to relying upon an error of law as a ground of appeal but may succeed if he shows that on any ground, whether of fact or law, the discretion of the primary judge has miscarried and can persuade the Supreme Court that a different order should have been made.

There are, however, two ways of the first importance in which an appeal in a matter of bail differs from an appeal against sentence. Both stem from the very nature of bail. The first is that an order admitting a person to bail is not a final order: it may be revoked at any time. The second is that the granting of bail is essentially a matter of practice and procedure. These two considerations both independently and in combination operate to impose on any appellate court a severe restraint upon interference with the order appealed from. In civil and in criminal cases alike appellate Courts have frequently refused to interfere with a primary judge's decision on a matter of practice and procedure."

These principles have been consistently applied in the determination of appeals under s18A.

In *Fernandez v Director of Public Prosecutions*, Winneke P said:

"It is clear from these authorities – as the court noted in *Beljaev* – that the principles which the court applies in deciding a "director's appeal" against sentence are broad, in the sense that intervention is not confined to demonstrated error of law. *Rather, the director may succeed if he can show that on any ground, whether of law or fact, the discretion of the primary judge has miscarried and can persuade the court that a different order should have been made.* Similar principles, therefore, are applied by the judge who entertains an appeal by the director pursuant to s18A of the *Bail Act*. However, as was pointed out by the court in *Beljaev*, the appeal which is brought to the court by virtue of s18A is an appeal against orders made "in a matter of practice and procedure", and is also interlocutory in nature. In accordance with authority, appellate courts should be reluctant to interfere with such orders."^[2]

6. The respondent has been on bail in respect of the present offences since 23 August 2012. He has on various occasions since then answered his bail and complied with bail conditions. The order the subject of the present appeal was made following the respondent's committal in respect of the charges to which I have already referred.

7. The DPP's complaint in respect of the order made on 5 August 2013 concerns the conditions enabling of the respondent to travel overseas to Croatia. There is no extradition treaty between Australia and Croatia. While there appears to be an inherited treaty that may have application between the United Kingdom and the former Yugoslavia, the affidavit material asserts that this

treaty does not appear to have been utilised in recent years.

8. The respondent is 31 years of age. His parents migrated to Australia from Croatia. He has extensive family in Croatia. Indeed, he lived there for four years from 1997 – playing soccer with the Croatia Football Club.

9. The charges the respondent faces are serious ones. If convicted, there is a real prospect that the respondent will be sentenced to a not insignificant term of imprisonment.

10. In my view, if the respondent was permitted to travel to Croatia, then, notwithstanding the fact that he has previously answered his bail and complied with bail conditions, there is a not insignificant risk that he might not answer bail in respect of the charges with which he has been committed for trial. Further, the material discloses that attempting to extradite the respondent from Croatia might be problematic.

11. The Magistrate thought that any risk in relation to the respondent's trip to Croatia could be adequately managed by the imposition of a second surety in the sum of \$100,000. I disagree. In my view, the risks of letting the respondent travel to Croatia – so far as not answering his bail is concerned – were, and are, unacceptable within the meaning of s4(2)(d) of the *Bail Act*. Notwithstanding the restraint that should be exercised in appeals of this kind,^[3] I am satisfied that the Magistrate was wrong to permit the respondent to travel overseas to Croatia in the circumstances of this case. Having regard to the seriousness of the charges upon which the respondent has been committed, the Magistrate correctly ordered reporting to the police three times a week, and the surrendering of the respondent's passport. This was not a case to then permit the respondent to travel out of Australia and away from the supervision entailed in the reporting condition. The order made by the Magistrate permitting this to occur was, in the language of the authorities in this area, manifestly the wrong order to make.

12. Having determined that a different order should have been made by the Magistrate, I must now, in accordance with s18A(6) of the *Bail Act*, set aside the Magistrate's order as to bail.

13. The Director does not oppose the granting of bail upon the other conditions ordered by the Magistrate on 5 August. In the circumstances, I will make an order admitting the respondent to bail with the sureties, and upon the conditions, imposed by the Magistrate on 5 August 2013. While there was debate before me as to whether there should only be one surety in the sum of \$100,000 in the event that the Director's appeal was allowed, in my view the circumstances of this case amply justify the requirement for two sureties as ordered by the Magistrate – notwithstanding that the respondent will not now be permitted to travel to Croatia.

14. Accordingly, the orders of the Court will be:

(1) Appeal allowed.

(2) The order of the Melbourne Magistrates' Court constituted by Lamble M made on 5 August 2013 granting the respondent bail be set aside.

(3) The respondent be admitted to bail on his own undertaking with the sureties ordered by Lamble M on 5 August 2013 and upon the conditions and special conditions referred to in that order, but absent any condition permitting the respondent to travel to Croatia or outside Australia for any purpose.

^[1] [2009] VSCA 26; (2009) 20 VR 717; (2009) 193 A Crim R 369 (Maxwell P, Vincent and Kellam JJA).

^[2] Ibid [10]-[11] (citations omitted).

^[3] Ibid.

APPEARANCES: For the appellant DPP: Ms R Sharp, counsel. Solicitor for Public Prosecutions. For the respondent Basic: Mr P Dunn QC, counsel. Dean Cole & Associates, solicitors.
