15/90

SUPREME COURT OF VICTORIA

R v DUROSE

JH Phillips J

16 February 1990 — [1991] VicRp 13; [1991] 1 VR 176

BAIL – CHARGE HEARD – ADJOURNED FOR A PRE-SENTENCE REPORT – INDECENT ASSAULT ON CHILD – MOTIVATION FOR COMMISSION OF OFFENCE UNCLEAR – WHETHER BAIL PENDING REPORT SHOULD BE GRANTED – WHETHER ACCUSED'S RELEASE DESIRABLE IN THE PUBLIC INTEREST: *BAIL ACT* 1977, S4(1)(c).

1. Pursuant to s4(1)(c) of the *Bail Act* 1977, where a case is adjourned for the purposes of obtaining a pre-sentence report, the accused is entitled to be granted bail unless the court is satisfied that the release of the accused would not be desirable in the public interest.

2. Where an accused pleaded guilty to a charge of indecently assaulting a 4 year old girl, no error was shown in the court's refusing bail pending completion of a pre-sentence report having regard to the unclear reasons for the commission of the offence and the possibility of public disquiet in the relevant neighbourhood.

JH PHILLIPS J: **[1]** The first matter which falls for determination in this proceeding in whether this Court has jurisdiction to hear this application which arises in the following circumstances. On 13 July, 1989 the applicant John Durose was charged with indecent assault on one Kate Ulman at Footscray on 10 July, 1989, an offence under s44(1) of the *Crimes Act* 1958.

On 13 February 1990, a few days ago, the applicant appeared at the Broadmeadows Magistrates' Court and pleaded guilty to that charge. One assumes that a consent to summary jurisdiction was forthcoming. The case proceeded with a police officer giving the Court an account of the circumstances of the offence. Then, Mr Taft, of counsel, who appeared for the applicant, asked the learned Magistrate to direct that a pre-sentence report be obtained before he reached a final view about sentence. The Magistrate acceded to that submission and directed that a pre-sentence report be obtained, and remanded the applicant in custody to 6 March, 1990. Counsel had asked that bail be extended, but this was refused.

When this matter was called on I indicated to Counsel I could not recall a similar application being made, and, after some short discussion, I adjourned the proceedings so that more adequate arguments might be mounted. Mr Taft for the applicant has submitted that the Court does have jurisdiction and he contends that that jurisdiction is vested in the Court in one of two ways. **[2]** Firstly, he submits that the information before the Magistrate by which his client was charged, has not yet been "determined" in the sense that final sentence has not been pronounced, and accordingly, his client comes within the terms of s18(1) of the *Bail Act* which provides that where a person is detained in custody pending the determination of the matter of an information and that person has been refused bail by a Magistrate he may make application for bail. However, under this section it appears that such application can only be made to a Magistrate or to the Court to which the applicant would be required to surrender himself under the conditions of bail.

But, Mr Taft argues, this Court nevertheless has jurisdiction under s18(5) which reads in these terms:

> "The foregoing provisions of this section shall not in any way limit or derogate from any right of application or appeal to the Supreme Court which any person may have apart from the provisions of this section".

Mr Taft submits that this Court has jurisdiction to entertain the appeal under its inherent jurisdiction unless that jurisdiction is precluded by one or other of the sections of the *Bail Act*. Mr Castle has argued to the contrary and submitted that sub-s5 does not preserve a jurisdiction.

In my opinion the submission of Mr Taft is correct and this Court has jurisdiction unless it was precluded in the present circumstances by some section of the Act. In my view, it is not so precluded. I have had somewhat more success than counsel in seeking to obtain authorities where this point has arisen in the past. It **[3]** seems to have been considered by judges of this Court at least twice. The first occasion was by Lush J in the matter of an application of *Edward Robert Black* unreported judgment given on 19 June 1981. In that case His Honour held that, in like circumstances to the present, he did not have jurisdiction.

My only knowledge of His Honour's ruling comes from an account of it given in another judgment to which I will shortly make reference, but I note that it was a brief ruling and that, in it, His Honour did not give any reasons for the conclusion that he reached. The same point was next considered by Crockett J in an application of *Allen John Heath* unreported, judgment given on 13 October 1982. Crockett J took a different view to that of Lush J and held that in the circumstances the Court did have jurisdiction. His Honour gave detailed reasons for his decision.

Difficulty always arises where a judge is confronted with a situation where two other judges of this Court – both extremely experienced judges – have taken a different view on a matter of principle. It is perhaps unnecessary to say that any judgment of Lush J would always warrant the utmost respect, but in so far as it appears to be an *ex tempore* judgment without His Honour having the benefit of the arguments that have been addressed to me today and which were apparently addressed in the application of *Heath*, I propose to follow the decision of Crockett J.

The provisions of s4(1)(c) of the *Bail Act* are plainly relevant and I shall now read those provisions:

> "Any person accused of an offence and being held in custody **[4]** in relation to an offence shall be granted bail where his case is adjourned by a court for inquiries or a report or whilst he is awaiting sentence except where the court is satisfied that it would not be desirable in the public interest to release the accused person pending completion of the inquiries or receipt of the report or pending sentence".

Thus, a discretion is conferred upon a Magistrate in the circumstances of the instant case and the applicant had a *prima facie* right to bail unless the Magistrate was satisfied the public interest warranted its refusal.

The *Bail Act*, plainly enough, does not expressly grant a right of appeal to me as a judge of this Court in the instant circumstances. However, as I have already said, I agree with Mr Taft's submission that such a right of appeal could be excluded only if the *Bail Act* was said to cover the field. That cannot be the case because of the exception contained in s18(5) of the Act.

It is clear that when a person is awaiting trial for an offence and that person is refused bail by a Magistrate that person has a right to make application to this Court. So, too, after a summary trial has been concluded an accused convicted and sentenced has a right to make application to this Court for bail pending the determination of any appeal. It would be an odd situation indeed if those two situations were catered for, but the present position of the applicant was overlooked.

It should also be borne in mind that although in this case the learned Magistrate has fixed a return date, I think it is a matter of notoriety that these pre-sentence **[5]** reports are not always prepared within the timeframe allowed and, in a real sense, the period an individual may be in custody pending the receipt of a pre-sentence report is often quite uncertain.

In all the circumstances, and fortified by the view which Crockett J took in the case of *Heath*, I hold that I do have jurisdiction to entertain this application. As the transcript will show, upon my inquiring whether the Crown objected to this matter being entertained when there was evident non-compliance with the relevant Practice Note concerning bail applications, Mr Castle replied that he did not object providing he was permitted to call a police officer to give *viva voce* evidence. He did call the officer, Detective Senior Sergeant Oomes from the Special Projects Unit. Mr Oomes provided some further information about the circumstances of the applicant's offence of indecent assault. It appeared that the girl involved was four years of age, and she was one of several children who attended a child-minding centre which the applicant's mother then conducted at her home in Chirnside Street, West Footscray. The offence was constituted by licking the girl's

vagina. It was committed during the day in circumstances where for some reason, the applicant was at his mother's house.

Mr Oomes also gave evidence that on 22 January this year the applicant was convicted of two counts of theft in a Magistrates' Court (the offences having been committed earlier this year) and was fined $200 on each charge. Those offences were committed, therefore while he was on bail for this offence. He, however, is not caught, in my opinion, by the reverse onus provisions of **[6]** the *Bail Act*. In those circumstances it is unfortunate that paragraph 9 and paragraph 10 of the affidavit in support of this application read as follows:

> "9. That I am told and verily believe the applicant is aged 20 and the prosecution did not allege any prior court appearances or convictions. Further, the applicant has had no previous court appearances or convictions. 10. That I am told and verily believe that the applicant has not committed any offence since 10 July 1989."

That affidavit was sworn recently. **[7]** Upon my inquiry it is clear that the applicant gave those instructions to Mr Stephen Mile, the deponent. Even, taking into account, as I have been urged to by Counsel for the applicant, the circumstance that the applicant is perhaps retarded or of limited intelligence, that circumstance does not, in my opinion, adequately explain his failure to mention a court appearance which had occurred so recently, and it is a factor I take into account in considering the merits of this application. The Court is asked to exercise a discretion and it is very important that an applicant takes a position of complete frankness with the Court.

The applicant's mother gave evidence and told me – and I accept – that the child minding group was closed after the commission of this offence and she no longer has children in her home. It is proposed, if bail was granted that the applicant will live with his parents at Chirnside Street, West Footscray. On the other hand, the girl who is the subject of the indecent assault and her family live quite close by and I think it is a reasonable inference that this matter must have become a subject of interest and discussion in the neighbourhood of Chirnside Street, West Footscray.

Mr Taft also relies on the likelihood that the applicant will lose his job if bail is not granted. He works as a sandblaster and has been in that employment for some months. His mother says, and I accept, that he seems to enjoy that job and is interested in it. Understandably perhaps, she has not been entirely frank with his employer and I make no criticism of her for that. She had to do the best she could in difficult circumstances and she simply **[8]** told the employer that he is undergoing some tests and will be back next week. If bail is not granted he will not be back next week. He apparently got his job by reason of his attendance at some unemployment centres with his father.

Mr Taft also pointed out that life in custody can be especially difficult and unpleasant for persons who are charged with this sort of offence. I think that is so but a responsibility, of course, is on the authorities to see that the applicant is safely detained. In my opinion, the evidence about his employment falls short of indicating that there is a clear and real risk that it will not be continued if he is not at work next week.

Mr Taft also submitted that in all the circumstances there is no real likelihood of the applicant committing another offence if he is released on bail. In my view, consideration of the public interest goes beyond that (although it is a factor) and extends to include the consideration of the views of right-minded people of the propriety of the applicant being on bail in the particular circumstances of this case together with questions of public disquiet in the relevant neighbourhood However, I think the most important consideration is that the reason or reasons for the commission of this office is or are, at the moment, quite unclear. Indeed, I infer that was why the applicant's counsel asked for the pre-sentence report direction and the learned Magistrate agreed to it.

Until that report is completed, the question of whether the applicant has a personality or psychological problem; its nature and gravity and what, if anything, can **[9]** be done about it must remain matters of speculation, and I think this circumstance is very important in the resolution of this application. It would not be right, in my judgment, while that important part of this case remains unclear and is subject to investigation, that the applicant should be admitted to bail.

I am, on the whole of the evidence, satisfied that it would not be desirable in the public interest to release the applicant pending receipt of the presentence report. In all the circumstances I propose to refuse the application.

Solicitors for the appellant: Slater and Gordon.
Solicitors for the respondent: JM Buckley, solicitor to the Director of Public Prosecutions.