11/96

SUPREME COURT OF VICTORIA

DPP (CWTH) v TANG and ORS

Beach J

5, 6 December 1995 — (1995) 83 A Crim R 593

BAIL – IMPORTATION OF DRUGS – BAIL TO BE REFUSED UNLESS EXCEPTIONAL CIRCUMSTANCES EXIST – MEANING OF "EXCEPTIONAL CIRCUMSTANCES" – DELAY OF SIX MONTHS BEFORE COMMITTAL – ESTIMATED DELAY OF SIX TO EIGHT MONTHS BETWEEN COMMITTAL AND TRIAL – WHETHER SUCH DELAY AN "EXCEPTIONAL CIRCUMSTANCE": *BAIL ACT* 1977, S4(2)(aa)(ii).

T. and others were committed for trial in respect of a charge of being knowingly concerned in the importation of approx. five kilograms of heroin. By virtue of s4(2)(aa)(ii) of the *Bail Act* 1977 ("Act"), the court was required to refuse bail unless satisfied that exceptional circumstances existed which justified the grant of bail. The magistrate granted bail to each accused, holding that the period of time already spent in custody (six months) and the further time of six to eight months until trial constituted an exceptional circumstance. Upon appeal—

HELD: Appeal allowed. Bail orders quashed. Each application for bail dismissed.
1. "Exceptional" is a word commonly used in legislation. Any person charged with an offence under s4(2)(aa) of the Act bears an onus of establishing that some unusual or uncommon circumstance exists which justifies the grant of bail.

2. The normal delay which occurs between arrest and committal and between committal and trial cannot, of itself, amount to an exceptional circumstance. In this case, there was nothing exceptional or unusual about the delay which had already occurred and the estimated delay before trial.

BEACH J: [1] I have before me five appeals lodged by the Commonwealth Director of Public Prosecutions pursuant to the provisions of s18A of the *Bail Act* whereby the Director seeks an order quashing orders made by the Magistrates' Court at Melbourne on 15 November 1995 whereby the Magistrates' Court released on bail the five respondents to the appeal.

In the months of February and March 1995, the five respondents Thinh Tang, Thi Doung Quach, Thay Dang, The Phoung Tran and Matthew Lap Tsin Chow were arrested and charged with being knowingly concerned in the importation of a commercial quantity of heroin contrary to para233B(1)(d) of the *Customs Act* 1901. Certain of the respondents were charged with other associated offences. They can be ignored for present purposes. What is alleged is that the respondents imported into this country from Vietnam some five kilograms of pure heroin with a street value of $12,000,000. The consignment was hidden in the hollow centres of nine ceramic lamp bases. Following their arrests the respondents remained in custody until the committal proceedings in respect of the charges, which commenced on 21 August last. The committal hearing extended over some 38 days between that date and 15 November 1995. At the end of the hearing each respondent was committed to stand trial at the County Court at Melbourne. Applications were then made on behalf of the respondents that they be released on bail pending their trial. The quantity of heroin imported into this country **[2]** was such as to attract the provisions of s4(2)(aa)(ii) of the *Bail Act* 1977. That subsection provides:

> "Notwithstanding the generality of the provisions of subs(1) a court shall refuse bail—
> (aa) in the case of a person charged with—
> (ii) an offence under s231(1), 233A or 233B (1) of the *Customs Act* 1901 of the Commonwealth (as amended and in force for the time being) in relation to a commercial or trafficable quantity of narcotic goods within the meaning of that Act—
> and the offence is alleged to involve—
> (iii) 30.0 grams or more of heroin; or
> (iv) 100.0 grams or more of cocaine; or
> (v) a prescribed quantity of any other drug of dependence that is prescribed— unless the court is satisfied that exceptional circumstances exist which justify the grant of bail".

At the conclusion of the applications for bail the Magistrate held that the period of time which the respondents had already spent in prison and would spend in prison prior to their trial in itself amounted to an exceptional circumstance and released the respondents on bail. The Magistrate imposed a number of stringent conditions upon each respondent. It is unnecessary to detail them in these reasons for judgment. It is from those orders that the Director appeals to this court. The section of the *Bail Act* dealing with such an appeal is s18A, the relevant subsections of which read: *[His Honour set out the relevant provisions of the section, referred to* Beljajev and Another v DPP (Victoria) and Another*, an unreported decision delivered on 8 August 1991 and continued]*...**[4]** If the Director satisfies me that the Magistrate erred in the exercise of his discretion and that a different order should have been made, in this case an order refusing the **[5]** respondents' applications for bail, then his appeal must succeed.

In the present case the Director contends that in the circumstances of this case the Magistrate was in error in finding that the period of time the respondents had spent in custody, and will spend in custody prior to their trial, constituted an exceptional circumstance. During the course of the hearing there was much said as to the meaning to be given to the word "exceptional" where used in s4(2)(aa) of the *Bail Act*. "Exceptional" is a word commonly used in legislation. One definition of it in the *New Shorter Oxford English Dictionary* is: "Of the nature of or forming an exception, unusual, out of the ordinary, special" (see vol 1 at 872). *Websters Dictionary* contains the following definition: "Relating to or forming an exception, out of the ordinary course, unusual, uncommon, extraordinary". In my opinion it does not matter which of those definitions one chooses to adopt. I consider it was the clear intention of the legislature that any person charged with an offence falling within the provisions of s4(2)(aa) bears an onus of establishing that there is some unusual or uncommon circumstance surrounding his case before a court is justified in releasing him on bail.

In my opinion the normal delay which occurs in this State between arrest and committal, and committal and trial, cannot of itself amount to an exceptional circumstance. I do not say that delay *per se* may not amount to an exceptional circumstance. If there is inordinate delay, it very well may. But that is not the situation in the present case. The respondents were **[6]** arrested in the months of February and March and their committal hearing commenced on 21st August. That is some six months later. In my experience that is the usual period of time which elapses in this State between the arrest of a person charged with a serious drug offence or murder and that person's committal. If such a person is then committed to stand trial, he will face a further delay of the order of six to eight months before his trial commences. In my opinion there is nothing exceptional or unusual about the delay which has occurred in this case since the arrest of the respondents, nor will there be anything exceptional or unusual about a delay of six to eight months between their committal and trial. In my opinion the Magistrate erred in the exercise of his discretion.

During the course of the hearing there was a degree of debate concerning the strengths and weaknesses of the Crown case as it related to each respondent. Clearly the Crown case against some respondents is stronger than the case against others, but the fact of the matter is that after a 38-day committal hearing the Magistrate rejected all applications made to him that he not commit a particular respondent to stand trial and committed all respondents to stand trial on what must be regarded as one of the most serious offences known to the law in this State, an offence having as its maximum penalty a term of life imprisonment. Clearly the Magistrate was of the opinion that the evidence called by the Director was of sufficient weight to support a conviction for the offence or offences with which each respondent has been charged. I have heard nothing in this case which causes me to come **[7]** to the view that the case against a particular respondent is so weak as to amount to or constitute an exceptional circumstance. In my opinion the orders that should have been made in this matter were orders dismissing the respondents applications for bail. The orders of the Magistrates' Court at Melbourne made on 15 November 1995 whereby the respondents were released on bail are hereby quashed. **ORDER:** In lieu of those orders I order that each respondents' application for bail be dismissed.

APPEARANCES: For the Applicant: Mr J Leckie with Mr A McKenna, counsel: Solicitors for the Applicant: C'wealth DPP. For the Respondent Tang: Mr R Kent with Mr P D'Arcy, counsel. Solicitors for Respondent Tang: Haines and Polites. For the Respondent Quach: Mr K McGowan, counsel. Solicitors for Respondent Quach: Amad and Amad. For the Respondent Dang: Ms J Perlman, counsel. Solicitors for Respondent Dang: Valos Black. For the Respondent Chow: Mr R van de Wiel, counsel. Solicitors for Respondent Chow: Valos Black. For the Respondent Tran: Mr Brustman, counsel. Solicitors for Respondent Tran: Valos Black.