36/10; [2010] VSC 309

SUPREME COURT OF VICTORIA

Re BRYANS

Pagone J

2 July 2010

CRIMINAL LAW – BAIL – SHOW CAUSE SITUATION – PROCESS TO BE EMPLOYED BY THE COURT WHEN CONSIDERING AN APPLICATION FOR BAIL – ONE-STEP PROCESS – MEANING OF – RISKS TO BE CONSIDERED – ACCUSED GUILTY OF RECENT CRIMINAL CONDUCT – SOME RISK OF INTERFERENCE WITH WITNESSES – ACCUSED MAY HAVE PREVIOUSLY BREACHED CONDITIONS OF BAIL – ASPECTS OF SURETY OFFERED CONSIDERED – WHETHER DETENTION IN CUSTODY NOT JUSTIFIED – APPLICATION FOR BAIL REFUSED: *BAIL ACT* 1977, S4(4)(c).

B. applied for bail in respect of offences which required him to show cause why his detention in custody was not justified. On the application it was said that B. had not an unblemished record and had some difficulty with abusive substances. Further, it appeared that he had breached special conditions of bail and that there was a possibility that if released, B. might reoffend. Also, in relation to the surety offered by B.'s mother, it was said that she may have been involved in some of B.'s conduct.

HELD: Application for bail dismissed.

1. It is important to remember that s4(4)(c) of the *Bail Act* 1977 imposes a burden upon the applicant which needs to be discharged in difficult circumstances. The circumstances are difficult because there is a presumption of innocence to be weighed against important community expectations and considerations, and because such applications are made in a context in which the parties are in part restricted in what they can say as a trial is yet to occur and, on this occasion, there is yet to be a committal proceeding.

2. The decision in *Asmar* [2005] VSC 487; MC30/2005 considered what was meant by "showing cause" in the context of applications for bail. The issue arose in that case in part because a difference of view had arisen about whether the authorities required a one-step process or a two-step process when considering bail applications. What Maxwell P made clear was that there is only one step in the process, namely that there needs to be established by the person in custody that there was no justification for the custody.

3. In considering whether to grant bail it is common to talk about and to consider four risks. They are whether the accused person (a) appears in accordance with his bail and surrenders himself or herself into custody, (b) does not commit an offence whilst on bail, (c) does not endanger the safety or welfare of members of the public, (d) does not interfere with witnesses or otherwise obstruct the course of justice. These are the four considerations which the law has described to deal with the one fundamental question, namely whether the custody is justified.

4. Having regard to all of the circumstances, the Court is not satisfied that the detention of B. in custody was not justified. Accordingly, the application for bail is refused.

PAGONE J:

1. This is an application for bail under section 4(4)(c) of the *Bail Act* 1977 (Vic). For the purposes of the application, the critical question is whether the accused person has shown cause why his detention in custody is not justified. I need to say something about what the obligation of showing cause means and the standard that needs to be satisfied for the requisite conclusion to be reached. The issues have been considered in many cases but the critical ones for the purposes of today are, in reverse chronological order, the decisions in Re an application for bail by *Asmar*[1] per Maxwell P, and *Director of Public Prosecutions v Harika*[2] per Gillard J.

2. It is important to remember that the section imposes a burden upon the applicant which needs to be discharged in difficult circumstances. The circumstances are difficult because there is a presumption of innocence to be weighed against important community expectations and considerations, and, of course, because such applications are made in a context in which the

parties are in part restricted in what they can say as a trial is yet to occur and, on this occasion, there is yet to be a committal proceeding.

3. The decision in *Asmar* considered what was meant by "showing cause" in the context of applications for bail. The issue arose in that case in part because a difference of view had arisen about whether the authorities required a one-step process or a two-step process when considering bail applications.[3] What Maxwell P made clear was that there is only one step in the process, namely that there needs to be established by the person in custody that there was no justification for the custody.[4] That is clear enough from what the President said in paragraphs 15, 16, 17 and 18 of his decision.

4. In that process, however, the fundamental test is whether the custody is not justified. It is not a matter for discretion (although judgment may play a part in the decision) and it is not a matter of deciding whether to grant bail on the balance of convenience (although such considerations may play a part in the ultimate decision). The decision requires, rather, a strong conclusion to be drawn that something which has been done in the name of the state is not justified. It is a difficult decision and for bail to be granted in these applications it is necessary that there be confidence in the conclusion that the custody is not justified.

5. In considering whether to grant bail it is common to talk about and to consider four risks. His Honour in *Asmar* did so in paragraph 15, in the context of the one step conclusion required by the section and his Honour returned to the four risks in paragraph 37 in considering the relevance that the surety (in considering whether the surety or the conditions upon which bail might be granted) might have on whether the custody might or might not be justified.

6. The four conditions were described in *Harika* and referred to by his Honour in *Asmar*. They are whether there is an unacceptable risk that if released on bail, first the person might engage in criminal conduct, secondly might threaten or harm witnesses, thirdly might abscond on bail, and fourthly might breach the conditions. In paragraph 37, the learned President put them slightly differently in considering the relevance of surety or the conditions upon which bail might be granted. In that context his Honour described them as whether the accused person "(a) appears in accordance with his bail and surrenders himself or herself into custody, (b) does not commit an offence whilst on bail, (c) does not endanger the safety or welfare of members of the public, (d) does not interfere with witnesses or otherwise obstruct the course of justice".

7. These are four considerations which the law has described to deal with the one fundamental question, mainly whether the custody is not justified. The four risks are useful criteria to consider in that context, and that is the way the case before me has been conducted. Consideration of the risks requires some prediction to be made. In *Asmar*, the learned President observed, in paragraph 25, that making predictions is difficult enough when the person has been found guilty of relevant and recent criminal conduct, but is more difficult in the context of an applicant for bail where the applicant is presumed to be innocent on the matters charged.

8. Predictions are difficult and the predictions called for in this context are about risks which must be based as best as one can on the circumstances and facts as they are known or believed at the time of the application. Here, there are factors that can fairly be said to point in either way. In relation to the potential for committing any future offences on bail, it must be said about Mr Bryans that he has not an unblemished record. He has, it is conceded, at least in the past – and it appears, to some extent still – some difficultly with abusive substances. He has committed other offences to which I have been referred, and he has had two reports, upon which he relies, both of which say that there are difficulties in his use of substances that require treatment. On the one hand, this points in his favour in suggesting that he might benefit from professional assistance and programs. On the other hand, it points to something that creates a potential for risk by confirming the existence of his use of drugs and indicating a present and continuing need for treatment. I am not confident that the applicant would not re-offend if granted bail especially because there is evidence of his conduct when on bail between 8 and 15 January this year.

9. The second matter is the interference with witnesses. His counsel has led cogent arguments about why some of the material before me should not cause me to have any concern about any potential interference with witnesses. As against that, however, there is material which shows that

someone has made threats to potential witnesses and that, of the people who made the threats, the accused – the applicant in this case – could be one of them. It cannot be excluded, on the basis of the material before me, that there is some risk of interference with witnesses.

10. As for the risk of not appearing on bail, what concerns me deeply in this case is that he was on bail on 8 January this year and that between that date and 15 January, he appears to have breached the special conditions of bail. His counsel argues that this conduct is explicable by reference to the applicant's circumstances at the time when the events occurred during which he seems to have been under some difficulties connected with his drug habit. That may be an explanation, but it is clear that the material before me does not show that he is yet free from drug addiction. At best it can be said, as is clear from the two reports that have been filed on his behalf, that two qualified people, have formed the view that he might benefit in the future from treatment. That may be, but the fact is, at the moment, the material before me points to a risk of repetition of conduct which is accepted to have existed in the past and might continue in the future.

11. Much has been said today, about the strength of the case, particularly in relation to a taped covert conversation. The applicant's counsel urges me to consider the possibility of its exclusion as a factor in concluding that the evidence against the applicant is not strong. I should be cautious about what I say in respect of that material. I am mindful of what was said by Justice Coldrey in the case of *R v Roba*,[5] where his Honour, at the trial (rather than at a bail hearing), decided to exclude a taped conversation on the grounds of public policy. He did so on the basis that what occurred in that case, in circumstances that bear some resemblance to the present, led his Honour to conclude that the excluded evidence had been obtained, at least, in reckless disregard of the accused's rights, sufficient, in his Honour's view, on a balance of factors, to exclude the taped conversation on the grounds of public policy.[6]

12. Procedural rights are not to be treated lightly. Procedural rights are at the heart of substantive rights. They are often what give substantive rights their force and effect. On the other hand, the exclusion of evidence is a question, ultimately, for the trial judge. It will be for the trial judge to decide whether or not to exclude material on the grounds of public policy if it be shown that it was obtained in disregard of a person's procedural or substantive rights. I do not think that I should form or express any view about the matter, beyond saying that it does not seem to be a case where the evidence is so clearly of a kind that would be excluded that I should safely, in a bail application, proceed upon the basis that it were excluded.

13. In those circumstances, I should assume that there is a probable chance that it will be taken into consideration at a trial, and, on that basis, that there is a probability that it may be harmful to the applicant at trial. In those circumstances, I cannot conclude that the case against him is not strong. I put it negatively and do not wish to be understood to be saying either that the material should be taken into account or that it is sufficient either to commit the accused or that he should be denied bail in the future if it arises for consideration at the committal. It is sufficient for the present application to express the view that I will not act upon the assumption that it might not be admitted or, if admitted, that it will not be used against the accused.

14. I have also considered whether the surety offered is sufficient for me to conclude that custody is not justified, but am troubled about the basis of the surety that was offered. Common human experience and expectations might suggest bail would be answered in circumstances where a failure to answer bail would put at risk the home of the accused's mother. On the other hand there are troubling aspects of the materials in this case that give me some apprehension. The material is not put or proven beyond reasonable doubt or even on the balance of probabilities. This is not an application in which I am called upon to make affirmative findings and do not make affirmative findings against either the applicant's mother or the applicant's grandparents. However, I am constrained by the material that I have before me. That suggests, rightly or wrongly, an involvement and active participation by the accused's mother in some conduct with the applicant that could only be regarded as harmful to his case. I particularly have in mind what appears in page 17 and 18 of the second exhibit to the affidavit of Suzanne Claire Penhall in which it is asserted that it was Donna Bryans (the accused's mother) who drove her son to arrange the purchase of heroin and that this occurred when he was on bail. The material asserts that the two made plans to obtain heroin for him "as a celebration for him getting bail prior to him being released from the custody centre".

15. The possibility that the applicant, if granted bail, would live with his grandparents may provide some comfort but, as against this, the material available to me indicates that it was at the time that he was living with his grandparents that some of the earlier events appear to have occurred.

16. In all these circumstances, I am only able to conclude that on the material before me I am not satisfied that the detention in custody is not justified, and in those circumstances I dismiss the application.

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[1] [2005] VSC 487 (Unreported, Maxwell P, 29 November 2005).
[2] [2001] VSC 237 (Unreported, Gillard J, 24 July 2001).
[3] *Re an application for bail by Asmar* [2005] VSC 487 (Unreported, Maxwell P, 29 November 2005) [7] –[10].
[4] Ibid [17].
[5] [2000] VSC 96; (2000) 110 A Crim R 245 (Coldrey J, 7 February 2000).
[6] Ibid [23].

APPEARANCES: For the applicant Bryans: Mr G Traczyk, counsel. C Marshall & Associates, solicitors. For the respondent DPP: Mr R Gibson, counsel. Office of Public Prosecutions.
