

33/81

## SUPREME COURT OF VICTORIA

***TORNEY, David John, Application for Bail by***

Lush J

17 June 1981

**BAIL - APPLICATION FOR REDUCTION OF BAIL - APPLICANT IN CUSTODY - BAIL GRANTED BY MAGISTRATE - WHETHER MAGISTRATE IN ERROR: BAIL ACT 1977, S4(2).**

The affidavit stated that the Crown opposed reduction of bail on the basis that the applicant was in custody pursuant to the sentence of the court and was not due for release until the 5th August. It was contended by the Crown that the application was erroneously treated for a substantive grant of bail. The Crown became aware that on the 5th of the month the applicant applied to the City Magistrates' Court for bail and was granted bail which was done on the basis of a misunderstanding, i.e. that he would not be undergoing any sentence at that stage. It was submitted that the Court was asked to vary an order which was a nullity, because the order of the Magistrate was contrary to section 4 sub-section 2 of the *Bail Act*.

Mr JUSTICE LUSH: You had better tell me what the custody history is.

Mr O'FARRELL: On the 7th November 1980 the applicant was convicted for breach of parole and was sentenced to the balance of the substantive sentence which was nine months 21 days. He was granted remissions on that sentence for the breach and he was due to be released on the 5th June 1981. In September of 1980, on the 24th September, he was convicted at Prahran Magistrates' Court of burglary. He was sentenced to pay a fine of \$250 in default three months. He failed to pay that fine and on the 22nd April 1981 a warrant was executed upon him, and the result of that is that he has to serve three months.

HIS HONOUR: That would extend his release date to the 5th August practically, would it not?

Mr O'FARRELL: Yes, Your Honour, that is as I am instructed by Pentridge. At the preliminary hearing in this matter in respect of which the application was made the preliminary hearing occurred on the 13th May 1981 – no order was made as to bail on that occasion. The reason for that was the fact that at that time the applicant was in custody. However, he applied for bail on the 5th June. That is the date when he was due to be released from the sentence he was serving for breaching his parole. There was an understanding at that time that the only outstanding custodial term that he would have to serve was the default term and apparently there was a misunderstanding by himself and the informant and the Magistrate, that the proper procedure would be for him to apply for bail, be granted bail, and then pay his fine and achieve the result of his release. However, the true situation in my submission, is that in order to be eligible to apply for bail he would have to pay the fine. In any event, he was granted bail whilst he was undergoing a term of imprisonment, and I submit that the order granting bail ought not to have been made and, with respect, that that order ought now be varied. Alternatively, if Your Honour adjourns this application the informant may be able to take steps to apply to the Magistrate to revoke his order.

HIS HONOUR: Section 4 sub-section 2 is peremptory. "A court shall refuse bail if the accused person is in custody pursuant to the sentence of the court or some other cause." I am not sure that in these proceedings you are entitled to any formal order that the Magistrate's order ought to be set aside.

Mr O'FARRELL: What I had in mind was that the informant would approach the Magistrate and revoke the order under section 18.

HIS HONOUR: Yes. Well, that is a preferable course. That is, bring it about that the informant applies.

APPLICANT: It was my understanding that a fine was not considered sentence in regards to a bail application, and I applied for the bail after I had finished my parole, and I was only serving the fine. The only thing that was holding me, in fact, was the fine.

HIS HONOUR: But the warrant for the fine was executed. As long as it was simply a court order that you pay the fine in default three months, that is not a prison sentence, but the warrant was executed on 22nd April and from that time you were under sentence for the three months, which became cumulative on your previous breach of parole.

APPLICANT: Yes, Your Honour, but what I mean, the breach of parole ran out when I was only serving my fine. I understood the fine could be paid any time and therefore wasn't counted as far as the bail application was concerned.

HIS HONOUR: No. You are under sentence. It is true you can get the sentence terminated by paying your fine, but until you do that no court is entitled to make an order for bail.

HIS HONOUR: I will adjourn this application to 5th August 1981 with leave to the applicant to give 48 hours' written notice to bring it on at an earlier date in the event of his paying the fine imposed on 24th September 1980. At the adjourned hearing the application will be deemed to be a substantive application for bail.

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