27/83

SUPREME COURT OF VICTORIA

R v LYCOURESSIS; R v SECOMBE (sub nom Re Lycouressis Re Secombe)

Murphy J

7 December 1982 — [1983] VicRp 82; [1983] 2 VR 219

CRIMINAL LAW – BAIL FOR APPEAL TO COUNTY COURT – ORDER BY MAGISTRATE THAT APPELLANT NOT BE RELEASED PENDING APPEAL – APPLICATION TO SUPREME COURT FOR BAIL –♠ WHETHER INHERENT POWER IN SUPREME COURT TO GRANT BAIL PENDING APPEAL: *MAGISTRATES' COURTS ACT* 1971, S75(1).

Section 75(1)(e)(iii) of the *Magistrates' Courts Act* 1971 provides that:
"Notwithstanding anything in this section, in no case shall an appellant be released from custody unless the Court stipendiary magistrate or justice so orders and the appellant has in the manner provided in sub-paragraph (i) entered into a recognisance in the sum and with the sureties (if any) determined pursuant to sub-paragraph (i)."

L. and S. had been sentenced to terms of imprisonment by separate Magistrates' Courts. They both lodged notices of appeal to the County Court and recognisances to prosecute the appeals were duly fixed by the relevant Magistrate. In L.'s case the recognisance was fixed in the sum of $1000 and the magistrate ordered that L. not be released pending determination of the appeal; the justice before whom L. entered into the recognisance did not order his release. In S.'s case the recognisance was fixed in the sum of $100, but the magistrate "declined to grant bail pending the appeal"; the justice before whom S. entered into the recognisance did not order his release. Accordingly, each appellant applied to the Supreme Court for "bail pending the hearing of the appeal".

HELD: Applications refused.
(1) In construing s75(1)(e)(iii) of the Act, it is a necessary consequence that an appellant who has lodged a notice of appeal and entered into the recognisance to prosecute, cannot be released pending appeal, unless he has a positive order directing his release, made by the court which convicted him or by a stipendiary magistrate or a justice.

(2) The Supreme Court has no inherent jurisdiction enabling it to grant bail and override the provisions of s75(i)(e)(iii) of the Act.

(3) The provisions of the *Bail Act* 1977 do not apply in such circumstances to enable the Supreme Court to grant bail on application made for bail by an appellant in custody.
***Re Torney* (unreported 2 October 1982, Crockett J); and**
***Re Lucas* (unreported 25 August 1982, Anderson J), applied.**

(4) As the appellants have entered upon their recognisances, and the justices before whom they did so did not thereupon order their release, it is not open to a judge of the Supreme Court to grant bail.
***R v Blackler* [1981] VicRp 64; (1981) VR 672, distinguished.**

(5) Under the provisions of the *Justices Act*, s145, it is clear that a Court or stipendiary magistrate which convicted the appellant could not, when determining the amount of the recognisance and sureties (if any), order that the appellant not be released pending appeal.

(6) If magistrates assume that by the addition of the words "unless the Court stipendiary magistrate or justice so orders" in s75(1)(e)(i) of the Act, that they have power to order that the appellant not be released pending appeal, then the appellant's position has dramatically changed.

MURPHY J: *[After setting out the facts, His Honour continued]:* ... **[3]** In each case the merits are in my opinion in favour of granting bail to the applicant and I should do so, if to do so is within my power. Each of these application involves a consideration of the *Magistrates' Courts Act* 1971 and the procedure concerning appeals to the County Court from summary convictions in the Magistrates' Court (see s6 of the *Magistrates' Courts Act* 1971 and s75).

What the Crown in effect submits is that the *Magistrates' Courts Act* codifies the law as to the circumstances in which an appellant from a summary conviction for which the appellant

has been sentenced to imprisonment can be released pending the hearing of the appeal to the County Court. Certain material matters which appear to be well established may be stated. An appeal to the County Court from a conviction in the Magistrates' Court is by way of rehearing. An appeal when properly constituted operates as a stay of execution. An appeal is only properly constituted when notice of appeal has been served within the time stipulated in s75(1)(a) on the persons set out therein and when the appellant has within 7 days after the day on which he gave notice of appeal entered into a recognisance in the prescribed form for such sum and with or without sureties as provided in s75(1)(e).

The recognisance into which the appellant enters is a recognisance "to prosecute the appeal at a place and on a day to be fixed by the Registrar of the County Court and to surrender himself and not to depart that Court without leave **[4]** and to abide the judgment of the Court on the appeal and to pay the costs awarded by the Court". See s75(1)(h). Although the appellant undertakes among other things "to surrender himself", the recognisance into which he enters is not a recognisance of bail. Rather it is a recognisance to prosecute the appeal in a sum fixed after the notice of appeal has been served, and the amount of the recognisance and the requirement of sureties (if any) should depend upon all the circumstances of the case, including the costs (if any) likely to attend the appeal. A recognisance fixed before notice of appeal is served has been held to be irregular, and to invalidate the appeal: *R v The Justices of Anglesey* (1892) 2 QB 29; *Ormond v Joske* (1910) 16 Argus Law Reports, current note 1; 16 ALR (CN) 1.

The recognisance must be entered upon, whether the appellant is or is not in custody sentenced to a term of imprisonment. An appellant from a Magistrates' Court to the County Court is not, by entering into the recognisance, admitted to bail in any sense at all. The purpose of the recognisance is among other things to discourage frivolous appeals. *]After considering the history of the scheme of the legislation, His Honour continued];* ... **[7]** The *Justices Act* 1958 and s75(1)(e)(i) of the *Magistrates' Court Act* 1971 provides for the release of a person who is "in custody" and who desires to be released therefrom "pending the determination of the appeal".

What however in not so clear is whether the Court or Stipendiary Magistrate which convicted the appellant, and whose sentence on appeal is stayed pending the rehearing before the County Court, can, when determining the amount of the recognisance and sureties (if any) under s75(1)(e)(i), order that the appellant not be released pending the appeal. Under the provisions of the *Justices Act* 1958 s145, I think it is clear that he could not do so. Under the terms of that Act, the justice before whom the appellant entered into a recognisance to prosecute the appeal "may order the release of the appellant from custody if he is detained for no other lawful cause". (See now last words of s75(1)(e)(i) of the *Magistrates' Courts Act* 1971). This paragraph does not suggest that there is any inhibition placed on the justice, before whom the recognisance is entered into save that the appellant, may **[8]** be detained for some "other lawful cause".

The use of the word "may" preceding the words "order the release" was in my opinion used in the *Justices Act* 1958 not to give to the justice "to whom the certificate and a copy of the appellant's notice of intention to appeal are produced" a discretion whether or not to release the appellant, but rather to emphasise that it is only if the certificate and notice of appeal are produced to him and if the recognisance is entered into before him in the sum and with such sureties (if any) as determined according to the sub-paragraph that he is "thereupon" empowered to release the appellant. In my opinion it is extremely doubtful whether he was entitled to exercise any independent discretion. I prefer the view that once the pre-conditions were satisfied, and if the appellant was not detained for some other lawful cause, the justice was empowered to order the release of the appellant.

This view of the meaning of the words as they appeared in the *Justices Act* is strengthened by a consideration of the alternatives. If the justice to whom the documents were presented and before whom the recognisance was entered into could refuse to release the appellant, then he was retained in custody, although he was not serving a sentence which, if imposed, had been stayed. His appeal might not come on for some months, as is forecast in at least one of the present cases. If the appeal succeeded the appellant would have been detained in custody for some months, and it would have been little satisfaction for the appellant to know eventually that the charge against him **[9]** for an offence triable summarily was dismissed on the rehearing.

This Court has decided in a series of unreported decisions that the *Bail Act* 1977 does not apply in such circumstances to enable this court to grant bail on application made for bail by the appellant in custody. (See e.g. *Re Torney* 25th October 1982, Crockett J; *Re Lucas* 25th August 1982, Anderson J). If, contrary to my opinion, it was the law that the justice might as a matter of discretion decline to release the appellant, even when all proper formalities had been satisfied, and if the appellant could not thereafter apply to this Court for bail pending the appeal, it would have constituted in my view an injustice which I cannot believe was intended. Furthermore it would have rendered nugatory to an important extent the provision implicit in the section, that by entering upon the stipulated recognisance to prosecute the appeal the appellant effected a stay of execution. It would also it my view stultify the law to the effect that the hearing of the appeal before the County Court is by way of rehearing.

With one important exception the provisions of s75 of the *Magistrates' Courts Act* 1971 proceed on the basis that an appellant against a conviction "in respect of which a term of imprisonment or detention was imposed" will be at large pending the hearing of the appeal (Cf. s75(1)(p)(ii); 75(1)(q)(ii). The exception to which I refer is sub-paragraph (iii) of s75(1)(e) of the *Magistrates' Courts Act* which reads:

> **[10]** "Notwithstanding anything in this section in no case shall an appellant be released from custody unless the Court stipendiary magistrate or justice so orders and the appellant has in the manner provided in sub-paragraph (i) entered into a recognisance in the sum and with the sureties (if any) determined pursuant to sub-paragraph (i)."

Section 142(6)(c) of the *Justices Act* 1958 had been in the same terms as s75(1)(c)(iii) save that the words "the Court stipendiary magistrate or justice so orders and" did not appear in the *Justices Act* 1958. When in 1973 the *Magistrates' Courts (Jurisdiction) Act* No. 8427 was passed "Part IX - Appeal to the County Court" – contained s75(1)(e)(iii) in the form in which we now find it, with those words added. One of the difficulties in construing the meaning and effect of the sub-paragraph in its context is that nowhere earlier in s75 is "the Court" or "stipendiary magistrate" required to consider or given power to order the release from custody of the appellant.

The whole of the earlier part of the section emphasises that the entry by the appellant upon the stipulated recognisance is a condition precedent (i) to a stay of execution, (ii) to a properly instituted appeal and (iii) to an order releasing the appellant from custody (should he be in custody). See s75(1)(b), 75(1)(c), 75(1)(d), 75(1)(e)(i) and 75(1)(e)(ii).

Since these words were inserted in the *Magistrates' Courts Act* in s75(1)(c)(iii) it appears that some stipendiary magistrates have adopted the practice, following service of a notice of appeal and upon being asked to determine the amount of the appellant's recognisance **[11]** and sureties (if any), of not only fixing the amount of recognisance but also ordering at the some time that the appellant not be released from custody pending the hearing of the appeal. Apparently they assume from the addition of these words in s75(1)(e)(iii) that they have power to make an order at the time of determining the recognisance that the appellant shall not be released pending the hearing of the appeal. If this is a correct interpretation of the sub-paragraph, then the addition of the words in question in the *Magistrates' Courts Act* have dramatically changed an appellant's position. Previously, the justice before whom the recognisance to prosecute the appeal was entered into had only to inspect the certificate and a copy of the appellant's notice of intention to appeal and to ensure that the recognisance was in the sum and with such sureties (if any) as determined by the Court stipendiary magistrate or justice under sub-paragraph (i) of 75(1)(o), and then to order the release of the appellant from custody. Now, he must also see whether there is an order for release given by "the Court stipendiary magistrate or justice". Presumably also he must ensure (if a Court is the relevant entity involved) that it is the Magistrates' Court which convicted the appellant which has so ordered. If it is "a stipendiary magistrate" who so orders, it may not be necessary that he is the magistrate who convicted the appellant, for the words used in sub-paragraph (i) are "a stipendiary magistrate" when defining who may determine the amount of the recognisance. The same applies in the **[12]** case of "a justice" outside the metropolitan area, but the words may relate only to those constituting the relevant Court.

In *R v Blackler* [1981] VicRp 64; (1981) VR 672 Starke J took the view that when s75(1)(e) said that an appellant was not to be released from custody "unless the Court stipendiary magistrate or justice so orders" it referred to any justice, and that because a judge of the Supreme Court was

by virtue of his office "a justice" (see s17 *Magistrates' Courts Act* 1971) he could order the release of the appellant when he entered into the stipulated recognisance. In *R v Lucas* 25th August 1982 (unreported) Anderson J ventured to suggest that the reference to "a justice" in s75(1)(e)(iii) was in its context a reference to the justice (should there have been one) who determined the amount of the recognisance and who was referred to in s75(1)(e)(i).

The section contains no reference to a power given to or requirement made of the Court or stipendiary magistrate or justice determining the amount of the recognisance to order that the appellant be released after the appellant enters into the recognisance determined. It refers only to the power of the justice before whom the recognisance is entered into, "thereupon" to order the release of the appellant.

In the present case the appellants (applicants) have entered upon their recognisance, and the justices before whom they did so did not "thereupon" order their **[13]** release, so that even should I consider myself "a justice" within the meaning of s75(1)(e)(iii) I could not adopt the course followed by Starke J in *Blackler* (above). In any event, the appellant who has been convicted summarily and sentenced to imprisonment, and who has given notice of appeal to the County Court, and entered upon a recognisance in the sum fixed and with sureties (if any) cannot be released pending the appeal, unless he has also a positive order directing his release, made by the very Court which convicted him or by a stipendiary magistrate or a justice. Whether or not this was intended to be the result of the insertion of these few words into an Act with such a history behind it, it appears to me to be the necessary consequence as a matter of construction. I do not intend to canvass the several decisions of single judges of this Court delivered on the hearing of bail applications of similar nature to the instant applications. It is not, I think, desirable or conducive to justice that refinements should be sought in individual cases in an endeavour to avoid the seemingly harsh consequences of the Act.

If the consequences of s75(1)(e)(iii) of the *Magistrates' Courts Act* 1971 are as many judges of this Court have interpreted them to be, it is my view that justice would be better served if the provisions of the *Bail Act* 1977 were amended to permit appellants from summary conviction who are not ordered to be released from custody to apply in the ordinary manner for bail under that Act. The *Bail Act* 1977 was passed after the *Magistrates' Courts Act* 1971, and the fact that it does not apply in these **[14]** circumstances may be a mere *lacuna* that has been created *per incuriam*. If so, of course, it should be cured as soon as possible. Otherwise the appeal provisions of the *Magistrates Courts Act* 1971, though operating as a stay of execution, would, because of the unavoidable delay often attending appeals be of academic interest only to appellants who are detained in custody pending the rehearing of their cases.

Several judges of this Court have also expressed the view that the Court has no inherent jurisdiction enabling it to grant bail and to override the provisions of s75(1)(e)(iii) of the *Magistrates' Courts* 1971. I believe that it is proper that there should be some definition in the approach of judges of this Court to matters of this kind, and accordingly I follow the decisions of my brethren, without wishing to lend weight to them. Each of the applications for bail will be refused. I would advise the applicants, if they desire to go further, perhaps to obtain a copy of this judgment when it is printed and return to the relevant Magistrates' Court and reapply there for an order that they be released pending appeal. The only other course they can take – as I see it – is to apply to the County Court pursuant to the second alternative set out in s75(1)(e)(v) for their release upon recognisance "upon and adjournment or postponement of the rehearing of the appeal."

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