

13/10; [2010] VSC 122

SUPREME COURT OF VICTORIA

Re MARIJANCEVIC

Lasry J

25 March, 8 April 2010

CRIMINAL LAW – APPLICATION FOR BAIL – APPLICANT CHARGED WITH OFFENCES INCLUDING DRUG TRAFFICKING – APPLICANT REQUIRED TO SHOW EXCEPTIONAL CIRCUMSTANCES – MEANING OF "EXCEPTIONAL CIRCUMSTANCES" – APPLICANT TO HAVE DIFFICULTY IN PREPARING CASE AND SUFFER PERSONALLY IF HELD IN CUSTODY – DELAY OF 22 MONTHS – APPLICATION GRANTED: BAIL ACT 1977, S4(2)(aa)(i).

M. was charged with offences including trafficking in methylamphetamine in a quantity not less than a commercial quantity. The offences were alleged to have occurred at a property in Broadford. When questioned, M. denied involvement in drug trafficking and applied for bail pending hearing of the charges. It was alleged that during the time of the alleged offending M. was then on bail and undergoing a trial in the County Court. On the application for bail, M. stated that:

- he had difficulty in preparing his case while in custody
- if he remains in custody he will lose his accommodation
- he will suffer a deterioration in his mental health
- the Crown case when properly analysed is weak
- there was a delay of 22 months in the charges coming on for trial.

HELD: Bail granted with conditions.

1. Because of the nature of the offences alleged, M. was required to establish exceptional circumstances to enable him to be entitled to bail. The *Bail Act 1977* does not define the term "exceptional circumstances". The plain meaning of that term required that M. establish circumstances which were out of the ordinary in respect of a person who would be in custody. It has been recognised, in a number of decisions in the Supreme Court, that a combination of circumstances may jointly constitute exceptional circumstances notwithstanding that none of them, taken individually, may be so characterised.

Marijancevic v DPP, MC33/2009; [2009] VSC 511, applied.

2. There is a variety of circumstances which have been found in various cases to constitute exceptional circumstances and they include issues such as the strength of the Crown case, the question of delay, strong family support, stable accommodation, availability of employment, low risk of flight or re-offending, lack of prior criminal history and the personal situation of the applicant.

DPP v Cozzi, MC15/2005; [2005] VSC 195; (2005) 12 VR 211, applied.

3. A period of 22 months' pre-trial detention is completely unacceptable and is exceptional in itself for the purpose of the present application for bail.

Marijancevic v DPP, MC33/2009; [2009] VSC 511, not followed on this point.

4. The question therefore was whether M. was an unacceptable risk if released on bail. Given the material which established a connection between the applicant M. and the jurisdiction, particularly in relation to his family, and given the non-contentious assertion by M. that he is indigent, the risk which is implicit in a release on bail of anyone charged with serious offences, as these are, can be made to be an acceptable risk by the imposition of appropriate conditions. Accordingly, bail is granted with certain conditions.

LASRY J:

1. This is an application for bail by Joseph Marijancevic ("the applicant"). Mr Marijancevic began the application by representing himself but at my suggestion subsequently made arrangements for Mr Gillespie-Jones of counsel to appear for him, as I understand it, on a *pro bono* basis. The Court is particularly grateful for Mr Gillespie-Jones's willingness to represent the applicant in those circumstances.

2. The applicant is 60 years of age and is charged with offences in relation to two separate occasions.

The first group of offences: Operation "Hotrod"

3. First, on 25 June 2009, he was charged with a number of offences, including conspiring to traffick a large commercial quantity of a drug of dependence, being methylamphetamine, contrary to the *Drugs, Poisons and Controlled Substances Act*. That offence is alleged to have been committed during the period between 4 July 2008 and 31 August 2008. As part of that group of offences, he is also charged that between 5 August 2008 and 31 August 2008, he possessed articles, materials and substances with intention to traffick in a drug of dependence. As I understand it, there are six co-accused in relation to these matters. Mark Adams and Paul Glushak are in custody, while Nola Preece, Evangelos Karditsis and Caline Preece are on bail. Another person charged, Daniel Rjanancew, pleaded guilty to assisting Nola Preece and has been released on a 15 month suspended sentence.

4. As I have said, the applicant was charged in June of 2009. As Mr Gillespie-Jones has pointed out, his co-accused were charged in September 2008. Mr Gillespie-Jones has relied on what he has described as some "animus" on the part of members of the Victorian police force towards Mr Marijancevic which is illustrated, among other things, by that delay in being charged. I express no conclusion on that issue.

5. In relation to this first group of offences, the applicant made an application for bail before Kaye J in this Court on 6 November 2009^[1]. In that application, he raised five factors which he argued either individually or collectively constituted exceptional circumstances. They included that, whilst in custody, he was having difficulty preparing his case. Second, that if he remained in custody, he would lose his rented accommodation. Third, if he remained in custody, his mental health would deteriorate. Fourth, that on proper analysis, the Crown case was properly described as weak. Fifth, he relied on matters relating to the possible delay of the trial of the applicant which is to be held in the County Court. In relation to that last matter, as His Honour said in his ruling, at paragraph 45:

"Thus on a worst case scenario it would seem the period between arrest and trial would be some 18 months."

6. His Honour went on to conclude that the delay was not an exceptional circumstance either on its own or in combination with the other matters raised. It is now clear that the period between arrest and trial will be of the order of 23 months, possibly longer and I will return to deal with that shortly.

7. Kaye J was not persuaded that, standing alone, any of the matters raised constituted exceptional circumstances and he concluded that, taken at their highest and in combination, the applicant had failed to establish exceptional circumstances thus his application was refused.

8. It would appear that His Honour was not informed that on 2 November 2009, further charges were laid against the applicant and the co-accused Adams and Glushak which represent the second group of offences which he now faces.

The second group of offences: Operation "Falsie"

9. The second group of offences include a charge of conspiracy between 21 March 2007 and 3 August 2007 with Adams and Glushak to traffick a drug of dependence, namely methylamphetamine, in not less than a large commercial quantity; possession of articles, materials and substances with the intention of trafficking in a drug of dependence; possession of prescribed precursor chemicals separately charged as benzaldehyde and nitromethane.

10. According to the summary provided by the relevant police officer, this operation involved an investigation into the manufacturing and trafficking of methylamphetamine at premises in Essendon between March and August of 2007. The summary provided by the police officer indicates that when a warrant was issued at the premises of 46 Cooper Street, Essendon on 3 August 2007, Messrs Glushak and Adams were present at the address and were later interviewed. The case appears to be one based on evidence demonstrating that the applicant had contacted chemical companies via phone, email and in person both in New South Wales and Victoria to inquire about and purchase chemicals and equipment for the manufacture of methylamphetamine. Much of the evidence does appear to implicate Glushak and Adams, particularly Glushak. As I understand it, the case against the applicant in this matter is significantly circumstantial and includes evidence

that fingerprints were found on a container and a glass funnel seized from 46 Cooper Street which are said to match the fingerprints of the applicant.

11. Another portion of the evidence relates to the circumstances surrounding the delivery of methylbenzine at 47 Spring Street Hastings to a man called Evangelos Karditsis. Police claim that Karditsis is a close associate of the applicant and has looked after the applicant's son. He is said to have taken possession of methylbenzine on 3 November 2006 and call charge records on his mobile phone number revealed that between 13 July 2006 and 13 August 2006 Karditsis had contact with the applicant on four occasions and there had been contact in the reverse direction.

Exceptional Circumstances

12. The consequence of the applicant being charged, as he is, with these offences under the *Drugs, Poisons and Controlled Substances Act* is that pursuant to s4(2)(aa)(i) of the *Bail Act* he must establish that exceptional circumstances exist which justify a grant of bail.

13. As Kaye J noted in the previous application, the word "exceptional" connotes circumstances that are out of the ordinary.

14. In *R v Maloney*, unreported, 31 October 1990, Vincent J, as he then was said:

"A number of decisions which have been handed down by judges in this Court, however, make it clear that such circumstances may exist as a result of the interaction of the variety of factors which of themselves might not be regarded as exceptional. What is ultimately of significance is that viewed as a whole, the circumstances can be regarded as exceptional to the extent that, taking into account the very serious nature of the charge to which they are applicable, the making of an order admitting the person to bail would be justified".

15. In *DPP v Cozzi*^[2], Coldrey J expressed agreement with the approach of Vincent J in *Maloney* and reviewed several of the cases which discussed the meaning of exceptional circumstances. Coldrey J said:

"An examination of the cases bearing upon this concept reveals a multitude of single and conflicting interpretations thrown up, no doubt, by the variety of fact situations with which Judges have been faced".

16. His Honour went on to refer to a variety of circumstances which had been found in various cases to constitute exceptional circumstances and they included issues such as the strength of the Crown case, the question of delay, strong family support, stable accommodation, availability of employment, low risk of flight or re-offending, lack of prior criminal history and the personal situation of the applicant.

17. I would add that a further consideration, which I am informed by Mr Gillespie-Jones will not be a consideration in this case, is whether or not a surety in relatively substantial terms is available. The provision of a substantial surety places an applicant for bail in circumstances where another person at risk of significant financial loss takes on the responsibility of ensuring the applicant's attendance at his or her trial. This is a matter of some significance.

18. The applicant has sought to support his application with an affidavit sworn by him on 18 January 2010 and a subsequent affidavit of 26 February 2010. The affidavit identifies a number of matters in support of a conclusion that exceptional circumstances have been demonstrated. The applicant complains at some length about the circumstances of his incarceration at the Metropolitan Remand Centre and, predating the involvement of Mr Gillespie-Jones, refers and relies on the fact that he has chosen to represent himself, at least at the time of swearing his affidavit.

19. The applicant has also outlined his family circumstances including his relationship with Nola Preece and the birth of a child, Joshua, in May 1997. In his affidavit he asserts the child is now under psychological care and has apparently Crohn's Disease which is an inflammatory disease of the intestines. A second child was born in May of 2009. He refers to and relies upon his involvement with his children and their need for his participation in their lives.

20. As a result of separate earlier proceedings, for a period of time the applicant had been detained in custody and in 2001 was released into circumstances in which he had no assets and no family contact. The situation was retrieved and rental premises were obtained from the Department of Human Services.

21. With that background in mind, the applicant also relies on a diagnosis made by Dr LR Turecek that the applicant is suffering from a significant depressive condition. Dr Turecek's reports are dated 7 April 2004 and 25 August 2008.

22. As at April 2008, the applicant's psychological condition had stabilised, according to Dr Turecek, though, according to the doctor, feelings of depression and deep demoralisation were still evident. Dr Turecek reported that the unresolved legal issues weighed heavily on his mind.

23. A more contemporary report dated 18 December 2009 has been provided by Dr Andrew Gibbs, the contents of which do not appear to be in substantial dispute. Dr Gibbs is a clinical neuropsychologist who has concluded that the applicant suffers from an untreated major depressive disorder. He suggests that his incarceration is making that condition worse.

24. The next issue to be dealt with which in my opinion is a significant issue, is the question of delay. There is no question that delay will often be a reason to find that exceptional circumstances have been established. As Kaye J pointed out in the earlier application, any delay in excess of 12 months is a matter of concern. His Honour expressed the view, as I have already described, that working on a period of 18 months between arrest and trial did not of itself constitute an exceptional circumstance. With the greatest of respect to His Honour, I disagree.

25. The evidence before me, however, takes the matter a step further, indicating that the first of the matters with which the applicant is charged is scheduled for trial in the County Court on 9 May 2011. The applicant has already been in custody for something more than nine months and therefore the aggregate pre-trial detention will be of the order of 22 months.

26. As I indicated to Mr Brown in the course of argument, although the Court continues to hear cases involving such lengthy delays, I regard 22 months of pre-trial detention as completely unacceptable.

27. Mr Gillespie-Jones, in the course of his helpful written submissions, referred to the observations of Maxwell P in *Asmar*^[3] at paragraph 27, where his Honour, sitting not in the Court of Appeal but as a single judge in the Trial Division, said the following:

"It was not disputed that, if bail were refused, Asmar would be in custody awaiting trial for something in the range of 14 - 16 months. That is, on any view, a very substantial period of pre-trial detention. One would surely require compelling evidence before deciding to deny a person his freedom for such a period purely on the basis of what he *might* do if released on bail."

28. Of course, in that context his Honour was dealing with the contention that the applicant for bail was an unacceptable risk, but the sentiment applies nonetheless in the cause of establishing a 22 month delay as an exceptional circumstance.

29. As I made clear to Mr Brown in the course of argument, I do regard a period of 22 months pre-trial detention as exceptional in itself for the purpose of this application for bail.

30. The next matter relied upon is the strength of the cases in relation to Operation "Hotrod" and Operation "Falsie", which are the code names for the two groups of charges. The strength of the case in Operation Hotrod was analysed by Kaye J in the course of his ruling and I do not have anything significant to add to that. It is obviously very much a matter of contention.

31. In relation to the second group of charges, I note that in the course of hearing applications for bail such as this, it is always difficult to make a genuine and reliable assessment of the strength of the case. In these matters, it does not seem to me that the case against the applicant could be described as weak nor as overwhelmingly strong. It is, I think, a reasonable case against the applicant in the circumstances.

32. The remainder of the matters relied upon by the applicant in his affidavit and by Mr Gillespie-Jones in the course of his submissions includes contentions about the inability of the applicant to obtain a fair trial, as I have already said, issues concerning his treatment by Corrections Victoria and those matters in combination.

33. As I understand it, it is significant for the applicant that if he remains in custody he will lose the accommodation he presently has, and I do regard that as a matter which, in combination, is significant in establishing exceptional circumstances.

34. I am therefore satisfied that the applicant has established exceptional circumstances on the basis of delay and turn to consider whether the respondent has established whether the applicant is an unacceptable risk.

35. The contention that the applicant is an unacceptable risk depends significantly on establishing the truth of the allegations made in the charges which he faces. The offences which constitute Operation Hotrod were said to have been committed during a period in which the applicant was on bail for offences in the County Court involving driving offences and injury offences and indeed it is said that the offences which constitute Operation Hotrod were committed right up to the point at which the jury in the County Court injury matter retired to consider its verdict. That is a matter of some concern. However, it does not seem to be in contention that despite the applicant's long and significant criminal history, no significant offending appears on his criminal record for the last 19 years. The applicant has no convictions for breaches of the *Bail Act* or for drug offences.

36. Given the material which establishes a connection between the applicant and the jurisdiction, particularly in relation to his family, and given the non-contentious assertion by Mr Gillespie-Jones that the applicant is indigent, it seems to me that the risk which is implicit in a release on bail of anyone charged with serious offences, as these are, can be made to be an acceptable risk by the imposition of appropriate conditions.

37. In all those circumstances, I propose to grant bail to the applicant.

38. The orders of the Court are that:

The said JOSEPH MARIJANCEVIC be admitted to bail on his own undertaking conditioned in the proper form for his appearance as required by law at the directions hearing for his trial at the County Court of Victoria on 11 May 2010 or such earlier date as he is required to attend by the Office of Public Prosecutions and thereafter on such dates as he shall be notified and upon the following special conditions:

(1) The said JOSEPH MARIJANCEVIC reside at 6 Appleby Court Sunshine in the State of Victoria.

(2) The said JOSEPH MARIJANCEVIC in the event that he wishes to change his address not to do so without giving the informant seven (7) days notice.

(3) The said JOSEPH MARIJANCEVIC report daily to the Officer in Charge of the Police Station at Sunshine or his nominee daily between the hours of 9 a.m. and 6 p.m.

(4) The said JOSEPH MARIJANCEVIC surrender any passport which he may hold to the Informant or the Director of Public Prosecutions and not apply for another passport. Any such passport not to be returned to JOSEPH MARIJANCEVIC except upon order of this Court or that of a Judge of the County Court of Victoria.

(5) The said JOSEPH MARIJANCEVIC not attend any point of interstate or international departure.

(6) The said JOSEPH MARIJANCEVIC not contact directly or indirectly any co-accused with the exception of Nola Preece nor any Prosecution witness except the Informant or his nominee and that the applicant not attend within one kilometre of 46 Cooper Street Essendon in the State of Victoria.

[1] [2009] VSC 511.

[2] [2005] VSC 195; (2005) 12 VR 211.

[3] [2005] VSC 487.

APPEARANCES: For the Applicant Marijancevic: Mr S Gillespie-Jones, counsel. For the Respondent: Mr D Brown, counsel. Office of Public Prosecutions.
