

43/00; [2000] VSC 451

SUPREME COURT OF VICTORIA

DPP v TONG

McDonald J

19 October, 1 November 2000 — (2000) 117 A Crim R 169

BAIL – ACCUSED CHARGED WITH TRAFFICKING IN COMMERCIAL QUANTITY OF HEROIN – APPLICATION FOR BAIL – APPLICANT REQUIRED TO SHOW “EXCEPTIONAL CIRCUMSTANCES” BEFORE RELEASE ON BAIL – BAIL GRANTED BY MAGISTRATE – COMBINATION OF VARIOUS FACTORS INCLUDING DELAY BEFORE TRIAL – WHETHER MAGISTRATE IN ERROR: *BAIL ACT 1977, S4(2)(aa)*.

1. Where a court is dealing with an application for bail under s4(2)(a) or s4(2)(aa) of the *Bail Act 1977*, it is not appropriate for the court to seek to define the expression “exceptional circumstances”. It is more appropriate for the court to examine the facts in each case to determine whether “exceptional circumstances” exist as would warrant the grant of bail.

2. In the present case, when regard is had to the matters taken into account by the magistrate when granting bail including the time delay which exists in such matters coming on for trial, it could not be said that the magistrate fell into error in determining that “exceptional circumstances” existed which justified the grant of bail.

McDONALD J:

1. The proceeding before the court is an appeal by the Director of Public Prosecutions for the State of Victoria, pursuant to s18A of the *Bail Act 1977*, against an order of the Magistrates' Court at Melbourne on 31 August 2000 granting the respondent bail in respect of nine charges of trafficking in heroin.

2. On 10 August 2000 the respondent and alleged co-offenders were arrested. The respondent was charged with nine counts of trafficking in a drug of dependence, heroin. The eighth charge against the respondent was that at Melbourne between 10 May 2000 and 10 August 2000, not being authorised by or licensed under the *Drugs, Poisons and Controlled Substances Act* she did traffick in a drug of dependence, namely heroin. The ninth charge laid against the respondent was that at Melbourne between 10 May 2000 and 10 August 2000, not being authorised by or licensed under the *Drugs, Poisons and Controlled Substances Act*, she did traffick in a commercial quantity of a drug of dependence, namely heroin. On 10 August 2000 the respondent was remanded in custody.

3. In summary the prosecution case against the respondent is as follows:

1. It is alleged that on 10 May 2000 a Covert Operative purchased one ounce of heroin from one Dahdah. Evidence via surveillance and telephone interceptions allegedly identifies the respondent as supplying the heroin to Dahdah.
2. It is alleged that on 23 May 2000 a Covert Operative purchased one ounce of heroin from Dahdah. The evidence via surveillance and telephone interception allegedly identifies the respondent as supplying Dahdah with this heroin.
3. It is alleged that on 27 June 2000 a Covert Operative purchased one ounce of heroin from the respondent.
4. It is alleged that on 4 July 2000 a Covert Operative purchased two ounces of heroin from the respondent.
5. It is alleged that on 12 July 2000 a Covert Operative purchased one ounce of heroin from the respondent.
6. It is alleged that on 7 August 2000 a Covert Operative purchased four ounces of heroin from the respondent.
7. It is alleged that on 9 August 2000 a Covert Operative ordered the purchase of 10 ounces of heroin from the respondent.
8. It is alleged that on 10 August 2000 the Covert Operative changed the aforesaid order to an order to purchase from the respondent, 13 ounces of heroin.

9. It is alleged that between 6 June 2000 to 10 August 2000 a legal telephone interception was executed on the respondent's mobile telephone and covered all conversations between the respondent and the Covert Operative. It is alleged that this telephone interception identified several other heroin transactions totalling a minimum of 12 ounces.

10. It is alleged that the quantity of heroin supplied by the respondent was 280 grams with a further 252 grams seized at the time of her arrest being in total 532 grams. In addition it is alleged that if the 13 ounces that the respondent agreed to supply on 10 August 2000 are considered along with the quantity of heroin identified through the telephone interceptions the total weight involved is approximately 980 grams of heroin.

4. On 31 August 2000 at the Magistrates' Court at Melbourne the respondent was released on her own undertaking with a surety of \$20,000 to appear at the Magistrates' Court at Melbourne for the purpose of a committal mention on 19 October 2000. The respondent was released on bail which bail was subject to the following special conditions that she:

- report daily to the officer in charge of the Altona North Police Station between the hours of 6 am and 9 pm;
- reside at 129 Seventh Avenue, Altona North;
- surrender her passport if one has been issued and not to apply for any other or any travel documents;
- not attend any point of international departure;
- not contact witnesses for the prosecution other than the informant; and
- not to own or use a mobile phone.

5. On 20 September 2000 at the Magistrates' Court at Melbourne, the Crown made application for extension of time with respect to the service of the brief and committal mention date. On that day the application was granted and the date for service for the brief was extended to 15 November 2000 and the committal mention date was fixed as at 13 December 2000. The respondent's bail was extended.

6. Pursuant to s4(2)(aa)(i) of the *Bail Act 1977* it is provided that the court shall refuse bail in the case of a person charged with an offence of trafficking in relation to a commercial quantity of a drug of dependence under s71 of the *Drugs, Poisons and Controlled Substances Act 1981*, "unless the court is satisfied that exceptional circumstances exist which justify the grant of bail".

7. The ninth charge against the respondent by virtue of s71 of the *Drugs, Poisons and Controlled Substances Act 1981* causes the provisions of s4(2)(aa)(i) to be applicable to her such that a court shall refused bail to her unless the court is satisfied that "exceptional circumstances" exist which justify the grant of bail.

8. During the course of the hearing, before the Magistrates' Court at Melbourne, of the application for bail, brought by the respondent, evidence was led from a witness, Nguyen Ta Tong, who resided at 129 Seventh Avenue, Altona North with her husband and three children. She gave evidence that she and her husband conducted a sewing business from their home. This witness is the aunt of the respondent. She gave evidence that the respondent had escaped from Vietnam in 1989, that she had been in a refugee camp in Malaysia for a period of time and that the respondent had come to Australia in 1994 with her son. The respondent lived with her aunt at Altona North for a period of time and then she took a flat on her own. Evidence was further led before the Magistrate that the respondent and her eight year old son had gone to America in order that the respondent's son may visit his father and his grandmother. At the time that the respondent returned to Australia her son did not accompany her as he was to continue the visit with his father. The witness said that recently she had received a telephone call from the child's grandmother to the effect that the respondent's son would be sent back to the respondent in Australia. This has not occurred to date. This witness gave further evidence that if the respondent was granted bail she could live with her and her family at North Altona and she could be employed in the sewing business conducted by the witness and her husband from their home. This witness also gave evidence that she was prepared to provide the surety for the grant of bail to the respondent if bail was granted.

9. Further evidence was led before the Magistrates' Court that after the arrest of the respondent she was initially held at the Custody Centre of the Magistrates' Court at Melbourne and that thereafter she was transferred to the Moorabbin Police Station where she was held in custody at the cells provided at that station. Evidence was further given that if bail was not granted to the

respondent, and she was to remain in custody, she would shortly be transferred to the Deer Park Women's Prison where she would be held in custody.

10. After evidence had concluded before the Magistrate, before whom the application made by the respondent for bail was heard, and after hearing submissions the Magistrate, in giving her reasons for her decision that bail should be granted to the respondent, said:

"I accept that the case against Ms Tong is a relatively strong one. I find however that due to a combination of factors, the onus on the applicant to establish exceptional circumstances has been completed and I find that the following matters, the matters which in combination make out those exceptional circumstances. I refer to Ms Tong's absence of prior convictions. The support that she clearly has from close family members who are well aware of the nature of the allegations made against her. I take into account the stable accommodation and the supervision that will be available to her. I take into account the fact that the offer of employment and I understand the evidence from the witness from whom I heard, her aunt, that there is work available for Ms Tong to undertake. I take into account the situation of Ms Tong's son. There is an issue with regard to his welfare. I am satisfied.... that his mother ought to be available to address that issue of his welfare. I take into account that there is no evidence that Ms Tong is suffering from an addiction. I take into account that she has suffered trauma while incarcerated. I also take into account, despite the evidence that I have heard, the conditions of her current confinement and hardship which she has undergone in relation to that confinement and the possibility that it will extend for any time whatsoever and addition to that I take into account the comments of Gina Gidoni, psychologist, and particularly her observation that Ms Tong is a vulnerable naive young woman who would have difficulty coping in a prison environment. I take into account... Ms Tong's lack of English and the delay that inherently exists in relation to these matters. In relation to the issue of risk, there is nothing put to me in relation to an allegation that Ms Tong was unlikely to appear or that she was likely to interfere with witnesses. It was said that there was a concern that there is a risk that Ms Tong would commit further offences of a like nature while on bail. In support of that, reference was made to her lifestyle. I did not find the evidence that was put to me in relation to her lifestyle convincing and I take into account that it appears that her supplier with regard to the alleged matters is also in custody."

11. Evidence before the Magistrates' Court was that the respondent was 26 years of age having been born on 14 August 1974.

12. The two principal grounds relied on by the Director of Public Prosecutions in this appeal are:

1. That the learned Magistrate in proceeding to grant bail to the respondent erred in finding, pursuant to s4(2)(aa)(i) of the *Bail Act 1977* that exceptional circumstances exist which justify the granting of bail.
2. That the learned Magistrate in proceeding to grant bail to the respondent erred pursuant to s4(d)(i) of the *Bail Act 1997* by failing to include in the order a statement of reasons for making the order.

13. Senior Counsel for the Director of Public Prosecutions informed the court that in prosecuting this appeal the second ground stated was no longer relied on.

14. Senior counsel for the Director of Public Prosecutions informed the court that it was common knowledge and able to be taken into account by the Magistrate that from the time of her arrest to trial in such a case as that presently under consideration was some 12 months or more and that if the respondent was to remain in custody hopefully her trial would commence in November 2001.

15. Senior Counsel for the Director of Public Prosecutions conceded that each finding of fact made by the Magistrate who heard the respondent's application for bail, was open to her to so find. He submitted however, that on the facts as found by the Magistrate it was not open to her to conclude that "exceptional circumstances" existed which justified the grant of bail to the respondent.

16. The principles to be applied by the court on an appeal of this nature are those set out by the Full Court in *Beljajev and Anor v Director of Public Prosecutions of Victoria and Anor*^[1]. The court^[2] said:

"It is not essential that the Director should be able to show an error of law in the narrow sense, although of course if error of law were demonstrated this court would be obliged to substitute its own

view of the order which should have been made. It is also open to the Director to show that in all the circumstances of the case the order was manifestly the wrong order to make even though it is not possible to point to any other identifiable error in the process by which the authority granting bail arrived at the order made. In other words, the Director is not in our opinion confined to relying upon an error of law as a ground of appeal but may succeed if he shows that on any ground, whether of fact or law, the discretion of the primary judge has miscarried and can persuade the Supreme Court that a different order should have been made. There are, however, two ways of the first importance in which an appeal in the matter of bail differs from an appeal against sentence. Both stem from the very nature of bail. The first is that an order admitting a person to bail is not a final order: it may be revoked at any time. The second is that the granting of bail is essentially a matter of practice and procedure. These two considerations both independently and in combination operate to impose on any appellate court a severe restraint upon interference with the order appealed from. In civil and in criminal cases alike the appellate courts have frequently refused to interfere with a primary judge's decision on a matter of practice and procedure.

17. In *Beljaev and Anor v Director of Public Prosecutions of Victoria and Anor* the Full Court had before it an appeal from a judge of this court. There are no reasons, however, why the principles so enunciated by the Full Court should not be applied to an appeal to this court from an order of the Magistrates' Court granting bail as in the present case. See the *DPP v Radev and Anor*^[3].

18. On this appeal, senior counsel for the appellant did not seek to rely on any specific error of law as a ground of appeal from the order made by the Magistrates' Court, granting bail to the respondent. Rather it was submitted that the discretion of the Magistrate had miscarried insofar as she had determined that there existed "exceptional circumstances" that justified the grant of bail to the respondent.

19. In the *Oxford English Dictionary*^[4] "exceptional" is defined as "of the nature of or forming an exception; out of the ordinary course, unusual, special". In *Owens v Stevens*^[5] Hedigan J considered the phrase "exceptional circumstances" as appearing in Schedule 5 to the *Magistrates' Court Act*. After referring to the definition of the word "exceptional" as appearing in the *Oxford English Dictionary* his Honour said^[6] in the context of that case:

"The facts must be examined in the light of the Act the legislative intention the interests of the prosecuting authority, the defendants and the victims. It may be that circumstances amounting to exceptional must be circumstances that rarely occur and perhaps be outside reasonable anticipation or exception. Courts have been slow and cautious before essaying definitions of phrases of this kind, leaving the context of the meaning to be filled by the ad hoc examination of individual cases. Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors."

20. In *Schwerin v Equal Opportunity Board*^[7] I agreed with respect to the aforesaid remarks by Hedigan J when addressing the question whether the failure of a person to institute an appeal within the time provided by s109(2)(a) of the *Magistrates' Court Act* was due to, "exceptional circumstances" within s109(5)(a) of that Act thereby enabling an appeal to proceed notwithstanding it was sought to be instituted later than 30 days after the day on which the order complained of was made.

21. In *Kent v Wilson*^[8] Hedigan J found that in the proceedings before him the Magistrate was in error in interpreting the expression "exceptional circumstances" in s18W(6) of the *Sentencing Act* 1991 as "not typical" of the behaviour of the respondent, but otherwise did not seek to interpret that expression. Rather his Honour addressed the facts of the case in determining whether it would be "unjust" to order the respondent to serve in custody the whole part of the Combined Custody and Treatment Order that had been previously imposed on the respondent.

22. In the matter of an application for bail by *John Dennis Moloney*^[9] Vincent J had before him an application for bail made on behalf of the applicant who was then being held on remand having been charged with the crime of murder. His Honour did not seek to define "exceptional circumstances" as contained in s4(2)(a) of the *Bail Act* 1977 but rather, after reviewing the relevant facts he said,^[10]

"None of the matters to which I have referred would of themselves constitute exceptional circumstances but taken in conjunction I consider that they do so".

His Honour proceeded in that case to admit the applicant to bail.

23. In my view it is not appropriate for the court to seek to define the expression "exceptional circumstances" as applicable to s4(2)(a) or (aa) of the *Bail Act* 1977. It is more appropriate for the court to examine the facts in each case in order to determine whether "exceptional circumstances" exist as would warrant the grant of bail to a person to whom s4(2)(a) or s4(2)(aa) of the *Bail Act* 1977 applies.

24. In *Beljaev and Anor v Director of Public Prosecutions of Victoria and Anor* the Full Court in its judgment said^[11]:

"A decision to grant or refuse bail must necessarily be to a very considerable extent a matter of impression or an instinctive synthesis of the considerations involved."

25. On an appeal such as the present it is for this Court to determine whether there existed an error of law, if such matter is relied on as a ground for the appeal, or otherwise whether on the evidence before the Magistrates' Court there exists demonstrable error on the part of the Magistrate in determining that "exceptional circumstances" existed as would warrant the granting of bail where s4(2)(a) or s4(2)(aa) of the *Bail Act* 1977 are applicable.

26. In my view when regard is had to the matters taken into account by the Magistrate when granting bail to the respondent, which matters included that which she referred to as "the delay that inherently exists in relation to these matters", it cannot be concluded that in this case that the Magistrate was in error in determining that "exceptional circumstances" existed which justified the grant of bail to the respondent. Accordingly the appeal of the Director of Public Prosecutions must be dismissed.

[1] Unreported 8 August 1991.

[2] At p29.

[3] [1999] VSC 284 at p7; 108 A Crim R 121.

[4] 2nd Ed.

[5] Unreported, 3 May 1991.

[6] At pp16-17.

[7] [1994] VicRp 60; [1994] 2 VR 279 at p286; [1994] EOC 92-561.

[8] [2000] VSC 98.

[9] Unreported 31 October 1990.

[10] At p4.

[11] At p34-35.

APPEARANCES: For the appellant DPP: Mr J Dickson QC, counsel. Director of Public Prosecutions. For the respondent Tong: Mr D Gurvich, counsel. VN Lawyers, solicitors.
