

07/85

SUPREME COURT OF VICTORIA

R v UYMAZ

O'Bryan J

26 March 1985

BAIL – ACCUSED CHARGED WITH TRAFFICKING IN OPIATES – ENTITLEMENT TO BAIL REVERSED – ONUS ON ACCUSED TO SHOW CAUSE WHY DETENTION NOT JUSTIFIED – WHETHER PERSONAL CIRCUMSTANCES OF ACCUSED DISCHARGE THE ONUS – WHETHER CONDITIONS OF RELEASE RELEVANT TO DISCHARGE OF ONUS: *BAIL ACT 1977*, SS4, 5.

U. was charged with trafficking in opium. Having been refused bail in the Magistrates' Court, U. applied to the Supreme Court for bail. It was argued on U's. behalf that the onus could be discharged by having regard to the provisions of s5(2) of the *Bail Act*. Further as U's wife was 4 months pregnant and that preparation of his legal defence would be hindered by his remaining in custody, it was argued that U's detention in custody was not justified.

HELD: Application for bail refused.

(1) **The provisions of s5 of the *Bail Act 1977* are concerned with conditions that may be attached to a bail order, and they have no direct bearing upon the accused's onus imposed by s4(4) of the *Bail Act 1977*.**

(2) **The circumstances concerning the pregnancy of the accused's wife do not show that the accused's detention is not justified.**

(3) **The circumstance concerning the hindrance to the preparation of the accused's legal defence does not discharge the onus.**

O'BRYAN J: [1] The applicant is aged 32 years. He is married with one son aged three years. His wife is four months pregnant. The applicant came to Australia from Turkey in 1975. He presently holds a Turkish passport. He has lived near Mildura in Northern Victoria for some years. The premises in which he resides are rented. The applicant has a sister living in Mildura and another living in Sydney. He enjoys close relations with his sister and her family and members of the Turkish community in Sydney. The applicant suffered a back injury and is now receiving sickness benefits. Presumably, his financial circumstances will not worsen if he is refused bail because his sickness benefits will continue to be available to his wife. On 12th March the applicant was intercepted by police driving his motor car in Merbein, close to his home. Merbein is a few kilometres from Mildura. Inside the car a quantity of 30 grams of heroin in a packet was located. The applicant was questioned by the police and allegedly admitted that he knew the packet contained heroin. He declined to say when or from what source he obtained the heroin or how much he paid for it. He said he was not a user of heroin and was not going to sell it. [2] Despite this lack of information, the law deems the applicant to be trafficking in heroin, having regard to the quantity involved.

Later in the day, during searches of the applicant's home and of a caravan occupied by a female with whom the applicant admitted he was associating, quantities of marijuana were found. The applicant admitted ownership and use of the marijuana. The case against the applicant is most serious and very strong. A conviction for trafficking in opiates usually results in a sentence of imprisonment, particularly when a large quantity such as this is involved. The applicant is due to appear in court again early in April when the committal proceedings may be heard. The police case is now ready to proceed. If committed for trial, as presently seems likely on the evidence available, a trial could take place in Mildura during May. Accordingly, it is unlikely that any inordinate delay will occur before trial.

The applicant applies for bail before this court, having been refused bail in the Magistrates' Court. The *Bail Act 1977* provides in s4(4) that where the accused person is charged with an offence of trafficking in opium the Court shall refuse bail unless the accused person shows cause why his detention in custody is not justified. In effect, there is a reversal of the *prima facie* entitlement

to bail provided for in s4(1) of the Act. A person may show cause why his detention in custody is not justified for a variety of reasons and it is not appropriate that I should define or delimit the matters that might be relied upon. Obviously, if the applicant can show that the case against him is not strong or is unlikely to result in a conviction, he might show cause why his detention in custody would not be justified, all other things being equal. [3] A long delay between arrest and trial, in some circumstances, might provide a reason for holding that detention in custody is not justified. There is no limit to the facts or circumstances that might be relied upon by an applicant seeking to discharge the onus imposed by s4(4).

Mr Richter, who appeared for the applicant, relies upon a decision of Hampel J in *Re Michael Ilardi*, unreported, 24th February 1984. Mr Richter submitted, or I so understood his argument, that an applicant can discharge the onus imposed by s4(4) by having regard to the provisions of s5(2). He submitted Hampel J so decided in *Ilardi*. I do not believe that is the *ratio* in *Ilardi's* case. Indeed, I am not persuaded that s5 has any direct bearing upon s4(4). Section 5 is concerned with conditions that may be attached to a bail order. If an accused shows cause why his detention is not justified in cases where a court considers it necessary to impose special conditions, it may do so pursuant to s5. In cases falling within s4(4) the legislature requires the judge or magistrate to include in the order for bail a statement of reasons for making the order. This unusual requirement is a clear indication that the grant of bail in such cases can only be justified for good reason.

The court is required to express in the order the justifying fact or circumstance for the grant of bail. I am not persuaded that the applicant has provided justifying facts or circumstances for the grant of bail. Mr Richter suggested that the applicant wishes to live with his pregnant wife, to assist her when her time is come. That is understandable. In a case not falling within s4(4) the personal circumstances of the applicant would provide a basis for the grant of bail. These circumstances do not show that the applicant's detention [4] is not justified. Mr Richter also suggested that the legal defence preparation to the charges will be hindered if the applicant remains in custody. I am not persuaded that will be so. The applicant will probably be detained in Melbourne pending committal where he will be available to his counsel. In any event this circumstance does not discharge the onus.

Finally, I should add that were the applicant not under the restraint of s4(4), I would consider there is an unacceptable risk that if released on bail the applicant might fail to surrender himself in answer to his bail. He is a Turkish national; he has limited and insecure roots in Victoria and he faces a very serious charge. By inference one might find he is a distributor in a hard drugs operation in north-west Victoria and that he would be placed under great temptation to flee the jurisdiction, if not Australia, were he to be released on bail. In my opinion, for the reasons I have given, this application must be refused.