11/01; [2001] VSC 237

SUPREME COURT OF VICTORIA

DPP v HARIKA

Gillard J

13, 24 July 2001

BAIL – SHOW CAUSE SITUATION – APPLICATION FOR BAIL – APPLICANT TO SHOW WHY DETENTION NOT JUSTIFIED – APPLICANT CHARGED WITH ARMED ROBBERY – DRUG-RELATED OFFENCE – CROWN CASE SAID TO BE A STRONG ONE – UNDERGOING SUSPENDED SENTENCE AT TIME OF COMMISSION OF OFFENCE – NUMEROUS PRIOR CONVICTIONS SOME INVOLVING VIOLENCE – BAIL GRANTED BY MAGISTRATE – REQUIRED TO RECORD IN BAIL ORDER STATEMENT OF REASONS – BRIEF REASONS GIVEN – WHETHER SUFFICIENT – FACTORS TO CONSIDER ON SHOW CAUSE APPLICATION – WHETHER MAGISTRATE IN ERROR: *BAIL ACT* 1977, S4(4).

H. was charged with one count of armed robbery. At the time of the offence, H. who has numerous prior convictions (some involving violence), had been convicted of multiple charges of burglary and theft, sentenced to 18 months' imprisonment which had been wholly suspended for two years. H. had previously been released on a community-based order (which he breached) which addressed the question of his rehabilitation. In granting bail upon an application by H., the magistrate considered that H. could be rehabilitated and ordered that H. attend Moreland Hall for rehabilitation and counselling. The reasons entered in the bail order by the magistrate were: "Age, supports, structure, has shown cause". Upon appeal—

HELD: Appeal allowed. Bail order set aside. Accused committed to custody.

1. By reason of s4(4) of the *Bail Act* 1977 ('Act'), the magistrate was required to refuse bail unless the accused showed cause why his detention in custody was not justified. In view of the fact that bail was granted, the magistrate was required by the Act to "include in the order a statement of reasons for making the order."

2. What the magistrate recorded in the order as a statement of reasons was the barest minimum. Judicial officers should explain in more detail the reasoning which led to the order. To state that the applicant "has shown cause" is a conclusion and is not a statement of reasons. When the magistrate's reasons were considered in the light of the transcript the statement of reasons for making the order did not comply with the obligation in s4(4) of the Act.

3. In the present case, there was a high probability that H. would be convicted and sentenced to a term of imprisonment. Further, H. has an appalling criminal record including a failure to answer bail, the commission of offences whilst on bail and commission of the present offence whilst undergoing a suspended sentence. The magistrate's concern was to put in place a structure which might lead to H's rehabilitation; however, the magistrate failed to take into account:

- **The risk of failing to answer bail**
- **The risk of committing further offences whilst on bail**
- **The risk of interference with witnesses**
- **The seriousness of the offence**
- **The high probability of a sentence of imprisonment**
- **The accused's extensive criminal history; and**
- **The strength of the Crown case.**

4. Accordingly, the magistrate was in error in failing to give sufficient weight to relevant matters and granting bail.

GILLARD J:

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1. Before the Court is an appeal by the Director of Public Prosecutions for the State of Victoria against an order made by a Magistrate, sitting at Melbourne on 5 June 2001, granting bail to a person accused of a serious offence.

Parties

2. The appellant is the Director of Public Prosecutions who has the right to appeal, to this

Court, an order granting bail to any person pursuant to s18A(1) of the *Bail Act* 1977 ("the Act"), if it appears to the Director that there are circumstances which show a contravention or failure to comply with any provisions of the Act in circumstances where a person is granted bail.

3. The respondent, Phillip Anthony Harika ("the respondent"), is a drug addict who has made a career in crime since late 1996.

Circumstances Leading to Bail

4. The respondent was born on 30 May 1977 and is presently aged 24 years.

5. On 25 January 2001, he was arrested and charged with one count of armed robbery. He was remanded in custody and although he made a number of applications for bail, he did not proceed with any of them.

6. On 5 April 2001, he was committed for trial at the County Court at Melbourne. He reserved his plea. The matter is listed for case conference at the County Court on 1 August 2001.

7. The circumstances of the alleged offence can be briefly stated.

8. On 10 January 2001, the respondent was in the company of Ms Felicity Simmons. They drove to West Heidelberg and purchased a quantity of heroin, which they administered in a nearby parkland. They then travelled to their respective chemists to collect methadone, which they administered.

9. At approximately 3.00 p.m. on that day, they drove to Thornbury and visited a milk bar in Mansfield Street. Upon entering the premises, the respondent produced a syringe and moved towards a female shop keeper, Mrs Nikolovski. The respondent banged the cash register and demanded that she open it. He pointed the syringe at her and threatened to stab her. She pleaded with him not to hurt her. She opened the register and the respondent removed approximately $300 in cash.

10. It is alleged that the respondent drove a short distance away, changed his clothes and disposed of the clothes he had been wearing, into a storm water drain. He then drove to an area in Preston and hid the vehicle. The respondent threatened to harm his associate in the event that she divulged anything concerning the robbery. The respondent contacted a dealer and purchased a further quantity of heroin, which he and Ms Simmons administered intravenously.

11. The victim, Mrs Nikolovski, is aged 36 years and was six months pregnant at the time.

12. The respondent was identified on 25 January 2001 and charged. It is said that the case against him is a strong one, including fingerprint evidence and eyewitness identification.

13. Counsel for the parties were unable to say when a trial of this matter may take place, although it was likely to be at the end of this year.

14. On 24 May 2001, the respondent made an application for bail which was adjourned by the learned Magistrate, who indicated that if appropriate drug treatment and rehabilitation services were available, she would re-consider the matter.

15. At the adjourned hearing on 5 June 2001, bail was granted on certain conditions relating to reporting, residing at home with his parents, not contacting any prosecution witnesses, attending rehabilitation assessment and counselling, and continuing on methadone as prescribed.

16. By reason of s4(4)(c) of the *Bail Act* 1977, the Magistrates' Court was required to refuse bail because the respondent has been charged with an indictable offence using or threatening to use "an offensive weapon". The Legislature has made it clear that the court must refuse bail "unless the accused person shows cause why his detention in custody is not justified".

17. Transcripts of the proceeding before the learned Magistrate on 24 May 2001 and 5 June 2001 were adduced in evidence before this Court.

18. By reason of the latter part of s4(4) of the Act, where a court grants bail, the court is obliged to "include in the order a statement of reasons for making the order".

19. The learned Magistrate recorded in the order, the following —

> "Reasons for granting Bail: AGE, SUPPORTS, STRUCTURE, HAS SHOWN CAUSE."

The Appeal

20. Section 18A of the Act gives the right to the Director of Public Prosecutions to appeal the order granting bail. The notice of appeal must set out the grounds relied upon, and must be given within one month after the bail is granted.

21. Section 18A(6) sets out the powers of the Court on an appeal under the section, and provides —

> "(6) Upon an appeal under this section the Supreme Court shall if it thinks that a different order should have been made quash the order and, without in any way limiting the powers of the Supreme Court with respect to bail, make any order in substitution therefor as it thinks ought to have been made."

22. The Act does not state the nature of the appeal. I considered the matter in *DPP v Abbott* (1997) 97 A Crim R 19. I followed a decision of the Full Court and held, that the appeal was in the nature of an appeal from the exercise of a discretion and that the well known principles relating to a discretionary order or judgment were applicable.

23. The Full Court in *Boris Beljajev and Anor v DPP*, unreported, delivered 8 August 1991, whilst noting that the appeal was in the nature of an appeal from a discretionary judgment, nevertheless stated that it was not essential that the Director should be able to show an error of law in the narrow sense. But the Court went on to say that there were two matters of importance, in relation to bail, which must be taken into account in considering the principles concerning a discretionary judgment. First, the bail is not a final order and second, the granting of bail is essentially a matter of practice and procedure. Their Honours then stated this at p30 —

> "These two considerations both independently and in combination operate to impose on any appellate court the severe restraint upon interference with the order appealed from."

24. I infer from that observation that there was a strong presumption in favour of the correctness of the decision below, and that it should be affirmed, unless it was shown to be clearly wrong. I refer to the observations made by Kitto J in *Australian Coal and Shale Employees' Federation v Commonwealth* [1953] HCA 25; (1953) CLR 621 at 627.

25. It follows that the appellant must establish a basis for interfering with a discretionary order.

Obligation to give Reasons

26. In the *Abbott* case, *supra*, I discussed the obligation, under the Act, of a Magistrate to give reasons. I followed the decision of Beach J in *DPP v Sehevella*, unreported, delivered 12 January 1997, and held that the failure of the Magistrate in the *Abbott* case to give any reasons was fatal and that the order made was a nullity. On that basis, I was prepared to set aside the order in that case.

27. This raises the question whether the learned Magistrate in the present matter has given reasons, to comply with the clear obligation that rested upon her under s4(4) of the Act, when an order granting bail was made.

28. The obligation upon the Magistrate is to "include in the order a statement of reasons for making the order".

29. As stated above, the reasons given were -

> "AGE, SUPPORTS, STRUCTURE, HAS SHOWN CAUSE."

30. Taken in isolation, the reasons are difficult to comprehend. Whilst one commends any judicial officer for being brief and to the point, the statement must be comprehensible to the reasonable reader and satisfy the description of "reasons". The object of the requirement is to ensure that judicial officers turn their minds to the issues and determine the matter in accordance with the law. The obligation to state reasons focuses the mind on the issues. In order to determine whether the judicial officer has done so, one turns to the reasons.

31. Turning to the reasons of the learned Magistrate, to state that the applicant "has shown cause", is a conclusion and is not a statement of reasons.

32. On their face, the Magistrate has determined that by reason of the respondent's age, the fact that there is a structure in place and that he has the necessary support of others, cause is established as to why his detention in custody is not justified.

33. The reasons are not to be considered in isolation. By reference to the transcript of the proceedings before the Magistrate and the documentary material adduced in evidence, this Court can determine what the reasons were for concluding that the applicant had shown cause.

34. The reasoning appears to be that the applicant was at an age where he could be rehabilitated; that a structure had been put in place with respect to rehabilitation, counselling and the continuation of his methadone treatment, coupled with obligations to see various personnel and to attend weekly meetings of Narcotics Anonymous. The support was provided by that structure, the various personnel and his family at their home.

35. The Magistrate imposed the usual stringent conditions concerning reporting, residence with parents, prohibition on contacting witnesses for the prosecution, a nightly curfew between the hours of 10.00 pm and 7.00 am, and an obligation to obey all lawful instructions of his father in relation to employment and other matters.

36. The learned Magistrate concluded –

> "You are to attend Moreland Hall at 10.00 am on 6 June for assessment for rehabilitation and counselling. You are to continue on the methadone programme as prescribed by Dr Mian. You are to attend Joe Beckett on 8 June at 2.00 p.m. and then as directed by her. You are to attend Narcotics Anonymous meetings at least weekly. Hopefully that structure will be enough to keep you out of trouble and of course if it is not, you will be straight back into custody before you know it."

37. What the Magistrate recorded in the order, as a statement of reasons for making the order, was, in my opinion, the barest minimum. Judicial officers should explain in more detail the reasoning which led to the order.

38. I am satisfied, when the Magistrate's reasons are considered in the light of the transcript of the two hearings before her, that the statement of reasons for making the order does comply with the obligation in s4(4) of the Act.

Principles — Show Cause — Relevant Matters

39. As the appeal is an appeal from a discretionary judgment, the burden rests upon the Director to show that the discretion miscarried.

40. In the *Australian Coal and Shale* case, *supra*, Kitto J, at p627, summarised the principles that apply —

> " ... There is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the Court of Appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court at first instance."

41. Any person accused of an offence is entitled to bail. That is the general rule laid down by s4(1) of the Act. However, in some circumstances, the right to bail is abrogated and instead, the applicant must prove to the satisfaction of a Judge of this Court "why his detention in custody is not justified". See s4(4). The applicant for bail has the burden of proving that his detention in custody is not justified.

42. The right to bail is lost if, *inter alia*, an accused person is charged with any indictable offence, in the course of committing which, he has used or threatened to use, *inter alia*, an offensive weapon. See s4(4)(c).

43. It follows that the respondent, having been charged with robbery using an offensive weapon, namely, a syringe, lost his right to bail and assumed the burden of establishing that his detention in custody was not justified.

44. However, that is not the end of the inquiry. If he establishes cause, the Court shall refuse bail if it is satisfied there is an unacceptable risk that if the applicant is released on bail, he may commit one or more of the prohibited acts set out in s4(2)(d). These include failing to answer bail, committing another offence whilst on bail or interfering with a witness. The factors that must be weighed in considering the question of unacceptable risk are set out in s4(3). It is noted that the Court must consider all relevant matters, and the list of specified ones is not exhaustive. The Court is bound to consider the nature and seriousness of the offence, the background of the accused, the history of previous grants of bail, the strength of the evidence against him, and also the attitude, if expressed to the Court, of the alleged victim. As I have already stated, this list is not exhaustive.

45. The burden of establishing unacceptable risk lies upon the Crown.

46. The two inquiries can overlap, in the sense that the unacceptable risk factors have to be weighed, when considering whether the applicant for bail has shown cause.

47. The Act does not define what is meant by the phrase "shows cause why his detention in custody is not justified". It is trite to observe that all relevant circumstances must be weighed, leading to the conclusion that the detention in custody is not justified.

48. In considering the issue of cause, the Court must not overlook the object of s4(4) of the Act. The Legislature has concluded that it is inappropriate that a person who commits a serious offence, and in the course of commission, uses or threatens to use an offensive weapon, should be at large, pending committal or trial. The probabilities are high that such a person will be committed to prison upon conviction. There are risks of failing to answer bail and committing a violent crime with grave consequences to the victim. Because of these factors, the Legislature intended that the person should not be at large, pending the trial.

49. Turning to the respondent, who is aged 24 years, it is alleged that he committed this serious offence on 10 January 2001. He was arrested and taken into custody on 25 January 2001 and was released on bail, subject to stringent conditions, on 5 June 2001. He has been committed for trial and it is expected that the trial will take place some time late this year.

50. The case against him is said to be a strong one. His fingerprint has been identified on the cash register tray, an eyewitness has identified him from a photo book, the victim's husband has identified him from a photo identification folder, the victim thought he was the offender, his associate has signed a statement implicating him, the motor vehicle which was driven from the scene has been identified as his vehicle, and in his record of interview, he has been selective in his answers when pressed with the circumstances of the robbery. In my opinion, the learned Magistrate should have proceeded on the basis, as indeed I think she did, that the probabilities were high that the respondent would be convicted. Taking into account his appalling record and the fact that he was undergoing an 18 months' suspended sentence at the time of the alleged offence, the probabilities are extremely high that if convicted, he will be imprisoned for a period of at least 18 months and maybe longer.

51. The respondent has an appalling criminal record, showing a failure to answer bail, the

commission of offences whilst on bail for other serious offences, and the commission of the January offence whilst undergoing a suspended sentence.

52. His criminal activities start with a court appearance on 28 October 1996 at the Prahran Magistrates' Court, where two charges of possessing and using cannabis were proven, without conviction, and adjourned. On 20 April 1998, at Preston Magistrates' Court, he was charged with theft and obtaining property by deception. Again, the charges were proven without conviction and he was fined. Approximately one year later, on 29 March 1999 at the same court, he was charged with a number of offences involving theft from a motor vehicle, cheating, using an unregistered motor vehicle, and more importantly, failing to answer bail. He was convicted and placed on a community based order for 12 months.

53. From that date on, it has been all down hill. On 24 November 1999, he was charged with breaching his community based order, failed to answer bail, and was charged with theft from a motor vehicle. Thereafter, there were a number of charges of theft from shops, unlawful possession, and on 11 April 2000, in the Melbourne County Court, he was convicted of intentionally causing serious injury and theft and sentenced to 12 months' imprisonment with a non-parole period of five months. Thereafter followed convictions in the Melbourne and Heidelberg Magistrates' Courts for theft, failing to answer bail, possessing property being proceeds of a crime, handling stolen goods, failing to answer bail, and many theft offences.

54. On 15 December 2000, he was convicted of multiple charges of burglary and theft, and sentenced to 18 months' imprisonment, which was wholly suspended for a period of two years.

55. Some 26 days later, it is alleged that he committed the offence on 10 January 2001.

56. Some of his prior convictions involved violence. He has been convicted on at least three occasions for failing to answer bail in 1999 and 2000. He has committed a number of offences whilst on bail. He spent some months in prison last year.

57. His employment record, to say the least, is spasmodic.

58. The respondent is a heroin addict who is on a methadone programme. There is little doubt that the bulk of his problems over the last two years are due to his addiction, and that most offences were committed in order to obtain money to feed his habit.

59. The basis upon which the application was made to the learned Magistrate was, that he was an addict who could be rehabilitated and that counselling and compulsory treatment would ensure that he would not be a risk to the community, despite his appalling record in the past. It is noted, with regard to the question of rehabilitation, that on 29 March 1999, the Preston Magistrates' Court released him on a community based order, which he subsequently breached. Part of the order addressed the question of rehabilitation.

Showing Cause

60. In determining the issue of cause, it is necessary, at the outset, to identify the factors which led the Legislature to decree that bail should be refused. What those factors are, will depend upon the circumstances of each case.

61. The relevant factors on the application by the respondent were, first, a weapon had been used during the commission of the alleged offence, which showed a propensity to resort to violence; secondly, the presence of the weapon provided the potential to cause serious physical and/or mental injury to a victim; thirdly, the probabilities are high that upon conviction, the respondent would be sentenced to a substantial term of imprisonment which may encourage him not to answer bail; and finally, there is a risk of the commission of another similar-type offence.

62. These seem to me to be the relevant factors which underpin the decision by the Legislature to refuse bail where a person, in the commission of an indictable offence, uses an offensive weapon. There may be other factors which would be relevant.

63. The respondent, as an applicant for bail, had to provide cogent evidence to answer these

concerns before it could be said that his detention in custody was not justified. In considering the factors, the background of the respondent, his prior convictions, the strength of the case against him, and the history of previous grants of bail, were all relevant.

64. His detention would not be justified if it was established that the risk of repeat offending was extremely remote, that the case against him was weak, that the probabilities were that he would not be sentenced to a term of imprisonment, that the use of violence was completely out of character, and that the possibility of re-offending, using a weapon, was remote. In considering the issue of cause, it is necessary to consider the applicant's past in making an assessment of whether he should be detained.

65. Although it is clear that the learned Magistrate was aware that it was a show cause application, she did not consider the issues that I have identified as relevant to the exercise. Her concern was to put in place a structure which hopefully would ensure that if he was released, he would not lapse back into his criminal ways. However, in reaching her decision, she failed to take into account, in my opinion, the relevant factors, namely, the risk that he may fail to surrender himself in answer to bail, the real risk that he would commit further offences if granted bail, the risk that he would interfere with a prosecution witness if released on bail, the seriousness of the offence, the high probability that he would be sentenced to a period of imprisonment, his extensive criminal history and lack of employment history. In addition, she failed, in my opinion, to give full effect to the fact that the Crown case against the respondent is indeed a strong one.

66. In my opinion, the learned Magistrate was in error in failing to give any or any sufficient weight to the relevant matters that I have referred to. It follows that her discretion erred.

Conclusion

67. In my opinion, bail should not have been granted to the respondent. His background showed a propensity to resort to violence. The use of a weapon during the commission of the last alleged offence, taking into account his prior criminal history, leads to the risk that he may offend again, with possible grave consequences. That is a risk that in the circumstances should not be taken. In my opinion, the probabilities are high that upon conviction, he will receive a substantial period of imprisonment, especially as the alleged offence was committed whilst undergoing a suspended sentence. Taking into account that he has failed in the past to answer bail, there is a real risk that he would not answer bail.

68. In my opinion, the respondent as applicant has failed to allay the concerns which induced the Legislature to refuse bail in these circumstances and accordingly, he has failed to show cause why his detention in custody is not justified. Indeed, in my view, his detention in custody is justified because of the risks of re-offending, and not answering bail. His record shows an escalation of criminal activity and resort to violence. The public must be protected. That is why the Legislature decreed that bail should be refused in relation to the alleged offence.

69. It follows that bail should not have been granted, the appeal should be allowed and the order granting bail be set aside.

70. Subject to submissions from Counsel, I propose to make the following orders:

(i) That the appeal by the Director of Public Prosecutions against the order made by the Magistrates' Court of Victoria at Melbourne on 5 June 2001 granting bail to Phillip Anthony Harika is allowed;

(ii) That the said order be set aside and the respondent be taken into custody.

APPEARANCES: For the appellant DPP: Mr B Kayser, counsel. Solicitor for Public Prosecutions. For the respondent Harika: Mr J Lavery, counsel. Peter Lynch, solicitor.
