60/88

SUPREME COURT OF VICTORIA

DPP v SPIRIDON

Hampel J

7 September 1988 — [1989] VicRp 31; [1989] VR 352

BAIL – DRUG OFFENCE – BAIL GRANTED – FACTORS TO BE CONSIDERED BEFORE GRANTING BAIL – WHETHER WRITTEN REASONS NECESSARY – ACCUSED RESIDENT INTERSTATE – ONUS REVERSED – WHETHER STATUTORY PROVISION INVALID: *BAIL ACT* 1977, S4; *CONSTITUTION* (CTH.), S117.

1. Where a person is charged with trafficking in a drug of dependence in excess of the prescribed minimum, the court, in determining whether exceptional circumstances exist to justify the grant of bail, may consider the matters set out in s4(2)(d) of the *Bail Act* 1977. Where the court grants bail, there is no statutory requirement imposed on the court to state its reasons for granting bail in the order.

2. As s4(4)(b) of the *Bail Act* 1977 appears to discriminate solely on the basis of residence, it is in breach of s117 of the *Constitution* (Cth.) and therefore invalid.

***Re Loubie* (1985) 62 ALR 139; (1986) 1 Qd R 272; 19 A Crim R 112; MC 9/1986, applied.**

HAMPEL J: *[After setting out the terms of the grant of bail, the grounds of appeal, briefly the facts of the case and the provisions of s18A of the* Bail Act *1977, and after holding that an appeal by the DPP under s18A of the Act involves a review of the decision granting bail, His Honour continued]:* ... **[8]** The next question therefore is whether the Director has demonstrated that the Magistrate fell into error as contemplated by the grounds of appeal. The provisions relevant to the determination of that issue are contained in s4 of the *Bail Act* 1977. The section commences with the provision in sub-s(1) that a person held in custody shall be granted bail in certain circumstances. The relevant portions of sub-s(2) are as follows: *[His Honour set out these provisions and continued]*

... **[10]** In the context of the present case, it is clear that sub-sec(2) requires a person charged with offences of trafficking and possession of heroin which involve an amount of the drug greater than 30 grams to show exceptional circumstances which justify release on bail. These provisions deal with the most serious offences and understandably require the applicant to discharge a most stringent onus. If bail is granted, then curiously and I think by oversight, no requirement is imposed on the Magistrate or a Judge to state reasons. It is only in sub-s(4) which deals with drug offences involving lesser quantities that such a requirement exists where bail is granted. Under that sub-section a person charged with an offence under sub-s(ca) involving less than 30 grams of heroin must discharge the onus of showing that his detention in custody is not justified. Sub-section (4)(ca) is expressed to be "subject to 2(aa)". The sub-sections deal with two different situations. One, under sub-s(2)(aa) **[11]** where the amount of the drug is over the prescribed minimum quantity. The other under sub-s4(ca) where the drug is not over the prescribed quantity.

In the present case, the amount of heroin involved was over 30 grams and so the Magistrate quite properly dealt with the matter under sub-s(2)(aa). He found that exceptional circumstances existed, he was satisfied that there was no unacceptable risk of non-appearance or of the other matters set out in s2(d)(i), and allowed bail. There was no requirement to state reasons. It follows that the contention that his order is a nullity because of such an error is unfounded. That disposes of ground 2.

Under ground 1 it was contended that the facts were, as a matter of law, incapable of supporting the finding of exceptional circumstances and such a basis for the release of the respondent was an error which vitiated the order. Mr Cash's affidavit in paragraph 7 sets out the matters which were relied on in what is described as a lengthy application. They included the respondent's personal circumstances, his previous good record, his role in the alleged offences

and his wife's medical condition. The learned Magistrate heard the committal proceedings and released the respondent on bail but not two of his co-accused. He was fully seized of the matter in all its detail and I am not able to say on the material before me that his conclusion is vitiated by any error or that it is so manifestly wrong that some error should be inferred. It is not possible to say that the combination of matters which he considered, including his assessment of the respondent's role in the offences, could not as a matter of law, amount **[12]** to exceptional circumstances. Ground 1 therefore cannot be sustained.

Equally, in my view, grounds 3 and 4 have not been made out. The Magistrate heard evidence and submissions which led him to conclude that there was no unacceptable risk under s4(2)(d)(i). He was fully aware of the nature and the circumstances of the offences and there is nothing before me to indicate that he did not give that matter sufficient consideration as he was required to do under s4(3) for the purposes of s4(2)(d)(i).

That leaves ground 5. The respondent was undoubtedly a resident of New South Wales and s4(4)(b) applied to him and provided a basis for the requirement on him to show that his detention in custody is not justified. This raised an interesting question as to whether the sub-section complies with s117 of the *Constitution* because it discriminates solely on the basis of residence in another State. Miss Curtain expressly abandoned all reliance on sub-s(4)(b) as a basis for contending that the onus rested on the respondent because of its operation or that it activated the requirement for the stating of reasons by the Magistrate. She preferred to rely on sub-s4(4)(ca) for those purposes. I am not sure that Miss Curtain's position absolves me from considering the constitutional argument raised by Mr Forrest.

Dowsett J in *Re Loubie* [1986] 1 Qd R 272; (1985) 62 ALR 139; 19 A Crim R 112 held that a court was bound to consider the constitutional validity of a section if the question arose on the face of the legislation, whether or not the matter is expressly raised by the parties. He held that an almost **[13]** identical provision of the Queensland *Bail Act* 1980 was invalid. The question was fully argued before him and he delivered a considered reserved judgment. I have not had the benefit of full argument on the point but I can see no reason why I should come to a different conclusion if such a conclusion is necessary to dispose of ground 5. For all these reasons the appeal is dismissed. No costs will be allowed as s18A(10) so directs.

Solicitor for the appellant: JM Buckley, solicitor to the Director of Public Prosecutions.
Solicitors for the respondent: Brian TD Cash.
