02/85

SUPREME COURT OF VICTORIA

R v DAUER

Nathan J

7 February 1985

BAIL – WHERE PREVIOUSLY REFUSED – RISK TO CROWN WITNESSES – WHETHER BALANCED AGAINST DEPRIVATION OF ACCUSED'S LIBERTY: *BAIL ACT* 1977, SS4, 18A.

D. was committed for trial in respect of offences for kidnapping, false imprisonment and assault occasioning actual bodily harm. In an application for bail it was alleged that whilst on bail, D. had committed a further indictable offence in respect of which, 3 previous bail applications had been refused. The Magistrate decided to grant bail to D. notwithstanding the risk of interference with Crown witnesses if D. were to be released. On appeal by the DPP—

HELD: Appeal allowed. Order for bail revoked.
In deciding whether to grant bail, one of the matters a Court should objectively assess is the proximity of the risk to the physical integrity of Crown witnesses. If the risk is unacceptable, then bail should be refused. The risk is not to be balanced against the fact that the accused will be deprived of his liberty if refused hail.

NATHAN J: *[After setting out the facts and the nature of the Application, His Honour continued]:* ... **[4]** The circumstances of this case indicate that whilst on bail for the primary offences – that is the kidnapping etc. – it is alleged that Dauer committed a further indictable offence, namely the conspiracy to pervert the court of justice between September and October 1984. This matter, the most serious of the secondary offences, was the subject of three previous bail applications all of which were refused. However bail was granted after the committal proceedings. It is in respect of that grant that the Director of Public Prosecutions now appeals. In the event that my remarks may be of some assistance to the Stipendiary Magistrate, I will refer to the provisions of s4 of the *Bail Act* and the methods of approach used by the learned Magistrate in dealing with the issue as it was before him. The effect of sub-s(2) of s4 is to reverse the presumption of entitlement to bail of a person charged with an indictable offence. It commences:

> **[5]** "Notwithstanding the generality of the provisions of sub-s(1) a court shall refuse bail—
> (d) if the court is satisfied—
> (i) that there is an unacceptable risk that the accused person if released on bail would"

(and there follows a number of possible courses of conduct. In this instance the relevant ones are) –

> "commit an offence whilst on bail;
> endanger the safety or welfare of members of the public; or
> interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or to any other person."

Sub-s(3) of s4 directs the court's mind as to some of those issues which may be pertinent in assessing the acceptability of the risk and recites as follows:

> "In assessing in relation to any event mentioned in sub-section (2)(d)(i) whether the circumstances constitute an unacceptable risk the court shall have regard to all matters appearing to be relevant and in particular, without in any way limiting the generality of the foregoing, to such of the following considerations as appear to he relevant, that is to say—
> (a) the nature and seriousness of the offence."

I interpolate that must be the indictable offence allegedly committed during the currency of the bail.

> "(b) the character, antecedents, association, home environment and background of the accused person;"

(c) is irrelevant for these purposes.

"(d) the strength of the evidence against the accused person."

I observe that the learned Magistrate's comments when arriving at his conclusion as to acceptability of the risks indicate he failed to take account of some of the considerations which he is statutorily obliged to consider, and I turn now to the reasons given by the learned Magistrate. In assessing the possibilities of risk as to the physical integrity of witnesses, the Magistrate said this:

> **[6]** "Now, obviously, in all the circumstances, the evidence that I have heard during the course of the proceedings, and of course the information I gained from reading the transcripts of the three bail applications, there is indeed a risk that that kind of thing could occur."

I make this observation: the learned Magistrate there placed at its lowest the comments of three judges of this court as to the degree of proximity of the risk which was likely to face Crown witnesses in this matter. The learned Magistrate should have given great weight to the fact that three judges of this court on a fact situation in front of them in no way markedly different from that which confronted him, were of the view that the seriousness of the threats made by Dauer in respect of the Crown witnesses was sufficiently close and proximate as to constitute an unacceptable risk and to result in the refusal of the bail application. The learned Magistrate then went on at p23:

> "I think there is a risk, however, that there could be some attempt to influence or interfere with some of the civilian witnesses. Now, the real question, in my view, is whether that risk is an acceptable one or unacceptable, balanced against the fact that Mr Dauer is to be deprived of his liberty, already for a considerable period of time."

Further the Magistrate did not hear from one of the threatened witnesses, a Mr Humphries, at all. The Magistrate fell into error. It is an absolute point for him to consider whether the witnesses are at risk or not. That is not to be balanced by way of some process against the liberty or otherwise of the accused man. The proximity of the risk is to be objectively assessed and if it is unacceptable, then indeed bail should be refused. I refer again to the structure and the provisions of sub-s(4), which have reversed the position of automatic entitlement of bail. Again, the learned Magistrate at p24 said this:

> **[7]** "Now, it seems to me that there must be very cogent reasons why a person should be kept in custody if without being convicted he can serve a term of imprisonment of that nature. That, of course, has to be balanced against that very real risk of interference with the witnesses. He is a man" etc.

The learned Magistrate, as a matter of objective evidence, has plainly come to the view that there was a very real risk of interference and in spite of that conclusion and in spite of the constraints placed upon him under the terms of the *Bail Act*, he came to the view that the risks were acceptable in this instance. Now, I make this observation at this juncture: the learned Magistrate was not, at that time, to know of an event which occurred outside the court subsequent to the committal proceedings. That is the event as to which Mr Grattidge has given evidence, namely, that on leaving the court the accused Dauer, in company with his co-conspirator and co-accused, was present, although not a participant in any way, in a further threat made by his co-conspirator to one of the Crown witnesses. It must be borne in mind in relation to the offences with which this man is charged – there is prior evidence that threats of a similar nature have been made to other Crown witnesses. The seriousness of threats made in company of the police in circumstances where all could hear of the nature of that threat – and I accept the evidence given by Mr Grattidge that it was real and proximate – are such that the making of it by a co-conspirator cannot be seen to assist the accused man and must be seen inferentially as being a circumstance in which, if bail were granted, and out of what may be seen to be some misconceived and misguided loyalty to a co-conspirator, the threat could be **[8]** put into effect, or some worse action carried out by Dauer. That is a circumstance to which, of course, the learned Magistrate could not advert.

Now, I return to the findings made by the Magistrate. The Magistrate had this to say at the conclusion of his ruling:

> "I have given lengthy consideration to this matter, overnight especially I have thought about it a great deal."

He then went on to talk about the time for a possible trial and it seems, as a matter of fact, misdirected himself as to the time that Dauer is likely to remain in custody if bail were to be refused, but said this:

> "I just wonder if any civilised community which bases itself on the rule of law that a person is innocent until proven guilty can really say to itself 'although that is the position, this society will keep innocent persons in the kind of accommodation which is provided in a place such as Pentridge for periods of at least six months', and I would have thought probably considerably longer, and still really say that it is a society which bases its rule of law on that proposition."

With respect to the Magistrate, the sentiments embedded in that statement do not reflect the law with respect to the bail of persons charged with committing an indictable offence whilst bail is already running. In those circumstances, the law has transferred the onus as to the entitlement to bail to the accused man. Of course, it is fundamental to our law that an accused person is innocent until the contrary is established, the entitlement to bail is a separate and distinct issue and there is no entitlement to bail *per se* in these circumstances arising out of the proposition "innocent until proved guilty". With bail, the proposition is that if there is an alleged **[9]** unacceptable risk or if there has been a commission of an offence whilst on bail, or if there has been an association of drug dealing and the other matters referred to in s4, then indeed there is no entitlement to bail unless a further set of given circumstances are established by the accused man himself.

Now, insofar as the learned Magistrate referred to the accommodation provisions at Pentridge, I make no comment except to say that I am in agreement with him. It is a sad reflection on a society which prides itself as being one of the advanced economies of the latter part of the 20th century that the appalling conditions in the remand section at Pentridge are tolerated. It is not a fit and proper state of affairs for a western democracy in the latter part of this century. **[10]** However the law must be put into effect, given the physical machinery of the State facilities as they are, and it is not for a magistrate – nor indeed a judge – to misdirect himself because the physical accommodations offered by the State to its remand prisoners are less than satisfactory. It is plain that on the basis of the comments by the magistrate he has misdirected himself as to the law.

Now I turn to the other issues in s4 of which the magistrate should have had attention in assessing the acceptability of risk – that is the nature and seriousness of the offence. In this instance the accused man is an officer of the police force. He has been charged with conspiracy to prevent the course of justice. It is very difficult to conceive of a more heinous offence so far as a serving police officer is concerned. That matter – the seriousness of the offence – was simply not adverted to at all by the magistrate. He is obliged under the provisions of sub-s(3) to have regard to the character, antecedents, and associations of the accused man. He did have regard to the character and antecedents of the accused man; he had no regard to the given associations of the accused man. The accused man is known to be an associate of brothel-keepers, and on his own evidence he is a shareholder and the landlord of a nest of brothels in St Kilda Road. It was incumbent upon the magistrate to give consideration to the known associations and status of the accused man; he did not. He was obliged under ss(3) to have regard to the strength of the evidence against the accused person. The reasons given by the magistrate indicate he had little regard to those factors. He was dealing with the committal **[11]** proceedings relating to the kidnapping whereas he was obliged under the terms of the *Bail Act* to have regard to the strength of the conspiracy case, the secondary offence. The transcript of his reasons for decision indicates that he had no such regard.

Finally, the learned magistrate misdirected himself as to the time during which Mr Dauer is likely to remain in custody pending trial. I accept the evidence given here this morning by Mr Andrews that if all parties are ready to proceed this matter could commence on 1st March and that it is likely to take one month. Accordingly I am satisfied that standing in the position given to me under the provisions of sub-s6, s18A, and having regard to the matters to which I am directed in ordinary applications for bail following upon an initial refusal, and having regard to all those considerations – namely, the nature and seriousness of the offence, character, antecedents and associations of Dauer, and the strength of the case against him – and I remind counsel that I

have read this matter and previously dealt with the strength of that case in the prior application for bail – I am satisfied that the circumstances do not constitute an acceptable risk so far as the community is concerned. I cannot be satisfied that this man is unlikely to commit an offence whilst on bail. The first such provision – I have the evidence of him being a known brothel-keeper, an associate of prostitutes, an associate of the sleazy operators who work within the brothel industry, and the fact that it is alleged against him that he has been living off the earnings of prostitutes. I am satisfied that there is a very distinct and **[12]** real likelihood that were this man to be released on bail he would continue to gather income out of the brothel industry, and also through the company with which he is associated.

Equally I am satisfied that the threats offered by him to other members of the community, in particular the Crown witnesses, are clear, proximate and very real, and as such would constitute an unacceptable risk to the community. Further, I am satisfied that the prospects of witnesses being otherwise obstructed and the course of justice itself being obstructed is too proximate and real to constitute an acceptable risk.

This appeal by the Director of Public Prosecutions will be allowed.
