

32/94

SUPREME COURT OF VICTORIA

DPP v MORGAN

Beach J

15 June 1994

BAIL – ACCUSED CHARGED WITH CONSPIRACY AND INCITEMENT TO MURDER – MONEY PAID TO PROSPECTIVE ASSASSIN – OFFENCES PREMEDITATED – STRONG CASE – WHETHER AN UNACCEPTABLE RISK OF COMMITTING FURTHER OFFENCES: BAIL ACT 1977, S18A.

Where an accused person was charged with conspiracy and incitement to murder his former wife and there was evidence that the offences were premeditated and involved payment of the sum of \$25000 to a prospective assassin, it was open to conclude that there was an unacceptable risk that if the accused remained on bail he may commit further offences against his former wife.

BEACH J: [1] On 5 April of this year the respondent John Victor Morgan was arrested and charged with conspiracy to murder and incitement to murder. The intended victim was the respondent's former wife Robyn Lesley Morgan. The facts relating to the two offences are set out in fairly brief form in the affidavit of Leigh Andrew Kelly sworn 10 June 1994. For present purposes they may be summarized as follows. The respondent and his former wife married in 1984 but separated in July of 1992. There were two children of the marriage, a boy who was born in 1988 and a daughter who was born in 1992. Proceedings between the parties came before the Family Court on 9 July of 1993. The respondent's former wife was given sole custody of the two children and the question of the respondent's access to the children was reserved. At the time that order was made a further order was made restraining the respondent from assaulting, harassing or molesting his former wife or from entering on to premises occupied by her, save for exercising any right of access he might gain to the children.

In December 1993 it is alleged that the respondent approached a person called Dwyer with a view to having Dwyer arrange for the respondent's former wife to be murdered. The fee offered or discussed with Dwyer at that time for the killing was the sum of \$25,000. In February of this year it is alleged that the respondent paid half that amount to Dwyer and the balance of the sum to him on 10 March of this year. Towards the end of March Dwyer contacted the police in relation to the matter and, as I would understand it, made full admissions to them [2] concerning the plan. Police officers then commenced a covert operation using an undercover police officer to pose as the prospective hitman. That police officer was introduced to the respondent on 1 April of this year and that meeting was recorded both visually and on audio tapes. It is alleged that during the course of the discussion that day the respondent told the undercover police officer that he wanted his former wife killed so that he could obtain full access to the two children. He is further alleged to have said that he wanted the murder to look like an accident or suicide.

Some three days later the undercover police officer contacted the respondent, told him that he was close to committing the murder, and asked the respondent whether he had changed his mind. It is alleged that the respondent said that he had not and that the undercover officer then told him that the contract would be carried out shortly. On the following day, 5 April, there was a further meeting between the undercover police officer and the respondent. That meeting was also filmed and taped. The police officer told the respondent that the victim was dead to which, so it is alleged, the respondent replied that he felt great. It was later that day that the respondent was arrested and charged with the two offences in question.

The matter came before the Magistrates' Court on 1 June last and on that occasion an application was made for bail on behalf of the respondent. The application was granted. The respondent was released on his own undertaking with two sureties each in the sum of \$50,000. [3] There were various special conditions imposed which do not have any real significance for present purposes. The Director of Public Prosecutions now appeals to this court seeking to have

the respondent's bail revoked. The appeal is made pursuant to the provisions of s18A of the *Bail Act 1977*. It is unnecessary to include the provisions of that section in these reasons for judgment.

In the unreported decision of the Full Court of this court delivered in the matter of *Beljaev & Anor v The DPP*, on 8 August 1991, the court had this to say concerning such an appeal:

"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 may succeed if he shows 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."

It is not a question therefore of whether I would or would not have granted bail had the original application been made to me. It is a question of whether I am satisfied that the order of the Magistrate was manifestly the wrong order to make in the matter. In that regard I think it is first necessary to look at what occurred before the Magistrates' Court on 1 June when the order granting the respondent bail was made. An account of the application before the Magistrates' Court that day is set out in a report prepared by Detective Senior Constable Shepherd which report is exhibited to the affidavit of [4] Leigh Andrew Kelly to which I have already referred. Detective Senior Constable Shepherd states that at the commencement of the case he was called to give sworn evidence; during the course of that evidence that he gave a summary of the case to the magistrate and that he then gave evidence as to the police opposition to bail stating that he believed the respondent posed a very real threat to the safety of the alleged victim and that he believed that the respondent may fail to appear at court if he was released on bail. Shepherd then speaks of certain cross-examination by counsel for the respondent during which he agreed that the central feature of the police opposition to bail in the case was a fear for the safety of the alleged victim.

Following Detective Senior Constable Shepherd's evidence the respondent was called to give evidence, during the course of which he stated that if released on bail he would not re-offend in any way and that he would not make contact with his former wife or any witnesses in the matter. The respondent was cross-examined by the prosecuting sergeant and during the course of the cross-examination agreed that the intervention order to which I have already referred was in place at the time the alleged offences were committed. At the conclusion of the respondent's evidence counsel for the respondent then indicated that he proposed to call the respondent's present wife, Andrea Morgan. According to Shepherd's report, at that stage the magistrate interrupted counsel and essentially asked him what type of surety his client would be able to raise. There was then some discussion between counsel and the [5] magistrate which the prosecutor was not invited to participate in, following which the magistrate stated, "Bail is granted." According to Mr Shepherd the magistrate did not at any stage allow any submissions or input from the prosecutor. The magistrate did not hear the entirety of the evidence in the case before making his decision and the magistrate apparently paid no attention at all to his expressed fear that the respondent posed a real threat to the alleged victim. Certainly, according to Mr Shepherd's report, at no stage did the magistrate address the matter.

What Counsel for the Director now contends is that the decision of the magistrate was manifestly wrong, that if one has regard to the serious nature of the offences with which the respondent is presently charged and the strength of the Crown case in relation to them, there is an unacceptable risk that if the respondent is permitted to remain on bail he will commit further offences against his former wife. In that regard it was stressed that the two offences were premeditated and that it was only by reason of the intervention of the police that they were not carried into effect; that the respondent had a deep commitment to have his former wife murdered, and that there is nothing to indicate that that is no longer his frame of mind. As to the strength of the Crown case, it was stressed that the discussions between the respondent and the undercover police officer were tape-recorded and recorded by means of a video or the actual meetings themselves were recorded by means of video tape. I should say that Mr Forrest who appears for the respondent [6] accepted that the Crown case is an extremely strong one.

In my opinion, the circumstances surrounding the commission of the offences in question were such as to cause one to conclude that there is a risk that if the respondent remains on bail he may seek to commit further offences against his former wife. The question then to be answered, however, is whether that risk can properly be categorized as an unacceptable one. In my opinion, when one has regard to the premeditation attaching to the offences and the steps taken by the respondent in relation to them, including the payment of the sum of \$25,000 to the prospective assassin, the only conclusion one can arrive at in the matter is that the risk is unacceptable. The magistrate did not take that view and, in my opinion, his decision in that regard was erroneous.

It follows, therefore, that the Director's appeal will be allowed and the bail granted to the respondent on 1 June 1994 is revoked.
