39/07; [2007] VSCA 195

SUPREME COURT OF VICTORIA — COURT OF APPEAL

MOKBEL v DPP (VIC and CTH)

Maxwell P, Vincent and Ashley JJA

28 June, 14 September 2007

CRIMINAL LAW – FORFEITURE OF BAIL – PRINCIPAL ABSCONDED WHILST ON BAIL – TWO-STEP PROCEDURE – MAKING OF FORFEITURE ORDERS AND WHETHER SURETY SHOULD BE RELIEVED OF OBLIGATION TO PAY – WHETHER JUDGE WHO MADE FORFEITURE ORDER SHOULD HEAR APPLICATION FOR RESCISSION – WHETHER JUDGE IN ERROR IN REFUSING APPLICATION FOR RESCISSION: *CROWN PROCEEDINGS ACT* 1958, S6(4).

1. Where a judge has made an order forfeiting bail pursuant to s6(1) of the *Crown Proceedings Act* 1958, and an application for rescission or variation is later made, there is no reason in principle why the same judge should withdraw from hearing the application. This practice has much to commend it because the judge making the forfeiture order does so with a knowledge of the background of the trial and the circumstances of the non-attendance of the bailed person.
***Re Condon* [1973] VicRp 40; [1973] VR 427, followed.**

2. Where, on the hearing of an application for rescission the judge found that the surety was not a genuine surety in that she had no entitlement to the property which was put up as security, this finding was clearly open in the circumstances.

MAXWELL P, VINCENT and ASHLEY JJA:

1. On 14 December 2006, Gillard J refused an application by the appellant that orders earlier made by him under s6(1) of the *Crown Proceedings Act* 1958 (Vic) be varied or rescinded. An appeal came on before this Court on 28 June 2007. After hearing argument, the appeal was dismissed, with the Court informing the parties that our reasons for judgment would be delivered at a later date.

2. The matter arose against the following background.

3. On 26 November 2004, Antonios Sajih Mokbel was committed for trial on a number of Commonwealth charges relating to the importation and trafficking of drugs of addiction. Bail was fixed on the provision of his own undertaking and a surety of $1,000,000.

4. The appellant, who is the sister-in-law of Mr Mokbel, on the same day, signed an undertaking in respect of his appearance at trial. This was supported by an affidavit sworn by her, containing statements to the effect that her real estate consisted of a dwelling house at 11 Downs Street, Brunswick which was worth not less than the amount required as surety. It later emerged that the property was registered in the name of J R Mokbel Pty Ltd, a company that held the property as trustee of a discretionary trust. The appellant was the sole director and shareholder and a beneficiary under the trust.

5. On 15 February 2005, in relation to State charges, the appellant again signed an undertaking in respect of Mokbel's appearance at trial. It was supported by an affidavit to similar effect.

6. The principal remained on bail during his subsequent trial[1] until, in the course of his final address, an application was made by the prosecutor for its revocation. Gillard J, the trial judge, decided, on Friday 17 March 2006, in conformity with a practice that has become relatively common over recent years, that bail would continue until the completion of addresses. The principal absconded over the weekend.

7. On 26 April 2006, his Honour declared the bail forfeited, pursuant to s6(1) of the *Crown Proceedings Act* 1958 (Vic), and made orders in respect of payment by the surety and the seizing

and selling of the property in default. He also made an order that, in the event of further default, the appellant serve a term of imprisonment of two years. Those orders have not been the subject of any appeal.

8. The principal gave no evidence in that proceeding. Nor did the appellant adduce any evidence. But the appellant's counsel made it clear that, upon orders being made, an application would be made pursuant to s6(4) of the Act that they be rescinded or varied.[2]

9. It was accepted by all concerned that the matter involved a two step procedure, first, the making of the orders under s6(1) which it appears was regarded by the appellant's counsel as effectively automatic, although as the provision makes clear this was the case only with respect to some of the orders to be made. And then, in the event of an application being made within 28 days under s6(4), consideration of the question whether the appellant should be relieved of her obligation to pay the amount of the surety.

10. When the application for rescission or variation came before the Court,[3] on a directions hearing, counsel for the surety submitted that his Honour should recuse himself from the proceeding because of perceived bias, disavowing however any suggestion of actual bias. The judge set out the reasoning upon which this application was based in his subsequent ruling as follows:

> [Counsel] expressed the concern in this way: "Your Honour, if I can simply put the perception this way. At the end of these proceedings the question for the fair minded person sitting at the back of the court is, if your Honour were to make an order resisting our client's application to vary or set aside the order which you have already made, whether there is a significant risk that a fair minded observer might think 'well in effect that's a bit tough, she's lost her house, million dollar house, because she is said to have failed in her duty as a surety', and yet the judge who imposed that order three days earlier had declined the request by the Crown to revoke Mr Mokbel's bail. How can that be fair and how can that be consistent? That is, in the bluntest of terms, the kind of perception that we say is relevant for your Honour to consider in this application."[4]

11. Pointing out that the principles that guide a court on an application of this type are well settled, his Honour made clear that he not only understood them, but was acutely conscious of his obligation to give them full effect.[5]

12. There is no need in the present case to refer to more than one of the many statements in the judgments setting out the proper approach. Brooking JA stated in *State of Victoria v Psaila and Lamb*[6]:

> A judge should not hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it: *Livesey v New South Wales Bar Association* ... The test is based not on notions of 'real likelihood' or 'real danger' but on reasonable apprehension on the part of a fair-minded and informed observer: *Webb v R*... . A question of ostensible bias can be a difficult one, involving matters of degree, and particular circumstances may strike different minds in different ways: *Livesey's case* ... Reasonable apprehension of bias must be firmly established; a mere lack of nicety is not enough: *R v Commonwealth Conciliation and Arbitration Commission; Ex parte The Angliss Group* ... . (Citations omitted)

13. Against that background of principle, Gillard J considered and adopted the practice followed by Crockett J in *Re Condon*[7] who said:

> The application came to me by reference from the judge sitting in chambers pursuant to a practice which, I understand, has now been followed for some time. The provision to which I have just referred allows the application to be made to a judge of the Court and the practice in the Supreme Court (but not the County Court where the matter is sent directly to the judge who first dealt with the matter) has been for the hearing of the application to be set down before the judge in chambers in the first instance to be followed by a reference, as I have indicated, to the judge who made the declaration that the recognisance in question be forfeited. The practice undoubtedly has much to commend it because the judge making such declaration does so with a knowledge of the background of the trial and the circumstances of the non-attendance of the bailed person that may be difficult for another judge to capture and yet such knowledge may be of great assistance in determining the matter. Indeed, on the hearing of this application it was plain from the submissions of both counsel that

they had relied on much of which I was aware by reason of my association with the trial that was to have taken place and in respect of which the principal failed to appear.

14. Setting to one side for the moment the possible consideration that Gillard J had permitted the principal to remain on bail, there was nothing whatever in the circumstances that militated against the adoption of this practice. It followed, his Honour concluded, that there was no reason in principle, or arising from the particular circumstances, that necessitated or justified his withdrawal.

15. The application for rescission or variation was also refused in a judgment handed down, on 14 December 2006, and it is that decision with which the present proceeding has been concerned.

16. In support of the submission that the orders made on 26 April 2006 should have been varied or rescinded, reliance was placed on three propositions.

17. First, as in the court below, it was argued that it is reasonable to assume that, as Gillard J had permitted the principal, a person of some notoriety, to remain on bail in the final stages of his trial, a fair minded and informed observer might perceive his Honour as having been acutely embarrassed on his own behalf and that of the court generally when the accused failed to appear. In that situation, the argument proceeded, the observer might maintain a reasonable apprehension that his Honour may not have brought an independent mind to the resolution of the surety's application.

18. It is important to bear in mind, when considering this contention, that the application was not being made by the principal, in relation to whom the judge may well have felt some annoyance, but by a person who had acted as surety for him and who may herself have been dismayed and betrayed by his non-appearance. From the perspective of the judge, who had not at that stage heard evidence or received submissions bearing on the matter from the appellant, she had to be regarded, *prima facie* at least, as a genuine surety who was at risk of losing her home. It was not suggested in this Court or in the court below that his Honour approached the matter in any different fashion. The question which arose for his Honour's consideration, and later for this Court, was the following: was there in that situation any reasonable prospect that an informed and fair minded observer might apprehend that he may not, consciously or unconsciously, deal fairly with the appellant as a consequence of feelings of frustration, anger or embarrassment arising from the fact that the principal had absconded? In our view, the answer was clearly – no.

19. There was simply nothing in the circumstances, the reasoning adopted by his Honour, the inferences drawn by him, the conclusion at which he arrived, or which otherwise can be seen to arise from any of his statements, suggestions or remarks, that could give rise to even the slightest suspicion that Gillard J may have been so influenced at the trial. The contention of apprehended bias rests upon the notion that a fair minded observer might suspect that the judge may have vented some feelings of embarrassment or frustration occasioned by the wrongdoing of another, either consciously or unconsciously, against a third party who, to his knowledge, may have been absolutely devastated by the failure of the principal to appear. It is apparent from his rulings and judgments that, at each stage of the process, the judge approached his responsibility with the utmost care. There was no reason to suppose that any reasonable observer acquainted with the matter or who took the trouble to read the material would possess any such concern.

20. Secondly, the argument was advanced that the judge, when considering an application under s6(4) of the *Crown Proceedings Act*, possessed the jurisdiction and responsibility to consider whether it would be unjust in the circumstances to require a surety to serve the term of imprisonment fixed in default of satisfaction of the undertaken financial liability, even if an application for rescission or variation of an order under that provision was refused.

21. This contention was, we concluded, misconceived. It is clear that, once the court is satisfied that there has been a failure to observe a condition of bail, s6(1) requires that a declaration be made that bail is forfeited and an order made that the amount undertaken by the surety be paid to the proper court officer. There is then a discretion to be exercised with respect to the time within which the amount undertaken must be paid and with respect to the period of imprisonment fixed for default. In the present case, had she wished to do so, the appellant could have adduced evidence or, through her counsel, presented submissions concerning either or both of those

matters. It appears however, from the approach adopted at the initial hearing, that the attention of the appellant was not centrally directed to arrangements for payment nor to the period of imprisonment that could be required to be served in default. It would have been appreciated that, under s6(1), a term of two years' imprisonment could well be imposed upon her, and safely assumed that the appellant and her legal advisors anticipated that, in view of the size of the surety, a term of imprisonment approaching the maximum would be fixed for default. Rather the appellant was concerned to be relieved of the financial obligation undertaken. If she succeeded at that level, no problem concerning the consequences of default could arise.

22. Section 6(4) is, in its terms, predicated on the making of both the mandatory orders for forfeiture and the exercise of discretion with respect to the period available to the surety to satisfy the undertaking and the period of imprisonment fixed for default under s6(1). It permits reconsideration only of the order requiring the surety to pay the amount undertaken. If that order is rescinded or varied, there will be incidental impact on the orders that address the consequences of default, but it is clear enough that the power of the court to rescind or vary an order made under s6(1) can only be exercised where it is considered that:

> ... it would be unjust to require [the surety] to pay the amount undertaken to be paid having regard to all the circumstances of the case.

23. There is no power conferred to consider separately the length of the term of imprisonment fixed in default. That has already been the subject of the exercise of discretionary judgment.

24. Thirdly, it was submitted that there was a "critical change" in the appellant's financial circumstances following the making of the forfeiture and default orders on 26 April 2006. Again the argument advanced was similar to that presented in the court below where it was put that:

> ... the most significant change of circumstances which is now – which remains unresolved is the fact that at the time that she entered into the arrangement to be Mr Tony Mokbel's surety, whatever the arrangements were her real estate or the real estate in which she believed she had an interest was not the subject of restraining orders. It is now. So that if Your Honour were to order that she pay $1m under the order that Your Honour originally made, neither of the two properties would be in a position to be used to meet that payment.

25. His Honour addressed the appellant's claim of interest in the Downs Street house in the passage –

> ... The applicant swore that she has real property valued at not less than $1,000,000, that her real estate consists of the residential property, and that the value of her equity was $1.14m. The true position is that the residential property is not owned by her and is instead owned by JR Mokbel Pty Ltd as a trustee. Since the applicant is one of a number of beneficiaries and the Trust is a discretionary trust, she is not entitled as a beneficiary to demand that the estate be distributed to her. Until the trustee resolves to transfer to her any property forming part of the trust estate, she has no interest in the property. She gave evidence that her husband, Milad, requested that she become the surety for his brother back in November 2004. She knew at that stage that JR Mokbel Pty Ltd was the registered proprietor of the property, and that the property formed part of the trust estate. She was the only shareholder and director of the company at that time, and it is difficult to accept that she swore the affidavit honestly believing that the home was hers.[8]

26. His Honour, after careful analysis of the appellant's evidence, concluded that she was "a witness without credibility" and that –

> The fact is that the bulk of what the applicant has revealed as being her major assets and the assets of JR Mokbel Pty Ltd are not owned by her at all, but are owned by the family trust. As at today, she has control of the family trust. On the other hand, the main assets, being the properties at Brunswick and Kilmore, are the subject of confiscation orders freezing assets in respect to the prosecution of her husband. The criminal '*Mareva*-type orders' that have been made in the past deny the family trust, the applicant and her husband any right to deal with the property. The applicant has made an application on behalf of the family trust to the court to exclude its properties from the effect of the orders made, but the proceedings have been adjourned *sine die*, and the reality is that they will not be heard until the end of the criminal proceedings against her husband. This could be well in excess of 12 months away.[9]

27. With respect to possible change in the position as a consequence of the making of the restraining orders, his Honour stated –

> However, in any event, there are no new circumstances relating to the applicant's financial position since she became a surety for the prisoner. The only change relates to the restraining orders, which interfere with the rights of the person or persons who have an interest in the property restrained to deal with it. The trust has made an application to be excluded from the restraining orders, but the application has not yet been heard. The circumstances, in my opinion, do not constitute new circumstances which should be taken into account in considering the financial impact and whether it is unjust for the applicant to pay the sum of $1m.[10]

28. These findings were clearly open in the circumstances. Moreover, the appellant's contention, in effect, was that her circumstances had changed when a restraining order was placed on the Downs Street property. There may have been a significant change in her circumstances if the effect of the order had been to deprive her of the ability to dispose of an asset and so pay the amount of the surety. But she had never been the owner of the property, and she had never had an ability to immediately access its value to her benefit – even if she had been disposed to do so. Gillard J found that she was not a genuine surety, and a challenge to that finding was not pursued on the appeal.

29. As sole director of the trustee of the trust, and one of its beneficiaries, the appellant could theoretically have transferred trust property to herself in order to pay the surety – that is, before dealings were restrained. But she had no intention of doing that, at least for the entirely understandable reason that the Downs Street property was the family home and she had three children to look after. In any case, Gillard J observed that the appellant's husband had the power to frustrate any such action, and found that it was "clear that the ultimate control of the whole Trust [was] in the hands of [the appellant's] husband." In the event, the argument that the appellant once had the ability to pay the amount of the surety, but that a change in circumstances precluded her doing so, was an argument that lacked substance.

30. Accordingly, there being no substance in any of the grounds argued before us, the Court dismissed this appeal.

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[1] Bail was extended by order of Gillard J on 29 November 2005, the appellant again signing appropriate documentation.
[2] The relevant provisions read:
s6. (1) Where a court is satisfied that a person has failed to observe a condition of bail the court shall declare the bail to be forfeited and shall order that the amount undertaken by the surety or sureties to be paid to Her Majesty in the event of such a breach be paid to the proper officer of the court forthwith or within such time as the court allows and that in default of payment of that amount in accordance with the order that the amount be obtained by seizing and selling the property of the surety or sureties and in default, in whole or in part, that the surety or sureties be imprisoned for the term (not exceeding two years) fixed by the order.
...
(4) Where bail is declared to be forfeited under sub-section (1) any surety may at any time within 28 days after the making of the order or, if the order was made in the absence of the surety, within 28 days after the order first comes to his notice apply to the Court that made the order to vary or rescind the order on the ground that it would be unjust to require him to pay the amount undertaken to be paid having regard to all the circumstances of the case and the court may vary or rescind the order and cancel any warrant issued in the case under the provisions of this section before the warrant so issued is executed.
[3] On 31 May 2006.
[4] *R v Antonios Sajih Mokbel and Renate Lisa Mokbel* [2006] VSC 221, [21].
[5] His Honour referred to the decisions in *Antoun v R* [2006] HCA 2; (2006) 224 ALR 51; [2006] 80 ALJR 497; (2006) 159 A Crim R 513; *Johnson v Johnson* [2000] HCA 48; (2000) 201 CLR 488; (2000) 174 ALR 655; [2000] FLC 93-041; (2000) 74 ALJR 1380; (2000) 26 Fam LR 627; (2000) 21 Leg Rep 21; *Webb v R* [1994] HCA 30; (1994) 181 CLR 41; (1994) 122 ALR 41; (1994) 68 ALJR 582; 73 A Crim R 258; *Re JRL; Ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342; [1986] FLC 91-738; 66 ALR 239; (1986) 60 ALJR 528; (1986) 10 Fam LR 917; (1986) 10 ALN N184; *Re Polites; Ex parte Hoyts Corporation Pty Ltd (No 2)* [1991] HCA 31; (1991) 173 CLR 78; (1991) 100 ALR 634; 65 ALJR 445; (1991) 38 IR 114; and *Livesey v New South Wales Bar Association* [1983] HCA 17; (1983) 151 CLR 288; 47 ALR 45; (1983) 57 ALJR 420 in this context.
[6] [1999] VSCA 193, [28].
[7] [1973] VR 427, 429.
[8] Mokbel v DPP (Vic) and DPP (C'th) [2006] VSC 487; (2006) 14 VR 405, 423; (2006) 170 A Crim R 179.
[9] Ibid 424-5.
[10] Ibid 428.

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