33/88

SUPREME COURT OF VICTORIA

Re BATINIC

Nathan J

29 March 1988

CRIMINAL LAW – BAIL – APPEAL – WHETHER APPELLANT HAS A RIGHT TO THE GRANT OF BAIL – WHETHER *BAIL ACT* APPLIES TO GRANT/REFUSAL OF APPEAL BAIL: *BAIL ACT* 1977, S4; *MAGISTRATES' COURTS ACT* 1971, S75(1).

1. A person does not have an automatic right to the grant of bail pending appeal. Any application for bail pending appeal is to be determined pursuant to the provisions of the *Bail Act* 1977.

2. Where a Magistrate sentenced a person to a term of imprisonment and that person lodged a notice of appeal and sought bail in the meantime, no error was shown in the Magistrate's refusing bail on the ground that the appellant may not answer bail if released.

NATHAN J: [1] I have before me an application by Fedor Batinic for bail pending an appeal against convictions recorded in the Magistrates' Court at Prahran. Mr Batinic pleaded guilty to one charge of handling stolen goods, eight charges of theft, three charges of theft by deception, one charge of attempted theft by deception, six charges of burglary, one charge of theft of a motor car and one charge of unlawful possession, at the Magistrates' Court on 28th March 1988. He was sentenced to a term of four years' imprisonment with a minimum of two years, which was the effective term in respect of all those charges.

After the convictions were recorded, Mr Melasecca, appearing for the applicant, made an application under the terms of s75(1) of the *Magistrates' Courts Act* for bail pending the hearing of appeals in respect of those sentences. The Magistrate, exercising a discretion invested in him under the terms of that section, refused the application, stating, **[2]** as was testified by Mr Melasecca, "He now has two years he owes the Parole Board. He is not even within the jurisdiction. I believe he would get a sentence even up there."

Mr Melasecca contends that the common law position has not been altered by the recent amendments to the *Magistrates' Courts Act* and the *Bail Act*, the principle being that a person convicted in a Magistrates' Court has, of right, an appeal to a County Court in respect of both conviction and sentence. As such, the penal order in the Magistrates' Court cannot be seen to be final and that bail pending the hearing of that appeal should follow almost as a matter of course. I use the qualifying word "almost", because Mr Melasecca concedes that a Magistrate would have a discretion, as he put it, in exceptional circumstances not to allow the bail.

It is, of course, a fundamental principle of the criminal law that a person whose penalty has not been delivered in final form should not be deprived of their liberty pending ultimate adjudication. I am satisfied that the *Bail (Amendment) Act* 1986 (No. 89 of 1986) and the amendments referred to in the *Magistrates' Courts Act*, put into a code form the provisions relating to the granting of bail, although they cannot be said to cover every contingency, nor indeed the circumstances of the particular appeal before me.

On the one hand, there is the consideration of liberty of a person until ultimately deprived of it by a court of ultimate decision, and on the other, the specific discretion invested in a Magistrate as to whether or not to grant bail pending an appeal.

[3] The matter comes before me in a manner in which I am asked to review the exercise of that Magistrate's discretion. If I were to proceed under the provisions of the ordinary review process I would be obliged to grant the Magistrate an opportunity to be heard, and I would need to have it established that the exercise of the Magistrate's discretion miscarried by either taking

into account matters which he should not have or failing to take into account matters which he should have. However, the *Bail Act*, codifying the law, as I have said, does set out the indicia for the granting of bail. It de-segregates offences into various classes, sets the onus upon an applicant in certain types of cases, and establishes other criteria to which the Court's mind should be addressed. Therefore I choose to treat this matter as if the same comes before me by way of an original or initial application for bail. Certainly I treat it as an appeal *de novo* from the Magistrate's decision.

That brings me to some authorities which are of relevance. Firstly, in *Re Barnett* [1987] VicRp 30; [1987] VR 367; 24 A Crim R 177 Hampel J concluded that a Justice as referred to in the *Magistrates' Courts Act* includes a Justice of this Court, and so much is apparent from a reading of the section. He found that an appeal concerning the entry of a recognizance could be heard before him, and he proceeded to treat that matter as a *de novo* application. I accept that case as authority for the proposition as to how I should proceed in respect of this application concerning an appeal from a Magistrate's decision. That case is also strong authority for the fundamental proposition to which I have already referred, namely the apparent right of a person to bail pending appeal.

[4] That case should be considered together with *Re Clarkson* [1986] VicRp 54; (1986) VR 583, which is not directly applicable because it dealt with an application for bail pending appeal made in respect of a Supreme Court conviction where the applicant was seeking bail pending an appeal to the Full Court. In that case the Court held that very exceptional circumstances were required to be established by the applicant to justify bail. The Court canvassed previous authorities and concluded quite firmly that there was no inherent or apparent right to bail pending appeal.

Returning to the particular fact situation. The applicant here contends he is in a drug rehabilitation treatment programme which, if it were interrupted by a gaol term, would seriously jeopardise any chances he has for rehabilitation. He contends that there is little likelihood of him refusing to answer bail, and in fact by virtue of the discipline exercised by the staff at the drug rehabilitation centre, he is more likely than not to present himself on appeal.

I am of the opinion that these considerations do not outweigh the apparent correctness of the way in which the Magistrate exercised his discretion, and as I see myself obliged to exercise my discretion afresh on the given facts, I come to the same conclusion as did the Magistrate. An intervening fact is this man is in receipt of some sort of treatment for his addiction, but that is not a compelling factor.

The Court would be churlish not to recognise the indifferent results obtained by such programmes and the fact that this man has been subject to such a programme for only a short period of time. It is conceded **[5]** that the last series of offences were all drug related and the applicant has prior convictions. It cannot be said that the ordinary criminal processes of this State are suspended merely because an applicant has sought or is being treated under a drug rehabilitation programme. There are facilities available in prison, although perhaps not as efficacious as those extramural facilities.

I am satisfied the Magistrate was right to conclude that the prospect of a term of imprisonment affected his discretion. It was reasonable for him to conclude that almost certain imprisonment, which did not face the applicant prior to conviction, was such as to make his further attendance before the Court a matter of some conjecture. That being so, I am satisfied, both on my own behalf and if I were to review the Magistrate's decision, that he did not fall into error, and accordingly this application for bail is dismissed.
