

03/07; [2006] VSC 441

SUPREME COURT OF VICTORIA

MUSTICA v DPP

Hollingworth J

10, 21 November 2006

BAIL – SERIOUS DRUG OFFENCES – APPLICANT REQUIRED TO SHOW "EXCEPTIONAL CIRCUMSTANCES" – CASE A RELATIVELY STRONG ONE – DELAY OF MORE THAN 2 YEARS BEFORE TRIAL – PERSONAL MATTERS – POOR HEALTH OF APPLICANT'S WIFE – HAS TIES TO THE JURISDICTION – NO HISTORY OF FAILING TO COMPLY WITH CONDITIONS OF BAIL – PARITY WITH CO-ACCUSED – AVAILABILITY OF SUBSTANTIAL SURETIES – NO PRIOR CONVICTIONS SINCE 1978 – SMALL RISK OF FURTHER OFFENDING – THEORETICAL RISK OF FLIGHT – BAIL GRANTED WITH CONDITIONS: BAIL ACT 1977 S4.

M. was arrested with a large number of persons in connection with an alleged drug ring operation and charged with numerous offences including trafficking drugs of dependence and conspiracy. A magistrate granted bail to two co-accused but not to M. It was said that the delay before M.'s trial would be somewhere between 24-30 months. In relation to personal matters, M.'s wife is in poor health and is on a waiting list for surgery. M. is an Australian citizen and has close family ties to the jurisdiction. M. was last before a court in 1978 and none of his prior offences involved drugs. There was no evidence that any unacceptable risk was made out. Substantial sureties were available and M. has no history of offending whilst on bail. Upon appeal—

HELD: Bail granted with two sureties totalling \$500,000 and other conditions.

1. Given the nature of the charges against him, bail must be refused unless M. can demonstrate that there are exceptional circumstances which justify the grant of bail. The *Bail Act 1977* does not define "exceptional circumstances". There must be factors present which take the case out of the norm and which would answer the description of "exceptional". The hurdle is a high one, but it should not be set so high that it is impossible for an accused person presently in custody to ever achieve or virtually ever achieve bail. Exceptional circumstances might exist as a result of the interaction of a variety of circumstances which, of themselves, might not be regarded as exceptional. Ultimately, each case must be assessed on its own facts. Even if exceptional circumstances are demonstrated, the court must refuse bail if it is satisfied that there is an unacceptable risk that if M. was released on bail, he would do any of the following: fail to answer bail; 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. The burden of establishing unacceptable risk lies on the Crown.

2. Whether a delay is or is not so inordinate as to constitute exceptional circumstances must obviously vary from case to case and must turn on its own facts. There is no particular point at which delay necessarily becomes inordinate. But delay itself, even without the apportioning of any blame, may be sufficient to exceed what society regards as an acceptable period for a person to be incarcerated without trial. It is not to the point to say that such a delay may be the "norm" or "usual" in the prosecution of serious and complex drug offences, if it exceeds what is acceptable.

3. When the likely delay of 24-30 months is considered in combination with the other matters raised by M. particularly the health of his wife and that no unacceptable risk has been made out, such a delay is so inordinate as to constitute exceptional circumstances.

HOLLINGWORTH J:

1. On 28 July 2006, the police arrested a large number of people, including the applicant, in connection with an alleged drug ring operating in the northern and western suburbs of Melbourne. The applicant is charged with the following offences: 10 counts of trafficking drugs of dependence between March and July 2006, in a quantity not less than an aggregate large commercial quantity; one count of conspiracy to kidnap in June 2006; one count of conspiracy to traffick (manufacture) a drug of dependence in May 2006; one count of dishonestly receiving stolen goods in July 2006.

2. On 10 August 2006, a magistrate granted bail to two of the applicant's co-accused, but refused the applicant's application for bail.

3. Given the nature of the charges against him, bail must be refused unless the applicant can demonstrate that there are exceptional circumstances which justify the grant of bail. The *Bail Act 1977* does not define "exceptional circumstances". There must be factors present which take the case out of the norm and which would answer the description of "exceptional". The hurdle is a high one, but it "should not be set so high that it is impossible for an accused person presently in custody to ever achieve or virtually ever achieve bail."^[1] Exceptional circumstances might exist as a result of the interaction of a variety of circumstances which, of themselves, might not be regarded as exceptional.^[2] Ultimately, each case must be assessed on its own facts.

4. Even if exceptional circumstances are demonstrated, the court must refuse bail if it is satisfied that there is an unacceptable risk that if the applicant was released on bail, he would do any of the following: fail to answer bail; 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. The burden of establishing unacceptable risk lies on the Crown.

5. The applicant argues that exceptional circumstances are established by the individual or cumulative effect of the following matters: delay; the poor health of the applicant and his wife; strong ties to the jurisdiction; lack of relevant prior criminal history; parity with co-offenders; the availability of substantial sureties. Some of these matters are also relevant to the issue of unacceptable risk.

The case against the applicant

6. In March 2006, police commenced an investigation into the drug trafficking activities of Ismayel Ramaden in and around the western suburbs of Melbourne. As the operation progressed, further primary targets were identified, including the applicant. Through various investigative techniques, the police concluded that these persons were involved in the regular trafficking to each other of substantial quantities of amphetamine ("speed"), crystal methamphetamine ("ice"), ecstasy and cannabis.

7. As a result of "cracking" a foreign language code, said to have been used by the co-offenders in telephone calls, the police allege that they have recordings of the applicant saying the following: he had customers who would purchase quantities of 10,000 ecstasy tablets; he could source pharmaceutical drugs for the purpose of drug manufacture; he had a number of couriers who sell drugs on a regular basis for him; he could source various types of drugs in large quantities; he would use his family to assist in his drug activities.

8. Subsequently, through the use of covert operatives, between 28 May and 24 July 2006 the police allegedly made purchases of ice totalling 12 ounces, and obtained ecstasy samples, from the applicant.

9. It is also alleged that the applicant, together with co-offenders Ismayel Ramadan, Dave Sacco and Frank Rajic, were involved in a conspiracy to manufacture ice and speed in commercial quantities. The applicant's role is said to have been to obtain 3kg of pseudoephedrine tablets. When Sacco was interviewed, he allegedly implicated the others in the conspiracy.

10. It is also alleged that on 22 June 2006, the applicant and Ramadan conspired to kidnap Dec Chu, who allegedly owed them money from drug debts.

11. It is also alleged that the applicant has received stolen goods such as water pressure sprays, a chainsaw, mag wheels and car stereos, as payment for drugs.

12. It is alleged that upon arrest, the applicant had in his possession 1.5 ounces of ice and \$2,180 cash (some of which allegedly came from a covert operative). The following were seized in a search at the applicant's house: a small amount of cannabis; a small amount of powder believed to be amphetamine; about 1kg of unknown crystal substance; drug cutting agents and scales; mobile phones; stolen property.

13. The following charges have been laid against some of the alleged co-offenders: Ismayel Ramadan and Pat Boca have been charged with trafficking a large commercial quantity; Rocco Neri and the applicant's son, Vince Mustica, have been charged with trafficking a commercial

quantity; Dave Sacco and Frank Rajic have been charged with conspiracy to traffick (manufacture) a commercial quantity. Other persons have been released, pending further charges on summons.

14. In terms of total quantities, the police allege that they have evidence of the applicant either selling or offering to sell large amounts of drugs including the following: over 25,000 ecstasy tablets; over 20 ounces of ice; over 15 ounces of speed; 3kg of pseudoephedrine tablets; over 12kg of cannabis. They allege his involvement in drug sales on a daily basis.

15. When arrested, the applicant made a "no comment" interview.

16. The Crown submits that there is a strong case against the applicant. Defence counsel did not really address me in relation to this issue. Unlike other bail applications before me, I have not seen any witness statements, records of interview, or transcripts or recordings of telephone intercepts. The informant has deposed that the police have evidence which "clearly" implicates the applicant in these serious offences, but I have no means of evaluating that evidence for myself.

Delay

17. Whether a delay is or is not so inordinate as to constitute exceptional circumstances must obviously vary from case to case.

18. The applicant has so far been in custody since 28 July 2006, a period of 4 months.

19. The prosecution is at a very early stage. There is an enormous amount of material for the police to process, including the chemical analysis of seized drugs, the analysis of intercepted communications and the obtaining of further witness statements. For example, there are said to be more than 7,000 taped telephone conversations. It has been said by the informant that drug analysis may take up to eight months to complete. The preparation of the hand-up brief will be complicated by the number of co-accused and the volume and complexity of the charges. At present, the Crown has been ordered to serve the hand-up brief in relation to the applicant by 7 February 2007. It hopes to be able to meet that deadline, but there is no guarantee it will be able to do so.

20. The committal mention date has been listed for 4 April 2007. In the ordinary course, the committal hearing would be some 5 to 6 months after the committal mention.

21. It seems that all parties agreed at the last bail application that, with current listing practices in the County Court, it was unlikely that a trial would take place before early to mid 2008. The supporting affidavit sworn by the applicant's solicitor in this Court suggests that it is more likely that the applicant's trial may not commence before late 2008 or possibly even early 2009. The estimate in that affidavit is not challenged by the Crown. I note that from arrest until the end of July 2008 would be a period of 2 years. It is not possible to be any more precise this far in advance.

22. If there were any change between now and committal, the most likely change would be that the committal mention or committal hearing have to be delayed because more time is needed to prepare the hand-up brief.

23. This is not a case in which the Crown suggests that it is too early to consider the question of delay.^[3] In any event, I cannot readily contemplate any changes between now and the committal date which might lead me to conclude that the applicant ought to remain in custody until committal and the matter be reconsidered thereafter.

24. It is not suggested that the anticipated delay is attributable to anybody's fault. I accept that the police and forensic scientists have to do the best they can with limited resources. But delay itself, even without the apportioning of any blame, may be sufficient to exceed what our society regards as an acceptable period for a person to be incarcerated without trial. It is also not to the point to say that such a delay may be the "norm" or "usual" in the prosecution of serious and complex drug offences, if it exceeds what is acceptable.^[4]

25. I was referred to numerous cases in which bail was granted in the case on the basis that actual or anticipated delays in the range of 18 months or more were inordinate and unacceptable.⁵¹ Of course, each case must turn on its own facts, and there is no particular point at which a delay necessarily becomes inordinate. But such cases may nevertheless be of some assistance.

26. The precise delay here is not certain because of the degree of forward looking required. On a best case scenario, the applicant's trial would not commence until some 18 months after arrest. On a more realistic scenario, the applicant's trial is unlikely to commence until somewhere between 24 and 30 months after his arrest. When considered in combination with the other matters mentioned below, particularly the health of the applicant's wife, such a delay is so inordinate as to constitute exceptional circumstances.

The applicant's wife

27. The applicant relies upon the physical and mental condition of his wife, Josephine, who is 49 years old. Mrs Mustica suffers from constant and severe abdominal pain as a result of complications from surgery performed in December 2001, during which a hole was inadvertently cut in her bowel and bladder.

28. Since 2002, she has also suffered from depression and a panic disorder, which seems to have deteriorated with her husband's incarceration. Her GP reports that she is severely depressed (despite medication), cries most of the time, is unable to sleep and "seems to be falling apart". A psychiatrist, Dr Roger Chau, has seen her twice during October 2006, apparently for medico-legal rather than treatment purposes. He reports that she presented in a very distraught mental state, complaining that she was suffering from extreme emotional stress due to her husband's incarceration and feels she is falling apart. He notes that she met the applicant as a teenager, married him when she was 18, and has therefore spent most of her life with him.

29. As a result of her medical condition, Mrs Mustica is unable to work and receives a disability pension. Prior to his arrest, the applicant was his wife's principal carer, and received a carer's pension. His wife cannot drive herself or travel away from home without assistance. Whilst the solicitor's affidavit says that Mrs Mustica is "unable to handle most day-to-day chores and tasks alone", the assertion was left very vague, and I do not have a clear impression of the exact limits of her physical abilities. I am certainly not persuaded that she cannot physically care for herself if left alone in the house for many hours.

30. Two daughters, Anne-Marie (25) and Vanessa (22), live at home with the applicant and his wife. Anne-Marie is currently working as a factory production worker, primarily on nightshifts. Until a few months ago, she was working as an airport cleaner on day shifts. Vanessa works as a retail sales assistant for about 25 hours a week. Both expect to be working longer hours as Christmas approaches. They are close to their mother and help out where they can.

31. Mrs Mustica's medical and psychiatric conditions are not such that they would, in themselves, constitute "exceptional circumstances". Nevertheless, the personal circumstances of a close family member, such as a spouse, can heighten the effect of delay, and are something to which I have some regard in coming to a conclusion that exceptional circumstances are made out.

32. One further matter is that she is currently on a waiting list for an operation to remove gallstones from her bladder, which also cause her pain. She has been offered the opportunity to have exploratory day-surgery at the end of November 2006. She says she is not prepared to do so without her husband by her side. That is entirely a matter of personal choice, rather than necessity; accordingly, I give it no weight in my decision.

The applicant's health

33. The applicant is 53 years old. He had a heart attack in 2001 or 2002, and currently suffers from coronary heart disease, high blood pressure, high cholesterol, type 2 diabetes and sleep apnoea. He currently receives daily medication for these conditions. He suffered from prolapsed discs a few months ago, which results in continuing pain and discomfort.

34. Whilst the applicant has some complaints about the way in which prison staff administer

his medication or test his blood sugar levels, I am not satisfied that such matters present a serious risk to his health.

35. I am not satisfied that any of his medical conditions are currently life-threatening or incapable of satisfactory treatment in a custodial environment. Accordingly, I would place little weight on this evidence, in considering whether exceptional circumstances have been established.

Ties to the jurisdiction

36. The applicant is an Australian citizen, who was born here. It is not alleged that he has any association with anyone or anything outside Australia.

37. He has close family in the jurisdiction, including his wife, working children, a mother and others. He speaks to his immediate family by phone every day, and they have visited him regularly in custody.

38. The applicant and his wife both went bankrupt in August 2005 and, according to their trustee in bankruptcy, have no realisable assets. They are in receipt of Centrelink benefits. Mr Mustica's only vehicle, a 1994 van, has been seized by police. The Crown does not allege that the applicant has any hidden wealth, rather that he has debts, including about \$50,000 in drug debts.

39. His wife and daughters have only recently signed a 12 month lease in relation to the home in which he proposes to reside. Apparently he is also named as a tenant on the lease, although he has never been to the house. Their status as tenants is obviously a lesser tie to the jurisdiction than home ownership.

40. The applicant has previously held an Australian passport, which has since expired. The police are concerned that he may obtain a new passport, either lawfully (by simply requesting a replacement) or because he has "access to fraudulent passports." The source of this latter concern seems to be that investigators have located 2 passports in his son's name, with different expiry dates, and the assertion that Ramadan was "heavily involved in sourcing fraudulent forms of identification".

Previous criminal history

41. The applicant was last before a court in September 1978, when he was 24 years old. Between 1969 and 1978, he was charged under several different names, with a number of offences, generally of an assault or theft nature. None of his prior offences involve drugs. There is no history of failing to comply with any grant of bail.

Parity with co-accused

42. Two co-accused were charged and immediately bailed by the police. Three others were subsequently granted bail by a magistrate: Dave Sacco and Frank Rajic on 10 August 2006 and Pat Boca on 18 August 2006. Ismayel Ramadan has not applied for bail and remains in custody. The applicant and Ramadan are the only remaining defendants in custody.

43. At the hearing on 9 and 10 August 2006, the Crown did not oppose the grant of bail in the case of Sacco and Rajic, provided the magistrate was satisfied that exceptional circumstances existed. In the case of the applicant, the Crown strongly opposed bail and alleged there was an unacceptable risk of committing further offences and failing to appear. The magistrate found that exceptional circumstances existed in the case of Sacco and Rajic, but not in the case of the applicant. She did not go on to consider unacceptable risk.

44. The magistrate rejected a parity argument on the basis that "all other matters" were not equal as between the applicant and Sacco and Rajic. In particular, she said that the applicant had been charged with far more offences over a longer period of time, and was alleged to be a prime offender who had dealt in millions of dollars of drugs over a long period. She also noted that Sacco and Rajic were drug addicts, whereas the applicant's motive appeared to be profit only. As I am not sitting by way of appeal from the magistrate, it is not necessary for me to examine her Honour's reasons further.

45. The fact that the applicant faces additional charges and over a longer period of time may well mean that "all other matters are not equal".^[6] Further, there are sufficient other differences between the applicant and the other two co-accused that I do not regard parity as an additional consideration in determining to grant bail.

The availability of substantial sureties

46. The applicant's brother, Carmelo Mustica, is willing to offer security over the property which is both his home and hobby farm, and in which he has equity of about \$350,000.

47. The informant deposed that he had some reservations that if the brother's equity was derived from drug trafficking, then the chances of him honouring the surety would be significantly diminished. Yet when one examines the hard evidence in relation to his brother's involvement in drugs, it boils down to this: two minor charges in 1993 and 1994 for possessing and using cannabis. I am not satisfied on the material before me that there is a basis for serious apprehension that Carmelo's property may be tainted.

48. In any event, the applicant's mother, Anna Maria Mustica, has now indicated that she is also prepared to act as surety. She is the sole registered proprietor of her home in Fawkner, which appears to be worth at least \$244,000.

49. There is no dispute that it is appropriate to require surety totalling \$500,000 to be provided as a condition of bail. I will require that Carmelo Mustica provide a surety in the sum of \$256,000 and Anna Maria Mustica provide a surety in the sum of \$244,000.

Unacceptable risk — Of further offending

50. The informant is concerned that if bail is granted, the applicant would return to trafficking in order to pay off drug debts of about \$50,000 "and maintain the lifestyle he was living prior to his incarceration". This is simply one of many bald, unsupported assertions by the Crown. There is no evidence before me that the applicant was living any lifestyle other than that of an undischarged bankrupt in receipt of social security benefits, who drove a 10 year old vehicle.

51. The Crown also argued that I should take into account the seriousness of the offences and the degree of criminality involved. The informant also fears that "if granted bail, he will re-establish relationships with previous drug associates and continue to commit drug offences."

52. As far as the risk of future re-offending is concerned, Maxwell P recently issued the following warning:

... it is widely recognised that the prediction of future dangerousness is notoriously difficult. Making predictions is difficult enough when the person has been found guilty of relevant, recent criminal conduct. How much more difficult it is when – as will always be the case with a bail application – the applicant for bail is presumed innocent of the matters charged.^[7]

53. The applicant has had no convictions since 1978 and no prior drug convictions at all. He has no history of offending while on bail.

54. While the possibility of him committing an offence while on bail cannot be ruled out, on the state of the evidence before me, I think the risk is small.

Of interfering with witnesses

55. There is no evidence or suggestion of any actual threats or attempts to contact witnesses.

56. The Crown relies upon the fact that one of the charges is of conspiring with Ramadan to kidnap a drug customer over outstanding drug debts. The informant's affidavit contains the bald assertion that "evidence obtained by investigators has shown a tendency toward violence as a form of retribution for unpaid drug debts." No evidence is before the court to support such a proposition. Nor is it clear whether the informant is referring to any customer other than the victim of the alleged conspiracy. It seems that the Crown will be relying on telephone intercepts in relation to the alleged conspiracy, but no such transcript or recording was in evidence before me.

57. I do not doubt the sincerity of the informant's belief that there is some risk. But if the Crown has serious concerns about the possible risk of interference with witnesses, it needs to put some evidence before the court to support that risk. I am not satisfied on the material before me that the risk is anything more than speculative.

Of failing to answer bail

58. The nature and seriousness of the charges are such that, if convicted, there is a strong likelihood that the applicant would be sentenced to a substantial term of imprisonment. That alone provides some incentive not to appear. However, in his favour, the applicant has no history of failing to attend court hearings.

59. There is always a theoretical risk of flight. In order to find that there is an "unacceptable risk", something beyond mere speculation or suspicion must be established.

60. The informant deposes that the applicant's son has been charged with drug trafficking and that both Mrs Mustica and Anne-Marie Mustica will be charged with trafficking, as the police have evidence that they assisted him with his trafficking activities. Apparently, they were not charged at the time of their initial arrest, as further analysis needs to be done to quantify the amount of drugs involved. The Crown argues that this leads to a risk that the applicant will try to move his entire family out of the jurisdiction if released on bail.

61. Without further knowledge of the possible severity of the proposed charges against the wife and daughter, and the nature and extent of their own connections with the jurisdiction, it is simply speculation for me to say what the applicant and his family might do.

62. Most importantly, there is no evidence of any financial capacity to flee the jurisdiction, or any obvious connection with another jurisdiction.

63. I am not satisfied on the material before me that the risk of failing to answer bail is anything more than speculative at the moment.

64. I do not accept the submission that the applicant's own poor health reduces the risk of his absconding and increases the probability of his answering bail. His medical conditions are not such as to place any practical limitation on his ability to travel.

Conclusion

65. Even if I proceed on the basis that the case against the applicant is a relatively strong one, nevertheless, I am satisfied that the combination of factors discussed above constitutes exceptional circumstances. The single most significant factor in that combination is delay; without the anticipated delay of at least 2 years, the other factors alone would fall a long way short of exceptional circumstances. I am not satisfied on the evidence that any unacceptable risk has been made out.

66. If at any stage in the future the Crown becomes aware of other material which might provide stronger evidence of unacceptable risk, there are of course procedures for applying for revocation of bail.

67. I intend to grant bail on the posting of sureties totalling \$500,000, being \$244,000 by the applicant's mother and \$256,000 by the applicant's brother, with the following conditions:

- (1) That the applicant reside at a specified residential address;
- (2) That he notify the informant within 24 hours of any proposed change of residential address;
- (3) That he report daily to the officer in charge of a specified police station;
- (4) That he not attend any international points of departure;
- (5) That he surrender any passport held and not apply for any further passport;
- (6) That he not contact any witnesses for the prosecution, other than the informant or his nominee;
- (7) That he not associate with or have any communication with other co-offenders, except immediate family members.

^[1] *Re Whiteside* [1999] VSC 413 per Warren J at [10].

^[2] *Moloney* (unreported, Supreme Court of Victoria, 31 October 1990); *Re Whiteside*; *Re Andrea Mantase* (unreported, Supreme Court of Victoria, 21 September 2000); *R v Cox* [2003] VSC 245.

^[3] Cf *Re Whiteside* [1999] VSC 413 at [19]; *R v Griffey* [2006] VSC 86.

^[4] *DPP (Vic) v Cozzi* [2005] VSC 195 at [33]; (2005) 12 VR 211.

^[5] Including *R v Medici* (Unreported, Supreme Court of Victoria), 27 September 1993; *R v Kantzides* (Unreported, Supreme Court of Victoria) 9 August 1996; *DPP v Radev* [1999] VSC 284; (1999) 108 A Crim R 121; *R v Mantase* (Unreported, Supreme Court of Victoria) 21 September 2000; *R v Alexopoulos* (Unreported, Supreme Court of Victoria), 23 February 1998; *R v Bernath* [2003] VSC 304; *R v Cox* [2003] VSC 245; *R v Ilsley* [2003] VSC 332; *Hildebrandt v DPP* [2006] VSC 198.

^[6] *DPP v Radev* [1999] VSC 284; (1999) 108 A Crim R 121 at [55].

^[7] *Re Fred Joseph Asmar* [2005] VSC 487 at [25], and see the cases referred to in footnote 16 of those reasons.

APPEARANCES: For the applicant Mustica: Mr C Dane QC, counsel. Tony Hargreaves & Partners, solicitors. For the respondent DPP: Ms M Williams SC, counsel. Solicitor for Public Prosecutions.
