32/98; [1998] VSC 195

SUPREME COURT OF VICTORIA

DPP v McKEE

Beach J

30 October 1998 — [1999] 1 VR 232

CRIMINAL LAW – BAIL – MURDER – ACCUSED COMMITTED FOR TRIAL – BAIL GRANTED TO ACCUSED BY COMMITTING MAGISTRATE – ACCUSED UNABLE TO RAISE SURETY – APPLICATION TO ANOTHER MAGISTRATE TO REDUCE SURETY – APPLICATION GRANTED – WHETHER OPEN TO MAGISTRATE TO DO SO: *BAIL ACT* 1977, S13(2)(b), 18(1).

1. Where a person who has been committed to stand trial for murder and has been granted bail wishes to apply to vary the amount of bail fixed, such application can only be made to the committing magistrate or to the court to which the person is required to surrender under the conditions of the bail namely, the Supreme Court.

2. Where a magistrate other than the committing magistrate entertained and granted an application to vary the bail fixed by the committing magistrate, such order and variation was null and void.

BEACH J: **[1]** This is an appeal by the Director of Public Prosecutions pursuant to the provisions of s18A of the *Bail Act* 1977 against the order of the Melbourne Magistrates' Court made on 8 September 1998 whereby the respondent Tracy Joan McKee was granted bail on a charge of murder. The order made by the committing magistrate was that the respondent be released on bail on her own undertaking with a surety of $50,000 and on the following special conditions. *[After setting out the conditions, his Honour continued] ...* It would appear that the respondent was unable to provide a surety of $50,000 and on 9 October made application to a magistrate other than the committing magistrate to reduce the amount of the surety. The magistrate in question acceded to the application and reduced the security required to one of $25,000. It is now argued on behalf of the Director that he had no power **[2]** to do so. What is said in that connection is that if one has regard to the provisions of s13(2)(b) of the *Bail Act* 1977 a person charged with murder can only be released on bail by the Supreme Court, a judge of the Supreme Court or the magistrate who commits the person for trial for murder. S4(2)(a) of the Act provides that a court shall refuse bail in the case of a person charged with murder except in accordance with s13.

Court is defined in s3 of the Act to mean, "court or judge and, in any circumstances where a member of the police force or other person is empowered under the provisions of this Act to grant bail, includes that member or person". Section 13(2)(b) of the Act reads:

> "Bail shall not be granted to a person charged with treason or murder unless—
> (b) in the case of a person charged with murder—
> (i) the Supreme Court;
> (ii) a judge of the Supreme Court; or
> (iii) the magistrate who commits the person for trial for murder—
> is satisfied that exceptional circumstances exist which justify the making of such an order."

It is said that s13(2)(b) evinces a clear intention to exclude the Magistrates' Court or County Court from exercising the power to grant bail where the charge is murder. The only exception to the jurisdiction being exercised exclusively by the Supreme Court is that relating to the magistrate who commits the person for trial. The exception is specific and identifies a person **[3]** not an institution or a body. It is said the underlying policy behind the exception is that a committing magistrate having heard the committal proceeding is then fully aware of—

> 1: The nature and seriousness of the offence.
> 2: The character antecedents and background of the accused.
> 3: The strength of the evidence against the accused.
> 4: The history of any previous grants of bail to the accused.

For the respondent it is argued that whilst it may well be that only a committing magistrate has the power to release on bail any person charged with murder, the Magistrates' Court as such has power to vary the amount of any bail fixed. This power, so it is said, is given to the court by s18(1) of the Act which so far as is relevant reads:

> "Where a person is detained in custody pending a ... trial for an offence ... and that person having been ... granted bail by a bail justice or the Magistrates' Court, objects to some amount fixed or condition imposed for his discharge from custody he may make application—
>
> (a) to the Magistrates' Court; or
>
> (b) to the court to which he would be required to surrender himself under the conditions of the bail—
>
> for an order ... varying the amount of any bail fixed or condition imposed (as the case requires)."

In my opinion s18(1) has no application to a case such as the present. I say that for the reason that the respondent has not been granted bail by a bail justice or the Magistrates' Court but by the magistrate who committed her for trial. Since the hearing of the appeal counsel for the **[4]** respondent has, with the consent of the Director, referred me to the decision of Nathan J in *Heinz v Bux*. The decision was delivered on 13 November 1996 and is to be found at page 57 of the series titled *Magistrates Cases* 1997. In that case His Honour was required to determine whether the *Magistrates' Court Act* 1989 created a single entity which administratively operated from a number of locations or a number of separate entities operating from different locations. Not surprisingly his Honour held that the Act created one entity, namely, the Magistrates' Court of Victoria which operates from a number of locations. At page 60 His Honour said:

> "The Act does not say, as Bux would suggest, the Court shall sit in self-contained divisions each with its own exclusive territorial or residential jurisdiction. It has not created a series of courts. It has created a single entity which administratively operates from a number of locations, possibly at different times."

In my opinion that decision throws little light on the question I am required to determine. Whilst the magistrate who committed the respondent to stand trial on the charge of murder is an integral part of the Magistrates' Court in that s(4)(2) of the *Magistrates' Court Act* provides that the court consists of the magistrates and registrars of the court, the legislature has chosen to specifically identify him as the only magistrate who has the power to release on bail a person committed to stand trial on such a charge. The fact that he and the other magistrates (together with the registrars) constitute the Magistrates' Court does not empower any other magistrate to entertain an application to release on bail any person who has been **[5]** committed to stand trial on a charge of murder or to vary the bail fixed by a committing magistrate in respect of that person.

My conclusion therefore is that if a person who has been committed to stand trial for murder and who has been released on bail by the committing magistrate wishes to apply to vary the amount of bail fixed, his application to do so must be made to the committing magistrate or to the court to which he is required to surrender himself under the conditions of his bail, namely, the Supreme Court. It follows therefore that in my view the order of 9 October 1998 is null and void and at the present time the respondent is unlawfully at large.

I turn then to the appeal as such.

[His Honour then considered this question, held that there were no exceptional circumstances justifying the grant of bail, allowed the appeal, set aside the order granting bail and revoked bail.]

APPEARANCES: For the Crown: Mr T Gyorffy, counsel. Office of Public Prosecutions. For the accused: Mr S Cash, counsel. Dan Causovski, solicitor.
