**31/98**

## SUPREME COURT OF VICTORIA

# *R v MAJERIC*

**Gillard J**

**10 July 1998**

**CRIMINAL LAW – BAIL – SERIOUS DRUG OFFENCES – ACCUSED TO SHOW EXCEPTIONAL CIRCUMSTANCES TO JUSTIFY GRANT OF BAIL – FAMILY CIRCUMSTANCES – LEGAL AID REFUSED – DELAY – WHETHER GRANT OF BAIL JUSTIFIED: *BAIL ACT* 1977, S4(2)(a)(ii).**

M. was arrested in August 1997 and charged with three offences under the *Customs Act* 1901 (Cwth) concerning the importation of a commercial quantity of heroin. The trial date is likely to be February 1999, M. has been refused legal aid and M's family is experiencing financial problems. Upon an application by M. for bail—

**HELD: Application refused.**
**In view of the nature of the charges, M. was required to prove that exceptional circumstances existed which justified the grant of bail. Save for the question of delay, M.'s family circumstances and the refusal of legal aid did not amount to exceptional circumstances. In respect of the effect of delay, each case must be considered in relation to its own set of circumstances and the question of delay is but one factor which must be weighed up with all other factors when determining whether or not exceptional circumstances have been shown. Having regard to the nature of the case and all of the matters put forward, M. failed to establish that exceptional circumstances existed which justified the grant of bail.**
***R v Alexopoulos* MC58/1998, explained.**

**GILLARD J: [24]** This is an application for bail by Anton Majeric pending the hearing of three alleged drug offences in the County Court. The arraignment hearing is fixed before a County Court judge on 5 August 1998. I understand, and it is accepted by both parties before me, that the likely date of the trial will be February 1999. The applicant, prior to his arrest, operated an importing and exporting business known as International Trading Company Pty Ltd. Its trade was with entities in Yugoslavia and more recently China. On 4 August 1997 a cargo ship arrived at Port Melbourne. One of the containers contained amongst its cargo, water chestnuts and a substantial quantum of heroin. The net weight of the heroin was 31.8 kilograms and its pure weight was 24 kilograms. It is said that this is the largest detected shipment of heroin in the history of this State. The applicant was arrested on 6 August 1997 and charged with three offences. They are:

> 1. That he was knowingly concerned in the importation into Australia of a commercial quantity of prohibited import, namely, heroin contrary to s233B(1)(e) of the *Customs Act* 1901;
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> 2. A count of attempting to possess a commercial quantity of prohibited import, namely, heroin contrary to s233B(1)(c) of the said Act; and
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> 3. Possessing a trafficable quantity of a **[25]** prohibited import, namely, heroin contrary to s233B(1)(c) of the said Act.

Two other persons have been charged. They are Marco Ambroj, who is still in custody, and Peter Alexopoulos who was also arrested but who was released on bail by an order of Hampel J made 23 February this year. The applicant, after his arrest, was remanded in custody and has remained so ever since. He has not made an application for bail before today. On 20 April this year he was committed for trial. The indictment has been filed. As I have already stated, there is an arraignment hearing on 5 August this year. The applicant proposes to plead not guilty at his trial and he denies being involved in the importation. He has a previous conviction for two counts of burglary and one count of car theft. He was sentenced to two and a half years' imprisonment on 29 August 1990. Any person accused of an offence is entitled to bail. That is a general rule laid down by s4(1) of the *Bail Act*. However, where a person is charged with an offence under s233B of the *Customs Act* 1901, the right to bail is abrogated and instead the applicant must prove to the satisfaction of a judge of this court "that exceptional circumstances exist to justify the making of such an order". See s4(2)(a)(ii) of the Act.

The applicant has the burden of proving exceptional circumstances. However, that is not the end of the inquiry. The court should refuse bail if it is satisfied that there is an unacceptable risk that if the applicant is released on bail he may commit one or more of the prohibited acts set out in s4(2)(b), by way of example, a **[26]** failure to answer bail, or commit an offence whilst on bail, or interfere with a witness. The facts must be weighed up in considering the question of unacceptable risk set out in s4(3). It is noted the court must consider all relevant matters, and the list of specified ones is not exhaustive. The Crown opposes the grant of bail to the applicant. It does so on two specified grounds, namely, the applicant has not shown exceptional circumstances and there is an unacceptable risk if the applicant was released on bail he may abscond as the maximum period of imprisonment for the commission of these offences is life. Clearly the applicant has to establish exceptional circumstances, and it is indeed a heavy burden.

In support of his application his solicitor, Christopher James Pearson, has sworn an affidavit, as has his [the applicant's] wife. Save for a suggestion of delay in the proceeding being brought on, the solicitor's affidavit does not disclose any exceptional circumstance. The applicant's wife deposes to financial problems and an industrial accident which stopped her employment for a period of time. She has recently recommenced work on a part-time basis. Again, her affidavit in my view does not disclose any exceptional circumstances. Mr Lovitt QC, who appears on behalf of the applicant, submitted that the prime basis for the application which he says demonstrates exceptional circumstances is the delay in bringing this applicant to trial. There was some dispute in the affidavit material as to the likely date of the trial but it now appears accepted between the parties that the most likely date is **[27]** February 1999. Mr Lovitt also relies upon two other matters: First, the question of refusal of legal aid. Again there is some dispute about whether that is the position. The affidavit material does not establish it, but I have been informed from the Bar table that the applicant received a letter in the last two days in which the Legal Aid Committee has indicated that aid will not be provided. I am prepared to proceed on the basis that at the moment legal aid has been refused, though, as Mr Lovitt points out, it may be that Legal Aid may change its mind in the future. There is always the prospect that the applicant may be able to get financial assistance from some other source to enable him to present his defence through legal representatives.

In my view, the fact that legal aid has been refused is not an exceptional circumstance. Indeed, it may be said in this day and age it happens quite often, but when analysed it comes down to the position that the applicant, if he has to appear for himself, will have to do his best whilst in custody to prepare his defence. Again, in my view, that is not an exceptional circumstance and, indeed, if one goes back over the years, that happened every now and again. No doubt he will have to do his best with the assistance of family and friends to prepare himself whilst in custody if he is not represented. The other matter which in the end I do not think Mr Lovitt put as an exceptional circumstance is the fact that a co-accused, Mr Peter Alexopoulos, was granted bail by Hampel J on 23 February this year. I did ask Mr Lovitt whether or not he was seeking to rely upon the parity principle, but he indicated he was not and so, I think, **[28]** that in the circumstances Mr Lovitt accepted that what His Honour did there does not constitute an exceptional circumstance. However, he quoted what His Honour said in support of his general proposition that there is inordinate delay in these proceedings and for that reason that is the exceptional circumstance. There is no doubt that on occasions inordinate delay can constitute an exceptional circumstance.

Dealing with what Hampel J said, when one reads the whole of his judgment, it is apparent that inordinate delay in that case was not the only matter he took into account, and that is quite clear by the observations he made in relation to the strength of the Crown case and the observations he made on pages 4 and 5 of his judgment. While I accept the general thrust of what His Honour said in that case as to the effect of inordinate delay, each case must be considered in relation to its own set of circumstances, and the question of delay is but one factor which must be weighed up with all other factors when determining whether or not exceptional circumstances have been shown. As I have said, the Commonwealth DPP opposes this application. Detective Senior Constable Rundas of the Australian Federal Police has sworn an affidavit in opposition. Constable Rundas sets out in summary form the case put against the applicant.

On an application such as this, it is inappropriate for a judge to express in detail any view as to the strength or otherwise of the Crown case. However, the judge must do his best, on the material which is placed before him, bearing in mind that it is untested, to form **[29]** some view

as to the strength or otherwise of the Crown case. In my view, on the material before the court it is open to infer that the case against the applicant is a strong one. I have considered all the matters that have been put to me by Mr Lovitt, and also the evidence which has been placed before the court, but in my view the applicant has failed to establish that there are exceptional circumstances and accordingly the application fails. But even if I was wrong in my opinion, there are unacceptable risk factors which would militate against the grant of bail in this case. They are the seriousness of the offence, the strength of the Crown case and the prospect of a long prison sentence if the applicant is found guilty. These are the type of factors which may cause a person to think twice about honouring his bail. I think, in all the circumstances there is that unacceptable risk in this case. For those reasons I dismiss the application

**APPEARANCES:** For the applicant: Mr C Lovitt QC, counsel. For the Crown: Mr B Young, counsel.

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