

52/08; [2008] VSC 516

SUPREME COURT OF VICTORIA

Re DICKSON

Lasry J

25, 26 November 2008

CRIMINAL LAW – ACCUSED CHARGED WITH 25 COUNTS OF ARMED ROBBERY AND 4 COUNTS OF ATTEMPTED ARMED ROBBERY – APPLICATION FOR BAIL – ACCUSED REQUIRED TO SHOW HIS DETENTION IN CUSTODY NOT JUSTIFIED – ACCUSED LIKELY TO BE IN CUSTODY BEFORE TRIAL FOR NEARLY 27 MONTHS – CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006 – WHETHER CHARTER REQUIRES THAT THE BAIL ACT 1977 BE INTERPRETED TO ALLOW FOR AN ACCUSED TO BE RELEASED ON BAIL REGARDLESS OF AN ESTABLISHED UNACCEPTABLE RISK – RISK THAT ACCUSED MIGHT COMMIT FURTHER OFFENCES – ACCUSED'S TIME IN CUSTODY MIGHT NOT BE RECKONED AS PRE-SENTENCE DETENTION GIVEN THAT HIS CUSTODY INVOLVES REVOKED PAROLE – ACCUSED'S ANTECEDENTS INCLUDE ARMED ROBBERY, DRUG OFFENCES AND OBTAINING PROPERTY BY DECEPTION – BAIL REFUSED: BAIL ACT 1977, S4(4)(c); CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006, S21(5).

D., who was in custody having been committed for trial charged with 25 counts of armed robbery and 4 counts of attempted armed robbery applied for bail pending trial. It was said that D. would have spent nearly 27 months in custody from the date of arrest to trial. It was submitted that such a delay was unreasonable and that the accused should be released on bail having regard to the relevant provisions of the *Charter of Human Rights and Responsibilities Act 2006* ('Charter') notwithstanding that D. may have been an unacceptable risk and that given the revocation of parole, D's custody may not have been classified as pre-sentence detention.

HELD: Application for bail refused.

1. The submission on behalf of D. that where a person has been held in custody for a period of time which a court determines is unreasonable, that person should be released on bail, regardless of any other circumstances is rejected. Further, the submission that the *Charter* requires that the *Bail Act* be interpreted to allow for an accused to be released on bail, regardless of an established unacceptable risk, whether it be a risk of flight, re-offending, interference with witnesses or otherwise is also rejected. The *Charter* has a significant role to play in emphasising the importance of particular rights, but when it comes to the right to be brought to trial without unreasonable delay, that right remains to be considered within the appropriate or relevant provisions of the *Bail Act*.

Gray v DPP [2008] VSC 4; MC 07/08, Bongiorno J, applied.

2. Notwithstanding the unreasonable delay in bringing the matter to trial, given that the accused's time in custody might not be reckoned as pre-sentence detention, the risk that he might commit further offences if released, the strength of the prosecution case, and D's antecedents, D. failed to satisfy the court that his continued detention in custody was not justified.

LASRY J:

1. This is an application for bail by George Elliot Dickson.

2. Mr Dickson is charged with 25 counts of armed robbery and 4 counts of attempted armed robbery alleged to have been committed between August and November 2006. The offences apparently all involve armed robberies or attempted armed robberies on 24 hour convenience stores. These are serious offences involving a disguised offender using a knife. The offences involved the removal of, in some cases, tens of dollars and in other cases several hundreds of dollars. Mr Dickson has prior convictions for armed robbery in Victoria and Queensland.

3. Mr Dickson's application is supported by an affidavit sworn by his solicitor Cameron Marshall dated 10 November 2008. Attached to that affidavit are reports by Dr Lester Walton dated 31 March 2008 and 8 September 2008. I will return to these reports shortly.

4. As a result of the nature of the offences charged against Mr Dickson, he is required to show cause why his detention in custody is not justified under s4(4)(c) of the *Bail Act* 1977 (Vic) ("the *Bail Act*"). In such a case the applicant bears the onus of showing why his detention in custody

is not justified. That will include demonstrating that he is not an unacceptable risk as explained by Maxwell P in *Asmar*.^[1] I do not believe he has discharged that onus.

5. Mr Dickson was first arrested in relation to these matters on 27 February 2007. When interviewed by the police, Mr Dickson made no comment in answer to the questions that were put to him, and was released without charge. The evidence on behalf of the applicant suggests that on 15 March 2007 he was admitted as an in-patient at the Northern Hospital in Epping. On 20 March 2007, the applicant was arrested whilst still an in-patient and charged with these matters. He has remained in custody since then.

6. The committal proceedings were held on 14 September 2007 in the Melbourne Magistrates' Court and Mr Dickson was committed to stand trial in the County Court of Victoria. The trial date was to be 6 October 2008 but I am informed that the date was vacated because the opinion of the parties was that the allocated four weeks would be insufficient time given that the Crown wanted to lead a substantial body of similar fact evidence. The estimate was revised to something of the order of three months. The trial date has now been fixed in that Court for 29 June 2009.

7. On 3 April 2008 the applicant was sentenced in the County Court of Victoria for obtaining property by deception to 180 days' imprisonment. On 23 April 2008, the parole on which he had been released in relation to earlier offences was cancelled. He has remained in custody and, as I understand it, has been serving pre-existing sentences and breached parole for a significant portion of the time since then. I am told that even if he were granted bail in this Court, he would not necessarily be released unless he was granted parole. It is by no means clear that would occur either.

8. Against that background, on 14 October 2008 Mr Dickson applied for bail in the County Court of Victoria and the application was refused in a ruling of his Honour Chief Judge Rozenes on 23 October 2008. Bearing in mind that Judge Rozenes' ruling was only a short time ago, Mr Traczyk, who appeared on behalf of the applicant, conceded that the matters that were relied on by his Honour for his conclusion were "still pertinent" and he took no issue with the reasons for his Honour's decision. Judge Rozenes' reasoning, he conceded, did militate toward a refusal of bail in this Court. It is, of course, to be noted that the application before me is not an appeal against the ruling of his Honour. The application before me is a hearing but it is legitimate to consider whether there was anything that was not considered on the application before Judge Rozenes that might now militate in favour of a grant of bail.

9. I have read his Honour's ruling carefully and, with respect, his analysis of the facts and the issues seems entirely appropriate, as was the outcome. I take Mr Traczyk's concession to involve an acceptance that the factual basis for his Honour's refusal of bail remains current and, with two exceptions, there are no other facts or circumstances which have altered since that ruling or which require reconsideration on this application. The two exceptions to which Mr Traczyk specifically refers are delay and the mental state of Mr Dickson.

Delay

10. In his application before me, the applicant relies primarily on the issue of delay, pointing to the fact that the trial will now not be held in the County Court of Victoria for another seven months. The delay was a factor relied upon in the application before Judge Rozenes.

11. It was submitted by Mr Traczyk on behalf of the applicant that the issue of delay was worthy of further consideration. The trial of Mr Dickson has been fixed for June 2009. The applicant has been in custody since March 2007. The reality is, therefore, that the applicant will have been in custody from arrest on these offences to trial for a period of nearly two years and three months.

12. The particular point which Mr Traczyk raised before me was the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ("the *Charter*"). The role of the *Charter* in a bail application on the question of delay appears not to have been raised before the Judge Rozenes. The *Charter* provides at s21(5) that:

A person who is arrested or detained on a criminal charge—
(a) must be promptly brought before a court; and

- (b) has the right to be brought to trial without unreasonable delay; and
- (c) must be released if paragraph (a) or (b) is not complied with.

13. The phrase “unreasonable delay” is not otherwise defined and nor would one expect to be. It must be regarded as descriptive given the particular circumstances. The section also appears to imply that for a delay to be “unreasonable” it would have occurred for reasons not attributable to the fault of the applicant. It was submitted on behalf of the applicant in this case that a total delay of two years and three months is unreasonable. That would be a difficult proposition to reject. As Judge Rozenes observed, pre-trial custody of that length is too long but it does not seem to me that I should consider that bare fact in isolation. In this particular case there are a number of other circumstances which complicate this application. They include the fact that, as Mr Atkinson who appeared on behalf of the Director of Public Prosecutions submitted, some significant portion of the time is being spent by the applicant serving pre-existing sentences or parole breaches and, as I understand it, even if I were to grant Mr Dickson bail, there is by no means any certainty that he could be released.

14. Mr Traczyk submitted on behalf of the applicant that the enactment of the *Charter* has brought about a significant change in the law in Victoria. Prior to the enactment of the *Charter*, it was submitted, there was no legal right to a speedy trial in Victoria. Mr Traczyk however submitted that s21(5) of the *Charter* has clearly created a legal right to be brought to trial without unreasonable delay. It was further submitted that the *Charter* requires that the provisions of the *Bail Act* must be interpreted in such a way as to give full effect to this right.

15. Indeed it was initially submitted, on behalf of the applicant, that where a person has been held in custody for a period of time which a court determines is unreasonable, that person should be released on bail, regardless of any other circumstances. I am unable to accept that submission. I cannot conclude that the *Charter* requires that the *Bail Act* be interpreted to allow for an accused to be released on bail, regardless of an established unacceptable risk, whether it be a risk of flight, re-offending, interference with witnesses or otherwise.

16. Section 1(2) of the *Charter* provides, in relevant part:

The main purpose of this *Charter* is to protect and promote human rights by—

- (a) setting out the human rights that Parliament specifically seeks to protect and promote; and
- (b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; ...

17. Section 1(2)(b) of the *Charter* requires that other statutory provisions be interpreted “so far as is possible” compatibly with human rights. The provisions of the *Bail Act* contain no reference to delay or to a right to a speedy trial. In this particular case, the *Bail Act* requires me to refuse bail unless the applicant shows cause why his detention in custody is not justified.

18. In *Gray v DPP*, to which I have been referred, Bongiorno J was concerned with an application for bail in relation to an offence which occurred on 4 November 2007. His Honour was hearing the application on 16 January 2008. A committal proceeding was fixed for 5 February 2008. Ultimately his Honour concluded that the trial of the applicant for bail could not be said to be likely to be concluded before the end of 2008. That may have meant a further delay of in excess of 12 months. His Honour also considered the risk that if bail was not granted, the applicant might spend more time in custody awaiting trial than a court might impose by way of minimum sentence to be served before being eligible for parole. As to that his Honour noted:

If the *Charter* in fact guarantees a timely trial, the inability of the Crown to provide that trial as required by the *Charter* must have an effect on the question of bail. It would be difficult to argue that a trial which may well be not held until after the applicant has spent more time in custody than he is likely to serve upon a sentence would be a trial held within a reasonable time. The only remedy the Court can provide an accused for a failure by the Crown to meet its *Charter* obligations in this regard (or to ensure that it does not breach those obligations so as to prejudice the applicant), is to release him on bail – at least the only remedy short of a permanent stay of proceedings.^[2]

19. It is not submitted on behalf of the applicant before me that he will spend more time in custody than he is likely to serve upon a sentence particularly bearing in mind that his present

custody involves revoked parole and is not simply pre-sentence detention. In *Gray* his Honour further concluded that the applicant was not a flight risk and there was little tangible evidence to suggest that the applicant would interfere with witnesses. Ultimately, his Honour concluded that the applicant had established that his continued incarceration was not justified and he was released on bail. What his Honour's ruling demonstrates is that the *Charter* has a significant role to play in emphasising the importance of particular rights, but when it comes to the right to be brought to trial without unreasonable delay, that right remains to be considered within the appropriate or relevant provisions of the *Bail Act*.

20. I note at this point that in my opinion the circumstances confronting his Honour in *Gray* are quite different from those before me. First, in this case given the particular circumstances a significant amount of the applicant's time in custody might not be reckoned as pre-sentence detention. Second, given Mr Dickson's mental condition and its apparent connection with his offending, there is a risk that he might commit further offences if he were released. It is put by Mr Atkinson that there is also a risk of interference with witnesses although Mr Atkinson accepts that such a risk is more circumstantial than actual.

21. Mr Traczyk further submitted that even where an unacceptable risk has been shown, the overriding question in determining whether an individual should be released on bail in cases where delay is cited as exceptional circumstances or good cause is whether release on bail is required to give full effect to that individual's right to be brought to trial without unreasonable delay.

22. There are, in my opinion, a number of matters that point to a refusal of bail and where that is the case, whilst it is appropriate to take the terms of the *Charter* into account and give full effect to the right referred to, that must be done against the scheme of the *Bail Act* and its relevant provisions. For the reasons I have already referred to, whilst the delay in the trial until June 2009 is most regrettable, in the particular circumstances of this case, the delay is significantly less prejudicial to the applicant than might normally be expected. I do not consider the provisions of the *Charter* materially affect the role of delay in this particular application.

The Applicant's Mental State

23. Dr Lester Walton, in two reports of 31 March 2008 and 8 September 2008, diagnoses Mr Dickson with chronic paranoid schizophrenia. The condition appears to have some causal connection with the inclination of Mr Dickson to commit offences via hallucinatory voices. The illness, Dr Walton says, is responsive to treatment but Mr Dickson has a pattern of neglecting his medication. As at September 2008, Dr Walton described the condition as in remission to a substantial extent. However, Dr Walton suggests that continuing treatment is required.

24. It was submitted by Mr Traczyk that if I were inclined to release Mr Dickson on bail I could impose a condition in general terms that he not be released unless and until he was granted parole and that if that occurred, that within 48 hours of release, he report to the North Western Mental Hospital and from then on obey the lawful directions given to him at that institution.

25. Mr Traczyk provided to the Court, on the applicant's behalf, a letter addressed to the solicitors for the applicant and signed by Ms Elizabeth M. Williams, Psychiatric Nurse at North Western Mental Health. The letter, which is dated 21 November 2008, indicates that should Mr Dickson be granted bail, the clinic at Northern Hospital can offer a Case Management Intake Assessment to the applicant on Friday, 28 November 2008.

26. I am afraid I could not be satisfied with such imprecise arrangements. The applicant has a significant criminal history with a serious mental illness which I gather is connected to his offending. In order to take into account any supervisory regime for the purpose of considering a grant of bail, the continuing circumstances of his supervision and treatment would need to be much more clearly specified. However I make this observation. If recovery and rehabilitation in custody have any meaning at all, then Mr Dickson remains in need of careful and focused treatment whilst in custody. Whilst I am not suggesting this has not occurred, I emphasise that he and his treatment must not be neglected whilst he is at the Metropolitan Remand Centre. I appreciate that resources are stretched but his need is significant. Further, Dr Walton reports that Mr Dickson has been exposed to traumatic conduct of self-harm by fellow prisoners at the Melbourne Assessment Prison. I urge Corrections Victoria to do everything they can to ensure

that such incidents are not repeated.

Strength of the Crown Case

27. The strength of the Crown case has not changed since the application before Judge Rozenes. As his Honour correctly noted in the application before him, it was not suggested then and it is not suggested to me that the evidence is so weak or tenuous that a conviction is unlikely on any of the counts faced by the applicant so as to justify a grant of bail.

28. The Crown case relies on voice identification from store surveillance video tapes and there may be some similar fact evidence of previous offences. The identification of the voice of the accused is made on some occasions by the ex-wife of the accused and also the son of the accused.

29. It is true that the Crown case depends on that voice identification evidence, but as presently advised I am not persuaded that the Crown case against Mr Dickson is weak. It is true that the voice identification evidence both from the civilians and the expert witness will no doubt be significantly tested in the trial but it is evidence which the jury might accept subject to the usual and clear warnings about identification evidence and voice identification evidence in particular.

Unacceptable Risk

30. In opposition to the application for bail, the Crown relies on the history of the matter and, in particular, Mr Dickson's failure to attend court twice in Queensland in 1998. The Crown also points to Mr Dickson's significant criminal history and that if he were convicted of these offences or a number of them he would be facing a substantial period of custody as well as breach of parole.

31. In examining whether Mr Dickson is an acceptable risk, under s4(2)(d)(i) of the *Bail Act* I am required to consider a number of matters including the nature and seriousness of the offence; and the character, antecedents, associations, home environment and background of the applicant for bail. I must look at the history of previous grants of bail and the strength of the prosecution case. I have done so. If available, I am also required to examine the attitude of the alleged victim of the offence or offences. No material of that kind is before me.

32. Mr Dickson has a significant criminal history which I will not recite in detail but it includes drug offences, theft and obtaining property by deception and armed robbery. In Queensland, Mr Dickson's history includes robbery with violence and a breach of bail in 1998.

33. The conclusion reached a month ago by Judge Rozenes that there are reasonable prospects of securing a conviction on at least six of the counts charged coupled with the applicant's record for committing offences whilst on bail or on parole is not under challenge before me.

34. In all the circumstances, the applicant has not satisfied me that his continued detention is not justified. The application is refused.

[1] [2005] VSC 487.

[2] [2008] VSC 4 at [12] (emphases added).

APPEARANCES: For the applicant Dickson: Mr G Traczyk, counsel. C Marshall & Associates, solicitors. For the respondent DPP: Mr P Atkinson, counsel. Office of Public Prosecutions.
