25/84

SUPREME COURT OF VICTORIA

R v HOLT

Marks J

19 June 1984

BAIL – GRANT OF APPEALED AGAINST BY ATTORNEY-GENERAL – BAIL GRANTED WHERE PREVIOUSLY REFUSED – COMMITTAL HEARING COMMENCED – WHETHER "NEW FACTS OR CIRCUMSTANCES": *BAIL ACT* 1977, S18(4).

At the end of the first day of the hearing of committal proceedings against H., the court granted bail notwithstanding that on three previous occasions, applications for bail had been refused. The court stated that as one of the prosecution witnesses had given evidence, "new facts or circumstances" had arisen, and accordingly, the court had power to determine the fresh application for bail. Subsequently, the court granted hail. On appeal by the Attorney-General against the order granting bail—

HELD: Appeal upheld. Order granting bail quashed.
(1) As applications for bail had been previously refused, the court could only entertain the fresh application for bail if it was satisfied with the pre-conditions provided by s18(4) of the *Bail Act*.

(2) Those pre-conditions include that:
(a) new facts and circumstances must have arisen since the previous refusal; and
(b) Those new facts and circumstances were not disclosed to the court which previously refused bail.

(3) The witness's having given evidence for one day could not in itself be a new fact and circumstance because that event alone did not necessarily bear on the question of bail.

(4) Accordingly, as the court did not give proper consideration to the pre-conditions in s18(4) of the *Bail Act*, it was in error and the order granting bail quashed.

MARKS J: [1] This is an appeal by the Attorney-General under s18A of the *Bail Act* 1977. It is a relatively new section, but has been introduced to deal with a situation such as this where the Attorney-General, on behalf of the community, wishes to challenge an order releasing an accused such as the respondent on bail. The present circumstances may be summarised shortly. The Respondent is one of two persons charged with a number of offences arising out of events which occurred on 26th January 1984, and 1st April 1984, Those events related to assaults on, and shooting of, two brothers by the name of Weiss. The first occasion involved events at their butcher's shop in Balaclava, whilst the second involved one of the brothers at his home.

[2] The Crown alleges that the two events were related, and that the Respondent and his co-accused were the persons involved on both occasions. The allegations are of the most serious kind. They involved entry to the butcher's shop by two persons, whom the Crown says were the accused, and an attack being made by those persons on the two brothers, such attack involving the throwing of a brick and discharge of firearms, with consequent shooting of both brothers – one of the brothers allegedly being shot three times. On the second occasion, the conduct was, if possible, capped by throwing hydrochloric acid at one of the brothers, namely, Bernard Weiss. The accused, the Respondent here, on no less than three occasions applied for bail and was refused. On each occasion he was legally represented, and one of the refusals was by a judge of this court on the day before the committal hearings commenced. It is clear that His Honour, on that occasion, had disclosed to him the fact that the committal hearings would commence on the next day.

At the end of the first day of hearing of the committal, the Stipendiary Magistrate granted bail. It is conceded by Mr Punshon, appearing here for the Respondent, that the magistrate was only entitled to entertain the application for bail if he was satisfied with the pre-conditions provided by s18(4) of the *Bail Act*, which reads:

> "Where application is made under sub-section (1) to a stipendiary magistrate or judge in respect of an order made by another stipendiary magistrate or judge the first-mentioned magistrate or judge shall not proceed to hear the matter of the application unless **[3]** the applicant was not represented by counsel or a solicitor when the order was made or the applicant satisfies him that new facts or circumstances have arisen since the making of the order that were not disclosed to the stipendiary magistrate or judge who made that order."

As I have said, it is conceded that the only basis on which the Stipendiary Magistrate was entitled to proceed to hear the application for bail at the end of the first day's hearing was if he was satisfied that new facts and circumstances had arisen within the meaning of that sub-section. I do not think the sub-section should be interpreted as meaning any new fact and circumstance whatever, but rather a new fact and circumstance bearing on the question of bail. It goes without saying that the new facts or circumstances must have been "not disclosed" to the judicial officers previously presiding at the time of the applications, that is, the times on which they had been previously refused. In the reasons he gave for granting bail, the Stipendiary Magistrate does not appear to have adverted to the pre-condition, nor to have stated on what basis he thought he could entertain the application. I have had drawn to my attention something that he said, in the course of argument, and which apparently appears at page 85 of the transcript. The Stipendiary Magistrate is recorded as having said:

> "I think Mr Weiss giving evidence here today would be a new fact and circumstance, so I want to hear from you as to why you think cause has not or should not be shown."

In making that statement the Stipendiary Magistrate was clearly addressing the Senior Constable presenting the prosecution case. The question arises at the outset then whether if it was part of the Stipendiary Magistrate's decision, he was **[4]** correct in holding that Mr Weiss, giving evidence that day, was a new fact and circumstance. In my opinion, there is nothing before me to indicate that the fact of Mr Weiss giving evidence on that day was something new, in the sense that it had not been disclosed to the judge of this court on the day before the committal hearing proceeded.

But, in any event, it would seem to me the fact of Mr Weiss having given evidence could not in itself be a new fact or circumstance within the meaning of the sub-section, because that fact or circumstance alone did not necessarily bear on the question of bail. It may be that what the Stipendiary Magistrate intended to convey was that he was so unimpressed by the evidence given by Mr Weiss, that he felt that the charges which rested on his evidence could not be sustained. However, the Stipendiary Magistrate did not say that, nor, from what I have gleaned, could he have said that at that stage, because I am informed that Mr Weiss's cross-examination has not been completed, nor had the Stipendiary Magistrate at the stage at which he granted bail heard anything like the whole of the evidence to be presented on the committal. The mere fact of a person having given evidence could not in the circumstances here have constituted a new fact or circumstance within the meaning of the sub-section.

I think that I am bound to take into account only what the Stipendiary Magistrate said. It would not seem proper for me to infer or conclude that he meant something else, or if he expressed himself differently he might have acted within the sub-section. **[5]** However, in deference to the fact that the liberty of the subject is here involved, I turn to the arguments put here on behalf of the Respondent that new facts and circumstances did in fact prevail, and that the magistrate had jurisdiction.

Mr Punshon has here argued on behalf of the Respondent that there were three new facts and circumstances; firstly, he says, the committal proceedings had to be adjourned, and that meant further delays. I do not think that is a new fact and circumstance within the meaning of the sub-section. For one thing, it could not be said that it was not disclosed to King J, who was the judge of this court who refused bail on the day before the committal proceedings began, what the position was in regard to the length of the committal hearings or that he might have come to a different conclusion if he knew that the committal proceedings would last more than one day. The mere fact, therefore, that the committal proceedings were to be adjourned at the end of the day could not, in my opinion, in the circumstances here constitute a new fact and circumstance. It is significant that it was not the one on which the Stipendiary Magistrate purported to act.

It was next said that the evidence of attempted armed robbery was weak. I understand Mr Punshon to mean by this submission that at the end of the day it was apparent to the Stipendiary Magistrate that the Crown may have difficulty in sustaining the charge of attempted armed robbery – alternatively, it may have difficulty in persuading him, the Stipendiary Magistrate, that the accused should be presented on that charge. The difficulty about this submission **[6]** is that the Stipendiary Magistrate could not have come to a firm conclusion of that kind without hearing all the evidence.

I find it impossible to conclude that in any event the Stipendiary Magistrate had decided at that stage that the Crown could not possibly persuade him to commit either accused on an attempted robbery charge. The Stipendiary Magistrate did make a comment which was consistent with him feeling that at that stage there may be difficulty in the prosecution case, but the difficulty facing the Respondent, I think on this aspect, is to identify precisely what was the new fact or circumstance. Was it that the Crown case was weaker than anticipated? Was it that the Crown case was weak in the sense that although there may be a case for the jury, the chances of conviction were slight, or was it that at that stage no Stipendiary Magistrate could properly have committed the accused for trial on the armed robbery charge? Without being satisfied as to what the new fact or circumstance was, I do not think that the pre-conditions of s18(4) of the *Bail Act* could be said to have been satisfied.

Mr Punshon's submission was simply that the new fact or circumstance was that the prosecution case on attempted armed robbery was weak or, alternatively, that the evidence was weak. I think that the answer to this is that without hearing all that he is obliged to hear the Stipendiary Magistrate could hardly make his assessment to that point a new fact or circumstance. The situation may well be different after he had heard all that he was obliged to hear including the submissions. But, in any event, it is very doubtful, in my opinion, whether the Stipendiary Magistrate **[7]** could have come to the conclusion that the weakness of the prosecution's case in respect of one only of a number of very serious charges could amount to a new fact or circumstance within the sub-section, by which I mean a new fact or circumstance which had a significant effect on the fate of a bail application. It must be borne in mind that the other charges were at least as serious if not more so than the attempted armed robbery. I would think many would regard them as more serious. What is pertinent, however, is that the other charges about which no submission here has been made as to their strength were also ones which by s4(4) of the *Bail Act* dictated the reverse onus of proof on a bail application.

The third new fact and circumstance suggested is that there had been one day's evidence on the committal proceedings. It must be remembered that the new fact or circumstance must be one that had not been disclosed on the previous applications which were refused. To suggest that Mr Justice King did not have disclosed to him that there would be one day's hearing of a committal on the day after he refused his application is very far-fetched. It is true that in terms he was not told that the committal proceedings would last longer than a day, or rather I have no evidence as to what he was told as to the length of the committal proceedings, but it must have been present to his mind that there would be committal proceedings. The fact that there had been a hearing for a whole day could hardly, in my view, amount to a new fact or circumstance of any moment within the meaning of the sub-section. I emphasise that we are not dealing here with a **[8]** situation at the conclusion of committal proceedings when some judgment may be made about the chances of success of a prosecution case. I make no comment whatever about that. It is to be emphasised that these committal proceedings had only commenced; they had not been completed; there is still some distance to go. In my view, therefore, the Attorney-General has demonstrated error on the part of the learned Stipendiary Magistrate and this appeal must succeed. In my view, the learned Stipendiary Magistrate did not give proper consideration to the conditions in s18(4) and was in error in finding that there were new facts and circumstances. It follows that the appeal must be upheld, and it would follow that I also am precluded from entertaining the application for bail.

In case, however, it is thought that what I have said is incorrect in any way, I would add that if I did entertain this application, I would feel obliged to refuse it. It seems to me that the respondent not only has failed to satisfy me that within the meaning of s4(4) his detention in custody is not justified, but rather that I am satisfied there are a number of very compelling factors why he should be kept in detention. He has in the past escaped legal custody and failed

to attend court. It is true that those events were some ten years ago, but I have been told by his counsel that he has only been out of prison since 1980. I have been asked to say that he has been rehabilitated since that time, but there is no material on which I could be so satisfied. Further, the matters with which the respondent faces committal are of a very serious nature and there is an unacceptable risk that there would be interference with prosecution witnesses and further offences committed. The antecedents of the respondent could hardly be worse. He has been in trouble since he was a young person, and the sheet to which I have been referred begins in 1964. I refrain from making further comments or observations about the material before me. It seems unnecessary to do so. I merely record my opinion that the appeal should be upheld and that consequently bail must be refused.

APPEARANCES: Mr JA Dee, counsel for the Appellant. Mr R Punshon, counsel for the Respondent Holt.
