**33/10; [2010] VSC 297**

**SUPREME COURT OF VICTORIA**

# *DPP (CTH) v THE MAGISTRATES' COURT of VICTORIA & BARBARO*

**Pagone J**

**22 June 2010**

**CRIMINAL LAW – BAIL – APPLICATION TO MAGISTRATE FOR – BAIL PREVIOUSLY REFUSED BY SUPREME COURT JUDGE – WHETHER MAGISTRATE HAS JURISDICTION TO ENTERTAIN APPLICATION: *BAIL ACT* 1977, S18(1).**

Section 18(1) of the *Bail Act* 1977 ('Act') provides:

> (1) Where a person is detained in custody pending the summary hearing of a charge or a committal proceeding or a trial and that person has been refused bail by a bail justice or the Magistrates' Court or, 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 granting bail or varying the amount of any bail fixed or condition imposed (as the case requires).

B. applied to a Magistrate for bail who indicated that he had jurisdiction to entertain the application. The DPP submitted that because of the provisions of s18(1) of the Act, the Magistrate had no jurisdiction to entertain the application because B. had previously been refused bail by a Judge of the Supreme Court.

**HELD: Application by the DPP refused.**
**A refusal to grant bail by a Judge of the Supreme Court does not always remove the power of a Magistrate to grant bail. Other provisions operate on their own terms and must be given their effect in the circumstances which they govern. In schedule 5 of the *Magistrates' Court Act* 1989 (Vic), as it relevantly stood in the past and as it was accepted that it applies to this case, upon committal for trial, the Magistrate is, amongst other things, required to consider afresh the question of bail; and whatever the proper construction of s18(1) may be, there is no justification to read down or narrow the provisions and effect of other provisions which confer power or require a fresh consideration of whether bail should or may be granted.**

***Scher v Popovic* unrep, VSC, Cummins J, 12 January 1990, followed.**

**PAGONE J:**

1. The issue raised in this proceeding is whether a Magistrate has power to hear a bail application under s18(1) of the *Bail Act* 1977 (Vic) ("the Act"). The resolution of the issue depends upon the construction of the section and its application to the facts of this case.

2. A Magistrate has decided that he does have jurisdiction to hear an application for bail and the DPP challenges that decision. Section 18(1) of the *Bail Act* provides:

> (1) Where a person is detained in custody pending the summary hearing of a charge or a committal proceeding or a trial and that person has been refused bail by a bail justice or the Magistrates' Court or, 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—
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> (a) to the Magistrates' Court; or
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> (b) to the court to which he would be required to surrender himself under the conditions of the bail—
>
> for an order granting bail or varying the amount of any bail fixed or condition imposed (as the case requires).

On 11 June 2010, Magistrate Garnett ruled that he had jurisdiction under this section to consider a fresh application for bail by a person who he has detained in custody. His Honour proposes to hear the application tomorrow afternoon and for that reason it is desirable for this application to be determined promptly.

3. The case of the DPP is simply that there is absent a condition which is necessary to enliven the power of the Magistrate as required by s18(1). It is a condition of the exercise of the power, relevantly, that the "person has been refused bail by a bail justice or the Magistrates' Court". In this case there has been an application for bail in September 2008 which a Magistrate has refused. However, in December 2009 a fresh application was made to a Magistrate which was granted. That grant of bail was the subject of an appeal under s18A, heard by J Forrest J, who decided on 6 February 2009 that bail should be refused. The decision of J Forrest J was upheld by the Court of Appeal.[1]

4. The DPP relied upon the refusal of bail by a Judge of this Court to show that the condition required by s18(1) (of bail having been refused by a bail justice or a Magistrates' Court) has not been satisfied in this case. The learned Magistrate considered this argument but he said, at paragraph 12 of his reasons:

> I accept that a literal interpretation of s18(1) would appear to preclude this court from hearing any further bail application by ... [the person in custody] in that this court did not refuse him bail on 19 December 2008. However, after considering the decision in *Scher & Premru*, the scheme of the *Bail Act* and the fact that this court continues to have the management and control of the proceedings, I find that this court does have jurisdiction to hear the application.

The decision in *Scher v Popovic*[2] raised an issue materially similar to that with which I am now concerned. In that case there had been a refusal of bail by a Judge of this Court and a subsequent application for bail made to a Magistrate on new facts and circumstances under s18(1) as it then stood. Its terms also set conditions to the exercise of power as now does s18(1) in its present form. The condition relevant to that case was the same as that raised in this case, except that its terms were expressed differently to accord with the different framework existing at the time. Relevantly, the reference which in the section is now to a bail justice was then simply to a justice; but it is conceded by the parties before me, correctly in my view, that the reference to a justice in the provisions at the time when *Scher* was decided meant a justice of the peace and did not include a justice of the Supreme Court. *Scher* is, therefore, a decision of substantial relevance to the question considered by the Magistrate and which is now before me.

5. In *Scher* Justice Cummins said:

> I consider that the provisions of s18(4) and the scheme of the Act are such that, as one would rightly expect in matters concerning the liberty of the subject, if there are new facts and circumstances which have arisen since the date of a relevant adjudication, the impingement of those facts upon the question of liberty ought be duly considered.[3]

Section 18(4) as it then stood is substantially to the same effect as its provisions stand now. Its effect is to limit fresh applications of bail unless, relevantly, new facts or circumstances have arisen since an earlier refusal of bail. It may perhaps be noted in passing that the section presupposes that fresh applications for bail might otherwise have been made without restriction. In any event, Cummins J held in *Scher* that a Magistrate had jurisdiction to consider a fresh application for bail and his Honour did so in circumstances where the earlier application had been rejected not by a Magistrate but by a Judge of this Court. The facts are to that extent identical to those confronting me.

6. The argument before his Honour in *Scher* was not precisely as that put before me. In Scher the argument put against the view he adopted was, rather, that the *dicta* of this Court in *R v Malkoun*[4] produced much the same effect as the argument now advanced before me. In *Malkoun* it had been said that it is the Court which initially grants the bail upon conditions which has the power to vary the conditions upon which bail had been granted.[5] The decision in *Malkoun* was therefore not strictly relevant to the facts in *Scher* and not strictly relevant to the facts with which I am concerned. Indeed, it may be accepted as stated in *Malkoun* that the power to vary an order of this Court is *ultra vires* inferior courts without embracing the proposition that the refusal to grant bail by this Court on an appeal under s18A extinguishes the power of the Magistrate to grant bail on a fresh application.

7. It is, I think, plain that a refusal to grant bail by a Judge of this Court does not always remove the power of the Magistrate to grant bail. Other provisions operate on their own terms and

must be given their effect in the circumstances which they govern. In schedule 5 of the *Magistrates' Court Act* 1989 (Vic),[6] as it relevantly stood in the past and as it was accepted that it applies to this case, upon committal for trial, the Magistrate is, amongst other things, required to consider afresh the question of bail; and whatever the proper construction of s18(1) may be, there is no justification to read down or narrow the provisions and effect of other provisions which confer power or require a fresh consideration of whether bail should or may be granted.

8. The difficulty, as the learned Magistrate correctly observed, lies in the literal reading of s18(1). A literal reading of the section requires that the refusal of bail have been by a bail justice or the Magistrates' Court and not by a Judge of this Court. Such a reading however, as the learned Magistrate also correctly observed, is contrary to the scheme of the Act. There is no sound basis in policy to deny to a Magistrate the power expressly preserved and narrowly crafted in s18(4). There is also no sound basis in policy to require or confine a person in custody to seek bail only in this Court where it is sought on the grounds of there being new and fresh evidence because this Court on appeal under s18A had held that a previous decision on different evidence by a Magistrate had been in error. Furthermore, I should follow a decision of a single Judge of this Court unless satisfied that the prior decision was clearly wrong (see *Booth v Ward*[7] and *Zotovic v Dobel Boat Hire Pty Ltd*[8]). I do not consider the decision in *Scher* to be clearly wrong but rather consider it to be clearly correct in outcome and correctly reflecting the policy in the provisions. The phrase in s18(1), "has been refused bail by a bail justice or the Magistrates' Court" must be understood as having constructively been satisfied where a Magistrate had granted bail but where his or her order has been substituted by a decision of the court on appeal under s18A of the Act. It is, after all, the decision of the Magistrate which enlivened the appeal in s18A. It was that decision which was substituted by the order by J Forrest J upon appeal in the exercise of the appellate jurisdiction. The effect of the order of this Court was to have refused to the person in custody the bail which he had sought from the Magistrate. Any new application is relevantly confined by s18(4) to situations where there is new and fresh evidence and there is nothing in the scheme of the Act to see any reason why such an application should not be made under s18(1). It would be a curious result (and in my view it would be contrary to the scheme of the Act which gives primary jurisdiction of bail applications to Magistrates and contemplates that fresh applications on new facts and circumstances are to be made to Magistrates) if the decision to appeal a grant of bail under s18A was to extinguish the power of a Magistrate having the continuing carriage of a person's criminal process to hear a fresh application if new facts and circumstances arise.

9. If, however, I am wrong about this and a literal construction of s18(1) is required, then its strict literal terms have been complied with in this case by the circumstances that in fact a bail application has been made to a Magistrate in September 2008 and had been refused by a Magistrate in September 2008. Accordingly I dismiss this application.

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[1] *Barbaro v Commonwealth Director of Public Prosecutions* [2009] VSCA 26; (2009) 20 VR 717; (2009) 193 A Crim R 369 (Maxwell P, Vincent and Kellam JJA, 3 March 2009).
[2] (Unreported, Supreme Court of Victoria, Cummins J, 12 January 1990).
[3] Ibid 4.
[4] (Unreported, Supreme Court of Victoria, Nathan J, 20 April 1989).
[5] Ibid transcript p65.
[6] See clause 24. Section 144(2)(c) of the *Criminal Procedure Act* 2009 (Vic) will apply to future proceedings.
[7] [2007] VSC 364; (2007) 17 VR 195, 48 (Cavanough J).
[8] (1985) 62 ACTR 29, 32 (Blackburn CJ).

**APPEARANCES:** For the plaintiff DPP (Cth): Mr D Gurvich, counsel. The Director of Public Prosecutions (Cth). For the defendant Barbaro: Mr M Croucher, counsel. Acquaro & Co, solicitors.

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