10/01; [2001] VSC 403

SUPREME COURT OF VICTORIA

DPP v MOKBEL

Cummins J

28 September, 1, 19 October 2001

BAIL – SERIOUS DRUG OFFENCES – ACCUSED SAID TO BE THE HEAD OF AN ILLICIT DRUG-TRAFFICKING SYNDICATE – ACCUSED TO SHOW 'EXCEPTIONAL CIRCUMSTANCES' BEFORE RELEASE ON BAIL – MATERIAL SHOWING ACCUSED INVOLVED IN CONTINUOUS AND SUBSTANTIAL DRUG OFFENCES – ACCUSED ALLEGED TO BE INVOLVED IN ATTEMPTED CORRUPTION – ACCUSED GRANTED BAIL BY MAGISTRATE – WHETHER ERROR SHOWN: *BAIL ACT* 1977, S4(2)(aa).

M. was charged with a number of serious counts of drug trafficking and related offences and one count of being knowingly concerned in the importation of a large quantity of cocaine. On an application for bail by M., material was tendered to the court which indicated that M. was the head of an illicit drug syndicate responsible for the importation and trafficking of substantial amounts of numerous illicit drugs including amphetamine, cocaine and LSD. Covert recordings indicated that M. was involved in incidents of corruption or attempted corruption of the course of justice. In granting bail, the magistrate referred to the delay before trial, M's financial ruin by being detained in custody pending trial, M's family support, the risk of flight, re-offending and interference with witnesses. Upon appeal—

HELD: Appeal upheld. Bail order revoked. Accused committed to custody to await trial.
The magistrate was plainly entitled to act on the estimate of the delay until trial, the possibility of financial ruin, the viability of strict reporting conditions and the other factors. However, these matters were to be assessed in the light of the nature and gravity of the charges and the risks involved. Further, the viability of the strict conditions imposed was to be assessed in the light of the character, antecedents and wealth of the accused and bearing in mind the matters such as the risk of interference with witnesses, obstructing the course of justice and committing further offences whilst on bail. Given the egregious character of the charges preferred against M. and the potential to pervert the course of justice, the magistrate fell into serious error in concluding that exceptional circumstances existed which justified the granting of bail.

CUMMINS J:

1. On 28 September 2001 before me were two appeals, respectively by the Victorian Director of Public Prosecutions and the Commonwealth Director of Public Prosecutions, pursuant to s18A *Bail Act* 1977 and each filed on 20 September 2001, from orders by a Magistrate made on 7 September 2001 granting bail to the Respondent, Mr Antonios Mokbel. I heard the appeals together, on 28 September 2001 and 1 October 2001 and on 1 October 2001 I allowed the appeals, revoked the orders below for bail, and committed the Respondent to custody to await his trial. I now publish my reasons for those decisions.

2. On 24 August 2001 the Respondent was arrested by Victorian police and charged with 11 offences contrary to the *Drugs, Poisons and Controlled Substances Act* 1981. On the same day, at the Melbourne Magistrates' Court the Respondent was charged by an Australian Federal police officer with one count of being knowingly concerned in the importation into Australia of a prohibited import, namely a trafficable quantity of cocaine, contrary to s233B(1)(d) *Customs Act* 1901. At the Magistrates' Court appearance on 24 August 2001 no application for bail was made by the Respondent. On 5 September 2001 the Respondent applied to the Magistrates' Court for bail on the State and Commonwealth matters. The bail hearing occupied three days. On 7 September 2001 the Magistrate granted the Respondent bail upon terms I shall later recite. On 20 September 2001 the Victorian and the Commonwealth Director of Public Prosecutions filed in this Court notices of appeal pursuant to s18A *Bail Act* 1977 from the Magistrate's order of 7 September 2001.

3. The principles governing appeals pursuant to s18A *Bail Act* 1977 are well known. Such appeals are not *de novo* hearings but are appeals strictly speaking. In a most helpful review (if

I may say so) the Full Court of the Supreme Court of this State in *Boris Beljajev and anor v DPP (Victoria) and anor* (unreported, 8 August 1991) considered the nature, history and ambit of s18A *Bail Act* 1977 appeals and at p29 concluded:

> "It is not essential that the Director should be able to show an error of law in the narrow sense, although of course if error of law were demonstrated this Court would be obliged to substitute its own view of the order which should have been made. It is also open to the Director to show that in all the circumstances of the case the order was manifestly the wrong order to make even though it is not possible to point to any other identifiable error in the process by which the authority granting bail arrived at the order made. In other words, the Director is not in our opinion, confined to relying upon an error of law as a ground of appeal but may succeed if he shows that on any ground, whether of fact or law, the discretion of the primary judge has miscarried and can persuade the Supreme Court that a different order should have been made. There are, however, two ways of the first importance in which an appeal in a matter of bail differs from an appeal against sentence. Both stem from the very nature of bail. The first is that an order admitting a person to bail is not a final order: it may be revoked at any time. The second is that the granting of bail is essentially a matter of practice and procedure. These two considerations both independently and in combination operate to impose on any appellate court a severe restraint upon interference with the order appealed from. In civil and in criminal cases alike appellate Courts have frequently refused to interfere with a primary judge's decision on a matter of practice and procedure."

Numerous subsequent decisions have applied those criteria. I do likewise.

4. In the material filed before me there is some supplementation and expansion (particularly in the Commonwealth appeal) of that which was before the Magistrate on 5-7 September 2001. There are also revised estimates of delay (notably by the Victorian Director). I consider I should put that later material and those later estimates aside, and proceed in this appeal upon the exclusive basis of that which was before the Magistrate. That exclusive approach is a consequence of the nature of s18A appeal as I have cited. I so proceed.

5. Before the Magistrate were the following matters of law and allegations of fact.

6. The Respondent, now aged 36 years, was charged with 11 serious counts of drug trafficking and related offences contrary to ss71 and 73 *Drugs, Poisons and Controlled Substances Act* 1981 and one count of being knowingly concerned in the importation into Australia of a prohibited import, namely a trafficable quantity of cocaine, contrary to s233B(1)(d) *Customs Act* 1901. The State charges comprehended a substantial chronological period: 12 October 2000 to 24 August 2001. The Commonwealth charge comprehended a quantity of pure cocaine almost 1000 times greater than the trafficable quantity of two grams (Schedule VI *Customs Act* 1901), and more than six times the "commercial quantity" as defined by the *Drugs, Poisons and Controlled Substances Act* 1981 Part 3 Schedule 11. A Victoria Police Operation and Taskforce had been monitoring the activities of the Respondent and others for some ten months. The State prosecution case alleged the following.

The Respondent was identified as the head of a syndicate responsible for the importation and trafficking of substantial amounts of numerous illicit drugs including amphetamine, methamphetamine, cocaine and LSD. A registered informer indemnified pursuant to s51 *Drugs Poisons and Controlled Substances Act* 1981 was utilised by the Victoria Police to meet the Respondent on numerous occasions between October 2000 and August 2001 and the informer covertly tape recorded numerous conversations between him and the Respondent. A large amount of drugs and chemicals were sold or exchanged by the Respondent with the informer, police expending nearly $200,000 in purchasing drugs from the Respondent. It was planned to arrest the Respondent and others involved with him on 24 August 2001 in a combined operation of the Victoria Police, Australian Federal Police and the Australian Customs Service. One of the others (Joseph Parisi) was in fact arrested on 21 August 2001 as the result of information as to his then possession of a large quantity of drugs.

In order not to compromise the police operation, when Parisi on 22 August 2001 applied in the Melbourne Magistrates' Court for bail, that application was not contested. Then on 24 August 2001 the Respondent, Parisi and two others (Mark Lanteri and Robrabih Karam) were arrested. There thus are three co-accused together with the Respondent in the State prosecution. The other three soon were granted bail. Upon arrest the Respondent made no admissions, was charged, and

was remanded in custody. In the Commonwealth prosecution, there are four co-accused: Marijan Banda, Paletasaia Schmidt, Edmond Schmidt and Ron Cassar. Each was arrested on 12 November 2000. Each ultimately was granted bail. The Respondent, of the eight persons charged, is the only person common to the State and Commonwealth prosecutions. The Respondent was charged in the Commonwealth matter after the provision to it of covert recordings and other material by the Victoria Police.

7. Before the Magistrate was a summary of evidence in the State prosecution and a draft statement of crown case in the Commonwealth prosecution. Each was tendered before me. During the proceedings before the Magistrate, three compact disks were played, in whole or in part, of conversations between the informer and the Respondent on 25 October 2000, 10 November 2000 and 1 December 2000. The State summary and Commonwealth draft statement, if an accurate account of truthful matter, propounded a web of illegality and corruption with the Respondent at its apex. If accurate and true, the material exposed continuous and substantial drug offences of an egregious kind and incidents of corruption or attempted corruption of the course of justice.

The covert recordings if accurate and truthful revealed discussions by the Respondent with the informer about payment or offers of payment by the Respondent to corrupt police to pervert the course of justice. One of the Respondent's numerous prior convictions is of attempting to pervert the course of justice, for which he was sentenced to 12 months' imprisonment, six months of which was suspended for 12 months. The offence arose from an attempt by the Respondent to bribe a County Court Judge through the Judge's Associate. Unfortunately for the Respondent the Associate he sought to utilise was an undercover police operative. The attempt was to obtain a non-custodial sentence of a drug dealer. All this was known to the Magistrate.

8. If convicted of the charges preferred against him, the Respondent faces lengthy terms of imprisonment. That also was known to the Magistrate.

9. The Magistrate plainly gave careful attention to the material before her. That is evident both from her *ex tempore* reasons given in articulate fashion on 7 September 2001 (transcript pp125-128) and from her published reasons (exhibit "c" to the affidavit of Mr PJA Atkinson of 19 September 2001) of 12 September 2001. The Magistrate looked to the relevant criteria (taken in order from her published reasons): delay, parity, strength of Crown case, flight, business commitments, risk of further offending, prior convictions and risk of interfering with witnesses, and risk of re-offending. The Magistrate was of course aware that, by reason of the offences charged, s4(2)(aa) *Bail Act* 1977 applied and which stated:

> "(the) court shall refuse bail... unless the court is satisfied that exceptional circumstances exist which justify the grant of bail."

The Magistrate concluded:

> "**CONCLUSIONS** My view is that a combination of factors in this case amount to exceptional circumstances. Generally the Victorian authorities confirm that it is valid to look at the applicant's overall situation, and consider whether a combination of factors meet the test. Mr. Mokbel faces a very long delay of about two years awaiting trial. This might in itself be enough to meet the test. But he also faces inevitable financial ruin if he is denied bail, and this would be tantamount to punishment commensurate with being convicted of the offences. Added to this is the more usual factor of family support, which has been demonstrated in this case. The risk of flight is reduced by his ties to the jurisdiction in the form of his family, his stable accommodation, and his business commitments, and by a large surety and stringent conditions of bail. The risk of re-offending is reduced by most of these factors as well, and by the threat of revocation of bail. The risk of interfering with witnesses is, as I have said, the risk of most concern, but the concern is somewhat ameliorated by the fact that most of the witnesses are likely to be immune from interference, and the scrutiny of the court will provide a safeguard. Bail is granted with sureties totalling $1,000,000 and conditions including twice daily reporting."

The delay of two years until trial was based upon an estimate given by counsel for the State Director. The Magistrate plainly was entitled to act on that estimate and to give it very substantial weight. However, delay is to be assessed in the light of the nature and gravity of the charges and the risks involved. The conclusion of "inevitable financial ruin" was based upon material which had as its ultimate foundation the truthfulness of the Respondent as to his lawful means. The

circumstance that the Respondent had accumulated large assets which were at risk is relevant but not conclusive. Further, the viability of the strict conditions imposed by the Magistrate including of twice daily reporting and of sureties totalling $1,000,000 is to be assessed in the light of the character, antecedents and wealth of the Respondent and bearing in mind the matters set forth in s4(2)(d)(1) including interfering with witnesses or otherwise obstructing the course of justice and committing offences whilst on bail. As to parity, the prosecution case is that the Respondent is the head of the illicit syndicate, not a mere operative of it. The strength of the prosecution allegations, of course, will better be able to be assessed at committal, as the Magistrate doubtless well appreciated.

10. It is profitless to analyse in detail the foundation for each discrete conclusion of the Magistrate or of them in combination. Given the egregious character of the charges preferred against the Respondent and the potential to pervert the course of justice, it is manifest that the Magistrate fell into serious error in concluding that exceptional circumstances existed which justified the granting of bail. The criterion adumbrated in *Beljajev* that "the order was manifestly the wrong order to make" (p29) is amply satisfied in this case. It was also manifestly wrong for the Magistrate to find, as required by s4(2)(d)(1) *Bail Act* 1977, that there was not an unacceptable risk of the matters there set out, in particular of interfering with witnesses, interfering with the course of justice and of committing further offences if on bail.

11. Accordingly I allow both appeals. I set aside the Orders made below. Considering the matters afresh for myself, I find no exceptional circumstances as contemplated by s4(2)(aa) and find unacceptable risk as contemplated by s4(2)(d)(i), in particular of interfering with witnesses, interfering with the course of justice and of committing further offences if on bail. Pursuant to s18A(8) I commit the Respondent to custody to await his trial.

12. Presently the committal mention dates are 3 December 2001 for the Commonwealth prosecution and 25 January 2002 for the State prosecution. I hope and expect that the Commonwealth and State Directors will take steps to bring the matters to trial significantly earlier than the estimate of two years given to the Magistrate. The matters should be prosecuted as expeditiously as they can be. It may be, given the seriousness of the charges preferred against the Respondent and the incidents of corruption alleged, that the Directors will seek trial in this Court.

APPEARANCES: For the DPP (Victoria): Mr W Morgan-Payler QC with Ms G Cannon, counsel. DPP (Victoria). For the DPP (Commonwealth): Mr A Howard QC with Mr S O'Sullivan, counsel. DPP (Commonwealth). For the Respondent Mokbel: Mr C Dane QC with Mr G Lyon, counsel. Kenna Croxford & Co, solicitors.
