

33/09; [2009] VSC 511

SUPREME COURT OF VICTORIA

MARIJANCEVIC v DPP

Kaye J

6 November 2009

CRIMINAL LAW – APPLICATION FOR BAIL - APPLICANT CHARGED WITH OFFENCES INCLUDING DRUG TRAFFICKING - APPLICANT REQUIRED TO SHOW EXCEPTIONAL CIRCUMSTANCES - MEANING OF "EXCEPTIONAL CIRCUMSTANCES" - APPLICANT TO HAVE DIFFICULTY IN PREPARING CASE AND SUFFER PERSONALLY IF HELD IN CUSTODY - DELAY - APPLICATION REFUSED: *BAIL ACT 1977*, S4(2).

M. was charged with offences including trafficking in methylamphetamine in a quantity not less than a commercial quantity. The offences were alleged to have occurred at a property in Broadford. When questioned, M. denied involvement in drug trafficking and applied for bail pending hearing of the charges. It was alleged that during the time of the alleged offending M. was then on bail and undergoing a trial in the County Court. On the application for bail, M. stated that:

- he had difficulty in preparing his case while in custody
- if he remains in custody he will lose his house
- he will suffer a deterioration in his mental health
- the Crown case when properly analysed is weak
- there was a question of delay in the charges coming on for trial.

HELD: Application for bail refused.

1. Because of the nature of the offences alleged, M. is required to establish exceptional circumstances to enable him to be entitled to bail. The *Bail Act 1977* does not define the term “exceptional circumstances”. The plain meaning of that word requires that M. establish circumstances which are out of the ordinary in respect of a person who would be in custody. It has been recognised, in a number of decisions in the Supreme Court, that a combination of circumstances may jointly constitute exceptional circumstances notwithstanding that none of them, taken individually, may be so characterised.

2. In relation to the matters raised by M., standing alone they do not constitute exceptional circumstances. The fact that M. might suffer financial and adverse consequences as a result of being in custody is unfortunate but are they not exceptional. On the material, it cannot be said that the Crown case is so lacking in prospects of success so as to constitute an exceptional circumstance.

3. In relation to the question of delay, on a worst case scenario there would be a period of some 18 months between arrest and trial. Any delay in excess of 12 months is always a matter of concern for a court dealing with an application for bail. However, given the type of delays to which criminal trial processes are unfortunately subjected, the delays forecast by M. do not amount to exceptional circumstances.

4. Taken in combination and as a totality, the circumstances taken at their highest do not constitute exceptional circumstances. Accordingly, the application for bail was refused.

KAYE J:

1. On 25 June 2009, the applicant, Joseph Marijancevic, was charged with conspiring with Mark Adams and Paul Glushak to traffic methylamphetamine in a quantity not less than a commercial quantity, with trafficking a drug of dependence, namely methylamphetamine, and with possessing articles, materials and substances with the intention of trafficking in a drug of dependence. Each of the offences are alleged to have occurred between 5 August and 31 August 2008.

2. The applicant is currently in custody in the Metropolitan Remand Centre.

3. On 20 July 2009, the applicant made an application in the Magistrates’ Court at Melbourne for bail. On 16 July that application was refused. Subsequently, at a committal mention hearing on 17 September 2009, he made a further unsuccessful application for bail.

4. The committal proceeding in respect to the applicant and his co-accused is due to commence on 23 November next.
5. The applicant now applies to this court for bail.
6. The prosecution case against the applicant is set out in some detail in the summary prepared by the informant which is an exhibit to the affidavit in opposition to this application. What I say in the following summary of the case is derived from that document.
7. The offences are alleged to have occurred at a property at 135 Elliotts Road, Broadford. On 6 July 2008 Nola Preece, the ex partner of the applicant, entered into a contract to purchase that property. The Crown alleges that the applicant, Adams, and Preece had each inspected the property before its purchase and were each involved in negotiations with the estate agent for its purpose. As part of the contract of sale they negotiated a licence agreement with the vendors which permitted them the rent-free use of a cottage and shearing shed on the property during the 90 day settlement period.
8. The Crown alleges that the applicant paid the \$1,000 cash deposit for the property. It alleges that on 8 July 2008, the applicant and Preece attended the offices of the vendor's agent and signed the lease agreement and, at the same time, the applicant paid the balance of the deposit, namely \$60,500, with a bank cheque.
9. Subsequently on 16 July 2008 Adams and Glushak were each observed at the cottage and at the shed on the property. An 5 August 2008, investigators covertly executed a search warrant at the property. During that search, investigators observed an illicit clandestine drug laboratory in the shearing shed at the property, which contained a number of items, including chemicals and equipment used in the manufacture of drugs.
10. I interpolate that on the same day, 5 August, a trial involving the applicant as the accused, commenced in the County Court at Melbourne.
11. Subsequently, on 8 August and then on 13 August investigators covertly executed further search warrants at the premises. During those searches they made further observations of the clandestine drug laboratory and the equipment being used in it.
12. On 14 August a listening device was installed in the shed at the property. In the course of that day, Adams and Glushak were each heard discussing the manufacture of methylamphetamine and the various methods used in association with the manufacture of that drug. In the course of their conversations on that day, Adams made passing reference to the applicant on two occasions.
13. On Sunday, 17 August 2008, shortly after midday, the Crown alleges that the applicant attended at the property. The applicant was still on bail in relation to the trial which was then undergoing in the County Court. That trial had nearly completed and indeed on the next day the jury returned its verdict.
14. On the Sunday, the Crown alleges that the applicant entered the drug laboratory and had discussions with Adams with respect to the manufacture of drugs. The transcript of that conversation, as derived from the intercept, is incomplete and there are some gaps in it.
15. On the next day, that is 18 August, the applicant was convicted by the jury on his trial in the County Court on two counts of reckless conduct endangering life and causing serious injury intentionally. Those charges in fact arose out of an incident in December 2004 in which it was alleged that the applicant had driven a vehicle towards a group of people following an argument he had with them. I interpolate that subsequently, in June 2009, the Court of Appeal set aside the convictions and ordered a new trial to take place. On 22 June 2009, Curtain J of this court granted the applicant bail on those charges pending his retrial. I understand that the retrial of those charges is currently listed in the County Court to take place in May 2010.
16. I return to August 2008. On 20 August 2008, investigators covertly executed another search warrant on the shed and took a video of and samples from the illicit drug factory. A preliminary

analysis of a sample taken from a 100 millilitre beaker containing 50 millilitres of liquid indicated the presence of phenpromethamine which is a structural isomer of methylamphetamine.

17. On 30 August, the applicant made a telephone call to Nola Preece from the Melbourne Assessment Prison. During that conversation he expressed his concerns as to Adams' then mental state, and he said to Preece that:

"All those bottles and things need to be boxed up because it's going to be for me when I get out."

18. On the next day, Preece and three other persons attended at the Broadford property and packed up the equipment and chemicals and they cleaned out the shed and the bungalow. At 4.50 pm on that day the investigators intercepted the vehicle, in which Preece was a passenger, and in the vehicle they located items taken from the Broadford property, including chemicals and equipment from the laboratory at that property.

19. The applicant was interviewed concerning the current charges, while he was in custody, in November 2008. In that interview, he denied involvement in drug trafficking. On 25 June 2009, three days after he was granted bail by Curtain J, he was subsequently interviewed again, and again he denied involvement in the offending alleged. On the same day he was charged with the current charges and he has been in custody since.

20. As I stated, during the time of the alleged offending the applicant was then on bail and indeed undergoing a trial in the County Court in respect of the charges which arose from the incident in December 2004. He had been on bail in respect of those charges since being committed for trial in May 2006. While on bail, in January 2007, he was charged with driving while disqualified. In May 2009, the Magistrates' Court at Broadmeadows convicted and sentenced the applicant to a term of imprisonment of four months, two of which were suspended for 18 months. The applicant has lodged an appeal against that conviction and that appeal is presently listed for hearing in the County Court next March.

21. Because of the nature of the offences alleged against the applicant in this case under the *Drugs, Poisons and Controlled Substances Act*, s4(2) of the *Bail Act* require that the applicant establish exceptional circumstances to enable him to be entitled to bail. The Act does not define the term "exceptional circumstances". The plain meaning of that word requires that the applicant establish circumstances which are out of the ordinary in respect of a person who would be in custody. It has been recognised, in a number of decisions in this court, that a combination of circumstances may jointly constitute exceptional circumstances notwithstanding that none of them, taken individually, may be so characterised.

22. The applicant represented himself before me. As I remarked during argument, Mr Marijancevic proved himself to be a more than capable advocate. His submissions were commendably orderly and lucid. In essence, he submitted to me that there were five factors which either individually or collectively constitute exceptional circumstances. They were, firstly, that while in custody, he has difficulty preparing his case. He intends, as is his right, to represent himself at the committal and, if committed, at the trial, and he is finding the conditions in custody make it difficult for him to do justice to himself.

23. Secondly he has submitted that if he remains in custody he will lose his house. Thirdly, he has submitted that if he remains in custody he will suffer a deterioration in his mental health. Fourthly, he has submitted that the Crown case, properly analysed, is so weak as to be an exceptional circumstance, and fifthly, he has pointed to matters pertaining to delay.

24. I shall first consider each of those five circumstances relied on by the applicant separately. In relation to the issue of preparation, the applicant pointed to two main matters. Firstly, he submits that he has not been able to have access to exhibits in the case, and in particular the original recording of the critical conversation at the Broadford premises on 17 August.

25. He has received an enhanced copy of it, however he has submitted it is important that he has the original, because of gaps which appear both in the transcript and in the enhanced copy. He submits that the original may reveal other conversations which give an exculpatory flavour to the conversations that are recorded on that day.

26. Secondly, he has submitted that he has difficulties in preparing his case. He has difficulties, apparently, in using the computer which is available to him and secondly, he has pointed to the need for him to represent himself with a clear and stress free head, and that he finds the conditions in custody militate against him being in such a condition when he appears in court.

27. Turning to those matters, notwithstanding the force with which they were put to me, I am not persuaded that standing alone they constitute exceptional circumstances. In due course, no doubt, the applicant will be able to listen to the original of the intercept and, indeed, I remark that it is important that he be given the opportunity to hear the original if he considers it is in his interests that he do so. No doubt that could be suitably arranged albeit under appropriate supervision.

28. I must say that I do not at this stage understand how the original recording of the conversation would enable the applicant to fill in gaps in the conversation if the enhanced copy has not enabled him to do so.

29. In terms of the limitations on his ability to prepare the case, it certainly seems that notwithstanding whatever limitations he does have, that he has been able to present the bail application before me, as I have already stated, in a very efficient and effective way. I do, of course, appreciate that it is one thing to present a bail application, and quite another thing to cross-examine witnesses at a committal proceeding, and to cope with all of the different vicissitudes that confront an advocate at a trial. Nevertheless, I am not persuaded that he is subjected to such disadvantage while in custody, at this stage, that would inhibit him from fairly representing himself in both at the committal proceeding, and, if he is committed, at the trial. Notwithstanding whatever difficulties he has, he clearly understands his case. He has a very fine grasp on the relevant details of it, and he has a very good understanding of the issues which he must confront.

30. In relation to his house, at the time of his arrest, Mr Marijancevic, was renting a house from the Department of Human Services. He has since received a notice to vacate those premises based on his inability to pay rent. The applicant told me that if he is granted bail he would be able to successfully apply to reduce the rental payable by him and that that would result in a recalculation of the outstanding rent which he would be liable to pay.

31. While I accept that statement of the facts from the applicant, I am unpersuaded that that circumstance, on its own, is an exceptional circumstance. It is an unfortunate, but nonetheless common, factor of imprisonment of people who are charged and not granted bail, that they do suffer financial and adverse consequences as a result of being in custody. To say that is not to ignore the fact that the consequences are unfortunate, however, I regret to say they are not exceptional. The factor relied on by the applicant is of course relevant when I come to consider the totality of the factors, but I am unable to say that, standing alone, it is an exceptional circumstance.

32. In relation to the health issues to which the applicant adverted, he tendered before me two reports of a psychiatrist, a Dr Turecek, one of 2004 and another of August 2008. The earlier report indicates that at that time the applicant was subject to a depressive condition for which he was receiving treatment. The later report, of August 2008, indicated that the applicant's condition, under treatment, had stabilised, but that the applicant still harboured feelings of depression and demoralisation, largely arising out of the legal issues in which he was involved.

33. I have not been provided, however, with any medical report as to the applicant's current condition.

34. The reports which have been put before me indicate that while the applicant is subject to a depressive condition, it does not appear to be so severe in itself as to constitute, at present, an exceptional circumstance. I would infer, as a matter of commonsense, that his retention in custody would not help his depressive condition and in all probability would be detrimental to it. However, in the absence of evidence I could not draw an inference that any deterioration was of such substance as to constitute itself an exceptional circumstance.

35. I turn, then, to the issues relating to the strength of the Crown case. It was this aspect of the application which occupied a large part of the applicant's submissions before me.

36. The applicant submitted that a large part of the Crown case contained in the informant's summary was based on two statements taken from the co-accused, Nola Preece. The Crown has indicated that it will not be relying on those statements at the committal proceeding and, indeed, will be withdrawing them from the depositions. The applicant therefore submitted that a large part of the case has now been effectively withdrawn against him and that the remnant of the case is particularly weak.

37. He supported that submission by referring me to documents which indicate that he has had, to put it mildly, some differences with the Clandestine Laboratory Squad of the Victorian police. He has been involved in some litigation with them, and he alleges that some of their characterisation of the evidence is affected by bias.

38. On the other hand, Mr Michael Tinney, of senior counsel, who represents the Crown, drew my attention to a number of matters which were independent of the evidence of Nola Preece. First, he drew my attention to evidence of surveillance of the applicant in June 2008, which showed that the applicant had a connection with his co-accused Adams and, to a significantly lesser extent, with Glushak.

39. Secondly, in relation to the purchase of the property at Broadford, he drew my attention to the fact that the estate agent says that Preece was with a man who introduced himself as Joe. Mr Tinney also referred me to some financial banking documents, which appear to show a connection between the applicant and the cheque which was used to pay the balance of the deposit to the estate agent for the purchase of the property.

40. Thirdly, in relation to the intercept of 17 August 2008, Mr Tinney referred me to the evidence of both Ms Lokes and Detective Senior Constable Kugler in which they both identified the applicant as the voice which has been attributed to him in the transcript.

41. Finally, Mr Tinney referred me to the events of 30 August, and particularly the conversation which he had with Nola Preece. In that conversation, at the least, the applicant made an implied admission to his connection with the Broadford property and secondly, what he has said, Mr Tinney submitted, might be fairly construed as an instruction to Ms Preece to remove incriminating items from the premises at Broadford. Mr Tinney also submitted that that inference is to be enhanced by the consequent actions of Ms Preece on the next day attending at the property and removing some of those items.

42. Mr Tinney submitted that indeed those factors, and others, constitute the Crown case against the applicant as a reasonably strong case.

43. Considering this aspect of the application for bail, as I remarked during argument, it is difficult for a judge at this stage to make any sensible estimate of the strength or otherwise of the Crown case. The committal proceeding has not taken place. The magistrate who hears the committal, after having heard cross-examination of witnesses, will be in a far better position than I am to make any realistic assessment of the Crown case, particularly in relation to this aspect of the application for bail.

44. At this stage, all I can conclude is that I do not consider that the Crown case is so lacking in prospects of success that that would constitute an exceptional circumstance in this application. In other words, I cannot characterise the Crown case as being weak or particularly weak so as to constitute an exceptional circumstance. Other than that, I think it is undesirable for me to say anything else about the strength or otherwise of the Crown case. However, the matters relied on by Mr Tinney correctly, in my view, do contradict the submission that this is such a weak case against the applicant that he ought to be entitled to bail as a result of it.

45. Finally, I turn to the issue of delay. Mr Tinney told me that the Crown's preference would be that if he is committed for trial, the applicant be tried in this court and if that were to occur, that the trial would take place in July or August 2010. If he is committed to stand trial in the County Court, it is likely that the trial will take place in early 2011. Thus, on a worst case scenario, it would seem the period between arrest and trial would be some 18 months. Of course predictions can, as experience tells us, sometimes be quite inaccurate. However, it would seem to me the

matters related by Mr Tinney are at present realistic and I should act on those estimates.

46. Any delay in excess of 12 months is always a matter of concern for this court. In this case the applicant, I think quite fairly, relies on the circumstance that in fact no charge had been laid before him before he was bailed on 22 June, and then he was charged three days later and taken back into custody.

47. However, at this stage, particularly given the type of delays to which the criminal trial processes are unfortunately subjected, I am unable to say that the delays forecast by Mr Tinney are exceptional circumstances. That aspect of the case may of course alter in due course but if those predictions hold good, I would not consider that the delay itself would be exceptional.

48. Thus pausing there, I am unable to conclude that any of the single factors relied on by the applicant are exceptional. In combination, I am satisfied he will suffer some disadvantage by being imprisoned while he is preparing his case and representing himself. However, that disadvantage has not been shown to me to be substantial.

49. He will unfortunately lose his house. The evidence does not enable me so say other than I could fairly conclude that a term in custody may have an adverse impact on his mental state, but I am unable to say that it would be severe or significant in the absence of evidence to that effect. The delay, whilst always unfortunate, is not unusual.

50. Taken in combination and as a totality, I do not consider that those circumstances, taken at their highest, do constitute exceptional circumstances and thus, for that reason, the application for bail would be refused.

51. The Crown initially also relied on the proposition that if exceptional circumstances were made out, there is an unacceptable risk that the applicant would reoffend and there is an unacceptable risk that he would endanger the safety and/or welfare of the public. Mr Tinney, in his submissions, properly conceded that the second aspect of that, that is the endangerment to the safety and welfare of the public, is not relied on. In my view there is no material in the documents before me which would enable me or entitle me to conclude that the applicant would be such a risk.

52. On the first limb, that is the unacceptable risk of reoffending, Mr Tinney relied on the fact that the applicant was on bail in relation to the matters in the County Court when he was involved in the alleged offending in this case, and also while he drove while disqualified, and he also draws my attention to the very long list of previous convictions of the applicant going back over 40 years.

53. On the other hand, the applicant properly draws to my attention that notwithstanding his exceptionally long list of previous convictions, he has no previous convictions for drug offences. That is a matter which I take into account.

54. My mind has wavered on this aspect of the case and indeed it is probably better I do not express any view on it, since I am not satisfied there are exceptional circumstances. If I had been required to express a view, albeit it with some hesitation, I would have accepted that there was an unacceptable risk of reoffending on bail, but I must say that is a matter on which other minds may differ.

55. However, in conclusion, I am not persuaded that the applicant has made out exceptional circumstances and therefore the application for bail is refused.

56. I again commend you, Mr Marijancevic, for the very able way in which you mustered and presented your case. Thank you, too, Mr Tinney for your assistance.

APPEARANCES: For the applicant Marijancevic: In Person. For the respondent DPP: Mr MH Tinney SC, counsel. Solicitor to Office of Public Prosecutions.