

23/09; [2009] VSC 384

SUPREME COURT OF VICTORIA

*Re KYLE MAGEE*

J Forrest J

4 September 2009

**CRIMINAL LAW – BAIL – CRIMINAL DAMAGE – SHOW CAUSE – WHETHER ONGOING DETENTION JUSTIFIED – LIKELY TOTAL EFFECTIVE SENTENCE FOR SUBJECT OFFENCE EXCEEDING PERIOD APPLICANT DETAINED IN CUSTODY – PROSPECT OF RE-OFFENDING – PURPOSE OF GRANTING BAIL: BAIL ACT 1977, S4(4).**

M. had been charged with causing criminal damage to the value of approx. \$340. Bail was refused by the magistrate on the ground that M. had numerous prior convictions for similar offences and was alleged to have committed the present offence whilst on bail for a similar offence. Further, it was alleged that there was a potential breach of a suspended sentence and there was a concern that he was likely to re-offend. M. had already spent 72 days in custody and whilst the risk of re-offending was real if bail were to be refused, M. would have spent a total of 127 days in custody which could be more than the sentence to be imposed. Upon an application for bail—

**HELD: Bail granted with conditions.**

1. The question in the present case was whether or not M. had shown cause why his detention in custody was not justified. If that question was answered in the affirmative, bail should be granted. If answered in the negative, bail must be refused. There was no second step.

*Re Asmar* [2005] VSC 487; MC 30/2005, applied.

2. In granting or refusing bail, a synthesis of the various considerations is required. In some cases, one particular matter may point squarely to the refusal of or, alternatively, the granting of bail, but this must be taken into account with all other relevant factors, bearing in mind that the primary question is whether a person will meet the conditions of bail and attend at the trial as required.

*DPP v Ghiller* [2000] VSC 435, applied.

3. Whilst it is true that there appeared to be a real risk of re-offending in the present case, that risk had to be balanced against other matters such as the relatively minor nature of the offence, the likely sentence to be imposed could exceed the period M. had been detained in custody, that M. did not pose a flight risk nor was unlikely to fail to answer his bail and that the criminal law would deal with any such re-offending.

**J FORREST J:**

**Background facts**

1. On 25 June the applicant, Kyle Magee, applied paint to an advertisement located in a tram shelter in William Street, Melbourne. The shelter is located outside the County Court building.

2. On the police case, he caused approximately \$340 worth of damage to the shelter. There is an issue about the costs involved in fixing that damage which does not need to be discussed further on this application.

3. As a consequence of his actions, which were observed by the police and are the subject of admissions by the applicant, Mr Magee has been charged with intentionally damaging property and possessing an article for the purpose of committing criminal damage. This refers to the paint brush.

4. These actions appear to be part of a continuing protest on the part of the applicant against advertising in the community.

5. The applicant has been held in custody for approximately ten weeks. An application for bail on 27 July 2009 was refused by Magistrate Garnett. The charges referable to this event will be heard on 29 October in the Magistrates' Court.

6. Up to this point, one could well remark, how could this happen? What appears to be a relatively minor offence has resulted in a citizen being incarcerated for over two months, and dependent upon this Court for a grant of bail, incarcerated for a further period of roughly two months, absent appeal or further application.

7. The Magistrate's refusal, no doubt, was based upon the applicant's prior record. He is, as described in the affidavit supporting the Crown's resistance to the granting of bail, a recidivist defacer of advertising in this State. He has six prior convictions between March 2007 and June 2009 for criminal damage, all related, as I understand it, to his campaign against advertising. Several of those convictions have resulted in his imprisonment. Moreover, at the time of the alleged offence on 25 June, he was on bail for at least one other similar offence. In fact, he has been charged with, in total, a further three offences allegedly committed prior to 25 June: 30 April, 2 May and 2 June 2009.

8. A condition of his bail in relation to at least one of the earlier offences (if not all) is that he would not attend within the CBD. Clearly in relation to the subject offence he was in breach of that condition when he painted the William Street tram shelter. Further, there is a potential breach of a suspended sentence imposed by the Melbourne Magistrates' Court on 12 June 2009 in relation to an offence committed on 5 June 2009. The suspended part of that sentence amounts to some 14 days.

### Submissions

9. It was said on behalf of the applicant that if convicted on this charge, the total effective sentence was highly unlikely to be more than two months' imprisonment. He has already served 72 days in custody. This, it was said on his behalf, was the paramount consideration. It was further said, on his behalf, that any risk of re-offending whilst real, would involve such minor re-offending that it can, if not put to one side, be treated as a relatively insignificant consideration.

10. The Crown relies upon two factors in its submission that bail be refused; firstly, that the applicant is likely to re-offend by causing further criminal damage; secondly, that the applicant's behaviour exhibits a blatant disregard for bail conditions which of itself invokes questions of public policy. It is said that those two factors should militate against the granting of bail.

### Analysis

11. At the time of this offence the applicant was at large awaiting trial for one of the other charges, therefore he must, pursuant to s4(4) of the *Bail Act*, show cause as to why his detention in custody is not justified.

12. In determining this issue I apply the principles set out by Maxwell P in *Re Fred Joseph Asmar (Asmar)*<sup>[1]</sup> and, in particular, his Honour's statements in relation to the manner in which s4 of the *Bail Act* is to be construed and applied. In particular His Honour said:

"In my view the only question for the court on an application to which section 4(4) applies is: Has the applicant shown cause why his/her detention in custody is not justified. Put another way, the question is whether the applicant has satisfied the court that his/her detention in custody is not justified. That question will be answered either in the affirmative or the negative. If answered in the affirmative, bail should be granted. If answered in the negative, bail must be refused. There is no second step."<sup>[2]</sup>

13. In granting or refusing bail, as *Asmar* and other decisions of this Court make clear, a synthesis of the various considerations is required. In some cases, one particular matter may point squarely to the refusal of or, alternatively, the granting of bail, but this must be taken into account with all other relevant factors, bearing in mind that the primary question is that set out by Eames J in *DPP v Ghiller*<sup>[3]</sup> cited with approval by Maxwell P in *Asmar*<sup>[4]</sup>:

"Even when an applicant for bail must show cause, that is even whether the presumption is that bail will not be granted unless the person makes out a case for bail, the primary question relevant to the grant of bail is whether a person will meet the conditions of bail and attend at the trial and as required. The question of the strength of the case against that person is merely one of the factors to be considered when evaluating whether it is more or less likely that a person would make the conditions of bail."

14. I interpolate here that the refusal of bail can never be treated as a substitute for the processes of the criminal Court dealing with offences other than the subject offence.
15. I turn now to the factors relevant to the refusal of granting of bail to the applicant.
16. The applicant is 25 years of age and is a Bachelor of Arts student at Monash University. Apart from the criminal damage convictions and associated charges, he has no other relevant prior convictions. It is clear that these persistent offences stem from his beliefs in relation to advertising and the evils which he apprehends attach to advertising.
17. He will, if released on bail, live with friends in a house in Footscray.
18. Whilst it is true that there appears to be a real risk of reoffending, and by that I mean a risk which is neither far fetched nor fanciful, whatever conditions are imposed, that risk has to be balanced against the following matters.
19. Firstly, the prospective offence of which there may be a risk is particularly low on the scale of criminal activity. That is not to say for one moment that it is to be condoned, quite the contrary. Citizens of this State, be they individuals or corporations, are entitled to have their property remain intact without interference by others.
20. Secondly, notwithstanding his prior convictions, it would seem to me highly unlikely that the period of imprisonment which will be imposed for this offence could be more, in a total effective sentence of imprisonment, than the ten weeks he has already served by way of putative pre-sentence detention. This, I think, is highly significant, as was submitted on behalf of the applicant. Further, if I refuse bail, the applicant will spend another two months in custody, a total of 127 days, far more than I perceive would be the result of a conviction and sentence imposed in the Magistrates' Court in relation to this particular offence.
21. Thirdly, it is not suggested by the Crown that he is a flight risk. There is no suggestion he would interfere with witnesses, nor is there any suggestion that it is likely or indeed possible that he will not attend the hearing in October.
22. Fourthly, such prospective re-offending carries no apparent risk of injury to any other member of the community or, for that matter, threat to any other member of the public. Again, I repeat, that is not in any way to condone that which he has done or may contemplate doing in the future.
23. Finally, the criminal law process will deal with any such re-offending. Counsel for the applicant drew my attention to what was said by Fox J in *Burton v R*<sup>[5]</sup>, cited with apparent approval by Maxwell P in *Asmar*.<sup>[6]</sup> His Honour said:
- “It is not normally a factor of any great weight adverse to the granting of bail that an accused person may possibly commit a crime while he is on bail. It should not readily be assumed that he might commit an offence or further offence. If he does, he will be dealt with by the criminal law. There are, however, situations in which the consequences of any crime he commits while on bail may be so serious and have such widespread effect that the possibility he may commit a crime while on bail is an important consideration.”<sup>[7]</sup>
24. To my mind, the qualification referred to by his Honour is pertinent here. A citizen should not be detained arbitrarily because there is a real risk of him committing a further offence of a relatively minor nature; one that the criminal law will punish if committed.
25. It is tolerably clear that the period for which the applicant has already been detained is likely to exceed the total effective sentence of the subject offence. Questions relating to this type of re-offending can be dealt with in due course by the criminal law taking its course, not by incarceration without bail for a period longer than that which would be served for the subject offence.<sup>[8]</sup>
26. In all the circumstances, I have taken the view that the applicant has shown cause and that he should be granted bail.

**Orders**

27. The question which then arises is the terms on which such bail should be granted. I have reflected at some length over that question. I have determined, ultimately, subject to hearing from counsel, that the following special conditions should be applied:

- (1) That the applicant reside at 91 Gordon Street, Footscray.
- (2) That the applicant not attend the Melbourne central business district within the street boundaries of Latrobe Street, Spring Street, Flinders Street and Spencer Street, unless to attend Court.
- (3) There should be a reporting condition which I will discuss with counsel in a moment, and
- (4) A standard condition as to any proposed change of address.

28. With the exception of the alteration to paragraph 3, I propose to make those orders. Paragraph 3 will read that the said Kyle Magee report each Wednesday to the officer in charge of the police station at Footscray or his nominee between the hours of 6.00am and 9.00pm.

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[1] [2005] VSC 487, [5]-[18].

[2] [2005] VSC 487, [11].

[3] [2000] VSC 435, [43].

[4] [2005] VSC 487, [15].

[5] (1974) 3 ACTR 77.

[6] [2005] VSC 487, [26].

[7] [1974] 3 ACTR 77, 78.

[8] I should add that in reaching this decision I have not found it necessary to refer to the principles set out in the *Charter of Human Rights and Responsibilities Act* (Vic) 2006.

**APPEARANCES:** For the applicant Magee: Mr D Glynn, counsel. Victoria Legal Aid. For the DPP: Ms M Stylianou, counsel. Office of Public Prosecutions.

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