30/05; [2005] VSC 487

SUPREME COURT OF VICTORIA

ASMAR, Bail application

Maxwell P

28, 29 November 2005

CRIMINAL LAW – BAIL – ACCUSED CHARGED WITH SERIOUS OFFENCES – "SHOW CAUSE" SITUATION – QUESTION FOR COURT TO CONSIDER WHEN DETERMINING APPLICATION FOR BAIL – WHETHER APPLICANT HAS SATISFIED COURT THAT DETENTION IN CUSTODY NOT JUSTIFIED – WHETHER ONE- OR TWO-STEP PROCESS: *BAIL ACT* 1977 S4(4).

1. The only question for the Court on an application to which s4(4) of the *Bail Act* 1977 applies is: "Has the applicant shown cause why his/her detention in custody is not justified?" There is no shift in onus. Where s4(4) applies, the applicant bears the onus from start to finish of showing that his/her detention is not justified. That question will be answered either in the affirmative or in 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.

***DPP v Harika* MC11/01; [2001] VSC 237, not followed.**

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

2. This does not mean that the "unacceptable risk" issues identified by s4(2)(d) are excluded from consideration. On the contrary, those issues must be at the heart of any consideration of whether a person's pre-trial detention is justified. Parliament has made clear in s4(2)(d) and in s5(2) that an assessment of those risks is central to the decision whether or not a person should be released on bail and, if so, on what conditions. It follows that if, having considered the four risk issues, the Court is satisfied that the continued detention is not justified, there is no occasion for s4(2)(d) to come into play. This is precisely because the matters with which s4(2)(d) is concerned will have already been fully considered in deciding the s4(4) question. There is no work for s4(2)(d) to do.

MAXWELL P:

1. On 28 November 2005, I heard an application for bail by Fred Joseph Asmar ("Asmar"). On 29 November 2005, I ordered that Asmar be released on bail, subject to [certain] conditions.

2. On 17 October 2005, Asmar was charged with the following offences:

- three counts of false imprisonment;
- three counts of making threats to kill;
- three counts of making threats to inflict serious injury;
- two counts of unlawful assault;
- one count of possession of an unregistered firearm;
- one count of impersonating a member of the police force; and
- one count of possession of cartridge ammunition whilst unlicensed.

All but the last of these charges relate to a single incident which is alleged to have taken place in the early hours of Friday, 23 September 2005, to which fuller reference will be made below.

3. Paragraph 4(4)(c) of the *Bail Act* 1977 ("the Act") is applicable, since Asmar has been charged with "indictable offence[s] in the course of committing which [he] is alleged to have used or threatened to use a firearm". In those circumstances, s4(4) of the Act requires that –

> "the Court shall refuse bail unless the accused person shows cause why his detention in custody is not justified."

4. The application for bail is opposed. An earlier application for bail in the Magistrates' Court was refused.

The applicable principles

5. Section 4 of the Act is headed "Accused person held in custody entitled to bail". The

attractive simplicity of this statement is, however, not borne out by the complicated provisions of s4. The entitlement to bail contained in the opening words of s4(1) is so hedged about with qualifications, with different tests and different onuses according to the class of offence involved, that the "scheme" of the provisions is difficult to discern.[1] (In its recently-published *Consultation Paper – Review of the Bail Act*, the Victorian Law Reform Commission notes that in its consultations "the most frequently raised problem... was section 4". The Commission is considering whether the *Bail Act* should be rewritten).

6. The following propositions can, I think, be distilled from the provisions of s4 (and of s13, which is incorporated by reference in s4(2)(a)):

> 1. If the accused person is in custody pursuant to the sentence of a court for some other cause, bail may be granted but only on condition that the person not be released on bail before he or she is entitled to be released under a parole order.[2]
>
> 2. In the case of a person charged with treason or murder[3], or with drug offences of the kind referred to in s4(2)(aa), bail must be refused unless the Court is satisfied that exceptional circumstances exist which justify a grant of bail.
>
> 3. Bail must be refused if the Court is satisfied that there is an unacceptable risk that the accused person if released on bail would:
> - fail to surrender himself or herself into custody in answer to his or her bail;
> - commit an offence whilst on bail;
> - endanger the safety or welfare of members of the public; or
> - interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or herself or any other person.[4]
>
> 4. In the case of a person charged with an offence referred to in s4(4), bail must be refused unless the accused person shows cause why his or her detention in custody is not justified.[5]

7. It is the inter-relationship of propositions 3 and 4 which requires consideration on the present application. More accurately, the question is how the "unacceptable risk" provisions of s4(2)(d) relate to the "show cause" provisions of s4(4). On this question, the applicant and the Crown were united in submitting that the correct approach was that set out by Gillard J in *DPP v Harika*.[6]

8. In *Harika*, the applicant was charged with armed robbery. Paragraph 4(4)(c) was therefore applicable. It followed, as his Honour said, that the applicant for bail assumed the burden of establishing that his detention in custody was not justified. His Honour continued:

> "However, that is not the end of the inquiry. If he establishes cause, the Court shall refuse bail if it is satisfied there is an unacceptable risk that if the applicant is released on bail, he may commit one or more of the prohibited acts set out in s4(2)(d). ... The factors that must be weighed in considering the question of unacceptable risk are set out in s4(3). It is noted that the Court must consider all relevant matters, and the list of specified ones is not exhaustive...
>
> The burden of establishing unacceptable risk lies upon the Crown. The two inquiries can overlap, in the sense that the unacceptable risk factors have to be weighed, when considering whether the applicant for bail has shown cause. The Act does not define what is meant by the phrase 'shows cause why his detention in custody is not justified.' It is trite to observe that all relevant circumstances must be weighed, leading to the conclusion that the detention in custody is not justified."[7]

9. On this analysis, as encapsulated in the Director's submission in the present case – "there is a two step process which requires the Court to consider the respective burdens imposed by the two subsections [s4(4) and s4(2)(d)]". In this process, so it is said, the applicant for bail must first "show cause why his detention in custody is not justified". That is the first step. Once cause is shown, the Court then moves to the second step, that is, to decide whether there is unacceptable risk as defined by s4(2)(d). On that issue, the prosecution bears the onus.

10. With great respect to his Honour, and to counsel who have sought in the present case to uphold the approach, I do not think this analysis is correct. As I read the Act, s4(4) is a provision which governs – exhaustively – applications for bail by persons charged with offences to which the subsection applies. Subparagraph 4(2)(d) has no application of its own force though, as I explain below, the "unacceptable risk" analysis must still be undertaken.

11. In my view, the question – the only question – for the Court on an application to which s4(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 in 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. (The contrast with the two-step approach which is required in an "exceptional circumstances" case is considered below).

12. This does not mean that the "unacceptable risk" issues identified by s4(2)(d) are excluded from consideration. On the contrary, those issues must be at the heart of any consideration of whether a person's pre-trial detention is justified. Parliament has made clear in s4(2)(d) and in s5(2) that an assessment of those risks is central to the decision whether or not a person should be released on bail and, if so, on what conditions. To ask (as s4(4) does) whether the person's detention is justified is simply to ask the same question in a different way. The same considerations must be relevant.

13. There may, of course, be additional considerations which, in a particular case, might be said to justify the person's continued detention. But the four nominated risks must, as it seems to me, be at the forefront of the Court's consideration of the justification for the person's detention. Put another way, I do not see how the Court could be satisfied – as s4(4) requires it to be – that the accused person's detention in custody was not justified, unless the Court was satisfied that there was no unacceptable risk on any of the four grounds.

14. It follows that if, having considered the four risk issues, the Court is satisfied that the continued detention is not justified, there is no occasion for s4(2)(d) to come into play. This is precisely because the matters with which s4(2)(d) is concerned will have already been fully considered in deciding the s4(4) question. There is no work for s4(2)(d) to do.

15. This is, in substance, the approach which Eames J adopted in *DPP v Ghiller,*[8] a case decided before Gillard J's decision in *Harika. Ghiller* was also a "show cause" case under s4(4) of the Act. His Honour said:

> "Even when an applicant for bail must show cause – that is, even when 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 the person is merely one of the factors to be considered when evaluating whether it is more or less likely that the person would meet the conditions of bail."[9]

In deciding whether the applicant had shown cause, his Honour went on to consider whether there was an unacceptable risk that, if released on bail, Mr Ghiller would engage in criminal conduct;[10] threaten or harm witnesses;[11] abscond on bail;[12] or breach bail conditions.[13]

16. For the most part, there is little practical difference between the two-step approach propounded by Gillard J and the one-step approach described above. As noted earlier, his Honour acknowledged that –

> "the unacceptable risk factors have to be weighed when considering whether the applicant for bail has shown cause."[14]

17. At the same time, I think it is important to make clear that once the applicant for bail shows cause that his detention is not justified, that *is* the end of the inquiry. There is no second step. Nor, therefore, is there any shift of onus. Where s4(4) applies, the applicant bears the onus from start to finish, of showing that his/her detention is not justified.

18. The one-step approach required by s4(4) may be contrasted with the two-step approach which has been held to be required where s4(2)(a) or s4(2)(aa) applies, that is, where the Court must refuse bail unless satisfied that "exceptional circumstances exist which justify the grant of bail." This Court has consistently held that, once the applicant for bail satisfies the court that exceptional circumstances exist which justify bail, bail must nevertheless be refused – in accordance with s4(2)(d) – if the prosecution establishes unacceptable risk.[15] No occasion arises

in the present case to consider whether, as a matter of construction, the phrase "exceptional circumstances... which justify the grant of bail" itself requires a consideration of "unacceptable risk" issues, such that in truth only a one-step approach is required.

19. In opposing bail in this case, the Crown relied on two of the four risk factors – the risk of further criminal conduct, and the risk of interfering with witnesses. Before I deal with those submissions, I should set out the circumstances in which the offences are alleged to have been committed. *[His Honour then referred to these matters, the risk of committing an offence whilst on bail, the risk of interference with witnesses and continued] ...*

44. I pointed out to senior counsel for the applicant that s4(4) did not confer on the Court a general discretion to grant bail on compassionate grounds. The subsection is not concerned with the applicant showing cause "why he/she should be released". That being so, I asked how these personal factors could bear relevantly on the "unacceptable risk" analysis which must be undertaken. Senior counsel submitted, and I accept, that the existence of pressing personal circumstances such as these is relevant to the Court's assessment of the likelihood that the applicant would, if released on bail, comply with stringent bail conditions.

45. I was particularly impressed with the evidence given by Mrs Asmar, and by the great need which she clearly has for his support, both in her distress over her father's imminent death and in the running of the business. Asmar was in court when that evidence was given and could not but have been deeply affected by what was said.

46. I am confident that Asmar realises, and will remember at all times when he is on bail, that his wife and his family and his business badly need him. I am confident also that he appreciates that any breach of his bail conditions would be simply disastrous for all concerned, himself included.

47. For these reasons, I expect that Asmar will comply with the bail conditions I have imposed. On that assumption, I was satisfied that there was no unacceptable risk on either of the grounds relied on by the Crown and, accordingly, that Asmar's detention was not justified.

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[1] cf. G Hampel and D Gurvich, *Bail Law in Victoria* (Federation Press, 2003) pp4-7.
[2] Subsections 4(2)(b), 4(2A).
[3] Subsections 4(2)(a), 13.
[4] Subsection 4(2)(d).
[5] Subsection 4(4).
[6] [2001] VSC 237.
[7] At [44]-[47].
[8] [2000] VSC 435.
[9] At [43] (emphasis added).
[10] [48].
[11] [52]-[53].
[12] [59].
[13] [60].
[14] At [46].
[15] See *Beljajev v DPP* (1998) 101 A Crim R 362; *Re Waters* [2005] VSC 443 at [5].
[16] See in this regard *Veen v R* [1979] HCA 7; (1979) 143 CLR 458 at 463-5; 23 ALR 281; (1979) 53 ALJR 305 per Stephen J; *Kable v DPP* [1996] HCA 24; (1996) 189 CLR 51 at 122-3; 138 ALR 577; (1996) 70 ALJR 814; (1996) 14 Leg Rep C1; [1996] 3 CHRLD 435 per McHugh J; *Attorney-General v David* [1992] VicRp 53; [1992] 2 VR 46 at 61-2 per Hedigan J; *Fardon v Attorney-General (Qld)* [2004] HCA 46; (2004) 223 CLR 575; (2004) 210 ALR 50; (2004) 78 ALJR 1519 at 1542-3 [123]-[125] per Kirby J.
[17] (*Supra*) at [43].
[18] (1974) 3 ACTR 77 at 78.
[19] [2002] VSC 321.
[20] At [17].

APPEARANCES: For the DPP: Mr R Skinner, counsel. For the applicant Asmar: Mr PG Priest QC and Mr D Hannan, counsel. Balot Reilly, solicitors.
