07/13; [2013] VSC 59

SUPREME COURT OF VICTORIA

Re MITCHELL

T Forrest J

8 February 2013

CRIMINAL LAW – BAIL – APPLICANT AT RISK OF RE-OFFENDING – APPLICANT HAD A *PRIMA FACIE* RIGHT TO BAIL – NATURE OF OFFENDING NOT GRAVE – SENTENCE IF CONVICTED WOULD BE SIGNIFICANTLY SHORTER THAN PERIOD ON REMAND – APPLICANT AN ABORIGINAL WOMAN AGED 22 WITH TWO YOUNG CHILDREN – OFFER MADE BY PERSON TO ALLOW THE APPLICANT TO RESIDE IN HER HOUSE – WHETHER BAIL SHOULD BE GRANTED WITH CONDITIONS: *BAIL ACT* 1977, S3A.

HELD: Application for bail granted with conditions.
1. The legal principles to be applied in this application were clear enough. The question of whether the applicant was an unacceptable risk of re-offending was not a discrete question in an application, nor was it necessarily determinative. It had to be considered with all the other factors relevant to bail against the background that the applicant was *prima facie* entitled to bail.

2. Whilst there was a real prospect that the applicant would re-offend whatever conditions were imposed, it was unlikely that she would be sentenced to a longer term than the period served on remand. The applicant had stable accommodation available to her and she was expected to become a mother again in April 2013.

3. Taking into account the applicant's Aboriginality as required by s3A of the *Bail Act* 1977 and other relevant matters, bail was granted with conditions.

T FORREST J:

1. The applicant is currently charged with six offences:

(1) two charges of obtaining property by deception on 1 December and 2 December 2012 contrary to s81(1) of the *Crimes Act* 1958 ('the Act');

(2) two charges of theft, both said to have occurred on 3 December 2012, contrary to s74 of the Act;

(3) escaping from custody on 4 December 2012 contrary to s479C(1)(a) of the Act; and

(4) obtaining a financial advantage by deception on 12 December 2012, contrary to s82(1) of the Act.

I shall refer to these as 'the current offences'.

2. The applicant unsuccessfully applied for bail on 20 December 2012 before the Melbourne Magistrates' Court. She was remanded to appear at the Swan Hill Magistrates' Court on 9 January.

3. When this application was filed, and indeed when the application was opened, bail was opposed on the basis that at the time of the alleged commission of these offences the applicant was already the subject of a grant of bail in relation to allegedly similar offending. I am unsure as to whether bail was opposed in the Magistrates' Court on the same basis. It followed then that the onus on the application rested on the applicant to demonstrate why her detention in custody was not justified.[1]

4. I am now told that it appears that the applicant was not on bail when these offences were committed. The onus, therefore, rests with the Crown to show that the applicant ought not be granted bail. They seek to do that by endeavouring to demonstrate that the applicant is an unacceptable risk of committing further offences whilst on bail. The applicant has a *prima facie* right to bail.

The nature of the offending

5. On its face, the offending is trivial when compared with other cases that come before this Court in this type of application. It is alleged in Count 1 that the applicant feigned homelessness

and illness and deprived a person of $30 on 1 December and $170 on 2 December. On 3 December, it is alleged she stole $50 from one person and $15 from another. Upon being apprehended by police on 4 December at her home, it seems that she requested to go to the toilet, leapt from a window, and then this pregnant mother of two proved too fleet of foot for the arresting members. Eight days later, in Mildura, she is alleged to have obtained a financial advantage by travelling on public transport on a children's ticket. I interpose that the way this latter charge is pleaded does not disclose an offence. It is unnecessary to set out the alleged circumstances any further. This is not offending on a grand scale.

6. His Honour the learned Magistrate refused bail, as I understand it, because of his concerns that the applicant represented an unacceptable risk of committing further offences whilst on bail. As I have observed, the applicant, it seems, had committed similar offences in August 2012, and had only just been placed on a Community Corrections Order.

7. The applicant has a prior history that involves numerous Children's Court offences, mostly relating to dishonesty and breaches of various types of court orders. She has continued to offend along the same lines in the adult courts. Since 2010 she has received several Community Based Orders for dishonesty offences. She has breached all of them with further offending. By June 2012, under the new Corrections regime, she received a three month Community Corrections Order with a 30 hour unpaid community work component. By November she was back before the Magistrates' Court charged with burglary, obtaining property by deception (two counts), attempting to obtain property by deception, theft, obtaining a financial advantage, shop stealing and breaching her Community Corrections Order. I presume she pleaded guilty and, for the first time, she was sentenced to a term of imprisonment, albeit wholly suspended. I understand the total effective term of the suspended sentence was six months suspended for a period of 12 months. Within two days, the first of the current offences was allegedly committed. The learned Magistrate's conclusion that the applicant presented an unacceptable risk of re-offending is unassailable.

8. That is not the end of this application, however. The applicant is a young Aboriginal woman aged 22. She has two young children and is soon to become a mother again. All her recent proven offending and the current offences it seems occurred in the Swan Hill area. Certainly she has been dealt with at the Swan Hill court.

9. The applicant's early life has been coloured by violence, extreme poverty and alcohol addiction within her family. She now has spent nearly seven weeks in custody for offences that, even with her prior record, would seem unlikely to carry any greater punishment than that already served. Ms Loretta Mitchell is the applicant's aunt. She lives in Mildura and in a letter annexed to an affidavit filed on the applicant's behalf has expressed a willingness to welcome the applicant into her home. I quote from this letter:

> I live in a three bedroom house. I have my grandson in my care, he is eleven years old. He has his own bedroom and I also have one room for Patricia. I am willing to take her. I will make sure I get her some counselling at the Aboriginal Co-op in Mildura. I want to help her in any way I can and I also want her to have her children in her care as she is a great mum. I know she can do it. Hopefully this wakes her up.
> Thanks
> Loretta Mitchell

10. It is true, as the prosecution point out, that that letter is neither sworn nor dated. But, in the circumstances of this case, where the applicant is represented by Aboriginal Legal Service and where she is indigent it would seem unreasonable not to accept the content of the letter filed on the applicant's behalf by her solicitors.

11. The legal principles that I must apply are clear enough. The question of whether the applicant is an unacceptable risk of re-offending is not a discrete question in an application, nor is it necessarily determinative. It must be considered with all the other factors relevant to bail against the background that the applicant is *prima facie* entitled to bail. Those other factors *inter alia* are these:

> (a) the likely seriousness of that re-offending;
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> (b) the likely sentence that could be imposed should the applicant be convicted of the offences upon which bail is sought;

(c) whether and to what extent the applicant is a flight risk;

(d) whether and to what extent the applicant is a risk of interfering with witnesses;

(e) the fact that, if there is re-offending, the criminal process will deal with that; and

(f) any personal factors that may attach to the applicant.

12. I am satisfied that there is a real prospect that the applicant will re-offend whatever conditions are imposed and that has troubled me, as it troubled his Honour, the learned Magistrate. But time has moved on since that application. As I have observed, the applicant has now served nearly seven weeks on remand. It is unlikely that she would be sentenced to a longer term of imprisonment for the current offences. I am told the matter is listed for contest mention on 19 February 2013 and that a contest could be heard by July or August 2013. By that time, the applicant will have served eight or nine months on remand for these offences; a period very significantly longer than any sentence that would reasonably be expected even if she were convicted of all the offences. I am prepared to accept that the applicant has stable accommodation available to her with her aunt, who is to be commended for her preparedness to assist the applicant and her family. As the applicant will become a mother again in April it is highly desirable that the baby come home to a loving family environment. The prospect of re-offending is marginally diminished by the fact of the applicant's now late-term pregnancy and her accommodation arrangement in Mildura. I should also add that the type of re-offending that the Crown contend constitutes the risk does not appear to involve any risk of injury to any other member of the community, and if there is re-offending, as I say, the criminal law will punish the applicant accordingly for that re-offending. In all these circumstances, I consider that I ought grant bail in this matter.

13. I should add that I have been required to take into account the applicant's Aboriginality, by virtue of s3A of the *Bail Act* 1977. In the context of this application I would have granted bail regardless of any impact from that provision. That said, over policing of Aboriginal communities and their overrepresentation amongst the prison population are matters of public notoriety. In this case I regard the use of s82(1) of the Act (obtaining financial advantage by deception) to charge an adult for travelling on a child's ticket as singularly inappropriate.

14. I propose to grant bail. The applicant will be admitted to bail on her own undertaking and on the following conditions:

(a) she attend at the Magistrates' Court of Victoria at Swan Hill on 19 February 2013 and not depart without leave of the court and, if leave is given, return at the time specified by the court and again surrender herself into custody;
(b) she reside at [nominated address];
(c) she attend at Sunraysia Community Health Service, corner of Deakin Ave and 13th Street, Mildura on Monday 11 February 2013 at 10.00am and comply with all lawful directions of the authorised representatives of that service; and
(d) she not contact, directly or indirectly, any witness except the informant.

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[1] See s4(4) of the *Bail Act* 1977.

APPEARANCES: For the applicant: Ms F Todd, counsel. Aboriginal Legal Service. For the respondent: Ms J Warren, counsel. The Office of Public Prosecutions.
