17/82

SUPREME COURT OF VICTORIA

Application for Bail by Michael SULLIVAN

Sir John Young CJ

11 February 1982

BAIL – ACCUSED CHARGED WITH CONSPIRACY TO IMPORT HEROIN – APPLICATION FOR BAIL – REVERSE ONUS – APPLICANT TO SHOW CAUSE WHY DETENTION NOT JUSTIFIED – APPLICATION REFUSED: *BAIL ACT* 1977, S4(4)(ca).

Applicant arrested on 5th January 1982 for conspiring to import heroin into Australia and on 21 January a further five similar Commonwealth charges laid, also 3 counts of making false statements to obtain Australian passports and 1 count (Victorian Act) of trafficking in heroin. S.'s application for bail on 21 January at Melbourne Magistrates' Court was refused. The Crown alleged that S., his defacto wife and others were involved in large scale importing of heroin thereby acquiring considerable wealth. Arrests were made in Thailand and seizure of large quantities of drugs. Following the death of his defacto in a fire at Fairlea Prison on 6th February a Judge allowed applicant's withdrawal of a similar application on the 9th February after the applicant claimed he was in a state of great confusion. A notice of a fresh urgent application was given on 10 February and heard on 11 February, the urgency being defacto wife's funeral at 10 am on 12 February.

Held: Application refused.
1. The amendment to the *Bail Act* which came into operation on 5 January 1982 is procedural and can be only given a prospective effect not a retrospective effect.

2. The offer to accept stringent conditions upon any bail granted does not show why an applicant's detention in custody is not justified. The conditions of bail are matters to be considered once it has been decided that bail should be granted and the onus imposed upon the applicant in the circumstances is not discharged by a contention that if bail were granted conditions of the most stringent character might be imposed.

3. The fact that an applicant for bail wishes to attend a funeral is not in the words of the statute, a reason or cause why the applicant's detention in custody is not justified. At best, it is a factor to be taken into account in arriving at a conclusion on that question, but it is a factor which can carry very little weight.

YOUNG CJ: ... **[4]** Applications for bail are, of course, governed by the *Bail Act.* That Act has recently been amended so as to insert into sub-s(4) of s4 a new paragraph. The amendment was made by Act No. 9690, which is the *Bail Amendment Act* 1981. That Act has been proclaimed to come into operation on the 5 January. Notwithstanding that fact, the Act is not yet available in print, as I was informed when an enquiry was directed to the Government Printing office this afternoon. However, counsel was fortunately able to refer me to the Act, and very properly did so, and I have obtained the text of the amendment.

The amendment adds paragraph (ca) to sub-s(4), which then reads:

> "Where the accused person is charged—
> (ca) with an offence of growing, preparing, manufacturing, selling, dealing in, or trafficking in opium, cocaine, or any salts or derivatives thereof, or any fresh or dried parts of any plant of the genus cannabis L, or any resinous or other extract of any such plant;
>
> the court shall refuse bail unless the accused person shows cause why his detention in custody is not justified."

Thus, in offences to which the paragraph relates, the onus is cast upon an applicant to show cause why his detention in custody is not justified. If he fails in discharging that onus, the court is directed to refuse bail. Mr Walker conceded that the applicant fell within the terms of the new paragraph because he was charged with an offence of trafficking in a derivative of opium. That concession is plainly right, but Mr Walker contended that the new paragraph did

not apply because he said that it is a penal provision not to be given retrospective operation. The suggestion was that the paragraph imposes or increases the penalties for the offences to which it relates, and therefore does not apply to offences committed before the Act came into operation. If this contention be correct, the consequences are very important, and for this reason I would have preferred to take a little longer to prepare my reasons for decision. As it was, I adjourned at 1 o'clock today and ... was able to take some time this afternoon to consider the matter.

What is involved in the contention is the application of s7(2) of the *Acts Interpretation Act*. The relevant part of that sub-section reads:

> "Where any Act ... amends any other enactment, then unless the contrary intention appears, the ... amendment shall not affect ... (c) any right privilege obligation or liability acquired accrued or incurred under any enactment so amended; or (d) affect any penalty forfeiture or punishment incurred in respect of any offence committed against any enactment so ... amended."

I think Mr Walker's contention may be considered in two aspects. It may be considered first of all as involving the assertion that the amendment made by the *Bail Amendment Act* 1981 affected the applicant's right to apply for bail, and, secondly, that it affected the penalty in respect of the offences with which he was charged. The question posed by Mr Walker's contentions is: does the new paragraph affect rights or penalties in that way, or is it to be classed as procedural only? In support of his submission, Mr Walker relied upon a decision of Lush J in *Bakker v Stewart* [1980] VicRp 2; (1980) VR 17 where His Honour was concerned with an amendment made to the *Motor Car Act* which affected the power of a magistrate to adjourn an information for an offence without recording a conviction in certain cases where the percentage of alcohol in the blood of the person charged was of a particular level.

From Lush J's reasons for judgment in that case Mr Walker extracted a proposition which is embodied in the following sentence on p22 of the report. After referring to the decision of the Full Court of South Australia in *Samuels v Songaila* (1977) 16 SASR 397, Lush J observed:

> "It is interesting to note that Zelling J at p413, and King J at p419 between them assembled a respectable body of authority for the simple proposition that laws mitigating the rigours of the criminal law or its penalties are to be construed retrospectively, and those which increase those matters are not, subject in both cases to any ascertainable intention appearing in the statute."

Mr Walker then contended that the casting on an applicant of the onus on showing why his detention in custody is not justified is in the nature of an increase in a penalty. I find myself unable to accept that submission. In my view paragraph (ca) does not alter any rights, it leaves a person in custody with the same right to apply for bail as previously existed. It merely directs the Court how such an application is to be considered and in that sense, is procedural only. Nor does the paragraph impose any new penalties. Indeed, I do not think that the paragraph can be characterised as a paragraph imposing a penalty. It is not concerned to impose a penalty for an offence and *ex hypothesi* at the time an application for bail is made the applicant has not been found guilty of any offence. The paragraph is, I think, clearly a paragraph dealing with procedure only. But in any event, it is not a case of giving retrospective effect to the amending statute. The *Bail Amendment Act* 1981 speaks from the 5th of January 1982, when it came into effect. The application for bail which is before me was at best originated yesterday. Thus the amendment need only be given only prospective effect and it directs me to refuse bail unless the applicant shows cause why his detention in custody is not justified. Other considerations might arise if I were in a position today of considering an application for bail made before the 5th of January 1982, and adjourned until today; but I need not pursue that question for it plainly does not arise.

Mr Walker next contended that even if I took the view that the onus was cast by the new paragraph upon the applicant he could show cause why his detention in custody was not justified. Mr Walker relied on a number of considerations in order to show the necessary cause. Many of these considerations involve the offer to accept stringent conditions as conditions of the bail which was being sought. Amongst the conditions suggested were stringent reporting conditions, restrictions on movement and various types of supervision including a subjection to daily urine tests. The reason for that suggestion is that it is said that the applicant has been a heroin addict, but it is suggested that since his arrest he has no longer taken heroin and is presumably alleged to be cleared of the addiction. There is no information before the Court as to what a daily urine test

would show or how useful it would be in determining whether or not the applicant ingested heroin in the twenty-four hours before the test, but that consideration is not of any critical importance in this application. In my opinion the offer to accept stringent conditions upon any bail granted does not show why an applicant's detention in custody is not justified. The conditions of bail are matters to be considered once it has been decided that bail should be granted and the onus imposed upon the applicant in the circumstances which I have described is not, in my opinion, discharged by a contention that if bail were granted conditions of the most stringent character might be imposed. I therefore put on one side the submissions by Mr Walker that the applicant would be prepared to submit to conditions as stringent as any I have heard suggested in a bail application.

The other matters upon which Mr Walker relied were these: first he said that the applicant is thirty-six years of age and has suffered no previous convictions. Those considerations are of course relevant, but I should observe that experience suggests that those who are charged with these very serious offences in connection with drugs and who are ultimately convicted of them are very frequently found to be persons of no previous convictions. Next it was said that the applicant's mother needs the applicant's support and assistance in the care of the child which was born to the union of the applicant and Mary Escolar Catila. The applicant's mother, is said to be seventy-seven years of age and currently to be caring for the applicant's son. Until the 26th of January her brother lived with her, but he died on that date and it is said that consequently she is now entirely alone and requires the help and support, both physical and moral of the applicant. It is further said that the applicant's son Sean, who was born on the 14th of August 1981, with a deformity to his left foot requires constant attention and daily manipulation and exercise.

Next Mr Walker relied upon the poor health of the applicant. There is little evidence before me about the applicant's state of health. It is simply said by his solicitor that he has suffered from chronic asthma for a number of years and that he has recently undergone extensive medical tests for thyroid, liver and kidney functions and that his incarceration is exacerbating his medical problems. It is also said that the uncertainty as to the time when the charges brought the applicant are to be heard is a factor to be taken into account. I would accept that it is a factor to be taken into account, but at this stage of the proceedings it is not a consideration that can be given as much weight as is sometimes given to it when an inordinate time seems to have elapsed before a case is brought to trial.

I turn next to the question of the funeral which I have been told is fixed for tomorrow. On the 10th February, the solicitors for the applicant wrote to the Minister for the Department of Community Welfare Services, renewing the verbal request, evidently made earlier, for permission for the applicant to attend tomorrow's funeral. That request, of course, was that the applicant be allowed to do no more than attend the funeral, and it was properly made to the Minister. The Minister, by letter of the same date – which has been handed to me – indicated that he had reconsidered the matter, but nevertheless, felt obliged to refuse the application.

It cannot be too strongly emphasised that the proceeding before me is not an appeal against the Minister's decision. The application made to the Minister was a proper one, and the Minister's refusal was, for all it appears, a decision which he was properly entitled to make. I am concerned on this application with a totally different question. I am concerned with the question whether the applicant should be released on bail until the trial, or, at any rate, until the committal proceedings. I am not concerned directly with the question whether he should be able to attend the funeral fixed for tomorrow. During the course of the argument, Mr Walker suggested that if I wished to take further time to consider my ultimate decision, I could grant the applicant bail terminating after the funeral in some appropriate way or at some appropriate time. I very much doubt whether there is such a power in the court. In particular, I do not know under what authority the applicant could be held in custody after the grant of such bail if any conditions imposed upon it had been complied with. However, in any event, even if I had such a power, I would not be prepared to exercise it in the circumstances of this case. The fact of the funeral tomorrow is not, in my opinion, in the words of the statute, a reason or cause why the applicant's detention in custody is not justified. At best, it is a factor to be taken into account in arriving at a conclusion on that question, but it is a factor which, in my view, can carry very little weight.

The considerations upon which Mr Walker has relied do not, in my opinion, discharge

the onus which rests upon him of showing cause why the applicant's detention in custody is not justified. I would add that in my view an applicant charged with offences such as these must show very exceptional and persuasive reasons why his detention in custody is not justified. The community is deeply and rightly concerned at the prevalence of the drug traffic which affects so many lives. It is notorious that large sums of money are earned in the trade and that large sums of money are ready to be spent to prevent offenders being brought to justice. There is also reason to believe that many crimes are committed to the same end. Further, if I were wrong about the application of paragraph (ca) of sub-s(4) of s4 of the *Bail Act*, I would be disposed, as at present advised, to refuse the application on the ground that if released, there would be an unacceptable risk that the applicant would fail to answer bail. The nature of the offences with which he is charged, including the offences relating to the passports, and the maximum sentences which are available for those offences, which include imprisonment for life, might of themselves be sufficient to lead to the conclusion, but it is unnecessary for me to explore that question further, for I do not base my decision on it. I base my decision upon the ground that the applicant has not persuaded me that his detention in custody is not justified.

For those reasons, the application is refused.
