15/05; [2005] VSC 195

SUPREME COURT OF VICTORIA

DPP (Vic) v COZZI

Coldrey J

30 May, 8 June 2005 — (2005) 12 VR 211

CRIMINAL LAW – BAIL – SERIOUS DRUG OFFENCES – ACCUSED REQUIRED TO SHOW EXCEPTIONAL CIRCUMSTANCES FOR RELEASE ON BAIL – ACCUSED APPREHENDED ON PROPERTY WHERE 5 HOTHOUSES CONTAINED NUMEROUS CANNABIS PLANTS – ACCUSED DENIED ANY KNOWLEDGE OF THE CANNABIS – STATED HE WAS ON THE PROPERTY TO CUT FLOWERS – CONSIDERATIONS ON APPLICATION FOR BAIL – "EXCEPTIONAL CIRCUMSTANCES" - MEANING OF – "DELAY" – BAIL WITH STRICT CONDITIONS GRANTED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *BAIL ACT* 1977, S4(2)(aa).

C. was apprehended whilst on a property where numerous cannabis plants were being cultivated in hothouses. C. denied knowledge of the cannabis and said that he was on the property to cut flowers. C. was later charged with serious drug offences and applied to a magistrate for bail. After considering C.'s personal factors, and the question of delay, the magistrate found that exceptional circumstances existed and granted bail to C. on strict conditions. Upon appeal—

HELD: Appeal refused.

1. The concept of "exceptional circumstances" is an elusive one. The phrase is not defined in the *Bail Act* 1977 and some judges of the Supreme Court have made it clear that such circumstances may exist as a result of the interaction of a variety of factors which of themselves might not be regarded as exceptional. What is ultimately of significance is that viewed as a whole, the circumstances can be regarded as exceptional to the extent that, taking into account the very serious nature of the charge to which they are applicable, the making of an order admitting the person to bail would be justified.

***Re Moloney,* Sup Ct, unrep., Vincent J, 31 October 1990, applied.**

2. The concept of delay has been dealt with in many cases. It is a matter of some sensitivity where the person incarcerated has the benefit of the presumption of innocence and it must be borne steadily in mind that bail is not about punishment in advance of a jury trial, but is designed to secure attendance at that trial. Accordingly, whilst there is necessarily a level of pragmatism involved in the concept of delay, its operation cannot be limited by reference to what is currently regarded as "normal" for the prosecutorial process.

3. Despite the seriousness of the offences, the prospective delay, together with the other factors to which the Magistrate referred in her decision are all capable, in combination, of constituting exceptional circumstances. Accordingly, it was open to the magistrate to have concluded that exceptional circumstances existed so as to justify the grant of bail.

COLDREY J:

1. On 30 March 2005, at the Magistrates' Court at Melbourne, the respondent, Sabino Cozzi was admitted to bail on his own undertaking on charges of cultivating a narcotic plant (cannabis) being a commercial quantity; two counts of possessing cannabis and one count of trafficking a large commercial quantity of cannabis (23/3/05); there was an additional charge of cultivate a narcotic plant (cannabis) being a large commercial quantity (1/9/04 – 23/3/05).

2. The following special conditions were imposed on the grant of bail:

> "1. Report to Glen Waverley Police Station daily between 6.00 a.m. and 9.00 p.m.;
> 2. Reside at 53 Holmbury Blv, Mulgrave Vic. 3170;
> 3. Surrender all valid passports or any other valid travel document held within 24 hours of release to the Informant;
> 4. Not attend any points of international departure;
> 5. Not leave Australia;
> 6. Not associate with any co-accused."

3. On 22 April 2005, the Director of Public Prosecutions filed a notice of appeal against the

grant of bail. It specified the following grounds:

> "1. THAT the learned Magistrate in proceeding to grant bail to the Respondent erred in finding, pursuant to s4(2)(aa)(i) of the *Bail Act* 1977 that there were 'exceptional circumstances';
>
> 2(a) THAT in granting bail to the Respondent the learned Magistrate gave undue weight to;
> Parity in terms of the fact that a co-defendant Dennis Sofianos was granted bail;
> The fact that the Respondent has a stable residence;
> The Respondent's ties to the jurisdiction;
> The likely delay in proceedings;
> The Respondent's family support;
> The Respondent's bail history;
> The Respondent's health;
> 2(b) THAT in granting bail to the Respondent, the learned Magistrate failed to accord sufficient weight to:
> The fact that the likely delay in the proceedings is not greater than usual."

4. In summary, the circumstances giving rise to the charges are that on 23 March 2005, police who were on a property adjacent to 269 Old Cape Schanck Road Boneo for matters unrelated to that before this Court, detected the smell of cannabis emanating from the latter property. They observed five hot houses (or igloos) on that property which, upon investigation, were found to contain numerous cannabis plants. While on the premises the respondent was disturbed as he was about to enter one of the hot houses. Upon observing the police the respondent turned and started to move quickly away. He was apprehended and was found to be carrying a pair of orange handled scissors. He immediately denied any knowledge of the cannabis plants.

5. Later the same afternoon a co-accused Sofianos was apprehended when he arrived at the property. Apart from making full admissions in relation to the cultivation of the crop (and, incidentally, implicating the respondent) Sofianos showed police a room in a dwelling situated on the property which was being used to dry and prepare the cannabis for packaging. There was a large quantity of dried cannabis on the floor in this room and a number of wires strung across the room with cannabis drying. Amongst other items located in this room was a roll of black plastic garbage bags.

6. A subsequent search of the respondent's motor vehicle revealed a roll of black plastic garbage bags that were identical to those found in the drying room as well as a brochure from an estate agent who managed the rental of the property where the cannabis was found.

7. The respondent maintained that he had no knowledge of the cannabis, stating that he was on the premises to cut flowers. Whilst there were flowers on the property they were not in the vicinity of where the respondent was initially observed. Also found in the appellant's possession was a business card for a shop that provided hydroponic equipment.

8. On 24 March 2005, the cannabis was examined and weighed by a botanist at 1,479 kilograms. It was, however, clear that the weight of the actual usable material – the dry weight – was about 25% of the total weight. Nonetheless, this would result in an amount of in excess of 350 kilograms, sufficient to constitute a large commercial quantity, with a value of between $1.5 and 2.5 million.

9. The material before the Magistrate indicated that the respondent was a 55 year old married man who lived with his wife and two of his four daughters in suburban Mulgrave. His two other daughters were married but apparently also lived within the jurisdiction. Both he and his wife were unemployed but the household was supported by contributions made by all of the daughters.

10. The respondent's wife had been diagnosed with breast cancer in July 2004, and had undergone surgery, and subsequent chemo and radiotherapy. The respondent was designated as a primary carer for his wife in her post-cancer phase although there was some evidence that she was capable of driving herself around.

11. The respondent's own medical condition was the subject of a report from a Dr Francis Tien Nguyen of the Waverley Police Road Medical Centre. It indicated that he had type 2 diabetes, high cholesterol, ferritin (an excess iron in the blood), gastritis, a fatty liver, and a thyroid nodule. The

evidence indicated that he had to have a scan in April in relation to the thyroid and that he took medication for his diabetes and cholesterol. The result of any scan was not before this Court.

12. The respondent had a number of prior convictions commencing in 1977. These included gaming offences, minor assaults and offences for selling heroin (1981) and trafficking and using heroin (1996) for which he had received 9 months' imprisonment and a 6 months' suspended sentence respectively. It was nine years since the last conviction and the respondent had no history of failing to answer bail.

13. In the initial bail hearing counsel for the respondent relied on what he asserted to be a weak Crown case and that for the respondent "to remain in custody would put in jeopardy his health and make home life for his wife extremely difficult."

14. In her oral reasons, the Magistrate referred to parity (she having found in favour of the bail application of co-defendant Sofianos) and the respondent's ties to the jurisdiction, ties to the family and stable family support. The Magistrate further commented that there would be some delay or some considerable delay in the matter reaching the trial stage. The Magistrate also found that the respondent did not pose any risk of absconding or committing any further offences. Indeed the informant expressed the view that the respondent would not abscond.

15. In neither her written nor oral reasons did the Magistrate specifically refer to the strength or otherwise of the Crown case or upon the role of the respondent as a carer for his wife. However, as the Full Court said in the case of *Beljajev & Anor v DPP (Victoria) and DPP (Commonwealth)*[1]:

> "In a bail application which is necessarily interlocutory and founded largely on hearsay and assertion, the judge is not obliged to state in his reasons every matter which he has taken into account or the weight which he has attributed to any particular matter. A decision to grant or refuse bail must necessarily be to a very considerable extent a matter of impression or an instinctive synthesis of the considerations involved."

16. The principles applicable to a Director's appeal are regarded as having been set out in the decision of the Full Court in *Beljajev*. In that case the Court (Young CJ, Crockett and Ashley JJ) stated[2]:

> "It is not essential that the Director should be able to show an error of law in the narrow sense, although of course if error of law were demonstrated this Court would be obliged to substitute its own view of the order which should have been made. It is also open to the Director to show that in all the circumstances of the case the order was manifestly the wrong order to make even though it is not possible to point to any other identifiable error in the process by which the authority granting bail arrived at the order made.
>
> In other words, the Director is not in our opinion, confined to relying upon an error of law as a ground of appeal but may succeed if he shows that on any ground, whether of fact or law, the discretion of the primary judge has miscarried and can persuade the Supreme Court that a different order should have been made.
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> There are, however, two ways of the first importance in which an appeal in a matter of bail differs from an appeal against sentence. Both stem from the very nature of bail. The first is that an order admitting a person to bail is not a final order: it may be revoked at any time. The second is that the granting of bail is essentially a matter of practice and procedure. These two considerations both independently and in combination operate to impose on any appellate court a severe restraint upon interference with the order appealed from. In civil and in criminal cases alike appellate courts have frequently refused to interfere with a primary judge's decision on a matter of practice and procedure."[3]

17. As the cases indicate[4] it is not a question of whether the appellate court would have granted bail had that Court been hearing the application at first instance. Rather, it is whether the material in front of the Magistrate could never have amounted to "exceptional circumstances".

18. The concept of exceptional circumstances is, itself, an elusive one. The phrase itself is not defined in the *Bail Act* 1997 (the Act), although some Judges have essayed a definition. In *Tang & Ors*[5], Beach J made reference to dictionary definitions of the word "exceptional". His Honour found that whatever definition was used, the applicant for bail "bears an onus of establishing that there is some unusual or uncommon circumstance surrounding his case before a court is justified in releasing him on bail".[6] In the course of argument the decision of Kaye J in the case

of *In the Matter of a Bail Application by Ismail Muhaidat*[7] was cited. In it his Honour remarked (p2):

> "The question of what are exceptional circumstances have been canvassed before. Effectively the applicant has to establish circumstances right out of the ordinary. They have to be exceptional to the ordinary circumstances which would otherwise entitle the applicant to bail."

19. On the other hand in *Re the Matter of Application for Bail by John Denis Moloney*[8] Vincent J, a most experienced Judge, pointed out that it was not possible to identify in any general definition what factual situations constituted exceptional circumstances. His Honour stated:

> "A number of decisions which have been handed down by Judges in this Court, however, make it clear that such circumstances may exist as a result of the interaction of a variety of factors which of themselves might not be regarded as exceptional. What is ultimately of significance is that viewed as a whole, the circumstances can be regarded as exceptional to the extent that, taking into account the very serious nature of the charge to which they are applicable, the making of an order admitting the person to bail would be justified."

20. I agree with respect with his Honour's approach.

21. An examination of the cases bearing upon this concept reveals a multitude of single and conflicting interpretations thrown up, no doubt, by the variety of fact situations with which Judges have been faced.

22. Among the major factors found to constitute exceptional circumstances have been the strength of the Crown case (where that may be sensibly assessed); the question of delay to committal and/or trial; and principles of parity (insofar as they are applicable to a bail application). As to the many other factors that courts have taken into account I use as examples only those cases cited in argument before this Court, which constitute but a representative sample. In *DPP v Nguyen*[9] the fact that the Magistrate had taken into account, in addition to issues of the strength of the Crown case, delay and parity, strong family support, stable accommodation, employment and low risk of flight or re-offending was accepted by the Judge without adverse comment. Similarly, in *Commonwealth Director of Public Prosecutions v Banda*[10] which was, like *Nguyen*, a Director's appeal, the Magistrate, in finding exceptional circumstances, took into account family situation and personal situation of the respondent including his primary role in caring for his mother, a significant role in caring for a surrogate father with serious health problems, his provision of financial support for a former partner looking after their intellectually handicapped daughter, work commitments, a strong attachment to the State and a lack of any unacceptable risk that the respondent may abscond and/or commit further offences as relevant factors, quite apart from potential delay or the principle of parity. The Judge was not persuaded that the Magistrate's decision that there were exceptional circumstances was manifestly wrong. In the case of *In the Matter of an Application for Bail by Andrea Mantase*[11] such factors as lack of any prior criminal history, constant employment, an unlikelihood of absconding and the personal situation of the applicant's wife who had recently had a miscarriage were factors which, together with likely delay, were found to constitute exceptional circumstances.

23. Ostensibly on the other side of the ledger is another case referred to in argument, namely *In the Matter of an Application for Bail by Ryan Leigh Johns*[12]. That was a case in which the age of the appellant (19 at the time of the alleged murder offence) and his personal circumstances (residence with his mother and the availability of a job) were not, in the circumstances, found to be exceptional, albeit the Judge did not rule such factors could not never constitute exceptional circumstances.

24. On the other hand, in *In the Matter of a Bail Application by Ismail Muhaidat*[13] Kaye J expressed the view that hardship to an applicant or his family, and disruption to his work constituted only "ordinary circumstances". Although, later in the ruling, his Honour found that the fact that the applicant's *de facto* was to give birth to their child in the very near future, potentially qualified as an exceptional circumstance, he ultimately found that such circumstances were not made out. His Honour also distinguished between potential and actual delay as a factor.

25. This brief examination indicates, in my view, that there are a variety of factors taken

into account by courts in considering the question of exceptional circumstances. In each case it appears to be a question of degree. Moreover, the lack of matters constituting unacceptable risk, detailed in s4(2)(d) are often taken into consideration.

26. As *Beljajev's case*[14] makes clear that subsection will need to be satisfied even when the hurdle of exceptional circumstances has been jumped, but it does not follow that the fact that an applicant is an acceptable risk cannot constitute a factor in the determination of such circumstances.

27. I take paragraphs 2(a) and 2(b) of the Director's Notice as essentially particulars of the grounds set out in paragraph 1. Moreover, as I understand the submissions of the appellant (putting to one side the issue of parity) it is not suggested that it was not open to the Magistrate to make the findings that she did, although there were some critical comments made by counsel as to the extent of the evidence upon which such findings were based. Essentially the appellant's case was that these factors, even in combination, could never amount to exceptional circumstances.

28. Insofar as the issue of parity is concerned, it was submitted that the original decision to admit Sofianos to bail was wrong and consequently the respondent could not rely upon it.

29. I interpolate that in the course of argument the Court was informed that the abandoning of an appeal instigated in the case of Sofianos stemmed from the subsequent assistance he had provided to the investigating police in obtaining evidence against an alleged third offender. Indeed it was indicated that Sofianos had applied to go into the witness protection regime. These factors were, of course, not relevant to the issue of parity before the Magistrate or, indeed, this Court, a circumstance which serves to reinforce the comments of the Full Court in *Beljajev* to the effect that the changing factual situations which are likely to attend bail applications, enlivening both fresh applications for bail or for revocation, may make the appellate process a cumbersome and ill-suited vehicle to resolve this interlocutory matter. Indeed, in terms of the passage of time, I note that this Court is faced with a situation where the respondent has already been complying with the bail conditions fixed by the Magistrate for a period in excess of two months.

30. In any event the factors which applied to Sofianos at that time, including his co-operation with the police, the fact that he had already been on bail (albeit for only a week), his lack of convictions for in excess of 15 years, and the evidence of the informant that he personally would be quite satisfied if the defendant remained on bail, distinguishes his situation from that of the respondent. Accordingly, whether or not Sofianos should have been granted bail, the differing circumstances of the two defendants render parity an inappropriate consideration in determining any grant of bail to the respondent.

31. Insofar as the strength of the prosecution case is concerned, I have already indicated that the Magistrate did not make any specific comment on this issue. Given the early stage of proceedings, including the ongoing status of the police investigation, this is not surprising. But it follows that the respondent cannot call in aid any weakness in the Crown case in seeking to support the finding of exceptional circumstances.

32. It was argued by the appellant that there was no evidence that the Magistrate found any great or inordinate delay. However, I note the transcript reference by the Magistrate to "considerable delay".

33. The concept of delay has been dealt with in many cases.[15] It is a matter of some sensitivity where the person incarcerated has the benefit of the presumption of innocence and it must be borne steadily in mind that bail is not about punishment in advance of a jury trial, but is designed to secure attendance at that trial.[16] Accordingly, whilst there is necessarily a level of pragmatism involved in the concept of delay its operation cannot be limited by reference to what is currently regarded as "normal" for the prosecutorial process.

34. In the present case, the Magistrate, who has great practical experience of the system, regarded the delay before this prosecution ever came to trial as considerable. Nothing was advanced by the prosecution on the question of the overall delay contrary to that view.

35. Ultimately, but not without some hesitation, I have come to the view that, despite the

seriousness of the offences, the prospective delay, together with the other factors to which the Magistrate referred in her decision (which I need not repeat but which I regard as encompassing the situation of his wife) are all capable, in combination, of constituting exceptional circumstances. Whether this Court would have made that finding at that time is not to the point. The question is whether it was open to the Magistrate to have done so. I have concluded that it was.

36. That, in my view, is an end to the matter. However, if the error in relation to parity is regarded, of itself, as vitiating the original order, I would not, at this stage, make an order altering the Magistrate's disposition. In determining that course I regard myself as entitled to take into account material which was not before the Magistrate when the original order was made.[17] Specifically I take into account the fact that the respondent is presently subject to strict bail conditions which he has been observing for some nine weeks.

37. If matters emerge in the future which the prosecution regard as requiring the revocation of bail, there are appropriate avenues in the Act which may be utilised for this purpose.

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[1] (unreported judgment delivered on 8 August 1991). This case has since been overruled in relation to rights of appeal from a single Supreme Court Judge to the Court of Appeal in *Fernandez v DPP* [2002] VSCA 115; (2002) 5 VR 374; (2002) 132 A Crim R 270.
[2] ibid at pp29-30.
[3] See also *DPP (Commonwealth) v Abbott* (1997) 97 A Crim R 19 and *DPP v Ghiller* [2000] VSC 435.
[4] *DPP v Nguyen* [2000] VSC 452 (McDonald J); *Commonwealth DPP v Banda* [2000] VSC 542 (Beach J).
[5] (1995) 83 A Crim R 593.
[6] ibid p596.
[7] [2004] VSC 17 (Kaye J).
[8] (unreported judgment of Vincent J delivered 31 October 1990).
[9] ibid.
[10] ibid.
[11] (unreported decision of Vincent J, 21 September 2000).
[12] [2002] VSC 436 (Nettle J).
[13] (delivered 20 January 2004).
[14] ibid pp35-36.
[15] For example, *George Pietrobon* (unreported decision of Crockett J, 13 January 1998); *Beljajev v DPP* (1998) 101 A Crim R 362; *Peter Alexopoulos* (unreported decision of Hampel J, 23 February 1998); and *Mantase* (ibid).
[16] See *R v Serratore* (1995) 132 ALR 461; 127 FLR 320; (1995) 38 NSWLR 137; (1995) 81 A Crim R 363; *DPP v Ghiller* [2000] VSC 435 (Eames J).
[17] *Fernandez v DPP* (ibid) at p392.

APPEARANCES: For the appellant DPP: Mr J Rapke QC. Steven Carisbrooke, Acting Solicitor for Public Prosecutions. For the respondent Cozzi: Mr C Heliotis QC. Kenna Teasdale Lawyers.
