**01/87**

**SUPREME COURT OF VICTORIA**

# *R v THE DIRECTOR-GENERAL of CORRECTIONS; ex parte ALLEN*

**Tadgell J**

**11 November 1986**

**CRIMINAL LAW – BAIL – COMMITTAL FOR TRIAL – NO APPLICATION MADE FOR BAIL – WHETHER COURT REQUIRED TO GRANT/REFUSE BAIL – WARRANT OF COMMITMENT – GROUNDS FOR REFUSAL NOT SPECIFIED IN WARRANT – WHETHER WARRANT INVALID: *BAIL ACT* 1977, S12(2).**

**1. Where a court commits for trial a person charged with an indictable offence, the court is not required to consider granting or refusing bail if there is no application for it.**

**2. Section 12(2)(b) of the *Bail Act* 1977 requires the court to certify on the warrant of commitment the grounds for refusal of bail. However, where no application for bail is made, the warrant is not invalid because it fails to specify a ground for refusal of bail.**

**TADGELL J:** **[1]** This is the return of an order nisi for a writ of *habeas corpus*. On 1st August 1986, after having conducted a preliminary examination of some three weeks' duration, a magistrate directed that the applicant, Peter John Allen, be tried at the September 1986 sittings of the Supreme Court for 11 serious indictable offences, most of which are drug-related. On the same day the magistrate issued a warrant of commitment of the applicant to prison until his trial. The warrant inaccurately or incompletely specified the nature of the charges against the applicant as "conspiracy" but nothing turns on that. The applicant has been detained in prison since 1st August 1986, and he **[2]** now complains that the warrant is insufficient to sustain his lawful detention.

The order nisi states three grounds, one of which (ground 2) is abandoned. Of the remaining grounds, ground 1 asserts in effect the warrant was never valid and ground 3 asserts in effect that warrant became invalid at the end of the September 1986 sittings of the Supreme Court. Each involves a very short point.

Ground 1 depends on the proper construction of s12 of the *Bail Act* 1977 which, so far as is now relevant, provides that -

> "12. (1) ...
> (2) Where a person charged with an indictable offence is committed to prison to take his trial for the offence the justices committing him shall either grant bail for the appearance of the person upon his trial or shall refuse bail and shall certify on the warrant of commitment—
> (a) where the justices grant bail— their consent to the person being bailed ...; or
>
> (b) where the justices refuse bail— a statement of such refusal and of the grounds for refusal."

The warrant of commitment in question, which consisted of an admittedly not very elegantly adapted printed form, purported to certify that the magistrate had "refused bail for the release of the defendant named in this warrant on the following grounds: no application." The last two words were handwritten. It is common ground that no application was made to the magistrate for bail at the time he directed that the applicant stand trial, and that the magistrate did not **[3]** grant bail. To that extent the warrant is accurate; but the argument in support of ground 1 was to the effect that the statement "no application" did not amount to a proper statement of "the grounds for refusal" of bail. It was argued that s12(2)(b) of the *Bail Act* requires a statement of a ground for refusal of bail of a kind contemplated by the Act; and that the Act, in requiring either a grant or refusal of bail, does not contemplate the absence of an application for it as a ground for refusing it. The warrant was said on that account to be invalid.

In my opinion the argument cannot withstand investigation. The requirement of s12(2) of the *Bail Act* that bail should be either granted or refused involves, in the context, either acceding or not acceding to an application for it. If bail is not sought s12(2) does not, as I would construe it, require a committing justice to consider whether to grant or refuse it. Whether bail, when granted to a person who is charged with an indictable offence and committed to prison to take his trial for the offence, is a privilege or a right, it cannot be forced on him; and he is not refused it if he does not seek it.

Putting to one side the case of an arrest without warrant, any grant of bail must logically be preceded by an order of remand or a warrant of commitment to prison. If a person who is the subject of such an order or warrant does not seek bail it would be absurd to suppose that s12(2) rendered the order or warrant invalid because the officer making or issuing it had not specified a ground for refusing bail that would **[4]** have been necessary had an application for it been made and declined. Ground 1 therefore fails.

*[His Honour then considered Ground 3 of the Order nisi, and held that it failed].*

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