

15/98

SUPREME COURT OF VICTORIA

R v ALEXOPOULOS

Hampel J

23 February 1998

CRIMINAL LAW – BAIL – DRUG TRAFFICKING – IMPORTATION OF HEROIN – CIRCUMSTANTIAL CASE – CONFINED NATURE OF EVIDENCE – EXCEPTIONAL CIRCUMSTANCES TO JUSTIFY GRANT OF BAIL – DELAY OF APPROXIMATELY 18 MONTHS FROM ARREST TO TRIAL – PERSONAL CIRCUMSTANCES OF ACCUSED – PREJUDICE TO FAMILY MEMBERS IF ACCUSED NOT RELEASED – WHETHER COMBINATION OF CIRCUMSTANCES ARE EXCEPTIONAL.

A. has been charged with offences relating to an alleged importation of heroin. The case against A. is circumstantial and not overwhelming and the evidence is of a confined nature in that it does not involve a long lead-up period with intercepts and observations but depends on the events immediately before the arrest. A.'s personal circumstances include his de-facto wife who has an alcohol and drug problem, the care of a 7-year old son and elderly parents not in good health who are attempting to run a family business. There will be a delay of some 18 months between time of arrest and trial.

HELD: Application for bail granted.

Whilst a delay of 18 months between arrest and trial might be normal or usual, the criteria for the grant of bail should be based on the concept of a humanitarian society which respects the presumption of innocence and abhors the idea that people are kept in custody for undue time without trial. Each case depends on its own circumstances; there cannot be arbitrary times for delays to justify the grant of bail. In view of the delay in the circumstances of the accused, exceptional circumstances exist which justify the grant of bail on strict conditions.

[Compare *DPP (Cuth) v Tang and Ors* (1995) 83 A Crim R 593; MC11/96. Ed.]

HAMPEL J: [1] This applicant for bail is charged with serious offences which relate to a very substantial importation of heroin. The allegations, briefly summarized, are that two men are said to have been caught virtually red-handed unloading a consignment of heroin in a warehouse in Richmond. The applicant is alleged to have been some distance away in circumstances where it is said there is a justifiable inference that he was involved by keeping watch and therefore involved in this importation. The amount of heroin involved is large and its value great. This was an investigation, unlike many others, which does not involve a long lead-up period with intercepts and observations. It rather depends on the events immediately before the arrests. As far as the applicant is concerned the case depends on observation of him and inferences which may be drawn from that observation and other features which connect him with the two men in the warehouse and with the unloading of this consignment.

It is conceded that this is a circumstantial case against the applicant. There was some debate before me about the strength of the case and each side contended that the case was either strong or not strong, depending whether it was the prosecution or the defence. It is, of course, difficult in my position to assess the strength of the circumstantial case. It is essentially a case in which an inference would have to be drawn, before the applicant could be convicted, that he was involved with the knowledge of the fact that this was an importation of [2] heroin. The Crown case against him, apart from circumstances in which he was found, depends on what are alleged to be false denials. They are false accounts about a mobile telephone, his connection with a particular car and his presence in the vicinity. Whether these will amount to false denials, for the purpose of this case, remains to be seen when the matter is argued at trial. They must, of course, be false denials pointing to the crime charged and not any other activity. Those are the sort of matters about which it is difficult to form a view at this stage.

In this application the applicant must show exceptional circumstances. What is relied upon for this purpose is a combination of factors, but the primary one is delay. The other factors

are the setting in which the delay is said to amount to exceptional circumstances. They involve his de facto relationship with a woman who has an alcohol and drug problem and is disabled by it frequently. That causes difficulties in looking after their seven year old son who apparently is looked after by the applicant from time to time, particularly when his mother is not able to do so. The other aspect of the setting is that the applicant has elderly parents who are apparently not in good health attempting to run a family business with the applicant's help. The argument on behalf of the Crown is that this does not amount to exceptional circumstances. The Crown relies on the fact that the applicant is charged with serious offences which carry substantial penalties of imprisonment if he is convicted. It relies on the nature of the case against the applicant and a number of cases in [3] which it was said that personal circumstances, such as his de facto wife's difficulties, his son's difficulties and his parents' situation do not amount to exceptional circumstances, nor does the fact that he has a large surety available. The Crown also relied on the fact that he has some prior convictions, that he has used different names, that he is therefore said to be an unacceptable risk insofar as his appearance for trial is concerned.

I have attempted to get some impression as to what the delay is likely to be in this case. The arrest took place in early August. It will be approximately eight months by the time the committal takes place and, if the applicant is committed for trial, then it will be, I think on the best estimate, at least some time early next year that this trial will commence. I find it difficult to understand why it is that it takes eight months to get a committal on in a case of this kind where the evidence is confined. I know that some preparation is necessary, but in my opinion that is a very long time before committal. I am then told that the arraignment, if the applicant is committed, will not take place until August, and that, in my view, makes it almost certain that this joint trial with some 90 witnesses will not take place until some time in 1999. It was said on behalf of the Crown by Ms Morrish that that is not an unusual delay and does not provide exceptional circumstances. She argued that to be exceptional these circumstances must be contrary to what is normal or usual and that this delay, although substantial, is not in that category.

In my opinion where exceptional circumstances which [4] substantially depend on delay are raised, they cannot be measured simply by what is the normal or usual delay at any particular period of time. Judges of this court have, over the years, said that long delays are simply not acceptable, quite apart from what may be normal or usual. There was a time when senior judges in this court thought that anything over a year, as a rule of thumb, would be treated as being exceptional and inordinate. I think there must be some objective criteria which does not depend purely on what the position is at the particular time because of delays in the system or lack of resources. It must be objective criteria based on the concept that we are a humanitarian society which respects the presumption of innocence and finds abhorrent the idea that people are kept in custody for undue time without trial. The *Bail Act*, I think, must be interpreted in that context and not simply by reference to what happens to be the unhappy norm at this time. As I said during argument, if at some time in the future the backlogs became such that it became the norm to have two or three year delays, it could not be said that that is not inordinate when one looks at fundamental principles and concerns with the liberty of the subject.

Of course, there cannot be arbitrary times and each case depends on its own circumstances. In my opinion, the delay in the circumstances of this accused does amount to exceptional circumstances and I think bail should be granted. Nor is this a case which is so overwhelming against the applicant that there is a clear risk that he will simply not face up to trial, quite apart from the exceptional circumstances issue. It is a case in which [5] the question whether circumstances point to guilt or not seems to be a matter for the jury. There are some cases where the evidence is so overwhelming, where people are caught red-handed, where they make admissions, where they have no where to go, so to speak. In such cases one may take the view that they are in such a hopeless position that they cannot be trusted to be out on bail for the temptation not to appear would be too great. I do not think this is such a case. The delay of what I consider to be at least one and a half years from arrest to trial is, in the circumstances of this applicant, inordinate. There is, of course, as experience shows, the probability that there will be greater delays still, given that the co-accused may need Legal Aid. It seems also that from an August arraignment in the County Court the build up of cases to the end of the year is likely to be such that this will become one of many cases waiting for trial in 1999.

It is not good enough, I think, to say we will wait and see what happens. There have been

cases recently where bail was granted after a year and a half or two years, because what was feared had actually occurred, namely an inordinate delay. But by then an accused who has not been tried had been in custody for an extraordinary time. That is unacceptable. Having said all that, of course, the system must accept that some time will have to pass before accused are tried. One cannot bring cases on immediately. However, when there is tension between resources and systems on the one hand and fundamental principles which I have mentioned, fundamentals must prevail. The system has to [6] change and more resources be made available. I think very strict conditions should be imposed. [*His Honour then proceeded to fix conditions of release.*]
