

34/09; [2009] VSC 620

SUPREME COURT OF VICTORIA

***R v CHALMERS***

Coghlan J

16, 18 December 2009

**CRIMINAL LAW - BAIL APPLICATION - CONSPIRACY TO TRAFFIC - CONSPIRACY TO CULTIVATE - TRAFFICK DRUG OF DEPENDENCE - CULTIVATE DRUG OF DEPENDENCE - WHETHER EXCEPTIONAL CIRCUMSTANCES EXIST TO WARRANT GRANT OF BAIL - DELAY PRIOR TO TRIAL CAPABLE OF CONSTITUTING EXCEPTIONAL CIRCUMSTANCES - PARITY - STRENGTH OF PROSECUTION CASE - APPLICATION REFUSED.**

C. was charged with a series of offences in relation to conspiracy to traffick in a drug of dependence. The evidence revealed that C. was involved in the business of selling cannabis and also in assisting others to grow cannabis plants for sale. The Crown case was that C.'s undertaking was a major business for the cultivation and distribution of cannabis for substantial gain. On an application for bail, C. stated that:

- there will be a substantial delay before the charges come on for hearing
- C.'s mother who was charged with similar offences has been granted bail
- the relationship with his partner who is about to give birth to a child will be affected
- No prior convictions, sureties and employment are available.

**HELD: Application refused.**

1. In relation to the question of delay, one feature of large cases is that they will take longer to come to trial and the question of delay needs to be looked at bearing that in mind. A delay of two years in the original bail application made in *DPP v Mokbel* [2001] VSC 403 was not found to amount to exceptional circumstances.

2. Looking at the case as a whole including the fact that if C. is convicted he will receive a substantial custodial sentence and the period of delay, the delay of itself was not capable of constituting exceptional circumstances.

3. In relation to the question of parity, it has been accepted that parity is a consideration to be taken into account in bail applications. In such questions, it is important to compare like with like. Although it is clear that C.'s mother was to play her part in the enterprise, the exceptional circumstances as found in her favour included her age, her stable residence and her health. These matters are not matters applicable to C. the applicant.

4. Although it would seem apparent now that if released on bail C. would reside with his partner, that has not always been the case and the strength of that relationship, although identifiable, is really open to some question. But even taking that relationship put at its highest, it would not, of itself, including the circumstances of the imminent birth of their child, amount to exceptional circumstances. Also, the lack of prior convictions, the availability of sureties or the possible employment open to C. are not capable of themselves, or in combination with those matters and with delay, of constituting exceptional circumstances.

5. Accordingly, the application for bail will be refused.

**COGHLAN J:**

1. By application dated and filed 20 November 2009, Paul Graham Chalmers makes application for bail.

2. He has been charged with a series of offences:

- Conspiracy to traffick a drug of dependence (cannabis) between 01/06/09 and 13/10/09
- Conspiracy to cultivate a drug of dependence (cannabis) between 01/06/09 and 13/10/09
- Traffick drug of dependence (cannabis) between 01/01/05 and 13/10/09
- Cultivate a drug of dependence (cannabis) between 01/06/09 and 13/10/09

3. The applicant, through his solicitor, Mr Stary, submitted that exceptional circumstances could be made out on the following grounds, some of them in their own right and others in combination.

4. Firstly, delay. These matters cannot go to trial until 2012. As the applicant was arrested in October 2009, it follows that he will be detained for more than two years by the time of his trial. Secondly, he has no prior convictions. Thirdly, he is in a relationship with his partner, who is about to give birth to their child and he would live with her. He has employment available to him.

5. His mother was granted bail. She, having been charged with identical offences. The issue of parity therefore arises. The accused has available to him, two sureties, each in the sum of \$100,000.

6. The Crown, through Ms Cannon, Crown prosecutor, concedes that in general, the delay in this case will be substantial. In addition, she concedes that delay is, in its own right, capable of amounting to exceptional circumstances in the appropriate case; where it is usually in combination with other circumstances.

7. It was submitted that a particularly relevant consideration to be taken into account, is the strength of the Crown case. The Crown case may be considered in two major parts. The first is the conspiracy to traffic a large commercial quantity of cannabis.

8. The allegation is that between June and October of this year, the applicant, his co-accused, Thompson and Marlik and his mother, and probably others, conspired to purchase a property at Kilsyth for the purpose of, among other things, establishing a cannabis production plant.

9. Based on the intercepted telephone conversations between the applicant and his co-accused, Thompson, it is alleged that the ongoing plan was to harvest eight plants a week, that is about eight pounds of cannabis, which would sell for \$3000 a pound. Extrapolated in an extreme way, that would lead to a gain of \$6,000,000 over a five year period.

10. Whether those expectations were capable of being brought to fruition is moot. It is clear, however, on the Crown case, that there was a plan to launch a substantial enterprise. Proof beyond reasonable doubt that it was an agreement to produce a large commercial community, will be an issue for trial.

11. On the case, a property had been purchased and some preliminary works undertaken. No area for production had been established and no cannabis produced.

12. The second allegation is that the applicant has, over a long period, been in the business of selling cannabis. The allegation covers the period, January 2005 to October 2009. That is almost five years.

13. The direct evidence, said to involve the applicant, involves the following matters. The seizure of 145 kilograms of cannabis, most of which consisted of growing plants, but 25 kilograms of dried cannabis, which were ready for sale. That cannabis would be valued at about \$170,000. More than \$65,000 in cash was seized.

14. On the present allegation, the applicant was also involved in assisting three other co-accused to grow plants amounting to a total weight of 48 kilograms. The telephone intercept material, it was suggested, proves the sale of 146 pounds of cannabis, or 66 kilograms, to a value of \$438,000 in the period, June to October of this year.

15. Whatever view is taken of the ongoing conspiracy, the Crown case is that the applicant was actually involved in the purchase of the property at Kilsyth and he had taken steps to ensure the property was not in his name.

16. Even if the ongoing size of the enterprise is less than the amount suggested by the informant, it remains a substantial undertaking. On the Crown case, this is no cottage industry, but a major business for the cultivation and distribution of cannabis for substantial gain.

17. The case does appear to be a strong one. There is a large amount of telephone intercept material, in which the matters alleged are apparently spoken about and spoken about openly. Additionally there is surveillance material and there is the material which has been served. There is the other available material about the purchase of the Kilsyth property.

18. One feature of large cases is, that they will take longer to come to trial and the question of delay needs to be looked at, bearing that in mind.

19. A delay of two years in the original *Mokbel* bail application, in the appeals and further applications, was not found to amount to exceptional circumstances.<sup>[1]</sup>

20. Insofar as the applicant is concerned, many of the matters alleged in the Crown case are challenged.

21. As the matters stand, however, as I have already observed, it does seem a strong case for a series of instances of commercial trafficking of cannabis. Whether at the end of the day the case will or could proceed as a large commercial quantity remains to be seen, and whether the case will proceed in terms of the charges as they are presently drafted also remains to be seen. For instance, an allegation referable to the period between 2005 and 2009 may need eventually to be broken down into its component parts.

22. I have already made observations and some remarks about the large commercial quantity allegation. It does seem almost certain that if the accused is convicted of any of the substantial matters, a substantial custodial sentence will be inevitable. In this case, looking at the case as a whole and looking at the period of delay, in addition to its general seriousness and having regard to the stage we have reached in proceedings, the final amount of delay is not known. Having as best as I am able, regard to prospective delay, I do not consider delay of itself as capable of constituting exceptional circumstances.

23. The question of the delivery of the full brief and the time scale and time plan for the future conduct of this case will be contingent upon what happens when the brief is delivered by 29 January and the committal mention is conducted on 11 March 2010. If, contrary to the assurances I have been given about the delivery of the full brief or the capacity to fix a proper time scale for the continuation of these matters by 11 March 2010, further delays are occasioned, the matter will need to be further assessed.

24. The next matter, considered in combination with the first but in one sense partially discrete, was the question of parity. What had happened in this case is that the applicant's mother had been charged with an identical set of offences and was released on bail. At least in modern times, it has been accepted that parity is a consideration to be taken into account in bail applications. The difficulty with the principles of parity, either when dealing with the questions of bail or dealing with the questions of sentence, mean that it is important to compare like with like. It is true on the material that has been put before me that the applicant's mother, Gloria, has been charged with identical offences and that evidence has been given that she is to be regarded as 'at the top of the tree' within the scheme of the operation. There can be little doubt, however, that in the present case, the allegation has always been that both the applicant and his mother are at the top of the hierarchy of the offending as it is alleged.

25. With particular reference to the conspiracy to traffic as it relates to the Kallista property, although Gloria Chalmers has been charged with that offence, the evidence as it has been outlined to me seems to more directly and actively involve the applicant. Although it is clear she was to play her part. The exceptional circumstances as found in favour of Gloria Chalmers included the following matters – her age, her stable residence and her health. It is axiomatic that the matters of age and health are not matters applicable to the applicant. It does not seem to me, in any event, that even when proper regard is had to the questions of parity, a relatively generous disposition in relation to the grant of bail as might well have occurred in this case, having particular regard to the matters of age and health can be given.

26. The other matters urged were that the applicant's relationship with his partner was another consideration capable in one sense of being exceptional in its own right but taken together

with other factors capable of amounting to exceptional circumstances. Although it would seem apparent now that if released on bail the applicant would reside with her, that has not always been the case and the strength of that relationship, although identifiable, is really open to some question. But even taking that relationship put at its highest, it would not, of itself, including the circumstances of the imminent birth of their child, amount to exceptional circumstances. And nor do I regard the lack of prior convictions, the availability of sureties or the possible employment open to the applicant as capable of themselves, or in combination with those matters and with delay, as capable of constituting exceptional circumstances. The application will be refused.

27. MS CANNON: Your Honour pleases.

28. HIS HONOUR: I should add this, the Crown submitted that the applicant was an unacceptable risk of re-offending whilst on bail. Given the conclusion that I've reached, it's unnecessary to make any finding with respect to that submission. As you understand I think pretty well, Mr Stary, things might change and if they change, the matter will fall to be reconsidered.

29. MR STARY: Yes, thank you, Your Honour.

30. HIS HONOUR: I think everyone understands what I've said about taking on trust what might happen between now and March but if it doesn't happen, well - - -

31. MR STARY: Yes.

32. HIS HONOUR: I don't know whether it would be possible but it's likely, if the matter did come back, it would come back before me.

33. MR STARY: Yes, thank you, Your Honour.

34. HIS HONOUR: Anything else?

35. MS CANNON: No.

36. HIS HONOUR: Thank you.

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[1] See *DPP v Mokbel* [2001] VSC 403.

**APPEARANCES:** For the DPP: Ms G Cannon, counsel. Office of Public Prosecutions. For the applicant Chalmers: Mr R Stary, counsel. Robert Stary Lawyers.

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