[2002] QSC 248

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

Application No S6732 of 2002

RE AN APPLICATION FOR BAIL BY JAMES SAMUEL MANWARING

BRISBANE

..DATE 31/07/2002

JUDGMENT

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HER HONOUR: This is an unusual application for bail not only because of the circumstances pertaining to the application but in the manner in which the application proceeded.

The applicant is not in a show cause situation and has been in custody for approximately 20 months since 4 November 2000. He is charged with three counts of assault occasioning bodily harm. One count is alleged to have occurred on 9 September 2000 and another count is alleged to have occurred on 28 October 2000. The third count is alleged to have occurred on 3 November 2000. He is also charged with one count of common assault alleged to have occurred on 8 October 2000, one count of rape, one count of attempted rape and one count of deprivation of liberty all of which are alleged to have occurred on 3 November 2000.

The applicant intends to plead not guilty to the seven counts and foreshadowed on the application of an intention to adduce psychiatric evidence as to his relationship with the complainant who is his former wife and to raise the defence of battered spouse syndrome. As was pointed out in submissions by Mr Carmody of senior counsel who appeared for the Crown, it is difficult to see the relevance of that defence to the charge of rape and attempted rape.

The offences that are alleged to have occurred on 3 November 2000 occurred after a domestic violence order had been taken out by the complainant on 12 October 2000.

Bail has been refused to the applicant on at least five previous occasions including by her Honour Justice White on 6 March 2002 because the applicant represented an unacceptable risk to the safety and welfare of the complainant and other potential witnesses.

The complainant has relocated to Tasmania. It was conceded by the Crown that this is a material change in circumstances which permits this further application for bail to be made. It is still contended by the Crown that, notwithstanding that the complainant has relocated to Tasmania, the risk to her safety and welfare and other witnesses remains an unacceptable one.

It is not necessary to deal with the other bases relied on by the applicant for the change of circumstances as such but I will mention them as those matters were also relied on as relevant to the application for bail.

There were previously 21 charges against the applicant all of which were alleged to have been committed against the complainant. That was reduced to the seven charges to which I have already made reference. The reasons for that were canvassed in a letter by the DPP to the complainant dated 17 June 2002. I will refer to this as the "DPP letter". A copy of that letter was provided to the applicant through his solicitors.

In general terms, in respect of 14 of the counts that have not been continued with, the DPP made a decision that there was not sufficient evidence of each of those offences and, therefore, decided to proceed with the seven counts in respect of which there was either corroboration or other supporting evidence.

The applicant relies on the comments made in that letter about the complainant's "unreliability" and the persistent and angry conduct of the complainant in dealing with officers of the DPP, which was also commented upon in that letter.

It is made clear by the affidavit of M A McCormack, the senior legal officer who has the file in the DPP's office relating to the criminal proceedings against the applicant, that one of the statements in that letter seized upon by the applicant in paragraph 5(1) of his affidavit filed on 24 July 2002 was made in reference to the complaints made by the complainant about staff in the office of the DPP and not about the complaints made by the complainant in respect of the offences which the applicant continues to face.

The reference to "unreliability" in the DPP letter was in respect of the charges that are not being pursued. This letter was the focus of the application from the applicant's point of view. Apart from not amounting to a material change of circumstances, the letter has little relevance to the application.

The other change of circumstances relied on by the applicant is the reduction of the charges from 21 to seven. Having regard to the seriousness of the counts of rape and attempted rape which are included in the seven counts, the reduction in number of charges is itself not a material change in circumstances.

Before dealing with the merits of the application a comment is called for in respect of the manner in which the application was conducted on behalf of the applicant. Even though the applicant is not in a show cause situation, the application was brought by him on limited material.

This was surprising when bail had been refused on at least five previous occasions. The applicant wished to rely on oral evidence from himself and his solicitor. That is not appropriate in the applications jurisdiction where there is only limited time available for each application and the estimated time given for this application when it was filed was 20 minutes.

Mr Carmody made concessions which obviated the need for oral evidence from the applicant but oral evidence was given by the applicant's solicitor. There was also piecemeal tendering of documents.

The Crown bears the onus of showing the applicant continues to be an unacceptable risk to the safety and welfare of the

complainant and other witnesses, having regard to the conditions proposed by the applicant for bail.

What favours the granting of bail is the length of time that the applicant has been in custody which, if he were convicted of the rape and or attempted rape, could be approaching the time that he would be required to spend in actual custody after sentence and the fact that the opportunities for the applicant to approach the complainant must now be more limited as the complainant has relocated to Tasmania to an address which is presently unknown to the applicant.

The Crown properly conceded for the purpose of the application that the applicant has no present intention of contacting the complainant if he is released on bail and has a present intention of complying with the conditions that would be imposed in any bail order.

What Mr Carmody raised, despite these concessions, was whether the applicant has got the strength to fulfil his current intentions.

It is also relevant to granting bail that the applicant is encountering difficulties in the preparation of his defence, particularly the consultation with his psychiatrist and psychologist.

The trial of the seven counts is set for 2 September 2002. During argument the possibility was flagged that the applicant

may need to seek an adjournment of that trial date. It was submitted on behalf of the Crown that the adjournment should be sought before the application for bail was pursued. The applicant's counsel declined to follow that path and wished for the application to be dealt with on the basis that the trial will go ahead on 2 September.

The background to the charges on the Crown case is that there was escalating domestic violence over a period of a couple of months culminating in the conduct which underlies counts 4 to 7, which are alleged to have occurred on 3 November 2000. The offences which comprise counts 4 to 7 are described as arising from a three hour period of terrifying, spiteful and unrestrained violence including holding the complainant captive, using scissors to cut her clothes off, smothering her with a pillow, stuffing a sheet in her mouth, trying to tie her up, urinating on her and forcibly penetrating her vaginally as well as anally.

The Crown case in respect of these four counts in particular appears to be strong in that the applicant admitted to a protracted episode of substantial violence against the complainant on that date during an interview with the police.

The imminence of the trial on 2 September 2002 supports a refusal of the application. The significance of the length of time in custody is affected by the fact that delays can be contributed to the applicant and particularly the fact that 18 months after being in custody he has changed solicitors.

The trial was listed for hearing on 10 May 2002. On 19 April 2002 an application was made for adjournment of the trial date. The adjournment was granted and the matter was relisted for trial commencing 29 July 2002. An application was made on 22 July 2002 for adjournment of that trial. The adjournment was granted and the trial was relisted for 2 September 2002.

It is a matter of concern that the focus of the applicant on this application and of his lawyers in the preparation for the trial is exploring the dropping of the 14 charges. One of the reasons canvassed in the DPP letter for dropping charges was that the complainant's mother did not provide the confirmation of early complaint which the complainant had stated she had made to her mother.

The applicant's solicitors on 27 July 2002 served on the applicant's 80 year-old, ill mother, a subpoena in the following terms:

> "To produce to the Court all notes, correspondence records and files in relation to your daughter, Patricia Maree Manwaring, aka Patricia Maree Gillespie, including any details in relation to her three marriages and other relationships."

The subpoena is clearly too wide and vexatious and the relevance of what is sought must be open to question. In addition, the applicant's solicitors made the following request of the DPP in the applicant's solicitor's letter dated 27 June 2002 after having received the DPP letter the

relevance of which the defence of the continuing charges must also be open to question:

> "Accordingly, we request copies of any and all documents held by your office in relation to Ms Gillespie's complaints and conduct in relation to your office and police, et cetera, including correspondence, notes, interview records, findings, responses and any other material relevant in the circumstances."

Both counsel described the relationship between the applicant and complainant in terms such as "harmful" or "explosive." That obviously has underlined or contributed to the Crown's attitude to this application and the risks which are perceived to flow if the applicant were allowed bail. That is also reflected by the statement made by the complainant for the purpose of this application.

Relevantly, the applicant relies on the opinion of his psychologist, Dr Brian Hazell, who supports the applicant's release on bail. Dr Hazell's report is Exhibit 5. Dr Hazell visited the applicant on 7, 14 and 21 June 2002. On the first visit Dr Hazell spent three hours with the applicant assessing his current psychological state. On the second visit he administered to the applicant a series of miscellaneous psychological tests. The third visit appears to have been in the nature of a conference involving lawyers and a psychiatrist, Dr Alan Freed.

One of the tests administered by Dr Hazell was the Eysenck personality questionnaire revised, which is referred to in his report as EPQ-R 1991. As a result of the applicant's answers

to that test Dr Hazell concluded that the applicant, "Is highly unlikely to offend if granted bail."

That test, however, was in respect of general testing for addiction and criminality. I find it difficult to place much weight on the result of that test when the offences arose out of incidents involving the complainant and it is common ground between counsel for the Crown and counsel for the applicant that the relationship between the complainant and the applicant is the critical factor in respect of the alleged offending and the risk of further offending.

Dr Hazell also expressed the opinion after applying other tests, that the applicant is "moderately to severely depressed". In his prognosis, Dr Hazell expresses the opinion that the applicant "has been enmeshed in a destructive pathological relationship" and then expresses the opinion that the applicant "is now free of that relationship".

In the same prognosis is juxtaposed the opinion that the applicant "needs to be protected from any harassment from the complainant. He considers her dangerous and wants to have nothing to do with her", which suggests a continuing preoccupation by the applicant with the complainant.

My drawing that inference from the report is borne out by the

conclusion of Dr Hazell that if the applicant is granted bail "he should continue to see me for a course of cognitive restructuring and supportive counselling to put him in a fit state to do his defence justice". Dr Hazell also states that the applicant "cannot simply be released on bail with no support and nowhere to go".

There was no precision offered as to the type of counselling that Dr Hazell suggests that the applicant undergo and no submissions were made as to how the condition dealing with counselling could be framed to ensure that it was able to be enforced or supervised.

As to residence, it was proposed that the applicant would live with either his parents or the mother of a doctor friend at Burleigh. No affidavit was provided from either the applicant's parents or the other proposed residence provider to enable an evaluation to be made of the real likelihood of either providing a suitable residence with appropriate supervision.

Although the applicant's parents were prepared to provide the equity in their house which they estimate to be $110,000 surety, I am not satisfied on the material that in the circumstances that would provide the incentive to the applicant to comply with bail conditions, particularly having

regard to the applicant's attitude to his parents as set out in Dr Hazell's report.

Another factor that supports the refusal of bail is that although the complainant has relocated, she must return to Queensland for the trial. In any case, relocation does not preclude contact by a person who is determined or unable to control himself from making contact.

The other matter which is also relevant to the refusal of bail is the fact that the alleged offending conduct on 3 November 2000 took place when the applicant was aware that there was a domestic violence order against him.

As I said at the outset of my reasons, this is an unusual application for bail. In some respects I consider that the circumstances could be described as exceptional. I have set my reasons out at length to explain all the factors that I have taken into account in weighing up whether or not the Crown has discharged the onus that it bears on this application.

I am satisfied that the Crown has shown that the applicant, if released on bail, will continue to be an unacceptable risk of reoffending and will be an unacceptable risk to the safety and welfare of Crown witnesses, but particularly the complainant.

The application is refused.

I really think, Mr Prus, the statement that I made to you yesterday about the application being premature was borne out by my reflecting on the material and that is also reflected by my reasons.
