[2019] QCA 261

COURT OF APPEAL

MORRISON JA
PHILIPPIDES JA
MULLINS AJA

Appeal No 10095 of 2019
SC No 8644 of 2019

VILIAMI TAANI PAEA KISINA **Appellant**

v

DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

BRISBANE

THURSDAY, 21 NOVEMBER 2019

JUDGMENT

MULLINS AJA: Mr Kisina appeals against the learned primary judge's refusal to grant him bail for the charges of possessing MDMA where the quantity exceeded schedule 4, supplying dangerous drugs and contravening order about information necessary to access information stored electronically. The police had located 32 storage boxes at a unit in Brisbane which, they subsequently established, held 807 kilograms of product containing MDMA of a high level of purity. Soon after on 4 August 2019, Mr Kisina was observed driving to the unit in a panel van. And with the help of an associate, he moved the 32 storage boxes into the back of the van. Mr Kisina was then observed driving the van to an address in Coorparoo where he transferred the boxes to a truck, driven by another associate.

The count of possession relates to his possession of the drugs in the 32 storage boxes and the count of supply relates to his transfer of the boxes to the associate driving the truck. Mr Kisina then drove the van away and parked it until he drove it again on 6 August 2019 to Sydney. He caught a flight back to Brisbane. When the van was searched by police, they identified a false floor that hid a remote controlled hydraulic compartment capable of storing large amounts of goods.

On 13 August 2019, the police executed a search warrant at the address where Mr Kisina was residing with his partner, children and parents. The search warrant allowed for an order for Mr Kisina to give a police officer the access information necessary to be able to use the storage devices in his possession and to gain access to the stored information. The third charge arose out of Mr Kisina's refusal to supply police with information to access his mobile telephone. Mr Kisina was remanded in custody after being charged with the three offences.

Mr Kisina is now 27 years old. He has no criminal history. He has been in a relationship with his partner for 10 years and there are two children of that relationship. They live with his parents in the house owned by his parents. He holds an Australian passport which he has surrendered to police and is willing to undertake not to apply for another passport. If granted bail, he is prepared to reside at his parent's home and report daily to the local police station. His parents are prepared to be sureties up to the sum of $200,000 in support of any bail undertaking entered into by Mr Kisina. The sum of $200,000 is equivalent to Mr Kisina's parents' net equity in their home and represents the value of most of their net assets. Mr Kisina also proposes the bail order includes a condition that he not leave the State of Queensland or enter any point of international departure unless the Director of Public Prosecutions provides prior written consent for him to do so.

The primary judge noted that Mr Kisina was not in a show cause situation. The primary judge was satisfied that conditions could be imposed on a bail order that reduced the risk of commission of further offences by Mr Kisina to an acceptable level. The primary judge was

concerned, however, that there was a material risk of failure to appear as, even if Mr Kisina were dealt with on the basis he was a courier:

> "He would be facing many, many years of actual custody."

The primary judge stated:

> "The factors in support of a grant of bail are that the applicant does not have a past criminal history, that his parents are prepared to provide a very substantial surety, and that the applicant has significant ties to the community and, therefore, reasons to remain in the community. Factors that are against the grant of bail are the very substantial period of imprisonment the applicant is facing if he is convicted of these offences. Balancing matters, I am not satisfied there are any conditions that could be imposed which would render that risk no longer unacceptable. There is an overwhelming reason for the applicant to flee in the present case, having regard to the magnitude of the charges he is facing. There are no conditions that could be imposed which would satisfy me that the risk of the applicant failing to appear in respect of these charges could be rendered no longer unacceptable."

The importance of the process of a grant of bail in a civilised society was emphasised in the oft quoted observations in the judgment of Justice Thomas, with whom Justice McPherson agreed, in *Williamson v Director of Public Prosecutions* [2001] 1 Qd R 99 at [22]. The decision whether or not to grant bail is an exercise of discretion where the assessment of risk by necessity is imprecise; *Keys v DPP (Qld)* [2009] QCA 220 at [15] and [16]. For the appellant to appeal successfully against the primary judge's order, the appellant needs to show an error of the type referred to in *House v The King* (1936) 55 CLR 499 at 504 to 505.

Mr Kisina argues the primary judge fell into error by placing too much weight on the potential for significant imprisonment without consideration of relevant authorities for sentences for a courier who had minimal involvement in respect of transporting an extremely large quantity of drugs, failed to adequately consider the presumption under section 9 of the *Bail Act* 1980 (Qld) that bail would be granted (as Mr Kisina is not in a show cause situation), and failed to adequately take into account Mr Kisina's personal circumstances and the effect of the proposed conditions in assessing risk.

The submissions on Mr Kisina's behalf include the following. It is apparent that Mr Kisina's role in relation to the possession of the drugs was the subject of police surveillance. It is

relevant to the seriousness of the possession and supply charge that objectively they relate to a very significant quantity of MDMA. On the information disclosed for the purpose of the bail application, Mr Kisina's role in the drug trafficking operation was confined and no inference can be drawn that Mr Kisina knew anything more about the scope of the operation than his role. There is nothing relied on by the respondent to suggest Mr Kisina has any unexplained income or wealth. There was not enough information before the court to justify the observation that Mr Kisina would be facing "many, many years of actual custody". The primary judge's conclusion there was an unacceptable risk of flight grounded in the prospect of a lengthy period of actual custody on sentence, overwhelmed the proper consideration of the presumption of bail, Mr Kisina's personal circumstances and the effect of the proposed conditions on reducing the risk of failing to appear.

The respondent submits that the primary judge's concern about the likelihood of a lengthy sentence with its bearing on the risk as to flight was an appropriate consideration. The primary judge recognised that Mr Kisina was not in a show cause situation but the balancing of all relevant factors was against the grant of bail.

The risk of flight is a relevant risk because of the potential for a sentence involving actual custody, even though Mr Kisina has no prior criminal history. It is premature, however, to be definitive about the length of any custodial component of the potential sentence. The risk of flight is moderated by conditions that reduce the opportunity for flight and act as a disincentive for flight.

The practical effect of Mr Kisina's handing over his passport is therefore relevant, as is his undertaking not to apply for another one or approach an international departure point. The respondent's material also discloses the practical step open to the respondent to request the Department of Foreign Affairs and Trade to place a bail alert against Mr Kisina's name. The fact that Mr Kisina's parents are prepared to use most of their assets to provide a substantial sum in support of their undertaking as sureties must be a strong disincentive to Mr Kisina to flee the jurisdiction. Mr Kisina's proposal to live with his parents and report daily to the local police station is a constraint on flight.

There was a lack of material before the primary judge to suggest that Mr Kisina had the means to flee. This combination of conditions and circumstances suggest that the primary judge was in error in concluding that the risk of flight was not reduced to an acceptable level. It is also not irrelevant that since the hearing of the application before the primary judge, it has become clearer that there will be delays in the matter proceeding to committal and final resolution. A starting point on the application before the primary judge was that Mr Kisina had a prima facie entitlement to be granted bail and the conditions proposed by Mr Kisina reduced the risk of flight to an acceptable level. Bail should be granted. During the hearing of this appeal, it has become apparent that for technical reasons the surety should be from Mr Kisina's father alone, but it should be in the sum of $200,000. I would, therefore, allow the appeal and grant bail on the conditions of the proposed draft order with the variation that the surety be in the sum of $200,000.

MORRISON JA: I agree.

PHILIPPIDES JA: I also agree.

MORRISON JA: Mr Hunter, can you bring back a draft order which you'll obviously get Ms Balic look at.

MR HUNTER: We'll have that done promptly.

MULLINS AJA: We don't think that the tracking device is essential.

MR HUNTER: May it please. Thank you.

MORRISON JA: And it seems to me, it's condition D at the top of page 66 that will need alteration.

MR HUNTER: Yes.

MORRISON JA: I think the rest is pretty much standard.

MR HUNTER: Thank you.