[2002] QCA 237

COURT OF APPEAL

DAVIES JA
WILLIAMS JA
JERRARD JA

Appeal No 5773 of 2002

KEVIN PHILIP NUDD **Appellant**

and

COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS **Respondent**

BRISBANE

DATE 01/07/2002

JUDGMENT

DAVIES JA: This is an appeal against a judgment of a judge of the Trial Division on 28 May 2002 for refusing an application for bail by the appellant. The learned primary judge refused bail because she was satisfied that there was an unacceptable risk that the appellant, if released on bail, would fail to appear and surrender into custody. It was accepted by the appellant in this appeal in his written submissions that that decision involved an exercise of discretion involving the judge's satisfaction that there was an unacceptable risk that the appellant, if released would fail to appear and surrender into custody. Accordingly the appellant faced the difficulty involved in an appeal against an exercise of discretion.

It is important at the outset in view of submissions which were made by Mr Martin today that I refer at once to section 16 of the *Bail Act* 1980 (Qld) under which the matter came before the learned primary judge and this Court. Section 16 requires a judge to refuse bail to a defendant if satisfied that there is an unacceptable risk that he, if released on bail, would fail to appear and surrender into custody. The section then sets out a number of specific matters

which a judge must take into account in determining that question without limiting the judge's considerations to those matters. Those matters which were relevant to this case stated in section 16(2) of the *Bail Act* are the nature and seriousness of the offence; the character, antecedents, associations and background of the appellant; and the strength of the evidence against the appellant. As I say, they are not the only factors which may be taken into account, but they are important factors which must be taken into account.

It is plain from a perusal of her Honour's reasons that she took into account those considerations, all of which she thought, rightly in my opinion, increased the risk of the appellant if released on bail would fail to appear.

I shall say something now about each of those. Firstly, the nature and seriousness of the offence. The offence was one of being knowingly concerned in importation of a commercial quantity of cocaine into Australia on 3 May 2001. The amount of cocaine involved was 64.45 kilograms. There can be no doubt about the seriousness of the offence. It carries a maximum term of imprisonment of life imprisonment.

As to its nature, it apparently involved the activities of a large number of people including allegedly the appellant, in the importation of a large amount of cocaine. The specific cocaine in this offence was contained in bags located in an inflatable boat positioned on the stern of a vessel which had sailed into Moreton Bay. The appellant was, at various times, resident in the United States and the nature of the offence was such that if he was associated in its importation he would be likely to have associates in the United States. The offence is, in any event, of the nature of one in which considerable criminal money is invested and which it is not uncommon for people suspected of being involved to seek to avoid apprehension.

Secondly, the character, antecedents and associations of the appellant. I have mentioned something of these already. However, I should also mention that he is a United Kingdom national and appears to have entered the United States on a United Kingdom passport in his own name. There is evidence that he applied for a United States passport in a false name, that

he had used a false New Zealand passport and a false driver's licence and Green Card in order to obtain a mail box in the United States and that he had undertaken to obtain a false passport for one of his alleged co-offenders in this offence. All of this indicates, if accepted, not only that the appellant is dishonest but that he has a capacity to obtain a false passport for himself were he to be released on bail.

It has been submitted on the appellant's behalf that all of his ties are to this jurisdiction and indeed his counsel, Mr Martin, has criticised her Honour for proceeding on the basis only that most of his ties were in this jurisdiction. However, his own affidavit demonstrates that he has lived in the United States since 1987 and has travelled back and forth since then. He has conducted two separate business enterprises there. He also appears to have travelled to other places including New Zealand to which I referred earlier. He therefore plainly has had associations in the United States and possibly other places, many of them when he made applications for false documents.

Thirdly, the strength of the evidence against the appellant. The learned primary judge described the case against the appellant as prima facie a strong Crown case. That does not appear to be disputed before us. In any event, it appears to be plainly correct, the evidence involving, as it does, recorded conversations between the appellant and the co-offender to whom I have referred and between that co-offender and others, some of which implicate the appellant in this offence, others in arranging to obtain a false passport for the alleged co-offender.

The factors to which I have referred, in my opinion, without more justified the learned primary judge in refusing bail. The main argument by Mr Martin in this Court appears to focus on what he submits are errors made by the learned primary judge either with respect to the appellant's medical condition and the need to obtain surgical treatment for the injury to his leg or with respect to the relevance of the bail conditions suggested below on the appellant's behalf.

As to the latter, the bail conditions, it is sufficient to say I think that they would not significantly reduce what appears to be an unacceptable risk of the appellant failing to appear. They would not, for example, prevent his obtaining a false passport, which he has a demonstrated capacity to obtain, and leaving the country either by plane or boat with such a passport or, in the latter case, possibly without one.

The extent to which the appellant's ankle disability disables him and consequently reduces the risk of his failing to appear was disputed. The learned primary judge thought that the way in which Dr Blew's report had been obtained and not disclosed to the Corrective Services Authorities promptly enough indicated the possibility of some tactical manoeuvring on the part of the appellant and his advisers. Whether that is so or not, there does not appear to be any impediment to the appellant obtaining all necessary treatment, including operative treatment within such time as not to cause his disability to worsen. He has, Mr Martin assures us, taken steps to obtain private treatment whilst in the gaol system. I am not persuaded that he is significantly worse off in this respect if he remains in custody than if he were admitted to bail. More importantly I do not think that his medical condition significantly reduces the risk that he would not appear if bail were granted.

For those reasons I would dismiss the appeal.

WILLIAMS JA: Particularly given the evidence as to the appellant's conduct in attempting to obtain false identification and false travel documents I am not satisfied that the learned trial Judge erred in concluding that there is an unacceptable risk that the appellant, if released, would fail to appear and surrender into custody.

I agree with all that has been said by Justice Davies. The appeal should be dismissed.

JERRARD JA: I agree. I have nothing to add.

DAVIES JA: The appeal is dismissed.