

SUPREME COURT OF QUEENSLAND

CITATION: *Gaven v DPP (Qld)* [2004] QCA 15

PARTIES: **KIMBERLEY JANE GAVEN**
(applicant/appellant)
v
DIRECTOR OF PUBLIC PROSECUTIONS
(QUEENSLAND)
(respondent/respondent)

FILE NO/S: Appeal No 11773 of 2003
SC No 10571 of 2003
SC No 7027 of 2003

DIVISION: Court of Appeal

PROCEEDING: Appeal from Bail Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 13 February 2004

DELIVERED AT: Brisbane

HEARING DATE: 4 February 2004

JUDGES: de Jersey CJ, Williams JA and Mackenzie J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **Appeal dismissed**

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND
PROCEDURE – BAIL – REVOCATION, VARIATION,
REVIEW AND APPEAL – where the appellant is charged
with offences of dishonesty – where false identities and
documents created – where appellant absconded to New
Zealand and returned voluntarily – whether the exercise of
discretion by the trial judge to refuse bail miscarried

Scrivener v Director of Public Prosecutions [2001] QCA
454; Appeal No 9094 of 2001, 23 October 2001, considered

COUNSEL: The appellant appeared on her own behalf
R G Martin for the respondent

SOLICITORS: The appellant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the
respondent

[1] **de JERSEY CJ:** I have had the advantage of reading the reasons for judgment of Mackenzie J. I agree that, for those reasons, the appeal should be dismissed.

- [2] **WILLIAMS JA:** I agree with the reasons of Mackenzie J and with the order proposed.
- [3] **MACKENZIE J:** This is an appeal against refusal of bail by Douglas J on 5 December 2003. The appellant was taken into custody on 4 July 2003 after arriving at Brisbane Airport from New Zealand where she had gone in 2002 after failing to appear at Southport Magistrates Court on a number of charges. They comprised 20 fraud offences, two stealing, one receiving and one entering premises. The amount of money involved was \$37,610, \$7,100 of which was allegedly taken from her grandmother's bank account.
- [4] She was granted bail with a surety. It is alleged that she was released when her partner Zara Lee Russell impersonated her mother, who would have been an acceptable person to provide a surety. She had used a false passport to go to New Zealand. She returned voluntarily to Australia in company with Russell.
- [5] The history of bail applications is that an application was made before Atkinson J on 28 August 2003 but adjourned so that the applicant could seek live-in accommodation at a drug rehabilitation centre. The application was renewed before Philippides J on 14 October 2003. The application was refused. Philippides J observed that the appellant was in a show cause situation because she had failed to appear and fled the jurisdiction using the false passport. She said that it had not been shown that she was not an unacceptable risk. However, she urged that the offences be dealt with expeditiously and not unduly delayed, leaving the way open for a further application on the ground of material change of circumstances if there was undue delay.
- [6] A further application, which is the subject of this appeal, was made before Douglas J on 5 December 2003. Douglas J identified the requirement that a material change of circumstances was required before the further application would be entertained. When asked specifically about changed circumstances the appellant identified "prospective employment with Career Employment Australia" and that she had written to Biala about being a patient there. There was also evidence of an enquiry made by Russell of a police officer in New Zealand about returning to Australia to face the charges. Although not specifically referred to orally, there was information that a rental unit was available; Philippides J had referred to lack of fixed place of residence. In addition the appellant addressed his Honour upon her personal circumstances and matters she disagreed with in the Crown material, and made submissions designed to establish that the prosecution case on a number of the charges was unsustainable and likely to be dismissed at committal.
- [7] In her written submissions, she relied on the fact that a committal date of 30 March 2004 had been set and it would be nine months after her arrest before the committal was concluded.
- [8] Douglas J also had before him her previous criminal history which contained a sequence of convictions for offences of dishonesty from 1994 to 2001 including two series of multiple fraud offences and a conviction of robbery with actual violence whilst armed. The appellant is in breach of probation if convicted of any of the offences with which she is currently charged. If convicted of all counts it is unlikely that she would avoid a substantial prison term.

- [9] In her submissions in the present proceedings, she stressed that she was drug free and wished to avoid repeating mistakes made in the past. She expressed optimism that a substantial number of the charges would be dismissed at committal, but said that being in custody was hampering her ability to prepare for those proceedings as she was not legally represented. She also suggested that she would spend longer in custody on remand than any term of imprisonment she might receive if convicted. She also put in issue whether, as the Crown material suggested, she had left her child in the care of her mother for most of its life. She also said that she had returned voluntarily to Australia.
- [10] Even if the matter were treated as a renewal of an application for bail rather than an appeal, in my view the application would have to be refused. The strengths or weaknesses of the cases against her cannot be determined in these proceedings. There is information in the Crown material that suggests that there is evidence linking her with offences. These issues may become clearer after committal. If the appellant's assertion about the strength of the cases against her proves correct, her prospects of obtaining bail may be better at that point, especially if her concern over the time she may spend in custody becomes well founded. But at present, the risk that, if granted bail, she may fail to appear when required remains high, especially in view of her apparent capacity to create false identities and documents.
- [11] Having said that, the matter came before the Court as an appeal against the decision of Douglas J refusing bail. The nature of an appeal is discussed in *Scrivener v DPP* [2001] QCA 454. Such an appeal ordinarily involves a rehearing on the record. The decision appealed from is one involving an exercise of discretion and the principles applying to setting aside a discretionary decision are relevant. In my view the applicant has not established that there is anything in the evidence that leads to the conclusion that the exercise of the discretion to refuse bail miscarried. I would dismiss the appeal.