SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

QSC [2004] 84

No 2813 of 2004

RE AN APPLICATION FOR VARIATION OF BAIL BY SCOTT ANDREW PRICE

BRISBANE

..DATE 14/04/2004

ORDER

HIS HONOUR: This is an application pursuant to section 10 of the Bail Act by a prisoner for a variation of bail granted in the Magistrates Court on the 27th of January 2004. The bail then granted was granted at a time when the applicant was in a show cause situation and it must be assumed that the Magistrate was satisfied that the applicant had shown cause why he should be granted bail.

There were a number of conditions imposed on the bail which was granted to the applicant. They were, apart from the usual conditions regarding appearance, that he reside at a stated address, that he report to the police at a nominated place and time daily and that there be provided a surety to the extent of $60,000.

The applicant seeks an order varying his bail to the extent that the condition of a surety of $60,000 or two sureties of $30,000 be deleted. The ground for the application for variation is that he is unable to provide a surety in such a large amount or indeed at all. That assertion made in his affidavit is unchallenged by the Crown.

The submissions on behalf of the Crown are first that the application for variation should be approached as though it were a fresh application for bail made to this Court. The consequence of such an approach Ms Ferguson, who appeared for the Crown, submitted is that the applicant is again in a show cause situation and second that he must deal not only with the

risk of his failure to appear but also with the question of the risk of the commission of further offences.

The Crown submits that adopting such an approach, it will be seen that the applicant is at substantial risk of re-offending if released and that he should therefore not be granted the variation which he seeks.

In my judgment the approach contended for by the Crown is not correct. The jurisdiction to vary bail is exercised as a fresh jurisdiction. That is to say it is a fresh application made to this Court, not an appeal from the order of the Magistrate. It is, however, not an application for a fresh bail order. The bail that was granted by the Magistrate remains in place. It is contrary to the Act in considering a variation application to take into account any considerations, which although relevant to the original bail application, are not relevant to the issues which arise on the variation application.

Similarly it is in my judgment not correct to apply section 16, subsection 3 of the Bail Act to an application such as this. That subsection is directed to the grant or refusal of bail and not to the question of whether bail already granted ought to be varied. I, therefore, approach the case not on the basis that contended for by the Crown but on the basis that I should take into account only those matters relevant to the particular variation which is sought.

A surety is required to ensure that the applicant turns up for his trial. The surety becomes liable in the event that the defendant fails to appear in accordance with his undertaking and surrender into custody. See form 8 and following of the forms under the Bail Act. Form 8 was given to the defendant in this case.

No facts have been advanced by the Crown before me which suggest that the presence or otherwise of a surety impacts in any way on the likelihood of the applicant committing further offences, nor has it been demonstrated that that likelihood impacts in any way on the desirability of there being a surety. I therefore do not take into account the risk of the applicant's re-offending.

Prima facie it is undesirable to impose a requirement for a surety in a grant of bail in circumstances where the offender is plainly unable to provide the surety required. Whether that was the position at the time bail was granted to the present applicant it is unclear. It may have then appeared that there was a possibility of such a surety being provided. No reason was advanced in the evidence before me for why such a high amount was set as the requirement of the surety. That is not the position now. There is no chance of a surety and such a condition renders the bail an empty gesture. The issue really is whether the applicant should have bail without a surety or whether the risk of his failing to appear is such that he should be kept in custody. That involves an examination of the circumstances.

The charges levelled against the applicant are numerous. The most serious of them are receiving, stealing, fraud and breaking and entering and committing an offence. The likely range of penalties, having regard to the applicant's criminal history, seems to be imprisonment for a period of up to five years. However, the applicant intends to plead guilty to these charges.

An indictment has been prepared for presentation in the District Court in respect of three of the charges and that indictment is expected to be presented on the 23rd of this month, nine days from now. In addition an ex officio indictment has been prepared in relation to all other offences expect one and that will be presented to the District Court on the day when the applicant appears for sentencing.

The indictment to be presented in nine days charges the three offences of burglary and stealing, wilful damage and unlawful use of a motor vehicle and the balance are in the ex officio indictment. When the former indictment is presented the Court will be invited to set the matter down for sentence, not for trial.

There is one outstanding matter pending in the Magistrates Court. Bail has already been granted in respect of it and because it is a drug matter involving an amount of drugs which would place it in the jurisdiction of this Court it could not be dealt with at the same time as the District Court matters in any event.

In short the applicant is to plead guilty to offences which carry a likely penalty of the order to which I have referred but because of this fact is likely to receive some discounting in respect of his cooperation in the administration of justice.

More important is the fact that he has been in custody already in respect of these offences for approximately two years and five months. That has not been continuous custody because he was in custody for four months, then on bail for a period, then taken back into custody, but the total amount is two years and five months and it is, even on the best estimate, unlikely that he would be sentenced inside about a further one to two months. In short there is some prospect that when sentenced the time in custody would equal or exceed the amount of actual custody which he is ordered to serve.

In these circumstances he submits he would be mad not to turn up for his sentence. I would not necessarily accept that submission literally and I am conscious that there could be reasons which might lead him not to turn up but I am satisfied that nothing has been shown in the present case which would demonstrate such a likelihood. He does have previous convictions for breaches of the Bail Act, but they do not, I am informed by the Crown, involve failing to turn up for the hearing.

In these circumstances it seems to me that there is some likelihood that if he is kept in custody he may have to serve

more imprisonment than will ultimately be imposed. He is conscious of that fact and is unlikely to fail to appear given the real possibility of his immediate release from custody.

I do not think there is any need to maintain the requirement for the surety. I therefore propose to order that the bail granted in the Magistrates Court to the applicant on 27 January 2004 be varied by deleting the requirement for one surety to the value of $60,000 or two sureties in the sum of $30,000 each.

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HIS HONOUR: I have just varied the draft slightly. The bail granted in the Brisbane Magistrates Court on 27 January 2004 be varied by removing the requirement of one surety of $60,000 or two of $30,000. I have initialled that.
