SUPREME COURT OF QUEENSLAND

CITATION:	*Director of Public Prosecutions v Filippa* [2004] QSC 470
PARTIES:	**THE DIRECTOR OF PUBLIC PROSECUTIONS** (applicant) **v** **TODD SEAN FILIPPA** (respondent)
FILE NO:	BS 10809/04
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	16 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	14 December 2004
JUDGE:	Douglas J
ORDER:	
CATCHWORDS:	CRIMINAL LAW - Jurisdiction, Practice and Procedure - Bail - Revocation, Variation, Review and Appeal – Nature of Review *Bail Act* 1980 ss 8, 10, 15, 16, 19, 19B, 19C, 30 *Uniform Civil Procedure Rules* 1999 r. 430 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, discussed *Ex parte Edwards* [1989] 1 Qd R 139, referred *Ex parte Maher* [1986] 1 Qd R 303, referred *House v The King* (1936) 55 CLR 499, referred *Powell v Streatham Manor Nursing Home* [1935] AC 243, referred *R v Wren* [2000] 1 Qd R 577, referred *Re Coldham; Ex parte Brideson [No. 2]* (1990) 170 CLR 267, applied *Scrivener v DPP* (2001) 125 A Crim R 279, referred
COUNSEL:	Mr M. Simpson for the applicant Mr P. J. Davis for the respondent
SOLICITORS:	Director of Public Prosecutions for the applicant Dearden Lawyers for the respondent

[1] **DOUGLAS J**: Todd Sean Filippa has been charged with trafficking and producing methylamphetamine. He was granted bail by a magistrate on 8 December 2004. The Director of Public Prosecutions has brought an application for review of that decision pursuant to s. 19B of the *Bail Act* 1980. A preliminary question has been raised by Mr Davis on behalf of Mr Filippa concerning the nature of the review available under s. 19B. The question is whether the review should be conducted as an appeal by way of rehearing or as a hearing de novo.

[2] Section 19B itself does not apply to a decision by the Supreme Court, a decision by a trial judge under s. 10(2) or a magistrate's decision where the magistrate acts as a reviewing court under the section. Decisions that may be reviewed include decisions of police officers. The section permits a review of another decision about release under Part 2 of the Act and, on the review, allows additional or substitute evidence or information to be given. The reviewing court may make any order it considers appropriate limited by some other sections of the Act, including s. 16, which details the circumstances where bail should be refused. The person or court making the decision under review must give the reviewing court any documents in the person's or court's possession that may be relevant to the review and the reviewing court must decide an application under the section as soon as reasonably practicable.

[3] To deal with the arguments it is useful to consider the structure of the Act. Section 19B was inserted into the Act in 1999 and does not appear to have been the subject of any decisions of this Court. Section 8 of the Act empowers a court to grant bail to a person held in custody where the applicant is awaiting a criminal proceeding to be heard by that court. There is also a general jurisdiction given to the Supreme Court by s. 10 to grant bail and to enlarge, vary or revoke the bail of anyone charged with a criminal offence. By s. 10(2) and s. 10(3) an exclusive jurisdiction to grant bail, which is not reviewable, is given to a trial judge once the proceeding before him or her has commenced; *R v Wren* [2000] 1 Qd R 577.

[4] By s. 30, bail granted to a defendant on an undertaking may be varied or revoked, upon the application of the Crown or complainant, by the court that granted the bail, the court before which an indictment has been presented or the Supreme Court if the court is of the opinion that it is necessary or desirable in the interests of justice to do so. A defendant who has been refused bail has a right to make further applications for bail to a single judge pursuant to s. 19 of the Act, subject to the discretionary restrictions identified in *Ex parte Edwards* [1989] 1 Qd R 139, 142 requiring a change in circumstances from an earlier application. An appeal is also able to be brought from a decision under the Act; *Ex parte Maher* [1986] 1 Qd R 303.

[5] Section 19B is contained in Part 2 of the Act as are s. 8, s. 10 and s. 15. Section 15 relaxes the ordinary procedural rules and rules about the admissibility of evidence in respect of proceedings about the release of persons under that part. That relaxation of the rules does not apply to an application to vary or revoke bail under s. 30 of the Act which appears in Part 4.

[6] Mr Davis' submission is that the review allowed by s. 19B, when viewed in the context of the Act as a whole, is an appeal by way of rehearing which requires error to be shown in the decision being reviewed. The decision whether to grant or not grant bail is, he submits, an exercise of discretion, review of which is governed by the principles in *House v The King* (1936) 55 CLR 499, 505, namely:

> "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for this if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[7] If that is the case then, he submits, the applicant Director has not identified with any precision the evidence which was before the magistrate, has not put before the court the reasons of the magistrate in granting bail and could only succeed if the allegations made and the objection to bail document which were likely to have been before the magistrate show that the decision to grant bail on strict terms was so unreasonable that it demonstrated error no matter what the reason for the decision might have been and no matter what other evidence may have been before the magistrate. His submission was that no such case could be made out by the Director here.

[8] One argument he makes for that conclusion draws strength from the safeguards he submits are required by the Act in cases where there is an application under s. 30 to vary or revoke bail previously granted. He submits that, as bail applications are civil proceedings of an interlocutory nature, evidence admissible on an application under s. 30 to vary or revoke bail would be confined to the evidence a person making it could give if giving evidence orally or to statements based on information and belief, if the person giving the evidence states the sources of the information and the grounds for the belief pursuant to r. 430 of the *Uniform Civil Procedure Rules* 1999. Because s. 30 is in Part 4 rather than Part 2 of the Act he submits that the relaxed procedures permitted by s. 15 are not applicable under such an application. He also points to the provision in s. 30(1) of the Act limiting the court's power to vary or revoke bail under that section to the circumstances where it is of the opinion that it is necessary or desirable in the interests of justice to do so.

[9] By contrast he then points to s. 19B(6)'s statement that the reviewing court may make any order it considers appropriate and the evidence sought to be led here by the Director. It is clearly presented on the basis that s. 15 of the Act applies to permit otherwise inadmissible evidence to be used on this application. The requirement for proper proof of evidence on an application under s. 30, he argues, is unsurprising because s. 30 prescribes a procedure by which bail obtained validly, in the absence of error by the primary court, and which has lead to the accused being at liberty may still be revoked but only by properly established evidence.

[10] It is in that context, therefore, that Mr Davis submits that, on its proper construction, the review provided for in s. 19B must be one of a decision which can be reviewed for error only on the discretionary grounds discussed in *House v The King*. Otherwise it would avoid the safeguards built into the process allowed by s. 30.

[11] To the contrary, the Director urges through Mr Simpson that this is a hearing de novo rather than an appeal by way of rehearing; see *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, 203-204 at [14]-[16]. In *Re Coldham; Ex parte Brideson [No. 2]* (1990) 170 CLR 267, which was discussed and distinguished in *Coal & Allied Operations,* two indications that the appeal there was properly treated as an appeal de novo included the power in the Australian Industrial Relations Commission to take further evidence for the purposes of the appeal and to make such order as it thought fit upon the determination of the appeal. It was the absence of the power to make such order "as it thought fit" in *Coal & Allied Operations* that distinguished it from *Re Coldham; Ex parte Brideson [No. 2]* see *Coal & Allied Operations* at [15]-[17].

[12] Mr Davis sought to distinguish that approach by reference to the fact that the appeal here was one from a court rather than an administrative body but the critical issue seems to have been the breadth of the powers given to the Commission on the appeal. As the Court said in *Coal & Allied Operations* at [15] the provision considered in *Re Coldham; Ex parte Brideson [No. 2]* requiring the commission to "make such order as it [thought] fit" indicated that the Commission's appellate powers were not constrained by the need to identify error on the part of the primary decision maker, but, rather, that the Commission was obliged to give its own decision on the evidence before it. Although Mr Davis submitted that, on such an approach, there was then no work left for s. 30 to do, that is not the case.

[13] Section 19B does not apply to a decision of the Supreme Court, which leaves s. 30 with room to operate independently of s. 19B. There also seems to be some overlap between s. 10 and s. 30 in respect of the Supreme Court's power to vary or revoke bail except where the bail has been granted to a defendant on an undertaking.

[14] He also submitted that, in the absence of the Magistrate's reasons, there remained nothing to review. That is not correct, however, as there is still his decision, the details of which are available and which can be reviewed. He also submitted that s. 19B had to be read with s. 19C dealing with review by the Supreme Court of a magistrate's decision where the magistrate's decision itself was a review of the decision of a police officer in relation to bail. Under s. 19C such a decision can only be reviewed with the Supreme Court's leave; see s. 19C(4). His submission in respect of that was that if s. 19B gives an unfettered jurisdiction to the Supreme Court to substitute its own decision irrespective of error below then there was no possible policy reason to deny the Supreme Court such a jurisdiction where a magistrate has made an intermediate decision. There may be some strength in that submission although the legislature may simply have wished to allow only one level of review as a matter of course. He also submitted that s. 19B(8)'s requirement that the court that made the decision under review give the reviewing court any documents in its possession that may be relevant to the review suggests that the focus is on review rather than hearing the matter afresh.

[15] It seems to me, however, that the decisive issue is the one previously identified, namely the provision of s. 19B(6) that on the review additional or substituted evidence or information may be given and the reviewing Court may make any order it considers appropriate. That appears to me to make the application one that should be treated as a rehearing de novo; see *Powell v Streatham Manor Nursing Home* [1935] AC 243, 263 referred to in *Scrivener v DPP* (2001) 125 A Crim R 279, 281-282.

[16] Accordingly it is my view that the matter should proceed as a rehearing de novo and that the admissibility of the evidence relied upon by the Director should be tested by reference to s. 15 of the Act rather than r. 430 of the *Uniform Civil Procedure Rules*.

[17] The reasons for the decision of the magistrate to grant bail subject to the conditions imposed on Mr Filippa are not yet before me in spite of the requirement of s. 19B(8) that the court that made the decision under review must give the reviewing court any documents in the court's possession that may be relevant to the review. I understand that there has as yet been no transcript made of the magistrate's reasons for his decision but any tape recording of those reasons may be a document in the Magistrates Court's possession that may be relevant to the review and certainly one would think that, if a transcript is produced, that would be a document relevant to the review that the Magistrates Court must give to this Court pursuant to that section. I shall hear the parties as to whether the application should proceed in the absence of those reasons or the other documents from the Magistrates Court.