[2009] QSC 197

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

PETER LYONS J

No 7556 of 2009

AN APPLICATION FOR BAIL BY
KEVIN JOHN TURBILL

BRISBANE

..DATE 27/07/2009

ORDER

HIS HONOUR: The applicant is charged with the murder of Rafal Jagoszewski at Eagleby on the 3rd of September 2008. He has been in custody since that date.

Because of the charge, under section 16 subsection 3 of the Bail Act, bail is to be refused unless the applicant shows cause why his detention in custody is not justified. I have with respect to that provision been referred to a statement first made by Hunt CJ at CL in R v Kissner unreported 17 January 1992 where his Honour said in respect of the analogous provision in New South Wales, that the strength of the Crown case is the prime consideration where this provision applies. That follows from the fact that the section demonstrates a clear legislative intention that persons charged with serious offences should normally or ordinarily be refused bail.

However, his Honour went on to state that if the Crown case is not a strong one, the other circumstances which apply generally in bail cases will be given greater weight and that the task of an applicant, although still substantial, will be correspondingly less difficult.

The principles stated by his Honour were adopted in Commonwealth DPP v Germakian [2006] NSWCA 275 at paras 9-11, a decision of the New South Wales Court of Appeal.

I therefore commence with an examination of the strength of the Crown case. I do not propose to recite in detail the summary of the evidence. However, it should be noted that the

principal offender is Clint Handley. He and the applicant went to the deceased's place of residence on the 3rd of September. At that time the deceased was originally at the rear of the house with a pocket knife carving initials on a tree. He came around the side of the house to the front of the house. There is evidence that Handley punched him and that Handley then sent the applicant first to get a gun, and then instead to get a knife from the car. The deceased retreated. The applicant brought the knife to Handley and at about the time the applicant handed the knife to Handley, the deceased retreated inside the house.

The applicant, at least on some of the evidence, then sought to have Handley desist from any further aggression towards the deceased, but Handley continued and got through the door and stabbed the deceased once. These accounts emerge, to a significant extent, from evidence of the witnesses who have given evidence at the committal. The accounts in the original statements to the police were less favourable to the applicant. One relevant witness remains to give evidence in the committal, which has not concluded. I am told that the committal will resume in September and that if the applicant is committed for trial, there will not be a trial until the latter part of next year.

It seems to me that as a result of the evidence at the committal, the case against the applicant, at least on the count of murder, is not particularly strong and he is not without some prospects of being acquitted.

The applicant is 19 years of age and is in a stable relationship, being the father of two young children. He has an offer, confirmed by affidavit evidence from the employer, of part-time employment one day a week as a factory hand. He has previously held a number of positions in floor sanding, as a motor mechanic, as well as a factory hand. He has a limited criminal history involving a number of assaults and some other offences, all as a juvenile. One offence occurred in 2002, a number occurred in 2003 and the most recent offences occurred in September 2005.

Apart from the strength of the Crown case, matters urged by the respondent relate principally to the risk of interference with witnesses, the risk of a failure to appear, and the risk of further offending. The concern relating to interference with witnesses is said to arise from the fact that the applicant intends to reside rather close to the place where the offence occurred. It is submitted that the place where the applicant proposes to live is effectively just on the other side of the freeway from the place where the offence occurred.

However, there is no suggestion of any connection between the applicant and this place, which is the residence of a number of witnesses. Most, if not all, of them have given evidence in the committal. Indeed this place seems to have been unknown to the applicant until the date of the offence. There is no suggestion that there is anything that would lead the

applicant to go to this address. There is no specific matter pointed to, indicative of an intention of the applicant to go to the address or make contact with the witnesses. The applicant proposes a condition that he have no contact either directly or indirectly with any of the prosecution witnesses except through his legal representatives. In this case it does not seem to me that the risk of interfering with witnesses is of any particular significance.

With a serious charge there is inevitably a risk of flight. The surety which is proposed is substantial. It is the sum of $100,000 offered by way of equity in a home owned by the applicant's uncle. It is significant and is offered by someone who has obviously some reasonably strong connection with the applicant. There are the other features which I have mentioned which suggest other significant ties with the jurisdiction.

The applicant proposes a thrice weekly reporting condition in addition to the surety. The applicant does not hold a passport. He deposes that he has never travelled outside of Australia.

Conditions are proposed on his behalf:

> that he not depart the state without the prior written consent of the Office of the Director of Public Prosecutions;

that he reside at 44 Therese Street, Marsden unless he receives written permission to do otherwise from the Office of the Director of Public Prosecutions;

that he not apply for a passport or exit visa nor approach any international point of departure;

all in addition to the reporting condition.

It seems to me that the risk of flight which must be present in every case, is not particularly significant in this case.

The third of the matters was the risk of re-offending. That is based on the applicant's criminal history. I note that that history is not particularly recent. I also note that the applicant was not the principal offender in the present case. The visit to the deceased's residence was not initiated by the applicant, and there is some evidence of his attempts to restrain Handley once the deceased withdrew into the house. I do not consider the risk of re-offending to be significant.

While I am conscious of the onus imposed on an applicant in a case such as this, I am also mindful as was said by Thomas JA in Williamson v DPP [2001] 1 Qd R 99 at para 22 that, "No grant of bail is risk-free." Taking together the circumstances and in particular the effect on the Crown case of the evidence at committal and the conditions proposed on behalf of the applicant, I am satisfied that the applicant has shown cause why his further detention in custody is not justified.

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HIS HONOUR: What I have written in is this. The circumstances of the case and in particular the effect of the evidence at the committal on the strength of the Crown case, together with the conditions proposed by the applicant, satisfy me that the applicant has shown cause for the purposes of section 16 subsection 3 of the Bail Act.

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HIS HONOUR: I make an order in terms of the draft which will be placed with the file.
