SUPREME COURT OF QUEENSLAND

CITATION:	*Re Morant* [2020] QSC 79
PARTIES:	**GRAHAM MORANT** (Applicant) **v** **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS** (Respondent)
FILE NO/S:	BS 319/18
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	3 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2020
JUDGE:	Lyons SJA
ORDER:	**Application refused**
CATCHWORDS:	CRIMINAL LAW — PROCEDURE — BAIL — AFTER CONVICTION — GENERALLY — Where the applicant was convicted after a trial of one count of counselling suicide and one count of aiding suicide – where the applicant was sentenced to ten years imprisonment and six years imprisonment respectively – where the applicant applied for bail pending the imminent handing down of a decision on appeal against conviction and sentence – whether there are strong grounds for concluding that the appeal will be allowed – whether the sentence imposed is likely to have been substantially served before the appeal is determined – whether the applicant has demonstrated exceptional circumstances in the context of the ongoing COVID-19 pandemic and the applicant's age and underlying medical condition *Bail Act* 1980 (Qld), s 8, s 16 *Ex-Parte: Maher* [1986] 1 Qd R 303, cited *Hanson v DPP (Qld)* [2003] QCA 409, cited
COUNSEL:	D Wells for the Applicant D Balic for the Respondent

SOLICITORS: Tamborine Mountain Law for the Applicant
Office of the Director of Public Prosecutions for the Respondent

HER HONOUR (delivered *ex tempore*): This is an application for bail by Graham Morant. He seeks bail pending the handing down of the decision of the Court of Appeal against both his conviction and sentence.

Mr Morant was subject to a trial in this court. It was a nine day trial, it occurred between 17 September 2018 and 26 September 2018 and he was found guilty on 2 October 2018 in relation to both counts. On 2 November 2018 Mr Morant was sentenced to a period of ten years imprisonment for counselling suicide and six years for the offence of aiding suicide. Convictions were recorded and no parole date was set, so by force of the legislation he becomes eligible for parole on 1 October 2023, as he was taken into custody on 2 October 2018.

On 3 February 2020 his appeal against conviction and sentence, including grounds that there was fresh evidence, was heard by the Court of Appeal. That decision was reserved. I note that if the three month protocol for the handing down of decisions by the Court of Appeal is observed, a decision of that court would be expected within the next month. No application for bail was made at the time the matter was heard before the Court of Appeal and there was no indication by the court, at that point in time, in relation to its decision.

There is no doubt that the Court of Appeal has power to grant bail in relation to a criminal proceeding before it under s 8(1)(a)(i) of the *Bail Act* 1980 (Qld). It is also clear that the powers of the Court of Appeal can be exercised by a Supreme Court judge under s 8(5) of the *Bail Act*. Section 8 of that Act sets out all the relevant provisions, with subsections (1) and (5) giving jurisdiction to this court to grant bail to an offender who wishes to appeal against their conviction or sentence.

It is clear that in the decision of *Ex-Parte: Maher,*[1] Justice Thomas indicated that:

> "the only area into which the Legislature has entered relevant to [an application for bail pending appeal] is the negative area of s. 16 which requires that if certain features are present the court is *not* to grant bail."

Those factors are well known and are set out in s 16(1) of the *Bail Act*. In s 16(2), the *Bail Act* provides that the Court "shall have regard to all matters appearing to be relevant" in assessing whether there is an unacceptable risk with respect to any event specified in s 16(1).

The authorities including the decisions of *Ex-Parte: Maher*[2] and *Hanson v DPP (Qld)*[3] make it very clear that the granting of bail pending an appeal, and in this case I note, pending the handing down of the decision on appeal, is exceptional. In *Ex-Parte: Maher* Justice Thomas said the following:[4]

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[1] [1986] 1 Qd R 303 at 309.
[2] [1986] 1 Qd R 303.
[3] [2003] QCA 409.
[4] [1986] 1 Qd R 303 at 311.

> "In some cases it may be possible to discern immediately a patent error in the proceedings below which indicates that the applicant has a good chance of success upon appeal. This may afford sufficient reason to grant him bail."

In this case I note bail has not been granted at any point prior to the appeal or subsequent to the hearing of the appeal. This court has jurisdiction, as I have already indicated. However, an applicant has no *prima facie* right to bail in these circumstances and a bail after conviction should only be exercised where the applicant can show exceptional circumstances.

In the submissions for the applicant, counsel for the applicant has accepted that the granting of bail pending appeal (and I take that to mean the handing down of the decision on appeal) is unusual and will only be made in exceptional circumstances. It would seem that the argument is that the COVID-19 pandemic is such an exceptional circumstance, and it would seem that the basis of the argument is that there are exceptional circumstances existing here.

Counsel has referred me to the usual test, which is noted in the authorities, and that usually the discretion to grant bail pending appeal is one that requires the analysis of two conditions:

1) The modern practice of granting bail pending an appeal only where it appears *prima facie* that the appeal is likely to be successful; or

2) Where there is a risk that the sentence will have been substantially served by the time the appeal is heard.

Counsel for the applicant argues that in this case, those two conditions do not have to in fact both be present and as I understand the argument, it is that the circumstances which exist in relation to the COVID-19 pandemic are such that they, prima facie, are exceptional circumstances. I note that the argument is set out in the submissions by counsel.

In terms of the usual elements which need to be considered, counsel has addressed those and does argue that given the applicant will be required to serve some five years, and he has served one year and five months, it is argued that that is a substantial proportion of the sentence (although it is accepted he is not eligible for parole for another three and a half years). It is also argued that the determination of the extent of Mr Morant's culpability in this case may take years because it was a sentence which was fairly unique and that there is no real precedent in relation to the sentence imposed. There were no other sentences or useful comparatives that could be relied upon. It is also argued that there is a likelihood of fresh evidence and there is an ongoing likelihood of fresh evidence. It is argued that there has not yet been a coronial inquest, but that this may well occur given the argument that there was DNA of two people found on the pull cord and the DNA of one matched the deceased and the other did not match the applicant.

It seems that police have refused to investigate the identity of the second person and I have note the response by the Superintendent in relation to an argument that the further investigation should be made. It would seem at this point in time there is no proposal by the police to make further investigations.

In relation to the other aspect of the prospects of success on appeal, in in this case the appeal has been heard and the decision is expected soon. It is not a case where there is patent error, it would seem to me, despite the arguments advanced by counsel. It would also seem to be the case that it could not be argued that there is a strong prospect of success in the circumstances. That has not been established on the material before me.

In terms of the other factors that one usually considers in relation to granting bail I accept that Mr Morant would not be a flight risk and I accept that he did comply with all of his bail conditions when he was granted bail pending trial. The factors that are relied upon are the exceptional circumstances generally in that the Queensland Government has clearly identified that there is a pandemic and has published a number of health directives. There have also been indications from the Queensland Government and indeed the Federal Government and the broader medical community that the list of those most at risk includes people over 65 with an underlying lung condition and also those over 70.

I accept that there is information before me which indicates that Mr Morant is over 70, he is 71. I also accept that he has some underlying conditions. The extent of those conditions is not fully known. I note that the email from Dr Zielinski, which was forwarded at 12.54pm today, provides at paragraph 3:

> "3. I do not know (without [further] tests by respiratory clinic) whether the scar tissue on Graham's lung is cancerous, precancerous or benign lesion. The possibility that his lung condition would exacerbate the complications of COVID 19 is real and potentially dangerous. Certainly he should be checked by CT scan urgently. When approached by his family on 25 March I was concerned at information that he lost weight."

Dr Zielinski also set out in his email that "COVID 19 spreads most rapidly in crowded conditions", and refers to the fact that prisons are places where the risk of spread is increased. He also states in the email that:

> "5. In the event that Graham did contract the disease in prison, the community would be disadvantaged because, since the consequences are in his case more likely to be serious, the likelihood is greater that scarce medical resources, like ICU resources, would need to be employed, and medical staff would be at risk by following prison safety protocol as well."

He argues that Mr Morant "would be safer by staying at home in his own community. Mt Tamborine is comparatively isolated and therefore suitable". In this regard, as I have said, I have had regard to the underlying principles in relation to a grant of bail pending an appeal decision. The principles are well-established and are set out in Hanson v DPP (Qld). At [5] the court said:

> "The decision of the Full Court in *Maher*'s case recognised that s 8(1) and (5) of the *Bail Act* give jurisdiction to this Court to grant bail to convicted offenders wanting to appeal their conviction or sentence, or both; but that the respect for a jury's verdict which underlies our system of criminal justice requires that a regularly obtained conviction should not be seen as a mere step in the process of appeal. Accordingly, the release on bail of an appellant sentenced to a reasonably long term of imprisonment should

> occur only in exceptional circumstances. To do otherwise runs the risk of proliferation of appeals without merit; and it is against the public interest, which is that convicted offenders are seen to be penalised. It would also encourage applications for bail which would really be preliminary hearings of subsequent appeals."

In this case there is no danger that the applicant will have served a substantial period before the determination of his appeal, which has already been heard. As I have indicated, it is foreseeable that the decision will be handed down in the near future.

Turning to the substance of the application, which is that there are exceptional circumstances in this case. It would seem to me that the second ground that there are strong prospects that the appeal would be successful, has not been made out in the application before me. I accept that the appeal has been heard, and it is therefore difficult to make any particular finding that there are strong grounds of appeal. Counsel for the DPP points out that the basis of the appeal centred on the length of the sentence and the argument by the applicant was that the more appropriate sentence would be one of eight years as opposed to one of ten years. I note that in that case, he would still be required to serve at least four years. Even if the sentence were eight years, it would still not mean that the applicant has served a substantial part of the sentence.

In essence, as I have said, this application really relates to the current pandemic as a factor relevant to the exercise of the discretion. I have considered that material closely, in particular I have considered the medical records in relation to Mr Morant. I have considered the opinion of Dr Zielinski, and I have also considered the opinion expressed by Dr Home. In that regard I have to note that Dr Home states that the primary risk factor is the high risk of COVID-19 at the applicant's age. He states that the report indicated the applicant had a chronic cough, but that that was four years ago. He notes the applicant's lung function is unknown because he has not had tests done. It is also clear that Mr Morant has an undefined lung condition (as I have already noted, in accordance with Dr Zielinski's report). I also note that Dr Home states that:

> "Whilst the confinements of custody will place all people at risk should a positive case be detected, it could be argued that at this point in time, a secure environment is safer than the outside world".

In this regard, I note the letter from the Commissioner for Corrective Services which is annexed to the affidavit of Ms Courtney Pallot. In particular, I note that commissioner Martin states that:

> "Officers and other essential staff entering Queensland prisons are required to undergo medical screening by Queensland Health (QH) staff, including temperature checks before entering. People exhibiting a temperature over 38 degrees or flu-like symptoms will not be permitted access, but instead will be referred to a fever clinic or emergency room. This process came into effect from 27 March 2020."

There has also been screening of all new and remanded or sentenced prisoners for indicators in relation to any flu-like symptoms or temperature factors. There are also precautionary measures in place, and also they have taken into account isolation protocols. The use of thermal cameras in correctional facilities is also being investigated and they

have put in place isolation accommodation areas and additional areas as needed. I accept, as Mr Wells has pointed out, that the records of Qld Corrective Services whilst it records a person's age and whether they are Aboriginal or Torres Strait Islander, it does not identify prisoners who have chronic illnesses.

It would seem to me that in the current circumstances where there is no current prisoner in any correctional centre in Queensland who has been identified as having COVID-19, the risks in a correctional centre at this point in time given the strict procedures for entry into the correctional centres, is in fact low. In fact, the prison population has been essentially isolated from anyone returning from overseas or anyone who is testing positive for any flu-like symptoms. It can be argued that in fact a person in custody is removed from and contained from a likely spread of illness.

As I have indicated, I accept Mr Morant is over 70 but in the circumstances that presently exist, while I accept that COVID-19 is an exceptional development, it does not constitute exceptional circumstances for the purposes of an application for bail pending the handing down of a decision by the Court of Appeal which is expected within a short timeframe.

In all of the circumstances, I am not satisfied that there has been established exceptional circumstances in this case and the application for bail by Mr Morant is refused.