HIGH COURT OF AUSTRALIA

KIRBY J

HAKIJA SINANOVIC APPLICANT

AND

THE QUEEN RESPONDENT

Sinanovic v The Queen (No 1)
[2001] HCA 35
Date of Order: 15 May 2001
Date of Publication of Reasons: 8 June 2001
S303/2000

ORDER

Application dismissed.

Representation:

W C Terracini SC for the applicant (instructed by Ramrakha Jenkins)

A M Blackmore for the respondent (instructed by Solicitor for Public Prosecutions (New South Wales))

CATCHWORDS

Sinanovic v The Queen (No 1)

High Court Practice - Bail - Application for bail pending application for special leave to appeal against conviction - Bail refused in State Supreme Court - Principles governing admission to bail prior to determination of special leave application - Whether exceptional case demonstrated.

Criminal law and procedure - Bail - High Court Practice - Undetermined application for special leave to appeal - Availability of bail - Principles governing grant of bail - Whether exceptional circumstances established.

Crimes Act 1900 (NSW), s 178BA.

1 KIRBY J. This application for bail is brought by Hakija Sinanovic ("the applicant").

The facts

2 On 13 January 1999, at his trial before McGuire DCJ and a jury, the applicant was found guilty of an offence against s 178BA of the *Crimes Act* 1900 (NSW). The indictment alleged that the offence had occurred on 11 December 1995 at Sydney. The offence alleged was that of dishonestly obtaining for himself a diamond ring, by deception, by representing that he would, on that day, deposit into a bank account of Stefano Designer Jewellery Pty Ltd a cheque for $27,000, being the price of the ring. No such cheque was deposited.

3 The verdict of guilty followed a brief retirement by the jury. Following the verdict, McGuire DCJ convicted the applicant. The maximum penalty provided upon conviction of the offence was 5 years imprisonment. McGuire DCJ sentenced the applicant to imprisonment for a minimum term of 16 months commencing on 16 May 2003. That was a date after the due completion of a sentence which had earlier been imposed on the applicant for offences with which this Court is not concerned. McGuire DCJ ordered that the primary sentence which he imposed would expire on 15 September 2004, after which he ordered that the applicant serve an additional term of 12 months imprisonment.

4 The applicant appealed to the New South Wales Court of Criminal Appeal. That Court, constituted by Wood CJ at CL, Hulme and Greg James JJ, heard the appeal on 4 February 2000. The applicant appeared in person. His wife was permitted to speak for him. The applicant also made a number of observations to the Court. In their reasons, the judges referred to difficulties which they had experienced in dealing with all of the points raised in the appeal because of the distractions from the issues at trial and the mode of presentation of the arguments. Those are not uncommon problems where an applicant appears in person. Nevertheless, for reasons given on behalf of the Court of Criminal Appeal by Hulme J, that Court dismissed the applicant's appeal against his conviction[1]. There were minor adjustments to the terms of the sentence.

5 The applicant then filed an application for special leave to appeal to this Court raising a number of grounds. I have considered the written statement in support of the application for special leave and the statement of the respondent opposing the grant of special leave.

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1 *R v Sinanovic* [2000] NSWCCA 397.

6 The applicant, in purported defence of the utility of his application to this Court, applied to the Supreme Court for bail. That application was heard by Greg James J on 2 May 2001. It was dismissed. His Honour concluded that there were no "special or exceptional circumstances" to warrant the immediate release of the applicant from serving the sentence which "stands good until or unless set aside by a competent Court of Appeal"[2].

The prospects of special leave to appeal

7 The applicant then commenced the application that is now before me. This application is not an appeal from the order of Greg James J. It is an invocation by the applicant of the separate jurisdiction of this Court.

8 In support of the application, an affidavit of Mr Karam Ramrakha, solicitor, was read. That affidavit deposes to various discrepancies, said to have arisen in the evidence adduced at the trial, concerning the identity of the diamond ring in question and the contested circumstances concerning its possession at and about the time of the offence. The affidavit also complains of McGuire DCJ's summing up to the jury which, it says, "in relation to the elements of the charge was inadequate and the jury was not properly directed in relation to the basis of the charge and the elements of 'dishonesty and deception'". Mr Ramrakha states that, in his view, the application for special leave has an "extra-ordinarily high prospect of success".

9 The disputed circumstances of the identity of the ring in question and the possession of the ring are factual matters which, alone, would not ordinarily attract special leave from this Court. This Court is not, as such, another Court of Criminal Appeal. Its intervention in criminal and sentencing matters is usually confined to questions of law and important principles. Some particular attention to the facts of this case might be warranted because the applicant was not legally represented before the Court of Criminal Appeal, as he is now. However, I could not describe the factual issues raised by the application, as presently understood by me, as a promising foundation for a grant of special leave.

10 The complaint about the directions to the jury may be in a different class. The issue concerning the directions to be given to a jury in a case of offences of dishonesty was considered by this Court in *Peters v The Queen*[3]. The Court in that matter was divided. It is possible that the present case might justify a return to that subject. I say no more than that it is possible. The somewhat

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2 *R v Sinanovic* unreported, New South Wales Court of Criminal Appeal, 2 May 2001 at [23] per Greg James J.

3 (1998) 192 CLR 493.

unpromising factual circumstances of the case may make it an unsuitable vehicle for the grant of special leave to elucidate the legal issues of dishonesty and the directions to be given to a jury in an offence involving dishonesty. However, I shall assume that there is some prospect that special leave may be granted. Unlike Mr Ramrakha, I would not regard those prospects as "extra-ordinarily high". I simply regard them as possible.

The applicable principles

11 The principles to be applied in this application are not in doubt:

1. The power to grant bail in this Court is not regulated by statute. The power stems from the inherent or implied jurisdiction of the Court[4].

2. The purpose of the exercise of the power is to prevent the processes of this Court, as envisaged by the Constitution, being rendered futile[5].

3. Nevertheless, the power still involves the exercise of a jurisdiction repeatedly described as extraordinary and exceptional. It is not affected, as sometimes it is under statute, by a stated presumption in favour of liberty. Its grant is exceptional because otherwise, it has been said, too ready a provision of bail might "whittle away the finality of the jury's finding and … treat the verdict merely as a step in the process of appeal".[6]

4. This Court has adopted a test of even greater stringency when the application for bail is made before special leave has been granted. Bail is very rarely granted at that stage, although the power to grant it exists[7].

5. Despite the foregoing, bail has sometimes been granted prior to the provision of special leave. Thus Dawson J granted bail in *Peters* before special leave had been granted[8]. Bail might, for example, be granted peremptorily following an important ruling by this Court which has clear application to

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4 *Robinson v The Queen* (1991) 65 ALJR 519.

5 *Peters v The Queen* (1996) 71 ALJR 309 at 310; *Markovina v The Queen* (1998) 72 ALJR 1522 at 1523 [9].

6 *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514 at 520.

7 *Caratti v The Queen* (2001) 1 Leg Rep C1 per McHugh J; see also the course adopted in *Marotta v The Queen* (1998) 20 Leg Rep C17 per Callinan J; *Weston v The Queen* (2000) 16 Leg Rep C2 per McHugh J.

8 *Peters v The Queen* (1996) 71 ALJR 309 at 310-311.

other cases where special leave has been sought and awaits a hearing. This is what occurred following *Cheatle v The Queen*[9] when this Court held that State laws providing for majority verdicts could not validly apply to the trial on indictment of an offence against federal law, by reason of s 80 of the Constitution. The cases affected were clear. The principle was clear. And the consequences for pending cases secured prompt intervention, usually with the consent of the prosecution and a grant of bail.

6. Once special leave is granted, this Court will consider an application for bail in a way more favourably than before, although it remains an exceptional provision[10]. In *Marotta v The Queen*[11], Callinan J, without pretending to lay down an inflexible checklist, referred to a number of considerations deemed relevant in that case, in which bail was granted. The grant of bail there was later shown to have been fully warranted. This Court unanimously allowed the appeal and set aside the convictions in issue[12]. The considerations collected by Callinan J, or such of them as are relevant, have been said by the New South Wales Court of Criminal Appeal to be similar to the considerations taken into account by the courts of New South Wales in the grant of bail under the statute operating in that State[13].

7. In cases where special leave has not been granted by this Court it will ordinarily be appropriate, as was done in this case, for the party seeking bail first to make an application to the court from whose judgment special leave is sought[14].

8. A special consideration may sometimes arise where it is clear that, were bail to be granted, the prisoner would continue to serve the sentence whilst on bail in circumstances where it would not be possible for the sentence to be

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9 (1993) 177 CLR 541.

10 See *Velevski v The Queen* (2000) 18 Leg Rep C2 per Gleeson CJ (refusing bail).

11 (1999) 73 ALJR 265 at 267 [18]; 160 ALR 525 at 528.

12 *Bull v The Queen* (2000) 74 ALJR 836; 171 ALR 613.

13 *R v Velevski* [2000] NSWCCA 445 per Barr J (Spigelman CJ and Hulme J concurring).

14 cf *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 1]* (1986) 161 CLR 681 at 684.

recommenced or varied, if special leave were ultimately to be refused or, if granted, the appeal were to be dismissed[15].

Bail is refused

12 Having regard to the foregoing principles, this application must be dismissed. It could not be said that the extraordinary and exceptional power to grant bail should be exercised in these circumstances even before this Court has considered whether to grant special leave. Although a grant of special leave is possible, I am far from convinced that it is highly likely, a fact that distinguishes this case from *Peters*. Necessarily, I say this without expressing any concluded opinion. What I have stated is no more than my impression at this time.

13 In the circumstances of this case the application for special leave ought first to be heard. In the light of the outcome of that application, when it is decided, the applicant may renew his application. If the special leave application fails, no occasion would arise to provide bail. If the application succeeds, the application can be reconsidered in the light of any matters elucidated in the hearing of the application for special leave. Even then the grant of bail remains exceptional. As past cases show, many factors are relevant to the exercise of the discretion. But the chief of these remain the assessment of the likelihood that the appeal will be allowed and the convictions quashed and the conclusion that, to refuse bail, would render the outcome of the appeal nugatory having regard to the remaining term of imprisonment to be served. Neither of those considerations is present in this application at this time.

14 Accordingly, the application is refused.

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15 *Whan v McConaghy* (1984) 153 CLR 631 at 635, 642; *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 487 [156], 490-492 [166]-168].