HIGH COURT OF AUSTRALIA

KIRBY J

IN THE MATTER OF APPLICATIONS BY ANTHONY JOHN PINKSTONE

Re Pinkstone's applications
[2003] HCA 46
Date of Order: 27 May 2003
P25/2003 and P30/2003

ORDER

1. *Order expedition of the hearing of the applicant's applications for special leave to appeal to this Court;*

2. *Order consolidation of those applications;*

3. *Direct that the applications be heard during the special leave list of the Court in Perth in October 2003 if no earlier date is found by the Registry acceptable to both parties;*

4. *Refuse bail; and*

5. *Certify for the appearance of counsel in chambers.*

Representation:

The applicant appeared in person

K P Bates for the respondent (instructed by Director of Public Prosecutions (WA))

CATCHWORDS

Re Pinkstone's applications

Practice and procedure – High Court – Expedition of hearing of application for special leave – Bail – Applications by prisoner in custody – Relevance of applications, if successful, to custodial punishment – Preservation of utility of appellate jurisdiction – Whether applicant has exhausted application for bail in State court – Whether bail available in State court when exercising federal jurisdiction – Need for special circumstances – Relevance of fact that special leave not yet secured – Consolidation of applications – Addition of ground of application for special leave.

High Court – Practice – Special leave application – Expedition of hearing – Bail – Consolidation of applications – Addition of ground of application.

Words and phrases – "supply".

Constitution, s 73.

1 KIRBY J. This is an application for bail and other orders pending a hearing in this Court of proceedings brought by Mr Anthony Pinkstone ("the applicant").

The background facts

2 The applicant was tried in the Supreme Court of Western Australia on counts of an indictment charging him with two offences against the *Misuse of Drugs Act* 1981 (WA) ("the MDA") as applied to the Perth airport by the *Commonwealth Places (Application of Laws) Act* 1970 (Cth) ("the Commonwealth Places Act"). The offences charged were: (1) that the applicant at Perth airport on 7 October 1999 had supplied to Mr Wayne Yanko a prohibited drug, namely a quantity of methylamphetamine, contrary to s 6(1)(c) of the MDA and, (2) that the applicant at the same place and earlier on the same day had attempted to supply to Mr Michael Brazier and Mr Paul Brazier a prohibited drug, namely a quantity of cocaine, contrary to s 6(1)(c) and s 33 of the MDA.

3 After a lengthy trial in the Supreme Court of Western Australia the applicant was found guilty by a jury of both offences. He was convicted by the trial judge. That judge sentenced him to 10 years imprisonment on the offence of supply and six years imprisonment on the offence of attempted supply. That left an aggregate term of 12 years 3½ months from 13 October 1999 when the applicant had first gone into custody. Eligibility for parole was refused by the trial judge.

4 The applicant appealed (or perhaps sought leave to appeal) against his convictions and sentences. That proceeding was heard by the Court of Criminal Appeal of Western Australia. On 28 March 2003 that Court, by a majority, dismissed the appeal against conviction[1]. The dissent of Rolfe AJ was confined to the applicant's conviction on the first count. In Rolfe AJ's view, on a proper application of the law, the evidence did not sustain a conviction of the offence in that count. The Court of Criminal Appeal allowed the applicant's separate appeal against sentence. It adjusted the aggregate terms of his sentence in a relatively minor way. However, it otherwise dismissed the applicant's challenge to his convictions and against the sentences that had followed.

5 The applicant has filed separate applications for special leave to appeal to this Court, both in relation to the decision on his convictions and on his sentences. In the ordinary course, without an order for expedition, those applications would be unlikely to be heard in 2003. The applicant therefore now moves this Court for expedition of the hearing of the special leave applications and for bail pending the hearing and determination of his appeal, if special leave

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1 *Pinkstone v The Queen* [2003] WASCA 66, (Murray J, with Wheeler J concurring, Rolfe AJ dissenting).

is granted. These are separate applications. I will deal with them separately. However, they have an obvious relationship to one another.

6 The applicant also seeks, out of time, to add a new ground of appeal to his special leave application concerning the challenge to his sentences. He asks for the consolidation of the two applications. He states that, unless granted bail, he will be unable to earn the money to pay the fees of his counsel in this Court. He seeks bail, inter alia, on that basis.

The application for expedition

7 I deal first with the application for expedition. The applicant says that he has a serious legal point to argue, one which attracted the support of one of the judges of the Court of Criminal Appeal. If successful, it would require resentencing that would effectively limit his sentence and provide for his early release from custody.

8 Upon the sentence following his conviction for supply of the prohibited drug, as varied by the Court of Criminal Appeal of Western Australia, the applicant would be eligible for release to parole on 13 October 2005. By inference, if the applicant were to succeed in his application for special leave and in an appeal to this Court and were discharged from the sentence for the offence of supply, but recharged and convicted of an offence of attempted supply of the first quantity of drugs, he would be resentenced in respect of such attempt. If he pleaded guilty to a new charge (or if he did not, was retried and later convicted of that offence), the new sentence would probably take his earliest release to community service or to parole somewhat beyond 2003. If he was acquitted of any new charge he would be entitled to immediate release. In the ordinary course, his special leave applications would be decided some time early in 2004.

9 The point raised by the application for special leave to appeal is an arguable one. Whether or not a grant of special leave is made would be a matter for the special leave Bench hearing the application. In the written case, the application is well argued. It arises in this way. The applicant dispatched two items by air cargo from Sydney airport to Perth airport. They were addressed to different recipients, who were to collect them at Perth airport, a Commonwealth place. As a result of earlier surveillance of the applicant's activities, arrangements were made for the cargo to be intercepted by police at Perth airport. Officers of the Western Australian Police took charge of the cargo when it arrived in Perth.

10 A person purporting to act on behalf of the designated recipient of the first item (Paul Brazier) arrived at the Perth airport. He asked for that item. However, his request was made before the cargo was available. The intended recipient was so informed. He did not renew the attempt to obtain the cargo.

This conduct was the basis of the charge of attempted supply of which the applicant was convicted.

11 Later in the same day, a person purporting to act for the designated recipient of the second item (Mr Yanko) presented himself at the Perth airport. He requested, and was given, that item. However, he did not receive it from the air company which was entrusted to supply it and who were the applicant's "innocent agents". In fact, he received it from police officers who were acting in their stead. Obviously, the police officers were not the applicant's intended or authorised agents. It is on this basis that the applicant argued in the Court of Criminal Appeal that he did not "supply" the drugs to the recipient, contrary to the MDA. That argument attracted the support of Rolfe AJ.

12 In the applicant's contention, it was the officers of the Western Australian Police who actually "supplied" the drug to the recipient. This is, as the applicant agreed, a technical argument. However, if it is good in law, that is sufficient.

13 Enough has been said to show that the point is reasonably arguable. The respondent did not contend otherwise. The applicant is in custody. Success on the application and in a later appeal would be highly relevant to the residual length of the applicant's custodial sentence. Unless heard soon its utility would be lost to the applicant. The application therefore warrants early consideration by this Court.

14 On that basis, I will order expedition of the hearing of the special leave application. On that footing, the application would probably be heard in the Perth list of the Court in October 2003. However, if earlier arrangements can be made with the Registry of this Court, at the convenience of the Court and the parties, an earlier hearing might be arranged in a special leave list elsewhere than Perth. Counsel for the respondent indicated that if an earlier listing could be secured in Melbourne or Canberra, that venue would be accommodated by the respondent. By inference, this would reduce substantially the costs to the applicant of his counsel's fees. I turn to the subject of bail.

The application for bail

15 *Applicable principles*: This Court has the power to grant bail as an incident of its appellate jurisdiction conferred by s 73 of the Constitution. Pursuant to the Constitution, the Court has the authority to do all things necessary to make its appellate jurisdiction effective, including the power to stay orders that are, or might be, the subject of its appellate jurisdiction and to grant bail so as to make an appeal effective. Nevertheless, the Court has said on many

occasions that bail should only be granted by this Court in exceptional circumstances[2].

16 Convictions, sentences and other orders by courts below this Court are not to be regarded as provisional pending the completion of an application for special leave or a final appellate hearing in this Court after special leave is granted. To secure a hearing of an appeal in this Court, which is not simply a higher general court of criminal appeal, special leave is necessary. The word "special" makes it clear that something "special" must be demonstrated about the case.

17 Obviously, in considering whether to grant bail regard must be had to an applicant's estimated prospect of success in this Court, the imminence of the expiry of any sentence so that the custodial part of the sentence would be completed before the decision, and other relevant considerations, such as the risk of flight. The grant of bail before the appellate jurisdiction of this Court has been engaged (by the grant of special leave) must be treated as truly exceptional. A *very* strong case is required before the grant of special leave for bail to be provided at that stage[3].

18 *Application in the State court*: This is the condition in which the applicant's request for bail now comes before me. Special leave has not yet been granted. However, before seeking bail in this Court, the applicant applied to the Court of Criminal Appeal of Western Australia for bail. He did this in deference to the remarks of Brennan J in *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 1]*[4]. In an earlier case, the Court of Criminal Appeal decided that it had no jurisdiction to grant bail in such cases. It so decided by reference to the language of the *Bail Act* 1982 (WA), read according to its own terms[5]. In the light of that decision, the registry of the Court of Criminal Appeal appears to have been reluctant to accept that that Court had jurisdiction to grant bail to the applicant.

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2 *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514 at 518-519; *Marotta v The Queen* (1999) 73 ALJR 265 at 267 [15]; 160 ALR 525 at 527; *United Mexican States v Cabal* (2001) 209 CLR 165 at 181 [40].

3 *Peters v The Queen* (1996) 71 ALJR 309 at 310; *United Mexican States v Cabal* (2001) 209 CLR 165 at 182 [43]. See also *Marotta v The Queen* (1999) 73 ALJR 265; 160 ALR 525 where Callinan J granted bail after the applicants had secured special leave to appeal.

4 (1986) 161 CLR 681 at 684.

5 *Lyon v The Queen* [2001] WASCA 197.

19 No consideration appears to have been given in the registry of the Court of Criminal Appeal to the fact that, in this case, the applicant's matter was in federal jurisdiction. Western Australian courts were exercising federal jurisdiction at the trial because the Western Australian Act (the MDA) only applied to the applicant's alleged offences by virtue of the Commonwealth Places Act. In respect of bail, in support of the applicant's proceedings in this Court, there was an additional basis for the application of federal jurisdiction, namely his application to this Court. Because this point seems to have been overlooked (as unfortunately it often is) no consideration appears to have been given to any operation of State laws in this case adapted by force of the *Judiciary Act* 1903 (Cth) to render those laws applicable to federal jurisdiction[6].

20 It is unnecessary for me to decide whether the decision of the Court of Criminal Appeal of Western Australia in *Lyon v The Queen* applied to a bail application by the applicant in this case. Clearly, the applicant exhausted his entitlements to bail in the State court. This was accepted by the respondent. He has now engaged the powers of this Court. It has undoubted power to grant bail for itself. The applicant has sought the exercise of that power.

21 Earlier in the proceedings, when the matter was before the courts of Western Australia, the applicant applied for bail to single judges of that Court. He was refused bail by Heenan J[7]. Later he was refused pre-trial bail by the trial judge, Roberts-Smith J[8]. His Honour refused bail on the basis that, although the applicant's trial had been seriously delayed by the state of the criminal trial list in Western Australia, there were unacceptable risks in the grant of bail.

22 The risks mentioned by Roberts-Smith J included that the applicant had made attempts to escape apprehension by police before his arrest, that he had used false passports in the past, that he had expertise as an air pilot and qualifications as a seaman and that he had previously engaged in extensive international travel and therefore had presumed international connections. These considerations led Roberts-Smith J to say[9]:

> "In my view the risk that he would abscond if granted bail must be so high as to be almost certain. I can envisage no conditions, no matter

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6 cf *Solomons v District Court of New South Wales* (2002) 76 ALJR 1601 at 1603 [7], 1608 [38], 1627 [139]; 192 ALR 217 at 220, 226-227, 252.

7 See *Pinkstone* (2000) 114 A Crim R 377.

8 See *Pinkstone* (2000) 119 A Crim R 462.

9 *Pinkstone* (2001) 119 A Crim R 462 at 475 [90].

how strict, short of remanding him in custody, which would reduce that risk to any acceptable level."

23 *Bail presently refused*: In the present application I am not bound by the assessment of another judge in another court at an earlier time and on different evidence. I take into account the fact that the applicant has, on any view, now served a large part of his sentence. I also take into account the fact that the applicant is an Australian citizen from an established family, that he has a fiancée who is an Australian citizen, that he has served part of his sentence in maximum security, that he has no previous history of absconding from bail and that he is now retained in a minimum security facility. I have read the correspondence offering the applicant employment if he were released on bail. I have not overlooked the fact that the applicant's request for bail is connected, in his submission, to his request to be able to earn sufficient funds to enable him to pay for counsel of his choice to argue his applications in this Court and, if special leave is granted, his appeal to this Court.

24 However, when I weigh the still relevant considerations mentioned in the earlier bail applications, especially the past conduct involving a false passport and the earlier evasion of authority and take into account the seriousness of the offences of which the applicant was convicted, the technical nature of the point raised by him which does not amount to an assertion of innocence and the applicant's otherwise lack of links with Western Australia to which he would have to return if special leave were refused, or being granted, if an appeal were rejected, my view is that bail should not be granted at this time.

25 If, however, the applicant were later granted special leave by this Court, and particularly after his appeal was heard, he could renew his application for bail. It would then be considered taking into account added ingredients favourable to the grant of bail[10]. At that time, I would expect the respondent to make available to any Judge of this Court hearing such application, the precise details of the eligible release dates of the applicant to community service or to parole on the assumption that he was successful in this Court.

Amendment and consolidation of applications

26 Two remaining points must be dealt with before departing from these applications. The applicant applied, although out of time, to have leave to amend his application for special leave in respect of the sentencing appeal, in order to raise an additional complaint against his sentence. The respondent raises no objection to that amendment. I will grant that leave. However, I have cautioned the applicant that this Court does not ordinarily become involved in sentencing

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10 See *United Mexican States v Cabal* (2001) 209 CLR 165 at 182 [42]-[43].

appeals and that he might be well advised to concentrate in his special leave application on his application against conviction[11]. I order the consolidation of the two applications for special leave to appeal now before this Court.

Legal representation of the applicant

27 Lastly, the applicant suggested that unless he were granted bail and able to earn funds to pay counsel, he would not be in a position to afford the fees of his chosen counsel for appearances in this Court. I am aware of the disadvantages that some prisoners face in securing adequate or any legal representation on appeals to a court of criminal appeal. Those difficulties are often enlarged in applications to this Court. I referred to them in *Cameron v The Queen*[12]. So far, the principle in *Dietrich v The Queen*[13] does not, in terms, apply to appeals but only to trials.

28 I will therefore say what Gaudron J and I said on the application for special leave by Mr Cameron, which Mr Cameron argued successfully in person. If the applicant truly cannot afford counsel to argue the application for special leave, it would in my view be appropriate for the Legal Aid authorities to consider the applicant's request for assistance or for the Western Australian Bar Association to consider the provision to him of pro bono assistance. Especially would this be so if the applicant were granted special leave. The point to be argued has attracted the dissenting opinion of Rolfe AJ. The respondent correctly accepts that it is reasonably arguable. It would be highly desirable, and in the interests of justice, that it should be properly argued before this Court. Potentially, it affects the liberty of the applicant in a significant way. The principle involved may also affect other cases. These are further matters to be taken into account.

Orders

29 For the reasons that I have given, the orders that I make are:

(1) Order expedition of the hearing of the applicant's applications for special leave to appeal to this Court;

(2) Order consolidation of those applications;

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11 cf *Postiglione v The Queen* (1997) 189 CLR 295 at 337.

12 (2002) 209 CLR 339 at 369-370 [96]-[97].

13 (1992) 177 CLR 292.

(3) Direct that the applications be heard during the special leave list of the Court in Perth in October 2003 if no earlier date is found by the Registry acceptable to both parties;

(4) Refuse bail; and

(5) Certify for the appearance of counsel in chambers.