

HIGH COURT OF AUSTRALIA

KIRBY J

DAVID ROBERT SIMINTON

APPLICANT

AND

AUSTRALIAN PRUDENTIAL REGULATION
AUTHORITY

RESPONDENT

Siminton v Australian Prudential Regulation Authority
[2008] HCA 44
2 July 2008
M45/2008

ORDER

1. *The application for bail is refused.*
2. *The applicant must pay the respondent's costs of this application.*
3. *The hearing of the applicant's application for special leave expedited to 1 August 2008.*

Representation

D B Sharp for the applicant (instructed by Erhardt & Associates)

D S Mortimer SC with S J Hibble for the respondent (instructed by Australian Prudential Regulation Authority – Melbourne)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Siminton v Australian Prudential Regulation Authority

High Court practice – Bail – Power of High Court to grant bail as incident of application to invoke appellate jurisdiction – Application made prior to grant of special leave to appeal from orders of the Federal Court of Australia convicting the applicant and imposing order of imprisonment for contempt of court – Exhaustion of remedies in Federal Court both in respect of appeal against substantive orders and refusal of bail by that Court – Whether refusal by High Court to grant bail would render proceedings in High Court nugatory or lacking in utility – Whether special or exceptional circumstances shown – Estimate of prospect of success in application for special leave – Bail refused – Hearing of application for special leave expedited.

Words and phrases – "special circumstances", "exceptional circumstances".

1 KIRBY J. Before the Court is a summons seeking an order that Mr David Siminton (the applicant) be admitted to bail on conditions fixed by the Court.

The background to the application

2 On 7 November 2007, Tracey J, in the Federal Court of Australia, found the applicant guilty of multiple charges of contempt of court arising out of breaches of an order earlier made in that Court by Gray J. Gray J made his orders on 10 January 2006.

3 For the contempt found, on 28 November 2007, Tracey J pronounced the necessary order and imposed on the applicant a penalty of 12 months imprisonment. The applicant appealed against that order. He challenged the basis for the finding of contempt, although he did not bring a separate challenge against the penalty.

4 Effectively, Tracey J stayed the commencement of his order for imprisonment pending the resolution of the applicant's appeal to the Full Court of the Federal Court. He did this by ordering that the warrant lie, unexecuted, in the registry of the Federal Court pending the hearing and determination of the applicant's appeal to the Full Court or further order.

5 On 30 May 2008, the Full Court of the Federal Court (constituted by Spender ACJ, Lander and Buchanan JJ) dismissed the appeal from Tracey J's orders. The Full Court made an order¹:

"Pursuant to order 6 of the Orders of Justice Tracey in proceedings VID 1607 of 2005 made on 28 November 2007, the warrant for the committal of David Robert Siminton to prison for a period of twelve months, referred to in order 4 of those Orders, be uplifted from the Court file, and be executed."

6 On the same day, 30 May 2008, on the basis of an oral application made after the delivery of the orders of the Full Court and the publication of the reasons for judgment of that Court, Spender ACJ, exercising a jurisdiction ancillary to that of the Full Court, stayed the execution of that order until 4.00 pm on 5 June 2008. That order was made on the basis of an indication, on behalf of the applicant, that he intended to apply to this Court for special leave to appeal against the orders of the Full Court and that he would bring on a notice of motion for a stay in the usual way.

1 *Siminton v Australian Prudential Regulation Authority* [2008] FCAFC 90.

7 A notice of motion and supporting affidavit were duly filed in the Federal Court and served on 2 June 2008, together with an outline of submissions and an attached draft application for special leave to appeal to this Court. On 5 June 2008, Spender ACJ, again exercising the incidental jurisdiction of the Full Court of the Federal Court, dismissed the applicant's application for a stay of the execution of the orders of that Court.

8 Spender ACJ found that the applicant's then proposed application for special leave to appeal to this Court would not be rendered nugatory if a stay were not granted by the Federal Court. He also found that none of the matters advanced by the applicant in his proposed application for special leave to appeal enjoyed a real prospect of success.

9 The applicant was thereupon committed to prison on 5 June 2008. He remains there at this time. The draft application for special leave, which was before Spender ACJ on 5 June 2008, was not immediately perfected in the sense that no application for special leave was, in fact, filed in this Court until 25 June 2008. However, it was filed on that day. It is now before this Court. It is in the pending list of the Court. It will be reached in the normal sequence of applications for special leave unless some measure of expedition is granted to it.

The nature of the proceedings and principles

10 As incidental to the application for special leave, and in order to protect and defend the utility of that application, by summons, the applicant has now applied to this Court for the exercise of its own jurisdiction to grant him bail, pending the hearing and determination of his application for special leave or further order.

11 I do not doubt that this Court has the jurisdiction to grant bail to the applicant as incidental to the exercise of its jurisdiction to consider and determine his application for special leave. Indeed, so much was not disputed by the respondent.

12 I remind myself that I am not sitting here on appeal from the orders of Spender ACJ, nor in a special leave application from those or earlier orders. I am sitting as a single Justice considering the application for bail, and that alone. I am not conducting a review of the order or reasons for decision of Spender ACJ on the determination by him of the application in the Federal Court for a stay of the operation of that Court's orders. My duty, and only duty, is to exercise the jurisdiction of this Court.

13 I take into account the fact that the liberty of the applicant is precious. I also take into account the fact that the imprisonment which the applicant is serving is for contempt of court. This is, in some ways, a peculiar wrong. It is not, as such, a criminal offence provided by legislation or otherwise, which has

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been executed following a decision by a jury or by a judge which has thereby resulted in his imprisonment².

14 Notwithstanding these considerations, the application for bail fails. Repeated authority of this Court has emphasised the exceptional character of a grant of bail by the Court prior to a grant of special leave to appeal to the Court and even, indeed, thereafter, pending the outcome of the appeal. The provision of bail, as incidental to the attempt to invoke the jurisdiction of this Court, requires the demonstration of special or exceptional circumstances³.

The reasons for refusing bail to the applicant

15 In my opinion, special or exceptional circumstances have not been established. I take into account all of the matters that have been urged upon the Court by the parties today. Chief amongst the considerations that bring me to my conclusion, adverse to the applicant, are the following:

- First, bail is not necessary in this case to preserve the utility of the subject matter of the application for special leave or of an appeal by the applicant to this Court. The subject matter of such application, and, if special leave is granted, of such an appeal, will remain relevant, even if I refuse bail. On the estimate of the likely hearing time of the applicant's application to the Court for special leave (which would be some time in August 2008) the applicant would still have about 10 months of his sentence then to serve. The special leave application therefore, obviously, has a utility. The refusal of bail would not render the pursuit of the application nugatory, in the sense of being of no value to the applicant;
- Secondly, in this case, unlike in *Pelechowski v Registrar, Court of Appeal*⁴, the applicant has already had the facility of an appeal against the orders of Tracey J to the Full Court of the Federal Court. That Court has considered his appeal on its merits. For reasons which it has published and which were unanimous, it rejected the applicant's appeal. That is an important point of distinction from *Pelechowski* where one of the reasons that moved Gummow J in this Court to provide bail to the applicant was

2 cf *Witham v Holloway* (1995) 183 CLR 525 at 529-532; [1995] HCA 3.

3 *Jennings Construction Ltd v Burgundy Royale Investments Pty Ltd [No 1]* (1986) 161 CLR 681; [1986] HCA 84 and *Beljaev v Director of Public Prosecutions* (1991) 173 CLR 28; [1991] HCA 16.

4 (1998) 72 ALJR 711. See also *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435; [1999] HCA 19.

the fact that "[i]f matters proceed in their ordinary course it is to be expected that the custodial sentence will, in whole or most substantially as to part thereof, have expired by the time the special leave application is disposed of"⁵. The other point of distinction is the fact that, in that case, exceptionally, the application for special leave was from the orders for punishment for contempt entered by the Court of Appeal of New South Wales. There had been no opportunity of intermediate appellate consideration;

- Thirdly, the case of the applicant is not "exceptional" or "special" as the authority of this Court repeatedly says is necessary for the provision of bail⁶. The applicant would not, here, have substantially served the sentence which he wishes to challenge. There would still be a real utility in his application and, if special leave were granted, in his appeal to this Court. The cases repeatedly emphasise that bail is not available from this Court simply because, in a pending matter, the applicant has been committed to prison by order of the court below; and
- Fourthly, I have reviewed the grounds of the application for special leave and considered these against the reasons for judgment of the Full Court of the Federal Court disposing of the applicant's appeal to it. In my estimation, the applicant's prospects of special leave cannot be said to be strong. I say this without prejudging the application. I have reached no final view upon it. However, necessarily, and in accordance with the authorities, I have had to consider whether there are strong prospects that special leave will be granted. If there were, that would be a consideration which would weigh in favour of the provision of bail. Viewing the matter on my present understanding, and only for the present purposes, I would not describe the prospects of a grant of special leave as strong. Accordingly, in the exercise of the jurisdiction and power of this Court to grant bail to protect the process that has been invoked in this Court, I would refuse the applicant's application for bail.

16 It follows that it is unnecessary for me to determine the other questions argued by the parties, such as the risk of flight, which I would not, as at present advised, consider to be great. Nor is it necessary for me to determine the conditions that would be appropriate to a grant of bail, were I to make that grant.

5 (1998) 72 ALJR 711 at 712 [6]. See also (1999) 198 CLR 435.

6 See, for example, *United Mexican States v Cabal* (2001) 209 CLR 165 at 196-197 [77]; [2001] HCA 60.

5.

Order for expedition and ancillary matters

- 17 Notwithstanding the foregoing conclusions, it is obviously highly desirable that the applicant's application should come before the Court and be decided as quickly as possible. If the applicant were granted special leave by the Court, obviously, it would be open to him to apply to the Court again for the grant of bail, as, indeed, he can do at any time on the basis of new evidence or argument.

Orders

- 18 The application for bail is refused. The applicant must pay the respondent's costs of this application. The hearing of the special leave application is expedited to the Melbourne list for hearing on 1 August 2008.