HIGH COURT OF AUSTRALIA

HAYNE J

PETER ALAN TILLEY APPLICANT

AND

THE QUEEN RESPONDENT

Tilley v The Queen [2008] HCA 58
19 December 2008
M84/2008

ORDER

1. *Application for bail refused.*

2. *The applicant shall forthwith serve his written case and draft notice of appeal on the respondent.*

3. *The respondent shall within 21 days of the service of the applicant's written case and draft notice of appeal file and serve its summary of argument.*

4. *The applicant may within 7 days of service of the respondent's summary of argument file and serve his reply (if any).*

5. *Subject to any further or other directions of the Court or a Justice, further steps in the application shall be taken in accordance with the Rules.*

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

CATCHWORDS

Tilley v The Queen

Criminal law – Jurisdiction, practice and procedure – Bail – Bail pending application for special leave to appeal.

1 HAYNE J. In March 2004, the Director of Public Prosecutions for the Commonwealth filed an indictment in the County Court of Victoria charging Murray James Perrier, Peter Hans Malman, Voicu Pop and Peter Alan Tilley with having conspired with each other and with others to commit an offence against s 233B(1)(b) of the *Customs Act* 1901 (Cth) of importing into Australia prohibited imports to which s 233B of that Act applied, namely, narcotic goods consisting of not less than a trafficable quantity of the narcotic substance heroin.

2 Eleven months later, on 2 February 2005, the four accused were arraigned before Judge King. Each pleaded not guilty. Of the four accused, all other than Mr Perrier were then on bail and their bail was continued until the jury returned to consider their verdicts. On 24 March 2005, on the 34th day of the trial, the jury returned verdicts of guilty against each accused. The accused other than Mr Tilley were sentenced on 19 May 2005.

3 Before she had sentenced Mr Tilley, Judge King was appointed a judge of the Supreme Court of Victoria. Accordingly, on 23 August 2005 another judge of the County Court, Judge Gaynor, passed sentence upon Mr Tilley. Judge Gaynor sentenced Mr Tilley to a term of seven years' imprisonment and fixed a non-parole period of five years.

4 In September 2005, Mr Tilley gave notice of application for leave to appeal to the Court of Appeal of the Supreme Court of Victoria against both his conviction and sentence. Mr Tilley's applications were heard with applications made by two of his co-accused, Mr Perrier and Mr Pop. The applications of the co-accused proceeded only in relation to sentence. The applications did not come on for hearing in the Court of Appeal until 25 June 2007. It is not possible to say from the material filed in this Court why it is that there was such a long delay between Mr Tilley filing his applications in September 2005 and the applications coming on for hearing in June 2007. On the face of things, however, the delay is of a length that would require cogent explanation.

5 The material filed by the Director of Public Prosecutions, in opposition to the grant of bail, records that at various times before September 2006 Mr Tilley sought, and was granted, extensions of time within which he was to file his outline of written submissions in support of his applications to the Court of Appeal. And as is often the case, amendments were made to both the grounds of appeal and the outline of submissions in the days immediately before the applications came on for hearing. But without further explanation, neither of these sets of circumstances appears to justify a delay of more than 21 months between the commencement of proceedings in the Court of Appeal and their coming on for hearing.

6 Be this as it may, Mr Tilley's application for leave to appeal against conviction and sentence and his co-accused's applications for leave to appeal against sentence having been heard on 25 June 2007 it was not until almost

exactly one year later, on 6 June 2008, that judgment was delivered in the Court of Appeal. Again, it is not possible to say from the material available to me why it is that disposition of the applications took so long. One applicant, Mr Perrier, who had been sentenced to life imprisonment, died before his application was determined.

7 The reasons of the Court of Appeal ultimately published do not, at least on their face, suggest any great complexity about the issues that were argued or state any explanation for why the joint reasons of the Court should have taken so long to prepare. It must, however, be said that the delay appears to be such that it could be justified only by compelling reasons of the most extraordinary kind. It is as well to explain why that is so.

8 In *Jago v District Court (NSW)*[1], this Court held that there is not a right at common law to the speedy trial of a criminal charge which is a right separate from the right to a fair trial. It is neither necessary nor appropriate to examine here what, if any, consequences now follow in Victoria in this respect from s 25 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) and its provision that:

> "(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees –
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> ...
>
> (c) to be tried without unreasonable delay".

It is sufficient to notice that, as Brennan J said in *Jago*[2], to hold that no right to a speedy trial was recognised by the common law "is not to say that the courts of this country do not regard speed in the disposition of criminal cases as desirable. To the contrary, it is a truism that justice delayed is justice denied." That is why, as Brennan J went on to record[3], "within the limits of their resources, the courts so mould their procedures as to avoid unnecessary delays in the disposition of cases both criminal and civil".

9 The material presently available does not suggest that there was, in this case, any reason external to the court that would explain why judgment reserved in June 2007 should take until June 2008 to deliver. Even if soon after the hearing it was thought to be apparent that the applications must be dismissed,

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1 (1989) 168 CLR 23; [1989] HCA 46.

2 (1989) 168 CLR 23 at 44-45.

3 (1989) 168 CLR 23 at 45.

leaving the matters undecided for so long is at least undesirable. Mr Tilley alleges that the pendency of his applications for so long worked hardship on him because it denied his progression in the prison system to less onerous conditions of confinement. I cannot decide whether that is so. And if the likely disposition of the applications was not apparent at or soon after the completion of the hearing, to leave the matters for so long not only amplified the difficulty of disposing of them, but also necessarily increased the difficulties that would be encountered if a retrial were to be ordered.

10 Mr Tilley now seeks special leave to appeal to this Court contending that what he describes as "the three written arguments for grounds 1, 6 and 11, presented to and accepted by the Crown and the Court at the hearing on June 25th 2007, were not read nor adjudicated upon" by the Court of Appeal. That is, it would appear that Mr Tilley seeks to invoke principles of the kind considered by this Court in *Jones v The Queen*[4]. Application of those principles to this case is disputed. The respondent in its written submissions opposing the grant of bail submits that the Court of Appeal "explicitly states that the written submissions (as opposed to oral argument) on [the relevant grounds] were considered" and refers in this respect to pars [39] and [40]-[53] of the Court of Appeal's reasons[5]. In his written case, and in his written submissions in reply to the respondent's submissions about bail, Mr Tilley disputes that the "written submissions" referred to by the Court of Appeal include what he had earlier described as "the three written arguments".

11 Mr Tilley applies for bail. He asks that his application be determined without oral argument. As noted earlier, the Director of Public Prosecutions has submitted written argument opposing the grant of bail. Mr Tilley accepts, correctly, that this Court's power to admit to bail is exercised only in exceptional circumstances. But he says that the chronology of events earlier described warrants exercising the power.

12 In particular, Mr Tilley submits that having now served nearly four years of a sentence in respect of which a non-parole period of five years was fixed, the circumstances are so exceptional that this Court should admit him to bail. In support of that submission, Mr Tilley refers to *Peters v The Queen*[6], where Dawson J pointed out[7] that this Court's power to grant bail is to be found in its

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4 (1989) 166 CLR 409; [1989] HCA 16.

5 *R v Perrier* [2008] VSCA 97.

6 (1996) 71 ALJR 309. See also *United Mexican States v Cabal* (2001) 209 CLR 165 at 181-182 [39]-[43]; [2001] HCA 60.

7 (1996) 71 ALJR 309 at 310.

power to preserve from futility the exercise of its jurisdiction by preserving the subject-matter of the prospective application for special leave to appeal[8]. Recognising that the occasions on which this Court will grant bail are "rare indeed", Dawson J went on to say[9] that "[i]n accordance with those principles one occasion when bail may be granted is where there is a risk that the sentence will have been served or substantially served by the time an application for special leave to appeal is heard *and where the application for special leave enjoys a reasonable prospect of success*" (emphasis added). And as the Court pointed out in *United Mexican States v Cabal*[10]:

> "Ordinarily, a person will be admitted to bail *before* the grant of special leave in a criminal case only where the Court is satisfied there are *very* strong grounds for concluding that leave will be granted. The applicant will also need to show that it is likely that the custodial sentence or the greater part of it will have expired before the application for leave is heard."

13 I accept that much of the non-parole period fixed in Mr Tilley's case has now been served. The interlocutory steps to be taken in relation to the application for special leave will mean that still more time will elapse.

14 On the material presently available, however, I do not consider that it is possible to say that Mr Tilley's application for special leave has a sufficient prospect of success to warrant his admission to bail. He has filed his written case but the respondent has not yet been called on to answer that written case. Until that is done I consider that it is not possible to decide what prospect Mr Tilley has of securing a grant of special leave. I cannot say on the material now available that there are very strong grounds for concluding that leave will be granted.

15 As indicated earlier in these reasons, however, there are aspects of the progress of this matter through the courts which appear to give no little cause for concern. Whatever cause for or explanation of the several delays that have occurred in the process may later be identified, it is plain that the further progress of the matter should not further be delayed. That being so, and with a view to expedition of the determination of the application for special leave, I will now direct, pursuant to r 41.10.1 of the High Court Rules 2004, that Mr Tilley forthwith serve his written case and a draft notice of appeal on the respondent. The respondent shall within 21 days after service of the applicant's written case

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8 *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514; [1983] HCA 13.

9 (1996) 71 ALJR 309 at 310.

10 (2001) 209 CLR 165 at 182 [43].

and draft notice of appeal file and serve its summary of argument and the applicant may within seven days of service of the respondent's summary of argument file and serve his reply, if any. Subject to any further or other directions of the Court or a Justice, further steps in the application shall be taken in accordance with the Rules.

16 The application for bail is refused.