HIGH COURT OF AUSTRALIA

CALLINAN J

Matter No P5/1998

JAMES LUIS MAROTTA APPELLANT

AND

THE QUEEN RESPONDENT

Marotta v The Queen; King v The Queen; Bull v The Queen
(P5-1998) [1999] HCA 4
Date of Order: 8 December 1998
Date of Publication of Reasons: 9 February 1999

ORDER

The appellant be admitted to bail pending the determination of his appeal to this Court on the following conditions:

1. *That the appellant reside with his parents at 148 Whitfield Street, Bassendean.*

2. *That the appellant enter into a bail undertaking in the form of Form 6 of the Bail Regulations (WA), in which he agrees to forfeit $10,000 to the Crown if he is convicted of the offence of failing to appear as required.*

3. *A person approved by a Justice of the Peace enter into a surety undertaking in writing that he will, subject to the* Bail Act *1982 (WA), forfeit $10,000 if the appellant fails to comply with any requirement of his bail undertaking.*

4. *That on a date to be fixed by notice to him in writing by the Deputy Registrar of this Court, as the date on which his appeal will be heard and determined, he surrender himself to the Sheriff of the Supreme Court of Western Australia to serve any balance of his sentence then*

remaining unserved in accordance with the warrant of commitment pursuant to which he is confined at that time.

5. *The appellant shall not communicate with the complainant named in the indictment or any other prosecution witness either directly or indirectly.*

Representation:

R K Williamson for the appellant (instructed by Williamson & Co)

B Fiannaca with V R Campbell for the respondent (instructed by Director of Public Prosecutions (Western Australia))

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

HIGH COURT OF AUSTRALIA

CALLINAN J

Matter No P8/1998

RODNEY WILLIAM KING APPELLANT

AND

THE QUEEN RESPONDENT

Date of Order: 8 December 1998
Date of Publication of Reasons: 9 February 1999
P8/1998

ORDER

The appellant be admitted to bail pending the determination of his appeal to this Court on the following conditions:

1. *That the appellant reside with his wife at 17 Clark Street, South Bunbury.*

2. *That the appellant enter into a bail undertaking in the form of Form 6 of the Bail Regulations (WA), in which he agrees to forfeit $10,000 to the Crown if he is convicted of the offence of failing to appear as required.*

3. *A person approved by a Justice of the Peace enter into a surety undertaking in writing that he will, subject to the* Bail Act *1982 (WA), forfeit $10,000 if the appellant fails to comply with any requirement of his bail undertaking.*

4. *That on a date to be fixed by notice to him in writing by the Deputy Registrar of this Court, as the date on which his appeal will be heard and determined, he surrender himself to the Sheriff of the Supreme Court of Western Australia to serve any balance of his sentence then remaining unserved in accordance with the warrant of commitment pursuant to which he is confined at that time.*

5. *The appellant shall not communicate with the complainant named in the indictment or any other prosecution witness either directly or indirectly.*

Representation:

R K Williamson for the appellant (instructed by Williamson & Co)

B Fiannaca with V R Campbell for the respondent (instructed by Director of Public Prosecutions (Western Australia))

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HIGH COURT OF AUSTRALIA

CALLINAN J

Matter No P9/1998

CHRISTOPHER JOHN BULL APPELLANT

AND

THE QUEEN RESPONDENT

Date of Order: 8 December 1998
Date of Publication of Reasons: 9 February 1999
P9/1998

ORDER

The appellant be admitted to bail pending the determination of his appeal to this Court on the following conditions:

1. *That the appellant reside at 95 Unnaro Road, Hillman in the State of Western Australia.*

2. *That the appellant enter into a bail undertaking in the form of Form 6 of the Bail Regulations (WA), in which he agrees to forfeit $10,000 to the Crown if he is convicted of the offence of failing to appear as required.*

3. *A person approved by a Justice of the Peace enter into a surety undertaking in writing that he will, subject to the* Bail Act *1982 (WA), forfeit $10,000 if the appellant fails to comply with any requirement of his bail undertaking.*

4. *That on a date to be fixed by notice to him in writing by the Deputy Registrar of this Court, as the date on which the appeal will be heard and determined, he surrender himself to the Sheriff of the Supreme Court of Western Australia to serve any balance of his sentence then remaining unserved in accordance with the warrant of commitment pursuant to which he is confined at that time.*

5. *The appellant shall not communicate with the complainant named in the indictment or any other prosecution witness either directly or indirectly.*

Representation:

R G W Bayly for the appellant (instructed by Bayly & O'Brien)

B Fiannaca with V R Campbell for the respondent (instructed by Director of Public Prosecutions (Western Australia))

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

1 CALLINAN J. These are revised reasons for the ex tempore judgment I gave on 8 December 1998. These are applications for bail pending the hearing of appeals to this Court in 1999. In the ordinary course of events the appeals are unlikely to be listed for hearing before the week commencing 22 March 1999 and it is possible that they will not be heard until May 1999. The applicants were convicted of the offences of sexual penetration without consent and indecent assault by the District Court of Western Australia on 2 July 1997. The applicants were also acquitted of other charges of sexual penetration without consent, indecent assault and deprivation of liberty. The charges arose out of an incident alleged to have occurred on 18 November 1995.

2 Each applicant was sentenced to a term of imprisonment; Mr Bull to a term of eight years, Mr Marotta seven years and Mr King six years.

3 The Director of Public Prosecutions did not dispute that Mr King is eligible for work release, which would mean that he may be released from prison to go to a job, if he has one, in January 1999. He is eligible for release on parole on 2 July 1999. Mr Marotta is eligible for home leave in March 1999. He could then, if successful in obtaining home leave, be permitted to go home on one day each month. In September 1999, if he has a job, he may be released on work release. He will be eligible for parole in March 2000. Mr Bull will be eligible for parole on 31 October 2000.

4 It is not certain, of course, that release will occur on the dates when each of the persons to whom I have referred is eligible for release. That will depend upon other matters, but there is no suggestion in any of the evidence that there has been any disqualifying conduct.

5 Appeals by the applicants against conviction were dismissed by a majority of the Court of Criminal Appeal of the Supreme Court of Western Australia (Pidgeon and Franklyn JJ, Ipp J dissenting) on 19 January 1998.

6 Applications for special leave to appeal to this Court from those decisions were filed on 13 February 1998.

7 In Perth on 19 and 21 October 1998 I heard applications for bail pending the hearing of those applications for special leave. I then ordered that the applications for bail be adjourned *sine die* and that the applications for special leave be expedited to be heard on 20 November 1998. I also made consequential orders with respect to the timing of various interlocutory proceedings to lead to the hearing of the special leave applications.

8 Special leave in each of these matters was granted by this Court (Gleeson CJ, Gummow and Kirby JJ) on 20 November 1998.

9 Their Honours refused special leave to appeal on the ground that the verdicts of guilty were inconsistent with the acquittals. The ground of appeal in respect of which special leave was granted is as follows:

> "[T]he Court of Criminal Appeal was wrong in law to rule that evidence of the sexually explicit contents of the telephone conversation between Mr Bull (an appellant) and the complainant soon before the time of the alleged offences, and other related conversations, was evidence of 'the complainant's disposition in sexual matters', and not part of the *res gestae*, and was, therefore, inadmissible by virtue of ss 36BA and 36BC of the *Evidence Act* 1906 (WA)".

10 In *Chamberlain v The Queen [No 1]*[1] Brennan J observed that a verdict of a jury was not to be treated for the purposes of an application for bail as provisional. That was a case however, in which an application for bail had been brought pending the hearing of an application for special leave to appeal to this Court. With respect, I doubt whether a grant of bail does treat a verdict of guilty as provisional. The verdict stands unless and until it is quashed. One of its consequences, the service of a custodial sentence, is only interrupted by a grant of bail.

11 Since his Honour's decision in *Chamberlain*, the Commonwealth Parliament has amended the provisions concerning the Court's power to allow an application for special leave to appeal by the insertion of s 35A of the *Judiciary Act* 1903 (Cth). That a change in the law may perhaps justify a different view from that which was stated by Brennan J, was adverted to by Gaudron J in *Robinson v The Queen*[2]. Her Honour said there:

> "Since the introduction of new procedures with respect to the grant of special leave to appeal in criminal cases, it may be that the considerations to be taken into account by this Court are not quite as restricted as they were in the case of applications pending the grant of special leave to appeal."

12 The granting of bail by this Court is not without precedent. For example in *Chew v The Queen [No 2]*[3], Toohey J held that the fact that the applicant had obtained special leave to appeal was a relevant factor in his Honour's consideration of an application for bail, as it indicated that the appeal was thought to raise some questions of substance, and was not frivolous.

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1 (1983) 153 CLR 514 at 519-520.

2 (1991) 65 ALJR 519 at 519.

3 (1991) 66 ALJR 221.

13 In that case the appeal had been heard. What seems to have impressed his Honour was that by the time the decision could be expected to be given the whole of the custodial part of the sentence in question there would have been served. Although the appeal had been heard in that case, that did not seem to be the decisive factor in his Honour's decision and, indeed, counsel representing the Director of Public Prosecutions was not able to point to any practical difference between that case and this case, particularly when, as there, his Honour carefully abstained as indeed he was, with respect, probably bound to do, from expressing any view as to the likely outcome of the appeal upon which he had by then sat.

14 Applications for special leave to appeal to this Court are not liberally granted. The annual reports of the High Court set out the statistics for cases and special leave applications heard in the year preceding their publication. In the year ending 30 June 1996 there were 71 applications for special leave to appeal from decisions in criminal matters and only 15 were granted. In the year ending 30 June 1997, 17 out of 70 were granted and in the last completed year ending 30 June 1998, 20 out of 86 applications were successful.

15 I accept that it has been held by a number of Justices of this Court sitting alone, that exceptional circumstances need to be shown for a grant of bail by this Court in the exercise of its inherent jurisdiction to grant bail[4]. I also accept that in some cases it has been held that a grant of special leave to appeal[5], and the imminence of the end of a custodial period of a sentence have not usually of themselves been regarded as special circumstances[6]. However, the outcome of those cases was no doubt affected by the facts which the Justices of this Court had to consider in them.

16 The official records of this Court might suggest to some that a grant of special leave is, of itself, such a rare event, that it is a rather exceptional circumstance in itself.

17 On any view, the fact that a grant has been made must be a relevant factor.

18 I have decided that in these cases bail should be granted. The reasons for my decision are:

1. special leave has been granted in all of the cases;

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4 *Chamberlain v The Queen [No 1]* (1983) 153 CLR 514 at 518-519.

5 *Parsons v The Queen* (1998) 72 ALJR 1325; *Robinson v The Queen* (1991) 65 ALJR 519.

6 *Parsons v The Queen* (1998) 72 ALJR 1325; *Robinson v The Queen* (1991) 65 ALJR 519.

2. without in any way seeking to pre-judge the appeals, I am of the view that they raise an arguable point, which may have real substance and which, if it succeeds, would probably justify a retrial;

3. pending trial, the applicants were granted bail;

4. substantial parts of the custodial sentences are likely to have been served and possibly completed in one case by the time this Court's decisions are published;

5. all of the applicants are, save with respect to the duration of the periods likely to be served, in the same position;

6. if the applicants are acquitted, then the benefit of such acquittals would be hollow victories;

7. the appeals in these cases will not in the normal course be heard for some months yet: there is no reason why the appeals should be given priority over other pending criminal appeals, and it may be expected that the Court would reserve its decision for some time after the hearing;

8. it seems to have been accepted that a concession was made in the Court of Criminal Appeal that some evidence had been wrongly excluded, although it has been made clear to me by the respondent to these applications that it contends that that concession did not in any way affect, or should not have affected the correctness of the convictions and the decision of the Court of Criminal Appeal;

9. I am of the view that so long as it be clear that the full terms in actual time to be served in prison are served if the appeals are refused, the public interest in the fact of the convictions and their consequences will not be adversely affected, whereas, there is, in my opinion, no public benefit or interest in the incarceration of people who might turn out to have been wrongly convicted according to law;

10. although even if the applicants make out their legal points, they may still have to demonstrate that their cases do not call for the application of the proviso, their cases are not ones in which they simply contend that the verdicts were unsafe and unsatisfactory and on that account alone should be set aside;

11. there is a carefully reasoned dissenting judgment in the Court of Criminal Appeal;

12. there is no suggestion that these applicants are likely to abscond or offend whilst on bail; and

13. there is, and almost all penal legislation and executive policies relating to parole, work release, home detention, rehabilitation and the like recognise, a real distinction between custody in prison and the head sentence actually imposed: and accordingly it is not inappropriate to have regard to the non-custodial aspect of a sentence in considering an application for bail.

19 Those are the reasons which lead me to the conclusion that bail should be granted in these cases. I emphasise that it is the combination of the matters to which I have referred and the facts of the cases before me that demonstrate sufficiently exceptional circumstances to warrant bail. A grant of special leave alone certainly would not do so.