CHEW

v.

THE QUEEN

JUDGMENT
(ORAL)

11/12/91

TOOHEY J.

CHEW

v.

THE QUEEN

This is an application that the applicant be admitted to bail pending determination of his appeal against conviction.

The applicant was granted special leave to appeal at the sittings of the Court in Perth on 22 October 1991. On 24 October his counsel appeared before McHugh J. and sought bail pending determination of the appeal. At that time it seemed likely that the appeal would be heard in Canberra on 10 December 1991. The attitude of the Crown was that if the appeal was not to be heard on 10 December it would not oppose a grant of bail because the applicant would have served the custodial part of his sentence before the appeal was heard.

McHugh J. refused the application, saying that there was nothing to stop a fresh application being made after the appeal was heard on 10 December. This was on the basis that it would then be clear whether a

decision on the appeal was likely before the non-parole period had expired.

The applicant was sentenced to a term of three years imprisonment on each charge of which he was convicted, the sentences to be served concurrently. In respect of those sentences a non-parole period of twelve months applies. I put the matter in that somewhat vague way because I was not taken to the details of the statutory scheme applicable to those sentences.

It is common ground however that, under the operation of the scheme, including provision for remissions, the earliest date on which the applicant may expect to be released on parole is 19 February 1992. The Crown accepted that, in the ordinary course of events, the applicant will be released on parole on that date. However the Crown now opposes the application for bail.

As might be expected, the applicant puts his case essentially on the basis that, the Court having reserved its decision on his appeal, it is almost certain that he will have served the custodial part of his sentence before his appeal has been determined. To

that extent, he says, the appeal will be futile except in so far as a successful appeal may clear his name.

The principles applicable where bail is sought from this Court pending the hearing of an application for special leave to appeal or the hearing of an appeal are well known. But the fact situations giving rise to those principles vary. *Chamberlain v. The Queen [No.1]*(1) concerned an application for bail pending an application for special leave to this Court. Brennan J. observed(2):

> " However the test may be formulated, in practice the grant of bail pending an application for special leave to appeal to this Court will be more restricted than the grant of bail by courts exercising a general statutory power where there is an actual appeal pending."

That is understandable. The reasons advanced by Brennan J. do not apply exactly here but the applicant does have in his favour a grant of special leave, indicating that his appeal was thought to raise questions of some substance and was not frivolous.

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(1) (1983) 153 C.L.R. 514.

(2) at p.519.

The appeal has now been heard and the Court has reserved its decision. I participated in the hearing of the appeal but in that respect can say no more than that questions of substance were argued.

These are, in a sense, negative considerations. They serve to dispose of any argument (and the Crown advanced no such argument on this application) that the appeal was devoid of all merit.

The applicant is still faced with the difficulty that he seeks to invoke an inherent jurisdiction, the exercise of which is justified only where there are exceptional circumstances: see *Robinson v. The Queen*(3).

The applicant says that his circumstances are exceptional because, if he is not admitted to bail, a successful appeal will mean that he will have wrongly served the entire custodial part of his sentence. In that regard he distinguishes cases in which an applicant has a long custodial sentence still to serve and he draws an analogy with a short term sentence

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(3) (1991) 65 A.L.J.R. 519.

which will be served before an appeal is heard: see *Re Cooper's Application for Bail*(4). The analogy is incomplete for any non-custodial period is still a part of the sentence.

Nevertheless, when all these considerations have been taken into account, I am persuaded that this is a proper case for a grant of bail. The application is not for bail pending the hearing of an application for special leave to appeal. It is not an application for bail pending the hearing of an appeal. The appeal has been heard, the Court has reserved its decision and the likelihood is that its decision will not be known until after the applicant, if not admitted to bail, will have served what is, in practical terms, the entire custodial part of his sentence. Whatever the fate of his appeal, it cannot be described as frivolous.

In all those circumstances I am prepared to accede to the application but will hear from counsel as to the conditions upon which the applicant may be admitted to bail.

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(4) [1961] A.L.R. 584.