

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA437/2010
[2010] NZCA 414**

BETWEEN ADAM JOHN MILES
 Appellant

AND THE QUEEN
 Respondent

Hearing: 31 August 2010

Court: Arnold, Keane and MacKenzie JJ

Counsel: R G Glover for Appellant
 M D Downs for Respondent

Judgment: 10 September 2010 at 10.00 am

JUDGMENT OF THE COURT

The appeal is allowed. The application for bail is remitted to the High Court for the formulation of appropriate conditions.

REASONS OF THE COURT

(Given by MacKenzie J)

[1] The appellant faces charges following a Police investigation into the manufacture and distribution of methamphetamine in Canterbury. On 9 June 2010, in the largest operation of its kind in the Canterbury region, Police executed 15 search warrants at Christchurch addresses. Six clandestine laboratories were located, ranging from chemical and equipment stores to complete but inactive

laboratories. Located at the appellant's address in Lyttelton was laboratory equipment, including an operational fume hood, three steam distillers, a reaction vessel fitted with a condenser, Pyrex glassware and recipes to cook methamphetamine. Chemicals involved in the manufacture of methamphetamine were also located. A detective in the Christchurch Clandestine Laboratory Team expressed the view that while the laboratory was not active, it was apparent from the staining of the equipment that all the equipment had been used for some period of time. In addition, one gram of methamphetamine, four grams of extracted pseudoephedrine material, some cannabis plant material and some gel capsules containing an unknown substance were seized. Also located at the address were four firearms, including a loaded air rifle, and ammunition.

[2] The appellant appeared in the District Court at Christchurch, initially on charges of conspiracy to manufacture methamphetamine, possession of equipment for manufacturing methamphetamine, and possession of firearms.

[3] The appellant sought bail. Because he has a prior conviction for a drug dealing offence, namely a conviction for possession of LSD for supply, s 16 of the Bail Act 2000 applies, so that bail can be granted only by a High Court Judge.

[4] The appellant's application for bail was first considered by French J in the High Court at Christchurch on 17 June 2010. Police opposed bail. They did so essentially on the ground that there was a risk that the appellant may interfere with witnesses or evidence. In an oral judgment on 17 June 2010, the Judge took the view that there was a significant risk of interference if the appellant were released on bail, and that that risk could not be mitigated sufficiently by the imposition of conditions. The Judge noted that because of the need for the Police to complete their inquiry without delay, the remand in custody should be for a very limited duration, and she directed that the matter be reviewed on 2 July 2010.

[5] In a second oral judgment delivered on 2 July 2010 following that further hearing, bail was again refused. French J noted that, since the original hearing, additional charges of possession of precursor substances, possession of materials and of manufacturing methamphetamine had been laid. She observed that the Police

inquiry was largely completed in that Police had by then collected the majority of the physical evidence required for the prosecution. Police continued to strongly oppose bail. They did so on two grounds, described by the Judge in these terms:¹

- (i) They say there are two key offenders involved in the conspiracy still outstanding, and there is a very real and significant risk that Mr Miles will make contact with those outstanding offenders.
- (ii) They say while there is no evidence to suggest Mr Miles has previously offended on bail, the nature of his current offending and the addictive properties of methamphetamine would suggest that if released from custody, he will continue to offend.

[6] The Judge recorded that the onus was on Police to satisfy her that there was just cause for detention, having regard to the considerations in s 8 of the Bail Act. The Judge observed that the offending is serious, a point which weighed very heavily with her. She noted that the evidence against the appellant appears to be strong. Against that, she listed as countervailing factors the presumption of innocence, the length of time before the matter comes to a hearing (likely to be next year) and the absence of previous convictions for breaching bail. The Judge said:²

I have carefully considered this matter, and have come to the view that bail should be declined. I have considered whether there are conditions that could fashion the risk that the police have identified, and in that regard I rely primarily on the risk of offending while on bail, rather than the contacting of the two outstanding offenders, given the significant uncertainty surrounding that latter issue. I am not satisfied there could be conditions that would reduce the risk to an appropriate level.

[7] Mr Glover for the appellant submits that the appeal is not one against the exercise of a discretion. Rather, he submits that the risk of offending while on bail, identified by the Judge as the relevant risk, was not such as to provide just cause for continued detention and that the Judge misdirected herself in finding that there was just cause. He submits that the risk of offending can be addressed by appropriate conditions and that the appellant would accept any bail conditions which might be imposed.

¹ At [6].

² At [12].

[8] Mr Downs for the respondent submits that the Judge did not err. She correctly apprehended that the refusal of bail required just cause and considered, but ultimately rejected, the imposition of conditions.

[9] A determination of whether there is just cause for continued detention requires an assessment of the extent of the risk of any one or more of the factors in s 8(1) of the Bail Act. The assessment of that risk may be informed by an assessment of the considerations enumerated in subs (2).

[10] In this case, the relevant subs (1) risk was that of offending while on bail. Here, the appellant has no record of having previously offended on bail. Police had relied, in support of the risk of re-offending, on “the nature of his current offending and the addictive properties of methamphetamine”. The Police grounds for opposing bail indicate that the appellant is not regarded as the central figure in the group. The grounds acknowledge that there is no evidence to suggest the appellant has previously offended on bail. The proposition that the nature of his current offending and the addictive properties of methamphetamine would suggest that if released from custody the appellant will continue to offend is supported in the grounds opposing by a general statement as to the harm caused by drug use, the link with serious crime, the high profits involved and the risk of environmental damage from clandestine laboratories.

[11] We do not consider that the addictive properties of methamphetamine are in themselves directly relevant to the risk of re-offending while on bail, because there is no evidence to suggest that the appellant is himself addicted to methamphetamine. There is accordingly nothing to suggest that the addictive properties of methamphetamine are likely to increase the risk of his offending while on bail. None of the general material relied upon in the grounds for opposing bail is directly relevant to the extent of the risk that the appellant may continue to offend.

[12] The seriousness of the offending is a relevant factor in assessing whether the risk of offending while on bail provides just cause for continued detention. The addictive properties of methamphetamine, and the extent of the harm done by that drug, are relevant matters in assessing the seriousness of the offending. Those

factors may well go to the extent of risk which could properly be tolerated. But while those factors may inform the assessment of the risk, the risk of re-offending must include an assessment of the likelihood of the appellant offending while on bail. The assessment must be a case-specific one.

[13] There is, as we have noted, no history of previous offending while on bail, from which a risk could be inferred. The appellant has a relatively limited criminal history. The only conviction potentially relevant to an assessment of his risk of re-offending is that for possession for supply of LSD. That conviction was in 1997. The age of that conviction, and the fact that it involves a different drug, point against any suggestion that the appellant's previous involvement with drugs is of itself sufficient to indicate a risk of offending while on bail. Any risk of offending on bail must, in those circumstances, be found in the circumstances of the offending itself, not in past experience.

[14] The Police case against the appellant is that he was part of an ongoing criminal enterprise involving a number of people for the manufacture and distribution of methamphetamine, and that his role in the enterprise was to act as a cook. The number of arrests made by Police indicates that the criminal enterprise has been dismantled. There is no material which suggests that the appellant has access to the means of manufacture, or a means of distribution, which might suggest a risk of further offending of a similar sort. An involvement in the manufacture of methamphetamine while on bail would require access to the necessary materials and equipment. There is no evidence to suggest that the appellant might have such access. Any involvement by the appellant in offending while on bail would necessarily be on a quite different basis from that which is alleged. There is no evidence from which a risk of some different offending might be inferred.

[15] For these reasons, we have reached the view that the Judge erred in principle in reaching the view that there was a risk of offending which provided just cause for continued detention. The result is that bail should be granted, on appropriate conditions. The material before us does not enable us to assess and fix the conditions which should be imposed. Accordingly, the appeal is allowed. The

application for bail is remitted to the High Court for consideration of the conditions to be imposed.

Solicitors:
Crown Law Office, Wellington for Respondent