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N.Z.L.R. Reports

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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

T.76/82
CA.316/82

File as: R v Te Moananui

420

BETWEEN MAURICE WIREMU TE MOANANUI

Applicant

AND THE QUEEN

Respondent

Hearing: 30 April 1984

Counsel: P.C. Mills for Applicant
B.E. Buckton for Crown

Judgment: 1|5|84

JUDGMENT OF EICHELBAUM J

This is an application for bail pending the hearing of an appeal. The background is certainly unusual. As long ago as December 1982 the applicant was sentenced to three years imprisonment following his conviction for rape after a jury trial. The appeals he lodged against both conviction and sentence were not disposed of until November 1983. It is apparent that a factor contributing to the delay was that the applicant was not represented.

The appeal against conviction was dismissed. The appeal against sentence was allowed, the sentence being reduced to two years to enable account to be taken of the fact that until 14 August 1983 the applicant elected to be treated as a remand prisoner. The present position therefore is that he has served some 8½ months of a two year sentence but has been in custody some 17 months in all. Assuming the applicant obtains the maximum remission, he will be due for release shortly before

the end of this year.

On 9 March 1984 the applicant lodged a further notice of appeal, this time, so Mr Mills submits, on questions of law alone. The grounds are certainly ones not directly raised in the earlier appeal.

I am not aware of any reported New Zealand authority directly in point on an application brought in these circumstances. Mr Mills has drawn my attention to several authorities from other jurisdictions. In England the Court of Appeal has frequently stated that admission to bail pending appeal is unusual and only to be granted in exceptional circumstances : R v Neville 1971 Crim LR 589. In Re Watton 1978, 68 Cr App R 293 a Court of Appeal comprising Geoffrey Lane LJ and Ackner and Watkins JJ said, in dealing with such an application :

> " . . . . the true question is, are there exceptional circumstances, which would drive the Court to the conclusion that justice can only be done by the granting of bail ? "
>
> (p 297)

Here Mr Mills relies on two factors as constituting exceptional circumstances. He placed principal reliance on the factor of delay, but I will first refer to his second point which was that the appeal had strong prospects of success. In developing this submission Mr Mills took me through the points he proposed to argue before the Court of Appeal. Before

the merits are reached he will need to persuade the Court that, the earlier appeal and its dismissal notwithstanding, the Court has jurisdiction to entertain the new application. Then, under merits, he proposes to argue that certain evidence relating to an earlier display of violence on the part of the applicant towards the complainant's sister should not have been admitted. He also intends to submit that as trial Judge I misdirected the jury on the same matter. Although I have to respond to Mr Mills' submission, it would be presumptuous of me to endeavour to deal in depth with any of these issues. If the arguments available on the jurisdiction question, and on either of the points under the heading of merits, were exceptionally strong it would certainly be a factor supportive of the present application. However, while I accept that the applicant has an arguable case on each aspect, I must say that none of them strikes me as pointing overwhelmingly to the ultimate success of the appeal.

Turning to the factor of delay, I have no doubt that Mr Mills is correct when he says that "oppression by delay" (R v Hicks 1981, 129 DLR (3D) 146, 151, Alberta Court of Appeal) is a matter properly to be taken into account on an application of this kind. The element of delay here is exceptional in the sense it is certainly out of the ordinary to have an appeal still extant 17 months after the date of sentence. The appeal outstanding of course is not the appeal lodged immediately after conviction and sentence, but Mr Mills is entitled to say that through no personal fault of the applicant, real points of contention are still outstanding after this length of time. In my opinion however there is a further aspect to be taken into

account in relation to delay, namely the prospective delay before finality. Although Mr Mills was inclined to debate the point, surely if, to take it to extremes, it could be said with certainty that the appeal was to be disposed of within a few days, it would be a futile gesture to release the defendant on bail at this moment. In fact the issue whether the Court of Appeal has jurisdiction to entertain the appeal is to be argued on 15 May, that is in a fortnight's time. Assuming that the applicant were successful there is no reason why there should be any substantial delay before the appeal was heard on its merits. The summing up has already been transcribed, there are no factors of complication regarding the preparation of the formal Case, and counsel for the Crown undertook to take such measures as he could to have the appeal brought on promptly. At the moment however the more important point is that conceivably, within a fortnight the appeal may be at an end. Regardless of the other points arising it would seem quite wrong to release the applicant at this stage when the result might be his recall to prison within as short a period as that, he having still seven or eight months of his sentence to serve. There would be an element of potential cruelty to the applicant in the prospect.

There is a further factor that weighs against the applicant. Although there was no problem about his bail while awaiting trial, among his lengthy list of convictions is one for failing to report to a work centre and another for failing to report to periodic detention. There is one for assaulting a constable on duty and another for resisting the police. If the applicant were released on bail in the circumstances already described, the pressure on him to abscond is a

factor that I think could not be ignored entirely; and the convictions mentioned demonstrate that he is not to be regarded as fully reliable in relation to obligations imposed on him by the authorities.

In the end I have to balance the prospective injustice to the applicant should the final result be that his appeal succeeds against the other considerations I have mentioned which go in the scales against him. In the result I have a clear view that it would be wrong to allow bail, notwithstanding the comprehensive and conscientious argument advanced by counsel. The application is refused accordingly.

Solicitors :

P.C. Mills Esq (Wellington) for Applicant
Crown Solicitor (Wellington) for Respondent