

**IN THE HIGH COURT OF NEW ZEALAND  
DUNEDIN REGISTRY**

**CRI 2007-012-4181**

**THE QUEEN**

v

**MICHAEL ANDREW SWANN  
KERRY GRAY HARFORD**

Hearing: 4 March 2009

Appearances: R Bates and A Killeen for the Crown  
J Haigh QC for accused Swann  
G King for accused Harford

Judgment: 4 March 2009

---

**REASONS FOR ORAL JUDGMENT OF STEVENS J  
(Application for adjournment and bail pending sentence)**

---

Solicitors/Counsel:

Crown Solicitor, PO Box 803, Dunedin 9054

J Haigh QC, PO Box 1614, Shortland Street, Auckland 1140

G King, PO Box 24086, Manners Street, Wellington 6142

A Killeen, Serious Fraud Office, PO Box 7124, Wellesley Street, Auckland 1141

B Boyd, PO Box 37139, Parnell, Auckland 1151

## **Introduction**

[1] The prisoner Michael Andrew Swann (the applicant) has filed an application for orders that his sentencing, to be heard on 11 March 2009, be adjourned to another date to be fixed by the Court. He has also sought an order that, if the sentencing were to be adjourned, he be granted bail pending sentence.

[2] The grounds advanced in support by the applicant are that the adjournment is necessary to enable the prisoner to resolve and/or assist in the resolution of reparation issues prior to sentencing and that the resolution of such issues would be relevant to the sentence to be imposed. Further, it was contended that bail pending sentence would enable the applicant to assist the Otago District Health Board (the ODHB) in recovering monies and assets due and owing by the applicant following his convictions. An alternative ground for seeking bail pending sentence (referred to in an affidavit from the applicant) was a separate one relating to a compassionate release so that the applicant might spend some final time with his mother who has terminal cancer.

[3] The applications for adjournment and bail (on both grounds) are opposed by the Crown. The grounds of opposition were set out in an affidavit from the Chief Executive Officer of the ODHB and in a memorandum from the Crown Solicitor. The Crown considers that the applicant is a serious flight risk.

[4] The sentencing date of Wednesday, 11 March 2009 for the applicant and his co-offender Mr Harford has been set since 19 December 2008. That date was fixed following discussion with counsel for all parties and a timetable provided for submissions. Counsel for Mr Harford wishes the sentencing of his client to proceed at the same time as the applicant and as scheduled on 11 March 2009. He therefore opposed the application for adjournment.

[5] As the sentencing date was fast approaching, the Registrar arranged for the applications to be dealt with by means of a telephone conference on Wednesday, 4 March 2009. During the conference, I heard further comprehensive submissions from counsel for the applicant and for the Crown.

[6] At the conclusion of the conference, I informed counsel of my decision on the basis that written reasons would follow later. I ruled that the application to adjourn the sentencing would be declined. Further, the application for bail to enable the applicant to resolve reparation issues was declined. But the application for bail on compassionate grounds would be adjourned. My reasons for such rulings are set out below.

### **The original bail application**

[7] When the jury delivered its verdicts convicting the applicant on 5 December 2008, an application for bail was made immediately on behalf of the applicant by junior counsel Mr Boyd. Counsel addressed the various factors to be considered under s 13 of the Bail Act 2000 (the Act). Counsel accepted that, where a defendant is found guilty, s 13(1) of the Act provides that the Court must not grant bail unless it is satisfied on the balance of probabilities that it would be in the interests of justice in a particular case to do so. The applicant therefore carried an onus under s 13(2) of the Act to “show cause why bail should be granted”.

[8] One of the factors urged on the Court in support of the bail application (under s 13(3)(d) of the Act) was the fact that there was an urgent need to resolve the issue of reparation. Counsel noted that the civil proceedings had been ongoing for some time and the applicant wished to ensure that as much money as possible was recovered so that the highest amount of reparation could be made. Counsel mentioned the risk of dissipation of assets through the civil litigation and put forward time and distance concerns and the fact that his solicitors were based in Auckland.

[9] In Minute [2] recording the decision to refuse bail pending sentence, the following reference was made to reparation:

[7] In relation to reparation, I have received an affidavit from Mr Rousseau regarding the difficulties which the Otago District Health Board has had in identifying, locating and securing Mr Swann’s assets. Some of these have only now been acknowledged in the course of the criminal trial as deriving from Otago District Health Board funds. Other matters in the affidavit are persuasive in emphasising the point that Mr Swann can assist in aiding the reparation process.

[10] In the reasons for declining bail, the question of reparation was specifically addressed as follows:

[10] So far as the other factors are concerned, none of the matters such as the personal circumstances of the defendant or his immediate family, or the factor regarding reparation, assist Mr Swann in discharging the burden which is upon him.

[11] So far as reparation is concerned, it is in Mr Swann's interest to do all he can to assist this process. But in my judgment he can do that from custody. He can give instructions by telephone or by letter or in person.

[11] The applicant was clearly placed on notice that reparation was an issue relevant to sentencing and that he should do all that he could to facilitate a resolution of reparation issues. His own counsel has stressed the need for urgent attention to these issues.

### **Reparation report**

[12] When the usual pre-sentence report from the Department of Corrections was called for, I took the additional step of ordering that a reparation report be prepared by a probation officer pursuant to s 33 of the Sentencing Act 2002. The provisions of s 34 of the Sentencing Act govern the preparation of reparation reports.

[13] For the purposes of these reasons, reference is also made to the provisions of s 10 of the Sentencing Act which require the Court on sentencing to take into account any offer of amends, agreement, response or measure to make amends. This provision is likely to be relevant at the sentencing of the applicant given the stage which has been reached between the parties regarding reparation. From the applicant's point of view, his position can be protected by an offer of amends, even if no agreement has been reached between the applicant and the ODHB.

[14] The Court has been provided with a reparation report dated 2 February 2009. So far as Mr Swann's input is concerned, the reparation report noted (drawing on the probation report) that the applicant presented as having limited insight into his offending and this had been reinforced by his guilty pleas. The report noted that the applicant was, prior to be remanded in custody, self-employed. He had informed the

report writer that once released he would continue the same type of work. The applicant accepted that reparation was being sought but he had advised that “he has no personal property, money or assets” and believes that all property expended with ODHB money has been “seized”. It is to be observed that the applicant provided no detailed information as to his assets (or the location of them) to assist the writer of the reparation report. This is in contrast to the applicant’s approach when giving evidence at his trial which was to recite in great detail information about the cars and boats and other items which he had acquired.

### **Grounds for adjournment and bail**

#### *Reparation*

[15] The applicant stated in his affidavit in support as follows:

4. While in custody there has been no possibility of my assisting with reparation. With bail, I believe I will be able to:
  - (a) Provide a total schedule of assets both in my name and the name of Computer South Limited from which to realise the maximum amount of reparation.
  - (b) Provide a schedule of all assets purchased with ODHB funds, and transactions made with ODHB funds, so that the tainted purchases may be traced.
  - (c) Provide locations of the assets referred to in (a) and (b) above.
  - (d) Provide transaction details of assets held by contractors involved, which may be held pending payment or as security.
  - (e) Recover and detail all records from my notes and e-files relating to ODHB funds spent.
  - (f) Work with company accountants and trustees to fast track the return of all company assets.
  - (g) Work with the people in (f) above to provide the monetary value of all vehicles and boats.
  - (h) Provide all company invoices, and details of possible duplicate payments on assets over which either I or the company have security charges.

- (i) Provide details of transactions that involve assets which have been used to offset payment. This will allow the ODHB to recover and realise any overpayments if they have been made.
  - (j) Provide details and statements to assist the Plaintiff in the Sew How case. This will save the Crown and the ODHB significant time, effort and money.
5. If proper analysis is not provided for the major assets, it will be impossible to realise their true value, which will result in the possible loss of millions of dollars.
  6. I am unable to do any of the above in custody due to the limitation on communication and incoming and outgoing information. I also have no access to computer records or accounts, or company accountants and company lawyers.
  7. If I am not granted bail in which to complete the above, I will be totally disadvantaged in providing any reparation. Further, if I remain in custody rather than put right the damage done by my offending, I do not believe it allows me to show that I take full responsibility for my actions.
  8. At the very least, I believe the ODHB as a victim of my actions deserves any reparation I am able to facilitate, which I can only do if I am granted bail.

[16] The applicant also stated that “I am totally remorseful for my actions, and if I am granted bail, prior to sentencing I will commit myself fully to co-operating with the ODHB and the Crown”.

*Compassionate ground*

[17] This ground for bail pending sentence relied on the applicant’s desire to spend some final time with his mother who has terminal cancer. Two documents were annexed as exhibits, namely, a letter from the Oncology Registrar to the Medical Oncologist Dr Blair McLaren dated 1 February 2008 and a letter dated 15 December 2008 by Dr McLaren himself.

[18] The difficulty with these reports is that they are both very much out of date. The first letter is over a year old and the other letter does not deal with the mother’s present condition.

[19] I propose to refer to this ground further when dealing with the submissions of counsel.

### **Opposition by Crown**

[20] The basis of the Crown opposition to bail and to the adjournment was set out in Mr Bates' memorandum. The Crown submitted that, having received the Crown sentencing submissions, the applicant would appreciate that he will likely be sentenced to a lengthy term of imprisonment. Therefore, he was seen as a significant flight risk. In terms of reparation, counsel noted that significant amounts of funds had not been traced. It was not clear whether all boats purchased by the applicant had been located or recovered. Further, one vessel was found recently stored at a farm on the West Coast. The location of the boat had not been disclosed by the applicant.

[21] The memorandum referred to an affidavit to be filed by the Chief Executive Officer of the ODHB outlining a long history of lack of co-operation and obstruction by the applicant in relation to identifying and locating the proceeds of the fraud. The affidavit provides ample evidence to support this submission.

[22] Crown counsel submitted that nothing appeared to have changed to date, apart from the declaration in the applicant's affidavit regarding his willingness to co-operate. Whilst the applicant had expressed remorse for his actions, the Crown considers that the offer to co-operate was conditional on the grant of bail and should be treated as having little credibility in any event.

[23] The Crown did not accept that while in custody there had been no possibility of assisting with reparation. Counsel submitted that the applicant could have assisted with many or all of those matters referred to in paragraph 4 of his affidavit (quoted at [15] above). The Crown had ongoing concerns (no doubt shared by the ODHB) that, if the applicant were in a position to communicate freely with other persons, further attempts might be made to frustrate reparation and prevent the location of assets as has been demonstrated by the history to date.

[24] Finally, the Crown offered the assistance of an experienced Police Officer with forensic accounting experience to assist with reparation while the applicant remained in custody.

### **Submissions of counsel**

[25] Mr Haigh QC, for the applicant, emphasised during the telephone conference that communication was a real issue while the applicant remained in custody. He referred to difficulties with the telephone, delays in mail reaching the prison and limited opportunity for faxing documents.

[26] Mr Haigh advised that the applicant was not prepared to accept the offer in Mr Bates' memorandum of assistance from an experienced Police Officer with forensic accounting knowledge. For his own reasons, the applicant remained suspicious of such assistance.

[27] Mr Haigh noted the contents of Mr Rousseau's affidavit but submitted that these related to the civil proceedings and the history thereof. His concern was to maximise on his clients behalf the prospects of reparation prior to sentencing.

[28] On the question of what has actually been done by the applicant to date, Mr Haigh referred to a visit by junior counsel Mr Boyd to Dunedin. During that visit, Mr Boyd conferred with the applicant and made an offer of settlement to the solicitors for ODHB. However, such offer of settlement had not been accepted. Further, there had been meetings with lawyers for the various trustees and Ms Peters who was representing the applicant in the civil proceedings.

[29] Mr Haigh referred to the fact that there was a stalemate in the civil proceedings. He understood as counsel why that was and he recognised that the position of the lawyers for ODHB was "difficult". In response to a question from me, Mr Haigh saw no difficulty with confidential disclosure of the offer of settlement, or any enhanced offer that might be made between now and sentencing. This would mean dealing with reparation in a manner consistent with the provisions in s 10 of the Sentencing Act. Mr Haigh also agreed that, in addition to the Court



being provided with details of the offer of amends, it should be possible for Mr Bates and him to reach an agreement as to the likely recovery from the various items that were now under the control of ODHB arising out of the civil proceedings.

[30] With respect to the application for bail on compassionate grounds, Mr Haigh accepted that the correspondence attached to the applicant's affidavit was out of date. He fairly noted that the applicant's mother had recently visited him in prison, having been taken there by the applicant's wife. Mr Haigh had no further up to date information about the condition of the mother. Mr Haigh urged that, rather than dismissing the application, it should be adjourned in case in the future more up to date and compelling evidence in support of bail might become available.

### **Crown response**

[31] For the Crown, Mr Bates referred to the grounds set out in his memorandum as summarised above. He submitted that there was no good reason for the Court to grant an adjournment of the sentencing. The question of reparation might take many months to resolve and indeed might never be resolved by agreement. Reparation might well have to be resolved during the course of the civil proceedings.

[32] So far as the application for bail is concerned, this should be declined if the adjournment is denied. As to bail on compassionate grounds, Mr Bates accepted that the Court might, rather than dismissing the application, simply adjourn the application.

### **Disposal**

#### *Application for adjournment of sentencing*

[33] This application must be declined. The sentencing date has been in place since 19 December 2008 having been agreed by all counsel and a timetable put in place for the filing of submissions. This timetable has been complied with and Mr Haigh for the applicant is due to file his submissions tomorrow.

[34] There is merit in Mr Harford's submission that he should be sentenced at the same time as Mr Swann and that there should be no further delay.

[35] There is no doubt that, with the sentencing due to take place in less than a week, the applicant is a flight risk. I agree with the submissions of Mr Bates that the applicant would see even the most restrictive bail terms as a challenge. Even electronically monitored bail is not fool proof.

[36] The application for bail on the ground of assisting the reparation process is in essence a rerun of the argument that was presented by Mr Boyd on 5 December 2008 and addressed in my ruling at that time. Nothing has changed that would support an application for bail made essentially on the eve of sentencing.

[37] Further, I am satisfied that the issue of reparation can be dealt with, even if there has been no final agreement reached with regard to reparation arising out of the civil proceedings. The Sentencing Act makes clear provision for an offer of amends to be taken into account: see s 10 of the Sentencing Act. In this case, it is likely that there will be agreement between counsel (as noted at [29] above) as to the likely recovery from those items which have been seized pursuant to orders in respect of the civil proceedings.

[38] I take into account that the applicant was expressly warned, in the minute of 5 December 2008, of the importance of co-operating in relation to reparation. He was urged to do all he could to assist this process. It is true that the applicant has pointed to difficulties with providing such assistance, but in terms of specific assistance which he might have provided, it seems that he personally has done very little, if anything, since 5 December 2008 to assist in the process of reparation.

[39] The assertion made in paragraph 6 of his affidavit lacks specificity and does not explain why the applicant has not provided much assistance, if any, to date. The contents of the affidavit are lacking in detail on this aspect and are unpersuasive.

[40] For all of the above reasons, the justification advanced for an adjournment on the basis of the need to assist with reparation has not been made out.

*Bail on compassionate grounds*

[41] There is insufficient evidence before me at the present time to warrant bail on compassionate grounds. The information advanced by the applicant is out of date and the Court simply does not have sufficient information to support bail on this basis. Particularly given that the applicant's mother is able to travel to the prison, with the assistance of the applicant's wife, there is no good reason presently available why bail should be granted on this basis.

[42] As noted earlier, this application is adjourned in case further and better information may come to light to support such an application.

[43] However, the applicant should be under no illusion. Compelling grounds would be needed to justify the grant of bail on this basis.

**Result**

[44] Despite the comprehensive arguments skillfully put forward by Mr Haigh and Mr Boyd on behalf of the applicant, the submissions advanced in support of granting bail are not such that the applicant has discharged the onus resting on him under s 13 of the Bail Act to show cause why bail should be granted.

[45] Accordingly, the application for an adjournment is dismissed. The application for bail to facilitate reparation is dismissed. The application for bail on compassionate grounds is adjourned. The sentencing of both prisoners will proceed on 11 March 2009 as planned.