

SUPREME COURT OF QUEENSLAND

CITATION: *Scrivener v DPP* [2001] QCA 454

PARTIES: **LEONARD PEARCE SCRIVENER**
(applicant/appellant)
v
DIRECTOR OF PUBLIC PROSECUTIONS
(respondent/respondent)

FILE NO/S: Appeal No 9094 of 2001
SC No 8345 of 2001

DIVISION: Court of Appeal

PROCEEDING: Appeal from Bail Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 23 October 2001

DELIVERED AT: Brisbane

HEARING DATE: 12 October 2001

JUDGES: McPherson and Davies JJA, Cullinane J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **Appeal dismissed**

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND
PROCEDURE – BAIL – REVOCATION, VARIATION,
REVIEW AND APPEAL – where appellant on bail for other
offences prior to arrest for murder – whether Judge at first
instance correct to refuse bail on the grounds that
circumstances had changed

CRIMINAL LAW – JURISDICTION, PRACTICE AND
PROCEDURE – BAIL – GROUNDS FOR GRANTING OR
REFUSING – BEFORE TRIAL – MURDER CASES

APPEAL AND NEW TRIAL – APPEAL – GENERAL
PRINCIPLES – RIGHT OF APPEAL – NATURE OF
RIGHT – APPEALS IN THE STRICT SENSE AND
APPEALS BY WAY OF REHEARING – DISTINCTION –
whether appeal from bail application is appeal *de novo* or
appeal by way of rehearing

Bail Act 1980 (Qld), s 13, s 16(3)(b)
Supreme Court of Queensland Act 1991 (Qld), s 29(1)
Uniform Civil Procedure Rules 1999 (Qld), r 745(2),
r 765(1), r 766(1)(c), r 766(2), r 767(2)

Edwards, ex p [1989] 1 Qd R 139, considered
House v The King (1936) 55 CLR 499, applied
Maher, ex p [1986] 1 Qd R 303, considered
Powell v Streattham Manor Nursing Home [1935] AC 243,
 applied
R v Hughes [1983] 1 Qd R 92, considered
R v Malone [1903] St R Qd 140, considered
Warren v Coombes (1979) 142 CLR 531, considered

COUNSEL: A Boe for the appellant
 R G Martin for the respondent

SOLICITORS: Boe & Callaghan for the appellant
 Director of Public Prosecutions (Queensland) for the
 respondent

- [1] **McPHERSON JA:** This is an appeal by Leonard Scrivener against a decision by Thomas JA sitting in Chambers in the Supreme Court refusing an application for bail pending trial on a charge of murder. The murder is alleged to have taken place in 1995 in a prison where the applicant and the deceased were inmates. At the time, the deceased was found dead in his cell bunk having died some hours before. He had, as the coroner later found, been strangled by some person or persons unknown. Since then, however, the police have been continuing their investigations of this and other acts of prison violence. Recently, they have received statements from three different informants, who claim that they had, or overheard, conversations with the appellant in gaol in which he admitted involvement in planning the murder, or cleaning up evidence of it afterwards, or that he had in fact carried out the murder himself.
- [2] There are some discrepancies between the accounts given by the three informants of what they say they heard or saw. The reliability of prison-yard confessions relayed by other inmates is of a notoriously low order, which led Thomas JA to remark that the prosecution case in this instance was a weak one. However, as Mr Martin for the Crown submitted on appeal, evidence of such confessions is frequently, and in the nature of things, all that is available to the prosecution in cases of this kind, but convictions are nevertheless obtained in some of those cases. Some forensic tests are still being carried out in relation to this murder, but they may not reveal anything of evidentiary value.
- [3] The appellant was arrested on 30 August 2001, and the committal proceedings are next listed for mention in the magistrates court on 5 November 2001. At the time he was arrested on the murder charge, the appellant was on bail, which had previously been granted by Atkinson J in the Supreme Court on 9 July 2001 in respect of eight offences alleged to have been committed between 13 May and 24 May 2001. They are: (1) possession of a motor vehicle with intent to deprive; (2) receiving stolen credit cards and car keys; (3) using another vehicle without consent; (4) operating a motor-car dangerously; (5) stealing number plates; (6) driving without a licence; (7) driving while under the influence; and (8) possession of stolen property, consisting of a number and variety of items of ladies' jewellery.

- [4] Charges (1) and (2) are due for mention in the magistrates court on 25 October 2001. The appellant plans to plead guilty to them. As to charges (3), (4) and (5), the appellant has, after pleading to them, already been committed for sentence to the next criminal sittings of the District Court. He also intends to plead guilty to charges (6) and (7) when these matters are next mentioned on 13 December 2001. He will plead not guilty to the offence in charge (8), which is, it would appear, by far the most serious of these matters.
- [5] It seems a valid inference that, at the time the appellant obtained bail on those offences on 9 July 2001, he had not yet decided to plead guilty to the first seven charges or announced his intention of doing so. On that occasion Atkinson J granted bail on stringent conditions including daily reporting, residence at a particular town in the Brisbane Valley (where his family lives), and abstaining from the use of drugs. On the bail application before Thomas JA on 26 September 2001, there was evidence that the appellant had fully complied with all of those conditions, and was working as an agricultural labourer in that district. At that time, however, it was, his Honour considered, highly likely that the appellant would receive sentences of imprisonment for the eight, or most of the eight, offences with which he is charged, as to all but one of which he now proposes to plead guilty or has already done so.
- [6] It was submitted on appeal that his Honour was not justified in making or acting on a prediction about the likely sentence or penalty that will be imposed for those offences. I do not see why that should be so. Granting or refusing bail often calls for a large measure of judicial prediction about matters like re-offending, future attendances at court, risks to witnesses, and so on. The accuracy of those predictions in the present case was affected by several factors, including the circumstance that the appellant has a remarkably long record of convictions, and that the eight offences in question were committed shortly after his release from custody in December 2000. His criminal history goes back to and before an occasion when the appellant (who is now 28 years old) was sentenced in the District Court in 1990 to a term of imprisonment for 7 years for assault with intent to steal with actual violence and unlawfully using a motor vehicle. Not content with that, he subsequently committed in prison so many more offences, including damaging property, attempting to escape, assaulting a prison officer and others, that his term in custody was extended from 7 to 10 years. It was shortly after he was released from that imprisonment that he committed the offences to which he now proposes to plead guilty.
- [7] It was also submitted before us that the effect of the order by refusing bail on this occasion was to displace or overrule the earlier decision of Atkinson J by which bail had originally been granted. It is self-evident that that was the effect of the later order: the appellant formerly had bail, whereas now he has not. But that is the result of the fact that the application for bail made to Thomas JA involved a different and further charge of another offence of a serious kind. Bail orders are interlocutory, and new developments or fresh evidence require the question of existing bail to be re-examined again in the light of those additional considerations. Once the appellant was charged with murder, his previous conduct, and the possibility that he would fail to appear, or would offend again, or would present a threat to witnesses, fell to be reconsidered in the light of the more serious charge. It cannot be suggested that the grant of bail on a charge, for example, of unlawful use of a motor vehicle is determinative or decisive of a later application for bail on a murder charge. By virtue of s 16(3)(b), read with s 13 of the *Bail Act* 1980, the onus rested on the applicant to show cause why his detention

in custody was not justified pending his trial for murder. The seriousness of the offence, especially in the case of an applicant with a record of violence like that of the appellant here, inevitably influences the way in which the discretion is exercised in such a case.

[8] The appellant submitted that, in determining whether or not on this appeal to reverse the order of Thomas JA refusing bail, it would be wrong for this Court to approach the question on the footing that the decision under appeal was given in the exercise of a discretion that would only be upset if, in conformity with the principles laid down in *House v The King* (1936) 55 CLR 499, it was shown that the discretion had in some respect miscarried. There had, it was said, been recent changes in the Rules of Court governing appeals, and perhaps also alterations that have taken place in the structure of the Court itself, which meant that a different approach to an appeal like this was now called for.

[9] As a matter of history, bail was originally a form of habeas corpus. See *R v Malone* [1903] St R Qd 140, 141; *R v Hughes* [1983] 1 Qd R 92, 93; *ex p Edwards* [1989] 1 Qd R 139, 141. At least when sought before, rather than in the course of, a criminal trial, it is therefore a civil proceeding and as such governed by the rules applicable to civil not criminal appeals. That is shown by the fact that *R v Hughes* was determined by the Full Court and not by the Court of Criminal Appeal. Another example of the same kind is *ex p Maher* [1986] 1 Qd R 303. The nature of the hearing on appeal is consequently dictated by the rules of procedure governing civil appeals, which was formerly O 70, r 1 of the Rules of the Supreme Court 1900, and is now Rule 765 of the Uniform Civil Practice Rules.

[10] Rule 765(1) declares that an appeal to the Court of Appeal is to be an appeal “by way of rehearing”. The Rule refers to an appeal “under this chapter”, which incorporates Rule 745(2) applying it to an appeal from the Supreme Court constituted by a single judge. It is well settled that a provision that characterises an appeal to this Court as a “rehearing” ordinarily refers to a rehearing on the record, and not to what is sometimes called a rehearing *de novo*. See *Powell v Streatham Manor Nursing Home* [1935] AC 243, 263. On such a rehearing the appellate court has power to draw inferences from primary facts, including facts found and facts not disputed, which is as complete as that of the primary judge: see *Warren v Coombes* (1979) 142 CLR 531, 537-541. On the other hand, an appeal under that form of procedure does not involve a rehearing of witnesses. There is nothing in UCP Rule 765(1) to suggest that it was intended to alter this approach. Further evidence may be received on appeal, but only on special grounds: see Rule 766(1)(c); and, unless the appeal is from a final judgment, without such special grounds in any case and as to matters that have happened after the date of the decision appealed against: r 766(2). The ambit of Rule 766 in these respects is perhaps not altogether clear; but this is not an appeal in which it is sought to adduce further evidence on behalf of the appellant. There is therefore nothing in these or other recent changes to the appeal rules that would operate to alter the principles governing appeals from decisions involving the exercise of a judicial discretion, as to which *House v The King* (1936) 55 CLR 499 remains the leading and binding authority.

[11] An appeal to this Court is not the only avenue open to someone whose application for bail has been refused. An alternative is to renew the application to another judge of the Court. The right of the applicant to go from one judge to another

was recognised by the Full Court in *R v Malone* [1903] St R Qd 140, 141, and again in *R v Hughes* [1983] 1 Qd R 92, 93, as well as by other authorities in this State. See also *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1928] AC 459. At least that is so before the accused is given in charge to the jury: *Bail Act 1980*, s 10(2); *ex parte Edwards* [1989] 1 Qd R 139, 141-142. However, successive applications of that kind will, as was suggested in *ex parte Edwards* [1989] 1 Qd R 139, 142-143, ordinarily prove fruitless unless in the meantime there has been a material change of circumstances.

[12] As well as going from one judge to another in the Supreme Court, an application for bail may also be renewed in the Court of Appeal. This was recognised in *R v Hughes* [1983] 1 Qd R 92. There the application was made to the Full Court; but the Court of Appeal now has jurisdiction to hear and determine all matters formerly within the jurisdiction of the Full Court: *Supreme Court of Queensland Act 1991*, s 29(1), so that a bail application can, on the authority of *R v Hughes*, now be renewed before this Court. For the reason given in *ex p Edwards* [1989] 1 Qd R 139, 141-143, however, an application to renew is ordinarily not likely to fare better in this Court than it did before a single judge, unless the applicant is in a position to show a material change of circumstances.

[13] In this instance the appellant chose to appeal on the ground that the decision of Thomas JA was wrong. It is, however, difficult to see that much if any advantage would have accrued him in the present case if this appeal were to be approached, as perhaps it might be, as an original hearing or renewal of his unsuccessful application in the Court below. It might facilitate the adduction of evidence of additional facts that have arisen since the primary application was decided; but that advantage would not count for much when regard is had to the facility for introducing fresh evidence under UCPR 767(2). As it is, no attempt has been made by the applicant to adduce any such evidence on this appeal, which consequently falls to be determined as an appeal in accordance with the principles established in *House v The King*. Judged by those principles, the decision of Thomas JA refusing bail to the appellant is not shown to be wrong. In determining whether the appellant had discharged the onus imposed on him by s 16(3)(b) of the *Bail Act* in his application for bail on the murder charge the learned judge was entitled to consider the matters that have been mentioned here. It has not been shown that he took account of irrelevant factors; or failed to take account of relevant factors; or that in any other respect his judicial discretion was incorrectly exercised.

[14] It follows that the appeal must be dismissed.

[15] **DAVIES JA:** I agree with the reasons for judgment of McPherson JA and with the order he proposes.

[16] **CULLINANE J:** I have read the reasons for judgment of McPherson JA in this matter and agree with them and the order he proposes.