

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
CRIMINAL DIVISION

Not Restricted

No. 1485 and 1486 of 2007

ARURAN VINAYAGAMOORTHY

Applicants

and

SIVARAJAH YATHAVAN

v

COMMONWEALTH DIRECTOR OF  
PUBLIC PROSECUTIONS

Respondent

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JUDGE: BONGIORNO J  
WHERE HELD: Melbourne  
DATE OF HEARING: 13 July 2007  
DATE OF JUDGMENT: 17 July 2007  
CASE MAY BE CITED AS: Vinayagamoorthy & Anor v DPP (Cth)  
MEDIUM NEUTRAL CITATION: [2007] VSC 265

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CRIMINAL LAW - Bail - Terrorism offences - Exceptional circumstances - Bail granted -  
*Crimes Act 1914 (Cth) s 15AA.*

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Applicant Vinayagamoorthy	Solicitor	Robert Stary & Associates
For the Applicant Yathavan	L. Lasry QC	Robert Stary & Associates
For the Respondent	M. Dean SC	Office of the Commonwealth Director of Public Prosecutions

HIS HONOUR:

- 1 On 1 May 2007 Aruran Vinayagamoorthy and Sivarajah Yathavan were charged with three indictable offences contrary to the *Criminal Code Act 1995* (Cth) , namely being members of a terrorist organisation, the Liberation Tamil Tigers of Eelam, or LTTE, contrary to s 102.3 of the Code, making funds available to a terrorist organisation, the LTTE, knowing it was a terrorist organisation contrary to s 102.6 of the Code and providing support or resources to a terrorist organisation, namely the LTTE, that would help it engage in an activity described in paragraph (a) of the definition of terrorist organisation in Division 102 of the Code. The applicant Yathavan is also charged with one offence contrary to s 21 of the *Charter of the United Nations Act 1945* (Cth). It concerns similar allegations of providing support to a proscribed entity.
- 2 They have been in custody since their arrest and now apply to this Court for bail pending their committal hearing which is currently scheduled for hearing on 10 September 2007, and for mention on 24 July, although the state of preparation of the matter, particularly with respect to the collection of evidence from overseas, would suggest that the completion of the committal in the immediate future must be regarded as doubtful.
- 3 The offences with which the accused are charged are federal offences. Accordingly, the law to be applied to this application is the common law of Australia as modified not only by the *Bail Act 1977* (Vic) but also by the *Crimes Act 1914* (Cth). In particular, s 15AA of the *Crimes Act* applies because the accused are charged with terrorism offences, that is to say offences created by Part 5.3 of the federal *Criminal Code*. Section 15AA(1) of the *Crimes Act* provides that to grant bail to a person charged with a terrorist offence a bail authority (which includes this Court) must be satisfied that exceptional circumstances exist. Thus the federal Act and its provisions are analogous to the provisions of the *Bail Act 1977* (Vic) which regulate the grant of bail with respect to certain serious State offences, including murder and some drug

offences. It should be noted that s 15AA does not apply to the offence with which Yathavan is charged under the *Charter of the United Nations Act 1945*.

4 Mr Dean of Senior Counsel for the Crown briefly opened the case against the accused. He referred to the judgment of the United Kingdom Court of Appeal in *R v F<sup>1</sup>* in which statutory provisions similar, but not identical, to those in Part 5.3 of the federal *Criminal Code* were considered. There the Court held, in the local context, that various provisions in the United Kingdom statute which defined certain acts as terrorist acts applied to those acts even where they were carried out with respect to foreign governments which were not democratic or which lacked the usual indicia of representative government as understood in the United Kingdom (scil. the Australian) context. The Court referred to United Kingdom domestic law, the European Convention on Human Rights, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, but ultimately decided the question by reference to the United Kingdom statute itself, holding that it did not distinguish between governments which might be said to adhere to commonly accepted notions of representative government and those which did not. Mr Dean's submission anticipated an argument which might have been expected with respect to the relationship of the LTTE and the Government of Sri Lanka. He referred to evidence concerning the part played by a Mr Jayakumar in an organisation in Australia called the Tamil Co-ordinating Committee and informed the court that Mr Jayakumar had died in March 2007 before these accused were charged with the offences they now face. He referred to telephone intercepts in which it is said Mr Vinayagamorthy identified himself as a member of the LTTE and to the fact that he had so described himself in documents when he applied for a protection visa upon his arrival in this country in 1996.

5 Mr Dean submitted that there was evidence that pieces of equipment had been purchased by Vinayagamorthy in Australia similar to equipment said to have been used by the LTTE in Sri Lanka. Similarly, said Mr Dean, he bought software from a

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<sup>1</sup> [2007] EWCA Crim 243

Western Australian company used to design the hulls of small high speed boats and hydraulic steering equipment for such vessels. As far as financial dealings were concerned, Mr Dean pointed to movements of money allegedly from Mr Vinayagamoorthy's bank accounts to Malaysia, en route, it is submitted, to Sri Lanka, although he conceded that the latter step at this stage, at least, is proved only by inference and not by direct evidence.

6 Mr Dean said that the second accused, Yathavan, was an important member of the LTTE in Australia, that he also had substantial financial dealings concerning the Tamil Co-ordinating Committee and that he had a fund-raising role for the LTTE in Australia.

7 Each of the charges faced by the accused requires proof by the Crown that the LTTE is a terrorist organisation within the meaning of the relevant division of the Code. The Crown concedes that it has not been declared to be such by any decision of the Australian Government, and perhaps more pertinently, although it was formerly regarded as a terrorist organisation in Sri Lanka it has not been so regarded since 2002 when a truce between it and the Government of Sri Lanka was first brokered through the good offices of the Government of Norway.

8 Since that time the LTTE has been recognised as a party to the peace process in Sri Lanka and its leader, whatever he might have been accused of doing in earlier years, was, and is said still to be, a part of that process. This is so apparently notwithstanding that there are allegedly international warrants for his arrest extant on serious charges. Of course, having regard to the terms of the relevant federal legislation under which these accused are charged, it is open to the Crown to prove that the LTTE is a terrorist organisation, notwithstanding its not having been so declared to be in this country or in Sri Lanka.

9 Mr Dean pointed out that the LTTE has been declared to be a terrorist organisation by a number of other countries and by the UN, although the relevance of these declarations on the issues in this case may be a matter of considerable debate.

Further, the Crown proposes to seek to tender expert evidence from two political scientists as to the status of the LTTE. These experts, whose opinions are before this Court, rely on primary and secondary sources to justify their conclusions, which, it is submitted, will be admissible to prove the Crown's contention. This evidence is, however, not without its difficulties as to admissibility. It is sufficient, for present purposes, to note that the prosecutor and counsel for the accused agreed for the purpose of this application that there are serious issues to be determined as to admissibility before these opinions will be admitted at trial. Although Mr Dean submitted that even without these opinions the Crown would be able to prove a case against these accused on the issue of whether or not the LTTE is a terrorist organisation, it is clear that the Crown case is not without its problems in that area as well.

10 The Crown case to be presented against these accused is extensive in terms of the volume of material contained in it. My references to it on these bail applications must, of necessity, be sketchy and, in any event, it is inappropriate to canvas in detail the strength of that case on a bail application, particularly where a committal proceeding has not yet been held and the full extent of the admissible evidence against the accused is a long way from being determined.

11 Mr Lasry of Queen's Counsel for Mr Yathavan submitted that there were a number of matters, which, taken in the aggregate, provided the exceptional circumstances necessary to justify bail to his client. The case against his client is entirely circumstantial, he submitted. He was first interviewed in November 2005. He denied that he was a member of any terrorist organisation then and he continues to do so, but he was not arrested and charged until May 2007, some 18 months later. He was well aware during the whole of this period that there was a police investigation proceeding and had he wished to flee or take any other step to avoid any further difficulties, he could easily have done so. He maintained to police at that time that the LTTE was not a banned organisation; had it been, he would not have had anything to do with it. Mr Lasry submitted that the mere lapse of time between Mr

Yathavan's record of interview and his being charged, could, itself, amount to the exceptional circumstances necessary to justify bail. Mr Lasry also pointed to the probable delay which will follow any committal, even if the present proposed commencing date of the committal is maintained.

12 There are a number of witness statements not yet available and requests for evidence from overseas countries, pursuant to the *Mutual Assistance in Criminal Matters Act 1987 (Cth)*, have not yet been finalised. It would seem highly unlikely, if this is the case, that evidence from these sources will be available in September, but that must remain to be seen. Mr Lasry submitted that the second half of next year would be the earliest practicable time that a trial in this case could take place. Applying this Court's experience of complex cases and knowing the caseload facing the Court, this estimate is, in my opinion, optimistic.

13 Mr Lasry also pointed to the fact that when these accused were arrested in May 2007, a press release issued by the Federal Police and the Victoria Police made it clear that the police did not regard their activities as posing any danger to anyone in this country.

14 As far as Mr Yathavan's personal circumstances were concerned, Mr Lasry submitted that his ties to this jurisdiction, his marital status, his 15 month old child, the fact that he owned property (subject to the inevitable mortgage) and the employment which is open to him, together with the circumstances of the case itself, constitute the exceptional circumstances which justify bail, particularly as he is willing and able to offer a substantial surety and is prepared to abide by any conditions imposed by the Court.

15 Mr Sary, for Mr Vinayagamoorthy, adopted Mr Lasry's arguments concerning the case itself and emphasised his client's ties to this jurisdiction. He submitted that his client had been originally granted a protection visa to remain in this country after he arrived in 1996 because he frankly disclosed that he was a member of the LTTE and that that was why he had a legitimate fear of persecution if he returned to Sri Lanka.

No objection was raised to his residence by the government on the ground of character, although his situation was, and remains, known fully to the authorities.

16 Mr Stary pointed to his client having purchased a property in this country, subject again to a mortgage, upon which he is paying some \$1900 a month, to his having been in employment and to his not having a passport or any other travel documents so as to make him a flight risk. He submitted that flight risk was not realistic. Mr Vinayagamoorthy's brother is about to come to this country under the skilled migration scheme and the accused himself has access to employment. Like Yathavan, he is also able to offer a substantial surety and will abide by any condition imposed by the Court.

17 I should add at this point that yesterday afternoon my Associate received a further submission from Mr Stary concerning his client. The hearing of this application concluded last Friday. This submission was sought to be filed without leave and ought not to have been. Accordingly, I have ignored it in deciding this application.

18 All counsel referred to various judicial pronouncements concerning the question of what constitutes exceptional circumstances in a case such as this so as to justify bail. Reference was made to *Tang & Ors*<sup>2</sup>, *DPP v Cozzi*<sup>3</sup>, *Whiteside*<sup>4</sup> and *Majeric*<sup>5</sup> and others from this jurisdiction and New South Wales. Whilst it is clear that such circumstances can be found in an aggregate of individual circumstances, any one of which might not alone be sufficient to be exceptional, just what will suffice in any particular case will always depend on the facts peculiar to that case. It is always difficult to apply expressions of judicial opinion in bail applications where the question to be determined is essentially one of fact in the unique circumstances of the case at hand.

19 The offences with which these men are charged are undoubtedly serious and that is why the law requires exceptional circumstances to justify bail, but it must also be

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<sup>2</sup> (1983) 83 A Crim R 593, 596 (Beach J)

<sup>3</sup> [2005] VSC 195 (Coldrey J)

<sup>4</sup> [1999] VSC 413 (Warren J)

<sup>5</sup> (Unreported, Gillard J, 10 July 1998)

kept in mind that they are entitled to the full benefit of the presumption of innocence. If that principle is abandoned, or even modified, for political expediency we risk the legal foundation of our whole criminal justice system. These men are innocent of these crimes unless and until they are proved beyond reasonable doubt to be guilty. The investigation process has taken almost two years to date. Neither of the accused have done anything to hinder that process or that investigation. Indeed, the material before the Court would suggest that they have co-operated.

20 Taking these considerations together with the evidentiary and other difficulties which the Crown must face in proving some at least of the allegations against them, the inevitable delay which will be incurred in finalising this matter, the ties to the jurisdiction which these men have, the lack of any evidence to support any allegation that they may commit offences or interfere with witnesses (whoever those witnesses might be) and their previous good character, there are exceptional circumstances in this case which justify the making of an order admitting each of them to bail. The same matters establish that the applicants do not pose an unacceptable risk as that term is understood in the bail context<sup>6</sup>.

21 Aruran Vinayagamoorthy and Sivarajah Yathavan will each be admitted to bail on his own undertaking to appear for a committal mention at the Melbourne Magistrates' Court on 24 July 2007 or such other date as he may be advised by the Commonwealth Director of Public Prosecutions, with one surety in each case in the sum of \$100 000 upon conditions.

22 [His Honour then discussed proposed bail conditions with counsel and fixed them accordingly].

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<sup>6</sup> *Bail Act 1977* (Vic) s 4(2)(d)