

SUPREME COURT OF THE STATE OF NEW YORK

QUEENS COUNTY:

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PEOPLE OF THE STATE OF NEW YORK

Docket No. 2002QN032037

-against-

SP #262-2002

MEHMET UNAL, P.

Part K-11

Defendant.

Date: August 26, 2002

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LEBOWITZ, J.

This proceeding provides the Court with the opportunity to set forth the clearly delineated jurisdiction in determining the excessiveness of bail brought on by writ of habeas corpus.

Defendant Mehmet Unal, was arrested for Arson in the First Degree on July 21<sup>st</sup> of this year for a fire that occurred on July 8<sup>th</sup>. Arraigned on August 1, 2002, defendant was held without bail. That determination is the subject of the present writ brought before this Court.

The habeas court has limited jurisdiction in reviewing matters of bail. It is not for the habeas court to substitute its own judgment nor to undertake a *de novo* review of the facts. As long as the bail set by the arraigning court was the product of an exercise of discretion resting upon a rational basis the habeas court is without authority to substitute its judgment as

to the question of bail. *People ex rel Brown v. Bednosky*, 190 AD2d 836 (2<sup>nd</sup> Dept. 1993)

It is therefore clear that, without undertaking a review of the entire record of the bail fixing court this Court has no basis upon which to determine whether remand was in fact an abuse of discretion. See *People ex rel Siegel v. Sielaff*, 182 AD2d 389, (1<sup>st</sup> Dep't, 1992), *People ex rel Shreiber v. Warden*, 282 AD2da 555, (2<sup>nd</sup> Dep't. 2001 Dis. Op. Friedman, J.). In keeping after a brief continuance for purposes of obtaining the minutes of the arraignment court, defendant has provided the court with same so as to allow it to conduct a proper review within its jurisdictional limits.

A review of the arraignment minutes indicate that while specific reasons were not given by the lower court for its bail determination it can be noted that the prosecutor presenting the case on behalf of the People told the Court that their request for remand was predicated upon the fact that the case was one of Arson in the First Degree and that gallons of contact cement and other "paraphernalia" were found in the store.

In response defense counsel argued that the defendant was a thirty-eight year old with no prior record, had lived in the United States for over twelve years as a naturalized citizen, resided at his current address for more than three years and was

the owner of a business. The defendant's counsel also argued that the evidence was circumstantial in nature and that the recovery of contact cement was not indicative of guilt, as it was a normal substance found in carpet stores, which was the locus of the fire. Defense counsel further pointed out that there were several members of the defendant's family and friends in court and that defendant was prepared to post a substantial amount of bail.

In reaching its determination, this Court notes that a lengthy habeas hearing was conducted before it. Much of the hearing centered on the nature of the charges.<sup>1</sup> It was defendant's position that the charges did not constitute Arson in the First Degree. This was of paramount importance as Arson in the First Degree is an A-1 felony which carries a lifetime sentence as opposed to Arson in the Second Degree, which is a class B violent felony whose sentence upon conviction ranges from a definite period of from five to twenty-five years imprisonment.

A review of section 150.20 of the Penal Law, Arson in the First Degree, reveals the following material elements relevant to the instant prosecution.

A person is guilty of Arson in the First Degree when

He intentionally damages a building by causing a fire and...the..fire was caused with the expectation or receipt of

financial advantage or pecuniary profit  
by the actor and

another person who is not a participant  
in the crime is present in such  
building.. and

the defendant knows that fact or the  
circumstances are such as to render the  
presence of such person therein a  
reasonable possibility.

The defendant made much of the fact that he believed that the first requirement that the fire be caused with the expectation of financial advantage or gain did not exist as the defendant would not recover under the insurance policy and that without such direct correlation to the proceeds of the policy or proof that defendant was paid to ignite the fire, that an element of Arson in the First Degree was absent and therefore would make the prosecution of Arson in the First Degree impossible. The second element, which was strongly argued by defendant, was that a person not a participant was present in the building at the time of the fire. The defendant argued that the definition of building was limited to the property under the address of the fire not to other properties, which concededly had different addresses but were in fact part of the same "row" of stores and apartments.

After reviewing the statutory language and the arguments in question and the complaint underlying the prosecution the Court finds that while the People may ultimately find it difficult to establish the relevant elements of Arson in the First Degree that the complaint nonetheless lays out a colorable claim of Arson in the First Degree. This finding is important as the severity of sentence particular to Arson in the First Degree, at least lends some basis for the arrainging court's remand of the defendant. Case law has held that the nature of the offense and the severity of the sentence when coupled with the probability of conviction (emphasis supplied) are all factors increasing the risk of flight or unavailability for trial and may form a rational basis for remand. See *People ex rel Seigal v. Sielaff*, supra.

In this case however, the third of those factors, the probability of conviction may not be as great as that cited in other cases wherein the arrainging court's determination was sustained on appeal. (For example, in *Siegal*, supra an A-1 possession charge, the subject narcotics were found in the apartment where defendant was arrested along with an extensive array of drug paraphernalia as well as a history of previous large cash transactions).

In the instant case the evidence is circumstantial. Circumstantial evidence in and of itself is no less reliable and

in fact may be more reliable than direct evidence. See PJI 1:70, *Brido Manhattan & Bronx Surface Transit Operating Authority* 188 AD2d 253, (1<sup>st</sup> Dep't 199). However, the circumstantial evidence pointed to by the Assistant at the time of arraignment consisted in large part with reference to the contact cement, which, has been pointed earlier herein, is a substance normally found in carpet stores. In addition, while the timing of the defendant's presence outside of the store may still have given him opportunity to be involved in the setting of the fire, defense counsel indicates that at roughly the same time the fire was occurring defendant was with a friend shopping at a discount appliance store and has proof in both a receipt and an impartial third party store employee. In determining whether or not the lower court's remand was excessive and therefore an abuse of discretion this Court notes while not mandatory there was no reference by the lower court to the other factors enumerated under CPL §510.30[2] which should be considered in determining whether or not an amount of bail would have been appropriate to secure defendant's attendance in court, which is the primary concern in issues of recognizance. (See CPL section 510.30[2](a)).

With reference to these factors, which were available to the lower court, defendant has no prior criminal history, is a

naturalized citizen of this country, has resided in this county for over twelve years, has been at his present address for over three years and has family in the area. It must be remembered that this Court is not reviewing an amount of bail as excessive but the question of whether holding defendant without bail was an abuse of discretion by the lower court.

In this regard, as point out by Professor Peter Preiser in his Practice Commentaries to CPL §510.30

Unlike Federal law which sets out standards that permit a court to commit a defendant for preventive detention to reasonably assure the safety of the community (citations omitted) the sole objective to be considered when a New York Court exercises its discretion in choosing between jail and bail, and in the case of the latter the form and amount thereof, is 'the kind and degree of control or restriction that is necessary to secure [the principal's] court attendance when required.'  
(Citations omitted)

It is relevant to note in this connection that the CPL Revisions Commission's proposal for preventive detention, which survived the first three published proposals for the CPL was specifically rejected by the legislature when it enacted the final bill.  
(Citations omitted) Ten years later in 1981, however, the Legislature modified its rigid opposition somewhat by permitting revocation of bail or recognizance for strictly limited public safety purposes. (Citations omitted).

See CPL §510.30 Practice Commentaries (1995).

This Court has attempted to rigorously comply with the Appellate standards of habeas review. That is, not to examine bail questions afresh or make *de novo* determinations of bail. In reviewing the record of the lower court, this Court is mindful that the determination must be reviewed in light of the record, which was made before the arraignment court. See *People ex rel Schreiber v. Warden*, supra. Keeping in mind its limited jurisdiction and adhering to its responsibility as set forth by Appellate precedent this Court nevertheless finds the determination of remand, no bail, solely based upon the nature of the charge and reference by the Assistant District Attorney to substances commonly found in the general everyday use of stores such as those which were the scene of the fire without reference to the other factors enumerated under CPL §510.30 [2](a) (i-viii) was in fact an abuse of discretion. The Court therefore finds that the remand status in this case was akin to preventive detention and did not rationally take into account whether some amount of bail would likely secure the defendant's attendance in court.

However, while finding remand status to be an abuse of discretion, this Court finds that while doubts may exist as to the People's ability to establish the necessary elements of Arson in the First Degree as discussed above, that the defendant nonetheless stands charged with what is now an A-1 felony and

therefore the severity of a potential sentence may very well increase the risk of flight, see *People ex rel Lazer v. Warden* 79 NY 2d 839. Therefore substantial bail is required to insure defendant's return to court.

Accordingly, the Court sets bail in the amount of \$500,000 insurance company bail bond or \$250,000 cash. See CPL 520.10 [1](a)&(c). It also requires defendant to turn his passport over, during the pendency of the prosecution, to the Office of the Queens County District Attorney. The execution of this order shall be stayed for a period of five days from issuance on August 23, 2002, within which the defendant will be given the opportunity to prepare a "bail package" in accordance with this decision. Said application will be presented to this Court for its approval. This stay will also allow the People, to determine whether or not they will seek a stay from the Appellate Division of this Court's order.

This constitutes the decision and order of the Court.

The clerk of the court is directed to mail a copy of this decision to the attorney for the defendant and to the District Attorney.

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JEFFREY D. LEBOWITZ  
A.J.S.C.

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1. While there was substantial oral argument the Court tried to limit the argument to those facts, which were available to the arraigning court so as not to indulge in a *de novo* review of the facts.

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