

# MAGISTRATES COURTS OF QUEENSLAND

CITATION: *Spence v Queensland Police Service* [2013] QMC 14

PARTIES: **MICHAEL KENNETH SPENCE**  
(applicant)

**v**

**QUEENSLAND POLICE SERVICE**  
(respondent)

FILE NO/S: MAG207306/13(4)

DIVISION: Magistrates Courts

PROCEEDING: Bail Application

ORIGINATING COURT: Magistrates Court at Brisbane

DELIVERED ON: 25 October 2013

DELIVERED AT: Brisbane

HEARING DATE: 24 October 2013

MAGISTRATE: The Honourable Judge Carmody QC

ORDER: **Bail is refused.**

CATCHWORDS: CRIMINAL LAW – PRACTICE AND PROCEDURE –  
BAIL – whether the applicant is a participant in a criminal  
organisation – whether the applicant can show cause why  
their continued detention is unjustified

*Bail Act 1980 (Qld)*

COUNSEL: JR Hunter QC for the applicant  
CD Patterson (Sergeant) for the respondent

SOLICITORS: Robertson O’Gorman for the applicant  
Respondent on own behalf

## The application

- [1] This is a contested pre-trial bail application by a locksmith charged with trafficking in the dangerous drug amphetamine with an estimated street value exceeding \$2.5 million between 26 June 2012 and 20 October 2013.

- [2] He and two co-defendants are said to have been members of the Hells Angels outlaw motorcycle gang. The prosecution initially claimed that the applicant was the Sergeant at Arms of that organisation during the whole alleged trafficking period but now concedes that he was not actually a gang member after 17 October 2013.
- [3] However, it is contended that they nonetheless continued to participate together in a defined criminal organisation involved in serious criminal activity up to the date of their arrest on 20 October 2013.
- [4] Investigating police oppose bail even with onerous conditions on the basis of an asserted belief that:-
- (a) the applicant poses an unacceptable risk if freed or fleeing;
  - (b) endangering public safety;
  - (c) tampering with witnesses; and
  - (d) otherwise **obstructing the court of justice** but he's apparently not expected to commit criminal offences.
- [5] The power to grant bail from police custody on criminal charges in Queensland is regulated by the *Bail Act 1980* (Qld) (the Act).

### **The bail discretion**

- [6] Magistrates have had the duty of settling bail terms in the common law world since 1679, when the English parliament passed the Habeas Corpus Act.
- [7] The main social purpose of bail is to strike the right balance between not unduly infringing upon the liberty of a **charged, but yet unconvicted person**, entitled to their freedom on the one hand and ensuring that he or she does not tamper with witnesses and go into community welfare or otherwise offend if released, until such time as the benefit of the presumption of innocence is lost.
- [8] Thus the bail discretion is exercised in a way that gives practical expression to the legislative intent and public policy objectives. It is the parliament's responsibility to make good laws consistent with the peace, order and good government of the state, consistently, with contemporary social values. It is for the police to enforce those laws and the courts to interpret and apply them, without fear or favour.
- [9] The court has a duty to grant bail under section 9 of the Act. Conditions for release must be no more onerous than necessary to achieve the objects of bail.
- [10] However, s 16(1) displaces the statutory presumption in favour of bail. Bail must be refused where the court is satisfied the defendant poses a relevant, unacceptable risk if released. The nominated risks are of flight, to the public safety and welfare, and criminal justice process itself.
- [11] Unless sentenced for the offence charged a person in custody not released on bail must be remanded in custody.
- [12] In assessing whether there is an *unacceptable risk* of a specified kind, the court has to weigh up all apparently relevant matters including, in particular, the

nature and seriousness of the offence, the defendant's character, antecedents, *associations*, home environment, employment and background, previous bail history and any cultural considerations that may arise: see s 16(2).

- [13] There is no mention of the standard of persuasion an opposing party has to meet in satisfying the court of the existence of a relevant unacceptable risk.
- [14] The decision whether to grant or refuse bail lies in a complex discretionary realm. The same body of evidence can lead to opposite but equally reasonable conclusions with neither being demonstrably right or wrong.
- [15] The bail process suffers from inherent shortcomings making it prone to inconsistency, unpredictability and uncertainty.
- [16] A heavy reliance on human logic, reasoned judgment and the exercise of discretion, are both strengths and weaknesses. It is naïve and dangerous to expect too much of any human system.
- [17] Unless human decision making is replaced with mechanical tools or intuitive robots, there is always a chance of unintended error and diverging opinions are inevitable, but provide no cause for personal attacks on the decision maker, especially one who is acting conscientiously, to the best of their ability.
- [18] However, the discretion clearly miscarries if a decision is unreasoned or unreasonable, illogical or perverse, or is influenced by irrelevant or extraneous considerations, such as external pressure from any source or ideological beliefs. Personal opinions are irrelevant.
- [19] Community confidence in the administration of justice is eroded whenever the bail discretion miscarries, and if it happens too often the court will eventually fall into disrepute.

### **Presumption against bail**

- [20] The *Criminal Law (Criminal Organisations) Disruption Amendment Act 2013* significantly amends section 16 of the *Bail Act*. As from 17 October 2013, four new subsections have been added. From now on, section 16(3A) requires the court to refuse bail to participants in a *criminal organisation*, regardless of the type of offence charged, unless he or she shows cause why a continued detention is unjustified.
- [21] The show cause provisions of section 16(3A) do not apply, however, if:
  - (a) the prosecution fails to establish that the defendant is a participant in a criminal organisation as a threshold fact or;
  - (b) if the defendant proves that the criminal organisation concerned is not one whose participants have, as a purpose, engaging or agreeing to engage in criminal activity.
- [22] Section 1 of the Criminal Code defines *criminal organisation* to mean:-
  - (a) An organisation of more than three persons who

- (i) have as a purpose engaging, directly or indirectly, in serious criminal activity within the *Criminal Organisation Act 2009* and
  - (ii) have by their association, represent an unacceptable risk to the safety welfare or order of the community
- (b) a criminal organisation under the *Criminal Organisation Act 2009* or
- (c) an entity declared to be a criminal organisation under regulation.
- (d) In reality, however, a serious criminal offence and serious criminal activities for bail purposes becomes increasingly relevant to bail with delay.

[23] A serious criminal offence is usually serious criminal activity for bail purposes.

[24] A *participant* is a director or officeholder of a corporate criminal organisation, or a person who associates or affiliates with, or acknowledges membership of such an organisation, or a person who meets or gathers with others, involved in any way with, or takes part in, the affairs of the organisation.

### **Public Policy Objectives**

[25] According to the Explanatory Memorandum, accompanying the amendments, section 16(3A) was introduced as part of a broader legislative reform package to deliver on the government's commitment to crack down on criminal gangs and create a more hostile zero tolerance environment for them, within the state, by among other things, imposing stricter bail laws aimed at making it harder for the courts to release participants in a criminal organisation on bail, pending trial, regardless of the type of offence charged.

[26] The amendments of which: see 16(3A) is an integral part, strike "...illegal conduct of the criminal gang participant, communicate the wrongful and cowardly nature of their offending and promotes community safety and protection from these offenders".

[27] The stated catalyst was an increased concern for community safety in the wake of violence involving rival motorcycle gangs on the Gold Coast on 28 September 2013.

[28] As the Explanatory Memorandum makes clear, section 16(3A) is intended to operate prospectively that is; to capture offenders who commit offences after it and the other amendments commenced on 17 October 2013. Although section 16(3A) admittedly impacts adversely on individual liberty its justification is said to be rooted in the need to deter concerning behaviour and to ensure the maintenance of civil authority and any encroachments on traditional civil rights is justified by the overall greater good and the fact that it is targeted only at individuals who offend, while enjoying the support and encouragement of the criminal group.

- [29] Thus the amendments taken as a whole evince unequivocal and unmistakable legislative intention that defendants, caught by the provisions of section 16(3A), should routinely be detained to achieve the underlying public policy objective of community safety and order.

### How the reverse onus works in practice

- [30] In the final analysis, the court not the parties is responsible for identifying and avoiding unacceptable bail risks on behalf of the community. This is because bail proceedings are not wholly adversarial. The court itself plays an inquisitorial role. Section 15, for example, permits (and on occasion pre-trial justice and the overall public interest may require) a bail court to forensically investigate, test or verify disputed historical issues or personal information about a defendant for that purpose, may receive by affidavit otherwise and take into account evidence of any kind it regards as credible or trustworthy in the circumstances: see s 15(1)(e).
- [31] The only enquiry that is expressly excluded is the guilt of the offence charged.
- [32] Once the police satisfy the court that person charged with any offence is a participant in a criminal organisation, the evidentiary and persuasive onus shifts to the defendant, to show cause why ongoing detention in custody is unwarranted. Either because he or she does not actually represent the unacceptable level of threat to the community assumed by the legislation or that the criminal organisation he or she belongs to does not have a criminal purpose.
- [33] Mr Hunter, the applicant's Senior Counsel, contends that s 16(3A) does not apply here for two reasons. First, he submits, the amendments only apply to post commencement date offending and there is no reliable or unequivocal evidence that his client did any act constituting part of the offence after 17 October 2013. Second being penal by nature, the terms of s 16(3A) should be construed strictly, so as to only require a defendant to show cause if he or she *is a participant in a criminal organisation at the time of the bail proceedings* not at the time of the alleged offending or arrest.
- [34] I understand the applicant ceased to be a member of the Hells Angels on 8 October 2013. Mr Hunter further argues that even accepting the police position that he and his co-accused formed a new criminal organisation which continued to conduct their trafficking business until 20 October 2013, their arrest broke the nexus with the practical effect of termination that criminal organisation as an entity and deprived them of the status of participants for section 16(3A) purposes.
- [35] However, the intended scope of section 16(3A) is wide enough, in my opinion, to include the applicant, even if the drafting language used is slightly inapt. Accepting the contrary proposition would produce absurd, unintended results and make section 16(3A) slightly jobless.
- [36] I reject the suggestion that the applicant's arrest was an intervening act with the legal consequence of converting him from a participant in a criminal

organisation into a non-participant. Section 16(3A) therefore applies, with full force and effect.

- [37] Accordingly, I must refuse him bail, unless he shows cause why remanding him in custody is not justified. The defendant in a show cause situation is required to show more than he or she is not an unacceptable risk of a specified kind. Pre-trial detention must be unjustified.
- [38] The only way the applicant sought to discharge the show cause obligation was via the well-marshalled arguments of his senior counsel. No evidence was led either for or by him, and no opportunity was taken to cross-examine the deponent of the affidavit opposing bail.
- [39] Accordingly, for all its deficiencies, that affidavit represents the only evidence I have. To the extent that it is not inherently improbable or been disavowed or have been specifically disavowed, I accept it as trustworthy enough to make findings or decisions about bail. I should say, however, that the quality of the information provided to me to help me perform this difficult task by both parties left much to be desired.

### **When is remanding a participant in a criminal organisation unjustified in Queensland?**

- [40] There is, of course, no single or simple answer to this question. It will vary case by case. The Act does not explain when pre-trial detention is unjustified, and it would be almost impossible to state with clarity and precision all the complex mix of influential discretionary considerations that may be in an infinite range of different bail contexts.
- [41] Strictly speaking, the section 16(3A) conclusion is that pre-trial custody is unjustified. It is not a determination that bail has to be granted. However, in a practical sense, they probably amount to the same thing – compare *DPP v Asmar* (2005) VSC 487 and *DPP v Harika* (2007) VSC 435.
- [42] Clearly, the higher the assessed risk, the stronger and more compelling any countervailing considerations would need to be to demonstrate that ongoing confinement would be an excessive or unjust precautionary safeguard.
- [43] No specific criteria as to when detention is and is not justified, is stated. However, preventable delays or circumstances that might make incarceration unjustified include a weak prosecution case, personal factors such as urgent or special medical needs or responsibilities.
- [44] As already noted, association with a criminal organisation is clearly seen by the legislature as prima facie evidence of unacceptable risk, which is not easily displaced. Section 16(3A) makes it plain that releasing defendants who espouse or adhere to a lawlessness ethos or criminal credo will generally be regarded as contrary to the public interest.
- [45] Thus, pre-trial confinement of an unconvicted defendant who is a participant in a criminal organisation will be unjustified only to the extent that it exceeds what is

reasonably necessary in all the circumstances to achieve the non-punitive or preventative objectives of bail or exceeds what is reasonable and necessary to prevent unacceptable threats to the integrity of the criminal justice system and community safety and order.

- [46] Section 8A of the *Bail Act* 1978 New South Wales is relevantly similar to ss 16(3A). In *DPP v Germakian* (2006) 166 A Crim R 201, Tobias JA noted the very high onus imposed on an applying defendant and regarded the strength of the prosecution case to be the prime but not sole factor and considered that the usual bail considerations such as those in s 16(2) of the Act were often of much less significance.
- [47] However, in *Sica v DPP* (2010) QCA 18, the Queensland Court of Appeal rejected the proposition that assessment of the strength of the prosecution case is a necessary requirement where there is insufficient information to make any meaningful assessment. Likewise, when the cogency of the evidence favouring conviction cannot be properly assessed, Chesterman JA (*Sica* at 52-54) regarded it as logically impossible to say that even lengthy pre-trial delay was unjustified in the relevant sense.
- [48] Technically, the likely penalty on conviction is not a significant factor either because pre-trial detention is preventative not punitive. It serves an entirely different purpose and is governed by separate principles to sentencing (*Lim v Minister for Immigration* (1992) 176 CLR 1 at 28).

### **The certainty of conviction**

- [49] Mr Hunter criticises the evidence in support of the allegations in the charge as weakly circumstantial and urges me not to accept all statements of fact held together by very little detail in the affidavit opposing bail. Much of the criticism he made of the affidavit has merit, but as I said before, in the absence of any contrary evidence of greater strength, doing the best I can with what I have before me today, I accept it to the extent that the certainty of conviction for trafficking cannot be said to be unlikely.
- [50] There is evidence of the applicant's presence when money circumstantially linked to drug deals is being countered and dealt with as well as evidence of his association with the Da Silva brothers. It is clear from what I have been told that the evidentiary base of the prosecution case relies on voluminous telephone and other electronically intercepted material which is yet to be fully analysed. Although the affidavit could have given me much more detail in a more comprehensible and helpful form, there is enough to make it appear that the prosecution has evidence capable of sustaining a conviction of trafficking.

### **Flight risks**

- [51] Trafficking in dangerous drugs is a prevalent and socially destructive offence. The maximum penalty is 25 years in prison.
- [52] Given the maximum penalty, being party to the unlawful business of trafficking in dangerous drugs, particularly amphetamine, is likely to involve a term of

actual imprisonment. This consequence provides an obvious incentive to flee if the opportunity arises.

- [53] On the other hand, the applicant is 25 years of age; he is in a long-term relationship and recently engaged with plans to marry next year. His fiancée is in full-time employment, and they have recently purchased a house in the State which is the subject of a large mortgage.
- [54] He is a qualified plumber. He has a relatively minor criminal history, which includes concerning weapons but no drug-related offence.
- [55] He has never been sentenced to a term of imprisonment, and there is no evidence that he has committed an offence whilst on bail.
- [56] He has never previously failed to appear and surrender himself into custody when on bail and nor has he a record for breaching bail conditions.

### **Future dangerousness**

- [57] There are allegations of the use of violence by him, admittedly non-specific, but they cannot be ignored. Again, no challenge on oath was mounted against the affidavit.
- [58] There does not appear in reality to be an unacceptable risk that he will interfere with the integrity of the justice system if he was released on bail. There is of course always such a risk but the evidence available to me does not suggest that the level of that risk in this case is an unacceptable one.

### **Delay**

- [59] The nature of this case will undoubtedly involve lengthy delay and I accept that it is unlikely that the matter will proceed to trial anytime in the next 12 months. However, delay is most significant when the strength of the prosecution case can be meaningfully assessed and is found to be a relatively weak one. That cannot be said here.
- [60] The limited material available to me does not allow me to conclude on the basis of delay either alone or in combination with other factors that continued detention before trial would not be justified.

### **Outcome**

- [61] The applicant has failed to discharge his onus and show cause why bail should be granted. This is so, despite the proposed conditions for bail put up on his behalf. Bail is refused because I'm not satisfied that continued detention is not justified in all the circumstances.
- [62] He is remanded in custody to appear on 20 January 2014 for a committal callover or mention. His appearance is not required.