SUPREME COURT OF QUEENSLAND

CITATION:	*Ackland v Director of Public Prosecutions (Qld)* [2017] QCA 75
PARTIES:	**PHILIP CRAIG ACKLAND** (appellant) **v** **DIRECTOR OF PUBLIC PROSECUTIONS (QLD)** (respondent)
FILE NO/S:	Appeal No 2658 of 2017 SC No 117 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from Bail Application
ORIGINATING COURT:	Supreme Court at Rockhampton – Unreported, 20 February 2017
DELIVERED ON:	28 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	21 April 2017
JUDGES:	Morrison JA and Atkinson and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – BAIL – REVOCATION, VARIATION, REVIEW AND APPEAL – where the appellant is charged with assault occasioning bodily harm and choking, suffocation or strangulation in a domestic relationship – where the appellant was refused bail in the Supreme Court by the primary judge – where the appellant submitted that the primary judge erred in finding that there was an unacceptable risk that if released on bail the appellant would commit an offence and that the primary judge failed to properly exercise their discretion in that the primary judge took irrelevant matters into account and failed to take into account relevant matters – where the *Bail Act* was amended after the appellant was refused bail by the primary judge – whether the judge erred in refusing bail *Bail Act* 1980 (Qld), s 8, s 16, s 46 *Criminal Code* 1899 (Qld), s 315A(1)(a), s 339(1) *Scrivener v DPP* (2001) 125 A Crim R 279; [2001] QCA 454, cited *Sica v Director of Public Prosecutions (Qld)* [2011] 2 Qd R 254; [2010] QCA 18, cited

Williamson v Director of Public Prosecutions (Qld) [2001] 1 Qd R 99; [1999] QCA 356, applied

COUNSEL: A J Glynn QC for the appellant
G P Cash QC for the respondent

SOLICITORS: McCarthy Durie Lawyers as town agent for Macrossan & Amiet for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MORRISON JA:** I have read the reasons of Atkinson J and agree with those reasons and the order her Honour proposes.

[2] **ATKINSON J:** The appellant, Philip Craig Ackland, applied for bail in the Supreme Court in Rockhampton on one count of assault occasioning bodily harm and one count of choking. The precise charges were as follows:

> "That on the 10th day of February 2017 at East Mackay in the State of Queensland one Philip Craig Ackland unlawfully assaulted one Jody Lesleigh O'Chin and thereby did her bodily harm and the offence is also a domestic violence offence; and
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> That on the 10th day of February 2017 at East Mackay in the State of Queensland one Philip Craig Ackland unlawfully choked one Jody Lesleigh O'Chin without her consent and Philip Craig Ackland was in a domestic relationship with Jody Lesleigh O'Chin."

[3] The first charge was alleged to be an offence under s 339(1) of the *Criminal Code* and the second was alleged to be an offence under s 315A(1)(a) and (b)(i) of the *Criminal Code.*

[4] The appellant was refused bail by a Magistrate immediately after his arrest on 11 February 2017 and by a judge of the Supreme Court on 20 February 2017. The power of the Supreme Court to grant bail is found in s 10(1) of the *Bail Act* 1980 which provides that the Supreme Court or a judge thereof may grant bail to a person held in custody on a charge of an offence whether or not the person has appeared before the Supreme Court in or in connection therewith.

[5] Section 16 of the *Bail Act* deals with when a court may refuse to grant bail. Section 16(1)(a) provides that a court shall refuse to grant bail to a defendant if it is satisfied –

> "(a) that there is an unacceptable risk that the defendant if released on bail—
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> (i) would fail to appear and surrender into custody; or
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> (ii) would while released on bail—
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> (A) commit an offence; or
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> (B) endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else's safety or welfare; or

(C) interfere with witnesses or otherwise obstruct the course of justice, whether for the defendant or anyone else."

[6] At the time the appellant applied for bail before the Supreme Court judge on 20 February 2017, the court was required to have regard to all matters appearing to be relevant in assessing whether there was an unacceptable risk as set out in s 16(1)(a). Section 16(2) provided that, without in any way limiting the generality of this provision, the court should have regard to such of the following considerations as appear to be relevant:

"(a) the nature and seriousness of the offence;

(b) the character, antecedents, associations, home environment, employment and background of the defendant;

(c) the history of any previous grants of bail to the defendant;

(d) the strength of the evidence against the defendant;

…"

[7] Any bail order made may be on conditions. Section 11(2) provides that where a court considers that the imposition of special conditions is necessary to secure that a person appears in accordance with their bail and surrenders into custody or that, while released on bail, does not commit an offence or endanger the safety or welfare of members of the public or interfere with witnesses or otherwise obstruct the course of justice, then the court may impose such conditions as the court thinks fit for any or all of those purposes. However s 11(5) provides that any conditions imposed should not be more onerous for the person than those that, in the opinion of the court, are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest.

[8] In his reasons for refusing bail, the judge first referred to the facts as alleged by the prosecution. They were that an argument occurred between the complainant and the appellant, who were then living together in a domestic setting. The complainant alleged that the appellant threatened to knock her out; grabbed her by the throat with his right hand so hard that she had trouble breathing; that she was unable to get away from him; that she pushed the appellant and, in doing so, scratched him on the face; and that, while choking her, the appellant used his other hand to punch her in the right side of the face.

[9] The complainant alleged that the appellant then came back in the evening intoxicated and a further attack occurred which involved him punching her to the left side of the face and to the right eye, nose and lip area. She was unable to say how many times that she was struck by him. The complainant further alleged that she fell backwards in the course of this attack and struck her head on the concrete and was dazed.

[10] A little later, after she said she informed the appellant that she intended to call the police, the appellant again attacked her, punching her in the face and upper body with a closed fist. She alleged that he then went about destroying photographs located throughout the house. After doing so, the complainant said that he again returned and attacked her by punching into her, in her face and upper body, again

with a closed fist. She managed to contact a friend and the appellant left before the police arrived.

[11] The learned judge referred to the appellant's personal circumstances: that he was aged 49, that he had maintained good employment until he suffered a significant injury involving prolapsed discs in his spine which needed surgical treatment a couple of years ago and which still needed treatment. His Honour said that the spinal injury and the need for treatment could not have much impact on his decision as the prison authorities were well accustomed to dealing with a whole range of health problems and prisoners have access to appropriate medical care. There was no evidence for him to take a different view.

[12] The judge then referred to the fact that the appellant had been previously dealt with for contravention of a domestic violence order. That contravention occurred in February 2016. A conviction was not recorded but the appellant was fined $1,000. His Honour referred to the circumstances of that offence which occurred in the context of a relationship that had come to an end between the appellant and a woman unconnected with the present proceedings. Some considerable time after the domestic violence order was in place and the relationship had come to an end, the appellant verbally abused that complainant in the street and pursued her with verbal abuse which the judge described as "disgraceful" and his Honour remarked that he could understand why a woman would be concerned at his conduct.

[13] The judge then referred to the fact that the appellant had indicated that he intended to plead not guilty and had, in submissions, referred to the likely sentence to be imposed upon him were he to be found guilty. His Honour also referred to fact that the appellant had not had any previous grants of bail and had therefore not failed to respond appropriately.

[14] His Honour also referred to the strength of the Crown case, which was in dispute and to the photographs which showed the many injuries which the complainant alleged were inflicted by the appellant in the episodes of violence the subject of the charges against him. His Honour observed that if the various wounds and scratches and abrasions shown in the photographs were fresh and consistent with the account that the complainant had given, the Crown would have a very strong case particularly in light of the appellant's version that there was no such attack and that all that occurred was that he pushed the complainant and she fell over.

[15] His Honour also referred to the fact that the complainant had sought to withdraw the complaint. In a handwritten note the complainant said that she considered the appellant's conduct to be out of character and her belief was that he would not do it again and she proposed to have no further contact with him. She said she did not want to stress and cope with court proceedings. His Honour also referred to other evidence, being the police officer's notes of a conversation with the complainant. In those notes, the complainant is reported to have told the police officer that she was "terrified of home". She said she did not want to go ahead with the complaint because she did not want to see him again and she would have to see him in court if she did not withdraw the complaint.

[16] The learned judge observed that the complainant's assessment of the appellant's character was not compelling and that there were other features that were of more concern to her which could not influence the result on the bail application particularly her fear of "home".

[17] His Honour also made reference to the delay that might occur before the matter was dealt with and there might reach a stage where it would be simply unjust to keep the appellant in jail on remand if it would appear that he was going to serve more time on remand than he would even if convicted, although he said that day was a long way off in this case.

[18] His Honour had regard to the danger to female complainants in such domestic situations which had been referred to by the prosecution in its submissions[1] and, considering the risk to the complainant if the appellant were to be released on bail, he declined to admit the appellant to bail.

The appellant's submissions

[19] The appellant submitted that the judge who refused bail erred in finding that there was an unacceptable risk that if released on bail the appellant would commit an offence and his Honour failed properly to exercise his discretion in that he took irrelevant matters into account and failed to take into account relevant matters. It was submitted that there was no basis for the judge to make a finding that the appellant, if admitted to bail, would be likely to commit further assaults on the complainant. Rather the judge referred to a generalised "notorious" risk present in the community as a whole. In doing so, the appellant submitted, his Honour gave weight to an irrelevant consideration but gave no weight to relevant evidence in relation to the issue before him in particular the evidence that the complainant wished to withdraw her complaint.

[20] On the day prior to the hearing of the appeal, Senior Counsel for the appellant filed a supplementary outline of argument referring to relevant amendments to the *Bail Act* which received assent on 30 March 2017.

[21] The appellant submitted that at the time bail was refused, the appellant had an entitlement to bail unless the judge hearing the bail application was persuaded that there was an unacceptable risk that he would further assault the complainant. It was submitted that if this court were of the opinion that his Honour erred in making the finding that he did, and thus refusing bail, then his entitlement to bail was enlivened and there was a right to bail from the time that the application was refused.

[22] If that submission was rejected, it was conceded that the onus fell on the appellant in the event that this court accepted that the learned judge erred in the approach he took. It was therefore submitted that this court would accept that the evidence established that the appellant was not an unacceptable risk of committing an offence against the complainant, given that he was 49 years old and his criminal history included only one relevant prior offence. It was submitted that that offence did not involve assaultive behaviour and he had no prior history of violent behaviour. Even if the offence were established, the complainant, who had been in a domestic relationship with the applicant for over two years prior to the allegations arising, had herself volunteered that it was out of character. It was submitted that her indication that she expected no further contact could be reinforced by a bail condition that he refrain from making contact with, or approaching within an identifiable distance of, the complainant. It was submitted that having regard to those matters, the appellant had established that his continued detention was not justified.

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1 Explanatory Notes, *Criminal Law (Domestic Violence) Amendment Bill (No 2) 2015* (Qld) 3.

The respondent's submissions

[23] The respondent submitted that the decision to grant or refuse bail involves an exercise of judicial discretion. To succeed on appeal the appellant must show a relevant error of law, a misunderstanding of pertinent facts or that the discretion was exercised in a way that was so unreasonable as to itself amount to an error of law or misunderstanding of fact. Decisions to grant or refuse bail, it was submitted, are necessarily based upon provisional assessments of limited material and the notion of "unacceptable risk" is not capable of a precise degree of definition. For these reasons bail decisions are "particularly unsusceptible to the appellate process" and the discretion has to be exercised within very broad parameters.[2]

[24] With regard to the document where the complainant expressed a desire not to proceed with her complaint, the respondent submitted that importantly at no stage did she suggest that the events did not occur but rather that she wished not to proceed for other reasons. It was submitted that while no medical evidence was tendered at the bail hearing the photographs were suggestive of numerous injuries to the complainant which were unexplained on his version of events. In addition there were text messages exchanged between the appellant and the complainant during the night when he gave a dismissive response to her texting him that she hoped he was "happy for hitting a female and putting her in hospital." In addition, a witness heard yelling and banging and saw the complainant struggling to walk and asking for help and saw the appellant pacing outside on the road. Only 12 months earlier the appellant had committed an offence of breach of a domestic violence order against another woman, even though that relationship had finished sometime earlier. It was submitted that it was within the limits of judicial discretion to consider that there was an unacceptable risk of the appellant committing further offences or endangering the safety or welfare of the complainant or both. It was a conclusion not so plainly unreasonable in light of the evidence as to indicate error.

[25] So far as his Honour taking into account a generalised notorious risk that men alleged to have committed domestic violence will reoffend, it was submitted that the judge could be understood as referring to the potentially grave consequences that must properly inform the assessment of risk. That is, the less serious the consequences the more likely an assessment of risk will favour an applicant for bail. Conversely, the more serious the potential consequences the less likely the risk of admitting an applicant to bail will be considered not unacceptable.

Discussion

[26] Subsection 8(5) of the *Bail Act* provides that if a Supreme Court judge refuses an application with regard to bail, the person making the application may apply to the Court of Appeal and that court may hear and determine the application. This matter has been framed as an appeal rather than an application under subs 8(5). The distinction between the two approaches was analysed by McPherson JA, with whom Davies JA and Cullinane J agreed, in *Scrivener v DPP*.[3] To succeed on any such appeal the appellant must show that the discretion of the primary judge miscarried. The test to be applied was set out by Thomas JA in *Williamson v Director of Public Prosecutions*[4] that the finding made below "was not reasonably open".

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2 *Sica v Director of Public Prosecutions (Qld)* [2010] QCA 18 at [15]-[16].
3 (2001) 125 A Crim R 279; [2001] QCA 454 at [10]-[12].
4 [2001] 1 Qd R 99 at [24]; [1999] QCA 354.

[27] It could not in my view be said that the discretion exercised by the primary judge to find, implicitly, that the appellant was an unacceptable risk of committing an offence or endangering the safety of welfare of the alleged victim of the offences, was not reasonably open.

[28] The appellant criticised the reasons of the learned primary judge on the basis that he assessed the risk of further offending conduct by reference to a generalised concept, namely the notoriety of repeat assaults in domestic violence situations, rather than assessing the risk to the particular complainant. I do not accept that submission. In my view the learned primary judge plainly assessed that there was a risk to the complainant because of the repeated assaults (the first separate from the others by a 10 hour time period), the complainant's expressed concern, and the fact that the appellant's previous domestic violence offence occurred in breach of an order. His Honour referred to the notoriety aspect only in the sense that it supported that the prosecution's concern was justified.

[29] The behaviour alleged against the appellant occurred in a number of episodes over a prolonged period and included repeated punching and even an attempt at strangulation. The complainant's injuries could not be explained by his exculpatory version. Her reasons for withdrawing the complaint were, as his Honour found, motivated in part by fear and did not demonstrate in any way that the alleged offences did not occur. In those circumstances it could not be said that the reasons his Honour gave for refusing bail were not reasonably open.

The Bail (Domestic Violence) Amendment Act 2017

[30] On 30 March 2017, the *Bail Act* was amended by the *Bail (Domestic Violence) Amendment Act 2017* (the Amending Act). The relevant provisions received assent on 30 March 2017. A new subsection was added to s 16(2). It provided:

> "(f) if the defendant is charged with a domestic violence offence or an offence against the *Domestic and Family Violence Protection Act 2012*, section 177(2)—the risk of further domestic violence or associated domestic violence, under the *Domestic and Family Violence Protection Act 2012*, being committed by the defendant.
>
> *Note—*
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> See section 15(1)(e) for the power of a court to receive and take into account evidence relating to the risk of further domestic violence or associated domestic violence."

[31] In addition, s 16(3) of the *Bail Act* was amended to reverse the onus of proof in certain circumstances. One of those is where the defendant is charged with a "relevant offence" (see s 16(3)(g)). In such a case the court shall refuse to grant bail unless the defendant shows cause why his detention in custody is not justified.

[32] A "domestic violence offence" and a "relevant offence" are defined in s 16(7) of the *Bail Act* which provides:

> "(7) In this section—
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> ***domestic violence offence*** see the Criminal Code, section 1.
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> ***relevant offence*** means—

(a) an offence against the Criminal Code, section 315A; or

(b) an offence punishable by a maximum penalty of at least 7 years imprisonment if the offence is also a domestic violence offence; or

(c) an offence against the Criminal Code, section 75, 328A, 355, 359E or 468 if the offence is also a domestic violence offence; or

(d) an offence against the *Domestic and Family Violence Protection Act 2012*, section 177(2) if—

(i) the offence involved the use, threatened use or attempted use of unlawful violence to person or property; or

(ii) the defendant, within 5 years before the commission of the offence, was convicted of another offence involving the use, threatened use or attempted use of unlawful violence to person or property; or

(iii) the defendant, within 2 years before the commission of the offence, was convicted of another offence against the *Domestic and Family Violence Protection Act 2012*, section 177(2)."

[33] As the defendant has been charged with a relevant offence, being an offence against the *Criminal Code* s 315A, the onus of proof would now lie on a person in the position of the appellant to show why his detention in custody is not justified.

[34] The Amending Act has some retrospective effect. It includes a transitional provision which was inserted into the *Bail Act* as s 46. It provides as follows:

"**46 Transitional provision for Bail (Domestic Violence) Amendment Act 2017**

(1) Sections 11 and 16, as amended by the amending Act, apply in relation to the release of a person on bail on or after the commencement.

(2) For subsection (1), it is irrelevant whether the alleged offence in relation to which the person is released on bail happened, or the proceeding for the offence was started, before or after the commencement.

(3) In this section –

amending Act means the *Bail (Domestic Violence) Amendment Act 2017*."

[35] Should this be treated as a further application for bail to this court, in my view the appellant has not satisfied the onus of proof of showing why his detention in custody is not justified. Further, if this appeal had been allowed, s 46 of the *Bail Act* would require the Court to have regard to the *Bail Act* as amended by the Amending Act if this court were to consider releasing the appellant to bail. In either case, I would refuse bail for the reasons already set out (albeit giving effect to the reverse onus): that is that the appellant has not satisfied this court that he does not

represent an unacceptable risk of reoffending particularly against the complainant whilst on bail.

[36] I would order that the appeal be dismissed.

[37] **DOUGLAS J:** I agree.