SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stasiak; R v Turkyilmaz* [2019] QSC 260
PARTIES:	**R** **v** **STASIAK, Bryan Wieslaw** (Applicant) **R** **v** **TURKYILMAZ, Gokhan** (Applicant)
FILE NO/S:	SC No 1 of 2019
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	8 October 2019
DELIVERED AT:	Cairns
HEARING DATE:	8 October 2019
JUDGE:	Henry J
ORDERS:	**1. The further prosecution of Bryan Stasiak on the circumstance of aggravation on count 1 is stayed.** **2. The application of Gokhan Turkyilmaz for separate trials is dismissed.**
CATCHWORDS:	CRIMINAL LAW – EVIDENCE – MATTERS RELATING TO PROOF – PRIMA FACIE CASE OR CASE TO ANSWER – GENERALLY – where the applicant was charged with a drug trafficking offence and with a circumstance of aggravation that he was a participant in a criminal organisation pursuant to s 161Q *Penalties and Sentences Act* – where the applicant applies for a ruling of no case to answer in respect of the circumstance of aggravation – where circumstantial evidence supports the inference the applicant's two co-accused both acted as his agents but not the inference they associated with one another – whether, upon consideration of phrases "criminal organisation" and "by their association", it could be said there is a case to answer CRIMINAL LAW – PROCEDURE – INFORMATION,

INDICTMENT OR PRESENTMENT – JOINDER – JOINT OR SEPARATE TRIAL – GENERALLY – where the applicant, co-accused on an indictment relating to trafficking, applies for a separate trial – where the trial would involve a substantial body of evidence unrelated to the applicant's activities but relevant to his co-accused – whether there is a risk that evidence will be misused against the applicant – whether the court ought order a separate trial

Criminal Code (Qld), s 590AA
Penalties and Sentences Act 1992 (Qld), s 161O, s 161P, s 161Q

R v Gesa & Nona [2000] 110 A Crim R 507

COUNSEL: J A Greggery QC for the applicant, Turkyilmaz
K T Bryson for the applicant, Stasiak
D Meredith for the respondent

SOLICITORS: Purcell Taylor Lawyers for the applicant, Turkyilmaz
Fisher Dore for the applicant, Stasiak
Director of Public Prosecutions (Queensland) for the respondent

HIS HONOUR: The applicants, Bryan Wieslaw Stasiak and Gokhan Turkyilmaz are charged, along with Wieslaw Stasiak, as follows: That between the 25th day of February 2016 and the 9th day of September 2017, partly in Cairns and elsewhere in the State of Queensland and partly in Sydney and elsewhere in the State of New South Wales, they carried on the business of unlawfully trafficking in the dangerous drug methylamphetamine and they were participants in a criminal organisation and they knew or reasonably to have known the offence was being committed in association with one or more persons who were, at the time the offence was committed or at any time during the course of the commission of the offence, participants in a criminal organisation.

The latter two allegations constitute a circumstance of aggravation of which I will say more later. I mention for completeness that Bryan Stasiak and Gokhan Turkyilmaz are the sole offenders in respect of some single other charges on the same indictment, but nothing turns upon the content of those charges for present purposes.

Bryan Stasiak applies for a ruling of no case to answer in respect of the circumstance of aggravation. Gokhan Turkyilmaz applies for separate trials. The applications are made pre-trial pursuant to s 590AA of the *Criminal Code*.

I deal firstly with Bryan Stasiak's no case application. The prerequisites to be met before such an application can fall for determination pre-trial were confirmed in *R v Gesa & Nona* [2000] 110 A Crim R 507 at 511, as being:

1. where the facts are either agreed or undisputed and;
2. where those facts are incapable of supporting a guilty verdict and;
3. where the Crown concedes that those facts represent the highest the Crown case can be put.

The focus in the present argument is of course not upon whether or not there is a case to answer taking the Crown case at its highest in respect of carrying on the business of unlawfully trafficking in the dangerous drug methylamphetamine, but rather, whether there is a case to answer in respect of the circumstance of aggravation. While the argument does not apply to the entirety of the charge, the prerequisites outlined in *Gesa & Nona* apply in the same way. Should the application be successful, consistent with the approach discussed in *Gesa & Nona*, it will manifest itself in an order that the prosecution of Bryan Stasiak in respect of the circumstance of aggravation be stayed.

The evidence gathered by the police in what was obviously a significant drug investigation regarding a variety of suspects, is apparently very substantial. I have been provided with a dot point summary of the evidence in the learned Crown Prosecutor's outline, along with reference to extracts of some of the evidence, most of which is constituted in this case by evidence gathered from the interception of telephone calls. Other evidence apparently includes evidence of, in particular, travel and accommodation which tends to give meaning to the content of some of the telephone evidence.

I, at one stage of argument, was concerned to check whether there was any additional evidence which the Crown sought to refer the court to in order that, if I were to proceed to a ruling, I was doing so in the manner prescribed by *Gesa & Nona*. After an adjournment, the prosecution confirmed there was nothing further to add relevant to the issues with which I am concerned.

In summary, the evidence supports the circumstantial inference that Bryan Stasiak was carrying on the business of trafficking in methylamphetamine during the charged period, namely between 25 February 2016 and 9 September 2017. It is also capable of sustaining the inference that Bryan used Wieslaw Stasiak as his agent in distributing the drugs for a substantial part of that period. It follows the case as against Wieslaw Stasiak is that he was, at the very least, a party to Bryan Stasiak's trafficking. I say "at the very least" because one does not know precisely what financial arrangement was in existence between them, but it is clear from the evidence that Wieslaw was acting as Bryan's servant. Various examples of the telephone intercepts to which I have been taken amply sustain that inference.

There came a time in July 2017 when Bryan and Wieslaw Stasiak travelled overseas to Poland and Bryan used Gokhan Turkyilmaz as his agent in apparently the same capacity as he had been previously using Wieslaw Stasiak. After their return from overseas, there was some further activity detected in respect of Wieslaw Stasiak, although that evidence is not as substantial in its depiction of his involvement in the enterprise as it was prior to the overseas trip.

To enlarge a little upon the evidence, it is clear that prior to July of 2017, the business of Bryan, in which Wieslaw was his agent, supplied to customers John King and Nicholas Wighton. While it appears Bryan had some role in the actual supply of the drugs, the supplies were principally the role of Wieslaw. Wieslaw would travel

to Sydney and source the drugs and then travel to Cairns where he would supply King and Wighton, or so the evidence circumstantially suggests.

Bryan and Wieslaw travelled to Poland as between 4 and 27 July 2017. On 2 July, Bryan met Turkyilmaz after Turkyilmaz had travelled from overseas and apparently gone through customs – see exhibit 4 page 109. On the same day, Bryan advised Wieslaw that "Gokhan", that is to say Turkyilmaz, would take over from him the following day and he would tell him where to go. The next day, Bryan told Wieslaw to go to an address linked to Turkyilmaz. The Crown contends that what was said as between them sustains the inference that he was sent there in order to leave something. I approach the evidence on the basis that it is capable of supporting that inference, having been taken to exhibit 4 pages 109 through 121.

Bryan Wieslaw informed King that Turkyilmaz would take over and King said he was unaware of that as his Blackberry was not working. On 4 July Bryan called Turkyilmaz telling him he was "leaving today" and would send him the contact details for King on the Blackberry, and on the same day Turkyilmaz called King and they arranged to meet. All of this points to the strong inference that Turkyilmaz was enlisted by Bryan to fulfil the role that had been carried out in the past by Wieslaw.

The passages of exhibit 4 which I mentioned were emphasised by the learned Crown Prosecutor in that they provided some evidence of proximity as between Wieslaw Stasiak and Gokhan Turkyilmaz, the inference being that there was an attendance by one in order to supply to or obtain something from the other at a specific location.

The evidence of that kind of conduct seems to be replicated after the Stasiaks returned from overseas. In a similar vein to the earlier episode just mentioned, Bryan again instructed Wieslaw about where to go and what to do, for example, to actually attend upon a specific address, go to a car and open the boot, for the obvious purpose of procuring whatever may have been left in the boot. Even if that inference is wrong, then the converse inference would be that it would be to leave something in the boot, although it seems to be the former that is more probable on the telephone evidence – see, for example, exhibit 4 pages 156 through 158.

This seems to be as close as the evidence comes to showing a connection between Wieslaw Stasiak and Gokhan Turkyilmaz, that is to say that one left something for collection by the other or vice versa, but in each instance at the instruction of Bryan, it seems.

Moving on, there were calls throughout July 2017 between Turkyilmaz and King which support the inference I have already referred to, that Turkyilmaz was fulfilling the role previously fulfilled by Wieslaw. There are other illustrations of that form of evidence emanating from contact between Turkyilmaz and King but they do not particularly take the present issue of concern anywhere.

Turkyilmaz himself left Australia on 30 July 2017. He returned on 11 August 2017.

On 30 July Wieslaw Stasiak travelled to Cairns and there was conversation between him and Bryan about transporting drugs to Cairns. During one of the calls, Bryan

told Wieslaw that Turkyilmaz had moved and to attend upon a new address. That is the call to which I have already referred – see exhibit 4 pages 156 to 158.

Turkyilmaz returned to Cairns on 11 August 2017 and seems to have resumed the role he was fulfilling while the two Stasiaks had earlier been overseas, that is to say the role as Bryan's agent. There is various evidence listed in the dot points supplied by the learned Crown Prosecutor about the interactions between Turkyilmaz and King. Some weight was put by the learned Crown Prosecutor on one of those interactions, particularly of 5 September 2017 when Gokhan, in response to King in a message via Wickr said:

> "Have you got the coin for the first four?"

The response is, said to be from Gokhan Turkyilmaz via Wickr:

> "I gave it to your mate, at the beach when I got the next four."

The reference to the mate is a reference to another player, allegedly one Spalding.

There are later references on 5 September to King alluding to the product not being the best quality, in response to which Turkyilmaz replied, via Wickr:

> "Yeah, I heard that. Not my gig. Boys getting in tonight. Come see us later. We'll chat."

Emphasis is placed on the plurality of "boys" in that particular communication. The CCTV evidence, in combination with other evidence, indeed shows that Bryan and Wieslaw Stasiak travelled to Cairns on 5 September under false names. A meeting actually ensued shortly after midnight but that meeting involved Bryan Stasiak and Gokhan Turkyilmaz and Spalding. So, whilst Wieslaw might have been in town, he was not involved in that meeting on the face of the evidence, which rather blunts without eliminating the relevance of the plural reference to "boys" in the above quoted passage.

Beyond that there is apparently little evidence of any significance relevant to the present issues. There are certainly further calls between Turkyilmaz and King and when the operation closed on 8 September, Turkyilmaz was found in possession of over $40,000, along with some Blackberry mobile phones.

The charged circumstance of aggravation relies upon Part 9D *Penalties and Sentences Act 1992*. Within that part, s 161O defines the meaning of a criminal organisation, s 161P defines the meaning of a participant in a criminal organisation and s 161Q provides for the circumstance of aggravation with which we are concerned. Subsection 1 thereof provides:

> "It is a circumstance of aggravation (a "serious organised crime circumstance of aggravation") for a prescribed offence of which an offender is convicted that, at the time the offence was committed, or at any time during the course of the commission of the offence, the offender –
>
> (a) was a participant in a criminal organisation; and

> (b) knew, or ought reasonably to have known, the offence was being committed–
>
> > (i) at the direction of a criminal organisation or a participant in a criminal organisation; or
> >
> > (ii) in association with 1 or more persons who were, at the time of the offence was committed, or at any time during the course of the commission of the offence, participants in a criminal organisation; or
> >
> > (iii) for the benefit of a criminal organisation."

The considerations in respect of the circumstance of aggravation include whether or not a person is a participant in a criminal organisation and, more particularly, whether or not there is evidence of the existence of the criminal organisation that is alleged. As to whether or not the latter, s 161O *Penalties and Sentences Act* provides, at subsection 1:

> "A criminal organisation is a group of 3 or more persons, whether arranged formally or informally –
>
> (a) who engage in, or have as their purpose (or 1 of their purposes) engaging in, serious criminal activity; and
>
> (b) who, by their association, represent an unacceptable risk to the safety, welfare or order of the community."

Some further matters are explained in s 161O but they are not pertinent to the particular issue of concern that has arisen in this case. That issue is whether there is evidence in this case, necessarily circumstantial evidence, capable of sustaining the inference that there was a group of three or more persons:

> "... who, by their association, represent an unacceptable risk to the safety, welfare or order of the community."

Broadly speaking there is evidence of persons here engaging in serious criminal activity. No one could sensibly argue to the contrary. Nor could anyone argue that carrying on the business of trafficking in methylamphetamine does not represent an unacceptable risk to the safety, welfare or order of the community. The pivotal question, though, relates to the words "by their association". The use of such language in s 161O(1) inevitably gives rise to the requirement that there exists association between the persons who are alleged, for the purpose of the circumstance of aggravation, to be a part of a criminal organisation.

In the present case it is not suggested that this is a criminal organisation of more than three persons. Some others were involved in the sense that they were supplied apparently wholesale quantity of drugs but it is not alleged that they form part of the organisation. So here we are dealing with the bare minimum requirement of three at the very best for the prosecution, namely Bryan Stasiak, Wieslaw Stasiak and Gokhan Turkyilmaz.

There is ample evidence of the association of Bryan and Wieslaw. There is ample evidence of the association of Bryan and Gokhan. The apparently fatal obstacle to the prosecution evidence (as explained in this application and which is, for the purpose of the application, common ground) is that there is no direct evidence of any association as between Wieslaw Stasiak and Gokhan Turkyilmaz. I of course accept that evidence of association can be indirect, that is to say circumstantial, but there must be some evidence capable of sustaining the inference that there was association as between the three members of the group.

It is tolerably clear that the words in s 161O(1) "by their association", are not a reference to the entity or organisation and, rather, are a reference to the act of associating (as to which different meanings, see, for example, the definition of association in the Macquarie Concise Dictionary 4th edition). I readily accept that acts of association can occur without necessarily there being evidence of direct contact between two persons alleged to be associating. I resist any broader articulation of what those circumstances might be in any given case and confine myself to the circumstances of this case.

Here what is relied upon to fill what appears, with respect, to be a fatal gap, is the evidence in particular, admittedly not exclusively, of the attendances by Wieslaw, at Bryan's direction, before and after going overseas, attendances which appear to involve drop offs of some kind with Turkyilmaz being the person who, while not present, would be the person who would end up with possession of what was being dropped off or, alternatively, was the person who had dropped something off.

This provides, undoubtedly, some evidence of each of them fulfilling the role of an agent of Bryan. What it does not do is provide evidence of any association as between Wieslaw Stasiak and Gokhan Turkyilmaz. Indeed, the way in which Bryan arranged things seems to make it plain that he went out of his way to avoid direct contact between those two gentlemen. Whilst of course that may not be enough to avoid a circumstance of aggravation of the kind we are concerned with here in every case, the difficulty confronting the prosecution case, as explained in this application, is there really is insufficient evidence to sustain the inference that there was any association between Wieslaw Stasiak and Gokhan Turkyilmaz. Taking the evidence at the best, they appear to each have been agents of Bryan. There is an absence of evidence of association between them, direct or indirect.

This is not a situation where I am looking at whether or not competing inferences consistent with innocence can be excluded. That is not my task in a no case submission. My focus is purely upon whether the evidence is capable of sustaining the guilty inference sought. For the reasons explained, on the evidence as explained to me, it is incapable of sustaining that inference.

It follows that the application is successful and my order is that the further prosecution of Bryan Stasiak on the circumstance of aggravation on count 1 is stayed.

Turning to the separate trial application of Gokhan Turkyilmaz, it will be appreciated from all I have summarised that there is a substantial body of evidence to be led about the trafficking activity of Bryan and Wieslaw Stasiak, long before there is any allegation of Gokhan Turkyilmaz being involved. Further to that, there is a difficulty so far as the evidence is concerned, or so it is alleged, in a trial judge explaining to a jury the use they can or cannot put the evidence of alleged parties to a preconcert to. The way in which the separate trial argument was advanced today, it is unnecessary for me to articulate any conclusion as to whether the evidence is sufficient to establish the existence of the relevant preconcert. It will be apparent from the reasons I have just given that one might think that evidence is pretty thin. There is certainly nothing that I have been taken to that can, as I have explained, point to association between Wieslaw and Gokhan Turkyilmaz, which it might be thought would at least be a significant obstacle to the argument about preconcert. However, I do not need to take that point further today.

It seems to me that I must approach the argument that I have heard on the basis that trial judges are at least capable of explaining and disentangling evidence that is admissible as against one person but not admissible against another when they are facing the same trial. There is, I accept, a real risk of misuse of what will be a body of obviously substantial, perhaps five days worth of, evidence of the activities of Bryan and Wieslaw Stasiak that has nothing to do with Gokhan Turkyilmaz.

The risk, it seems to me, is two-fold. One is that the jury may wrongly use the subliminal momentum of that evidence which one infers collectively is likely to make it fairly obvious there was a trafficking business going on, so that the jury will too readily leap to the conclusion that whatever Gokhan Turkyilmaz was doing was necessarily aiding that business.

The other risk is that the inadmissible evidence, so far as Turkyilmaz is concerned, may also add to the momentum of the conclusion that by adding him as a player, there is enough to give rise to the requisite three for the purpose of the circumstance of aggravation. I have to say that concern falls away in the light of my earlier ruling. It is difficult to see how either of the other two, even though they were not applicants, will not be affected by the ruling I have made.

The other argument was that there will be a significant burden upon Gokhan Turkyilmaz having to essentially engage lawyers to sit through about five days of evidence that has nothing to do with him. I accept that that is obviously a prejudice. I regret to say it is one of the consequences that follow from investigations and cases of the kind with which we are concerned. It is not determinative, although I am not dismissive of it.

In my view, in light of the ruling I have made in respect of the other application and the probability of what will unfold from there, concerns about the circumstance of aggravation confusing things tend to fall away. The risk of misuse of the earlier evidence, whilst real, I think can be adequately handled by direction. This is the sort of case in which, while there is a significant body of evidence, it will be very obvious

to the jury that none of it involves Gokhan Turkyilmaz. So the prospect of them ignoring my directions on that topic I would think is minimal.

Notwithstanding, then, the added burden of having to sit through a trial made longer in respect of evidence that will not be admissible against him, I am ultimately not persuaded that it is in the interests of justice to order or, indeed, so prejudicial or risky that I ought order, the separate trials of Gokhan Turkyilmaz. His application for separate trials is dismissed.