SUPREME COURT OF QUEENSLAND

CITATION:	*Henry v DPP(Qld)* [2003] QCA 2
PARTIES:	**CALLUM ROSS HENRY** (applicant/appellant) v **DIRECTOR OF PUBLIC PROSECUTIONS** (respondent)
FILE NO/S:	Appeal No 397 of 2003 Appeal No 399 of 2003 SC No 84/03 SC No 11537 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeals from Bail Applications
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	29 January 2003
DELIVERED AT:	Brisbane
HEARING DATE:	29 January 2003
JUDGES:	McPherson JA, Davies JA and Mullins J Separate reasons for judgement of each member of the Court; each concurring as to the orders made
ORDERS:	**1. Appeals allowed with costs** **2. The appellant is admitted to bail on the conditions in the draft order that will be initialled by counsel** **3. The respondent is to pay the applicant's costs of the application before Mackenzie J**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRATICE AND PROCEDURE – BAIL – REVOCATION, VARIATION, REVIEW AND APPEAL – where appellant refused bail – where appellant had moved out of jurisdiction while charges were pending and resisted extradition – error of the judge at first instance in characterising the approach of the courts to forfeiture of cash deposits – application for bail considered on the merits
COUNSEL:	P J Callaghan for the appellant C Heaton for the respondent
SOLICITORS:	Boe and Callaghan for the appellant Director of Public Prosecutions (Queensland) for the respondent

MULLINS J: The appellant was refused bail by her Honour Justice Wilson on 20 December 2002 and by his Honour Justice Mackenzie on 9 January 2003. He has appealed against both refusals.

The appellant is charged with dangerous driving causing death and unlicensed driving arising out of a collision that occurred on 15 November 2000 at the intersection of Pinelands Road with Symons Road Sunnybank Hills between the Mack truck and trailer which the appellant was driving along Pinelands Road and a nine year old boy who tragically died as a result of the collision.

There was no real dispute before the Judges at first instance or on this appeal as to the general facts and circumstances surrounding the accident. The applicant is 27 years old, having been born on 19 April 1975. He was 25 years old at the time of the collision.

According to the police collision analyst the appellant's semi-trailer was driving at about 64 kilometres per hour at the time of hitting the child and travelling at about 78 kilometres per hour at the commencement of the braking. The speed limit in the area was 70 kilometres per hour.

The applicant therefore approached the intersection at slightly above the speed limit. He started reacting about 63 metres before the impact. His reaction time has been estimated by the police at about three seconds which would

suggest that the braking started whilst the lights facing him were either amber or red. The truck had slid for a distance of 20 metres before the impact with the child. The applicant was not intoxicated.

According to the summary of the witness statements, the traffic light facing the appellant turned red just when he went through; the child was in a group of school children who appeared to be mucking around and in a hurry; and the child ran onto the road before the "green man" pedestrian light was activated and did not look before he went onto the road.

After the accident the appellant, who is a New Zealand citizen, returned to New Zealand. He left information with the Queensland Police Service as to where he could be contacted. He did not make himself available, however, for an interview with Queensland Police after he was contacted by them in New Zealand. It appears that he was charged with these offences in October 2001 but did not become aware of the charges until October 2002 when the Queensland Police attended in New Zealand and arrested the appellant.

The appellant was granted bail pending extradition proceedings in New Zealand. He was advised by his solicitor in New Zealand that he could successfully resist extradition. There was therefore a contested extradition proceeding, as a result of which the appellant was extradited to Australia on 28 November 2002. He has been in custody since that time.

For the purpose of the bail applications the appellant was not in a show cause situation under section 16 subsection 3 of the Bail Act 1980. The grounds for refusal of bail by her Honour Justice Wilson were that there was a considerable risk of the appellant failing to appear and that the risk of the commission of further offences was not an acceptable one. It appears that the appellant committed further driving and traffic offences during the period he was in New Zealand from January 2001.

Further material was put before the Court for the hearing of the application on 9 January 2003. His Honour Justice Mackenzie did not make an express finding that there was a material change in circumstances in order to allow his Honour to consider the application on the merits, but proceeded to deal with the application on the merits on the assumption that there was a material change in circumstances.

His Honour refused bail on the merits on the basis that, if there were a conviction, the appellant would serve a term of imprisonment which would be more than the time from his being taken into custody until it was likely that a committal would be held for these offences.

His Honour said that it was unpredictable how the strength of the prosecution case would turn out but that should become clearer by the time of the committal. His Honour was also satisfied that there was a substantial risk that the appellant may not appear to face further proceedings in view of the

appellant's failure to return to Australia voluntarily and his resistance to extradition.

The additional material that was before his Honour was that the applicant was the father of a baby daughter who, at the age of three months, was left with the appellant's parents in his home town in New Zealand on 22 December 2002 by the child's mother and that the appellant's mother was prepared to come to Brisbane with the baby if the appellant were granted bail to enable the appellant to bond with his child.

The other additional material was to the effect that the appellant's father was prepared to provide a cash deposit of $15,000 as a condition of the appellant's release on bail pending trial. This latter circumstance arose as a result of the appellant's father being informed that the respondent's submissions before her Honour Justice Wilson were to the effect that if the appellant were granted bail a surety was required.

The approach of the respondent to these appeals is that, as his Honour Justice Mackenzie considered the question of bail on its merits, the focus of the appeal should be on the decision of his Honour Justice Mackenzie. That is a sensible approach in light of the fact that additional material was placed before his Honour which was not before her Honour Justice Wilson.

It is not raised by the respondent that there was no material change in circumstances when the matter was being considered by his Honour Justice Mackenzie. The issue then is whether there is any basis on which the decision of his Honour Justice Mackenzie can be considered, having regard to the principles in House v. The King (1936) 55 CLR 499 at 504-505.

His Honour focused on the issue of the risk of the appellant failing to appear if granted bail. In his reasons his Honour dealt with the appellant's father's offer of a cash deposit as a deterrent to the appellant from absconding in canvassing the issue of whether there was a material change in circumstances.

His Honour did not expressly deal with that issue in considering the merits of the application. It is implicit, however, in his Honour's reasons that the matters he adverted to in canvassing the material change in circumstances were taken into account by him in considering the merits of the application for bail and, in particular, the risk of failure to appear.

At page 5 of his reasons his Honour stated,

> "Nor do I generally think that a deposit of money is necessarily a deterrent to absconding if a person is minded to do so. Quite often, in any event, the person who has put the bail up is able to persuade Courts that he should be relieved from the sins of the absconder".

That is relied on by the appellant to submit that his Honour erred in failing to characterise properly the approach of the

Courts in considering an application to relieve a defendant or surety from forfeiture of the cash deposit or an order to pay an amount pursuant to an undertaking.

The appellant relies on the statement by the Court of Appeal in Baytieh v. The State of Queensland [1999] QCA 466 in which it was stated:

> "It may be accepted that the circumstances will be rare in which it would be against the interests of justice to require the person indebted to pay any part of the amount ordered to be paid given the importance of ensuring the integrity of the surety system."

The reference in that quote to the interests of justice is a reference to the provision in section 32B of the Bail Act 1980 which deals with the circumstances in which a Court can revoke an order of forfeiture. It is, therefore, submitted by Mr Callaghan of counsel, on behalf of the appellant, that, in particular, the second sentence of that quoted from his Honour Justice Mackenzie's reasons at page 5 is inconsistent with the approach of the Court in characterising the circumstances in which an order relieving against forfeiture would be made as rare.

I agree with this submission. I am satisfied that there is an error in these reasons which affected the consideration by his Honour of the question of whether or not the bail should be granted. It is, therefore, appropriate for this Court to consider the application for bail on the merits. The respondent bears the onus of showing that bail should not be granted.

The appellant has provided a draft order which sets out the conditions proposed by the appellant to reduce the risks of failure to appear and further commission of offences to an acceptable level. The draft order includes a reporting requirement, a residence requirement, a condition that the applicant not drive any motor vehicle until the conclusion of the criminal proceedings against him, a condition that the applicant not apply for any passport until the conclusion of the criminal proceedings against him and the requirement of the deposit of $15,000 with the Clerk of the Court to be refunded only at the conclusion of the criminal proceedings against the appellant.

The issue which was live before his Honour Justice Mackenzie and remains relevant was that of the risk of failure to appear. Having regard to the appellant's personal circumstances which are canvassed in the material and the conditions which are proposed on behalf of the appellant which are relevant to the risk of failure to appear, particularly, the proposal of a significant cash deposit of $15,000, having regard to both the appellant's circumstances and those of his father, the risk that the appellant will not appear when required is not such as to preclude the grant of bail.

I would, therefore, order that both appeals be allowed and that bail be granted in terms of the draft order which has been provided by Mr Callaghan.

I would also order that the respondent pay the appellant's costs of both appeals. Although this appeal has focussed on the decision of his Honour Justice Mackenzie, it was prudent for the appellant to appeal also against her Honour Justice Wilson's decision if this Court had taken the approach that his Honour Justice Mackenzie had rightly considered that there was no material change in circumstances.

McPHERSON JA: Yes, I agree.

DAVIES JA: Yes, I agree.

...

McPHERSON JA: Well, the appeals are allowed with costs. The appellant is admitted to bail on the conditions in the draft order that will be initialled by counsel.

...

McPHERSON JA: The order as to costs will be that the respondent pay the costs of the appeals and also of the application before Justice Mackenzie only.
