SUPREME COURT OF QUEENSLAND

CITATION:	*DPP v Bakir* [2006] QCA 562
PARTIES:	**DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)** (appellant) **v** **YASSAR BAKIR** (respondent)
FILE NO/S:	Appeal No 10888 of 2006 SC No 10175 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	15 December 2006
JUDGES:	Jerrard, Keane and Holmes JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**(1) Appeal dismissed** **(2) The stay granted by Chesterman J on 13 December 2006 and enlarged by this Court on 15 December 2006 is discharged**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – ENFORCEMENT OF JUDGMENTS AND ORDERS – EXECUTION AGAINST THE PERSON – QUEENSLAND – BAIL – where Judge of the Supreme Court granted bail to respondent on certain conditions – where another Judge of the Supreme Court temporarily stayed the execution of that order – whether the stay should be extended or discharged – whether the risk that the respondent might interfere with witnesses if he were to be released on bail was an acceptable risk that justified the grant of bail *Bail Act 1980* (Qld), s 15(3) *House v The King* (1936) 55 CLR 499, cited *R v Cain (No 1)* (2001) 121 A Crim R 365; [2001] NSWSC 116; SC No 71244 of 2001, 1 March 2001, cited *Scrivener v DPP* (2001) 125 A Crim R 279; [2001] QCA 454 Appeal No 9094 of 2001, 23 October 2001, cited

COUNSEL: D R MacKenzie for the appellant
M J Byrne QC for the respondent

SOLICITORS: Director of Public Prosecutions (Queensland) for the appellant
Ryan & Bosscher for the respondent

[1] **JERRARD JA**: This matter is an appeal by the Director of Public Prosecutions against orders made in the Trial Division of this Court on 12 December 2006, granting bail to Yassar Bakir on serious charges. Those are:

- attempted murder;
- unlawful possession of a weapon;
- dangerous conduct with a weapon;
- two charges of robbery with actual violence;
- two charges of deprivation of liberty;
- unlawful use of a motor vehicle; and
- common assault.

[2] The bail conditions include that Mr Bakir provide a surety in the amount of $100,000, surrender himself at the Southport Magistrates Court on 26 March 2007 and thereafter for the purpose of a committal hearing which will be held, and likewise that he surrender himself and appear at any criminal sittings of the District or Supreme Court to which he is committed for trial or sentence. He is required to reside with his brother Abad Kareem Hassan at 5 Baker Street Merrylands, Sydney, New South Wales; to remain in that residence overnight between 9:00 pm and 6:00 am, and report between 8:00 am and 6:00 pm to the officer-in-charge of the Merrylands Police Station on five of the seven days of the week. He is also to surrender all passports in his possession, not approach any port of international departure, nor apply for a passport; he may not have any direct or indirect contact with his co-accused Steven Hill, nor with any Crown witness except his wife Tanya Bakir, and he is not to enter the local authority area of the Gold Coast other than for appearances required at the Southport Magistrates or District Court.

[3] Those are restrictive conditions, if complied with. The learned judge who granted bail on those conditions was moved to do so because Mr Bakir had been in custody since 13 June 2006, when he was arrested at his solicitor's offices in Southport. The committal hearing is set down for 26 March 2007, and it is unlikely that Mr Bakir would have a trial before the first half of 2008. The learned judge was satisfied that the bail conditions imposed adequately dealt with the separate risks that Mr Bakir would re-offend on bail, not appear to answer the charges, and interfere with potential Crown witnesses.

[4] The bail application heard on 12 December 2006 was actually the second such application for bail by Mr Bakir. The first was heard on 25 July 2006, and refused. At that stage Mr Bakir was charged only with attempted murder, unlawful possession of a weapon, and dangerous conduct with a weapon. The other charges (the two counts of robbery with actual violence, the two counts of deprivation of

liberty, and the counts of unlawful use of a motor vehicle and of common assault) were only laid on 11 December 2006, although the application heard on 12 December 2006 was heard in respect of all charges. It follows that while Mr Bakir's lawyers argued on 12 December 2006 that circumstances had changed since his unsuccessful application for bail in late July 2006, those changes in circumstances included that he was now charged with more serious offences. It was correct, as the judge who granted bail observed, that Mr Bakir's position had been clarified since his unsuccessful earlier application for bail; his committal date had been set and the probable trial date - assuming a plea of not guilty was maintained on all counts - could be predicted. Perhaps the most significant change was his undertaking to live with his brother, the asserted source of the surety.

[5] In *Scrivener v DPP* (2001) 125 A Crim R 279[1] McPherson JA, giving the judgment of the Court, restated the principle that while an applicant for bail has a right to renew an unsuccessful application before another judge, successive applications will ordinarily prove fruitless unless there has been a material change of circumstances by the time of the second application.[2] McPherson JA likewise wrote that an application for bail may be renewed in this Court, but it is unlikely to succeed unless the applicant is in a position to show such a material change.[3] In this matter the learned judge who granted the application for bail was satisfied that clarification of how long the applicant would have to wait for his trial was a new circumstance, and the judge was moved by the considerations described by Sperling J in *R v Cain (No 1)* (2001) 121 A Crim R 365[4] at 367, where that judge wrote that the prospect that a private citizen, who has not been convicted of any offence, might be imprisoned for as long as two years pending trial, was, absent exceptional circumstances, inconsistent with modern concepts of civil rights.

The charges

[6] The counts on which he was refused bail by a Judge of the Supreme Court on 25 July 2006 arose out of an incident which occurred on the evening of 9 June 2006, when the complainant Pita Wilson was shot, in an apparently dimly lit area not far from the Fisherman's Wharf Tavern in the Gold Coast area. Mr Wilson has provided a signed statement to the police, in which he positively identifies Mr Bakir as the man who shot him. The identification is not overwhelmingly convincing, because in two conversations held while Mr Wilson was in hospital, on 10 June 2006 and 11 June 2006, he was recorded as saying - if the transcripts are accurate - that he could not see who shot him, because it was dark. However, in the second of those conversations, he did identify Mr Bakir as the person whom he had been going to meet at the place where he was shot, and in a third conversation on 11 June, Mr Wilson named Mr Bakir as the man who shot him, asserting that he was "100 per cent" sure of the identification.

[7] Mr Wilson's statements provide very little explanation for why Mr Bakir would want to shoot him, but that deficiency in the prosecution case may well be solved by the evidence of another potential prosecution witness, a Ben Radcliff. His second statement to the police, dated 11 July 2006, is much more informative than his first

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1 [2001] QCA 454; Appeal No 9094 of 2001, 23 October 2001.

2 His Honour cited from *Ex parte Edward* [1989] 1 Qd R 139 at 142-143; (1988) 35 A Crim R 465 at 468-470.

3 Citing from *R v Hughes* [1983] 1 Qd R 92.

4 [2001] NSWSC 116; SC No 71244 of 2001, 1 March 2001.

one, dated 10 June 2006. Ben Radcliff's first statement explains as little about his and Pita Wilson's dealings with Mr Bakir, as Mr Wilson's statement does. His second statement explains that Mr Radcliff had previously been involved in importing into the Gold Coast area significant quantities of a significant precursor from which an addictive and dangerous drug could be - and was - manufactured by Mr Radcliff, and on-sold. Purchasers included Mr Bakir's co-accused, Mr Hill. Mr Radcliff's second statement describes two occasions on which Mr Bakir and Mr Hill assaulted Mr Radcliff, taking property from him and also depriving him of his liberty; a jury could conclude that the motive of the two offenders was to persuade Mr Radcliff to import some of that precursor for Mr Bakir and Mr Hill. Mr Bakir is a member of a motorcycle gang, and Mr Radcliff's second statement describes his agreeing to do as Mr Bakir and Mr Wilson were urging him to do; and his statement says he did cause another importation of that significant precursor to happen, financed by a third party, who was an associate of Mr Wilson's.

[8] On Mr Radcliff's second statement, Mr Bakir and Mr Hill were anxious to get possession of the precursor after its importation. The jury could conclude from Mr Radcliff's evidence that so too were Mr Wilson and the financier. The jury could conclude that Mr Bakir's motive for the shooting was either to get possession of the imported drug, or to remove Mr Wilson as a competitor for possession of it.

[9] That Crown case will largely depend on the evidence of Mr Radcliff, an indemnified drug dealer. If accepted, his evidence would establish that Mr Bakir had certainly arranged to meet Mr Wilson at about 7:30 pm on 9 June, and that their hostile dealings concerned those drugs Mr Radcliff had so recently imported. Mr Radcliff's evidence, if accurate, reveals that Mr Bakir is an aggressive and dangerous "standover" man, one who is likely to attempt to interfere with the two important witnesses against him, namely Mr Wilson and Mr Radcliff.

[10] Apart from their evidence, there is some important forensic evidence. Police executed a search warrant on Mr Bakir's residence on 12 June 2006, and located a number of 9 mm pistol rounds. Those were compared with six spent 9 mm pistol cartridges located in the immediate area in which the complainant had been shot, and the result can be summarised as saying that the conclusion is available for a jury that the 9 mm bullets, which were fired into Mr Wilson's body, came from the same collection of bullets as those seized from Mr Bakir's residence.

[11] Mr Bakir was actually on bail at the times in which he allegedly assaulted and robbed Mr Radcliff in April and early June 2006, and when he allegedly attempted to murder Mr Wilson. He had been on bail since late March 2005, when he was arrested in relation to possession of cannabis, and possession of a Queensland Police Service identification badge. The substantive reason he was refused bail in July 2006 was because of the unacceptable risk that he would attempt to interfere with witnesses. At that time he was proposing to live, if given bail, with his wife, from whom he had been separated as at 9 June 2006.

[12] That proposition stated by Sperling J is very true, but there are also civil responsibilities. The prosecution case is not overwhelming, because it depends partly on the identification evidence of the victim, which is obviously open to criticism (as is Mr Wilson's general honesty about his own involvement in drug dealing), partly on the evidence of an indemnified drug dealer, Ben Radcliff, and partly on the forensic evidence. However, the nature of the case revealed by Mr

Radcliff's evidence shows that a good deal of material is required from Mr Bakir, to satisfy the onus placed on him by s 15(3) of the *Bail Act 1980* (Qld). That section provides that a court shall refuse to grant bail unless a defendant shows cause why the defendant's detention is not justified, where the defendant is charged with an indictable offence alleged to have been committed while the defendant was on bail, or when charged with an indictable offence in the course of committing which the defendant is alleged to have used a firearm. Both those circumstances apply to Mr Bakir.

[13] The learned judge, who granted bail on 12 December 2006, faced the different situation that Mr Bakir had agreed to live in New South Wales with his brother, and therefore not in the Gold Coast area. The bail condition forbidding him from entering the area of the Gold Coast City Council will certainly reduce the risk of his directly interfering with either Mr Wilson or Mr Radcliff. Undoubtedly, even if held in custody, Mr Bakir could probably get assistance from others not in custody to do that, but it is easier to do if he is at large, and easiest if he is living on the Gold Coast.

[14] Mr Bakir's brother, the proposed surety, now actually lives at 5 Baker Street, Merrylands. An affidavit from Abad Hassan sworn on 27 June 2006 gives his address as 5 Baker Street, Merrylands, but also reveals that Mr Hassan was self-employed on the Gold Coast and was then living in an apartment in Main Beach, and intended to live there for at least the next 12 months. Mr Bakir's affidavit dated 30 November 2006 described an intention to live with his father in Ashmore in the State of Queensland, if given bail; it was a quite late proposition that he would live with his brother. That proposal emerged in answer to the prosecution's apprehension that Mr Bakir would abuse the opportunity, that being on bail would provide, to intimidate Mr Radcliff and Mr Wilson.

[15] The learned judge hearing the second bail application was presented with different circumstances from the Judge who heard the first. On that first application the respondent prosecution was able to supply the Judge only with a copy of the statement taken from Mr Wilson on 16 June 2006, in which Mr Wilson positively and unequivocally identified Mr Bakir as the assailant. However, on 26 November 2006 the Police prosecutions supplied Mr Bakir's solicitor with transcripts of the conversations held at the hospital on 10 and 11 June 2006, in which Mr Wilson had at first declared an inability to identify the gunman. That new information available to Mr Bakir's solicitors did weaken the direct identification evidence against Mr Bakir; but the circumstantial case against him was strengthened by the evidence of Ben Radcliff, released to Mr Bakir's solicitors only on 30 November 2006. That circumstantial case was revealed to be one in which Mr Wilson would in all likelihood be considered as an intending drug dealer.

[16] The prosecution case therefore rested on a different, circumstantial, basis by the time of the second bail application. Also, by the time it was heard Mr Bakir had agreed to live at his brother's residence in Sydney, if granted bail. The prosecution did not challenge his brother's bona fides in the matter, and this Court heard briefly from Abad Hassan on the appeal. Mr Hassan said he would not allow members of Mr Bakir's motorcycle club to visit to Mr Bakir at Mr Hassan's home in Baker Street, and Mr Hassan was not challenged on that. Residence with his brother will reduce considerably the opportunity to interfere with witnesses, as will the bail condition requiring Mr Bakir to remain away from the Gold Coast.

[17] Finally, mention should be made that Mr Bakir did return from Sydney and surrender himself at his solicitor's office on 13 June 2006, the day he was taken into custody. That circumstance tells in his favour. I disagree with the submission advanced by the appellant Director, namely that there had been no substantial change in circumstances when the second bail application was heard. There had been, and the discretion to grant or refuse bail did properly fall to be considered a second time. The appellant is correct that Mr Bakir faces very serious charges, but the evidence is not overwhelming, and he has already returned once to answer them. It will be a considerable time before the charges are heard, and the orders made by the learned judge do remove an unacceptable level of risk that Mr Bakir will interfere with witnesses or re-offend in this State on bail. His past conduct suggests there is an acceptable risk he will appear. For those reasons I would dismiss the appeal.

[18] I propose orders that:

- the appeal be dismissed; and
- the stay granted by Chesterman J on 13 December 2006 and enlarged by this Court on 15 December 2006 be discharged.

[19] **KEANE JA:** I agree with the reasons of Jerrard JA. There is, however, one particular aspect of this matter in relation to which I would add some brief additional observations.

[20] It was common ground at the hearing of the appeal that the appellant was obliged to demonstrate an error on the part of the learned primary judge in accordance with the well-known statement of principle in *House v The King.*[5] In this regard, the principal focus of attention must necessarily be upon the risk that the respondent might interfere with witnesses if he were to be released on bail.

[21] A judge of the Trial Division, in refusing the respondent's application for bail on 25 July 2006, held that the respondent had not demonstrated that his release on bail would not give rise to unacceptable risk of interference with witnesses. His Honour said:

> "I am especially concerned by the prospect that he would seek to contact witnesses or otherwise interfere with the presentation of the case against him. Part of that concern comes from the fact that the evidence against him is principally that of the complainant, but also involves about 25 lay witnesses, some of whom are said to have been associates or former associates of the applicant. That concern also results in part from evidence of the activities of others in relation to the complainant and other potential witnesses which has occurred since the commission of the alleged offences. Now, there is no evidence which directly implicates the applicant in this conduct but in the present context which involves an assessment of the relevant risks of a grant of bail, that evidence cannot be ignored.
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> The applicant is a member of a particular motor cycle group. That in itself is not a basis for criticism but it is relevant because there is evidence that another person associated with the same group attempted to gain access to the complainant at the hospital where he

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5 (1936) 55 CLR 499 at 504-505.

> was recovering from being shot. That is said to have occurred on 12 June; that is some three days after the complainant was shot.
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> On 10 June, that is the day after the shooting, there is evidence that another person also having some apparent association with that group, attended at a previous residential address of the complainant armed with an iron bar and intimidated persons at that address. Now, they have not made a complaint. Those matters, that is the attendance of those persons, is the subject of evidence which cannot be fairly tested in the present context of this application but nor can the evidence be, as I have said, ignored."

[22] On the appellant's behalf, it was said that the learned primary judge, in granting bail on 12 December 2006, failed sufficiently to take into account the risk of interference with witnesses, or acted upon an irrelevant consideration, namely the respondent's willingness to submit to a condition of bail requiring the respondent to reside in Sydney.

[23] The appellant argued that the risk of interference with witnesses will exist even if the respondent is required to reside in Sydney pending his trial. While the respondent is in custody, his communications with associates in the motor cycle group to which he belongs can be closely monitored. It is said that this will not be the case if he is at liberty, even if he is at liberty in Sydney.

[24] It is to be emphasised that the learned primary judge did not suggest that the respondent's release would not pose any risk at all to witnesses; rather, her Honour proceeded on the footing that the condition as to residence in Sydney was sufficient to reduce the risk which had earlier been identified to an acceptable level. In reaching this conclusion, her Honour was acting on the basis that the arrangements for the respondent to live in Sydney pending his trial had been made in response to the appellant's argument that the risk of interference with witnesses if the respondent were to be at liberty on the Gold Coast was unacceptable.

[25] The respondent's willingness to submit to a condition of bail that he reside in Sydney was thus directed to meeting the risk that the respondent might interfere with witnesses if released. Therefore, it cannot be said that her Honour failed to take this consideration into account in striking the balance between the considerations which favoured the grant of bail as against those considerations which weighed against the respondent's application. It may be said that the condition as to residence in Sydney was not apt to eliminate all possibility that witnesses might be interfered with, but it cannot be said that her Honour failed to have regard to this consideration as one relevant to the exercise of her discretion.

[26] Her Honour clearly came to the view that the condition as to residence in Sydney reduced the relevant risk to an acceptable level. While the opportunity for the respondent to arrange for witnesses to be interfered with might be greater if he is not in custody, it cannot be said that he has had no opportunity to make such arrangements, if he were minded to do so, while he has been in custody. There is no suggestion in the evidence that any interference with witnesses beyond that referred to in the refusal of bail on 25 July 2006 has occurred.

[27] In these circumstances, the learned primary judge concluded that, if the respondent was required to reside in Sydney, the possibility of the respondent directly

confronting witnesses was obviated while the prospect of his arranging such a confrontation was sufficiently unlikely as to be an acceptable risk. This is a conclusion on which reasonable minds might differ, depending as it does on an assessment as to the likely course of human behaviour. Such assessments are inevitably matters of impression and degree. There is no objective standard by reference to which it can be said that her Honour's assessment was wrong, just as it could not be said that an assessment that the condition would not suffice to reduce the risk to acceptable levels would be wrong in the sense of the formulation in *House v The King*.

[28] In my respectful opinion, it has not been demonstrated that her Honour erred in treating the condition as to residence in Sydney as a basis for concluding that she could be satisfied that there was not an unacceptable risk that the appellant's release on bail would result in witnesses being interfered with.

[29] I agree with Jerrard JA that the appeal must be dismissed, and with the other orders proposed by his Honour.

[30] **HOLMES JA:** I agree with Jerrard and Keane JJA.