SUPREME COURT OF QUEENSLAND

CITATION:	*Ex parte Taylor* [2009] QSC 131
PARTIES:	**TAYLOR, Edward Charles** (applicant) v **DIRECTOR OF PUBLIC PROSECUTIONS** (respondent)
FILE NO/S:	BS 3799 of 2009
DIVISION:	Trial Division
PROCEEDING:	Bail Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	22 April 2009
DELIVERED AT:	Brisbane
HEARING DATE:	21 April 2009
JUDGE:	Applegarth J
ORDER:	**Application dismissed**
CATCHWORDS:	CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – MISCELLANOUS OFFENCES – STALKING – GENERALLY – whether complainant must be aware of offending conduct at the time it occurs for the stalking offence to be made out *Criminal Code* (Qld), s 359B *Bail Act* 1980 (Qld), s 16 *R v Davies* [2004] QDC 279, applied *Williamson v Director of Public Prosecutions (Queensland)* [2001] 1 Qd R 99; [1999] QCA 356, applied
COUNSEL:	L Ackerman for the applicant K Dent for the respondent
SOLICITORS:	Robertson O'Gorman for the applicant Director of Public Prosecutions (Queensland) for the respondent

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

APPLEGARTH J

Application No 3799 of 2009

RE AN APPLICATION FOR BAIL BY EDWARD CHARLES TAYLOR

BRISBANE

..DATE 22/04/2009

ORDER

HIS HONOUR: This is an application for bail by Edward Charles Taylor. The applicant has been charged with the following offences:

1. That on 9 November 2008 at Bargara in the State of Queensland he unlawfully stalked Yvonne Jean Taylor and for one of the acts constituting unlawful stalking he possessed a weapon within the meaning of the *Weapons Act* 1990 namely a Category C semi-automatic shotgun.

2. That on 9 November 2008 at Bargara he unlawfully had possession of a dangerous drug, namely cannabis sativa.

3. That on 9 November 2008 at Bargara he possessed a weapon, namely a Category C semi-automatic shotgun and the weapon unlawfully possessed was a Category C weapon.

This is arguably a show cause situation pursuant to s 16(3) of the *Bail Act* 1980 (Qld) because it is alleged that the applicant "used" a semi-automatic shotgun in the course of committing the alleged offence. There is no reason to suppose that the word "used" should be given an unduly narrow interpretation: cf *Williamson v Director of Public Prosecutions* [2001] 1 Qd R 99 at 102 [14]-[15] in which the applicant was alleged to be party to an offence in which someone else used the weapon. Arguably the applicant "used" the weapon in the course of committing the alleged stalking offence. If this is a show cause situation, I am required to refuse bail unless the applicant shows why his detention in

custody is not justified. If this is not a show cause situation I must grant bail unless I am satisfied that there is an unacceptable risk that if the applicant were released on bail:

(a) he would fail to appear;

(b) while on bail he would:

(1) commit an offence;

(2) endanger a person's safety; or

(3) interfere with witnesses.

Section 16 of the *Bail Act* requires me to consider a number of matters in determining the acceptability or otherwise of the risk including the nature and seriousness of the offence, the character, employment and general background of the applicant, whether there has been any previous grants of bail and the strength of the evidence against the applicant.

The Crown opposes bail particularly due to the seriousness of the offences, the unacceptable risk of the applicant committing further offences and the unacceptable risk to the safety and welfare of the complainant and other witnesses.

Factual background

The applicant has a serious history of domestic violence. During an interview with police on 9 November 2008 he admitted to having been physically violent to his wife over many years. These assaults were not reported to police as the complainant claims that the applicant threatened to kill her and her family if she involved the police. She informed the police of

various acts of violence committed against her including the discharge of a firearm into a caravan on their property in circumstances in which the applicant believed that she was in it.

On 25 October 2008 the applicant and the complainant were involved in an argument during which she was assaulted. Those matters are detailed in the material including pages 3 to 6 of the affidavit of Kelly Maree Thompson. There is currently an arrest warrant issued in New South Wales for the arrest of the applicant in relation to the offences allegedly committed against his wife on 25 October 2008 involving offences of stalking, causing grievous bodily harm, detaining a person with intent, and assault occasioning actual bodily harm.

In the middle of the night on 3 November 2008 the complainant, Mrs Taylor, fled her home and was collected by her daughter who ordinarily lived in a caravan park on the Gold Coast. In the following days the applicant is alleged to have frequently called their daughter in an attempt to locate the complainant. He made these calls from New South Wales. He is also alleged to have smashed up the home of a male who assisted the complainant to leave.

The applicant phoned the Gold Coast Caravan Park and when he could not reach his daughter there he was told by the caravan park staff that his daughter was no longer residing there and she had moved to Bundaberg with her partner and her daughter.

The applicant eventually spoke to his daughter and this time the daughter told him that she was moving but made the false statement that the complainant was not with her. However, out of concern that the applicant would not believe this denial, and fearing that he would follow them to Bundaberg, the complainant went to police and sought shelter in a domestic violence refuge outside of Bundaberg. She understandably feared that after the conversations that occurred between the applicant and her daughter that the applicant was coming after her.

That fear proved well-founded because the complainant printed out directions to a caravan park at Bargara that he found on the internet, and he left New South Wales and took with him a semi-automatic shotgun in the boot of his car. He arrived in Childers outside Bundaberg on the morning of Sunday, 9 November 2008.

He rented a car from a local business in order to better conceal his presence. He admitted to police that he did not want his wife or his daughter to see his car as he believed they would run from him. He told the operator at the rental company that he was there as his wife and daughter had left him and he had come up to get them.

He purchased a pocket-knife from a local camping store. He purchased a camping guide to the local area and then he commenced driving to every caravan park looking for his daughter. It is fortunate that the store attendant at the

camping store alerted police to her suspicions and took the number plate of the hire car.

The police alerted the applicant's daughter and she left the caravan park that she and her husband were staying in and drove to the Bargara Police Station. However, the applicant was by then present at the caravan park and witnessed his daughter and her partner leave. He'd seen them for some time. He said his intent was to wait until the time was right to approach his wife.

The applicant gave a false name to the caravan park operator. Later he was intercepted by police and on that occasion he was found in possession of the pocket-knife. He was also found in possession of a quantity of cannabis which relates to the second charge.

A search of the carboot of the car found a semi-automatic shotgun wrapped in a tent and a heavy steel bat. Three shotgun cartridges were located inside the applicant's toiletries bag. The applicant told the police that he owned the shotgun and had brought it with him from his home and was going to use it to scare his daughter's partner and the male he suspected was also there. He stated he believed those persons would assault him if they saw him.

The applicant told police that he just wanted to talk to his wife and that he wanted her to come back to him. He claims he had no intention of harming her in any way.

The nature and seriousness of the offences

The applicant concedes that the offence of unlawful stalking is serious in nature and that if convicted, the applicant would be sentenced to an actual term of imprisonment.

The respondent submits that the alleged offences are obviously serious in nature. I accept that submission. Although most of the oral argument in relation to the offences centred on the strength of the Crown case on the indictable offence of unlawful stalking, it is important to recall that the applicant remains in custody and seeks bail in relation to the offence of unlawful possession of a category C weapon for which the maximum penalty is four years' imprisonment. I regard that offence as a serious offence and one to which, on the material before me, the applicant has no defence.

I note that the offence is possessing firearms, not using them, in public. That said, the circumstances in which the applicant had possession of the shotgun provides circumstances of aggravation. On the applicant's own admission, he said he was worried that his daughter's partner, and the man his wife left with, may assault him if they saw him, so he was going to use the shotgun to scare them off. It is possible that his possession of the shotgun was for a more sinister purpose. However, if it was for the admitted purpose of scaring people off it amounts to a serious circumstance, particularly where police located three shotgun cartridges in a toiletries bag in the boot of the car. The applicant was not in possession of

the shotgun on his way to a clay-pigeon shooting competition. He had it in his possession with the intent to use it if he encountered his daughter's partner, and in the circumstances in which he placed his daughter and her partner under observation at the caravan park, there was a very real risk that he would use the shotgun as he intended to, with possible tragic consequences.

The applicant's circumstances

The applicant's character, antecedents, employment, general background and the criminal history are the subject of documents under Ms Gilles' affidavit and are also addressed at paragraphs 18 to 22 of the applicant’s affidavit. His criminal history is also Exhibit "ECT01" to his affidavit. It includes offences of assaulting police and resisting arrest. In 1984 he was convicted of sexual intercourse without consent, and common assault, to which he pleaded not guilty. He was found guilty and served 11 months out of an 18-month prison sentence.

He acknowledges that he has minor drug, traffic and street offences in his criminal history, which dates back to the late 1970s. However, as noted in his Counsel's submissions, he has no criminal history since 1995. However, he has a history of domestic violence. The applicant and his wife have a farm property where they bred dogs when they lived together near Kempsey. They lived there for 11 years. The applicant has no dependent children, and has parents who live close to

Brisbane. There is no relevant history of previous grants of bail.

The strength of the evidence against the applicant

I first consider the offence of unlawful stalking. The applicant submits that the Crown case for this offence is very weak and that, as a matter of law, the conduct alleged to constitute the offence that is alleged to have occurred on 9 November does not amount to an offence under s 359B of the *Criminal Code*.

Section 359B provides:

> **"359B What is unlawful stalking**
>
> ***Unlawful stalking*** is conduct -
>
> (a) intentionally directed at a person (the ***stalked person***); and
>
> (b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and
>
> (c) consisting of 1 or more acts of the following, or a similar, type-
>
> (i) following, loitering near, watching or approaching a person;
>
> (ii) contacting a person in any way, including, for example, by telephone, mail, fax, email or through the use of any technology;
>
> (iii) loitering near, watching, approaching or entering a place where a person lives, works or visits;
>
> (iv) leaving offensive material where it will be found by, given to or brought to the attention of, a person;
>
> (v) giving offensive material to a person, directly or indirectly;

(vi) an intimidating, harassing or threatening act against a person, whether or not involving violence or a threat of violence;

(vii) an act of violence, or a threat of violence, against, or against property of, anyone, including the defendant; and

(d) that-

(i) would cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to, or against property of, the stalked person or another person; or

(ii) causes detriment, reasonably arising in all the circumstances, to the stalked person or another person."

Although I was referred to the Magistrates Court brief concerning the facts in relation to this charge, and I have outlined the narrative of events which appears in the witness statements, it is important to be clear that the conduct in question is alleged to have occurred on 9 November 2008. Reliance is not placed upon conduct that is said to have consisted of an act or acts that occurred on earlier dates and I expressed no view as to whether it would be possible to rely upon any acts that occurred in New South Wales by virtue of s 12 of the *Criminal Code*. In any forthcoming prosecution for unlawful stalking it will be necessary for the prosecution to be precise concerning the conduct relied on for the purpose of s 359B and to particularise on what occasion or occasions it was engaged in and the acts which were alleged to constitute the relevant conduct.

I should not presume that the relevant conduct necessarily will be that particularised in paragraph 14 of the applicant's submissions, namely hiring a motorcar, purchasing a pocket knife and a camping guide, and driving to the caravan park where the complainant's daughter resided on 9 November and doing so whilst in possession of a weapon. It may be that conduct of a more general kind will be particularised involving his pursuit of his wife and daughter. However, for present purposes the acts identified in paragraph 14 of the applicant's submissions provide useful examples of alleged conduct which illuminate the applicant's principal submission as to why the conduct alleged did not constitute the offence of unlawful stalking. It is submitted that neither Ms Yvonne Taylor nor her daughter had any knowledge of that conduct until after the applicant's arrest for the alleged offence of unlawful stalking.

In *R v Davies* [2004] QDC 279 at page 7, McGill DCJ stated certain matters upon which particular reliance is placed by the applicant.

> "...it is not stalking unless the person concerned, the stalked person, is aware of what is going on and is reacting to that awareness so as to satisfy paragraph (d)... It seems to me that it is not stalking to engage in conduct, the stalked person is entirely unaware of merely because once the stalked person finds out about it later the stalked person is unhappy about it".

That passage does not in terms state that the stalked person must be aware of the conduct at the actual time it is going on. The second sentence expresses a negative proposition in a

case in which the stalked person is "entirely unaware" of conduct at the time later finds out about it and, as a result, is "unhappy about it".

Earlier passages in his Honour's judgement raised the significant issue of whether there must be some temporal connection between the relevant conduct and the knowledge or awareness of the stalked person. His Honour refers at page 6 to extrinsic material which states that conduct intended by the offender "should be known to the potential victim, and which is in fact known by the victim". As his Honour said, it is important not to substitute the words of the Explanatory Note for the words of the section, however, that passage does suggest that the legislative intent was that the conduct would be conduct which was known to the victim, that is the stalked person. However, the statute does not state that any such knowledge or awareness must exist at the time of the conduct. As his Honour said (at page 6, line 45) in some circumstances "there might be some lapse in time between the particular act identified in paragraph (c) and the time when the stalked person became aware of it". The example is given of a stalked person who was not at the relevant place at the particular time for the offence constituted by an act referred to in s 359B(c)(iii).

His Honour continued:

> "But it seems to me that even in relation to that, unless the stalked person is made aware of it at some time, then it is difficult to see how either of the detriments could be suffered".

The offence under s 359B is not complete unless one or other of the elements in subparagraph (d) is satisfied. Sub-paragraph (d)(i) arguably applies in a case in which the stalked person is unaware of the conduct in circumstances in which, if it had been known, the conduct "would cause the stalked person apprehension or fear, reasonably arising in all the circumstances of violence to, or against property of, the stalked person, or another person."

However, I proceed on the basis that there is an argument based upon the decision in *Davies* and the extrinsic material that the offence requires the conduct to be known at some time by the victim.

In this case the relevant conduct, if proved and known to the complainant, would cause detriment, reasonably arising in all the circumstances to her, given the facts of the case and the definition of "detriment" in s 359A. This is not a case, like *Davies*, in which the complainants were simply angry and upset. The conduct would also cause the stalked person apprehension or fear, reasonably arising in all the circumstances, of violence to her, or another person.

It may be that on 9 November 2008 neither the complainant nor the defendant knew of any of the relevant conduct listed in paragraph 14 to the applicant's submissions until after the applicant's arrest. They may have had an apprehension that he was likely to follow them to the Bundaberg region, but I am prepared to accept for the purposes of this application, that

neither of them knew of the specific conduct until after the applicant's arrest. If this be so, then on the applicant's legal argument, the applicant was arrested before the offence of unlawful stalking was complete. However, that does not necessarily preclude the conclusion that the offence of unlawful stalking was in fact completed upon their becoming aware of those matters.

In summary, the prosecution of the unlawful stalking case must clearly particularise the relevant conduct, and at present that conduct is alleged to have occurred only on 9 November 2008 at Bargara. The offence is not established simply by proof of conduct that consists of one or more of the matters set out in s 359B(c), or acts of a similar type. The relevant conduct must have had the causative potency referred to in s 359B(d)(i), or actually cause detriment, reasonably arising in the circumstances, to the stalked person, or another person. The section does not in terms state that the stalked person must know of the relevant conduct. In many cases, for example, where they are aware that they are being followed or are contacted, they will. Whilst this section does not in terms state that the stalked person must know or be aware of the relevant conduct, such a requirement is arguably implicit in each of the alternative elements of s 359B(d). Such a conclusion derives support from the extrinsic material referred to in the judgment of McGill DCJ in *R v Davies*. The section does not explicitly or implicitly state that the stalked person must be aware of the relevant conduct at the time it occurs. In many cases this will be the fact of the

matter. McGill DCJ in *Davies* states, "it is not stalking unless the person concerned, the stalked person, is aware of what is going on and is reacting to that awareness so as to satisfy paragraph (d)". Taken in isolation, that sentence suggests a requirement of awareness at a time the conduct is occurring. However the earlier passage (at page 6, lines 45 to 51) leaves open some lapse between the time of the particular act and the time when the stalked person becomes aware of it.

In some cases, the lapse of time may, in all the circumstances, preclude the causing of detriment to the stalked person or undermine the conclusion that the conduct would cause the stalked person apprehension. However, in other cases a lapse of time may not preclude such a finding, even in a case in which the defendant has been taken into custody. The material before me does not permit me to reach any definite assessment of the strength of the Crown case on this aspect.

As Thomas JA observed in *Williamson v Director of Public Prosecutions* (supra) at 103 [22] an exercise of this kind includes "forming provisional assessments upon very limited material of the strength of the Crown case". The point of law raised by the applicant is one of substantial merit. The point may need to be determined in other proceedings. For present purposes, and on the assumption that neither the complainant nor her daughter had any knowledge of the relevant conduct until the applicant’s arrest, it is arguable that

knowledge after that time was apt to complete the offence. The competing argument is that there has to be a closer temporal connection and that knowledge obtained after the applicant's arrest is not sufficient. I am not persuaded that the Crown's case is very weak, however I acknowledge that it confronts these issues of law and fact, and is limited to conduct by the applicant on 9 November 2008 and its likely or actual consequences to the stalked person.

I turn to the possession of weapons charge. The Crown's case on this is undoubtedly strong.

The risk of risk to the safety and welfare of individuals and potential interference with witnesses

I consider that there is a very real threat to the welfare and safety of the complainant and those who may seek to assist her. I do not have any degree of assurance that, if released on bail, the applicant will maintain his distance from the complainant and will not again attempt to seek her out.

I reach this view against the background that I have indicated of domestic violence, the applicant's conduct in arriving from interstate armed with a semi-automatic shot gun, and the manner in which he went about concealing his presence at Bargara. I consider that such a risk is unacceptable even where I might assume that steps have been taken for the complainant to be in some form of shelter or protection. It remains the fact that the applicant, by his past conduct, by contact with his daughter, has an intelligence and capacity to

seek her out, and by seeking her out may well be able to ascertain the whereabouts of the complainant. His ability to access the whereabouts of his daughter gives rise to a concern of potential interference with witnesses and endangering the safety and welfare of persons who may attempt to stop him talking to his daughter.

In response to that identified risk, the applicant's submission is that it is anticipated that, if granted bail, he will immediately be arrested and extradited to New South Wales for the New South Wales offences that I have referred to. Those offences relate to the complainant, and the applicant submits that those offences are far more serious than the offences that are the subject of this application.

It should not be taken for granted that if the applicant obtains bail he will immediately be arrested and be extradited to New South Wales. I was told at the hearing that the New South Wales authorities may take the attitude that extradition to New South Wales should await the outcome of the Queensland proceedings, which are obviously further advanced. Even if I was to assume, without an evidentiary basis, that the applicant if granted bail would immediately be arrested and extradited to New South Wales, this does not remove the risk to the safety and welfare of the complainant, or the risk that the applicant will commit further offences. Whilst the applicant's counsel submits that the New South Wales offences are far more serious than the offences the subject of this application, it is not said that no application for bail would

be made in New South Wales. No undertaking in that regard is proffered and the proposed bail order is not conditioned on the applicant surrendering himself into the custody of New South Wales police so as to execute the New South Wales arrest warrant and to not thereafter, without further notice to the Queensland authorities, apply for bail in New South Wales.

It is not appropriate for me to predict or pre-empt the outcome of any application for bail in New South Wales. However, there is no assurance that the applicant will be taken into custody and extradited if bail is granted, or if he is, that he will be not granted bail in New South Wales.

In the light of the applicant's history of domestic violence and his conduct in November 2008 in pursuing and seeking out the complainant and his daughter, I consider that there is an unacceptable risk to their safety. On that occasion the applicant equipped himself with a semi-automatic shotgun and purchased a pocket-knife. I consider that the applicant poses an unacceptable risk of re-offending and a risk to the complainant and witnesses if released upon bail and that the proposed conditions are insufficient to make that risk acceptable.

The risk of failure to appear is ameliorated by conditions including a proposed surety. There is some risk of a failure to appear. The applicant, however, has some family ties in Queensland and a reporting condition would moderate the risk of a failure to appear.

Conclusion

I conclude that the applicant presents an unacceptable risk of committing further offences and of threatening the safety and welfare of the complainant and witnesses. The complainant has used a firearm in the past to shoot into a caravan in which he believed the complainant was staying and he took a firearm with him in search of the complainant in November 2008. He armed himself with a knife and has a history of domestic violence. The risk of his re-offending and causing harm to the safety and welfare of witnesses is unacceptable.

Other matters

The applicant has been in custody since his arrest on 9 November 2008. It seems unlikely that a trial in the District Court will take place before late 2009, by which time the applicant will have spent approximately one year or more in custody on remand.

The applicant submits there is a significant risk that, if convicted, the time he will have spent in pre-sentence custody will exceed the penalty that may be imposed. I take that submission into account. I also take into account that the offence of stalking, if proven, is likely to be regarded as an extremely serious one by reason of the applicant's conduct including his possession of a shotgun, ammunition and a knife.

I also take account of the possibility that the applicant's legal submissions on the offence of stalking will be upheld

and that the offence may not be proven. If the applicant is not convicted, or, if convicted, has spent more time in pre-sentence custody than the penalty that is imposed, these matters may be taken into account in later proceedings in New South Wales. However, even if they are not, I do not consider that the risk, that if convicted the time the applicant will have spent in pre-sentence custody will exceed the penalty, is such as to justify a grant of bail.

It is important that matters be resolved as soon as possible. It is unclear when the weapons offence will be determined. The future course of the matter may include submissions to the Director of Public Prosecutions concerning the unlawful stalking offence and an application of the kind made in *Davies* case under s 590AA.

In the meantime, the applicant faces two serious offences and, for the reasons that I have given, I consider that he poses an unacceptable risk that, if released on bail, he will commit a further offence or endanger a person's safety.

If the applicant is not in a show cause situation then I refuse bail because I am satisfied that there is such an unacceptable risk. If, however, the applicant is in a show cause situation, I am satisfied that he has not established that his detention in custody is not justified. Accordingly, I dismiss the application.
