SUPREME COURT OF QUEENSLAND

CITATION:	*Director of Public Prosecutions (Cth) v Dang* [2013] QCA 32
PARTIES:	**DIRECTOR OF PUBLIC PROSECUTIONS (CTH)** (appellant) **v** **TAM MINH DANG** (respondent)
FILE NO/S:	Appeal No 1809 of 2013 SC No 11837 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from Bail Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	6 March 2013
DELIVERED AT:	Brisbane
HEARING DATE:	6 March 2013
JUDGE:	Muir JA and Atkinson and Martin JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – OTHER MATTERS – where the respondent is charged with attempting to possess a commercial quantity of heroin – where evidence before the primary judge suggested that the street value of the heroin was at least $15,500,000 – where evidence put before the primary judge that the respondent was a flight risk – where strict conditions of bail were imposed by primary judge – where the surety was the spouse of a convicted drug trafficker – where no challenge was made to that surety before the primary judge – where the primary judge granted the plaintiff bail – whether the primary judge erred in exercising their discretion to grant bail *Criminal Code* 1995 (Cth), s 11.1(1), s 307.5 *Fernandez v Director of Public Prosecutions* (2002) 5 VR 374; [2002] VSCA 115, cited *House v The King* (1936) 55 CLR 499; [1936] HCA 40, applied

Keys v Director of Public Prosecutions (Qld) [2009] QCA 220, considered
R v Abbott (1997) 97 A Crim R 19; [1997] VSC 45, cited

COUNSEL: G R Rice SC for the appellant
A J Kimmins for the respondent

SOLICITORS: Director of Public Prosecutions (Commonwealth) for the appellant
Bosscher Lawyers for the respondent

MARTIN J: The respondent is charged that on 10 December, 2012, he attempted to possess a commercial quantity of a border controlled drug, namely, heroin, that had been unlawfully imported contrary to sections 307.5 and 11.1(1) of the *Criminal Code* (Cth).

In brief, the circumstances of the alleged offence are as follows: In November, 2012, Customs officers conducted an examination of a shipping container of furniture which had arrived in Brisbane from Vietnam. They discovered that the furniture contained 78 packages. Each package contained about 750 grams of powder. The total weight was 58.6 kilograms.

The powder contained heroin in concentrations of between 50.9 per cent and 74.2 per cent. The total pure heroin involved is of the order of 36.25 kilograms.

That heroin powder was replaced with an inert substance, and the consignment was sent on. Shortly after that, a courier truck collected the consignment and delivered it to a private residence at Robertson.

The furniture was then loaded into a trailer and driven by a co-accused to a site in Munruben. The respondent and another co-accused accompanied in another vehicle.

On the same day, Australian Federal Police officers attended at the Munruben property and attempted to gain entry to a detached garage. It was padlocked shut. After some time the padlock was unlocked and three men, one of whom was the respondent, were found to be inside, standing near the furniture.

The furniture had been smashed open, and a number of packages had been removed and placed on the floor. A heat seal press and a quantity of plastic heat sealed bags were nearby.

In the garage was a hired station wagon with Victorian registration. Inquiries with the rental company confirmed that the vehicle was hired by the respondent the day before the arrival of the shipping container for a period of 30 days.

The inside door trims of the vehicle had been removed and there was evidence that would support a finding that the drugs were to be planted in the door panels.

The evidence before the learned primary Judge was that the street value of the heroin was estimated to be at least $15,500,000.

An appellant who challenges the exercise of discretion in a bail application has significant hurdles to clear before the decision below will be disturbed. In order to succeed, an appellant must establish a relevant error of law, or a misunderstanding of pertinent facts, or show that the discretion was exercised in the way that was so unreasonable as to in itself amount to an error of law or misunderstanding of fact: *House v The King* (1936) 55 CLR 499.

The nature of a bail hearing was described in this way by Chesterman JA in *Keys v DPP* [2009] QCA 220: "[15] The judgment to grant or refuse bail necessarily includes forming provisional assessments upon very limited material, of the strength of the Crown Case and of the applicant's character. It is an assessment of a risk according to an imprecise standard.

[16] The character of the assessment required under s 16 of the *Bail Act* coupled with its discretionary nature, makes the judgment particularly unsusceptible to the appellate process."

The interlocutory nature of bail hearing constitutes another difficulty, that an appellant has in a case like this. Bail is not a final order. If a person who receives bail fails to comply with the conditions of that bail, then he or she may be subject to a revocation or the imposition of further conditions.

Further, the granting of bail is a matter of practice and procedure. These two considerations, both independently and in combination, operate to impose on any Appellate Court a severe restraint upon interference with the order appealed from: *R v Abbott* (1997) 97 A Crim R 19 and *Fernandez v DPP* (2002) 5 VR 374 at 390.

The first ground upon which the appellant relies, namely, that the respondent presented as an unacceptable risk by failing to appear was specifically argued before the learned primary Judge. The contentions were set out in the written outline and in oral argument. Notwithstanding the material contained in Mr Illidge's affidavit, her Honour concluded that the very strict conditions she intended to impose would work to ameliorate the risk which might otherwise exist.

The appellant has not demonstrated that her Honour made an error of the type described in *House v The King* in reaching that conclusion.

The second ground, namely, that the learned primary Judge failed to take into account that the surety was the spouse of a convicted drug trafficker, was not argued below. A close reading of Mr Illidge's affidavit reveals the connection between the proposed surety and unlawful activity. No submission was made that the possible surety was unsuitable. A judge is entitled to proceed on the basis that a proposed surety is acceptable, unless it is explicitly contended otherwise. If that occurs, then consideration of suitability would, of course need to occur. But the condition of bail is not that any particular person provide a surety, but simply that a surety be provided.

The appellant was given the opportunity on at least two occasions to comment upon the proposed conditions of the bail order; and apart from a comment about the amount of the surety, no variation was sought.

I am not satisfied that the appellant has demonstrated an error of the type which would allow this Court to interfere with the decision. I would dismiss the appeal.

MUIR JA: I agree.

ATKINSON J: I agree.

MUIR JA: The order of the Court is that the appeal be dismissed.