SUPREME COURT OF QUEENSLAND

CITATION:	*Le v Director of Public Prosecutions (Qld)* [2013] QCA 280
PARTIES:	**CUONG LE** (appellant) **v** **DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)** (respondent)
FILE NO/S:	Appeal No 8382 of 2013 SC No 7919 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from Bail Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	20 September 2013
JUDGES:	Muir JA and Philippides and Henry JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – BAIL – REVOCATION, VARIATION, REVIEW AND APPEAL – where the appellant is charged with a number of drug related offences – where the appellant was refused bail in the Supreme Court by the primary judge – where the appellant appeals the decision of the primary judge on the grounds the primary judge erred in combining the regard given to the seriousness of the alleged offences with the strength of the evidence against him and the refusal of bail is so unjust as to show error – whether the primary judge erred in refusing bail *Bail Act* 1980 (Qld), s 9, s 16(1), s 16(2) *House v The King* (1936) 55 CLR 499; [1936] HCA 40, cited *Sica v Director of Public Prosecutions (Qld)* [2011] 2 Qd R 254; [2010] QCA 18, cited *Williamson v Director of Public Prosecutions (Qld)* [2001] 1 Qd R 99; [1999] QCA 356, cited
COUNSEL:	A Boe, with A D Anderson, for the appellant P J McCarthy for the respondent

SOLICITORS: Boe Williams Lawyers & Advocates for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **MUIR JA:** I agree that the appeal should be dismissed for the reasons given by Henry J.

[2] **PHILIPPIDES J:** I agree that for the reasons given by Henry J the appeal should be dismissed.

[3] **HENRY J:** The appellant appeals the decision of a Supreme Court Judge of 29 August 2013 refusing him bail.

The alleged offending

[4] The appellant is charged with:

1. two counts of trafficking, in heroin and methylamphetamine respectively, between 22 April 2013 and 8 August 2013;
2. thirty-eight counts of supplying heroin, variously on 4 July 2013 (x 1), 9 July 2013 (x 1), 11 July 2013 (x 2), 14 July 2013 (x 2), 16 July 2013 (x 1) 17 July 2013 (x 3), 18 July 2013 (x 2), 19 July 2013 (x 2), 20 July 2013 (x 4), 21 July 2013 (x 4), 31 July 2013 (x 1), 1 August 2013 (x 4), 2 August 2013 (x 4), 3 August 2013 (x 2), 5 August 2013 (x 3) and 6 August 2013 (x 2);
3. one count of the aggravated supply of methylamphetamine on 6 August 2013;
4. two counts of possession of heroin and methylamphetamine respectively in aggravated quantities on 8 August 2013;
5. two counts of production of heroin and methylamphetamine respectively on 8 August 2013; and
6. five counts of illicit possession of various items on 8 August 2013, namely a semi automatic handgun, ammunition, a motor vehicle used in connection with trafficking, scales, cryovac bags, a heat sealer and mobile phone used for trafficking and a sum of money suspected of being tainted property.

[5] The prosecution case derives principally from police surveillance of the appellant during the three and a half month trafficking period. The evidence includes covertly recorded conversations in which the appellant is heard to be arranging for the purchase, physical acquisition and sale of drugs.

[6] The appellant was repeatedly observed during the day driving about the greater Brisbane region meeting at various locations with people he was allegedly selling drugs to. He met with some apparent customers more than once a week. Some of his alleged customers were street level drug dealers.

[7] The appellant was also seen to travel with an associate to Sydney about twice a month and there meet with an unidentified person, apparently acquiring large amounts of methylamphetamine and or heroin before hiring a rental car and driving back to Brisbane with the associate.

[8] On 6 August 2013 the appellant allegedly arranged for a male associate to fly to Sydney with over $800,000 cash in his possession. The associate was then supplied

with a large quantity of methylamphetamine in exchange for the money before returning to Queensland by train and bus. He was intercepted by police on arrival at the Surfers Paradise bus terminal on 7 August in possession of three kilograms of methylamphetamine in one kilogram packages. The appellant was seen in the area apparently waiting to pick up his associate but decamped on seeing the police arrest.

[9] On 8 August 2013 the appellant arranged to be supplied with a large quantity of dangerous drugs. He met with two male persons in a rented BMW sedan. The passenger from the BMW entered the appellant's motor vehicle holding a plastic bag inferentially containing the drugs the appellant was to purchase. The male person returned to the BMW. It was intercepted and during a search of the vehicle $260,000 cash was located.

[10] The appellant was followed back to the car park of an inner city high-rise residential unit building at which he owned a unit rented to others. During the trafficking era he had been repeatedly surveilled going to a storage area in the car park of that building. He was intercepted and found in possession of a shopping bag containing approximately 1.6 kilograms of what is likely methylamphetamine. The police then executed a search warrant upon the storage area. There they found $58,360 cash, 262.1 grams of heroin separated into half ounce lots, 482.9 grams of packaged methylamphetamine, scales, plastic bags, heat sealing equipment, anti surveillance equipment, a replica handgun, bullets and a semi automatic handgun.

The appellant's circumstances

[11] The appellant is a 25 year old man who was born, raised and educated in Brisbane. After leaving high school he completed a mechanic's apprenticeship and worked for some time as a mechanic but in the last two years or so has only been working on his family's fishing trawlers on a casual basis.

[12] He has a minor criminal history that includes an offence on 22 March 2012 for possessing property suspected of having been used in connection with the commission of a drug offence. He has no past breaches of bail.

[13] He has been in a de facto relationship for three years with Ms Trang Ngo with whom he has a 22 month old daughter. They had been residing at a house at Coomera owned by Ms Ngo up to the time of his arrest. She has since taken steps to rent her Coomera property and is residing with the appellant's brother at Eight Mile Plains.

[14] The appellant's major assets are a 2008 model Holden Commodore, a jet ski, a Haines Hunter boat and the above-mentioned apartment in the Brisbane CBD acquired by him in about 2011 or 2012 for $380,000. He owes about $280,000 on its mortgage. His partner, Ms Ngo, owns and operates a fish and chip shop at Beenleigh. She is prepared to use the equity in her home towards a surety of up to $100,000 for the appellant's bail. The appellant's Aunt and her husband are also prepared to provide a cash surety of $25,000.[1]

[15] The appellant was arrested and went into custody on 8 August 2013. He has not specifically deposed to whether he intends to contest the charges but, inferring that to be his intention, he is unlikely to face trial until at least late next year.

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[1] On the hearing of this appeal a friend of the appellant's sister also deposed to being prepared to provide a surety through the equity in her home.

The decision below

[16] The appellant was not in a show cause position and accordingly was entitled to be granted bail[2] unless the primary judge was satisfied there was an unacceptable risk of the defendant failing to appear or surrender into custody or committing an offence or of the other adverse possibilities identified in s 16(1) of the *Bail Act* 1980 (Qld).

[17] In assessing whether there is an unacceptable risk s 16(2) of the Act identifies relevant considerations as including:

> "(a) the nature and seriousness of the offence;
> (b) the character, antecedents, associations, home environment, employment and background of the defendant;
> (c) the history of any previous grants of bail to the defendant;
> (d) the strength of the evidence against the defendant …"

[18] The prosecution emphasised the first and last of those considerations in submitting there was an unacceptable risk of the appellant failing to appear.

[19] The primary judge noted the likelihood of a long delay before the disposition of the charges, the fact the appellant did not have a significant criminal history or prior breach of bail, the appellant's significant familial and financial ties to the jurisdiction and the offering of sureties and other stringent bail conditions.

[20] His Honour acknowledged it was difficult at such an early stage to assess the strength of the prosecution case but was clearly troubled by the nature and seriousness of the alleged offending. He observed:

> "The combined effect of the matters which I have mentioned in the period of some three and a half months up to the time of the applicant's arrest are, it seems to me, very concerning. I accept that one cannot reach a firm conclusion about the strength of the prosecution case. It seems to me, however, that I have to make an assessment of the risk of flight, which is the major issue on this application, based on such information as I have.
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> The length of period of the observations, while not particularly long, is nevertheless not insubstantial. The amounts of money which appear to be associated with transactions involving the applicant are really quite large, and of significant concern. So are the quantities of drugs, if that is what they are, firstly said to be found in his possession, both in his car and in the storage area, and secondly, in the transaction shortly, that is, a couple of days, before his arrest. I am satisfied that the risk of flight is unacceptable, notwithstanding the bail conditions offered. By reason of the combined effect of all of those matters, I accordingly refuse the application."

The appeal

[21] The decision whether or not to grant bail pursuant to s 16 of the *Bail Act* 1980 (Qld) involves an exercise of judicial discretion in respect of a necessarily imprecise assessment of risk.[3] It is an assessment about which minds may differ. On an

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2 *Bail Act* 1980 (Qld) s 9; *Williamson v Director of Public Prosecutions (Qld)* [2001] 1 Qd R 99, 101.

3 *Sica v Director of Public Prosecutions (Qld)* [2010] QCA 18, [15].

appeal against such a decision it is not enough that judges on appeal might have exercised their discretion differently than the primary judge had they been presiding at first instance. To succeed, an appellant must either:

(i) establish some specific error in the exercise of the discretion, by reason of the application of wrong principle, reliance upon extraneous or irrelevant matters, misapprehension of the facts or omission of a material consideration; or

(ii) show the decision is so unreasonable or plainly unjust that a failure to properly exercise the discretion may be inferred.[4]

The appellant purports to do both.

[22] His grounds of appeal are, in effect, that:

(i) the primary judge erred by conflating the regard to be given to the seriousness of the alleged offences with the assessment of the strength of the evidence against the appellant; and

(ii) the refusal of bail is so plainly unjust as to bespeak error.

Specific error?

[23] In first considering the alleged specific error, regarding consideration of the strength of the evidence, it is noteworthy that at the outset of the proceeding below his Honour checked with the appellant's counsel whether he wanted to proceed or await the arrival of evidence such as drug analysis. The appellant wanted to proceed. He is not to be criticised for that but it did have the consequence that the presiding judicial officer was required to make a decision on the material then before him.

[24] In the course of submissions below, when the appellant's counsel submitted it was almost impossible to assess that there is a strong case, it appeared the submission did not go to what the material suggested about the likely strength of the evidence, but rather, to the difficulty in making the assessment at such an early stage. It is an important distinction. Where a defendant applies for bail at a time when a prosecution brief of evidence is yet to be assembled the court must do the best it can in assessing risk on the material then available. His Honour was correct to observe in the course of submissions:

> "The point is, I have to act on provisional material. … I have to act on what it seems to show."

[25] The fact that the early timing of a bail application makes it difficult to assess the strength of the evidence does not mean the court must conclude the evidence is not strong. It means merely that the exercise of assessing the strength of the evidence is unavoidably imprecise.

[26] As to the specific complaint made by the appellant, it was submitted that while his Honour acknowledged the limitations in the material in allowing a firm conclusion to be reached about the strength of the prosecution case he had no real regard to those limitations. It was submitted, in effect, that the importance of the distinction between the strength of the evidence and the seriousness of the offence became lost and in assessing the seriousness of the alleged offending his Honour gave no weight to the acknowledged limitation in being able to assess the strength of the evidence about that offending.

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4 *House v The King* (1936) 55 CLR 499, 505.

[27] The error complained of is not borne out on a review of his Honour's ex tempore reasons. It is apparent from those reasons that his Honour was well aware there were competing considerations to be taken into account, one of which was the strength of the evidence. His Honour acknowledged that a firm conclusion could not be reached about the strength of the prosecution case. His Honour's closing observations emphasised the large amounts of money and drugs found, thus confirming he gave greater weight to those aspects of the alleged offending about which the evidence before him appeared strongest. The fact that his Honour ultimately gave obviously significant weight to the nature and seriousness of the alleged offending in his assessment of whether the risk of flight was unacceptable does not mean he therefore failed to have regard to the other considerations he had acknowledged.

Unjust refusal?

[28] Turning to the more general ground, that the refusal of bail was so plainly unjust as to bespeak error, there were undoubtedly significant considerations in the appellant's favour. He has met his bail in the past. He does not have a significant criminal history. He has strong family and financial ties to the jurisdiction. The imposition of sureties and stringent reporting conditions would reduce the prospect of him failing to appear in answer to the charges. If the charges go to trial, the trial will not be heard for at least another year.

[29] As against this, the evidence against him obviously includes visual surveillance and recordings of conversations. The guilty interpretation put on such evidence by police is sometimes unsustainable, however, in this case the actual seizures of drugs and money demonstrates that the prosecution evidence, at least as it relates to the closing days of the surveillance period, is strong. The evidence of the final interception of the appellant and the discovery of the stock, handgun and other tools of trade of a serious drug dealer is likely very strong.

[30] Even if the appellant were convicted in respect of his activity detected in the final days of the surveillance he would be facing a lengthy prison sentence. He has a strong motivation to not appear in answer to the charges.

[31] Against this background, minds may differ as to whether the appellant presents an unacceptable risk of flight, particularly allowing for his ties to the jurisdiction and the effects of stringent bail conditions. However, in light of the above considerations it cannot be inferred that there was a failure to properly exercise the discretion.

Conclusion

[32] The decision to refuse bail was not unreasonable, unjust or infected by error.

[33] I would dismiss the appeal.