

SUPREME COURT OF QUEENSLAND

CITATION: *Da Silva v Director of Public Prosecutions; Da Silva v Director of Public Prosecutions; Spence v Director of Public Prosecutions* [2013] QSC 316

PARTIES: **In Application No 10279 of 2013:**

BRUNO ALEXANDRE DA SILVA

(Applicant)

v

DIRECTOR OF PUBLIC PROSECUTIONS

(Respondent)

In Application No 10280 of 2013:

NUNO MIGUEL DA SILVA

(Applicant)

v

DIRECTOR OF PUBLIC PROSECUTIONS

(Respondent)

In Application No 10281 of 2013:

MICHAEL KENNETH SPENCE

(Applicant)

v

DIRECTOR OF PUBLIC PROSECUTIONS

(Respondent)

FILE NO/S: BS 10279/13
BS 10280/13
BS 10281/13

DIVISION: Trial Division

PROCEEDING: Application for bail

DELIVERED ON: 8 November 2013 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 8 November 2013

JUDGE: Margaret Wilson J

RULING: **None of the applicants is a participant in a criminal organisation within the meaning of section 16(3A).**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – BAIL – BEFORE TRIAL – OTHER CASES – where the three applicants were each charged with trafficking offences – where the applicants applied for bail – where the Crown submitted that each of the applicants “is a participant in a criminal organisation” within the meaning of section 16(3A) of the *Bail Act* 1980 (Qld) –

construction of section 16(3A) – the time at which an applicant must be a participant in a criminal organisation – whether reference to extrinsic materials permissible – whether purposes of the *Bail Act* or recent amendments require modification of the plain grammatical meaning of the statute

Acts Interpretation Act 1954 (Qld) s 14A, s 14B
Bail Act 1980 (Qld) s 9, s 16(1), s 16(2), s 16(3), s 16(3A),
Criminal Code 1899 (Qld) s 60A
Criminal Code (Criminal Organisations) Regulation Act
 2013 (Qld)
Criminal Law (Criminal Organisations Disruption)
Amendment Act 2013 (Qld)
Criminal Organisation Act 2009 (Qld)

Mills v Meeking (1990) 169 CLR 214; [1990] HCA 6

COUNSEL: In Applications No 10279 and 10280 of 2013:
 P Callaghan SC for the applicant
 T Fuller QC for the respondent

In Application No 10281 of 2013:
 J Hunter QC for the applicant
 T Fuller QC for the respondent

SOLICITORS: In all applications:
 Robertson O’Gorman for the applicants
 Director of Public Prosecutions (Queensland) for the
 respondent

MARGARET WILSON J: There are three applicants for bail. Each has been charged with trafficking in amphetamines between 26 June 2012 and 20 October 2013. There is a preliminary question common to each application: whether the applicant is in a show cause situation, that is, whether section 16(3A) of the *Bail Act* applies.

By section 9 of the *Bail Act*, there is a presumption in favour of bail. That presumption is a rebuttable one, and it is subject to other provisions of the Act. By section 16(1), the presumption is rebutted and bail must be refused if the Court is satisfied (a) that there is an unacceptable risk of failure to appear, the commission of an offence, danger to the safety or welfare of anyone claimed to be a victim of the offence or to the safety or welfare of anyone else, or interference with witnesses or other obstruction to the course of justice, or (b) that the applicant should remain in custody for his own protection.

Section 16(2) sets out factors to be taken into account in determining whether there is such an unacceptable risk. They include, in paragraph (b), the character, antecedents and associations of the applicant.

Section 16(3) and section 16(3A) are referred to as show cause provisions. They provide as follows:

(3) “Where the defendant is charged—

- (a) with an indictable offence that is alleged to have been committed while the defendant was at large with or without bail between the date of the defendant's apprehension and the date of the defendant's committal for trial or awaiting trial for another indictable offence; or
 - (b) with an offence to which section 13 applies; or
 - (c) with an offence in the course of committing which the defendant is alleged to have used or threatened to use a firearm, offensive weapon or explosive substance; or
 - (d) with an offence against this Act; or
 - (e) with an offence against the *Criminal Organisation Act 2009* section 24 or 38; or
 - (f) with an offence against the Criminal Code section 359 with a circumstance of aggravation in section 359(2);
- the Court or police officer shall refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified and, if bail is granted or the defendant is released under section 11A, must include in the order a statement of the reasons for granting bail or releasing the defendant.

- (3A) If the defendant is a participant in a criminal organisation, the court or police officer must—
- (a) refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified; and
 - (b) if bail is granted or the defendant is released under section 11A
 - (i) require the defendant to surrender the defendant's current passport; and
 - (ii) include in the order a statement of the reasons for granting bail or releasing the defendant."

Subsection 16(3A) was introduced by the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013*. It commenced to operate on 17 October 2013.

In each of the three matters now before the Court, the question is whether the applicant "is a participant in a criminal organisation" within the meaning of section 16(3A) of the *Bail Act*.

"Participant" bears the meaning in section 60A of the *Criminal Code*. It is as follows:

"Participant, in a criminal organisation means—

- (a) if the organisation is a body corporate – a director or officer of the body corporate; or
- (b) a person who (whether by words of conduct, or in any other way) asserts, declares or advertises his or her membership of, or association with, the organisation; or
- (c) a person who (whether by words or conduct, or in any other way) seeks to be a member of, or to be associated with, the organisation; or
- (d) a person who attends more than 1 meeting or gathering of persons who participate in the affairs of the organisation in any way; or
- (e) who takes part in the affairs of the organisation in any other way; but does not include a lawyer acting in a professional capacity."

The definition of “criminal organisation” in s 1 of the *Criminal Code* is as follows:

“***Criminal organisation*** means—

- (a) an organisation of three or more persons:
 - (a) who have as their purpose or one of their purposes engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in, serious criminal activity as defined under the *Criminal Organisation Act 2009*; and
 - (b) who, by their association, represent an unacceptable risk to the safety, welfare or order of the community; or
- (b) a criminal organisation under the *Criminal Organisation Act 2009*;
- (c) an entity declared under a regulation to be a criminal organisation.”

Mr Fuller of Queen’s Counsel for the DPP submits that each applicant “is a participant in a criminal organisation” because (a) at the time of the alleged offence he was a member of the Hells Angels motorcycle club; alternatively (b) of the involvement of each other in the offending conduct.

The first alternative, membership of the Hells Angels motor club at the time of the alleged offence, invokes paragraph (c) of the definition of criminal organisation. The Hells Angels motorcycle club has been declared to be a criminal organisation under the *Criminal Code (Criminal Organisations) Regulation Act 2013*. However, on the evidence, the applicant Spence resigned as a member of that organisation on 7 October 2013 and both Da Silvas resigned as such on 8 October 2013. Subsequent surveillance evidence is consistent with their having done so.

The other alternative, involvement with each other in the offending conduct, seeks to invoke (a) of the definition of criminal organisation. Trafficking in amphetamines is engagement in “serious criminal activity” within the meaning of the Act.

The real argument relates to the time at which an applicant must be a participant in a criminal organisation if the show cause provision in section 16(3A) of the *Bail Act* is to apply.

Mr Fuller submitted that on the proper construction of section 16(3A) it is not necessary that the applicant is a current participant in a criminal organisation. In other words, it is not necessary that he be such a participant at the time of the application for bail. He submitted that section 16(3A) refers to a class of persons: those who associate with a criminal organisation. He submitted that someone “is a participant” if he falls within that definition. He submitted that it is not a requirement that the participation be evidenced at the time of the hearing of the bail application, and that it is not necessary that the person then be a current participant. In support of this he relied on paragraph (b) of the definition of “participant”, which he said points to past conduct. But in my view none of the paragraphs of the definition of “participant” is necessarily limited to past conduct. Unlikely as it may be, a person might well assert, declare or advertise his membership or association with such an organisation at the hearing of a bail application. In other words, paragraph (b) is not necessarily limited to past association.

The wording of section 16(3A) can be contrasted with that of section 16(3). Subsection (3) looks to past conduct; it requires the making of an allegation about past conduct. Subsection (3A) on the other hand requires proof of a fact.

In construing subsection (3A) it is proper to start by giving the words their plain meaning. It is expressed in the present tense. On its plain meaning it refers to someone being such a participant at the time of the application.

By section 14A of the *Acts Interpretation Act*, in the interpretation of an Act, the interpretation that will best achieve the Act's purpose is to be preferred to any other. This principle applies whether or not the Act's purpose is expressly stated in it. In *Mills v Meeking* (1990) 169 CLR 214 at 235 Dawson J said of a similar provision in the *Interpretation of Legislation Act 1984* (Vic) that the purposes of an Act are to be taken into account in construing its provisions "not only where those provisions on their face offer more than one construction, but also in determining whether more than one construction is open." His Honour continued that close attention must still be paid to the actual words of the provision, and he said (inter alia) that if the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes, and it must be consistent with the wording otherwise adopted by the draftsman.

The purpose of an Act is to be gleaned from the Act as a whole. The *Criminal Law (Criminal Organisations Disruption) Amendment Act* had as its purpose the amendment of various statutes.

It is permissible to have reference to extrinsic materials for the purposes referred to in section 14B of the *Acts Interpretation Act*, namely,

- (a) "if the provision is ambiguous or obscure – to provide an interpretation of it; or
- (b) if the ordinary meaning of the provision leads to a result that is manifestly absurd or is unreasonable – to provide an interpretation that avoids such result; or
- (c) in any other case – to confirm the interpretation conveyed by the ordinary meaning of the provision."

In my view it is accordingly permissible to have regard to the explanatory notes which relate to the *Amendment Act*. They described the purposes of the *Amendment Act* as being to amend the various statutes. In relation to the *Bail Act*, "amend the *Bail Act 1980* to provide that where the court or a police officer is satisfied that a defendant, who is charged with any offence, is a participant in a criminal organisation, then:

- a mandatory condition of bail is that the defendant must surrender their passport or passports and must be detained until the condition is complied with; and
- the defendant will be in a show cause situation, that is, the court or police officer shall refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified."

Under the heading "Consistency With Fundamental Legislative Principles" the following was said in relation to amendments to the *Criminal Code*, the *Bail Act* and the *Penalties and Sentences Act*,

"The Bill impacts on the rights and liberties of individuals through amendments to ... introduce stricter bail laws ... All of the amendments outlined above are further justified as they apply only to participants in criminal organisations and thereby target only those individuals who offend while enjoying the support and encouragement of the criminal group. The amendments strike at the illegal

conduct of the criminal gang participant, communicate the wrongful and cowardly nature of their offending and promote community safety and protection from such offenders. The amendments operate prospectively and will only capture offenders who commit offences after the amendments commence.”

However in relation to the present applications for bail, participation in a criminal organisation is not an element of the offence charged. Further, section 16 of the *Bail Act* does not create an offence. Rather, it regulates the grant of bail, and must be seen as doing so in the overall context of the presumption of innocence which is at the heart of the criminal system, the need to ensure the integrity of the criminal justice system, and the need to ensure the protection of the community.

On its plain grammatical meaning section 16(3A) refers to a person who is a presently a participant in a criminal organisation, that is, someone who is a participant at the time of the application.

Association with a criminal organisation at the time of offending may, by section 16(2), be relevant to the assessment of risk under section 16(1). But that is a different question from the one I am presently addressing, which is whether the applicant is in a show cause situation. I am unpersuaded that the purposes of either the *Bail Act* as a whole or of the amendment recently introduced require modification of that plain grammatical meaning.

A further submission was made on behalf of the applicants that a show cause provision should be strictly construed because it interferes with what is otherwise prima face a right to bail. That may well be so, but in my view it is not necessary to rely on this in the face of clear grammatical meaning.

Accordingly, I rule that none of the applicants is a participant in a criminal organisation within the meaning of section 16(3A). None of them is in a show cause situation.