

SUPREME COURT OF QUEENSLAND

CITATION: *Re Best* [2014] QSC 125

PARTIES: **JOSHUA RUSSELL BEST**
(applicant)

v

DIRECTOR OF PUBLIC PROSECUTIONS (QLD)
(respondent)

FILE NO/S: BS 4949/14

DIVISION: Trial

PROCEEDING: Application for bail

DELIVERED ON: 10 June 2014

DELIVERED AT: Brisbane

HEARING DATE: 5 June 2014

JUDGE: Alan Wilson J

ORDER: **Bail is granted, on the conditions set out in a draft order initialled and placed on the court file**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – BAIL – before trial – generally – where the applicant must show cause why detention in custody is not justified

CRIMINAL LAW – PROCEDURE – BAIL – jurisdiction of Supreme Court – generally

Bail Act 1980 (Qld), s 9, s 16
Drugs Misuse Act 1986 (Qld)

R v Jurd [2007] QCA 228

COUNSEL: R Frigo of counsel for the applicant Joshua Russell Best
A J Robinson, solicitor, for the respondent DPP(Qld)

SOLICITORS: Potts Lawyers for the applicant
Office of the Director of Public Prosecutions for the respondent

- [1] **Wilson J:** Mr Best, 23, has been in custody since 30 April 2014 on two charges: entering a dwelling with intent and using/threatening violence whilst armed and in company, and robbery with actual violence (again, whilst armed and/or in company). He seeks bail.
- [2] The application is brought under the *Bail Act* 1980 (Qld). There is a presumed entitlement to bail for a person held in custody on criminal charges under s 9, but that presumption is rebutted if the court is satisfied, under s 16(1), that there is an

unacceptable risk that the defendant if released on bail would fail to appear and surrender into custody or would, while released on bail, commit an offence, or endanger the safety or welfare of a person who is claiming to be the victim of an offence, or interfere with witnesses or otherwise obstruct the course of justice.

- [3] The burden of establishing that there is an *unacceptable risk* ordinarily falls upon the Crown but, under ss 16(3) and 16(3A), that burden shifts in certain circumstances to the applicant, who must be refused bail if he or she cannot show cause that detention in custody is *not justified*.
- [4] Mr Best carries that burden because a weapon, a knife, was allegedly used during the incident which led to him being charged. Nevertheless, the primary focus remains upon the question whether or not any risk associated with bail and the matters set out in paragraph [2] is *unacceptable*.
- [5] The charges against Mr Best arise out of a home invasion on 17 April 2014, albeit that he was not physically present and the actual invaders were two other men with whom he is jointly charged.
- [6] It is said that they were acting on his behalf to collect a debt from one the occupants of the home and that he counselled and procured their undertaking the invasion, the threatening of an occupant by them with a knife, and their taking of motor vehicles; and, that there was communication between them and Mr Best during the invasion and, later, another communication between him and one of the occupants who, it is alleged, knew Mr Best and claims to have recognised his voice when one of the perpetrators spoke to him by telephone during the invasion; and, later, when Mr Best allegedly telephoned that occupant.
- [7] The DPP opposes bail primarily on the grounds that Mr Best is an unacceptable risk of failing to appear, of interfering with a witness or witnesses, and of reoffending.
- [8] His criminal history is germane to a consideration of those risks. He has been convicted of 30 criminal offences since 2006 including ten offences against the *Drugs Misuse Act 1986* (Qld) and six offences of violence. He has been sentenced to a term of imprisonment on four occasions. The most recent, however, was over four years ago and involved a wounding offence for which he was sentenced to 18 months imprisonment, but placed upon an immediate parole release order. His compliance with that order was not, however, impressive. The criminal history suggests he breached it on four occasions and eventually the breaches and other offending led to him serving four months in prison in 2012.
- [9] The criminal history shows two other relevant things: first, that in a period of six years he has been convicted of assaults upon five persons, predominantly females but also including police officers; and, secondly, that since 2006 he has regularly appeared in court charged with offences of violence, or drug offences. Despite attempts at rehabilitation through drug counselling and testing, he frequently failed to comply and returned positive results for drugs. He also has some history of reoffending while on bail in the past: in October 2009 he was charged with wounding and assault occasioning bodily harm and granted bail, but reoffended one month later and, again, the offending involved an assault occasioning bodily harm.

- [10] Balancing those considerations are the facts that, in recent years, his offences have been of a relatively low level or minor nature. Certainly, offending in 2013 involved contravention of a domestic violence order but it is doubtful that any of those breaches involved violence or the risk of serious harm to the victim – each attracted a fine only.
- [11] A surety of \$5,000 has been offered, he appears to be in a stable relationship, and there is evidence to show he can immediately return to employment as a concreter. Despite some minor instances of non-appearance in the past, the risk he would not appear to answer his charges and for all necessary court proceedings cannot be described as unacceptable.
- [12] The Crown says it has a strong case but counsel for Mr Best contends the opposite. The available evidence makes it impossible to be confident one way or the other. Certainly, the contention that the victim allegedly knew Mr Best and claims to have recognised his voice suggests the Crown case is not without its strengths. In particular it is alleged that shortly after the home invasion Mr Best telephoned the victim and enquired if he had reported the matter to the police and allegedly said, to the victim: “*Because if you have ...*”. It was argued, for Mr Best, that these words are ambiguous and, arguably, did not constitute a threat. That question would, if evidence to this effect is admitted, be a matter for a jury.
- [13] Relevantly – so far as the risk of Mr Best interfering with witnesses is concerned – the victim *did* eventually complain to the police and these charges were brought. Nor does anything in his criminal history suggest a propensity towards efforts to overbear or frighten witnesses. That risk is not, in those circumstances, unacceptable.
- [14] In light of Mr Best’s criminal history it has to be accepted that there is some risk that he may reoffend. That said, the risk cannot reasonably be described as unacceptable: the present charges did not involve any actual assault by him, and previous incidents involving actual assaults are now some time in the past and were not, themselves, of an order suggesting he is a person of whom the general community should go in fear.
- [15] He has been in custody for 42 days at the time of delivery of judgment. The charges are proceeding, presently, through the Brisbane Magistrates Court, but it is impossible to say how long Mr Best might remain in custody until his case comes to trial. If convicted, he may face a lengthy period of imprisonment.¹
- [16] Mr Best’s legal representatives, mindful no doubt of the concerns naturally excited by his criminal history, have proposed bail on strict conditions including a surety of \$5,000, daily reporting conditions, a curfew, and drug screening.
- [17] While the risks contended for by the Crown are certainly palpable, they are not unacceptable and I am satisfied that he has established that his detention in custody is not justified; and that the conditions proposed can adequately address the level of risk which exists including, in particular, the requirements for daily reporting, drug screening, and an absolute prohibition on any direct or indirect contact with the complainants or his co-accused.

¹ See *R v Jurd* [2007] QCA 228.

- [18] At the hearing the Crown representative signified acceptance of the appropriateness of those conditions, if bail is granted, and I will make an order in terms of the draft provided.