SUPREME COURT OF QUEENSLAND

CITATION:	*Sica v DPP (Qld)* [2010] QCA 18
PARTIES:	**MASSIMO SICA** (applicant/appellant) **v** **DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)** (respondent)
FILE NO/S:	Appeal No 14354 of 2009 SC No 13000 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from Bail Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	4 February 2010
JUDGES:	Chief Justice and Keane and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – BAIL – BEFORE TRIAL – APPEAL FROM SECOND BAIL APPLICATION – the appellant was arrested and charged with the murders of three siblings – the Crown's case is circumstantial – the appellant has a relevant criminal history – whether the primary judge exercised the discretion required by s 16 *Bail Act* 1980 (Qld) – whether delay due to a lengthy committal proceeding warrants the granting of bail – whether s 16(2) *Bail Act* 1980 (Qld) obliges a judge to assess the strength of the Crown case, regardless of the difficulty – whether the primary judge erred in not expressly mentioning factors relevant to the likelihood of the appellant absconding if granted bail – whether the risks the appellant might not appear and might interfere with prosecution witnesses are sufficient to justify his continued detention *Bail Act* 1980 (Qld), s 13, s 16(1)(a), s 16(2), s 16(3)(b) *Commonwealth DPP v Germakian* (2006) 166 A Crim R 201; [2006] NSWCA 275, distinguished *House v The King* (1936) 55 CLR 499; [1936] HCA 40, applied

Lacey v Director of Public Prosecutions (2007) 176 A Crim R 394; [2007] QSC 291, followed
Scrivener v DPP (2001) 125 A Crim R 279; [2001] QCA 454, followed
Williamson v Director of Public Prosecutions [2001] 1 Qd R 99; [1999] QCA 356, applied

COUNSEL: S Di Carlo for the appellant
B G Campbell for the respondent

SOLICITORS: Provestlaw for the appellant
Director of Public Prosecutions (Queensland) for the respondent

[1] **CHIEF JUSTICE**: I have had the advantage of reading the reasons for judgment of Chesterman JA. I agree that the appeal should be dismissed, for those reasons.

[2] **KEANE JA:** I have had the advantage of reading the reasons for judgment of Chesterman JA. I agree that the appeal should be dismissed, for those reasons.

[3] **CHESTERMAN JA**: On 30 December 2008 the appellant was arrested and charged with the murders of Neelma Singh, Kunal Singh and Sidhi Singh. The murders are alleged to have been committed on the evening of 20 – 21 April 2003. The three bodies were discovered by the appellant on 22 April 2003 in the spa bath of their family home at Bridgeman Downs.

[4] Ms Neelma Singh was strangled. At or about the time of her death she was struck violently on the head with a garden fork. Kunal Singh was also struck on the head with the fork but died from drowning in the bath. Sidhi Singh died from head injuries.

[5] DNA from each of the three deceased was found on the prongs of a fork located in its usual position in the garage of the house, where garden tools were kept.

[6] There was no sign of forced entry to the house.

[7] There is evidence that Kunal Singh and Sidhi Singh were attacked in their beds, presumably when they were asleep. Their bodies were then taken to the bath which was filled with water. There were no signs that any of the deceased resisted the attacks on them.

[8] The deceased were aged respectively 24, 18 and 12. They were alone in the house when murdered. Their parents were overseas, in Fiji, on business.

[9] On 2 January 2009 the appellant applied for bail. His application was dismissed by Douglas J on 27 January 2009. On 19 November 2009 the appellant made a second application for bail. That, too, was heard by Douglas J and dismissed on 14 December 2009. The appellant has appealed against the second refusal of bail.

[10] The committal hearing to determine whether the appellant should be put on trial for murder commenced in the Magistrates Court on 13 August 2009. It was adjourned part heard on 18 September 2009 and resumed on 22 January 2010.

[11] Section 16 of the *Bail Act* 1980 provides:

"(1) ... a court ... shall refuse to grant bail ... if ... satisfied –

(a) that there is an unacceptable risk that the defendant if released on bail –

(i) would fail to appear and surrender into custody;

(ii) would while released on bail –

(A) commit an offence; or

(B) ...

(C) interfere with witnesses ...

…

(2) In assessing whether there is an unacceptable risk with respect to any event specified in subsection (1)(a) the court ... shall have regard to all matters appearing to be relevant and in particular ... to ... the following considerations as appear to be relevant–

(a) the nature and seriousness of the offence;

(b) the character, antecedents, associations, home environment, employment and background of the defendant;

(c) …

(d) the strength of the evidence against the defendant;

(e) ...

(3) Where the defendant is charged –

…

(b) with an offence to which section 13 applies ... the court ... shall refuse to grant bail unless the defendant shows cause why (his) detention in custody is not justified".

Murder is an offence to which s 13 of the *Bail Act* applies.

[12] The nature of an appeal against the refusal of an application for bail is well established. In *Scrivener v DPP* (2001) 125 A Crim R 279 McPherson JA (with whom Davies JA and Cullinane J agreed) said (281-283):

"By virtue of s 16(3)(b), read with s 13 of the *Bail Act 1980*, the onus rested on the applicant to show cause why his detention in custody was not justified pending his trial for murder. The seriousness of the offence, especially in the case of an applicant with a record of violence like that of the appellant here, inevitably influences the way in which the discretion is exercised in such a case.

…

As a matter of history, bail was originally a form of habeas corpus. … At least when sought before, rather than in the course of, a criminal trial, it is therefore a civil proceeding and as such governed by the rules applicable to civil not criminal appeals. …

… this appeal … consequently falls to be determined as an appeal in accordance with the principles established in *House*. Judged by those principles, the decision … refusing bail … is not shown to be wrong. … It has not been shown that

> [the judge] took account of irrelevant factors; or failed to take account of relevant factors; or that in any other respect his judicial discretion was incorrectly exercised."

[13] In *Keys v Director of Public Prosecutions (Qld)* [2009] QCA 220 I said, with the agreement of Fraser JA:

> "[22] The appeal is against the exercise of judicial discretion conferred and circumscribed by the terms of s 16. To succeed the appellant must demonstrate error of the kind described in *House v The King* (1936) 55 CLR 499 at 505. The appellant must establish some misunderstanding of the law or misapprehension of the facts on the part of the primary judge, or point to a judgment so patently unreasonable as itself to provide evidence of some error of law or misunderstanding of fact."

[14] Reference was made to *R v Hughes* [1983] 1 Qd R 92 in which Connolly J, giving the judgment of the Full Court, explained (95-96) that the common law rule which:

> "… led to the refusal of bail in the case of murder unless the applicant made out exceptional circumstances",

had been supplanted by s 16 of the *Bail Act* which provided:

> "… an exhaustive statement of the manner in which the discretion in which to grant bail is to be exercised in relation to all offences…",

but that in most cases s 16 will produce the same result as the common law rule because

> "… the nature of this offence, if no more appeared, would be sufficient to raise an inference which would satisfy s 16(1)(a)(i) if coupled with a prima facie strong case."

[15] There is a further constraint. 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;" per Thomas JA in *Williamson v Director of Public Prosecutions* [2001] 1 Qd R 99 at 103. Moreover it is an assessment of a risk according to an imprecise standard. The notion of "unacceptable risk", while not devoid of content, is not "capable of yielding" a precise "degree of definition": *M v M* (1988) 166 CLR 69 at 78; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 593 per Gleeson CJ.

[16] The character of the assessment required under s 16, coupled with its discretionary nature, makes the judgment particularly unsusceptible to the appellate process. The scope for demonstrating error of the kind required by *House* is necessarily limited. The discretion has to be exercised within very broad parameters.

[17] A second principle is also well established by authority. Where successive applications for bail are made following the refusal of an earlier application the subsequent application will only succeed where the applicant demonstrates that a material change in circumstances has occurred between the two applications. See *Ex parte Edwards* [1989] 1 Qd R 139 at 142– 3.

[18] With this recital of the relevant limitation on the application, and the appeal, it is appropriate to consider the learned primary judge's reasons for refusing the application. His Honour said:

> "Since the last time his application came before me, it is argued that there have been material changes in circumstances, now warranting the grant of bail. The most significant of those … relate to the questions of delay and the ability of the (appellant's) lawyers to obtain instructions … .
>
> There have already been several weeks of committal hearings … and I am told by (the appellant's counsel) that there could be up to 14 more weeks required. He blames part of the reason for that on … late disclosure by the prosecution … of relevant material.
>
> (Counsel) for the Director of Public Prosecutions, told me that material required by Section 590AB of the Criminal Code, had been provided prior to the committal hearing. … He also says that all requests for further disclosure have now been met … .
>
> (Counsel) also submitted that the material provided recently at the (appellant's) request, was not thought to be required to be disclosed … .
>
> As against that, (counsel for the appellant) says that much of the material he has requested … has proved to be of assistance … in pointing to possible suspects other than the (appellant). …
>
> The problem raised at this stage is, however, the likely further length of the committal hearing and how it might be affected by the further disclosure that has been made, rather than by me entering into an exercise of determining whether all the material … should have been supplied pursuant to the Code. If the material does require such a lengthy further period for the committal hearing, it is a matter that does concern me because of the possible length of time during which the (appellant) will be incarcerated.
>
> To a large extent … the length of the committal hearing is a matter under the control principally of the (appellant) and his counsel and it is a matter that was also canvassed before me in the last application, as a potentially lengthy committal hearing.
>
> I am not persuaded … that the circumstance has changed materially … as to require the decision now to be different.
>
> …
>
> The ability of the (appellant) to give instructions at the prison was criticised as inadequate, but there was evidence that interviewing rooms can be pre-booked for up to eight hours, with equipment for playing audio and video recordings … required for this case. …
>
> This again was something … canvassed on the previous application … as a significant problem and it is an issue that appears to occur regularly in this Court … . Again … there does not seem to me to be a significant change in the circumstances affecting that issue … .

> There remain the same issues that concerned me on the previous occasion, namely the risk of flight, the concern that the (appellant) will interfere with prosecution witnesses, based on his previous seriously criminal behaviour, in committing arson and attempted arson on police stations, in order to attempt to destroy evidence, and the risk that he would commit further offences.
>
> ….
>
> (The appellant's counsel) also argued that the committal hearing so far had demonstrated the weakness of the Crown case. That was not conceded by (counsel for the DPP) and I remain in the same position as I was on the earlier occasion … namely, unable to determine on the material presently available to me the strength or otherwise of the case, which clearly seems to be a circumstantial case, based on relevant activities of the (appellant) and some scientific evidence.
>
> … the strength of the prosecution case … would fall to be examined much more readily after the committal hearing had been concluded when some reliable argument might be able to be mounted as to its strength or weakness, but, from what I have been told, and in the time available for an application of this nature, it is impossible … to determine the matter.
>
> Accordingly … the (appellant) has failed to establish … a material change of circumstances … ."

[19] Before turning to the detail of the appellant's submissions and the criticisms of the primary judgment it will be helpful to set out what can be gleaned of the prosecution case because it is a relevant factor in the exercise of the discretion to grant or withhold bail, and because it assists in understanding the primary judge's reasons.

[20] The appellant and the deceased Neelma Singh had been in a relationship which extended to physical intimacy between September 2001 and February 2003. One reason for the termination of the relationship was Neelma Singh's parents' opposition to it, and some dislike by Mr Singh towards the appellant. There is evidence that the appellant reacted badly to the termination. In March 2003 he appeared to have invented a story that he had been diagnosed with a brain tumour in order to elicit sympathy from Neelma Singh and re-awaken her affection for him. In the same month he anonymously distributed a number of emails depicting photographs of Neelma Singh taken when she was naked. The emails were sent to members of her family, and friends. On 27 March 2003 Neelma Singh recorded a conversation she had with the appellant on a mobile telephone. She was concerned by what she regarded as his increasingly irrational behaviour. Her concerns were reported to Stafford Police by Ms Singh and her father. Mr Singh installed an alarm system into his house at the end of March 2003, principally to keep the appellant away.

[21] On 13 April 2003 Mr and Mrs Singh left Australia for Fiji. The appellant admits visiting the Singh house on Sunday 13 April, Tuesday 15 April, and Thursday 17 April. On the first two of those dates the alarm was not armed. On the third it was armed, at 1.40 am on 18 April, presumably after the appellant had left.

[22] The pattern is regarded as significant by the prosecution, though it appears to indicate that the appellant was received by the Singh children as a guest, not an intruder.

[23] A text message found on Neelma Singh's mobile telephone sent to the appellant at 8.56 pm on 20 April 2003 suggests that she expected him to visit her later that night. This is at a time when she believed him to be terminally ill but it is to be remembered that the couple had enjoyed an intimate relationship for two years which had ended only some weeks previously, and which, on the appellant's account, had been re-established. On 13 April 2003 Neelma Singh printed a prayer, apparently for the appellant's recovery, on a sheet of paper which she must have shown to him. His fingerprints were on it. Another prayer was printed out on 20 April 2003. This does not bear the appellant's fingerprints.

[24] The three siblings were in the habit of frequently making phone calls and of sending emails and text messages by mobile telephone to their friends. Such communications continued into the late hours of the night. No communication from any of the mobile telephones owned by any of the children was made after 11.00 pm on 20 April 2003.

[25] Some days before the murders, on 16 April 2003 the appellant contacted a former boyfriend of Neelma Singh's, Mr Amit Lala and requested a meeting. They met for lunch during which the appellant told Mr Lala:

1. He had never been in a relation with Neelma Singh;
2. That he was homosexual;
3. That he had a terminal brain cancer and a life expectancy of a month;
4. That he had not sent the photographs of the naked Neelma Singh (some of which Mr Lala had received).

[26] The appellant told Mr Lala that he knew where he worked, his telephone numbers, his parent's address and his email address. Mr Lala was disturbed by this information and felt threatened by the appellant. Mrs Singh says that her daughter was interested in re-establishing her former relationship with Mr Lala. There is some other evidence, from Neelma Singh's telephone, that she maintained her dislike of Mr Lala.

[27] On Tuesday 22 April 2003 the appellant, his two children, and a niece, went to the Singh house. The time was said by neighbours who saw him arrive to be a few minutes before 2.00 pm. The appellant was seen to go to the rear garage door of the house which he entered. The children remained outside. He emerged with a pet dog which he gave to the children. A tradesman working next door had occasion to speak to the appellant, who did not appear agitated and said nothing about bodies. At 2.33 pm the appellant rang police communications. He said there were "three dead bodies in a bathtub". The appellant spoke in more detail later that afternoon to police and described what he observed. In particular he said that Sidhi Singh was wearing coloured shorts, blue or green. Photographs taken of the bodies are said to show that Sidhi Singh was wearing black tracksuit pants completely covering her from the hips down, and so concealing her undergarments.

[28] Although, as I mentioned, there were no signs of forced entry to the house some items of property were missing, apparently stolen. The items were personal and were for the most part Neelma Singh's jewellery, including a gift to her by the

appellant. More valuable property was untouched, but Neelma Singh's diary was taken.

[29] Investigating police found nine consecutive footprint impressions on a carpeted floor and staircase. The footprints led from a tiled area to and then up the staircase to the second storey. They appeared to have been left by a sock covered foot, or feet. The socks had been soaked in a household bleach which appeared to have been used to clean part of the tiled floor adjacent to the downstairs carpet. A bottle of bleach was discovered in a laundry cupboard. Traces of Neelma Singh's blood were on the bottle.

[30] Blood from Neelma Singh was found on the carpet in her bedroom. The sheets had been removed from her bed and put in the bath, with the bodies. The sheets showed evidence of bleaching. The chemicals in bleach destroy DNA material.

[31] A cigarette butt was found on the ground near the rear door of the house. The appellant's DNA was on the butt. Other cigarette butts were found in the garage. They had the DNA of both the appellant and Neelma Singh.

[32] Robert Kennedy, a Canadian policeman described as an "… expert … in … footprint morphology" has concluded that there is "strong support to the hypothesis that crime scene impression number one and the known impressions of (the appellant) were made by the same person." Impressions of the appellant's feet (presumably "crime scene impression No. 1") when wearing socks were taken by the expert who compared:

> "… all the individual details, such as overall size, shape and location of the toe pads, contour of the metatarsal ridge, and the contour of the ball of the foot."

He modified his opinion in oral evidence by saying there is support for the hypothesis, but not strong support.

[33] The appellant owned two personal computers. On the evening of Monday 21 April 2003 he activated a program to delete all data from one of them save for the operating systems. His second computer, kept at the family holiday unit, revealed a list of email addresses identical to those to which photographs of the naked Neelma Singh were sent.

[34] In records of interview the appellant said that in the week prior to the murders he and Neelma Singh saw each other whenever possible and he went surreptitiously to the Singh house on three occasions late at night where he met Neelma Singh and engaged in sexual intercourse with her. He parked his car some distance from the house to avoid detection by the other Singh children. It seems he was afraid they might report his presence to their parents. He gained entry to the house through the rear garage door which was left open for him. On 22 April 2003 he went with his niece and two children to the Singh house. His purpose in going was to allow the children to play with the youngest Singh child before seeing a movie. He places his arrival at the house at 2.20pm.

[35] The appellant has a relevant criminal history. On 27 May 1993 he was convicted in the Brisbane District Court on numerous charges: unlawfully damaging property; arson of a building; arson of a motor vehicle; break, enter and steal; unlawful use of a motor vehicle; attempted arson. He was sentenced to nine years' imprisonment on the charges of attempted arson and arson of a building, five years for breaking,

entering and stealing, and two years imprisonment for the charges of unlawfully using and for damaging motor vehicles. Parole was recommended after three years. He was in fact released on parole in May 1996 but on 11 September 1998 he was again dealt with in the District Court in Brisbane on a charge of attempted arson and sentenced to a term of two years and six months imprisonment cumulative upon the terms imposed in 1993. The attempted arson, committed on 15 October 1997, occurred while the appellant was on parole.

[36] The circumstances of the offending are also relevant. The offences which the appellant was dealt with in May 1993 involved a criminal spree with a number of co-accused in a short space of time. During their activities the young men were spoken to by a police officer from the Ashgrove Police Station. His approach was resented and the appellant with another man went late at night to the police station where the officer's car had been parked at the end of his shift. They slashed the tyres in an act of revenge or retribution. That activity was the subject of one of the charges of wilful damage. Some of the other offences involved the discharge of a .22 rifle. It was used to shoot at and damage a school building. The motivation for that offence was that one of the criminals had applied to the school principal for a job, but had not been taken on. Later in the evening the appellant and some co-accused were talking together near a pizza shop owned by the appellant's parents. A police officer approached them and searched the car owned by one of the co-accused. He found the rifle and confiscated it. He took it to the Ashgrove Police Station where it was locked in a safe. Later that evening in an attempt to destroy evidence which might implicate them in an earlier offence the appellant and others set fire to the police station, destroying it.

[37] The attempted arson in October 1997 had its origin in some enmity between the appellant and his co-accused on that occasion, and a man they both encountered while in prison. They disliked the man or perhaps had suffered in some way at his hands. In any event they went to his home with "molotov cocktails" which they intended to throw into the home to "scare" the occupant. They were disturbed and ran off but not before the co-accused threw a molotov cocktail at the home, causing some damage.

[38] Some other matters should be referred to. One is that in the weeks prior to the murders the appellant and Mr Singh were engaged in a bitter physical confrontation in which the appellant made threats against Mr Singh's life, and assaulted him, though not seriously. The episode had its origin in a sense of grievance the appellant felt in support of Mrs Singh and Neelma Singh.

[39] The next matter to mention is that a listening device was concealed in the appellant's home in September 2006. It recorded a conversation between the appellant and his parents in which they discussed the possibility that he might leave the state for a short period, five or seven days, to avoid being served with a summons to be examined before the Crime and Misconduct Commission in connection with the murders. He did not in fact leave the jurisdiction.

[40] Against this background one turns to consider the appellant's contentions.

[41] The first submission made by Mr di Carlo, who appeared for the appellant, was that the learned primary judge had not exercised the discretion required by s 16 at all. It is impossible to understand why the submission was made. It is clearly wrong. The judge expressly set about the assessment described in s 16.

[42] The appellant next pointed to the delay that will occur between the appellant's arrest and his eventual trial. It is over a year since the arrest and the committal has not concluded. On the appellant's estimation it will take at least 14 more weeks and not conclude before August this year. A trial earlier than the second half of 2011 is most unlikely.

[43] Delay is, obviously, of considerable importance in cases of this kind. It is always concerning when an accused is held in custody for a lengthy period pending trial. There is considerable prejudice to an accused who, after perhaps years in jail, is acquitted. In considering a bail application in a murder case the judge is obliged to weigh that consideration against the strength of the Crown case and the risks that if allowed bail an accused might abscond, re-offend, or interfere with witnesses.

[44] In *Lacey v Director of Public Prosecutions* [2007] QCA 413, however, this Court expressly disapproved the notion that substantial delay itself establishes that pre-trial incarceration of an accused is unjustified. The court said:

> "[12] … . It may be accepted that lengthy detention without trial is not easily justified, but to say that it **cannot** be justified by the strength of the Crown case is a proposition not supported by any available reading of s 16(3). … Further, there may be several reasons for delay. In some cases, the delay may be due to the conduct of the accused. In some cases, it may be due to the conduct of the prosecution. In some cases, it may be due to the shortage of court resources … . In some cases, it may be due to a combination of all of the above. To the extent that the Crown is not intentionally, or by neglect, causing the delay, it becomes more difficult to accept that "delay of itself shows cause". Unacceptable risks of flight or witness tampering or further offending do not become acceptable because the case against the accused requires a lot of witnesses to be called and, therefore, a long time to get to trial.
>
> [13] The length of delay, the reasons for that delay and the strength of the Crown case will always be matters of degree which must be balanced to arrive at a decision as to whether bail should be granted. … The strength of a Crown case and the consequent risks of flight or interference with Crown witnesses do not diminish as the length of time to trial increases. … The essence of the exercise of the judge's discretion is to balance competing considerations and to weigh the relative importance which the different factors bear in the context of the decision which needs to be made. …" (footnote omitted)

[45] It is, I think, possible in this case to conclude that the reason for the delay and the length of the committal proceeding is the responsibility of the appellant, not the prosecution. The contrary is asserted by the appellant but the reality is surely that the prosecution case, which I have outlined, is a confined one. It is a circumstantial case and the circumstances are few in number and small in content. Mr Campbell who appeared for the respondent, told us that the prosecution case will take a substantial but not a long time. This is admittedly imprecise but most circumstantial

cases proceed apace because there is no controversy about the existence of the circumstances.

[46] The appellant's counsel in his written submissions asserts that about 800 witnesses will need to be "thoroughly cross-examined." It is inconceivable that there are 800 relevant witnesses to the facts germane to the prosecution case. It appears from a remark made by the appellant's counsel to the primary judge that the materials (now supplied) requested from the prosecution, the supply of which is blamed for the delay, are being used by the appellant to identify other possible suspects for the murders. That is not an orthodox use of committal proceedings, which are to acquaint an accused with the evidence against him and to satisfy a Magistrate whether the evidence is sufficient to warrant putting him on trial: rather than to conduct a second investigation into the crime.

[47] How the appellant and his lawyers conduct the preliminary hearing is a matter for them, but if they chose, as they appear to have done, to use it for the purpose described, and in a manner so extravagant of time, thereby prolonging proceedings, any complaint of delay loses most of its force. A committal hearing of six months' duration, in a case such as this, appears both unnecessary and wasteful.

[48] Delay and its prejudice must be set against the strength of the prosecution case. The learned primary judge did not attempt an assessment of the prosecution case. His Honour thought it was impossible in the circumstances. Counsel for the appellant criticises this approach: he submits that a judge determining a bail application must undertake the task no matter how difficult. A failure to do so will result in appealable error; the failure to consider a relevant factor.

[49] The appellant claims to find support for the submission in a remark made by Martin J in *Lacey v Director of Public Prosecutions (Qld)* [2007] QSC 291 in which his Honour said:

> "[12] … it is difficult to assess the actual strength of this case. But it still has to be done. …"

Martin J was, I think, addressing the remark to the particular application before him, not expressing a general principle. The context was a case of homicide by a shooting committed in front of several witnesses. The case was one of which an assessment of the Crown case could be made and was, in fact, considered to be relatively strong. The judgments in *Lacey* on appeal give no support to the appellant's proposition. It is contrary to Thomas JA's observation in *Williamson* and is contrary to commonsense and experience. There are occasions when a judge hearing a bail application can make a shrewd assessment of the Crown case – eg where there are eyewitnesses or confessions. There are also occasions when no meaningful assessment can be achieved.

[50] I do not myself understand how a detailed assessment of the Crown case can be made when the committal is incomplete and, on the appellant's estimate, 800 more witnesses have to be examined "thoroughly" before all the relevant material will be available. In any event s 16 of the *Bail Act* requires a judge to have regard to the strength of the evidence against an accused as it "appear(s) to be relevant." The degree of relevance varies with the extent to which it is possible, in any particular application, to determine the strength of the case. Obviously, where materials demonstrate a strong Crown case, or a weak one, the factor has considerable

relevance. Where only a limited assessment can be made, or no assessment, the factor loses weight as a consideration, and therefore relevance.

[51] Section 16(2) does not oblige a judge to assess the strength of the Crown case, regardless of difficulty. It requires only that, to the extent the strength of the case is apparent, it must be taken into account.

[52] Counsel for the appellant referred to, and relied upon, a number of cases cited by Martin J, principally *Director of Public Prosecutions (Cth) v Germakian* [2006] NSWCA 275. The case does not help him. It was concerned with s 8A of the *Bail Act* 1978 (NSW) which provided that:

> "A person accused of an offence to which this section applies is not to be granted bail unless the person satisfies the … court that bail should not be refused."

To that extent the legislation is similar to the *Bail Act* (Qld) which requires the court to refuse bail to an offender charged with *inter alia* murder unless the applicant shows cause why his detention in custody is not justified. Section 8A applied to serious drug offences. Tobias JA (with whom Ipp JA agreed) referred with approval to a judgment of Hunt CJ in an unreported case:

> "The presumption against bail expressed in s 8A imposes a difficult task upon an application to which the section applies. Its effect is not merely to place an onus upon the applicant to establish his entitlement to bail. He must satisfy the court that bail should not be refused. … the presumption expresses a clear legislative intention that persons charged with the serious drug offences specified in the section should normally – or ordinarily – be refused bail. …"

Hunt CJ went on to say that the strength of the Crown case had "become the prime consideration where s 8A applies" and that:

> "… if the Crown case is a strong one, the applications for bail … (which succeed) must necessarily be somewhat special, and the task of the applicant to overcome the presumption that bail is to be refused will ordinarily be a difficult one. On the other hand, if the Crown case is not a strong one … the task of the applicant (although still a substantial one) will be correspondingly less difficult."

[53] Tobias JA also quoted with approval a passage from the judgment of Sperling J, in *R v Iskandar* (2001) 120 A Crim R 302 at 305.

> "... where s 8A applies, an application for bail should normally or ordinarily be refused. A heavy burden rests on the applicant to satisfy the court that bail should be granted. The strength of the Crown case is the prime but not the exclusive consideration. Countervailing circumstances common to applications for bail in the generality are to be accorded less weight than in the ordinary case. The application must be somewhat special if the Crown case … is strong."

[54] I do not understand the expressions of principle to differ from the principles applicable to applications for bail under s 16. The cases do *not* say that the court must make an assessment of the strength of the Crown case. One point they make is that assessments when made are important to the discretion. They also emphasise

the abnormal or extraordinary nature of the grant of bail in cases to which the section (s 16(3)) applies.

[55] The most that can be said, I think, is that the Crown case is not without substance but is less than compelling. The expert testimony in "footprint morphology" is potentially important. It appears to be the only evidence capable of directly linking the appellant to the murders. It is not possible to say the extent to which it might provide that link. Much, I suppose, will depend upon the percentage of the population which has a foot structure identical to that which left the bleached imprints on the carpet. About that we were told nothing. The footprints apart, the only evidence establishing the appellant's presence in the house on 20 April 2003 is circumstantial. He denies being there that night. The evidence that he went is that Neelma Singh expected him to come as indicated by her telephone message, the unarming of the alarm and, perhaps, the printing of the prayer sheet. Against that is the telephonic indication that she was unwell. Unless there is evidence that the garage was cleaned between 18 and 20 April the evidence that the appellant smoked cigarettes in the garage does not prove when he did so. He admits being at the house on 13, 15 and 17 April.

[56] There is no apparent motive for the appellant to have killed Neelma Singh. According to his account they had resumed their amorous relationship. The account is corroborated by Ms Singh's electronic message to him, and by leaving the door of the house unlocked for him. The prosecution's postulate is that:

> "There were a number of potential issues for argument between the appellant and (Neelma Singh), including (his) behaviour towards her father, the (photographs), the false story in relation to the brain tumour and that the appellant approached Amit Lala."

It is, on this appeal, unnecessary and unhelpful to analyse the postulation in detail. It may, however, be observed that the appellant's aggression towards Mr Singh does not, on its face, afford any motive for murdering his children, and that the "potential" of the other points to provide a motive appear more conjectural than evidential.

[57] Delay will assume more importance in circumstances where the prosecution case is weak, but that cannot be said: the case is not without substance. The learned primary judge was right that no proper assessment of the strength of prosecution case can be attempted. One cannot therefore say that the delay which will accompany the appellant's continued detention is unjustified; the more so when it is the appellant and his lawyers who are responsible for the delay.

[58] The learned primary judge considered the risk that the appellant would flee the jurisdiction if granted bail to be unacceptable. When refusing the first application his Honour said:

> "The respondent argues that the (appellant) has failed to discharge that onus … pointing in respect of the risk of a failure to appear to the seriousness of the charges … and the explanation for the fact that, even though the (appellant) clearly anticipated he was at risk of being charged … (he) has not left the jurisdiction, … the Crown argues I should regard as the likelihood that he previously thought that it was unlikely that he would be charged … . In that context, they refer to a covertly taped conversation … (which) occurred in a

> context to which I shall refer later, but the Crown ask me to infer … that there was at least serious discussion of flight … and that that was a relevant fact in respect of the issue whether there was a risk that he would fail to appear for any trial of these charges. That fact does seem to me to be a significant fact and one that I am not satisfied has been negated as a relevant risk … ."

[59] Some additional facts are relevant to this point, and should be mentioned. The applicant is 40 years of age. He has resided with his family in Queensland since 1984, when he was 14. He is disabled and does not work. He is married with a daughter almost four years of age. Until his arrest he lived with his wife and child. He has two teenage children from a previous relationship. His son lived with him and his wife. His parents are successful small business people and own properties with an aggregate value of about $1.5 million. Mr and Mrs Sica have offered a surety for the appellant's appearance at his trial, if granted bail, in the sum of $900,000, a very substantial amount.

[60] The primary judge did not mention these facts which are relevant, and may be substantially so. They do indicate the increased likelihood that the appellant would not abscond if granted bail because of his family and emotional ties to the jurisdiction and the severe financial detriment his flight would occasion his parents.

[61] The fact that the primary judge did not expressly mention these factors does not, of course, mean they were overlooked, but it is surprising that if taken into consideration they were not mentioned.

[62] A failure to consider them would amount to an error of fact as described in *House*. In fairness to the appellant I consider we should accept that error has been demonstrated with the consequence that this Court should exercise the discretion afresh.

[63] There are substantial considerations both ways. In the appellant's favour is the fact that he remained in the jurisdiction for six years after the murders when he was, and knew himself to be, a suspect, and indeed the only suspect for the murders. Although he briefly discussed the possibility of leaving the jurisdiction he did not do so and the discussion involved the possibility of a few days' absence only. He has ties to the jurisdiction and there is a large surety. As against that there is the consideration that the appellant has now been charged with three murders and faces, if convicted, a mandatory term of life imprisonment and the impossibility of parole for at least 20 years. That circumstance provides a powerful incentive for any man to avoid trial. There is a circumstantial case against him.

[64] There is a legislative presumption against the granting of bail in cases of murder. *Hughes* and *Keys* both demonstrate that it is usual to exercise the discretion in such cases in favour of detaining an accused, and that such applications must be dealt with cautiously. There is a strong community interest in assuring that persons charged with serious criminal offences are tried for them. In this case, should the appellant not appear at his trial, considerable resources which have been expended in the investigation and presentation of the case at committal will be wasted. What is to be assessed is whether the risk that the appellant might not appear is unacceptable. That means, as I would understand it, if the risk that the appellant might not appear is sufficient to justify his continued detention then he should be

detained. The matter is incapable of precise expression or definition. Are the considerations tying the appellant to the jurisdiction sufficient to outweigh the incentive that he might seek to avoid the chance of conviction and a lifetime in prison?

[65] With some hesitation I would conclude, as did the primary judge, that the risk is unacceptable.

[66] The learned primary judge also had regard to the risk that the appellant might interfere with or attempt to intimidate, witnesses in the case. It is in this respect that the appellant's criminal history is relevant. As the primary judge pointed out a number of his previous convictions, for serious offences, involved the destruction of buildings in an attempt to destroy incriminating evidence against him, and retaliation against persons whom he disliked or who had participated in the investigation of his criminal activity. His conduct in regard to Mr Lala raises a concern that he can ascertain the address and contact details of a person who, for whatever reason, interests him.

[67] On this aspect of the case the primary judge said:

> "There remain the same issues that concerned me on the previous occasion, namely the risk of flight, the concern that the (appellant) will interfere with prosecution witnesses, based on his previous seriously criminal behaviour, in committing arson and attempted arson on police stations, in order to attempt to destroy evidence, and the risk that he would commit further offences.
>
> (Counsel for the DPP) described the arson offences as specifically targeted to subvert criminal prosecutions and that does seem to me to raise serious issues in respect of the (appellant's) application now as then."

[68] This was a particular risk which the *Bail Act* required the primary judge to address. The evidence referred to by his Honour was particularly apposite to the assessment. His Honour did not have regard to any other evidence. The weighing of the evidence to determine whether the risk was unacceptable cannot be assailed in the absence of error, fact or law, neither of which is suggested. Indeed, with respect, his Honour's concern for this aspect of the case appears entirely justified. This is itself sufficient to dispose of the appeal.

[69] There remains to mention the complaint raised by the appellant which is that his imprisonment makes it difficult to give instructions to his lawyers. The difficulty was recognised by the general manager of the Arthur Gorrie Correctional Centre in his letter of 11 December 2009. The appellant now concedes that if the conference and communication facilities which the manager describes are made available to the appellant the inconvenience in giving instructions, "would not amount to a significant factor on its own … ." The point has lost its substance.

[70] The primary judge also considered there to be an unacceptable risk that if granted bail the appellant might commit further offences. The origin of this concern was the evidence of the physical altercation between the appellant and Mr Singh in the weeks prior to the murder. There was evidence which supports the assessment but it is not necessary to refer to it in any detail. The application was refused on other

substantial grounds, which I have discussed, each of which itself justifies the refusal of the application and which has not been shown to be affected by any error.

[71] Two further matters should be mentioned briefly. The first is that the appellant's counsel complained that the learned primary judge had misconstrued s 590AB of the *Criminal Code*. A perusal of his Honour's reasons show that he made no such error. In any event that section is irrelevant to the application.

[72] The second point is that Mr Kennedy's report on his comparison of footprint impressions was not in the material before the primary judge nor in the appeal books. We were given copies but reserved a ruling on its reception. I would rule it inadmissible: it was not before the primary judge and no fresh application for bail was made to the Court of Appeal. I have read it, in any event, and consider it makes no difference to the outcome of the appeal. Its only possible relevance is with respect to the assessment of the strength of the Crown case, and it is not helpful in that provisional assessment.

[73] The appeal must be dismissed.