

SUPREME COURT OF QUEENSLAND

CITATION: *Mikulcik v Director of Public Prosecutions (Qld)* [2023] QCA 27

PARTIES: **ALENA MIKULCIK**
(appellant)
v
DIRECTOR OF PUBLIC PROSECUTIONS (QLD)
(respondent)

FILE NO/S: Appeal No 11895 of 2022
SC No 10563 of 2022

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – Unreported, 13 September 2022 (Freeburn J)

DELIVERED ON: Date of Orders: 22 February 2023
Date of Publication of Reasons: 7 March 2023

DELIVERED AT: Brisbane

HEARING DATE: 22 February 2023

JUDGES: Bond JA and Gotterson AJA and Davis J

ORDERS: **Date of Orders: 22 February 2023**

- 1. Appeal dismissed.**
- 2. Application to the Court of Appeal to vary bail conditions allowed.**
- 3. Appellant’s undertaking as to bail dated 21 November 2021 varied by deleting the second and third subparagraphs of condition (d).**

CATCHWORDS: CRIMINAL LAW – PROCEDURE – BAIL – REVOCATION, VARIATION, REVIEW AND APPEAL – where the appellant was charged with unlawful stalking of her neighbour and released on bail – where the special conditions of the appellant’s bail included that she must remove all cameras and de-activate the sensor alarm on the side boundary fence between her property and that of the complainant’s – where the appellant sought an order varying the terms of her bail to allow her use of the cameras and sensor – where the appellant introduced fresh evidence that the complainant had moved away from the neighbouring property – whether the bail conditions remained necessary to secure that the appellant did not unlawfully stalk her new neighbour by the use of the cameras or the sensor alarm

Bail Act 1980 (Qld), s 8(1), s 8(5), s 9, s 10(1), s 11(2)

Clumpoint v Director of Public Prosecutions (Qld) [2005] QCA 43, cited

COUNSEL: The appellant appeared on her own behalf
R G Reid for the respondent

SOLICITORS: The appellant appeared on her own behalf
Director of Public Prosecutions (Queensland) for the
respondent

- [1] **BOND JA:** On 22 February 2023, the Court made the following orders:
- (a) Appeal dismissed.
 - (b) Application to the Court of Appeal to vary bail conditions allowed.
 - (c) Appellant's undertaking as to bail dated 21 November 2021 varied by deleting the second and third subparagraphs of condition (d).
- [2] These are my reasons for joining in those orders.
- [3] On 21 November 2021 the appellant was charged with unlawful stalking contrary to s 359E(1) of the *Criminal Code* (Qld) between 16 February 2017 and 20 November 2021. The complainant was her neighbour. She was released on watchhouse bail.
- [4] Her conditions of bail included the following special conditions (recorded in the three subparagraphs of condition (d) of her undertaking as to bail dated 21 November 2021¹):
- (a) first, that she must have no contact or communication directly or indirectly with the complainant, the complainant's husband or two named witnesses;
 - (b) second, that she must remove all cameras placed in trees on the side boundary fence between her property and that of the complainant and her husband within 24 hours of the bail undertaking; and
 - (c) third, that she is required to de-activate the sensor alarm placed on the side boundary fence between her property and that of the complainant and her husband within 24 hours of this bail undertaking.
- [5] On 8 August 2022, the appellant unsuccessfully applied to the Magistrates Court to vary those bail conditions. On 5 September 2022, the appellant filed an application in the Trial Division of the Supreme Court seeking the variation of each of those conditions. The application was heard on 13 September 2022. The appellant sought the removal of the second and third special conditions and variation of the first special condition to exclude contact by her children.
- [6] The evidence relied on by the respondent below established an arguable case on the charge of unlawful stalking. The affidavit relied on by the respondent exhibited statements from:
- (a) the complainant;

¹ The conditions included the addresses of the properties concerned and the names of the complainant and her husband and the two witnesses, but it is unnecessary to record those details in these reasons.

- (b) the complainant's husband;
- (c) a former neighbour, who had lived at the property adjoining the other side of the appellant's property between November 1996 and December 2018; and
- (d) a current neighbour, who was a friend of the complainant and who, for the last 6½ years, had lived in the property situated behind the appellant's property and that of the complainant and her husband.

[7] Those statements established an evidentiary basis for the case that the appellant had unlawfully stalked the complainant. The evidence contained in the statements of the complainant and her husband was supported in material respects by the statements of the former neighbour and the current neighbour. The picture painted by the statements as a whole was as follows:

- (a) The appellant and the complainant and her husband had been neighbours for 15 years.
- (b) In 2017 the appellant's behaviour towards the complainant and her husband escalated.
- (c) The appellant verbally abused them constantly. She placed a stereo on a chair in the backyard and played music for up to 14 hours a day, every day. She followed the complainant to the shops, intimidating her. She took photos of the complainant's house and filmed the complainant and her husband when she saw them in their yard. She filmed the complainant's husband while he mowed the lawn. She harassed tradesmen completing work at the complainant's house. Each time the complainant's grandchildren attended the address for a swim, the appellant operated a leaf blower at the fence the entire time they were in the pool.
- (d) The appellant placed cameras in the trees on the boundary fence pointing directly into the complainant's pool area. In December 2017 she installed cameras in trees along the boundary fence. The cameras point directly into the complainant's pool yard and do not appear to capture any of the appellant's yard. Since the cameras had been installed the complainant had attempted to gain some privacy by taking steps within her own property to block the view of the yard. But each time the complainant attempted this, the appellant moved the camera higher up the tree.
- (e) On 29 February 2020 the appellant installed a sensor alarm pointing at the complainant's side gate. Each time the complainant or her husband walked down that side of their property the alarm was activated. The alarm was extremely loud and each activation lasted approximately 10-20 seconds.
- (f) The appellant's behaviour had caused the complainant to feel fear and apprehension. The complainant was fearful of the appellant, honestly believing the appellant would hurt her. The complainant said that the on-going intimidating, harassing and threatening behaviour had stopped her living her normal life. Her family did not want to come over for lunches, she avoided the local shopping centre as she was terrified to run into the appellant, and she had started to go away on the weekends to get away from the appellant.
- (g) The behaviour had been a detriment to the complainant's health. She had been hospitalised twice in 2018 with severe stomach pain and weight loss. She was

later diagnosed with Severe Anxiety relating to the on-going harassment from the appellant. The complainant also saw her General Practitioner regularly to manage her anxiety and help with the stress. She had never before suffered from either depression or anxiety.

- [8] It is notable that although the former neighbour described having personally had constant issues with the appellant during the period they were neighbours, she stated that the grief which she suffered was nothing in comparison with behaviour directed to the complainant. Her statement described behaviour which she characterised as specifically directed at the complainant. The current neighbour's statement was to similar effect. In particular, her statement recorded an incident when she had complained about the appellant's cameras and the appellant had told her "I am not interested in you, I am only interested in her", pointing to the complainant's house.
- [9] The appellant relied on her own affidavit deposing to the truth of the contents of a number of statements which she had previously made and which were exhibited to her affidavit. Her material painted a different picture of her interactions with the complainant and her husband: one in which the complainant's husband was the aggressor. On her evidence, she was the victim of inappropriate harassment by the complainant and her husband, not the other way around. Amongst other things, she advanced these propositions:
- (a) The complainant's husband had physically attacked her on three separate occasions. He was a large and intimidating person.
 - (b) One occasion, which the appellant characterised as an attempt by the complainant's husband to murder the appellant, occurred on 17 December 2017. She said that after she had challenged his conduct in cutting parts of her shrubs which hung over into his land, he had become enraged and, still carrying garden shears, he had tried to climb over a gate into her property. On that occasion, she retreated into her house in a panic and had called the police.
 - (c) On another occasion, she said that he had acted in an intimidatory fashion by standing next to the fence and watching her when she was trimming the same shrubs. She complained about being made uncomfortable and when he responded that he did not care, she said she would do the same to him when he next mowed his lawn. Later, when he was mowing the lawn in his front yard, she did so and when he finished, she said that he grabbed the grass container and emptied the cuttings on her head.
 - (d) On a third occasion the complainant's husband was moving rubbish out to a kerbside pick-up. She was concerned that he might damage her car and went back into her yard and stood along the fence line filming him in case he did so. After she so positioned herself, she said that the complainant's husband carried a tree branch to the kerbside and, in the course of passing her, caused her to be hit in the face by part of the branch.
 - (e) She was concerned about the risk of further attacks. She contended that she needed the cameras to record evidence of those attacks.
 - (f) As to the sensor alarm (or "beeper", as she referred to it), the appellant contended it was important for her safety because the complainant and her husband:

“... often go to the low front yard fence of my front enclosed courtyard as they deliberately placed all of their three rubbish bins there to give them an excuse to watch us and listen to our conversations. The beeper warns us when they are around to be cautious and watch out for violence, for harassing behaviour and to quieten our conversation.”

- (g) Essentially, she contended the surveillance that she wished to reactivate would warn her in advance of the possibility that she might be at risk of violence or harassing behaviour on the part of the complainant and her husband.
- (h) She also complained that it was unfair that the complainant and her husband were still keeping their cameras on even after she was forced to remove her own. She said that the complainant and her husband had video and audio cameras facing the street, her front yard, her side yard and her backyard, including a listening device facing her family and living areas, her daughter's bedroom and her bathroom as well as her garden.
- (i) So far as the no-contact condition was concerned, the appellant sought a variation of the condition to exclude contact by her children.

[10] As the primary judge recognised, the case advanced against the appellant had not yet come to trial. In his reasons, the primary judge characterised the issue before him in these terms:

“... this is a neighbourhood dispute. The offending the subject of the bail conditions are serious acts constituting alleged unlawful stalking. That unlawful stalking is said to be constituted by a placing of multiple cameras pointing directly into the neighbouring property, including the backyard and pool area. As the Crown says, this could be characterised as a gross invasion of privacy and one which, understandably, causes distress to [the complainant and her husband]. As the Crown also says, the placing of the sensor alarm specifically pointing to the complainants' property could also cause distress.

The point of the conditions is to, effectively, remove at least a substantial part of the stalking behaviour the subject of the charges. Of course, those charges have not yet come to Court, and they may or may not be successful.

The question on this application is whether the three conditions I have mentioned are more onerous than those that are, in the opinion of the Court, necessary, having regard to the nature of the offence, the circumstances of the applicant and the public interest.”

[11] The primary judge then explained why, in his view, the applicant had not advanced an adequate case for variation of the no-contact condition. Finally, he addressed the merits of the application for deletion of the second special condition concerning the cameras, in these terms:

“As to the cameras condition, the applicant stated that she wanted the cameras reinstated, because the neighbours move about their property doing things that she finds suspicious or for no reason. She mentioned that they are often near the garbage bins, which I gather are near the boundary, and those bins could easily be placed on the other side of

their property. And she is also concerned that the neighbours are poisoning her tree, and so the purpose of a camera would be to gather evidence in respect of that offending conduct. None of those grounds seem to me to be a reason for varying the bail conditions.

The applicant also points out that her neighbours have cameras and listening devices that are pointed towards her. Assuming that to be correct, it is difficult to see how that impacts on the bail undertaking that has been given or the charges that are before the Court. It is not for the Court to facilitate some sort of arms race in cameras. And I note, in particular, that the cameras that were to be removed, and have been removed, were placed in the trees on the side boundary fence. Of course, if the neighbours have cameras which are pointed at the applicant's property, she may well have a complaint that she should take up with the police."

- [12] The primary judge did not specifically address the application for variation of the third special condition dealing with the sensor alarm or beeper before stating that he was not satisfied that there was any proper basis for varying the bail conditions. The primary judge dismissed the appellant's application.
- [13] The appellant appealed to this Court seeking to overturn that dismissal. She did not challenge the dismissal of the application so far as it related to the first special condition. Rather, she sought an order granting her "the use of the cameras and the beeper for the purpose it was originally used to protect my family and my property." Effectively she sought an order varying the terms of her bail by deleting the second and third conditions referred to above. In order for her appeal to succeed, the appellant was required to establish that the primary judge's exercise of discretion miscarried in one of the ways identified in *House v the King* (1936) 55 CLR 499. Of course, if she had persuaded this Court that the discretion had miscarried, it would have then been necessary for this Court to exercise the discretion afresh.
- [14] But the appellant also advanced an alternative basis for her argument that the second and third conditions should be deleted. Based on fresh evidence, her written submissions in reply contended that her application to vary the bail conditions should be reheard or dealt with by this Court. The fresh evidence was contained in her affidavit affirmed on 14 February 2023. In that affidavit, the appellant deposed that the complainant and her husband had sold their house in November 2022 and, although they had moved to another house in the same residential area, they were no longer her neighbours. They no longer shared a dividing fence and she could not possibly use a camera to look into their backyard. In January 2023 a new neighbour had moved into the house formerly owned by the complainant and her husband. As at the date of the appellant's affidavit, she and the new neighbour had never spoken. Nevertheless, the appellant reported that the new neighbour had himself put up a camera overlooking the appellant's backyard.
- [15] It is clear that this Court has original jurisdiction to vary the conditions of bail imposed by a Magistrates Court, although such an application would not ordinarily succeed unless a material change of circumstance could be established: see ss 8(5) and 10(1) of the *Bail Act 1980 (Qld)* and *Clumpoint v Director of Public Prosecutions (Qld)* [2005] QCA 43 at [3]. The fact that the complainant and her husband had moved away after the application by the primary judge was heard and decided was plainly a material change of circumstance.

- [16] In those circumstances, it was unnecessary to consider the question whether the discretion of the primary judge could be said to have miscarried based on the material before him. If the appeal succeeded, this Court would be required to exercise the discretion in relation to bail itself, in light of the evidence which was before the primary judge and the fresh evidence of materially changed circumstances. That is exactly what it would do when considering the application before it to exercise its original jurisdiction. Accordingly, the preferable course was simply to exercise a fresh discretion based on the changed circumstances. The appeal could be dismissed and the application to exercise original jurisdiction considered.
- [17] In *Clumpoint* at [17], the Court of Appeal noted (1) that s 8 of the *Bail Act* empowered a court to grant bail to a person held in custody (s 8(1)(a)) and to vary bail so granted (s 8(1)(b)); (2) that under s 9, a court is, subject to the *Bail Act*, ordinarily required to grant bail or to enlarge or vary bail already granted; and (3) this reflects the basic but important principle of the criminal law that an accused person is presumed to be innocent prior to conviction and should not be punished before conviction.
- [18] The jurisdiction to impose the presently impugned bail conditions was that conferred by s 11 of the *Bail Act* which provided:
- “(2) Where a court or a police officer authorised by this Act to grant bail considers that the imposition of special conditions is necessary to secure that a person –
- (a) appears in accordance with the person’s bail and surrenders into custody; or
- (b) while released on bail does not –
- (i) commit an offence; or
- (ii) endanger the safety or welfare of members of the public; or
- (iii) interfere with witnesses or otherwise obstruct the course of justice whether in relation to the person or another person;
- that court or police officer shall impose such conditions as the court or police officer thinks fit for any or all of such purposes.
- ...
- (5) Conditions imposed pursuant to subsection (2) shall not be more onerous for the person than those that in the opinion of the court or police officer are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest.”
- [19] The original justification for the imposition of the special conditions was said to be the risk that while released on bail the appellant might, by the future use of the cameras or the sensor alarm, commit the offence of unlawfully stalking the complainant contrary to s 359E(1) of the *Criminal Code*. Reliance was placed on s 11(2)(b)(i) of the *Bail Act*. Whatever might once have been said in favour of that

argument, any risk of unlawful stalking of the complainant by the future use of the cameras or the sensor alarm had disappeared when the complainant and her husband sold their house and moved away.

- [20] Notwithstanding the changed circumstances, the respondent opposed the appellant's application to vary her bail conditions. The only argument advanced by the respondent was a continued reliance on s 11(2)(b)(i) of the *Bail Act*. The respondent argued that the impugned conditions were necessary to secure that the appellant, while released on bail, did not unlawfully stalk her new neighbour by the use of the cameras or the sensor alarm. Such conditions, it was said, were no more onerous than was necessary having regard to the nature of her alleged offending, the circumstances of the appellant and the public interest.
- [21] For her part the appellant argued that –
- (a) She wanted to be able to use the camera and the beeper to protect her family.
 - (b) She had no history with the new neighbour and no reason to put the cameras up so as to watch the new neighbour.
 - (c) She had no present intention to use the cameras to watch the new neighbour.
 - (d) So far as the beeper was concerned, she had no reason to put the beeper back on because she did not fear the new neighbour.
- [22] The respondent's argument must be rejected.
- [23] I would accept that there is a real risk, possibly even a likelihood, that, if the conditions are removed, the appellant will at least replace the cameras in the trees in her backyard. Notwithstanding the appellant's stated lack of intention so to do, I would accept there is a risk that she might in the future point the cameras towards the new neighbour's backyard, if the relationship with the new neighbour degenerates. However, the offence of unlawful stalking of a neighbour cannot be constituted merely by placing cameras in trees in a backyard, even if they are pointed towards a neighbour's backyard, or by having a sensor alarm at the side of a house, **without more**. A cursory examination of the elements of "unlawful stalking" in s 359B of the *Criminal Code* and the related definition of "detriment" as set out in s 359A suggests that an evidentiary basis for the Court to draw the requisite conclusions about the impact of such conduct on the new neighbour would be required before one could conclude that there was a risk of conduct meeting the definition of unlawful stalking. Counsel for the respondent accepted that there was no evidence with respect to the circumstances of the new neighbour.
- [24] Although the respondent disclaimed this proposition, its argument was tantamount to inviting this Court to infer that any use of the cameras by the appellant would be a precursor to the type of activity that was allegedly conducted against the complainant and her husband. But there was no sufficient evidentiary basis to conclude there was any such risk in relation to the new neighbour. The evidence for the offending with which the appellant had been charged supported the conclusion that the appellant had a particular animus towards the complainant. Yet there was no evidence whatsoever of any animus between the appellant and her new neighbour. Indeed, the only evidence before this Court was that they had never even spoken.
- [25] Because there was an insufficient evidentiary basis to form the view that the impugned conditions were necessary to secure that the appellant, while released on

bail, would not unlawfully stalk her new neighbour by the use of the cameras or the sensor alarm, I agreed with the appellant's contention that her undertaking as to bail should be varied by deleting the impugned conditions.

[26] **GOTTERSON AJA:** I agree with the reasons of Bond JA.

[27] **DAVIS J:** For the reasons given by Bond JA, I joined in the orders made on 22 February 2023.