

# DISTRICT COURT OF QUEENSLAND

CITATION: *Re KLE* [2022] QDC 286

PARTIES: **R**  
(respondent)  
**v**  
**KLE**  
(applicant)

FILE NO/S: DC 645 of 2022

DIVISION: Criminal

PROCEEDING: Application

ORIGINATING COURT: District Court at Southport

DELIVERED ON: Orders given 12 December 2022  
Reasons delivered 15 December 2022

DELIVERED AT: Southport

HEARING DATE: 12 December 2022

JUDGES: Wooldridge KC DCJ

ORDER: **The application for bail is refused.**

CATCHWORDS: CRIMINAL LAW – PRACTICE AND PROCEDURE – BAIL – where the applicant made an application for bail pending trial – where the applicant is in a show cause position – where bail was previously refused – whether there has been a material change of circumstances – whether the applicant presents an unacceptable risk within the meaning of *Bail Act 1980* (Qld) s 16.

*Bail Act 1980* (Qld) s 8, s 16  
*Criminal Code 1899* (Qld) s 315A

*Lacey v DPP (Qld)*; *Lacey v DPP* [2007] QCA 413  
*Lynch v Director of Public Prosecutions (No 2)* [2020] QSC 64  
*Re Dunshea* [2021] QSC 163  
*R v HBZ* [2020] QCA 73  
*Williamson v Director of Public Prosecutions* [2001] 1 Qd R 99

COUNSEL: M Purcell for the applicant  
A Buckby for the respondent

SOLICITORS:           The Aboriginal and Torres Strait Islander Legal Service for  
                                  the applicant  
                                  The Office of the Director of Public Prosecutions for the  
                                  respondent

## **Introduction**

[1]     On 7 December 2022 the applicant [KLE] filed an application for bail. The application was opposed by the Crown, as respondent. The matter came to be heard on 12 December 2022. On that date orders were made that the application for bail was refused. It was indicated<sup>1</sup> that the reasons for the order would be delivered today, 15 December 2022.

## **Charges**

[2]     The applicant is charged on indictment with the following offences:

- Count 1:                 Strangulation in a domestic setting;
- Counts 2 & 3:         Assault occasioning bodily harm (domestic violence offence);
- Count 4:                 Wilful Damage (domestic violence offence).

Count 1 is alleged to have occurred on the 15<sup>th</sup> day of September 2021. Counts 2, 3 and 4 are alleged to have occurred on 12 February 2022. Each of the charges relate to the same named complainant with whom the applicant is alleged to have been in a domestic relationship at the time.

[3]     In the course of oral submissions at the hearing it was indicated that the applicant is also remanded in custody on related charges of Contravention of a domestic violence order, and Breach of bail. Those charges are not before this Court.

[4]     The circumstances of the offending as alleged by the Crown are set out in a Statement of Facts.<sup>2</sup>

[5]     The circumstances of Count 1 as alleged include the applicant putting both hands around the throat of the complainant and squeezing the complainant's throat, rendering the

---

<sup>1</sup>         Primarily for reason of logistics in the hearing of other matters listed, unrelated to this matter. The matter was otherwise originally to have been mentioned today 15 December 2022.

<sup>2</sup>         Exhibited to the affidavit of Corey Roebuck-Eyles affirmed 9 December 2022.

complainant unconscious. The applicant is said to have threatened the complainant “*this is it, you’re going to die; this is the end of your life*”. The complainant reported the matter to police that night. She was observed to have some redness to both sides of her neck as well as bruises to her upper chest and both arms and an abrasion and graze to her legs.

- [6] Counts 2 to 4 occurred on the one occasion of 12 February 2022. Count 2, as alleged, involved the applicant dragging and pushing the complainant while holding her arm in a tight grip. She suffered swelling and bruising. Count 3, as alleged, involved the applicant grabbing the complainant by the hair and pulling her to the floor, then punching her to the face several times, whilst saying “*I could easily kill you*”. The complainant sustained swelling, tenderness and bleeding to her scalp.
- [7] The statement of facts also refers to conduct alleged to have occurred between that outlined above in relation to Count 2 and 3. The applicant is said to have grabbed the complainant by the hair and dragged her to the lounge room, thrown her onto the couch, and pressed his knee against the complainants throat. The complainant kicked the applicant in the stomach to get him off. The applicant got up and the complainant started crawling away. The applicant “*punched the air with his fists*” during which he also punched the complainant. At present it is not clear that that conduct is alleged as particulars of Counts 2 or 3.
- [8] Count 4 relates to the applicant allegedly grabbing the complainant’s phone from her and deliberately damaging it, in an attempt to render it inoperable in response to the complainant expressing an intention to call the police in relation to the applicant’s assault of her. The complainant was ultimately able to contact police on a different phone. Police attended and medical assistance was sought for the complainant. Photographs were taken depicted the injuries sustained by the complainant.<sup>3</sup>

---

<sup>3</sup> Some of the photographs have also been included in the respondent’s material on this application: See the exhibits to the affidavit of Corey Roebuck-Eyles affirmed 9 December 2022.

### History of proceedings and remand

- [9] The applicant was originally granted bail in relation to the offence the subject of Count 1, committed on 15 September 2021. The conditions of his bail required that he have no contact with the complainant.
- [10] Following the events to which Count 1 relates, police also obtained a temporary protection order on 16 September 2021. The order required the applicant to be of good behaviour toward the complainant and not commit domestic violence toward the complainant. It also prohibited the applicant from contacting the complainant either directly or indirectly, or approaching within 100 metres of the complainant. The complainant and the applicant did however recommence their relationship and have contact.
- [11] The applicant appeared in the Southport Magistrates Court on 14 February 2022, when charged with the offences the subject of Counts 2, 3 and 4 on the indictment.<sup>4</sup> The applicant applied for bail. That application was refused.<sup>5</sup>
- [12] On 19 May 2022 the applicant was committed for trial to this Court following a full hand up committal hearing. An application for bail was made at the conclusion of the committal hearing, but refused. The applicant was remanded in custody on all charges.
- [13] An indictment was presented in this Court on 6 October 2022. The transmission sheet indicates that the prosecution indicted an additional charge of Assault occasioning bodily harm (Domestic Violence Offence) to what the applicant had been charged with, but did not proceed with a second charge against section 315A *Criminal Code* (Qld), or a charge of Stealing, on which the applicant had been committed for trial.
- [14] A trial listing was not immediately sought by the applicant, in the context of ongoing discussions between the applicant's legal representatives and the Crown. The matter remains contested. In affidavit material filed on this application, the applicant asserts that he is instructing his legal representatives that he wishes to plead not guilty to three of the four counts on the indictment.

---

<sup>4</sup> And other charges.

<sup>5</sup> Neither party has placed material before the Court on this application relating to that earlier application for bail in the Magistrates Court.

- [15] Prior to the hearing of the application, further to the indication of the applicant that a trial date was to be sought, the matter was listed for hearing in the week of 20 February 2023.<sup>6</sup> Although the matter is not listed as a “Number 1” trial at this time, there are three trial courts sitting in Southport that week across which the matter will be given priority.
- [16] The applicant has now been remanded in custody since 13 February 2022, a period of approximately 10 months.

### **Legislative framework – show cause position**

- [17] Section 8 of the *Bail Act 1980* (Qld) vests jurisdiction to grant bail upon any court (subject to exceptions) in which a criminal proceeding is pending.
- [18] Section 16 *Bail Act 1980* (Qld) is a critical provision. It provides:

#### **16 Refusal of bail generally**

(1AA) This section applies in relation to a defendant who is an adult.

(1) Notwithstanding this Act, a court or police officer authorised by this Act to grant bail shall refuse to grant bail to the defendant if the court or police officer is satisfied—

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

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

(ii) would while released on bail—

(A) commit an offence; or

(B) endanger the safety or welfare of a person who is claimed to be a victim of the offence with which the defendant is charged or anyone else’s safety or welfare; or

(C) interfere with witnesses or otherwise obstruct the course of justice, whether for the defendant or anyone else; or

(b) that the defendant should remain in custody for the defendant’s own protection.

.....

---

<sup>6</sup> Both parties having indicated that date to be suitable.

- (2) In assessing whether there is an unacceptable risk with respect to any event specified in subsection (1)(a) the court or police officer shall have regard to all matters appearing to be relevant and in particular, without in any way limiting the generality of this provision, to such of 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) the history of any previous grants of bail to the defendant;
  - (d) the strength of the evidence against the defendant;
  - (e) if the defendant is an Aboriginal or Torres Strait Islander person — any submissions made by a representative of the community justice group in the defendant's community, including, for example, about—
    - (i) the defendant's relationship to the defendant's community; or
    - (ii) any cultural considerations; or
    - (iii) any considerations relating to programs and services in which the community justice group participates;
  - (f) if the defendant is charged with a domestic violence offence or an offence against the *Domestic and Family Violence Protection Act 2012*, section 177(2) —the risk of further domestic violence or associated domestic violence, under the *Domestic and Family Violence Protection Act 2012*, being committed by the defendant;

*Note—*

See section 15(1)(e) for the power of a court to receive and take into account evidence relating to the risk of further domestic violence or associated domestic violence.

- (g) any promotion by the defendant of terrorism;
- (h) any association the defendant has or has had with—
  - (i) a terrorist organisation within the meaning of the Criminal Code (Cwlth), section 102.1(1); or
  - (ii) a person who has promoted terrorism.

- (2A) However, in assessing whether there is an unacceptable risk with respect to any event specified in subsection (1)(a) a court must not have regard to the effect on the risk of imposing a condition under section 11(9B).

.....

- (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 while awaiting trial for another indictable offence; or
  - (b) with an offence to which section 13(1) applies; or
  - (c) with an indictable 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

*Note—*

For this paragraph, a person proceeded against under section 33(3) is taken to be charged with an offence against this Act—see section 33(7).

- (e) with an offence against the *Penalties and Sentences Act 1992*, section 161ZI or the *Peace and Good Behaviour Act 1982*, section 32; or
- (f) with an offence against the Criminal Code, section 359 with a circumstance of aggravation mentioned in section 359(2); or
- (g) with a relevant offence;

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.

*Note—*

See also section 16A(6).

.....

(6) In this section—

*domestic violence offence* see the Criminal Code, section 1.

*relevant offence* means—

- (a) an offence against the Criminal Code, section 315A; or
- (b) an offence punishable by a maximum penalty of at least 7 years imprisonment if the offence is also a domestic violence offence; or
- (c) an offence against the Criminal Code, section 75, 328A, 355, 359E or 468 if the offence is also a domestic violence offence; or
- (d) an offence against the *Domestic and Family Violence Protection Act 2012*, section 177(2) if—
  - (i) the offence involved the use, threatened use or attempted use of unlawful violence to person or property; or
  - (ii) the defendant, within 5 years before the commission of the offence, was convicted of another offence involving the use, threatened use or attempted use of unlawful violence to person or property; or
  - (iii) the defendant, within 2 years before the commission of the offence, was convicted of another offence against the *Domestic and Family Violence Protection Act 2012*, section 177(2).

[19] Here each of Counts 2, 3, and 4 are indictable offences that are alleged to have been committed while the applicant was on bail in relation to another indictable offence. Further each of Counts 1, 2, and 3 on the indictment are a “*relevant offence*” as defined. Accordingly, pursuant to section 16(3) of the Act, a court is required to refuse to grant bail unless the applicant shows cause why his continued detention in custody is not justified.<sup>7</sup>

---

<sup>7</sup> Although not addressed in the submissions of the parties, the further charges of Breach of Bail and Contravention of a Domestic Violence Order which are said to be before the Magistrates Court, would likely also place the applicant in a show cause position.



### **Material change of circumstance**

[20] As the applicant has previously applied for bail, it is incumbent upon the applicant to demonstrate a material change of circumstance, whereby the application for bail ought to be further entertained. That is, the applicant need satisfy the Court that there are additional facts that have arisen, or additional facts that have been discovered, which are decisive in the sense that those new facts alter the balance in favour of granting bail.<sup>8</sup>

[21] The matters relied upon by the applicant here to so demonstrate material change are:

(a) That since the last application, when the applicant was committed for trial, the prosecution have not proceeded with a further charge of Choking, or with a charge of Stealing, that the applicant had previously been charged with; and

(b) That it is not expected that any trial will proceed “until well into” 2023.

[22] The respondent submits that no material change in circumstance has been demonstrated.

[23] It may be accepted that the prosecution have not indicted a second charge against section 315A *Criminal Code*. This decision - as the prosecutor’s submissions on this application were understood, and having regard to the statement of facts of the prosecution - related to the inability for the prosecution to establish the elements of the offence to the requisite standard, in terms of the effect upon the complainant’s breathing. A further charge of Assault occasioning bodily harm has been indicted, relating to the events of the same date as were otherwise before the Magistrate at the time of the previous application. The submission by the applicant that the further charge of Stealing, which was not proceeded with would have been “at the forefront” of the Magistrate’s considerations has not been further contextualised, but is noted.

[24] The position remains, however, as follows:

i) The first charge in time, now Count 1 on the indictment, relates to an allegation of domestic violence against the complainant;

---

<sup>8</sup> See the discussion in *Re Dunshea* [2021] QSC 163 per Freeburn J at [6]-[10].

- ii) That charge, with which the applicant was, and remains charged, is a “*relevant offence*”, such that a court is required to refuse to grant bail unless the applicant shows cause why his detention in custody is not justified.
- iii) The applicant was previously granted bail in relation to the first charge. The conditions of that grant of bail included that the applicant not have contact with the complainant;
- iv) The applicant was also subject to a temporary protection order which required that he not commit domestic violence against, or have contact with, the complainant;
- v) The charges of 12 February 2022 relate to allegations of further domestic violence against the same complainant as the earlier charge related to;
- vi) That conduct, as alleged, however charged, was in contravention of the conditions of the grant of bail, and the temporary protection order;
- vii) Although there has been some variation in what is now charged in relation to the events of 12 February 2022 from the charges the applicant faced when he last applied for bail, the position remains unchanged that as a result of the nature of some of the charges the court is required to refuse to grant bail unless the applicant shows cause why his detention in custody is not justified.

[25] The applicant’s submission that any trial will not proceed until “well into” 2023 need be considered in light of the matter now being listed for trial in February 2023, in just over two months’ time. As the respondent submits, a trial listing in nine months was not likely to have been outside the contemplation of the Magistrate at the time of the applicant’s last application for bail.

[26] Nonetheless delay and period of time spent on remand are a relevant consideration.<sup>9</sup> But it remains that delay need be considered in the context of the relevant statutory framework and the other competing factors presented. As was said in *Lacey v DPP (Qld)*; *Lacey v DPP* [2007] QCA 413:<sup>10</sup>

---

<sup>9</sup> *Lacey v DPP (Qld)*; *Lacey v DPP* [2007] QCA 413.  
<sup>10</sup> At [13].

*“That exercise of discretion is not an empirical exercise; there are no bright lines drawn to determine conclusively when one important factor outweighs another.”<sup>11</sup>*

## **Unacceptable Risk**

[27] As stated by Thomas JA in *Williamson v Director of Public Prosecutions* [2001] 1 Qd R 99:<sup>12</sup>

*“No grant of bail is risk free. The grant of bail, however, is an important process in civilised societies which reject any general right of the executive to imprison a citizen upon mere allegation or without trial. It is a necessary part of such a system that some risks have to be taken in order to protect citizens in those respects.”*

[28] Whether an applicant has shown cause is separate from the question of whether there would be an unacceptable risk of certain things occurring if the applicant were granted bail. There will, however, often be a substantial overlap between the factors that may go to whether cause has been shown and the factors that inform whether an unacceptable risk exists.

[29] The applicant’s criminal history includes previous but dated convictions for breach of bail.

[30] The applicant’s earlier grant of bail as concerns the offence which is Count 1 on the indictment, was subject to a residential condition and a non-contact condition. The applicant now proposes conditions of bail including in addition, regular reporting, a nightly curfew, and, if thought appropriate, the use of a GPS tracking device.

[31] The respondent contends that the applicant, if released to bail, poses an unacceptable risk of committing an offence, and endangering the safety or welfare of the complainant,<sup>13</sup> and in effect, that such risk cannot be adequately ameliorated by the conditions proposed. The respondent relies upon the circumstances of the alleged offending, and the circumstances of the offending occurring while subject to and in contravention of conditions of bail and a protection order.

---

<sup>11</sup> See also *Lynch v Director of Public Prosecutions (No 2)* [2020] QSC 64 at [41] per Martin J.

<sup>12</sup> At [22].

<sup>13</sup> If so, that would also here present a risk of interference with witnesses.

[32] There is in my view significant strength in the submissions of the respondent.

### **Disposition**

[33] Accepting that the change in the charges the applicant now faces, as indicted by the prosecution, is a change in the circumstances from what was before the Magistrate when the applicant last applied for bail, it is not a matter which in my view would, in all the circumstances alter the balance in favour of granting bail.

[34] While the applicant has now served 10 months on remand, and will have served 12 months by the time of when this matter is now listed for trial, that does not in and of itself, here, establish that the continued pre-trial incarceration of the applicant is not justified. This is not a case where the time that the applicant has spent on remand is clearly disproportionate to the seriousness of the offences faced by the applicant, mindful also of the relative strength of the Crown case.<sup>14</sup>

[35] The applicant has not shown cause why his continued detention in custody is not justified. Further, if released to bail, I am of the view that the applicant presents an unacceptable risk of committing further offences whilst on bail, and an unacceptable risk to the safety and welfare of the complainant.

[36] Accordingly, the application for bail is refused.

---

<sup>14</sup> Each of the parties have referred to *R v HBZ* [2020] QCA 73 as providing some guidance as to relevant sentencing principles and sentencing tariffs for an offence against section 315A *Criminal Code* (Qld).