SUPREME COURT OF QUEENSLAND

CITATION:	*Director of Public Prosecutions (Cth) v Elizabeth Anne Turner & Anor* [2015] QSC 298
PARTIES:	**COMMONWEALTH DIRECTOR OF PUBLIC PROSECUTIONS** (applicant) **v** **ELIZABETH ANNE TURNER** (first respondent) **BETTY DUNMALL** (second respondent)
FILE NO:	SC No 409 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	28 October 2015
DELIVERED AT:	Brisbane
HEARING DATE:	14 October 2015 Further submissions received 16 October 2015 (applicant) and 20 October 2015 (respondents)
JUDGE:	Flanagan J
ORDER:	**The application be adjourned so as to permit to the applicant to serve a notice at the defendant's residential address requiring the defendant to personally appear before the court at 9.30 am on Monday 9 November 2015.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – BAIL – SURETIES – where the defendant was granted bail on his own undertaking with a deposit of money and sureties – where the defendant's trial was set down – where the defendant's bail was revoked and a warrant issued for his apprehension due to the defendant's breach of his bail reporting conditions and a suspicion of the defendant having absconded – where the defendant's solicitors were given leave to withdraw – where the defendant's trial dates were subsequently vacated – where the Commonwealth Director of Public Prosecutions applies for the defendant's sureties to be forfeited – where sureties can only be forfeited if the defendant fails to appear before the court in accordance with the defendant's undertaking – where the respondent sureties submit that the defendant has not failed to appear before the court in accordance with the defendant's

undertaking as the only time in the future that the defendant was to appear personally was at the commencement of his trial, such trial having been subsequently delisted – whether the defendant has failed to appear before the court in accordance with the defendant's undertaking so that the sureties are forfeited

Bail Act 1980 (Qld), s 6, s 8, s 11, s 17, s 20, s 31, s 32, s 32A

Beckwith v The Queen (1976) 135 CLR 569; [1976] HCA 55, cited
Director of Public Prosecutions v Priestley [2013] NSWSC 407, cited
R v Adams (1935) 53 CLR 563; [1935] HCA 62, cited
R v Mokbel (2006) 199 FLR 176; [2006] VSC 158, cited

COUNSEL:	A J Guilfoyle for the applicant P J Davis QC, with J R Jones, for the respondents
SOLICITORS:	Director of Public Prosecutions (Commonwealth) for the applicant McKays Solicitors for the respondents

Introduction

[1] The Commonwealth Director of Public Prosecutions seeks the following relief:

(a) A declaration pursuant to s 31(1) of the *Bail Act* 1980 (Qld) ("**the Act**") that the bail undertaking of Markis Scott Turner ("**the defendant**") is forfeited; and

(b) An order pursuant to s 32(1) of the Act that the surety and cash deposits that are a condition of the bail undertaking of the defendant be forfeited and paid to Her Majesty.

[2] Section 31(1) of the Act provides:

> "Where a defendant who has been released on bail fails to appear before the court in accordance with the defendant's undertaking and surrender into custody the court may forthwith declare the undertaking to be forfeited."

[3] The respondents to the application are the sureties in respect of the defendant's undertaking. Elizabeth Anne Turner, the first respondent, is the defendant's mother and Betty Dunmall, the second respondent, is the defendant's maternal grandmother.

[4] They oppose the declaratory relief sought primarily on the basis that it has not been established that the defendant, in terms of s 31(1) of the Act, has failed to appear before the court in accordance with his undertaking and surrender into custody.

[5] It may be accepted that if this precondition is not met, then the court can neither declare the undertaking to be forfeited nor order the securities forfeited and paid to Her Majesty.

[6] The issue to be determined therefore is whether, in the particular circumstances of this case, there has been a failure on the defendant's part to appear before the court in accordance with his undertaking and surrender in custody, as those concepts are to be understood in the legislative context of s 31(1) of the Act.

[7] For the reasons which follow I have determined that, as yet, this precondition has not been satisfied.

The relevant circumstances

[8] The defendant was arrested by Australian Federal Police on 27 May 2011. He was charged by police later that evening and remanded in custody.

[9] On 1 June 2011 the defendant applied for and was granted bail in the Supreme Court in Mackay. The defendant was released on his own undertaking with a deposit of money of $150,000 and a surety in the amount of $450,000.[1] Undertakings as sureties were signed by the first respondent who provided a surety of $450,000 and a cash deposit of $70,000 and by the second respondent who provided a reduced cash deposit of $30,000.

[10] Paragraph 3 of the defendant's undertaking provides:

> "Upon the presentation of an indictment against me, I shall obey the directions of the Court, whether given to me personally or to my Counsel or solicitor, with respect to any further appearance by me and, if I am directed to appear personally, I shall surrender into custody and not depart from the Court unless my bail is enlarged."

[11] The undertaking identifies the defendant's residential address as 1 Kilgour Street, East Mackay, Queensland 4740. The undertaking does not specify an address for service of notices. Paragraph 4 of the undertaking requires the defendant to give immediate written notice to the Director of Public Prosecutions of any change of address for service of notices or his residential address other than the change that arises if he surrenders into custody.

[12] The undertaking also requires the defendant to report to the Officer in Charge at Mackay Police Station between the hours of 6.00 am and 6.00 pm on each Friday of the week, commencing 3 May 2013.

[13] From an examination of the endorsements on the court's records, the following relevant events took place after the defendant had entered into his undertaking.

[14] On 18 September 2013 an indictment was presented in the Supreme Court at Townsville. The defendant along with his relevant co-accused was indicted with three counts, namely

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1 *Bail Act* 1980 (Qld) s 11(1)(d).

conspiracy to import a commercial quantity of a border control drug and two counts of conspiracy to traffic in a commercial quantity of a controlled drug. Orders were made for the transfer of the matter to the Mackay Registry and the defendant's bail was enlarged. The defendant was legally represented on this occasion.

[15] On 29 May 2014 the defendant was arraigned and pleaded not guilty to all counts. His bail was enlarged until further order.

[16] On 20 April 2015 the trial of the defendant and his co-accused was set down to commence 29 September 2015 at the Supreme Court in Brisbane. The defendant was legally represented.

[17] On 11 September 2015 the applicant applied ex-parte for the defendant's bail to be revoked and for a warrant to be issued for his apprehension. The basis for seeking the revocation was that on 7 September 2015 Federal Police discovered that the defendant, in breach of his reporting conditions, had last reported to the Mackay Police Station at 6.30am on Friday 14 August 2015. The affidavit material filed in support of the application to revoke bail also showed that the defendant's wife and two children departed Australia from the Brisbane International Airport on 22 July 2015 and have not since returned. Attempts to locate the defendant at his residential address have failed. An inspection of the defendant's residence revealed furniture and personal possessions visible in the premises, clothes on the clothesline and a motor vehicle parked in the driveway.

[18] In an affidavit filed by leave on 11 September 2015, Justin Norman Trembath, a Federal Agent, states:[2]

> "I believe the (defendant) has absconded and will fail to appear before the Supreme Court on Tuesday 29 September 2015, when his trial is listed to commence."

[19] I made orders revoking the defendant's bail and issued a warrant for his apprehension which remains outstanding. On the same day, namely 11 September 2015, the solicitors for the defendant sought and were granted leave to withdraw as the defendant's legal representatives on the record.

[20] On 25 September 2015 an order was made delisting the defendant's trial. Neither he nor his solicitors (who had already been granted leave to withdraw) appeared on this date.

Consideration

[21] Both parties accept that the relevant provision of the undertaking is paragraph 3 which I have quoted above. The parties also accept that the defendant's undertaking is distinct from the grant of bail, so that the revocation of the defendant's bail pursuant to s 30 of the Act does not relieve the defendant from compliance with the undertaking.

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[2] Affidavit of Justin Norman Trembath sworn 10 September 2015, [8].

[22] The correctness of this proposition is evident upon an examination of the relevant provisions of the Act. Section 8(1)(a) of the Act gives to the court the power to grant bail to a person held in custody for an offence if the person is awaiting a criminal proceeding to be held by that court in relation to that offence. By s 11 a court in granting bail is required to consider the conditions for the release on bail in a certain sequence, namely the release of the person on the person's own undertaking:

(a) without sureties and without a deposit of money or other security;

(b) with a deposit of money or other security of stated value;

(c) with a surety or sureties of stated value; or

(d) with a deposit of money or other security of stated value and a surety or sureties of stated value.

[23] The grant of bail is therefore quite separate and distinct from a person's undertaking.

[24] The word "undertaking" is defined in s 6 of the Act to mean:

> "a promise in writing with respect to bail signed by a defendant or by a defendant and the defendant's surety or sureties that the defendant will appear at a hearing or an adjourned hearing or upon the defendant's trial or an appeal and surrender into custody and comply with such other conditions as are imposed for the defendant's release on bail."

[25] An undertaking is therefore a written promise that the defendant will appear when required and surrender into custody as well as a promise to comply with other conditions.

[26] Section 20(1) of the Act provides that a defendant to whom bail is granted shall, before being released from custody, enter into an undertaking in the approved form. Section 20(2) of the Act requires the defendant to provide and the undertaking to contain the defendant's residential address and an address for service. In my view s 20(2) would permit a defendant's residential address, if it is the only address notified, to constitute an address for service of notices.

[27] The distinction between a grant of bail and a defendant's undertaking is further highlighted by s 20(3A)(a) of the Act which provides:

> "(3A) In the case of bail granted to a defendant following the defendant's committal for trial the undertaking shall be subject to—
>
> (a) conditions that the defendant—
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> (i) shall appear or be represented by the defendant's lawyer before the court to which the defendant is committed for trial at the time stated in, and in accordance with, the notice given pursuant to section 27; and

(ii) if the notice states that it is intended to ask the court to proceed with the trial at the time stated in the notice—shall surrender into custody and not depart from the court unless the bail is enlarged; and

(iii) shall obey the directions of the court, whether given to the defendant personally or to the defendant's lawyer, with respect to any further appearance and, if directed to appear personally, shall surrender into custody and not depart from the court unless the bail is enlarged; and

(iv) shall notify the director of public prosecutions or, as the case may be, deputy director of public prosecutions in writing forthwith of any change of address for service of notices or residential address other than that arising from the defendant's surrender into custody; and

(b) such further conditions—

(i) as are imposed under section 11(2), (3), (6) or (9) or the Youth Justice Act 1992, section 52; and

(ii) as the court thinks fit to impose."

[28] The effect of s 20(3A)(a) is that the undertaking must contain a condition that the defendant shall obey the directions of the court, whether given to the defendant personally or to the defendant's lawyer, with respect to any further appearance and, if directed to personally appear, surrender into custody and not depart from the court unless bail is enlarged.

[29] The effect of my order revoking the defendant's bail is that he is now at large unlawfully. He remains subject to his undertaking to appear when notified.

[30] Both parties accept that the only relevant notification to the defendant's legal representatives that he was required to personally appear was the direction made on 20 April 2015 setting the trial to commence on 29 September 2015.

[31] The revocation of the defendant's bail did not affect the promise made by the defendant to obey the directions of the court given to his legal representatives on 20 April 2015 to personally appear at his trial and surrender into custody.

[32] The real issue, however, is the effect of the order made on 25 September 2015 vacating the defendant's trial dates. It may be accepted that the vacation of the trial dates was not notified to the defendant. The resolution of this issue requires further consideration of s 31 of the Act.

[33] Before the court may declare the undertaking to be forfeited there are three matters that are required to be satisfied:

(a) the defendant has been released on bail;

(b) the defendant fails to appear before the court in accordance with the defendant's undertaking; and

(c) the defendant has failed to surrender into custody.

[34] The requirement in (a) is fulfilled upon the establishment of the historic fact that the defendant has been released on bail. Here the defendant was released on bail on 1 June 2011.

[35] As to the requirement in (b), the term "fails to appear" is not a defined term. I have already referred to the definition in s 6 of the Act of "undertaking". The word "court" is also defined in s 6 as relevantly including a judge or justice, whether sitting in court or acting in another way. What is significant about this definition of "court" is that any failure to appear is to be determined not by reference to a general failure to attend at the premises of the Supreme Court at Brisbane and report to someone in authority, but rather by reference to a failure to appear before a judge or justice generally sitting in court.

[36] As to (c), the effect of appearing before the court in accordance with an undertaking is that the defendant surrenders him or herself into the custody of the court. The defendant is not free to depart unless the undertaking is enlarged. The term "surrender into custody" is defined in s 6 to mean "surrender into the custody of the court at the time and place for the time being appointed for the defendant to do so". This definition is also consistent with a defendant surrendering into the custody of a court at a particular time and place rather than simply attending at the premises of the Supreme Court.

[37] The applicant however submits that the listing of the trial for 29 September 2015 constituted a direction of the court that the defendant appear before the Supreme Court at Brisbane on the date of the trial fixed at 29 September 2015. Upon that direction being given to his counsel, the defendant became bound to surrender into custody and not depart from the court unless his undertaking was enlarged.[3] The applicant further submits that the court when it delisted the defendant's trial had no power to enlarge the defendant's undertaking as he was not then on bail.[4] In any event, the Court made no order on 25 September 2015 enlarging the defendant's undertaking.

[38] Whilst the applicant concedes that the defendant's appearance and surrender on 29 September 2015 was "arguably awkward" the court can be satisfied the defendant has absconded and failed to appear and surrender into custody on that date.[5]

[39] I accept that, in the event the defendant was required to appear before the court in accordance with his undertaking on 29 September, the evidence is sufficient to establish such a failure on the balance of probabilities.[6]

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3 Applicant's supplementary outline of submissions dated 16 October 2015, [22].

4 Applicant's supplementary outline of submissions dated 16 October 2015, [23]. See *Bail Act* 1980 (Qld) s 17(2).

5 Applicant's supplementary outline of submissions dated 16 October 2015, [25]-[27].

6 See the affidavit of Justin Norman Trembath sworn 10 September 2015; affidavit of Elizabeth Anne Turner sworn 14 October 2015 wherein she deposes at [22] that she has not seen the defendant since 13 August 2015.

[40] The respondents submit that the court's direction made on 20 April 2015 for the defendant to appear at his trial was in effect "countermanded" by the delisting of the trial.[7] An appearance on 29 September 2015 was therefore not required "in accordance with [his] undertaking".[8]

[41] In construing the phrase in s 31 "fails to appear before the court in accordance with the defendant's undertaking and surrender into custody" it must be remembered that the making of a declaration forfeiting the undertaking has a real potential to affect not only the propriety rights of a surety but also their liberty.[9] It must therefore be accepted, as submitted by the respondents, that the resolution of any ambiguity must not extend criminal liability.[10]

[42] In my view no ambiguity arises in construing s 31. The relevant phrase has a necessarily technical meaning because it is the pre-condition that triggers a number of subsequent and serious consequences. The failure to appear before the court and surrender into custody would generally require a constituted court at which the defendant is required to appear at a particular time. This flows from the definition of "court" which includes a judge or justice whether sitting in court or acting in another way. Such a construction is also consistent with the court's power to enlarge a defendant's undertaking. It is necessary to have a constituted court for this power to be exercised in circumstances where a defendant does appear in accordance with the defendant's undertaking and surrenders into custody.

[43] The delisting of the defendant's trial meant that no court was constituted before which the defendant could appear and surrender into custody on 29 September 2015. There has therefore, at this stage at least, been no failure on the part of the defendant to appear before the court in accordance with his undertaking and surrender into custody.

Disposition

[44] As I construe the defendant's undertaking, his address for service remains his residential address.

[45] I therefore order that the application be adjourned so as to permit to the applicant to serve a notice at the defendant's residential address requiring the defendant to personally appear before the court at 9.30 am on Monday 9 November 2015.

As to the requisite standard being on the balance of probabilities see *R v Mokbel* (2006) 199 FLR 176, 184 [31] (Gillard J).

7 Respondents' supplementary outline of submissions dated 20 October 2015, [13(iii)].

8 Respondents' supplementary outline of submissions dated 20 October 2015, [13(iv)].

9 *Bail Act* 1980 (Qld) ss 32(1), 32A(1), (2).

10 Respondents' supplementary outline of submissions dated 20 October 2015, [2] citing *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J); *R v Adams* (1935) 53 CLR 563, 567 (Rich, Dixon, Evatt and McTiernan JJ); *Director of Public Prosecutions v Priestley* [2013] NSWSC 407.