SUPREME COURT OF QUEENSLAND

CITATION:	*Re Young* [2020] QSC 75
PARTIES:	**Andrew Eric Young** (Applicant) **v** **Commonwealth Director of Public Prosecutions** (Respondent)
FILE NO/S:	BS 3668/20
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	8 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2020
JUDGE:	Lyons SJA
ORDER:	**Application refused**
CATCHWORDS:	CRIMINAL LAW — PROCEDURE — BAIL — AFTER CONVICTION — GENERALLY — Where the applicant was convicted after a trial of two counts of fraud with circumstances of aggravation and 17 counts of insolvent trading – where the applicant was sentenced to 9 years imprisonment with the overall sentence on all counts structured so as to require him to serve 5 years in actual custody before being released on recognisance – where the applicant applied for bail pending appeal against conviction and sentence – whether there are strong grounds for concluding that the appeal will be allowed — Whether the sentence imposed is likely to have been substantially served before the appeal is determined — Whether the applicant has demonstrated exceptional circumstances in the context of the ongoing COVID-19 pandemic and the applicant's medical condition *Bail Act* 1980 (Qld), s 8, s 9, s 16 *Criminal Code Act* 1899 (Qld), s 613, s 645 *Ex-Parte: Maher* [1986] 1 Qd R 303, cited *Hanson v DPP (Qld)* [2003] QCA 409, cited

Kesavarajah v The Queen (1994) 181 CLR 230, cited

R v Fuller [2008] QCA 303, cited

R v Kelly (Edward) [2000] 1 QB 198, cited

R v Ogawa [2009] QCA 201, cited

United Mexican States v Kabal (2001) 209 CLR 165, cited

COUNSEL: S Holt QC for the Applicant
L Crowley QC and P Kinchina for the Respondent

SOLICITORS: Anderson Legal for the Applicant
Office of the Commonwealth Director of Public Prosecutions for the Respondent

HER HONOUR (delivered *ex tempore*): The applicant, Andrew Eric Young, applies for bail pending the determination of his appeal in the Qld Court of Appeal.

On 10 January 2020 he was convicted in the District Court, Brisbane, by a jury of two counts of fraud, with a circumstance of aggravation and 17 counts of insolvent trading. The two counts of fraud related to offences under the *Criminal Code Act* 1899 (Qld), and the 17 counts of insolvent trading related to offences against the *Corporations Act* 2001 (Cth).

The applicant had been charged on 6 December 2011 and his trial commenced on 16 September 2019 in the District Court. During the trial evidence was given by 42 witnesses, there were over 1000 exhibits and there were 57 days of trial and thousands of pages of transcripts.

The jury returned a verdict on 10 January 2020 and he was sentenced on 7 February 2020 to a total of nine years imprisonment. The structure of the sentence was such that he was required to serve five years in actual custody, until 9 January 2025, when he will be released on recognisance.

On 7 February 2020, he filed a notice of appeal against his conviction and sentence.

The application for bail pending determination of the appeal is essentially on the following bases:

1. The strength of the grounds of appeal, particularly ground 10 of the conviction appeal, and the particular risk that the COVID-19 pandemic presents to the

applicant, given his age and significant health issues, particularly his heart disease; and

2. It is argued that the genuine risk to the life of the applicant, because of the COVID-19 pandemic, reduces the weight that should be given to reasons why bail pending appeal is commonly rejected.

This is the applicant's first application for bail since he was convicted. I accept he was on bail for eight years without any contravention prior to being sentenced.

Section 8 of the *Bail Act* 1980 (Qld) gives this court jurisdiction to grant bail to an offender who appeals his conviction or sentence.

That jurisdiction is to be exercised pursuant to ss 9 and 16 of the *Bail Act*, and s 16 sets out the situations in which the court has a duty to refuse bail. Section 9 clearly refers to the court's duty to grant bail in favour of persons who have not been convicted, subject to the Act. Section 9 does not however set out the manner in which the court should exercise the discretion to grant bail pending an appeal.

The relevant principles are well known and have been discussed in a number of decisions. The decisions commonly referred to are the Queensland Court of Appeal decision of *Ex-Parte: Maher,*[1] and *Hanson v DPP (Qld).*[2] It is generally accepted that bail will only be granted in exceptional circumstances following a conviction.

In *Maher* the court adopted the principles that were set out by the High Court in *United Mexican States v Kabal*,[3] where it was held that to stay an order of imprisonment before deciding the appeal is a serious interference with the due administration of justice, and to allow bail pending the hearing of an appeal after a person has been convicted and imprisoned makes the conviction appear contingent until confirmed. It also places the court in the invidious position of having to return to prison a person whose circumstances may have changed dramatically during the period of liberty whilst on bail. Furthermore the Court held it also encourages unmeritorious appeals and undermines respect for the judicial system in having a recently sentenced person walk free. It was

[1] [1986] 1 Qd R 303.
[2] [2003] QCA 409.
[3] (2001) 209 CLR 165.

also considered to undermine the public interest in having a convicted person serve their sentence as soon as practicable.

Generally, in applications for bail pending appeal, the court will grant bail if two conditions are satisfied:

1. There are strong grounds for concluding that the appeal will be allowed; and

2. Usually the applicant is required to show that the custodial part of the sentence is likely to have been substantially served before the appeal is determined.

That statement of principle was confirmed in *R v Ogawa,*[4] where the Queensland Court of Appeal held that ordinarily, in order to establish exceptional circumstances, it is necessary to show strong grounds for concluding that the appeal will be allowed and the appellant may be required to serve an unacceptable portion of the sentence before the appeal can be heard. However, that statement of principle acknowledged that exceptional circumstances may be held to exist even though those two requirements are not satisfied, but that the prospects of success on appeal will always be an important consideration. The court held that it is always necessary that the discretion to grant or withhold bail be exercised in light of the principles as well as having regard to all the relevant circumstances and in particular, to those referred to in s 16 of the *Bail Act*.

It is also clear that in both *Hanson v DPP* and *R v Fuller*[5] the Court of Appeal emphasised that the release of a person on bail sentenced to a reasonably long term of imprisonment should only occur in exceptional circumstances.

I note that in particular in *Ogawa* there were reasonably short sentences imposed and a short period was left to be served before the hearing of the appeal. In that case, it would seem there were some 39 days left to be served when the bail was granted pending appeal.

There is no doubt that the discretion to grant bail pending appeal is one that is not to be lightly exercised and requires the court to consider the factors to be of sufficient gravity to outweigh the public factors that have already been outlined.

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[4] [2009] QCA 201.
[5] [2008] QCA 303.

In this application, the applicant relies on a consideration of the term "exceptional circumstances" as referred to in the decision of the Queen's Bench in *R v Kelly (Edward)*[6] where Lord Bingham of Cornhill stated that the word exceptional is an ordinary familiar English adjective and not a term of art. He held (at 208):

> *It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered*.

I accept that in the current environment of the COVID-19 pandemic, this is an exceptional event. The question is however whether this event is such as to amount to exceptional circumstances for the purpose of an application for bail pending appeal. Clearly it is one aspect of the total consideration, but it cannot be the entire consideration. As I have already indicated, the cases clearly establish that there has to be consideration of the relevant principles and the provisions of the *Bail Act*.

I accept that the applicant is a 66 year old man with a history of coronary artery disease and that his cardiologist has stated that he has significant coronary artery disease and that he would be potentially at risk of complications if he contracted the COVID-19 virus because of his cardiac problems. That cardiologist stated that cardiac complications following COVID-19 infections can be quite devastating in the over 60s, particularly those with an underlying cardiac pathology.

I accept that the affidavit of Mr Anderson sets out the current circumstances in which the applicant is living. The evidence is that he is currently at the Woodford Prison. He is sleeping on a mattress on the floor in a communal area given there are not enough beds, and I accept he shares communal facilities.

I also accept that should the illness appear in the prison environment it would spread quite quickly and the applicant would be vulnerable.

In terms of the medical conditions that the applicant presents with, it would seem that there had been an application before the District Court in July 2017 for the vacation of the trial dates due to the applicant's physical health, in particular his cardiac condition.

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[6] [2000] 1 QB 198.

On that occasion, the court was not satisfied the material provided a basis for vacating the trial dates.

During the course of the trial, medical issues arose in relation to his physical condition. They were investigated and I note that the trial was able to continue despite those issues. In particular it would seem that he was physically able to continue the trial.

I note in particular that on 21 of November 2019, the applicant had some medical issues including anxiety, hypertension and bouts of angina. He was allowed an adjournment to attend a medical appointment and was admitted to the Royal Brisbane Hospital for observation and investigation.

He was discharged the next day after various investigations, and was then allowed an adjournment to attend various appointments. The trial then continued, however I do note that he collapsed on 18 December 2019 during his closing address (but while he was outside the courtroom). He was taken to hospital but discharged the same day and it was recommended that he rest. He was then deemed fit to return to court on 20 December 2019.

In terms of his fitness for trial and his ability to satisfy the Presser criteria, I note that during the trial the applicant sacked his legal representatives and became self-represented on 14 October 2019.

He applied for a mistrial on the basis that he could not represent himself and that was refused.

There was then an application to the Mental Health Court in relation to his fitness for trial with respect to, I gather, the State offences, and the trial was put on hold while that was determined.

On 14 November 2019 I understand, from reading the reasons of Deveraux DCJ, the Mental Health Court held the applicant was fit for trial and the proceedings should continue according to law.

The issue of the applicant's fitness for trial pursuant to s 645 of the *Criminal Code* was then specifically raised for consideration before the trial judge as the trial was underway.

The applicant was legally represented for the purposes of that determination.

The judge determined that there was no basis for a jury, properly instructed, to be satisfied that the applicant was unfit for trial and refused to put that question to the jury.

Whilst there are some 13 grounds of appeal which have been raised in the notice of appeal, in this application Counsel for the applicant relies in particular on ground 10, which is that the determination as to whether the applicant was fit to continue his trial was a matter for the jury pursuant to s 645 of the *Criminal Code*, and that the trial judge erred by determining that matter himself and not referring it to the jury once it appeared to him that the applicant was of unsound mind and in particular, that he was not fit to continue the trial.

Turning then to the relevant principles, as I am required to do; first, to the issue as to the strength of the appeal. As I have noted, Counsel for the applicant argues that the trial judge went beyond the question that was appropriate for him to determine, which was a threshold issue as to whether it appeared that the applicant was a person not of sound mind, and he considered the matter that the jury was required to consider.

I have considered the transcript of the proceedings before the trial judge. Having considered that material, it is clear that on 15 November 2019 the trial judge considered the provisions of s 645 together with s 613 of the *Criminal Code* and he then referred to the material before him. His Honour referred to relevant authorities, in particular the decision in *Ogawa* by Keane J. He indicated that in relation to the question involving ss 613 and 645 before a trial judge, the issue to determine is a threshold question; namely, whether there is a real question as to whether it appears to be uncertain that a defendant is either capable of understanding the proceedings or is fit to be tried, as the case may be.

In determining that threshold issue, the trial judge referred to the decision in *Kesavarajah v The Queen*,[7] and his Honour considered that the test as set out there was whether a defendant was fit for trial and the meaning of that term. He considered the High Court's consideration of that term and the determination that it meant "inability by reason of some physical or mental condition to follow proceedings for a trial and to make a defence in those proceedings". It was said in that case, and the judge referred to this in particular, that the test needed to be applied in a reasonable and common-sense fashion. The trial judge then specifically referred to the Presser criteria and to the issue

[7] (1994) 181 CLR 230.

as to whether the defendant was self-represented, and the fact that in the case before him it arose because of evidence that the applicant had a short-term memory deficit. The trial judge then considered the material before him, particularly Dr Kovacevic's report, and the material which had been provided to the Mental Health Court, particularly the evidence of Professor Byrne.

His Honour then embarked on a consideration of the context of the trial and the adjustments which had been made for the applicant. He noted that in the context of the trial there were many witnesses and documents and that it was the third time that the applicant had engaged in the trial. He noted that the trial was document-based and that there was no scope for surprise evidence. He considered the question was, does the deficit make Mr Young unfit in the trial, and that the preliminary question was whether it was "open to the jury to so find or is it not even that the threshold was passed".

His Honour concluded that because of the adjustments "there is no basis, in my opinion, upon which a jury, properly instructed, could be satisfied Mr Young is not fit for trial. I will not put the question to the jury".

The applicant argues that that was a determination for the jury and not for the judge. The respondent argues that the trial judge was entitled to refer to the context of the question in answering the threshold question, and that he was entitled to consider the context of the trial and the adjustments which had been made.

It would seem to me on consideration of the authorities, that there is no clear authority on the extent to which a trial judge should go in determining the threshold question, particularly in a long and complex trial where that issue of fitness had been essentially determined on a number of occasions already. That will be a significant issue for the Court of Appeal.

The real issue for me in today's application is whether there are strong grounds of appeal.

It would seem to me, after considering the material, that as Counsel for the respondent contends, this is not a case where the court is in a position to immediately discern an obvious error. As Counsel for the respondent argues, the transcript on my understanding and analysis of it indicates that his Honour correctly identified the relevant authorities,

identified the test to be applied, looked at the evidence put forward and determined the question before him.

On the material before me, I cannot therefore necessarily conclude that there would be strong grounds of appeal. Clearly there are grounds of appeal and important questions to be answered by the Court of Appeal, but it would not seem to me that it is clear cut. It would not appear to me that the prospects of success on appeal are so strong that it would justify granting an appeal in the current circumstances on that basis only.

The applicant is not in danger of serving more time in custody than he would before his appeal can be determined, even though it may, because of the complexity of the issues, be that his appeal is not determined until late 2020 or early 2021. The Court of Appeal is still sitting, and is working through its caseload in an expeditious way – there is no holdup in matters being determined before the Court of Appeal. There is no real issue of delay.

As I have indicated, Counsel have argued the trial judge went beyond what he was required to do in determining the threshold issue and that is a matter for the Court of Appeal.

Turning to the other issue which is relied upon in this application, which is whether the applicant's medical condition is such that the impact on him, should the COVID-19 virus become present in the correctional facility, represents exceptional circumstances such that the relevant principles would be satisfied.

The applicant argues that ordinarily bail pending appeal would only be granted if it could also be shown that a substantial period of incarceration could be served before the appeal is determined, and that whilst that is not the case here, the case is that with the COVID-19 virus as it presently stands, it presents a risk to the applicant, it is argued, most acutely during the period during which the appeal will be prepared, heard and determined. It is argued that the COVID-19 virus presents a particular risk to the applicant and it is combined with the timing of his appeal, and therefore represents a period of incarceration that is not justified in the exceptional circumstances that the applicant find himself in. It is argued that the genuine risk to the life of the applicant because of the COVID-19 virus reduces the weight that ought to be given to the reasons why bail pending appeal is commonly rejected.

It is argued that the applicant's medical conditions are not likely to change during any period of bail, and public confidence in the administration of justice could not be diminished because the practical recognition of COVID-19 has already seen significant alterations to the usual practices and procedures in the criminal justice system. Furthermore, it is argued that the applicant has an exemplary record in the community. He was not convicted of violent offences. He was on bail for a substantial period and he does not represent any risk in s 16 of the *Bail Act* which is unacceptable.

It is also argued that he would consent to a residential condition, a curfew condition, the surrendering of his passport, and he would not leave Queensland.

In weighing up all of the relevant principles and particularly a consideration of the *Bail Act*, I have considered also the affidavit of Mr Potts and the communication from the Commissioner for Corrective Services Queensland which sets out the current position in relation to Queensland prisons. As things currently stand, the evidence before me indicates there is no COVID-19 prisoner in any correctional facility. There are no prisoners who have currently been diagnosed. I also accept the material indicates Corrective Services have taken significant steps to prevent the spread of COVID-19, should it occur, within correctional facilities. I note in particular the current evidence is that everyone entering a correctional facility is required to undergo medical screening including temperature testing. There is also an increased focus within correctional facilities in relation to cleaning surfaces and hand washing. There is also a recently introduced policy whereby all new prisoners are required to isolate for 14 days before coming into a correctional facility. There are also, on the material, further isolation accommodation areas within Corrections currently being developed, and there is also consideration being given to the installation of thermal cameras and the identification of vulnerable prisoners.

The material before me indicates there is an action plan for when COVID-19 cases are identified and it is clear that Stage 4 restrictions will be implemented at that point in time. These restrictions were successfully implemented on 26 March 2020 when a prison officer at Wolston Correctional Centre tested positive and Stage 4 restrictions were implemented but after further testing, Stage 3 restrictions were returned.

The material indicates that the applicant is currently in a residential area and that he is able to access a large residential compound during the day. He also has the ability to apply, because of his medical conditions, for a cell by himself.

As things currently stand, I cannot ascertain that Mr Young is in any particular danger.

I accept the argument for the applicant that there is a great potential that he would be affected but, given the strategies that have been put in place, I am not satisfied that the dangers that are currently presenting to the applicant are such that would warrant this aspect of the application to overtake a consideration of the other principles and the other matters that I am required to take into account.

Overall, after consideration of the relevant principles of the *Bail Act*, and in particular, a consideration of the strength of the appeal, as well as the general principles in relation to exceptional circumstances and the considerations which must apply, I am not satisfied that the applicant has at this point established exceptional circumstances.

Accordingly the application for bail pending appeal is refused.