SUPREME COURT OF QUEENSLAND

CITATION:	*R v Hill* [2020] QSCPR 14
PARTIES:	**R** **v** **HILL, Ryan Henry** (applicant)
FILE NO/S:	Indictment No 97 of 2019
DIVISION:	Trial Division
PROCEEDING:	Pre-Trial Hearing
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	19 June 2020
DELIVERED AT:	Cairns
HEARING DATE:	18 June 2020; 19 June 2020
JUDGE:	Henry J
ORDER:	**Application dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – ADJOURNMENT, STAY OF PROCEEDINGS OR ORDER RESTRAINING PROCEEDINGS – STAY OF PROCEEDINGS – where the applicant was charged with drug trafficking with a circumstance of aggravation of being a participant in a criminal organisation – where the applicant seeks permanent stay of the prosecution of the circumstance of aggravation on the basis that the facts which the prosecution are in a position to prove are incapable of establishing a case to answer – where the Crown allege the defendant who was based in Cairns was in communication with an offender in Sydney who would arrange for parcels containing various dangerous drugs to be sent to Cairns – where the defendant in Cairns was also in communication with a second offender in Cairns who facilitated the delivery of packages containing dangerous drugs through a transportation and freight company – where the Sydney offender was also in communication with a second offender in Sydney who would send the packages containing dangerous drugs to Cairns – where the prosecution case is that the criminal organisation consisted of four individuals: the two offenders based in Cairns and the two offenders based in Sydney – whether it would be open to the jury, or a judge hearing the trial alone, to conclude that the alleged association of persons was a criminal organisation within the meaning of s 161O *Penalties and Sentences Act*

1992 (Qld)

CRIMINAL LAW – EVIDENCE – MATTERS RELATING TO PROOF – PRIMA FACIE CASE OR CASE TO ANSWER – GENERALLY – where the applicant and respondent rely upon the re-statement of test to be applied to a "no case to answer" submission found in *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1 – where that case suggests if the judge deciding a no case submission believes there is a hypothesis consistent with innocence reasonably open on the evidence, he or she must find that there is no case to answer – whether that is an accurate statement of the test to be applied to a "no case to answer" submission

Criminal Code (Qld), s 590AA

Penalties and Sentences Act 1992 (Qld), s 161O, s 161P, s 161Q

Attorney-General's Reference (No 1 of 1983) [1983] 2 VR 410, applied
Beckwith v The Queen (1976) 135 CLR 569, applied
Doney v The Queen (1990) 171 CLR 207, applied
Questions of Law Reserved on Acquittal (No 2 of 1993) (1993) 61 SASR 1; (1993) 70 A Crim R 323, not followed
R v Bilick (1984) 36 SASR 321, considered
R v Gesa & Nona (2000) 110 A Crim R 507, applied
R v Hilton [2020] QSCPR 2, distinguished
R v Stasiak; R v Turkyilmaz [2019] QSC 260, considered
R v Stewart; ex parte Attorney-General [1989] 1 Qd R 590, followed

M Bagaric, *Ross on Crime* (Thompson Reuters, 6th ed, 2013), considered
Glass, "Acquittals by Direction" (1986) 2 *Australian Bar Review* 11, applied
Glass, "The Insufficiency of Evidence to Raise a Case to Answer" (1981) 55 *Australian Law Journal* 842, considered

COUNSEL: A Glynn QC, with D James, for the applicant
N Crane for the respondent

SOLICITORS: Philip Bovey and Company for the applicant
Office of Director of Public Prosecutions (Queensland) for the respondent

HIS HONOUR: Ryan Henry Hill is charged with carrying on the business of unlawfully trafficking in dangerous drugs with a serious organised crime circumstance of aggravation. He has pleaded guilty to trafficking simpliciter, but not guilty to the circumstance of aggravation. He makes application pre-trial pursuant to s 590AA

Criminal Code (Qld) for a permanent stay of the prosecution of the circumstance of aggravation on the basis that the facts which the prosecution are in a position to prove are incapable of establishing a case to answer in respect of the circumstance of aggravation.

The legal theory underpinning an application of this kind is that it would be an abuse of process to permit the prosecution of a circumstance of aggravation which it is known in advance cannot succeed. Because the test to be applied in these circumstances is identical to the test a trial judge would apply to a no case to answer submission at the close of a prosecution case, it is a prerequisite to an application of the present kind that the facts upon which the prosecution relies to prove the circumstance of aggravation are accepted by the defence for the purposes of the application and that the Crown concedes those facts represent the highest the Crown case can be put – see *R v Gesa & Nona* (2000) 110 A Crim R 507. That prerequisite has been met by the parties' acceptance that my decision should be premised upon the facts set out in documents styled "Attachment A Relevant Facts" and "Appendix A Schedule of Toll Consignments", as well as some further facts stated from the bar table this morning.

There was reference made in the course of the applicant's counsel's submissions to evidence given by Mr Hill in the course of an earlier pre-trial hearing. To remove doubt, this was done to illustrate points made about the inadequacy of the prosecution case. His testimony is not relied upon as forming the facts said to constitute the prosecution case.

The assessment to be undertaken is made more difficult by the circumstantial nature of the prosecution case. As will become apparent, whether the facts can prove the circumstance of aggravation involves issues of degree upon which reasonable minds may differ. This highlights the importance of not drifting unwittingly into the role of the jury, or the judge in a judge-alone trial, as the ultimate arbiter of fact.

The well-known test to be applied to a no case to answer submission was described in *Doney v The Queen* (1990) 171 CLR 207 at 214–215 as follows:

> "…[i]f there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."

During submissions the question was raised whether this test differed in the context of a circumstantial case. The applicant and respondent appeared to rely, in different ways, upon King CJ's purported restatement of principle in *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1[1] at 5 where his Honour said:

> "I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and

[1] A case which is also reported *sub nom Case Stated by DPP (No 2 of 1993)* (1993) 70 A Crim R 323.

> thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt or, to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence." (emphasis in original)

Regrettably, his Honour's attempt to "put it another way" at the end of that passage, which I will refer to as the "King rider", has the potential to cause confusion. It suggests if the judge deciding a no case submission believes there is a hypothesis consistent with innocence reasonably open on the evidence, he or she must find that there is no case to answer. The King rider is at odds with well-established principle. I pause to explain why because the above passage seems to have become increasingly cited, perhaps because it appears in that popular ready reckoner of some practitioners in the criminal jurisdiction, *Ross on Crime* (Thompson Reuters, 6th ed, 2013) at 1058 [14.1120].

In the decision of the Queensland Court of Criminal Appeal in *R v Stewart; ex parte Attorney-General* [1989] 1 Qd R 590 the approach which later materialised in the King rider was expressly disapproved. McPherson J, as he then was, with whom Andrews CJ and Demack J agreed, said at 592:

> "…Only if the evidence had been such that an inference to that effect was incapable of being drawn beyond reasonable doubt could it be said that there was in law no material on which a verdict of guilty might be found; that there might remain a possible inference consistent with innocence did not serve to remove the question from the province of the jury."

His Honour went on to endorse an extra curial proposition of Mr Justice Glass in "Acquittals by Direction" (1986) 2 *Australian Bar Review* 11 at 12, namely:

> "…The trial judge never asks himself the question whether the facts and inferences which the Crown evidence is sufficient to establish are reasonably open to an explanation consistent with innocence ... Whether the Crown has excluded every reasonable hypothesis consistent with innocence is a question not for the judge, but for the jury."

The same conclusion was reached by the Full Court of the Supreme Court of Victoria in *Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410 at 415. That decision was approved by the High Court in *Doney v The Queen* (1990) 171 CLR 207. Indeed, King CJ in *Questions of Law Reserved on Acquittal (No 2 of 1993)* referred to that decision with evident approval earlier on the very page containing the passage I have quoted. The apparent pedigree of the King rider appears in an earlier article by Justice Glass than that quoted by McPherson J in *Stewart*. That article, entitled "The Insufficiency of Evidence to Raise a Case to Answer" appeared in (1981) 55 *Australian Law Journal* 842. At page 853 it contained the following proposition:

> "Fully extended the question of sufficiency for the judge may be expressed as follows: Is the prosecution evidence by means of primary proof and secondary implication capable of proving circumstances of such a character that a reasonable jury could think that every reasonable hypothesis except the guilt of the accused is excluded."

That passage conveys a similar meaning to the King rider. It is not a meaning to which Justice Glass subscribed for long. It is inconsistent with the passage in his 1986 article quoted by McPherson J in *Stewart*. Justice Glass' 1981 article was evidently very well-known to King CJ, for his Honour cited and fully agreed with its reasoning in *R v Bilick* (1984) 36 SASR 321 at 335. It may be that while Justice Glass had shifted position by 1986, after *Bilick*, King CJ was unaware of the shift in adding his rider by the time of *Questions of Law Reserved on Acquittal (No 2 of 1993)*. In any event, for the reasons given, I give no weight to the King rider and abide by the orthodox position recited by McPherson J in *Stewart*.

The circumstance of aggravation which is the target of the present application is provided for in the *Penalties and Sentences Act 1992* (Qld) in Pt 9D – Serious Organised Crime. The practical effect of s 161R therein is if the circumstance of aggravation is proved additionally to the offence simpliciter, the court must impose a mandatory minimum of at least seven years imprisonment cumulatively to the sentence imposed for the simpliciter offence, which must be imposed without regard to the mandatory cumulative consequences of the circumstance of aggravation.

The circumstance of aggravation is defined in s 161Q as follows:

> "**161Q Meaning of serious organised crime circumstance of aggravation**
>
> (1) It is a circumstance of aggravation (a ***serious organised crime circumstance of aggravation***) for a prescribed offence of which an offender is convicted that, at the time the offence was committed, or at any time during the course of the commission of the offence, the offender—
>
> (a) was a participant in a criminal organisation; and
>
> (b) knew, or ought reasonably to have known, the offence was being committed—
>
> (i) at the direction of a criminal organisation or a participant in a criminal organisation; or
>
> (ii) in association with 1 or more persons who were, at the time the offence was committed, or at any time during the course of the commission of the offence, participants in a criminal organisation; or
>
> (iii) for the benefit of a criminal organisation.

> (2) For subsection (1)(b), an offence is committed for the benefit of a criminal organisation if the organisation obtains a benefit, directly or indirectly, from the commission of the offence.
>
> (3) To remove any doubt, it is declared that a criminal organisation mentioned in subsection (1)(b) need not be the criminal organisation in which the offender was a participant."

Section 161Q(3) carries no relevance here in that the prosecution case is that Hill knew or ought reasonably have known that in committing the simpliciter offence he did so in association with one or more persons who were participants in a criminal organisation in which he himself was a participant. Put another way, the prosecution case is that there was one criminal organisation in play. That case is that the organisation consisted of four individuals: two based in Sydney, "the Sydney offenders", and two based in Cairns, "the Cairns offenders". It is alleged the Sydney offenders were involved in repeatedly sending large quantities of illicit drugs to Cairns by arrangement with the Cairns offenders and that the Cairns offenders were involved in repeatedly sending large quantities of cash back to Sydney in an arrangement with the Sydney offenders.

The Sydney offenders were Khalid Kanj and Sandeep Dharan. Kanj obviously had access to wholesale quantities of drugs. He used the other Sydney offender, Dharan, as his local storeman and postal agent. Dharan would attend a storage shed where Kanj had evidently arranged for the drugs to arrive. Dharan would weigh and package the drugs and send them via Australia Post to addresses in Cairns provided to him by Kanj. Of the Cairns offenders, it was Hill who coordinated the receipt and distribution of the drugs into Cairns. He onsold the drugs to wholesale drug dealers who paid him money. It can be inferred he kept substantial amounts of such money, but also couriered very substantial amounts of it back to Kanj via Dharan.

Kanj, Dharan and Hill for a time used Australia Post parcels to courier the drugs to Cairns from Sydney. However, after a number of seizures, they changed to sending the packages via the Toll courier network. In Cairns, Hill recruited a local Toll employee, Jamie Payet, the other Cairns offender. Payet would effectively ensure the safe transit of the packages sent by the Sydney offenders to Cairns and was paid by Hill for doing so.

During the Australia Post era, Hill would text or email his drug order to Kanj using encrypted phones. Kanj would forward a screenshot of the order to Dharan who, on sending the drugs to the relevant name and destination in Cairns, would forward the tracking number to Kanj who would in turn forward it to Hill.

In the Toll era, those chains of communication were varied to the extent that after creating consignment paperwork inclusive of the relevant barcode sticker, Payet would email the particulars to an email address provided to him by Hill. That email address was controlled by Dharan. Though Payet did not specifically know who he was emailing, he would have realised he was dealing with a contact in Sydney, having regard to the sender details on the consignments. Kanj informed Dharan of the change of arrangements by which the Toll employee would be facilitating the process via the Toll consignment notes.

There is no evidence of Kanj and Dharan operating a wider distribution network so an inference is reasonably open that they were distributing only to Hill. In a similar vein,

there is no evidence of Hill sourcing any substantial quantities of drugs other than from Kanj.

Kanj and Dharan would communicate using encrypted phones. Kanj also arranged for Dharan to supply Hill with a number of encrypted phones. Hill used one of them and gave another to Payet. He also supplied such phones to a number of his wholesale buyers in Cairns, but for present purposes, the significance of the phones is that they were deployed for use by and between the Sydney and Cairns offenders.

In summary then, during the Australia Post era Hill and Kanj would communicate with each other and Kanj would communicate with Dharan. There was no direct line of communications between Dharan and Hill although it was, of course, Dharan who was forwarding the packages in accordance with Hill's requests conveyed to Kanj. During the Toll era Hill and Kanj continued to communicate and, of course, Kanj continued to communicate with Dharan. At the Cairns end, Hill, of course, communicated with Payet and Payet was in turn communicating with Dharan by email, albeit that he did not know the identity of the person he was forwarding the emails to.

The offending activity came to an end after police searches in Cairns following which Kanj instructed Dharan to cease activity.

The prosecution case, in effect, is that Kanj, Dharan and Hill and subsequently Kanj, Dharan, Hill and Payet were involved in a well-organised and exclusive association engaged in commercial trafficking of illegal drugs from Sydney into Cairns. The critical issue is whether it would be open to the jury, or a judge hearing the trial alone, to conclude that the alleged association of persons was a criminal organisation within the meaning of Pt 9D.

Section 161O *Penalties and Sentences Act* defines a "criminal organisation" as follows:

> "**161O Meaning of criminal organisation**
>
> (1) A ***criminal organisation*** is a group of 3 or more persons, whether arranged formally or informally—
>
> (a) who engage in, or have as their purpose (or 1 of their purposes) engaging in, serious criminal activity; and
>
> (b) who, by their association, represent an unacceptable risk to the safety, welfare or order of the community.
>
> (2) For subsection (1), it does not matter whether—
>
> (a) the group of persons—
>
> (i) has a name; or
>
> (ii) is capable of being recognised by the public as a group; or
>
> (iii) has ongoing existence as a group beyond the serious criminal activity in which the group engages or has as a purpose; or
>
> (iv) has a legal personality; or

(b) the persons comprising the group—

(i) have different roles in relation to the serious criminal activity; or

Example—

Of the persons comprising a methylamphetamine syndicate, different persons are responsible for supplying the cold and flu tablets, extracting the pseudoephedrine from the tablets, supplying other necessary ingredients, and cooking the ingredients to produce methylamphetamine.

(ii) have different interests in, or obtain different benefits from, the serious criminal activity; or

Example—

Of the 3 persons comprising a group that engages in serious criminal activity, 1 person obtains the profit from the activity and pays the other 2 persons an amount for engaging in the activity.

(iii) change from time to time.

Example—

a networked online child exploitation forum

(3) In this section—

engage, in serious criminal activity, includes each of the following—

(a) organise, plan, facilitate, support, or otherwise conspire to engage in, serious criminal activity;

(b) obtain a material benefit, directly or indirectly, from serious criminal activity."

As to the meaning of "participant", it is defined in s 161P as follows:

"**161P Meaning of participant**

(1) A person is a participant in a criminal organisation, if—

(a) the person has been accepted as a member of the organisation and has not ceased to be a member of the organisation; or

(b) the person is an honorary member of the organisation; or

(c) the person is a prospective member of the organisation; or

(d) the person is an office holder of the organisation; or

(e) the person identifies himself or herself in any way as belonging to the organisation; or

Examples—

- using a theme-based naming convention or icon to establish a screen name or profile for an online child exploitation forum
- wearing or displaying the patches or insignia, or a version of the patches or insignia, of a criminal organisation

(f) the person's conduct in relation to the organisation would reasonably lead someone else to consider the person to be a participant in the organisation.

Example of conduct for paragraph (f)—

doing any of the following for a criminal organisation involved in the production and sale of cannabis—

- tending the cannabis plants
- packaging the cannabis for sale
- selling the cannabis
- laundering the profits from the sale of the cannabis
- managing the day-to-day business of the organisation

(2) For subsection (1)(a), a person may be accepted as a member of a criminal organisation—

(a) informally; or

(b) through a process set by the organisation, including, for example, by paying a fee or levy."

Of the events or behaviours set out in s 161P(1) as marking a person as a participant, the most relevant in the present context is s 161P(1)(f). If it were open to a jury to conclude that the Sydney and Cairns offenders constituted a criminal organisation, then the nature of Hill's activities, vis-à-vis that organisation, could reasonably lead someone else to consider him to have been a participant in that organisation. It follows for the purposes of the present argument that the point of determinative focus is whether the Sydney and Cairns offenders together constituted a criminal organisation as defined in s 161O.

Since I am taking the prosecution case at its highest, I will focus for the purpose of the present exercise upon the more populous participation of the Toll era and whether during that era, Kanj, Dharan, Hill and Payet were a group of three or more persons engaged in serious criminal activity and who, by their association, represented an unacceptable risk to the safety, welfare or order of the community.

It can scarcely be doubted that it would be open to a jury or a judge trying the case alone to conclude that these men were engaged in serious criminal activity, the relevant consideration in s 161O(1)(a). As to s 161O(1)(b), it might readily be accepted that if they

were acting in association with each other as a group of three or more persons, their association could represent an unacceptable risk to the safety, welfare or order of the community.

The reference in s 161O(1)(b) to "their association" is a reference to the prerequisite "group of three or more persons" contained at the outset of s 161O(1). The use of the word "association" in s 161O(1)(b) sheds some minor and uncontroversial light on the meaning of the words "group of three or more persons", in that it contemplates it must be a group of three or more persons who are associating.

In *R v Stasiak; R v Turkyilmaz* [2019] QSC 260, I concluded there was an absence of evidence of association, "direct or indirect", as between two of the alleged "group of three" said to constitute a criminal organisation. This meant the Crown case was incapable of proving the existence of the requisite criminal organisation. The void in the evidence was so obvious that it was unnecessary to elaborate upon why indirect association would be potentially sufficient for the purposes of s 161O(1)(b).

The applicant submits that if the legislature had intended that indirect association was sufficient, it would have said so. The competing argument, of course, is that if the legislature intended the word "association" to be confined only to direct association, it would have said so. There is nothing in the context of s 161O, or more broadly, part 9D, to suggest that the word "association" in s 161O should be read down to give it a more confined meaning than its ordinary meaning.

In *Beckwith v The Queen* (1976) 135 CLR 569 at 576, Gibbs J observed:

> "In determining the meaning of a penal statue the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences."

I perceive no ambiguity in the meaning of the word "association". It is a word of ordinary usage. It connotes some form of connection, to be sure, but not the precise manner or form of the connection. To describe the word "association" as requiring only a direct association would involve the same erroneous reasoning as describing the word "contact" as requiring only direct contact, as distinct from indirect contact. Reading the word "association" in its context, I readily conclude the association it contemplates may be direct or indirect.

While in *R v Stasiak; R v Turkyilmaz* [2019] QSC 260, I focused on the concept of association because of the particular circumstances of that case, sight must not be lost of the central requirement at the start of s 161O(1) that there be a group of three or more persons. Section 161O(2) lists a variety of features which would not preclude a group being regarded as a group. But that does not remove the need for there to be evidence capable of supporting the inference, in the positive, that there is a group of three or more persons.

My attention was drawn in argument to the explanatory notes to the *Serious and Organised Crime Legislation Amendment Bill 2016*, where at page 119 it was said of the new s 161O:

> "The definition addresses the interpretation given to the term (and/or concept) of 'group' in *R v Hannan, Hannan, Gills, Murrell & Hannan* [2016] QSC 161. To remove any doubt, the scenario illustrated by that case is intended to be caught by the definition under new section 161O."

In *Hannan*, Justice Peter Lyons was concerned with the provisions of the predecessor legislation to Pt 9D, namely the *Vicious Lawless Association Disestablishment Act 2013*. His Honour's case turned upon the meaning of the word *"*group*"* in the definition of *"*association*"* in s 3 of that Act. It seems likely the above passage in the explanatory notes is a reference to paragraph [46] of his Honour's reasons, in which he observed:

> "I have already noted that provisions of the Act envisage that an association will have members. The provisions, in my view, envisage that a participant might rely on membership as of a means of distinguishing between himself or herself from those who are not members; and membership would provide a basis for claiming some form of assistance or support from, and accordingly asserting some form of obligation, probably not legal, falling on, others who are members. These considerations suggest that an association, including a 'group', has some form of existence which would be recognised by others and is in some way capable of identification as an entity. For want of better expressions, I would describe these characteristics as 'recognisable group existence' and 'recognisable group identity'."

One does not need to have recourse to the explanatory notes to understand the unambiguous effect of s 161O(2)(a)(ii) is that, in considering the meaning of "group", it does not matter that the collection of persons allegedly constituting the group are not capable of being recognised by the public as a group. In the context of the generally covert nature of criminal activity, I would think that is hardly a consideration of seismic influence. The ultimate arbiter of fact would necessarily be looking to evidence of which the public was hitherto unaware, in weighing up whether that evidence was sufficient to prove a group of three or more persons existed.

The *Macquarie Dictionary* (7th ed, 2017) relevantly defines the noun "group" as:

> "1. any assemblage of persons or things; clusters; aggregation. 2. a number of persons or things ranged, or considered together, as being related in some way."

Recourse to other dictionaries produces similar explanations, which need not be recited here. It is tolerably clear from such definitions that there must be some unifying combination or relation between persons for them to constitute a group. The applicant contends, in effect, that while Kanj and Dharan might be described as a group of persons, and that while Hill and Payet might be described as a group of persons, there was no connection or relationship between them, such that all four could be described as a group.

The applicant relies heavily upon my reasoning in *R v Hilton* [2020] QSCPR 2. I there found that, taking the prosecution case at its highest, Hilton was an important wholesale customer of the alleged criminal organisation which was shipping drugs into Cairns (drugs he was receiving from Hill). However, I observed there was no evidence of his

participation in that alleged criminal organisation, highlighting the importance of that element contained in s 161Q(1)(a). The application draws upon that reasoning to contend that, at the highest for the prosecution case, Hill was just a customer of Kanj.

That characterisation of the relationship between the players is certainly arguable, as a matter of inference, from the known facts. While there is evidence that large amounts of money were regularly being couriered, inferentially, by Hill, back to Kanj, and that Hill was also deriving large amounts of money for his own use, the evidence is silent as to the precise commercial arrangement between the two men. The applicant, unsurprisingly, highlights this to emphasise the inference would be open that the applicant was buying drugs from Kanj, simply as his customer.

It will be recalled, however, that my present concern is not with whether the prosecution can exclude such a hypothesis as a reasonable hypothesis consistent with innocence. That there is a rival view, other than that urged by the prosecution, as to how this array of persons ought be characterised, would be matter for the consideration of the jury, or a judge hearing the trial alone. It says nothing as to whether the inference contended for the by the prosecution is capable of being sustained by the evidence.

In my conclusion, there is evidence capable of supporting the inference that the Sydney and Cairns offenders were, together, a group engaging in serious criminal activity who, by their association, represented an unacceptable risk to the safety, welfare, or order of the community. There existed a unifying connection, or relation, between them. That connection or relation was not confined merely to Kanj and Dharan, or to Kanj and Hill, or to Hill and Payet. They were not three sets of associations operating in isolation. Further, if it matters, Payet apparently associated with Dharan to the extent that, albeit without knowing him personally, he forwarded him the consignment information emails. One might observe pen pals are pals nonetheless. There was also an element of indirect association, as between Hill and Dharan, in that without apparently ever meeting each other, one was forwarding the drugs to the other.

Unlike *R v Stasiak; R v Turkyilmaz* [2019] QSC 260 and *R v Hilton* [2020] QSCPR 2, this is not a case in which it could be said that the prosecution facts are simply incapable of sustaining the requisite conclusion of guilt. Rather, this case involves an assessment of degree as to how one characterises what was occurring as between the Sydney and Cairns offenders. Much turns upon that variable, but the evidence appears capable of proving these men were all involved in a unified and organised task; a task being conducted by and between them, namely, the trafficking of the drugs from Sydney into Cairns. They each had different roles in that organised undertaking but, in my conclusion, the evidence is capable of sustaining the inference that they did so in association with each other as part of a group.

My conclusion says nothing of the persuasiveness of the evidence in favour of the inference sustaining guilt, or its capacity to exclude inferences consistent with innocence. That is not the task at hand. My conclusion does mean the present application must fail and the debate with which it is concerned be left to the determination of the jury, or a judge determining the case alone, as the case may be.

My order is application dismissed.