MAGISTRATES COURTS OF QUEENSLAND

CITATION:	*Van Tongeren v ODPP (Qld)* [2013] QMC 16
PARTIES:	**PAUL VAN TONGEREN** (applicant) **v** **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION (QLD)** (respondent)
FILE NO/S:	MAG217673/13(5)
DIVISION:	Magistrates Courts
PROCEEDING:	Bail Application
ORIGINATING COURT:	Magistrates Court at Brisbane
DELIVERED ON:	14 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2013
MAGISTRATE:	The Honourable Judge Carmody QC
ORDER:	**Bail is refused.**
CATCHWORDS:	CRIMINAL LAW – PRACTICE AND PROCEDURE – BAIL – whether the applicant is a participant in a criminal organisation – whether the applicant can show cause why their continued detention is unjustified *Bail Act 1980 (Qld)*
COUNSEL:	ME Bouchier for applicant DR Kinsella for respondent
SOLICITORS:	Bosscher Lawyers for applicant Respondent on own behalf

Introduction

[1] This is a contested bail hearing.

[2] The applicant is an unconvicted defendant who has been held in custody since his arrest eight (8) days ago on charges of disorderly behaviour on hotel premises and affray.

Jurisdiction

[3] Bail hearings in the Magistrates Court are ordinarily held in the geographical district or division in which the defendant lives or the offence occurred (cf s 139(1)-(2) *Justices Act* 1886 (Qld).

[4] However, the venue can be varied by direction of the Chief Magistrate (s 12(2)(d) *Magistrates Act* 1991 (Qld)).

[5] By Practice Direction of 21 of 2013 all bail hearings to which s 16(3A) of the Bail Act applies are to be heard in Court 20 in the Brisbane Magistrates Court from 4 November 2013.

[6] Thus, notwithstanding that the related criminal proceedings are pending in the Toowoomba Magistrates Court, this court has authority to grant bail under s 8 of the Bail Act (*Re: Groves' Application* (2013) Qd R 310 per WB Campbell J).

History of bail

[7] Modern bail is conditional liberty granted subject to the Act. Conditions added to encourage compliance must not be overly onerous *for the person* in the circumstances: s 11(1). Special restrictions may also be imposed to ensure the objects of bail and mitigate risk.

[8] A defendant not released on bail or sentenced for the offence charged must be remanded in custody: s 8(2).

[9] The word *bail* derives from the French for hold and deliver. The old common law did not recognise a right of liberty for defendants on remand (*Chau –v- DPP* (1995) 37 NSWLR 639 per Gleeson CJ at 646) but from the early medieval period routinely released them into the custody of a surety via a form of habeas corpus as an alternative to the "inadequate and disease ridden gaols and lock ups" (R Roulston, *Principles of Bail*, Proceedings of the Institute of Criminology, Sydney University Law School (1969)).

[10] In Norman times the power was entrusted to the nobles and then to sheriffs but was transferred to justices during the reign of the Tudors and in the late 17th century devolved to Magistrates because of excesses and abuse of power "designed to elude the benefit of… liberty"(Sir William Holdsworth *A History of English Law* (vol IV pp525-8)).

[11] Over the next 500 years bail jurisprudence developed into a coherent body of law and practice which was incrementally consolidated into bail statutes and then codified.

[12] Today bail in Queensland is controlled exclusively by the *Bail Act* 1980 (Qld) (the Act) (*R v Hughes* (1983)1 Qd R 92 per Connolly J at 95-96).

The importance of bail

[13] The law recognises the undesirability of pre-trial custody if there is a viable less extreme alternative.

[14] This stance not only acknowledges the value traditionally placed on liberty in a free society but is also reflective of the heavy financial and human costs pre-trial detention involves.

[15] It also discloses an appreciation of the personal deprivation and hardship of prison life, especially for breadwinners and their dependants (*Edwards –v- The Queen* (1996) 98 A Crim R 510 per Gleeson CJ at 515).

[16] Defendants who are ultimately acquitted or not imprisoned for longer than they spent in custody of remand are probably hardest hit (New South Wales Law Reform Commission, *Bail*, Report No.133 (April 2012) [5.10] pp. 66-67).

[17] For these and a range of other reasons *needlessly* keeping unconvicted defendants in jail pending trial can be contrary to the overall public interest.

Bail practice and procedure

[18] Bail proceedings are governed by civil – not criminal- procedures (*Scrivener –v- DPP* [2001] 125 Crim Appeal Reports 279, 281 – 283). The principles of open justice and procedural fairness also apply.

[19] A bail dispute is not wholly adversarial. The court itself plays partly an inquisitorial role. It, not the parties, are ultimately responsible for releasing defendants who do not need to be held in involuntary custody pending trial and for detaining those who do. This is a "solemn duty" to be discharged on the basis of the best information available.

[20] The strict rules of evidence are relaxed to allow the court to receive and take into account information of any kind it considers credible or trustworthy enough in the circumstances: s 15(1)(e).

[21] This includes matters the party agree are relevant: s 15(1)(d) and affidavit or other verified information about the defendant's previous bail history, criminal record and the probability of conviction: s 15(1)(c).

[22] Disputed facts are resolved according to the balance of probabilities.

[23] The court may make its own investigations of and concerning the defendant as it sees fit. This includes examining the applicant and other witnesses.

[24] The only prohibited area of inquiry is the defendant's guilt of the offence charged: s 15(1)(a)-(d).

[25] Bail proceedings can, and in my opinion, should, be postponed even (or perhaps especially) at summary level if obtaining sufficient reliable information impracticable for the purposes of making a bail decision due to lack of time: s 16(1A).

[26] The traditional requirement of a significant change in the circumstances between successive bail applications emphasises the need for an applicant to adequately prepare and properly present supporting evidence on the original application (*Fisher –v- DPP* (Q) (2011) QCA 054).

The bail discretion

[27] The social purpose of bail is to strike the right balance between not unduly infringing upon the liberty of a charged, but yet unconvicted, person on the one hand and ensuring that he or she keep the peace and is of good behaviour if freed, until such time as the benefit of the presumption of innocence is lost.

[28] The decision whether to grant or refuse bail lies in a complex discretionary realm. The same body of evidence can lead to opposite but equally reasonable conclusions with neither being demonstrably right or wrong.

[29] The discretion is intended to be exercised in a way that gives practical expression to the legislative intent and public policy objectives.

[30] In *Magaming –v- The Queen* 2013 HCA 40 (11 October 2013) per Keane J explained the resolution of public policy issues by the exercise of legislative power in the context of federal sentencing:

> [105] a sentence enacted by the legislature reflects policy driven assessments of the desirability of the ends pursued by the legislation and the means by which those ends might be achieved. It is distinctly the province of the legislature to gauge the seriousness of what is seen as an undesirable activity affecting the peace, order and good government of the Commonwealth and the soundness of the view that condign punishment should be enacted as a ceiling or a floor.
>
> [106] In laying down the norms of conduct which give effect to these assessments, the legislature may decide that an offence is so serious that consideration of the particular circumstances of the offence and the personal circumstances of the offender should not mitigate the minimum punishment thought to be appropriate to achieve the legislatures objectives whatever they may be.

Granting Bail

[31] The court has a statutory duty to release unconvicted defendants on bail in *certain cases*: s 9.

[32] This so called "presumption" in favour of bail reflects fundamental criminal justice values and basic democratic rights including:

- the presumption of innocence;
- the rule against state interference and unjustified involuntary detention;
- the rejection of punitive confinement outside the judicial process; and
- the public interest and a fair trial for both the state and the defendant: (New South Wales Law Reform Commission, *Bail*, Report No.133 (April 2012) [10.32] at pp. 149-150)

[33] The statutory duty to grant bail is subject to the Act and can be displaced by the overriding community interests mentioned in s 16(1).

[34] The court is bound to refuse bail if satisfied of an *unacceptable risk* that any of the 4 (four) events specified in s 16(1)(a) *would* occur if the defendant was released on bail namely:-

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

(ii) (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

A defendant is also sometimes held in custody for his or her own protection.

Unacceptable Risks

[35] In assessing whether there is an unacceptable risk of a sub s (16)(1)(a) event the Court shall have regard to all apparently relevant matters including:-

(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: s 16(2)(a)-(d).

[36] Obviously the significance of any one consideration will vary case by case depending on how much information is available and what it discloses: *Sica –v- DPP* (Q) [2010] QCA 18 at [15].

[37] In *Williamson –v- DPP* [2001] Qd R99 at [117] Thomas JA described s 16(1)(a)(i) and (ii) A as the *main* grounds.

[38] As Thomas JA recognises in *Williamson*: no grant of bail is risk free and care must be taken not to be overly risk averse just to avoid criticism or condemnation.

[39] The term "*unacceptable*" has a function similar to that of the term "*substantial*" in other statutory settings. It imports a requirement that the *likelihood* of the relevant future conduct or event is not "trivial or transient" (*Condon –v- Pompano Pty Ltd* [2013] HCA 7 at [23]).

[40] Assessing risk is a weighing of all relevant factors, whether stated in the Act or not, to arrive at an estimate of the chances and consequences of a s 16(1)(a) outcome.

[41] Although, no standard of persuasion is mentioned in the Act it appears that to thwart a bail application an "unacceptable risk" is expected to be established as a *fact* to a legally sufficient and satisfactory level of certainty; that is to say, as a matter of probability.

[42] The criterion is a notoriously vague but just because it is not "capable of yielding" a more precise "degree of definition" (*Sica –v- DPP* (Q) [2010] QCA 18 at [15]) does not mean that it is devoid of any practical content. It does not leave the court free to characterise as "unacceptable" any level of risk it chooses.

[43] In deciding the question of possible future harm the court must act on rational inferences drawn from predictive or prognostic, rather than purely historical, facts. The outcome is dictated by the weight of the united force and mutual reinforcing effect of all the direct and circumstantial evidence available assessed in the light of the parties respective power to produce or capacity to contradict (*Vetter –v- Lake Macquarie City Council* [2001-2002] CLR 439 at 454).

[44] However, a defendant's level of future dangerousness and its potential human and social cost is a matter of judgment and degree necessarily based on "…provisional assessments upon very limited material…" (per Thomas JA in *Williamson –v- DPP* [2001] 1 Qd R 19 at 103).

[45] This inherent weakness and unavoidable imperfection of the risk assessment process in any given set of circumstances makes it easy to miscalculate both the chance of a specified event occurring and the magnitude of its potential adverse consequences. But

the indeterminacy of the concept does not deprive the exercise of the bail power of its judicial character (*Baker v the Queen* (2004) 223 CLR 523).

[46] Similar broadly stated standards are common place in statutes and, as Professor Zines observed, *the technique of judicial interpretation is to give it content and more detailed meaning on a case to case basis* (see *Thomas v Mowbray* (2007) 233 CLR 307 at 351).

[47] The Supreme Court also adopts "unacceptable risk" as a yardstick in making continuing preventive detention orders under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld).

[48] The same test is routinely employed by the Family Court to resolve inconclusive child abuse issues in parenting cases. In *M –v-M* (1988) 166 CLR 69 at 75, for instance, a risk of future sexual molestation was held to be unacceptable on the basis of a "lingering doubt" as to whether or not it had happened in the past.

[49] Predictive conclusions are also integral to the criminal sentencing discretion and calculation of damages for future losses in civil negligence cases (cf *Fardon* 223 CLR 575 at 657 per Callinan and Heydon JJ).

[50] Nonetheless, depriving unconvicted defendants of personal liberty on what amounts to predicted dangerousness, is controversial if not uncommon because it is logically possible for the issue (an unacceptable risk) to be proven to the satisfaction of the court as a probability on the basis of historical possibilities and predicted future events: *Minister for Immigration and Ethnic Affairs* [1980] 31 ALR 666 per Smithers J at 673; cf *Re H* (1996) 1 All E R 1 at 21) whereas judicial power is customarily exercised in relation to probable past facts.

[51] The practical problem of risk based intervention is that some decision makers are naturally more risk averse than others, which gives rise to the potential of some taking too much risk with someone else's safety and the rest not taking enough.

[52] Such a risk cannot be scientifically demonstrated. It is founded on assumptions, intuition, belief, experience, suspicion and even "guesswork" (*Kable* per Gaudron J at 106 and McHugh J at 123).

[53] A finding of an unacceptable risk is at best a forecast about what a defendant would do founded on an informed opinion or discretionary judgment about what he may have done. The ultimate conclusion of an unacceptable risk is as to a potential as distinct from an actual event (*M v M* at 75). There is an element of "better safe than sorry" and a risk of harm to the community taking precedence over the potential for injustice to the defendant.

[54] As Gleeson J CJ noted in *Fardon* at 1523 the way the criminal justice system should respond to unacceptable risks represents an almost intractable problem. The potential for injustice exists whether pre-emptive steps are taken or not. On the one hand, a "false positive" will result in the unjust incarceration of an unconvicted defendant and, on the other, a "false negative" may mean that the price of one undeserving person's liberty is significant community harm.

[55] The challenge in each case is whether the probability and gravity of the assessed risk of harm to others justifies depriving the person of their liberty and denying them the same rights and freedoms they might easily deny their innocent victims.

[56] Arguably a risk is only unacceptable in the intended sense when a failure to act would be unreasonable or irresponsible with the public safety welfare interests of others in the community.

[57] Thus, pre-trial confinement of an unconvicted defendant is unjustified only to the extent that it exceeds what is reasonably necessary, in all circumstances, to achieve non-punitive public policy objectives of the legislation or goes beyond or exceeds what is reasonably necessary to prevent unacceptable threats to the integrity of the criminal justice system and community safety and order.

Refusal Criteria

Non-appearance

[58] This is often said to be the decisive of bail questions: *DPP –v- Ghiller* (2008) VSC 435 per Eames J at [43].

[59] Material considerations include:-

- the strength of the person's family ties including friends, employment and residential stability, financial commitments, cultural bonds and social connections;
- disincentives for avoiding the court date;
- the likelihood of conviction together with the probability of a custodial sentence and its possible duration.

[60] While the danger of absconding and a persistent history of non-attendance have to be distinguished from inadvertently failing to appear on a single occasion failure to appear has major adverse consequences, irrespective of the reason, in two respects. First, the obligation to face and answer to the law is avoided. Second, public resources are wasted, distressed victims, anxious witnesses and potential jurors are all inconvenienced.

The nature and the seriousness of the offence charged

[61] Ordering pre-trial detention *solely* because of the serious nature of the offence arguably amounts to punishment without judicial proof of guilt. It runs counter to the presumption of innocence and the requirement of due process.

[62] The anticipated outcome of the proceeding is, of course, more important, in a practical sense, than either the type of offence charged or the prescribed maximum penalty.

[63] However, there are many cases in which the nature and seriousness of the offence charged combined with the alleged circumstances such as use of firearms, premeditation or callousness etc will be directly relevant to one or more of the s 16(1)(a)(i)-(ii) considerations. For example, the more serious the charge and stronger the case the longer a likely lengthy prison sentence, the greater the natural temptation to abscond is going to be.

[64] The same circumstances may also be directly or indirectly relevant to the risk of other offences being committed. For example, a person charged with a terrorism offence involving the use of explosives may present a high risk of both absconding and of serious offending if released (New South Wales Law Reform Commission, Bail, Report No.133 (April 2012) [10.90] at pp159 – 160).

[65] The more serious the possible offence and its possible negative impact the lower the tolerance will be for taking the risk: *Fountain –v- DPP* [2002] 1 Qd R 167.

[66] Here the applicant is liable on conviction to a minimum mandatory ten year sentence on the affray.

The certainty of conviction

[67] This and the probability of a lengthy custodial sentence on conviction is a critical predictor of absconding and interference with witnesses. Defendants charged with offences involving violence, injury or death, the use of weapons, aggravated sexual harm or serious property or drug related offences in this State face severe penalties up to a maximum of life without parole.

[68] The incentive for fleeing arguably increases proportionately to the prospect of conviction which in turn hinges on the comparative strength or weakness of the prosecution case and severity of the likely punishment.

[69] Likely imprisonment may increase the incidence and rate of flight especially when the means (wealth and international mobility) or the opportunity (links with organised crime gangs) are both high and the corresponding disincentives are low (lack of ties or dependants).

[70] However, attempting to predict the outcome of any trial is always problematic and almost impossible before committal. Thus, there is no requirement, even in show cause situations, for the court to consider this criterion if the available information is in sufficient for the purpose (*Sica v DPP* [2010] QCA 18 at [50]).

Prior offences

[71] Clearly, repeat offending is contrary to the public interest. This antecedent is relevant to the extent it reflects on character and to the risk of non-appearance, the likelihood of committing further serious offences or threatening a particular person's safety on bail especially where the previous offending involves family or other violence.

[72] A criminal record may also go to the likelihood of a custodial sentence and its duration and hence to a risk of flight. Past conduct can be and often is the best predictor of future behaviour.

Previous bail breaches

[73] Prior non-compliance with bail conditions may be indicative or symptomatic of a defendant's lack of respect for the courts or personal irresponsibility and can be predictive of a future failure to appear.

[74] A history of recidivism on bail or parole or offending during any period of conditional liberty such as an intensive corrections order, a suspended sentence or good behaviour bond, or probation or other community based order is also logically suggestive of a propensity to re-offend or not comply if released.

Other factors

[75] The legislation does not specifically mention the period of time and conditions under which the person may be held in custody or genuine impediments to obtaining legal advice and preparing for trial but both can be highly relevant.

[76] Delay can be particularly important to bail. Like all other factors, however, it must be weighed against the prospects of acquittal and the risks that if released the defendant would flee, re-offend, interfere with witnesses or threaten public safety: *Sica* at [15].

[77] It assumes more significance when the prosecution case is weak.

[78] The postponement of justice does not mean that pre-trial detention is necessarily unjustified. A lot depends on the degree of excessiveness, major cause and burden of loss having regard to the probability of conviction and severity of the likely sentence.

[79] To the extent that the prosecution is not responsible for the delay it is more difficult to accept that "delay of itself shows cause". If the conduct of the defence increases the length of time to trial any complaint of delay loses most of its force (*Lacey v DPP* (Q) (2007) QCA 413 [12]-[13], [47]).

[80] In other words, s 16(1)(a) risks do not become more acceptable over time.

[81] Strictly speaking, adverse consequences of pre-trial detention for the person's family, or third party hardships such as employer, landlord or creditor, are not matters that can properly be taken into account in assessing risk or the justifiability of pre-trial detention.

[82] Nonetheless, decision makers need to be alive to the personal characteristics and special needs or responsibilities of remandees.

[83] Character and *associations* are related factors. Experience shows, for example, that members of criminal organisations and gangs use force and threats disproportionately to other social groups for a range of reasons including dispute resolution, intimidation or reprisal purposes. Altercations and physical assaults are shared sub-cultural norms and common features of their affiliations and social interaction (Hirshi, T (1969) *Causes of Delinquency*, Berkeley, University of Californian Press; Wolfgang, M (1969) *The Subculture of Violence: Towards and Integrated Theory of Criminology*. London. Travistock.

Participants in criminal organisations

[84] In the wake of increased violence on the Gold Coast involving rival criminal motorcycle gangs, the Queensland Government introduced "tougher anti-bikie laws" and added a circumstance of aggravation into section 72 (affray), provided for mandatory minimum terms of imprisonment in certain circumstances and tightened bail laws.

[85] A new subsection 16(3A) was introduced by the *Criminal Law (Criminal Organisations Disruption) Amendment Act* 2013.

[86] As from the 17 September 2013, *participants in criminal organisations* must be refused bail unless they show cause why their continued detention is unjustified: s 16(3A)(a).

[87] Notably, these changes apply regardless of the type of offence charged. In other words, it does not matter for the operation of s 16(3A), whether the offence the defendant is charged with is an indictable offence, a simple offence or a regulatory offence: s 16(3C).

[88] The provisions of s 16(3A) however, do not, apply if the defendant proves that the criminal organisation is not an organisation that he has, as one that has a purpose of engaging in criminal activity: s 16(3D).

[89] The proper role of the legislature in determining what is in the public interest must be acknowledged: *Nicholas v The Queen* (1998)193 CLR 173 at 274 and in applying s 16 the court will necessarily have regard to the apparent objects of bail including community protection from the activities of participants in criminal organisations (*Condon –v- Pompano Pty Ltd* [2013] HCA 7 at [23]-[24]).

[90] In *Kable v DPP* (*NSW*) (1996) 189 CLR 51 Dawson said at 73-74:

> "Judicial pronouncements confirming the supremacy of parliament are rare but their scarcity is testament to the complete acceptance by the courts that an act of parliament is binding upon them and cannot be questioned by reference to principles of a more fundamental kind".

[91] The recent amendments have to be interpreted consistently with the established central principles of statutory interpretation.

[92] The starting point is to prefer the construction that best promotes the underlying purpose or object of the Act (*Carr v Western Australia* (2007) 232 CLR 138 at 5-6 per Gleeson CJ).

[93] The primary object of legislative construction is to construe the relevant provisions so that it is consistent with the language and purpose of all the provisions of the statute (*Project Blue Sky Ink v Australian Broadcasting Authority* (1998) 194 CLR 355 at 69 and 71).

[94] It is also well established that a statute should not be assumed to abrogate existing fundamental rights in the absence of clear language (*Gifford v Stain Patrick Stevedoring Pty Ltd* (2003)214 CLR 269 [36]).

[95] According to the Explanatory Memorandum, accompanying the amendments, section 16(3A) was introduced as part of a broader legislative reform package to deliver on the government's commitment to crack down on criminal gangs and create a more hostile zero tolerance environment for them, within the state, by among other things, imposing stricter bail laws aimed at making it harder for the courts to release participants in a criminal organisation on bail, pending trial, regardless of the type of offence charged.

[96] The amendments of which s 16(3A) is an integral part, strike "…illegal conduct of the criminal gang participant, communicate the wrongful and cowardly nature of their offending and promotes community safety and protection from these offenders".

[97] As the Explanatory Memorandum makes clear, section 16(3A) is intended to operate prospectively; that is to capture offenders who commit offences after it and the other amendments commenced on 17 October 2013. Although section 16(3A) admittedly impacts adversely on individual liberty its justification is said to be rooted in the need to deter concerning behaviour and to ensure the maintenance of civil authority and any encroachments on traditional civil rights is justified by the overall greater good and the fact that it is targeted only at individuals who offend, while enjoying the support and encouragement of the criminal group.

The threshold issue: Is s 16(3A) activated?

[98] The respondent contends that the defendant is a participant in a criminal organisation and is in a show-cause situation.

[99] The term *participant in a criminal organisation* has the meaning in s 60A of the Criminal Code viz:

(a) a director of a body corporate organisation;
(b) a person who asserts directly or indirectly or advertises his or her membership of an association;
(c) a person who recruits another member;
(d) a person who attends more than one meeting of the group;
(e) who takes part in the affairs of the organisation in any other way.

[100] The relevant date is when the application is heard and determined (Re: Da Silva & Ors [8 November 2013] per Wilson J No: 10279/13).

[101] A criminal organisation defined in s 1 of the Criminal Code is:

(a) an organisation of 3 (three) or more persons:
  (i) who have as their purpose, or one of their purposes, engaging in, organising, planning, facilitating, supporting, or otherwise conspiring to engage in serious criminal activity as defined under the Criminal Organisation Act 2009; and
  (ii) who by their association represent an unacceptable risk to the safety welfare or order of the community; or
(b) a criminal organisation under the Criminal Organisation Act 2009;
(c) an entity declared under a regulation to be a criminal organisation.

[102] It is common ground between the parties that the Bandidos Motorcycle Club (the OMCG) is a declared entity under *Criminal Code (Criminal Organisations) Regulation Act* 2013.

[103] The Crown submits that the applicant's ongoing association with or membership of the Bandidos can and should be inferred from the number of sightings by police of him wearing club colours.

[104] Constable Thaler deposes to seeing the applicant in full Bandidos colours on 11 difference occasions from 5 June 2008. He was most recently seen with a dozen Cairns chapter members on 5 September 2013 at Yamanto.

[105] According to The Laws of Australia [16.3.160} where there is no direct evidence of a fact in issue, it may be presumed to exist at a particular time because of its proved existence at an earlier or later point in time. The presumption of continuance is a process of deduction, reasoning and inference from probabilities. Its strength depends upon the accompanying facts. The degree of probability of the continuance depends on the changes of intervening circumstances having occurred to bring the existence to an end (*Axon –v- Axon* (1937) 59 CLR 395 at 405 per Dixon J).

[106] There is an ample body of evidence demonstrating the applicant's participation in the Bandidos criminal organisation as at the time of his arrest.

[107] At the outset of the hearing an affidavit purporting to be the applicant's resignation of membership from the CMG was read with leave. The question of its effectiveness arises. I am highly sceptical of the gesture.

[108] The "resignation" does not contain any convincing disavowal of the ethos or practices of the criminal organisation. In fact, it looks to me more like cynical expedient attempt at improving the prospects of bail rather than a sincere declaration of disassociation.

[109] The frequency, length and recency of this applicant's past links to the OMCG makes the inference that he is still a participant safe to draw for bail purposes.

[110] Once the prosecution satisfies the court that person charged with any offence is a participant in a criminal organisation as it has here, the evidentiary and persuasive onus shifts to the defendant, to show cause why ongoing detention in custody is unwarranted.

Is continuing detention unjustified?

[111] There is, of course, no single or simple answer to this question. It will vary case by case. The Act does not explain when pre-trial detention is unjustified, and it would be almost impossible to state with clarity and precision all the complex mix of influential discretionary considerations that may be in an infinite range of different bail contexts.

[112] Technically, the section 16(3A) conclusion is that pre-trial custody is unjustified. It is not a determination that bail has to be granted. However, in a practical sense, they probably amount to the same thing – compare *DPP v Asmar* (2005) VSC 487 and *DPP v Harika* (2007) VSC 435.

[113] No specific criteria for deciding when detention is not justified is stated in the Act. However, preventable delays or circumstances that might make incarceration unjustified include a weak prosecution case or excessive preventable delay and, personal factors such as urgent or special medical needs or responsibilities.

[114] As already noted, association with a criminal organisation is clearly seen by the legislature as prima facie evidence of unacceptable risk, which is not easily displaced. Section 16(3A) makes it plain that releasing defendants who espouse or adhere to an ethic of lawlessness or criminal credo will generally be regarded as inimical to the public interest.

[115] Section 16(3A) seems to express a clear legislative intent that regardless of the offence actually charged and despite their level of future dangerousness assessed on an individual level by reference to the risk assessment factors in s 16(2), participants in criminal organisations are now regarded by the law to be unacceptable threats to community welfare solely by virtue of their association (cf s 1 of the Criminal Code) and for that reason alone should "normally-or ordinarily-be refused bail" (*DPP –v- Germakian* [2006] NSWCA 275).

[116] This suggests that from now on it will be incumbent of a participant in a criminal organisation to identify some special as distinct from exceptional reason why he or she should not be refused bail in Queensland (*R –v- Iskander* (2001) 120 A Crim R 302, 305 per Sperling J).

[117] Precautionary thinking and pre-emptive action inevitably raise fundamental civil liberties issues but are not alien or necessarily irreconcilable with democratic values. Social control measures in a criminal context are always a controversial matter of degree.

[118] The increased emphasis placed by the law of bail on safeguarding public safety arguably means that a defendant charged with say, an offence aggravated riot under s

359(2) of the Criminal Code could manage to show cause under s 16(3) but fail under s 16(3A) just because he is a participant in a criminal organisation.

[119] Even if this construction is wrong and sets the intended standard of persuasion for s 16(3A) at too high a level pre-trial confinement of a non-convicted participant in a criminal organisation will only be unjustified to the extent that it exceeds what is reasonably necessary in all the circumstances to achieve the protective objectives of the new bail laws and the proper precautionary functions of preventive detention (cf *Lim –v- Minister for Immigration* (1992) 176 CLR 1, 28).

[120] In *Masters v DPP* (1992) 26 NSWLR 450, the court said:

> "The presumption against bail imposes a difficult task upon the person so charged to persuade the court why bail should not be refused. That presumption expresses a clear legislative intention that persons charged with the serious drug offences specified in the section should normally – or ordinarily – be refused bail."

[121] In other words, a grant of bail in cases to which s 16 applies is abnormal or extraordinary: Lacey at [54].

[122] How the "unacceptable risk" factors in s 16(2)(a)-(e) relate to the "show cause" provisions of s 16(3A) is unclear.

[123] Obviously the s 16(1) and 16(3A) inquiries can overlap and some matters will be relevant to both.

[124] As Maxwell P noted in *Asmar* (2005) VSC 487 at [12] consideration of risk factors similar to those in s 16(2)(a)-(d), is "central" to the decision whether or not an applicant shall be released on bail and, if so, on what conditions:

> "To ask…whether the person's detention is justified is simply to ask the same question in a different way. The same considerations apply… The specific risks must be at the forefront of the consideration of the justification of the person's detention."

[125] On this basis a court may be satisfied that detention was unjustified if it concludes that the defendant does not pose an unacceptable degree of risk.

[126] However, in discussing show cause situations in *R v Iskandar* (2001) NSWSC 7 Sperling J commented:

> the legislation intends the court to place less weight on the circumstances common to all bail applications and more…on the strength of the Crown case...
>
> Common to all bail applications are the circumstances that the applicant's continued incarceration will cause a serious deprivation of his general right to be at liberty, together with hardship and distress to himself and his family, and usually with severe effects upon the applicant's business or employment, his finances and his abilities to prepare his defence and to support his family.
>
> Also common to most bail applications… is the availability of sureties prepared to forfeit (with or without security) large sums of money to ensure

> that the applicant will answer his bail; an application would otherwise be unlikely to be considered in relation to such serious matter.
>
> The legislature has, notwithstanding all those particular circumstances, enacted the presumption against bail in these cases, so that such circumstances will not ordinarily be sufficient to overcome the barrier to bail which [s.8A] has erected.
>
> As Badgery-Parker J said, if the Crown case is a strong one, the applications for bail in which they will be sufficient to do so must necessarily be somewhat special… the task of the applicant to overcome the presumption that bail is to be refused will ordinarily be a difficult one.
>
> On the other hand, if the Crown case is not a strong one, the circumstances to which I have referred in the last paragraph will ordinarily be given greater weight, and the task of the applicant (although still a substantial one) will be correspondingly less difficult.

s 16 2(b) considerations

[127] The applicant seeks to show cause on the basis of the contention that the evidence of affray is weak and therefore, despite the mandatory minimum of 6 (six) months imprisonment, ongoing incarceration is unwarranted because conditional release is a viable less extreme alternative.

[128] The applicant was born and raised in Sydney. He is now 46 years old and works primarily as a truck driver. He has two adult daughters living in New South Wales. He has cared for his 10 year old son on a full-time basis since about July. The mother lives in the ACT.

[129] The defendant has a partner in full-time employment. He has a previous conviction but has never been on bail or in jail before.

[130] If granted bail he would continue to live with his partner and son in Toowoomba. He is willing to comply with a reporting condition and the special restrictions listed in his affidavit at [16] (a)-(j).

[131] He denies having a passport or firearms licence.

The alleged offence

[132] The prosecution case is based on CCTV footage and direct eyewitness accounts.

[133] The alleged disorderly conduct consists of a prolonged and apparently unprovoked attack on a defenceless hotel patron by the applicant in company with another man at the instigation of a female companion.

[134] The aggravated affray involves opposing groups fighting and exchanging punches in a hotel car park. The defendant is not seen to throw punches in the CCTV footage. However he is clearly involved in the melee walking in and out of camera view. He is depicted in a semi-conscious state being assisted to a vehicle in which he and his associates left the scene.

[135] The defence contends that the evidence with respect to the only offence punishable by imprisonment is weak and the applicant has only one prior entry in his criminal history

for a minor matter, and should be granted bail because strict conditions, for example curfew; non-association, banning the applicant from licenced premises, can be imposed to reduce relevant risks to an acceptable level.

[136] The prosecution argues that whilst the offences charged are individually not particularly serious, they involved alcohol fuelled violence committed in a public place where the applicant was the principal aggressor and the evidence in relation to each of the offences is strong. If convicted, the applicant will be sentenced to a term of imprisonment of no less than six (6) months in duration. The risk of flight is therefore high.

[137] Based on the likelihood and mandatory consequences of conviction the applicant's connections with the Bandidos plus a finding of unacceptable risk of flight, interference with witnesses and offending if released is reasonably open. I am satisfied that such a finding should not be made.

[138] Continuing pre-trial detention is therefore justified despite the nature of the offences charged.

[139] In *R v Chaouk* [2010] VSC 315 King J found that links with an OMCG combined with the possession of 36 passports, two loaded firearms and threats to the alleged victim was relevant to bold the issue of flight and interference with witnesses and that despite family ties and a delay of two years, a trial date a "hang-out" with the Hells Angels was an unacceptable risk.

[140] In the matter of *Re Conci* [2013] VSC 368 Forrest J refused a show cause application by an OMCG member charged with home invasion and assault of threats to involve other gang members even though he had a good work history, a sick mother and placed heavy reliance on the prospects of a delay of up to two years before trial.

[141] As the new amendments implicitly accept, peer networks are a risk factor for adult (as well as adolescent) delinquency. So is a subculture norm of violence and anti-social behaviour.

[142] On the other hand, I am not persuaded by the evidence as a whole or the applicants proposed conditions of release that there are enough effective disincentives for him not to fail to appear or offend if bailed.

[143] The show cause onus is not discharged. Ongoing detention has not been demonstrated to be unjustified.

[144] Application is dismissed. Bail is refused.

[145] The defendant is remanded in custody to appear at the next committal callover in the Toowoomba Magistrates Court.