



RULE OF LAW
INSTITUTE OF AUSTRALIA

Bail Case Note : R v Davis [2018] NSWSC 1831

Facts

The applicant, Mr Davis was at home with his girlfriend Ms Quinn. The deceased broke into the house for the apparent purpose of theft. He had in his possession a 'knuckle duster' and replica pistol. He was disturbed. He fled the house and in his possession he had property of the applicant and a black satchel - the property of Ms Quinn.

Ms Quinn gave chase. She caught the deceased and there was a scuffle. The deceased tried to punch Ms Quinn but missed, lost his balance and fell over. While on the ground the deceased took out the gun and apparently said he was going to shoot Ms Quinn.

Mr Davis also gave chase. He ran up behind the deceased. He carried a samurai sword. Just as he was about to strike the deceased in defence of Ms Quinn she yelled out '*Don't*'. It is unsure whether Ms Quinn was yelling at the deceased not to shoot or the co-accused not to strike the accused with the samurai sword. Mr Davis struck the deceased across the head with the sword dealing a fatal blow.

Ms Quinn and Mr Davis were charged with murder as a joint criminal enterprise. Mr Davis applied for bail. The matter came before HH Justice Rothman of the Supreme Court of NSW.

In his bail application, Mr Davis not only had to satisfy ss 17 & 18 of the Bail Act regarding unacceptable risk as he was charged with murder he also had to satisfy S 16 of the *Bail Act* requiring him to 'show cause' why he should not remain in custody on remand awaiting trial. The relevant sections of the *Bail Act* are reproduced below:

Legislation

16A ACCUSED PERSON TO SHOW CAUSE FOR CERTAIN SERIOUS OFFENCES

(1) A bail authority making a bail decision for a show cause offence must refuse bail unless the accused person shows cause why his or her detention is not justified.

(2) If the accused person does show cause why his or her detention is not justified, the bail authority must make a bail decision in accordance with Division 2 (Unacceptable risk test--all offences).

(3) This section does not apply if the accused person was under the age of 18 years at the time of the offence.

16B OFFENCES TO WHICH THE SHOW CAUSE REQUIREMENT APPLIES

(1) For the purposes of this Act, each of the following offences is a **"show cause offence"** :

(a) an offence that is punishable by imprisonment for life,

(b) a serious indictable offence that involves:

(i) sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years, or

(ii) the infliction of actual bodily harm with intent to have sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years,

(c) a serious personal violence offence, or an offence involving wounding or the infliction of grievous bodily harm, if the accused person has previously been convicted of a serious personal violence offence,

(d) any of the following offences:

(i) a serious indictable offence under Part 3 or 3A of the Crimes Act 1900 or under the Firearms Act 1996 that involves the use of a firearm,

(ii) an indictable offence that involves the unlawful possession of a pistol or prohibited firearm in a public place,

(iii) a serious indictable offence under the Firearms Act 1996 that involves acquiring, supplying, manufacturing or giving possession of a pistol or prohibited firearm or a firearm part that relates solely to a prohibited firearm,

(e) any of the following offences:

(i) a serious indictable offence under Part 3 or 3A of the Crimes Act 1900 or under the Weapons Prohibition Act 1998 that involves the use of a military-style weapon,

(ii) an indictable offence that involves the unlawful possession of a military-style weapon,

(iii) a serious indictable offence under the Weapons Prohibition Act 1998 that involves buying, selling or manufacturing a military-style weapon or selling, on 3 or more separate occasions, any prohibited weapon,

(f) an offence under the Drug Misuse and Trafficking Act 1985 that involves the cultivation, supply, possession, manufacture or production of a commercial quantity of a prohibited drug or prohibited plant within the meaning of that Act,

(g) an offence under Part 9.1 of the Commonwealth Criminal Code that involves the possession, trafficking, cultivation, sale, manufacture, importation, exportation or supply of a commercial quantity of a serious drug within the meaning of that Code,

- (h) a [serious indictable offence](#) that is committed by an [accused person](#):
- (i) while on [bail](#), or
- (ii) while on parole,
- (i) an indictable [offence](#), or an [offence](#) of failing to comply with a [supervision order](#), committed by an [accused person](#) while subject to a [supervision order](#),
- (j) a [serious indictable offence](#) of attempting to commit an [offence](#) mentioned elsewhere in this section,
- (k) a [serious indictable offence](#) (however described) of assisting, aiding, abetting, counselling, procuring, soliciting, being an accessory to, encouraging, inciting or conspiring to commit an [offence](#) mentioned elsewhere in this section,
- (l) a [serious indictable offence](#) that is committed by an [accused person](#) while the person is the subject of a warrant authorising the arrest of the person issued under:
- (i) this Act, or
- (ii) Part 7 of the *Crimes (Administration of Sentences) Act 1999* , or
- (iii) the *Criminal Procedure Act 1986* , or
- (iv) the *Crimes (Sentencing Procedure) Act 1999* .
- (2) In this section, a reference to the facts or circumstances of an [offence](#) includes a reference to the alleged facts or circumstances of an [offence](#).
- (3) In this section:

"firearm" , **"firearm part"** , **"prohibited firearm"** and **"pistol"** , and **"use"** , **"acquire"** , **"supply"** or **"possession"** of a [firearm](#) or [firearm part](#), have the same meanings as in the [Firearms Act 1996](#) .

"prohibited weapon" and **"military-style weapon"** , and **"use"** , **"buy"** , **"sell"** , **"manufacture"** or **"possession"** of a [prohibited weapon](#), have the same meanings as in the [Weapons Prohibition Act 1998](#) .

"serious indictable offence" has the same meaning as in the [Crimes Act 1900](#) .

"serious personal violence offence" means:

- (a) an [offence](#) under Part 3 of the [Crimes Act 1900](#) that is punishable by imprisonment for a term of 14 years or more, or
- (b) an [offence](#) under a law of the Commonwealth, another State or Territory or any other jurisdiction that is similar to an [offence](#) under that Part.

17 ASSESSMENT OF [BAIL CONCERNS](#)

- (1) A [bail authority](#) must, before making a [bail decision](#), assess any [bail concerns](#).
- (2) For the purposes of this Act, a **"bail concern"** is a concern that an [accused person](#), if released from custody, will:
- (a) fail to appear at any proceedings for the [offence](#), or
- (b) commit a serious [offence](#), or
- (c) endanger the safety of [victims](#), individuals or the community, or
- (d) interfere with witnesses or evidence.
- (3) If the [accused person](#) is not in custody, the assessment is to be made as if the person were in custody and could be released as a result of the [bail decision](#).
- (4) This section does not apply if the [bail authority](#) refuses [bail](#) under Division 1A (Show cause requirement).

18 MATTERS TO BE CONSIDERED AS PART OF ASSESSMENT

(1) A [bail authority](#) is to consider the following matters, and only the following matters, in an assessment of [bail concerns](#) under this Division:

(a) the [accused person](#)'s background, including criminal history, circumstances and community ties,

(b) the nature and seriousness of the [offence](#),

(c) the strength of the prosecution case,

(d) whether the [accused person](#) has a history of violence,

(e) whether the [accused person](#) has previously committed a serious [offence](#) while on [bail](#),

(f) whether the [accused person](#) has a history of compliance or non-compliance with any of the following:

(i) [bail acknowledgments](#),

(ii) [bail conditions](#),

(iii) [apprehended violence orders](#),

(iv) parole orders,

(v) home detention orders, good behaviour bonds or [community service orders](#),

(vi) intensive correction orders,

(vii) community correction orders,

(viii) [conditional release](#) orders,

(ix) [non-association and place restriction orders](#),

(x) [supervision orders](#),

(f1) if the [bail authority](#) is making the assessment of [bail concerns](#) because the [accused person](#) has failed or was about to fail to comply with a [bail acknowledgment](#) or a [bail condition](#), any warnings issued to the [accused person](#) by police officers or [bail](#) authorities regarding non-compliance with [bail acknowledgments](#) or [bail conditions](#),

(g) whether the [accused person](#) has any criminal associations,

(h) the length of time the [accused person](#) is likely to spend in custody if [bail](#) is refused,

(i) the likelihood of a custodial sentence being imposed if the [accused person](#) is convicted of the [offence](#),

(i1) if the [accused person](#) has been convicted of the [offence](#), but not yet sentenced, the likelihood of a custodial sentence being imposed,

(j) if the [accused person](#) has been convicted of the [offence](#) and [proceedings on an appeal against conviction or sentence](#) are pending before a [court](#), whether the appeal has a reasonably arguable prospect of success,

(k) any special vulnerability or needs the [accused person](#) has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment,

(l) the need for the [accused person](#) to be free to prepare for his or her appearance in [court](#) or to obtain legal advice,

(m) the need for the [accused person](#) to be free for any other lawful reason,

(n) the conduct of the [accused person](#) towards any [victim](#) of the [offence](#), or any family member of a [victim](#), after the [offence](#),

(o) in the case of a serious [offence](#), the views of any [victim](#) of the [offence](#) or any family member of a [victim](#) (if available to the [bail authority](#)), to the extent relevant to a concern that the [accused person](#) could, if released from custody, endanger the safety of [victims](#), individuals or the community,

(p) the [bail conditions](#) that could reasonably be imposed to address any [bail concerns](#) in accordance with section 20A,

(q) whether the [accused person](#) has any associations with a terrorist organisation (within the meaning of Division 102 of Part 5.3 of the [Commonwealth Criminal Code](#)),

(r) whether the [accused person](#) has made statements or carried out activities advocating support for [terrorist acts](#) or violent extremism,

(s) whether the [accused person](#) has any associations or affiliation with any persons or groups advocating support for [terrorist acts](#) or violent extremism.

(2) The following matters (to the extent relevant) are to be considered in deciding whether an [offence](#) is a serious [offence](#) under this Division (or the seriousness of an [offence](#)), but do not limit the matters that can be considered:

(a) whether the [offence](#) is of a sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the [Crimes Act 1900](#) ,

(b) the likely effect of the [offence](#) on any [victim](#) and on the community generally,

(c) the number of [offences](#) likely to be committed or for which the person has been granted [bail](#) or released on parole.

Bail Determination

Oppose grant of bail	For grant of bail
<p>Not only does Mr Davis have prove under s 17 was not an 'unacceptable risk' he also had to satisfy s 16 'show cause' most serious of charges - Murder requiring a second review of bail application.</p>	<p>Mr Davis was not an unacceptable risk and where there may be concerns they can be overcome by bail conditions. The defence argued for Mr Davis</p> <ol style="list-style-type: none"> 1. This was the first time he had been brought to the attention of the police, first time imprisoned and he had no driving offences - 'a clean skin' 2. As a 'clean skin' Mr Davis would have more difficult time in prison than people associated with crime or criminal elements 3. As Mr Davis had never been to court therefore never refused bail so there is no unacceptable risk of failure to appear or commission of another offence 4. He was not known to the deceased person and there is no motive for murder which was a fundamental weakness in the Crown case 5. There should be no concerns about collusion over evidence as both Ms Quin and Mr Davis had given statements
<p>The Crown argued the three elements of murder were satisfied:</p> <ol style="list-style-type: none"> 1. It was a deliberate act 2. Intended to do harm 3. It wasn't (self) defence on behalf of Ms Quin as the applicant didn't need to use such force to protect Ms Quin and a reasonable person would not behave in a similar manner in similar circumstances and the applicant 4. The applicant demonstrated conscious guilt 	<p>The defence argued the act didn't satisfy the three elements of murder for the following reasons:</p> <ol style="list-style-type: none"> 1. Although there was a serious and perhaps deliberate act and 2. Although the act was intended to do harm it was not intending to cause death or even grievous bodily harm 3. The intention of the deliberate act was negated by the subjective belief of the applicant that he had to act immediately due to extreme provocation being the immediate need to protect Ms Quin (self defence) and any 'reasonable' person in the same circumstances would have reacted the same conclusion 4. The applicant panicked in the situation and was not consciously guilty of the extreme action
<p>The matter cannot be reduced to manslaughter because the applicant could not satisfy the court in his state of mind there was no intention to commit or inflict grievous bodily harm or to kill require no intention to deliberately commit a crime and no intention to harm unnecessarily</p>	<p>There was no motive so there is a possibility the murder charged should be reduced a lesser charge of manslaughter</p> <p>Determination : Bail granted with conditions</p>