

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CRIMINAL

CITATION : MITSOPOULOS -v- THE STATE OF WESTERN
AUSTRALIA [2015] WASC 5

CORAM : CORBOY J

HEARD : 18 DECEMBER 2014

DELIVERED : 19 DECEMBER 2014

PUBLISHED : 6 JANUARY 2015

FILE NO/S : MBA 43 of 2014

BETWEEN : JAMES STEVEN MITSOPOULOS
First-named Accused

TRENT STEVEN FITZGERALD
Second-named Accused

AND

THE STATE OF WESTERN AUSTRALIA
Respondent

Catchwords:

Criminal law - Bail - Turns on its own facts - No new principles

Legislation:

Bail Act 1982 (WA), cl 1 and cl 3 pt C sch 1

Result:

Bail granted

Category: B

Representation:

Counsel:

First-named Accused : Ms S Nigam
Second-named Accused : Ms J G Fordham
Respondent : Ms L Petrusa SC

Solicitors:

First-named Accused : Nigams Legal Barristers & Solicitors
Second-named Accused : Fordham & Roast
Respondent : Director of Public Prosecutions (WA)

Case(s) referred to in judgment(s):

Milenkovski v The State of Western Australia [2011] WASCA 99; (2011) 42
WAR 99

CORBOY J:

(This judgment was delivered orally on 19 December 2014 and has been edited from the transcript.)

The application and the result

1 Brent Steven Fitzgerald and James Steven Mitsopoulos are each charged with two offences: first, that on 15 November 2014 at Madeley, with intent to harm, they each did an act which resulted in bodily harm being caused to Ricky Jay Taylor; and second, that on the same date and at the same place, with intent to harm, they did an act which resulted in bodily harm being caused to Charles James Lewis Bellamy.

2 Each charge alleges an offence under s 304(2)(a) of the *Criminal Code* (WA) (the Code). That section provides that:

If a person, with an intent to harm, omits to do any act that it is the person's duty to do, or does any act, as a result of which:

- (a) bodily harm is caused to any person; or
- (b) the life, health or safety of any person is or is likely to be endangered,

the person is guilty of a crime and is liable to imprisonment for 20 years.

3 The expression 'bodily harm' is defined by s 1 of the Code to mean any bodily injury which interferes with health or comfort. Section 304(3) provides, so far as is relevant, that, 'an intent to harm is an intent to unlawfully cause bodily harm to any person'.

4 Five persons are also charged with intentionally doing an act that resulted in bodily harm being caused to Mr Taylor: Lopa Fanou Browne, Adam Leslie Hyde, Garreth Carl Mackenzie, Shane Gregory Mitchell and Emmanuel Tabuwa. Mr Fitzgerald and Mr Mitsopoulos have each applied for bail.

5 I have concluded that their applications should be granted for the reasons that follow.

The facts alleged by the prosecution

6 The facts alleged by the State are that each of the accused and the victims attended a kickboxing tournament at the Kingsway Indoor Stadium, Madeley, on the evening of 15 November 2014. The event was attended by over 500 people, including young children. The tournament

was conducted in an indoor court area (the Arena). Mr Fitzgerald, Mr Mitsopoulos and the other accused persons attended the event together and occupied a reserved table during the event.

7 Mr Taylor was seated at a table close to the table occupied by the accused persons. Mr Taylor recognised Mr Fitzgerald, having known him when they both lived in Geraldton. The State alleges that there was some tension between Mr Taylor and his companions and Mr Fitzpatrick and the other accused persons during the tournament, and that the accused behaved in a way that was intended to intimidate and harass Mr Taylor. Mr Taylor states that at one point there was a confrontation between himself and Mr Fitzgerald and at least some of the other accused. There was no physical contact during that confrontation.

8 However, the State further alleges that Mr Taylor was attacked by the accused as he was leaving the Arena; that Mr Taylor was repeatedly punched and kicked; that Mr Bellamy sought to intervene to stop the assault on Mr Taylor or to assist him to defend himself from the accused; that Mr Fitzgerald and Mr Mitsopoulos assaulted Mr Bellamy; and that Mr Taylor and Mr Bellamy were injured as a result of the assaults.

9 Mr Taylor states that he sustained a laceration to the back of his head that required five stitches, swelling and bruising to his left eye and cheekbone, cuts to the inside of his lips, bruising and swelling to the right side of his face. He also suffered a laceration to his right kneecap, bruising and swelling to the right side of his leg and body.

10 Mr Bellamy states that he attended Royal Perth Hospital for treatment of his injuries. A report provided by the hospital states that he received a fracture to the right lateral inferior orbit and zygoma and a laceration below the left eye and that he was at risk of damage to his vision and/or sustaining a concussion if he had not received medical treatment.

11 Much argument in the hearing of the applications was directed to the strength of the cases against Mr Fitzgerald and Mr Mitsopoulos. That argument was relevant to two issues. First, the mandatory questions posed in cl 1(a) pt C of sch 1 to the *Bail Act 1982* (WA) and, second, whether it would be unfair for Mr Fitzgerald or Mr Mitsopoulos to be detained in custody awaiting trial because there was a real possibility that they would not be sentenced to an immediate term of imprisonment if they were convicted.

12 I had raised in the hearing a third issue to which the strength of the State's case might be relevant: whether the alleged circumstances of the offences amounted to wrongdoing of such a serious nature as to make the grant of bail inappropriate: par (g) of cl 1 pt C. On reflection I have concluded that the court is not permitted to consider the strength of the prosecution's case in considering the question posed by par (g) of cl 1. The paragraph refers only to the alleged circumstances of the offence or offences. Further, cl 3 of pt C, which does refer to the strength of the evidence against the accused person, is expressed to only apply to the matters raised in par (a). Accordingly, par (g) simply requires the court to consider whether, on the allegations made by the prosecution about the circumstance of the offence or offences, the wrongdoing involved is so serious as to make it inappropriate to grant bail.

13 It will be necessary for me to comment further on the State's case. Obviously, my comments are only intended to address those issues that I have identified as being relevant to that issue. However, I will order that my reasons for granting bail be suppressed until the charges have been finally determined, given the comments that I make about the State's evidence.

The applicants' submissions

- 14 Mr Fitzgerald contended that he ought to be granted bail as he:
- (a) has no relevant criminal history except for a conviction for assault occasioning bodily harm;
 - (b) has no history of failing to comply with bail conditions where they had been previously imposed;
 - (c) has complied with community supervision in the past;
 - (d) has ties to the jurisdiction;
 - (e) intends to defend the charges and there is likely to be a delay before the charges can be tried;
 - (f) operates a business and will suffer a significant financial loss if he is not released on bail.
 - (g) is no longer a member of an outlaw motorcycle gang.

15 It is further submitted that conditions can be imposed that would satisfactorily address any risk of the kind to which cl 1 pt C refers.

- 16 Mr Mitsopoulos submits that he should be granted bail as:
- (a) he does not have a criminal history;
 - (b) he is in a long-term and stable relationship and has other ties to the jurisdiction;
 - (c) he was a nominee member of a motorcycle gang but he has now decided to leave that gang;
 - (d) it is reasonably arguable that he would not be sentenced to an immediate term of imprisonment if he was convicted;
 - (e) it is likely that there will be a significant delay in the charges going to trial, having regard to the state of the lists in the District Court;
 - (f) the State's case against him is not strong and he has a good defence to the charges;
 - (g) conditions can be imposed that would satisfactorily address any risk of the kind to which cl 1 pt C refers.

The State's submissions

- 17 The State submits that Mr Fitzgerald and Mr Mitsopoulos should be denied bail as:
- (a) the case against each of them is strong;
 - (b) the alleged circumstances of the offending is of such a serious nature as to make the grant of bail inappropriate;
 - (c) Mr Fitzgerald and Mr Mitsopoulos are members of an outlaw motorcycle gang that is involved in continuing serious criminal activity so that there is a risk that they will offend or seek to interfere with witnesses if bail is granted, and that risk cannot be sufficiently removed by any conditions that might be imposed under pt D sch 1;
 - (d) there is also a risk that they might fail to appear in court in answer to their personal undertakings if bail was granted, because of the serious nature of the offences and the likely consequences for them if they are found guilty of the charges that have been alleged.

18 The principles to be applied in determining an application for bail are well established and were identified by the Court of Appeal in *Milenkovski v The State of Western Australia* [2011] WASCA 99; (2011) 42 WAR 99. In summary:

- (a) The *Bail Act* was intended to contain a comprehensive code on the subject of bail.
- (b) The jurisdiction to grant bail does not arise unless and until the judicial officer is satisfied that bail may be properly granted, having regard to the provisions of cl 1 and cl 3 of pt C sch 1 to the Act.
- (c) Clause 1 of pt C contains no express statutory presumption for or against the grant of bail. Rather, the judicial officer is required to exercise the discretion having regard to the questions in pars (a) to (g) and to any other question that the decision-maker considers relevant. That is, the correct approach to the exercise of the discretion is sourced in and guided by the matters referred to in pars (a) to (g) of cl 1.
- (d) The court is required to consider and answer the mandatory questions before commencing the balancing process inherent in the exercise of the discretionary power to grant bail. The answers to the mandatory and other relevant questions provide the factual basis for the exercise of the discretion.
- (e) All of the mandatory questions with the exception of par (e) are directed to whether there are positive grounds for refusing bail. The matters in par (e) go to the question of whether it is possible to neutralise wholly or sufficiently the grounds for refusing bail. The focus of the questions that direct attention to whether there are proper grounds to refuse bail is the means by which the legislature has chosen to acknowledge the presumption that an accused person is innocent until proven guilty.
- (f) The Act does not place a legal onus on any party to the application. However, the structure of cl 1 is such that bail will be granted if there is no material before the court providing a proper foundation for refusing bail. Consequently, it will often be for the State to furnish the material required to provide a proper foundation for refusing bail. The word 'may' in pars (a) and (d) of cl 1 means the possibility of the event occurring. So, for example, the court is required to answer the question whether, if the accused

is not kept in custody, there is a possibility that he or she would fail to appear in court in compliance with his or her bail undertaking.

- (g) It may be that having regard to all relevant matters in cl 3 the nature and seriousness of the offence and the probable method of dealing with the accused upon conviction are sufficient to enable the court to conclude that the accused may fail to appear in court in compliance with his or her bail undertaking and the existence and the extent of that possibility may, having regard to the answers of all of the other mandatory questions in cl 1, require or justify the refusal of bail. However, the common law presumptive approach for or against bail is inconsistent with the approach required under the *Bail Act*.

- 19 The questions posed by pars (b), (d) and (f) of cl 1 pt C, do not arise in these applications. It is necessary to consider the questions posed in par (a) cl 1, having regard to the matter specified in cl 3. The evidence and considerations relevant to those questions will also inform the answers to the questions contained in pars (c), (e) and (g) of cl 1.

The strength of the State's evidence

- 20 As I have indicated, much argument was directed to the strength of the State's case against Mr Fitzgerald and Mr Mitsopoulos and the evidence on which the State relies. That reflected the grounds put forward by the State for opposing the applications.

- 21 Again, I emphasise that I am only concerned with the quality of the evidence that has been served by the State to date to the extent that it informs the answers to the mandatory questions posed in par (a) cl 1. What follows are comments, substantially in point form, on the State's evidence. I have not made findings about what the evidence establishes. That is not the task of a judicial officer determining an application for bail.

- 22 I begin with some observations about the statements provided by Mr Taylor, Mr Bellamy and two other witnesses, Mr Ross and Mr Shopera. Their statements provided context for the CCTV and mobile phone film that recorded some but not all of the incidents that are the subject matter of the charges and the prelude to those incidents.

23 I note the following matters in relation to the statements provided by Mr Taylor:

- (a) he describes the friction between himself and the accused persons and, in particular, Mr Fitzgerald that developed during the night of the tournament. The State's case is that the aggressive and intimidating behaviour described by Mr Taylor culminated in Mr Taylor being assaulted.
- (b) Mr Taylor says that he was punched to the left-hand side of the face as he left the Arena. He fell to the floor and covered up to protect himself. He was bleeding heavily from his face and nose. He felt pain to the back of his head and to his knee. The State's case is that Mr Taylor was struck on the back or the top of his head with a metal table number by one of the accused.
- (c) Mr Taylor does not identify who struck or kicked him.

24 The State does not allege that Mr Taylor was assaulted by either Mr Fitzgerald or Mr Mitsopoulos. The State's case is that they were parties to the assault pursuant to s 7(b) and 7(c), and possibly in the case of Mr Fitzgerald, s 7(d) of the *Criminal Code*.

25 I note the following matters in relation to Mr Bellamy's statement:

- (a) He states that he saw a man who was hitting another man who was lying on the floor of the Arena trying to protect himself. Another man kicked the man on the floor and Mr Bellamy decided to go to the aid of the man who was being assaulted.
- (b) He states that he moved in and started yelling about not hitting a man while on the ground. He further states that he had his hands out wide to show that he was not part of the fight. He stepped in between the man on the ground and the person who was hitting him. He then felt a hit to the side of his right cheek. He thought it might have been someone's arm or something and it felt more like a thud than a punch. He was then punched again to the right cheek and immediately felt his face swell up and become inflamed. He felt his eye shut and he could not see out of it. His cheek was hurting and his nose was bleeding. He realised that someone was hitting him and he could tell it was coming from behind so he turned around and saw three men. He went to punch one of them but as he punched he tripped over a cable tray and missed. He ended up on the floor and immediately put his hands up over his

head. He curled up to protect himself. He was still being hit on the elbows and the back of the head. He was hit three or four times. He was on the floor for a few seconds before someone pulled him back onto his feet. He was then taken to see a doctor.

(c) Mr Bellamy does not provide a description of any of his assailants.

26 The State's case is that Mr Fitzgerald and Mr Mitsopoulos assaulted Mr Bellamy; that is, as I understand it, that they are both principal offenders under s 7(a) regardless of who actually struck the blow or blows that caused Mr Bellamy's injuries. They may also have each assaulted Mr Bellamy independently in such a way as to also cause him an injury that constituted bodily harm.

27 Mr Ross is a team supervisor employed by Tri-Shield Services. Tri-Shield Services provides security services and Mr Ross was the security team supervisor for the tournament.

28 I note the following matters in relation to his statement:

(a) He described observing an altercation between a group of people and one male. He stated that, and I quote, 'The group was standing up and in each other's faces.' He could not hear what was being said but he could tell that it was a heated exchange. He described the sole male as being about 6 foot 5 or 6 foot 6 and in his mid-30s. He was wearing a white shirt and dark trousers. He had short hair. Mr Taylor is depicted in the CCTV film and in photographs forming part of the prosecution brief as wearing a grey T-shirt. He has very closely cropped hair. It is not clear to me whether Mr Taylor is the man described by Mr Ross as being the sole man confronted by a group of other persons.

(b) Mr Ross described some members of the group who were involved in the altercation with the male. He stated that the main instigator was about 6 foot tall with a 'really solid build'. That person had 'a few rings on his fingers and big chunky silver necklace'. He had tattoos on both arms. He described two other members of the group as wearing black T-shirts and that there was a female in the group. He described her as being about 5 foot 8 tall, dark hair, dark complexion and dark clothing. He noticed that she was the only female in the group. I refer later in my reasons to what the CCTV footage shows about the appearance of Ms Murfit but it is clear that the female described by Mr Ross is not Ms Murfit. There is a woman who is similar in appearance to the person

described by Mr Ross who is shown in the mobile phone footage towards the end of that footage. Again, I do not know whether or not that is the female who was described by Mr Ross. The incident to which he refers occurred prior to the assaults that are the subject matter of the State's charges.

- (c) It does not appear to me that Mr Fitzgerald was wearing a chain in the CCTV or mobile phone footage. He was wearing a white T-shirt.

29 Mr Shopera is also employed by Fire Shield Services and was working at the tournament. He was standing at the exit of the Arena when the tournament finished. I note the following matters in relation to his statement:

- (a) He described a male wearing a white T-shirt and blue pants who appeared to be drunk. I will refer to that person as 'male A'. Male A said something to another male who was in a group. A member of the group pointed in the face of male A. The man who was pointing was about 190 cm tall, in his early forties and had blond hair. He was wearing a dark T-shirt and blue pants. Another member of the group who was wearing a dark T-shirt pulled the man who was pointing away.
- (b) Mr Shopera subsequently saw male A say something to a male in another group. That person was wearing a black T-shirt and black pants. He looked angry as a result of what was said and started punching male A to the face. Two more men in the group also started punching male A. A third male joined in the assault. According to Mr Shopera, another male tried to stop the fight. That male was tall with blond hair. He looked unstable and Mr Shopera thought that he was drunk. He did not throw any punches and was just pushing people apart. Mr Shopera did not see that male being struck by any blow but he did see the male's right eye was suddenly red and swollen. Mr Shopera then saw another male pull a silver spanner from his back pocket and enter the fight. That person was wearing a black T-shirt and blue jeans.
- (c) Mr Shopera does not refer to any person wearing a white T-shirt.
- (d) Assuming that male A is Mr Taylor, there is an indication in Mr Shopera's statement that Mr Taylor may have been engaging in exchanges with crowd members as he was leaving the Arena that, at least to some extent, might be regarded as provocative.

Mr Mitsopoulos' instructions

30 Mr Mitsopoulos relied in support of his application on an affidavit prepared by his solicitor, Ms Perling (affidavit of Margot Sonja Perling made on 3 December 2014). The affidavit contained Mr Mitsopoulos' instructions on what had occurred at the tournament.

31 Briefly summarised, Mr Mitsopoulos alleges that Mr Taylor appeared to be drunk and was behaving aggressively towards the accused persons during the night. They did not respond to his provocations, according to Mr Mitsopoulos.

32 Mr Taylor was still behaving aggressively when Mr Mitsopoulos and his companions sought to leave the Arena. Mr Mitsopoulos moved in the direction of Mr Fitzgerald's partner and her child in order to protect them from Mr Taylor's behaviour. Mr Mitsopoulos was then punched to the side of the head by an unknown male. He stumbled and grabbed hold of Mr Bellamy in order to steady himself. He and Mr Bellamy then commenced wrestling and Mr Bellamy punched Mr Mitsopoulos numerous times to the jaw. Mr Bellamy was then punched by another male and he released his hold on Mr Mitsopoulos.

The CCTV and mobile phone footage

33 CCTV cameras were located at various points within the stadium. Film taken by the cameras discloses that a barrier was used to define the Arena and to control access to that area. The barrier created a corridor behind the Arena. The CCTV footage shows the accused arriving together and it is not in dispute that they sat as a group at a reserved table to watch the tournament.

34 Mr Fitzgerald's partner, Ms Murfit, and her daughter formed part of the group. Ms Murfit has blond hair and fair skin. She was wearing a white shirt and blue jeans when she arrived at the sports centre. She had put on a black cardigan by the time that she left the Arena at the end of the tournament. Mr Fitzgerald was wearing a white T-shirt. He did not appear to be wearing a chain. The other accused were wearing black or predominantly black T-shirts, except for one person who had on a dark blue T-shirt. At least two of the accused appeared to be wearing a gold chain. The person who I take to be Mr Miller was wearing a red T-shirt.

35 The CCTV footage shows patrons exiting the Arena at the completion of the tournament by passing through the barrier into the adjacent corridor. Mr Fitzgerald's partner, Ms Murfit, and her child and

some of the accused had passed through the barrier into the corridor when their attention was drawn to something occurring within the Arena. The other accused who were in the corridor then moved back into the Arena.

36 The incidents that are the subject of the charges against the accused were not captured by the CCTV cameras. However, film taken with a mobile telephone camera captured part of the incidents. The mobile phone footage does not show how the fights commenced. It starts with Mr Taylor and three men grappling on the floor of the Arena. Mr Fitzgerald is one of the men wrestling on the floor and the footage shows him apparently pulling Mr Taylor away from the other men. As Mr Fitzgerald swings Mr Taylor around on the floor, his attention is apparently attracted to Mr Bellamy and Mr Mitsopoulos. They are grappling with each other.

37 The footage does not show how they first came together. The footage shows Mr Bellamy holding Mr Mitsopoulos around the neck and Mr Mitsopoulos holding Mr Bellamy under his arm and across his shoulder blade. Mr Fitzgerald moves across to Mr Bellamy and throws a punch, either to the side of Mr Bellamy's face or the top of his shoulder or, so it is submitted on behalf of Mr Fitzgerald, to Mr Mitsopoulos.

38 The State alleges that the punch struck Mr Bellamy to the side of his face, causing the fracture to his eye socket. Mr Bellamy and Mr Mitsopoulos continue to grapple and Mr Fitzgerald grabs Mr Bellamy and swings him away from Mr Mitsopoulos. Mr Bellamy and Mr Fitzgerald fall to the ground, Mr Bellamy landing on his left side. Mr Bellamy gets to his feet, holding his head as he does so. Mr Mitsopoulos apparently pushes Mr Bellamy's head downwards while Mr Bellamy is still in a crouched position. As best as can be ascertained from the footage, the push did not involve a significant amount of force.

39 Mr Bellamy gets to his feet and is pushed back in the shoulder by Mr Fitzgerald. Mr Bellamy then approaches Mr Fitzgerald and appears to punch him to the upper chest. Mr Fitzgerald backs away, as does Mr Bellamy. Mr Bellamy is seen apparently wiping blood from the side of his face. Mr Fitzgerald then appears to leave the Arena. Mr Taylor is punched and kicked while the confrontation between Mr Bellamy, Mr Mitsopoulos and Mr Fitzgerald is occurring.

The parties' submissions on the State's case

40 The State's case is to the effect that Mr Taylor was singled out by Mr Fitzgerald and the other accused because of a prior animosity between

Mr Fitzgerald and Mr Taylor. The other accused were prepared to become involved in, first, harassing Mr Taylor and, later, assaulting him because of their loyalty to Mr Fitzgerald as the State commander of the motorcycle club to which they belonged and the ethos of that club.

41 Accordingly, on the State's case, all of the accused either assaulted Mr Taylor or aided in the assault by being present, ready to assist in the assault if required. Mr Fitzgerald aided the other accused to assault Mr Taylor by, at one point, pulling Mr Taylor off the two accused with whom Mr Taylor was grappling. Mr Fitzgerald and Mr Mitsopoulos further assisted in the assault of Mr Taylor by preventing Mr Bellamy from intervening.

42 Further, the State alleges that Mr Fitzgerald and Mr Mitsopoulos assaulted Mr Bellamy by each punching him and it may be that both are principal offenders under s 7(a), regardless of which one of them struck the blow or blows that caused Mr Bellamy's injuries. They may each have separately assaulted Mr Bellamy and caused an injury that constituted bodily harm.

43 Except in obvious cases, it is difficult to characterise the strength of a prosecution case with a few adjectives. I did not consider that it is appropriate to characterise the State's case as being either strong or weak.

44 As against Mr Fitzgerald, the mobile phone footage clearly shows him, first, pulling Mr Taylor away from two of the accused with whom Mr Taylor was grappling on the floor of the Arena and then moving across and punching Mr Bellamy, apparently with some force, while Mr Bellamy is holding onto and being held by Mr Mitsopoulos. There is, as I have said, an issue as to where the punch thrown by Mr Fitzgerald landed. The State alleges that it struck Mr Bellamy on the side of his face and was most likely the blow that fractured his right eye socket. Mr Fitzgerald submits that the footage shows that the blow landed on Mr Mitsopoulos. Counsel for each party has pointed to other parts of the mobile phone footage as supporting the version for which they contended.

45 Mr Fitzgerald further submits that he was acting to defend Mr Mitsopoulos and the other accused. The State will rely on Mr Taylor's evidence concerning the earlier exchanges between himself and the accused and on his evidence, and that of Mr Bellamy, that the assaults on each of them were unprovoked. Mr Mitsopoulos denies those matters, albeit not on oath but through instructions given to his solicitor.

46 It is not easy to assess these conflicting accounts and competing arguments on the material available and in the context of a 'paper' application. The accounts given by Mr Ross and Mr Shopera are equivocal without further context and there appear to have been some significant differences between what Mr Bellamy has stated about how he was assaulted and what is shown in the mobile phone footage. Similarly, there appear to be significant differences between Mr Mitsopoulos' instructions and what is shown in the CCTV film and the mobile phone footage.

47 In my view:

- (a) There are reasonable prospects of the State securing a conviction against Mr Fitzgerald and Mr Mitsopoulos.
- (b) The State's case against Mr Fitzgerald is stronger than its case against Mr Mitsopoulos.
- (c) There are some evidentiary difficulties inherent in the State's case on the material that has been served on the accused today.
- (d) Those difficulties leave open the possibility that the State may fail to prove that Mr Fitzgerald and/or Mr Mitsopoulos did not act in self-defence. There will be issues concerning who instigated each fight - whether, for example, Mr Taylor was aggressively speaking to someone in the accuseds' group as they left the Arena or whether he was set upon by one or more of the accused because of what had occurred earlier in the night; whether Mr Mitsopoulos first struck Mr Bellamy or whether Mr Mitsopoulos was struck by somebody else and then stumbled into wrestling with Mr Bellamy; whether the response of Mr Fitzgerald was reasonable, given the number of accused who were grappling with Mr Taylor and the nature of the fight between Mr Bellamy and Mr Mitsopoulos. It is not possible to say, confidently, what a jury might find about those and related issues.
- (e) The State's case is not so strong that it can be inferred that there is a risk that Mr Fitzgerald and Mr Mitsopoulos will fail to appear in court for that reason alone.
- (f) I do not consider that it can be inferred that there is a real significant risk that Mr Fitzgerald and/or Mr Mitsopoulos will interfere with witnesses solely because of the strength of the State's case.

48 Clause 3 of pt C sch 1 refers to the likely disposition if an accused person is found guilty of the charge or charges that have been alleged against them. I accept the State's submission that it is most likely that Mr Fitzgerald would be sentenced to an immediate term of imprisonment if he is found guilty of the charges alleged against him. The term of imprisonment is likely to be in excess of 2 years.

49 The position in relation to Mr Mitsopoulos is more difficult, as he has no criminal history and given the material presently available on the circumstances in which the offences allegedly committed by him occurred. I accept that there is some prospect, if he was convicted, that he might receive a conditionally suspended imprisonment order. However, that is not to diminish the seriousness of the charges that have been alleged against him. They are charges for which, on conviction, ordinarily, an offender could expect to be sentenced to an immediate term of imprisonment.

50 Mr Fitzgerald admits that he was the State commander of the Comancheros Outlaw Motorcycle Gang at the time that the offences were allegedly committed. Mr Mitsopoulos admits that he was a nominee member of the motorcycle club, although he says that he only became a nominee member in about early November 2014.

51 Detective Sergeant Moore is the investigating officer in relation to the offences allegedly committed by Mr Fitzgerald and Mr Mitsopoulos. He states that he has acquired information from two police operations concerning, among others, the Comancheros Outlaw Motorcycle Gang. He further states at paragraphs 25 and following of his affidavit:

The Comanchero Outlaw Motorcycle Gang is extensively documented on police intelligence databases for their involvement in drug distribution and extortion activities. Members and associates of the Comanchero Outlaw Motorcycle Gang will use violence and intimidation to facilitate the commission of criminal offences and have total disregard for the law. Police view the Comanchero Outlaw Motorcycle Gang as a criminal syndicate whose members have a history of extreme violence, including murder, and their illegal activities are known to include assault, theft, drug distribution, extortion and money laundering.

52 He then goes on to refer to police operations and to charges that have been laid against persons in respect of demanding property with threats and intent to extort or gain in relation to those investigations and police operations. Detective Sergeant Moore also states that members of the Comancheros have booked visits to Mr Fitzgerald while he has been held in custody following his arrest.

53 I accept Detective Sergeant Moore's evidence for the purpose of these applications. However, the evidence is expressed at a high level of abstraction from the operational detail. Further, it is generally evidence of association, rather than evidence of the particular involvement of Mr Fitzgerald and Mr Mitsopoulos in the activities described by Detective Sergeant Moore. That is less of a difficulty in considering the possible involvement of Mr Fitzgerald in those activities. An inference can be drawn from the fact that he was the State commander of the gang. However, the evidence is more problematic in considering the position of Mr Mitsopoulos. He was only a nominee member for a short period and it is not possible to discern what involvement such a member might have had in the criminal activities of the gang merely through his membership.

54 Mr Fitzgerald and Mr Mitsopoulos have provided affidavits in which they state that they have disassociated themselves from the gang and renounced their membership. I have some reservations about the language used by Mr Fitzgerald to describe his renouncing of his membership. He says that he has ceased to be an 'active member' of the gang. It concerns me that this language may disguise some form of ongoing association. However, there are no grounds for rejecting their evidence and I have proceeded on the basis that each is no longer a member of the Comanchero Outlaw Motorcycle Gang.

55 Mr Mitsopoulos has no criminal history. He has been in a long-term relationship with Ms Beets and they jointly own an apartment. Ms Beets operates a café and is planning to open another café in the New Year. She states that Mr Mitsopoulos assists her in conducting the café business and has been involved in the planning of the new café (affidavit of Fayth Cheryl Beets made on 11 December 2014).

56 Mr Fitzgerald relies on an affidavit made by his solicitor in support of his application (affidavit of Judith Fordham made on 3 December 2014), and an affidavit made by Wayne Percival Miller. Ms Fordham's affidavit contains Mr Fitzgerald's instructions that he owns and manages the gymnasium which employs six persons. Mr Fitzgerald was a State amateur boxing champion and his personal association with the business is an important aspect of its operations. The business trains approximately 40 students per day and Mr Fitzgerald is responsible for its day-to-day operations. The business has recently expanded and is experiencing financial difficulties as a result.

57 [Suppressed]

58 Mr Fitzgerald has a criminal history. He was first convicted of an offence in August 2004, possession of a prohibited drug with intent to sell or supply. He was convicted of further drug-related offences in 2006 and 2007. He was convicted in the District Court in February 2007 of assault occasioning bodily harm for which he was sentenced to a term of imprisonment of 6 months.

59 Since that time, he has been convicted of various traffic offences and, in March 2013, of possessing a prohibited weapon for which he was fined in the Magistrates Court the sum of \$300.

60 Having regard to all of the matters that I have canvassed in these reasons, I have concluded that there is a possibility that if the accused are not kept in custody they might fail to appear in court in accordance their bail undertaking or commit an offence that could endanger the safety, welfare or property of a person or interfere with witnesses or otherwise obstruct the course of justice. However, I have also concluded that there are conditions which could be reasonably imposed under pt D which would sufficiently remove the possibility of those matters occurring.

61 I note that Mr Fitzgerald and Mr Mitsopoulos had significant connections to the jurisdiction. Mr Mitsopoulos does not have a criminal history. Mr Fitzgerald, although he has a criminal history, has not offended for a long period of time between 2007 and 2013 and Mr Fitzgerald is now in a relationship which involves Ms Murfit and her child and should operate as a protective factor. He has a business to look after and I note, in particular, that he and Mr Mitsopoulos have on oath stated that they have renounced their membership of the outlaw motorcycle gang to which Detective Sergeant Moore has referred in his affidavits.

62 I have also taken into account the observations I have made about the strength of the State's evidence.

63 I have already expressed my views on the meaning, in effect, of par (g) of cl 1. The paragraph requires the court to make a judgment as a matter of impression. The judgment the court is required to make is not susceptible to a fully-reasoned explanation. I can say that I have answered the question posed by par (g) by reference to the statements made by Mr Taylor and Mr Bellamy, what is depicted in the CCTV and mobile phone footage and the evidence concerning the injuries sustained by Mr Taylor and Mr Bellamy.

64 I accept that the offences alleged against Mr Fitzgerald and Mr Mitsopoulos are serious. That is evidence from the maximum penalty that may be imposed for the offences and I note that the offences are defined as serious offences within the meaning and for the purpose of sch 2 to the *Bail Act*. However, I do not consider that the circumstances alleged by the State disclose wrongdoing that is so serious as to make the grant of bail inappropriate.

65 Finally, there were submissions made about the effect of delay between the arrest of the accused and the likely trial date in the District Court. There is, in my view, nothing extraordinary about that delay and it is not a factor that I have taken into account positively in favour of the applicants in determining this application. They are my reasons for granting the applications.