

IN THE COURT OF APPEAL
SUPREME COURT OF QUEENSLAND

CA Number: 770 of 2005

Appellant/Applicant: John Major Clumpoint

And

Respondent: The Director of Public Prosecutions (Queensland)

Appellant/Applicant's Written Submissions

This Court's jurisdiction

1. There are two bases for this Court's jurisdiction. There is firstly an appeal from the decision of Muir J¹ refusing to delete certain conditions of bail imposed in the Magistrates Court.²
2. This Court also has original jurisdiction to determine an application to vary conditions imposed in the Magistrates Court.³ The Appellant also applies within this jurisdiction. The same material which was before Muir J is relied upon as well as the further affidavit of Paula Morreau which deposes to some subsequent relevant events.
3. It is a ground of appeal that Muir J erred - in the sense identified in *House v The King* (1936) 55 CLR 499 at 503 - in the exercise of the discretion.⁴ A proper regard for all of the material could not have supported his Honour's refusal to amend the conditions.
4. However, given the original jurisdiction of this court, the primary issue really is whether the conditions imposed by the Chief Magistrate are more "onerous" than necessary to meet the risks outlined in section 11(2) of the *Bail Act* ("the Act"), having regard "to the nature of the

¹ Appeal Record Book ("ARB") pp 285-289.

² The record book contains all of the material that was before his Honour.

³ Section 10(1) together with section 8(5) of the *Bail Act*. *Scrivener v DPP* (2001) 125 A Crim R 279 at 282 per McPherson JA: "As well as going from one judge to another in the Supreme Court, an application for bail may also be renewed in the Court of Appeal. This was recognised in *R v Hughes* [1983] 1 Qd R 92. (...), so that a bail application can, on the authority of *R v Hughes*, now be renewed before this Court.

⁴ *House v The King* (1936) 55 CLR 499 at 503: "It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance."

offence, the personal circumstances of the defendant and the public interest”: section 11(2A) of the Act.

5. An application to remove conditions is not a reconsideration of the grant of bail or the section 16 requirements in that respect. Whilst the applicant was in a “show cause” position before the Magistrate to obtain bail,⁵ the applicant did not bear that onus before Muir J, nor does he in this Court. The application before Muir J was not an appeal from the magistrate’s exercises of discretion, nor was it a fresh grant of bail. That situation remains the case in the application before this Court.⁶

Bail history

6. The applicant was originally refused bail by another magistrate shortly after he was charged. On 6 December 2004, the Chief Magistrate granted bail to the applicant on his own undertaking, conditioned that:⁷
 - 6.1. he reside at 49 Powell Street Wulguru (in Townsville) except with the prior written consent of police;
 - 6.2. he comply with a curfew such that he should not be absent from that residence between the hours of 7pm and 7am each day;
 - 6.3. he “present himself at the front entrance of his residence when required to do so by a police officer checking compliance with a bail condition”;
 - 6.4. he report daily between the hours of 8am and 6pm to the Townsville Police Station;⁸
 - 6.5. he “not visit Palm Island during the duration of his bail”
 - 6.6. he “not during his bail leave the boundaries of the city of Townsville and Thuringowa” without the prior consent of police;
 - 6.7. he not have contact with prosecution witnesses or with any other person charged;
 - 6.8. he attend before the Townsville Thuringowa Community Justice Group;
 - 6.9. he “not directly or indirectly organise or participate in any public rally, meeting or protest or other event in relation to the death of Cameron Doomadgee at Palm Island, the Palm Island riots on 26 November 2004 or the circumstances which have resulted in him being charged with these matters.”
7. The charges are listed for committal mention before the Townsville Magistrates Court on 10 March 2005.
8. The trial, if one is held, will probably not be listed by the trial courts until 2006.

⁵ Due to the allegation of the use of “offensive weapons” or “explosive substances”: s.16(3)(c) of the Act.

⁶ *Price, An Application for variation of bail* [2004] QSC 84.

⁷ ARB 14: Exhibit “B” to the affidavit of the Applicant.

⁸ These conditions were varied in minor respects by another magistrate in the Townsville Magistrates Court on 21 December 2004, such that the reporting requirement was reduced to every Monday, Wednesday and Friday.

The decision of Muir J

9. His Honour's refusal focussed on findings that:
 - 9.1. "...what is likely to happen on Palm Island is affected by the perceptions of members of the local community. It is difficult to assess on the state of the material the likelihood of what Mr Boe refers to as the "frustrations" of the community resulting in violent actions."⁹
 - 9.2. "The evidence shows that steps are being taken which are designed and are probably likely to reduce the risk of group violence. But I accept the submissions of Mr (Ross) Martin of Senior Counsel on behalf of the respondent that it is too early as yet to conclude that the risk (of group violence) is at a level where I could be satisfied, so far as the applicant is concerned, of the existence of no unacceptable risk in terms of section 16 subsection (1) of the Bail Act."
 - 9.3. "In arriving at this conclusion I have had regard to the prior criminal history of the applicant. That history does not suggest to me an appropriate capacity on the part of the applicant to hold himself aloof from an emotionally triggered outbreak of violence occasioned by some grievance, pent-up frustration or occurrence."¹⁰
 - 9.4. "I do not think for present purposes that it is particularly useful for me to speculate as to matters which might give rise to difficulties on Palm Island but the material refers to the commencement of a Coronial Inquiry in the near future. That is an event of some significance. Presumably at that time and as events unfold around it, it will become possible to form a more accurate assessment of the degree or risk which would be posed by the applicant's returning to reside with his family and continue with his employment."
 - 9.5. "I am also not persuaded on the material before me that having regard to the necessarily close contact the applicant would have with other residents on the island that there would be an acceptable risk of interference with witnesses."
10. His Honour accepted that it was "highly desirable" that the applicant be permitted to return to the island, his family and employment "at the first reasonable opportunity", provided that "the requirements of the Bail Act can be met."¹¹
11. There has been no determination of the applicant's guilt and evidence has not been presented to permit a proper assessment of his culpability.
12. In these circumstances it could not be doubted that the impact of the Draconian conditions upon the applicant's personal circumstances and on his family is severe.

⁹ ARB 288, L1-10.

¹⁰ The applicant's criminal history appears at ARB 93-95.

¹¹ ARB 289, L3-100.

13. The primary submission on appeal is that his Honour impermissibly placed undue weight on the fears and opinions expressed by police deponents when the issue to be determined was whether, having due regard to “the nature of the offence, the personal circumstances of the defendant and the public interest” the conditions were too onerous.

Events since the decision

14. A brief of evidence for the coronial inquiry has been delivered to a number of parties including the family and the Chairperson of the council both of whom have been granted “leave” to appear at the inquest.¹²
15. Through this very public process, the council and the community have been re-assured and have seemingly accepted, that the matters contained in the brief, which include supplementary opinions and corrections by the author of the original autopsy report and from an independent forensic pathologist, that this coronial inquiry is now most likely to be an independent, impartial and transparent process designed to get to the truth of the cause of death.¹³
16. Further public acceptance of this can be gleaned from the events that occurred at and surrounding the Directions Hearing convened by the State Coroner at Palm Island on 8 February 2004. The relevant matters arising from this event include:
- 16.1. The attendance of hundreds of members of the indigenous community, including all members of the council and the family of the deceased as well as some of the notable public spokespeople from the community.
 - 16.2. The granting of leave for the Chair of the local council to appear.
 - 16.3. The successful efforts by the council to enlist the assistance of community security personnel to oversee the event.
 - 16.4. The absence of any violence or threat of violence.
 - 16.5. The publication of the matters that will be investigated in the inquiry as identified by Senior Counsel assisting the Coroner.
 - 16.6. The ruling that, given the substantial community and family interest in the proceedings, a substantial part of the inquest will be conducted on the island.
 - 16.7. The State Coroner’s own assessment of the relevant risks of group violence re-occurring following his personal attendance at the island to conduct the Directions Hearing and view.¹⁴

¹² Section 36(1)(c) of the *Coroner’s Act 2003* (Qld) requires the Coroner to be satisfied that a party has a “sufficient interest”.

¹³ Refer supplementary affidavit of Ms Morreau.

¹⁴ Exhibit “PM-11” to the further affidavit of Paula Morreau affirmed on 14 February 2005.

17. In particular, the ruling that a substantial part of the inquest will be conducted on the island has fortified the feeling that there will be transparency in this process.

Section 11(1) issues

'Onerous' nature of the present special conditions¹⁵

18. The effect of the present conditions upon the applicant and his family is detailed in the affidavit material before the Court from the applicant and his wife.¹⁶
19. The conditions requiring the applicant to reside in Townsville and not with his family at Palm Island (No.s 1, 4, 5, 6 and 8):
- 19.1. Require the applicant to live in unsustainable conditions.
 - 19.2. Prevent him improving those conditions because of his effective re-trenching from gainful employment.
 - 19.3. Jeopardise his work position.
 - 19.4. Cause financial unsustainability for his young family.
 - 19.5. Separate him from his spouse of 18 years.
 - 19.6. Separate him from his children, which deprive them of his parenting and disrupt their development.
 - 19.7. Separate him from his elderly mother and extended family.
 - 19.8. Exclude him from his community at a particularly difficult time and deprive his community of his contributions.
 - 19.9. Impose an unacceptable burden upon the functioning of his family and cause extreme physical, psychological and emotional stress for him, his wife and children.
20. The fact that the conditions require the separation of the applicant from his family and preclude his capacity to meet his current employment responsibilities renders them "too onerous".

"nature of the offences"

21. The applicant is charged that on 26 November 2004:
- 21.1. he took part in a riot: section 63 *Criminal Code* (maximum penalty 3 years imprisonment); and
 - 21.2. whilst riotously assembled he unlawfully destroyed Palm Island police station: section 65 *Criminal Code* (maximum penalty life imprisonment).
22. The specific conduct alleged against him in the police material¹⁷ is that he:

¹⁵ The term onerous whilst used in section 11 is not defined in the Act. The Macquarie Concise Dictionary, 3rd Ed definition is: "adj. burdensome, oppressive, or troublesome."

¹⁶ ARB 15-16 (Cindy Clumpoint), ARB 7-9 (John Clumpoint); ARB 252-253 (submissions).

¹⁷ ARB 85-86; para 4 of affidavit of David John Miles.

- 22.1. attended a rally meeting, having brought a portable microphone for use by various speakers at the meeting, which speakers then urged the crowd to attack police and damage police property;
 - 22.2. was part of a group of people who advanced on the police station after the rally, passing the microphone to others to speak, which speakers then urged an attack against police and their property;
 - 22.3. incited the crowd to attack and destroy police property;
 - 22.4. was part of a group who damaged a police vehicle using rocks, sticks and a spanner; and
 - 22.5. threw rocks at a police residence before it was burnt by others.
23. The respondent's submission below that he was a "ring leader" is unsupported.¹⁸ A brief of evidence has not yet been published so the strength of the crown case cannot really be assessed. However, the applicant is not alleged to have actually burnt the building down, rather it is alleged that he has some liability under the party provisions.
24. The QP9 records that he denied the specific allegations made against him.

"circumstances surrounding the offences"

25. The offences clearly arose out of a special convergence of unfortunate and tragic events.
26. The context in which the conduct occurred is set out in affidavit of the Chair of the Palm Island Community Council, Erykah Kyle.¹⁹ Involvement in the offences was not planned, organised or pre-conceived. The conduct can be directly traced to grief, distress and a profound sense of injustice. Whether this perception is misplaced might be disputed but the fact that it was genuinely held could not be. These matters have been significantly ameliorated by recent events.²⁰ The circumstances do not suggest any general propensity on the part of the applicant to violence or resort to crime generally.

"personal circumstances of the applicant"

27. The applicant is 40 years old. He is indigenous. He is married. He lives with his wife and 4 children, aged 3, 10, 13 and 21. He has lived on Palm Island for most of his life. His extended family also reside on Palm Island.

¹⁸ ARB 272; para 10 of respondent's written submissions; ARB 281, L1-9.

¹⁹ ARB 66-69.

²⁰ As set out in Paula Morreau's further affidavit.

28. He is a qualified carpenter. He and his family live in a house built by him on the island. He works two jobs, including casual but permanent work with the Bwngcolman Community School (as groundsman, security, skill share program tutor etc) (“the Community School”) and at the Palm Island Aboriginal Council Canteen (as a sales/shop hand). His wife also works full-time, as the registrar of the Community School.
29. The applicant is regarded as a responsible and productive member of his community.
30. The applicant’s criminal history has had no entries since April 2002 (for conduct in December 2001). The offences which involve “violence” ceased in 1997. The complainant was his wife. She attests, in her affidavit filed below,²¹ that following counselling there is no longer any violence in their relationship and has not been for many years. The only damage to property offence (wilful damage in 2000) was in a different context altogether.
31. The history must be viewed in the context of the history of the Palm Island settlement. For example, damage to property, whilst objectively serious, is recognised as manifesting an expression of disempowered frustration following perceptions of injustice within Aboriginal communities.²² See more on this issue below. The fact that he has managed to build a productive and useful life at Palm Island, particularly over the last few years, is the most relevant aspect of his history for current purposes.

The “public interest”

32. Section 11 of the Act requires there to be regard to the “public interest.” See *O’Sullivan v Farrer* (1989) 168 CLR 210 at 216:
- “(…), the expression “*in the public interest*”, when used in a statute, classically imports a discretionary value judgement by reference to the undefined factual matters, confined only “*in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view*”: *Water Conservation and Irrigation Commission (N.S. W.) v Browning*, per Dixon J.”
33. The objects of the *Bail Act* are to regulate the release of persons under an appropriate framework to ensure that persons charged with offences appear in court when required and to address the risks associated with persons facing serious criminal charges being released into the community. See *Williamson v. DPP* [2001] 1 Qd R 99 at 103:

²¹ ARB18-19.

²² Chapter 11.10.16 of the RCADIC: “The destruction of property, and various forms of self-mutilation are also widespread and rule-governed expressions of grief and distress in Aboriginal societies.”

“No grant of bail is risk free. The grant of bail however is an important process in civilized societies which reject any general right of the executive to imprison a citizen upon mere allegation or without trial. It is a necessary part of such a system that some risks have to be taken in order to protect citizens in those respects.”

34. In assessing “the public interest” in this context it is not possible to view the currently alleged offences fairly without a contextual regard to the history of relations between the police and the Palm Island indigenous community. A useful précis of this history was before Muir J which comprises an excerpt from the Queensland Regional Report annexed to the Royal Commission into Aboriginal Deaths in Custody (“the RCADIC”).²³
35. The RCADIC identified the issue of unrealistic bail conditions as an “underlying issue” contributing to Aboriginal deaths in custody. Two examples - the deaths of Lloyd James Boney and Shane Kenneth Atkinson - were placed before Muir J to place the harshness of the conditions imposed in the grant of bail to the applicant within a proper context.²⁴
36. His Honour seemed to accept the submission that bail conditions represent no more than an assurance and certainly not “a general reform of (an applicant’s) character” and that they should not be used to mete summary punishment.²⁵
37. The interests of the Applicant’s children do not seem to have been given any proper regard in imposing and maintaining this condition or in the affidavit material filed in this court.²⁶ An extended separation of the applicant from his children is not in their interests.
38. It cannot be in the public interest to impose conditions which cause the destruction of a family unit by separation prior to conviction for any extended period.

The Police opposition to bail

39. The complainants in the present matter are themselves police officers. Police are not always able to see matters from the perspective of the indigenous community particularly when it comes to issues attending isolated communities.²⁷

²³ ARB 46-48; Exhibit PM-6 to the affidavit of Paula Morreau.

²⁴ Paras 29-30; ARB 256-257.

²⁵ ARB 288.

²⁶ The UN Convention on the Rights of the Child was ratified by the Commonwealth in 1990 and entered into force in Australia on 16 January 1991. Articles 3 and 9 are apposite. See also *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1994-1995) 183 CLR 273.

²⁷ The complexities on this issue are difficult to summarise. They appear in Chapter 13.4 of the RCADIC. One apt observation is at 13.4.8 “It is also important to bear in mind that the police culture is a subculture within the wider culture of non-Aboriginal Australia, in which both Aboriginal people and police are enveloped. Police and Aboriginal people do not

40. Magistrate Glasgow's observations following his 'post-riot' visit²⁸ were acknowledged by Muir J.²⁹ However they only suggest that the Court on its fortnightly visits since the "riot" have not encountered any general lawlessness or disrespect for law and order.
41. Ms Kyle's affidavit also reveals that the trigger for the "riot" was the publication of the suggestion that the death in police custody followed injuries which may have been sustained as a result of "an accident" in police custody.³⁰ The lack of wisdom in the taking of this course by the Coroner was addressed below.³¹ Those observations are maintained.
42. However, the recent events surrounding the coronial inquest reveal that the community has proper cause to now expect an independent judicial inquiry.
43. In any event, it would be unfair to determine the applicant's liberty and freedom of movement by reference to a general concern of calamity on the island in police relations. Regard should also be had to the following:
- 43.1. The applicant has already suffered considerable punishment in the form of 11 days in custody; demeaning monitoring of curfew conditions; separation from his family and home over 2 ½ months; deprivation of his income in that period; and likelihood of losing his employment position.
- 43.2. The applicant is regarded in his community as a responsible family and community man. He has mature responsibilities which he has been meeting. He is now well apprised of the consequences of breaching his bail by involvement in any further criminal conduct. He knows that the consequences of his bail being revoked are dire for his young family.

interact separately from the rest of the community, but as part of it. Police are agents of the dominant non-Aboriginal community and are almost entirely drawn from it. What they do is in a large degree responsive to attitudes in the wider community, although in times of change police attitudes, embedded in a police culture that is highly resistant to change, may lag behind changes in the rest of the community. On the other hand, with successful and enlightened leadership, police attitudes may be in advance of those of the rest of the community. Certainly the Commission has seen examples at the local level and at the highest level where police have been quicker than the general non-Aboriginal community to respond to new situations and new ideas. Often this is because of the enlightened leadership of some police officer, but it is often reinforced by the realisation of the rank and file police that a good relationship with the local Aboriginal community can make their work more pleasant and less onerous. Aboriginal people themselves become agents of change in police attitudes as they win the respect of police by their efforts and achievements, and by their constructive efforts within their communities."

²⁸ ARB 246, L10-11 "I have been there (Palm Island) on the 14th and 15th (December 2004). I've sat in my Courts there. I've been welcomed on the island. Every defendant who should have appeared, appeared before me and no warrants were issued. We proceeded in the normal way. I was not at all under threat. Neither was my staff. We entered that island as guests and were treated with respect as is my my – as my means I always treat the defendants before me similarly."

²⁹ ARB 289; L29-33.

³⁰ ARB 66-69.

³¹ Paras 46-49 of the applicant's submissions; ARB 261-262.

- 43.3. He has now been led to believe that there will be a proper and impartial inquiry into the death which has considerably placated the “frustrations” of injustice of many within the community.
- 43.4. The police who were on the island prior to the death in custody, and who may be implicated in the inquest, have all left the community.

Submissions

- 44. The offences are relatively serious. However the applicant’s alleged role did not include actual involvement in the burning of the building. The continuation of the conditions as presently framed which prohibit the applicant from residing with his family at Palm Island are, for the reasons set above, simply too onerous.
- 45. It is submitted that the grant of bail such that the applicant is released on his own undertaking with:
 - 45.1. a reworking of the residence condition (1) to require the applicant to reside on Palm Island with his family in his family home; and
 - 45.2. the retention but amendment of condition (7) to oblige the applicant not to have any communication with prosecution witnesses or any co-accused (of whom his legal representatives are advised in writing) about the evidence surrounding the offences charged;

would clearly be sufficient to meet any perceived risks under the *Bail Act* as a result of his being released into the community.

Bret Walker
14 February 2005