

# SUPREME COURT OF QUEENSLAND

CITATION: *Clumpoint v Director of Public Prosecutions (Qld)* [2005] QCA 43

PARTIES: **JOHN MAJOR CLUMPOINT**  
(applicant/appellant/applicant)  
**v**  
**DIRECTOR OF PUBLIC PROSECUTIONS**  
**(QUEENSLAND)**  
(respondent/respondent/respondent)

FILE NO/S: Appeal No 770 of 2005  
SC No 304 of 2005

DIVISION: Court of Appeal

PROCEEDING: Appeal from Bail Application  
Miscellaneous Application – Civil

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 2 March 2005

DELIVERED AT: Brisbane

HEARING DATE: 23 February 2005

JUDGES: McMurdo P, Jerrard JA and Douglas J  
Judgment of the Court

ORDERS: **1. Appeal allowed**  
**2. Application to vary bail granted**  
**3. Order that the applicant appear and surrender himself into custody:**  
**(a) at the Magistrates Court at Townsville on 10 March 2005 and on such other dates, times and places as a Magistrates Court may determine;**  
**(b) before the criminal sittings of the court to which he may be committed in respect of the offence, or any offences, at the sittings specified by the court to which he is committed at the date, time and place fixed for the trial, notice of which shall be given to him by his solicitors, by the Director of Public Prosecutions, or by a person authorised by the Director of Public Prosecutions;**  
**(c) the applicant not depart from either of these courts without leave of the court and so often as leave is granted, return at the time appointed by the court and again surrender himself into custody**

4. **The applicant shall reside at his home residence at 1 Butler Bay Road, Palm Island or at such other place or places as agreed in writing by the Director of Public Prosecutions**
5. **The applicant shall not, directly or indirectly, communicate about the charges with any prosecution witness to the charges arising out of the events on Palm Island on 26 November 2004**

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – BAIL – REVOCATION, VARIATION, REVIEW AND APPEAL – where applicant charged under s 65 *Criminal Code* 1899 (Qld) with unlawful destruction of a building while being riotously assembled – where maximum penalty of life imprisonment – where applicant granted bail by Magistrates Court under special conditions – where applicant Indigenous – where under conditions unable to reside with his wife and children in the family home – where unable to visit his community – where unable to continue employment – where application to Supreme Court to vary bail conditions refused – where primary judge considered application to vary bail under s 16 *Bail Act* 1980 (Qld) instead of s 9 and s 11 of the *Bail Act* – whether bail conditions more onerous than necessary

*Bail Act* 1980 (Qld), s 8, s 9, s 10(1), s 11, s 16

*R v Hughes* [1983] 1 Qd R 92, applied

*Scrivener v Director Of Public Prosecutions* [2001] QCA 454; (2001) 125 A Crim R 279, applied

COUNSEL: B W Walker SC for the appellant/applicant  
R G Martin SC for the respondent

SOLICITORS: Boe Lawyers for the appellant/applicant  
Director of Public Prosecutions (Qld) for the respondent

- [1] **THE COURT:** This appeal relates to recent events on Palm Island.<sup>1</sup> The material before this Court establishes the following. On 19 November 2004, an Indigenous man was arrested by police on Palm Island. He died a few hours later in police custody. There was uncertainty and speculation in the Palm Island community as to the cause of death. On 26 November 2004, Ms Erykah Kyle, elected chair of the Palm Island Aboriginal Council, read a summary of the first autopsy report released by the Coroner to a crowd of people near the Council building, including the observation that initial investigations could not exclude that the cause of the deceased's injuries was an accident. The situation quickly deteriorated.<sup>2</sup> Rocks, bricks and other objects were thrown at police officers and the police station. Police officers retreated into the police station. The windows of the police station were smashed and members of the crowd attempted to enter the police station. Police fled from the station to the barracks compound behind. The senior sergeant's residence and the police station were ablaze. Police estimate that the replacement value of the destroyed police station, court house and residence is \$3 million. In addition, individual police officers have lost large amounts of personal property. Some of the police officers have been deeply traumatised by the incident.<sup>3</sup>
- [2] The applicant, Mr Clumpoint, was taken from Palm Island to Townsville police station on the morning of Saturday, 28 November 2004 and was later charged that on 26 November 2004 at Palm Island he took part in a riot.<sup>4</sup> That offence is punishable by a maximum sentence of three years imprisonment. In all, 35 people were charged with offences arising out of the incidents of 26 November 2004. He and 21 others were initially refused bail whilst the remainder of those charged were bailed. On 6 December 2004, a charge that he being riotously assembled unlawfully destroyed the Palm Island police station<sup>5</sup> (punishable by a maximum sentence of life imprisonment) was substituted for the lesser offence. The Chief Magistrate granted him bail with a number of conditions, including that he reside at a specified address in Townsville or such other place agreed to in writing by the officer in charge of police at Townsville; that he is subject to a curfew and shall not be absent from or depart his residence between 7.00 pm and 7.00 am; that he present himself at the front entrance of his residence when required to do so by a

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<sup>1</sup> Palm Island was gazetted as a reserve in 1914 by the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld) which under s 9 authorised the Minister to remove "every [unexcepted] aboriginal within any District" to, and keep within, reserves. The Act was subsequently replaced by the *Aboriginals Preservation and Protection Act 1939* (Qld); then the *Aborigines' and Torres Strait Islanders' Affairs Act 1965* (Qld) and next the *Aborigines Act 1971* (Qld). Aborigines in the Cardwell–Tully district, removed to the newly established Hull River Mission, were further removed to Palm Island after the Mission was destroyed in a cyclone in 1918. By the early 1920s Palm Island was the largest government settlement for Indigenous Queenslanders. It was used for many years as a place to which Aborigines from all over the State were sent. Over half the Aboriginal removals between 1919 and 1937 in Queensland were to Palm Island (Extract from evidence to the Royal Commission into Aboriginal Deaths in Custody 1991, Regional Report of Inquiry into Queensland, ex 6 to the affidavit of Paula Morreau affirmed 13 January 2005). See also Blake, T, *A History of the Cherbourg Settlement*, UQP 2001, pp 43-45 and 136 which documents that Aborigines were sent from Cherbourg, then Barambah, to Palm Island for punishment so that it was known amongst Aborigines as "Punishment Island". Palm Island remained an Aboriginal settlement under the control of the Queensland government until 1986 when the government relinquished control and title passed to the Palm Island Community Council in the form of a Deed of Grant in Trust (see *Land Act 1994* (Qld), Ch 3).

<sup>2</sup> Affidavit of Erykah Kyle affirmed 14 January 2005.

<sup>3</sup> Affidavit of David John Miles sworn 13 January 2005.

<sup>4</sup> *Criminal Code 1899* (Qld), s 63.

<sup>5</sup> *Criminal Code 1899* (Qld), s 65.

police officer checking compliance with a bail condition; that he report personally to the officer in charge of police at Townsville between 8.00 am and 6.00 pm each day;<sup>6</sup> that he not visit Palm Island; that he not leave the boundaries of the City of Townsville and Thuringowa without first obtaining the consent of the officer in charge of Townsville police; that he have no contact whatsoever, either directly or indirectly with any prosecution witnesses who are known to him to be prosecution witnesses in the matters arising out of the incidents on 26 November 2004; that he attend the Townsville–Thuringowa Community Justice Group as and when directed by the coordinator of the Justice Group and that he shall not directly or indirectly organise or participate in any public rally, meeting or protest or other event in relation to the death of the Indigenous man at Palm Island, the events on Palm Island of 26 November 2004 or the circumstances which have resulted in him being charged with these matters.

- [3] On 21 December 2004 he applied unsuccessfully to a Townsville magistrate for a variation of those conditions to allow him to return to his home and family on Palm Island. He then applied on 14 January 2005 to a Supreme Court judge to vary the bail conditions. This appeal is from the refusal of that application. Alternatively, Mr Clumpoint asks this Court to exercise its original jurisdiction to vary the conditions of bail imposed in the Magistrates Court. It is clear that this Court has that original jurisdiction: *Bail Act* 1980 (Qld) ("the *Bail Act*"),<sup>7</sup> *Scrivener v Director of Public Prosecutions*<sup>8</sup> and *R v Hughes*.<sup>9</sup> Such an application will not ordinarily succeed, however, unless a material change of circumstance can be established.<sup>10</sup>
- [4] Mr Clumpoint's contention both before the learned primary judge and in his fresh application to this Court is that he should be released on bail on his own undertaking with a residence condition which allows him to live on Palm Island with his family in their home and with a condition obliging him not to have any communication with prosecution witnesses or his co-accused arising out of the events on Palm Island on 26 November 2004.

#### **The material before the primary judge**

- [5] In addition to the matters earlier stated, the following information was before the learned primary judge. Mr Clumpoint was born in Townsville and has lived on Palm Island most of his life. He is 40 years old. He has a significant criminal history commencing in 1981 initially for what appears to be, from the community-based sentences imposed, relatively minor offences of dishonesty, driving offences, drug offences and street offences. Of more significance are his convictions for two offences of assault occasioning bodily harm on a female in 1987 and two further charges of assault occasioning bodily harm and breach of a domestic violence order in 1993 for which he also received non-custodial sentences. Later that year, he was convicted of breaching a probation order imposed for disqualified driving and sentenced for the first time to three months imprisonment. In 1997, he was convicted and fined \$400 for breaching a domestic violence order. Later that year, he was sentenced to three months imprisonment after being discharged from an

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<sup>6</sup> This condition of bail was later varied to allow the Aboriginal and Torres Strait Islander Legal Service (ATSILS) and the Community Justice Group to convey the bailees in groups of six every Monday, Wednesday and Friday to the Townsville police station.

<sup>7</sup> Section 8(5) and s 10(1).

<sup>8</sup> (2001) 125 A Crim R 279, 282.

<sup>9</sup> [1983] 1 Qd R 92.

<sup>10</sup> *Scrivener*, 282.

intensive correction order for disqualified driving which he had breached. In 1999, he was convicted and fined for obstructing a police officer. In 2000, he was placed on 18 months probation and ordered to complete 140 hours community service for wilful destruction and convicted but not further punished for a breach of the *Bail Act*. It seems from his criminal history that this offence of wilful damage may have been committed after he had been charged with the minor offence of using insulting words for which he was later convicted and fined. In 2002, he was convicted but not further punished and ordered to pay \$600 restitution for breach of a probation order and a community service order. For the offence of contravening a direction or requirement, he was convicted and sentenced to seven days imprisonment suspended for 18 months. He was also convicted of breaching the *Bail Act* on 1 November 2001 but no further action was taken. He has not been convicted of any offences since 10 April 2002.

- [6] Mr Clumpoint swore that the offences of assault were perpetrated upon his wife; he is ashamed of this conduct which occurred at a time in his life when there were significant tensions in their relationship and he was drinking too much alcohol. He and his wife have since undergone counselling and have addressed many of the issues that underpinned his unacceptable behaviour. There has been no domestic violence in their relationship for many years. He swore that the wilful destruction offence occurred when he smashed the windscreen of a truck owned by the Palm Island Aboriginal Council after a work dispute. He cannot recall breaching the *Bail Act* but assumed each instance was a mix-up in communication so that he missed the court appearances. The fact that in each case no penalty was imposed supports that assumption.
- [7] His elderly widowed mother resides at Palm Island where she was born and has lived all her life as do his two surviving brothers and his younger sister. He has been living with his wife for about 18 years; they have been married for ten years and have four children, two biological children aged 13 and 10, a 21 year old son of his wife from a previous relationship and a three year old adopted child. All children live in the three bedroom home at Palm Island which Mr Clumpoint built.
- [8] Mr Clumpoint has worked as a carpenter or labourer in the building industry for many years. In early 2004, he obtained a carpentry trade certificate and is now a qualified and licensed carpenter. Prior to his arrest, he was employed in a permanent casual multi-skilled position at a community school on Palm Island. The principal under whom he worked, Mr Michael Hobbs, described him as a capable and reliable worker who was effective in working and communicating with Palm Island youths.
- [9] Mr Clumpoint swore that the compliance with the special bail conditions has caused him and his family extreme personal and financial hardship. He was missing his immediate and extended family. Initially he resided with his sister in an outer Townsville suburb but reporting became onerous. He then moved closer to central Townsville where he resided with his niece and her two 15 year old children in a crowded two bedroom flat. His wife and children were missing him. His wife has employment on Palm Island but the cost of travelling to and from Townsville to visit him on a regular basis is prohibitive. He has not been able to obtain employment in Townsville but it seems that employment is available to him on Palm Island. He believes that if he can return to Palm Island the curfew condition would be difficult because of his employment as a night watchman and that the

police to whom he would have to report at Palm Island may still be angry about their belief as to his involvement in the riots. He is confident that he could live and work at Palm Island and still avoid contact with others charged with or giving evidence in the matters arising from the incidents on Palm Island on 26 November 2004.

- [10] Ms Cindy Marie Clumpoint, Mr Clumpoint's wife, is registrar of a Palm Island community school. She deposed to the financial and emotional hardships to her and her children caused by her husband's enforced separation. She confirmed that Mr Clumpoint's breaches of the *Bail Act* arose out of confusion as to court dates and were not deliberate attempts to avoid meeting his bail. She also confirmed that Mr Clumpoint in recent years has moderated his alcohol use, that there have been no episodes of domestic violence for some years and that their marital relationship is now harmonious. The young man whose death triggered the events of 26 November 2004 was Mr Clumpoint's cousin and they were very close. The family needs now to be together in their grieving.
- [11] The chair of the Palm Island Aboriginal Council, Ms Erykah Kyle, an elder of the Palm Island community, affirmed that she believed the events of 26 November 2004 were borne out of the grief, distress and perceptions of injustice felt by Palm Islanders following the publication of the interim view that the death in custody of the young man on 19 November 2004 may have been an accident. Since then she observes that his appropriate and respectful funeral with no unwanted police presence and the visit to Palm Island of the Premier and his Ministers without any adverse reaction from Palm Islanders demonstrates that there is no prospect of a repeat of the events of 26 November 2004. Ms Kyle deposes that in her view the return of Mr Clumpoint to his family and job on Palm Island will not create or increase any such risk but will be viewed by the community as an appropriate recognition of the relaxing of tensions between the police and the community.
- [12] Townsville magistrate, Mr Glasgow, who refused the application to vary bail on 21 December 2004, has twice sat on Palm Island since 26 November 2004 and described being "welcomed on that island ... not at all under threat ... [he and others] entered that island as guests and were treated with respect." Nevertheless, Mr Glasgow was not then prepared to vary bail by lifting Mr Clumpoint's banishment from Palm Island because of the risk to police officers and property if there were a return to riotous behaviour.
- [13] The police allegations against Mr Clumpoint are that he carried a microphone during the course of the riot and encouraged others in the destruction of government property. When interviewed by police, Mr Clumpoint acknowledged that he passed around a microphone but denied that he used it to incite the crowd or that he did anything to encourage the crowd to assault police or destroy property. Affidavit material from police officers expressed unparticularized concern that Mr Clumpoint's return to the 3,500-strong Palm Island community could trigger unlawful behaviour and place police and police property at risk.

**The learned primary judge's reasons**

- [14] In considering the application to vary the conditions of bail, his Honour noted that he was required under s 16(1) of the *Bail Act* to consider "whether there is an unacceptable risk that [Mr Clumpoint] if released on bail would, amongst other things, commit an offence or interfere with witnesses or otherwise obstruct the

course of justice." His Honour then considered the matters set out in s 16(2) in assessing whether there was such an unacceptable risk. On the material before him, his Honour considered that "the risk of reoffending ... is, to an extent, related to the volatility of the situation on Palm Island and the risk of a reoccurrence of group violence or disorder." His Honour accepted that steps had been taken which were probably likely to reduce the risk of group violence but accepted the respondent's submissions that it was too early to conclude that there was no unacceptable risk under s 16(1). In accepting that submission, his Honour had regard to Mr Clumpoint's prior criminal history which did not suggest to his Honour "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." His Honour also referred to the imminent commencement of a coronial inquiry into the death in custody, noting that:

"Presumably at that time and as events unfold around it, it will become possible to form a more accurate assessment of the degree [of] risk which would be posed by the applicant's returning to reside with his family and continue with his employment. Plainly, it is highly desirable that he be permitted to do so at the first reasonable opportunity as long as the requirements of the Bail Act can be met."

- [15] His Honour was also not persuaded on the material before him:
- "... 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. Again, with the passage of time, it seems likely that this risk will diminish to an acceptable level. ... [T]hat time has not yet arrived."
- [16] In reaching those conclusions, his Honour had regard to the evidence of the Townsville magistrate who refused the application for variation of bail on 21 December 2004.

### **The Bail Act**

- [17] Section 8 of the *Bail Act* empowers a court to grant bail to a person held in custody (s 8(1)(a)) and to vary bail so granted (s 8(1)(b)). Under s 9, a court is, subject to the *Bail Act*, ordinarily required to grant bail or to enlarge or vary bail already granted. This reflects the basic but important principle of the criminal law that an accused person is presumed to be innocent prior to conviction and should not be punished before conviction. Under s 11:
- "(1) A court or police officer authorised by this Act to grant bail shall consider the conditions for the release of a person on bail in the following sequence –
- (a) the release of the person on the person's own undertaking without sureties and without deposit of money or other security;
  - (b) the release of the person on the person's own undertaking with a deposit of money or other security of stated value;
  - (c) the release of the person on the person's own undertaking with a surety or sureties of stated value;
  - (d) the release of the person on the person's own undertaking with a deposit of money or other security of stated value and a surety or sureties of stated value,

but shall not make the conditions for a grant of bail more onerous for the person than those that in the opinion of the court ... are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest.

(2) Where a court ... authorised by this Act to grant bail considers that the imposition of special conditions is necessary to secure that a person –

- (a) appears in accordance with the person's bail and surrenders into custody;
- (b) while released on bail does not –
  - (i) commit an offence; or
  - (ii) endanger the safety or welfare of members of the public; or
  - (iii) interfere with witnesses or otherwise obstruct the course of justice whether in relation to the person or another person;

that court ... shall impose such conditions as the court ... thinks fit for any or all of such purposes.

(2A) Conditions imposed pursuant to subsection (2) shall not be more onerous for the person than those that in the opinion of the court ... are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest.

..."

[18] The learned primary judge did not approach the application to vary bail by considering s 9 and s 11 but instead considered whether he ought to refuse bail under s 16. This approach was wrong in law. Because Mr Clumpoint had already been granted bail the question was not whether bail ought to be refused under s 16 but whether the conditions of bail imposed on Mr Clumpoint when he was released on bail on 6 December 2004 were still necessary to secure Mr Clumpoint's compliance with the matters set out in s 11(2)(a) and (b) and whether those conditions at the time of the application to vary bail were by that time more onerous than necessary having regard to the nature of the offence, Mr Clumpoint's circumstances and the public interest (s 11(2A)).

[19] His Honour erred in not approaching the question to be determined under the *Bail Act* in this way. His Honour's conclusions on the facts, which were open on the material before him, suggest that he may well have ultimately decided to refuse the application to vary bail even had he considered the appropriate matters under s 9 and s 11 of the *Bail Act* instead of only under s 16. Nevertheless, his Honour's final determination was flawed because it was reached by the wrong path. It follows that the decision can be now reviewed and this Court may exercise its own discretion to determine whether the application to vary bail should be granted.

#### **The further material before this Court**

[20] In determining that issue, this Court has the benefit of further evidence and the knowledge that another six weeks have passed on Palm Island without overt community tumult despite it remaining firmly in the public eye. On behalf of Mr Clumpoint, his legal practitioners have affirmed that they have visited Palm Island from Saturday 5 February to Tuesday 8 February 2005 and did not observe any incident of conflict between police and members of the community. They met councillors and committee members, including key spokespeople within the

community who appeared to accept that the impending coronial inquiry would be an independent and transparent investigation into the November 2004 death in custody. On 8 February 2005, the State Coroner held a pre-inquest conference in a community hall on the island for about two to three hours. Despite the heat and the limitations of amplifiers, the meeting was conducted appropriately, effectively and without disruption. After the conference, the Coroner and some lawyers walked without incident through the community to view the scene of the young man's death on 19 November 2004, accompanied by senior members of the community and with the Council's own voluntary security personnel. Mr Clumpoint's lawyers believe from their dealings with Palm Island community members that the decision by the Coroner to hold part of the inquest on Palm Island has fostered a growing acceptance that the coronial inquiry will be independent and transparent.

- [21] On 9 February 2005, the State Coroner wrote to Ms Kyle in her role as chair of the Palm Island Aboriginal Council in these terms:

"Thank you very much for making me feel welcome on your beautiful island yesterday. The courtesy shown to me and my staff and the assistance provided to us were very much appreciated. The orderly manner in which people participated in the proceedings and the tolerance shown to the large group of lawyers and media as they walked among the houses in what was inevitably a fairly intrusive activity was, in my view, a credit to the community."

- [22] On the morning of the hearing in this Court (23 February 2005), Mr Clumpoint's legal representatives filed further affidavits describing their visits to Palm Island from Wednesday 16 February to Friday 18 February 2005 when the Palm Island community again remained peaceful with no acts of violence or untoward behaviour. During this period, the Queensland Premier and a number of Cabinet Ministers and Directors-General and other officials of State government departments again visited the Island.

- [23] A further affidavit from Mr Clumpoint's wife, Cindy Marie Clumpoint, was also filed. She deposed that she and her children have suffered ongoing and substantial detriment since the refusal of the application to vary bail on 14 January 2005. In early February 2005, the school term recommenced and she has been working fulltime at the community school on Palm Island. She continues to provide financial support to Mr Clumpoint and since his banishment from Palm Island and his inability to attend his work she has been the sole breadwinner for the family unit. Household expenses absorb all her wages. She is under a great deal of stress because of this financial pressure. She estimates that Mr Clumpoint's lost wages, additional family travel and the expenses of supporting him in Townsville arising out of his banishment from Palm Island have already cost about \$15,000. She is finding it increasingly difficult to cope as a sole parent, not only financially but physically and emotionally. She greatly misses his contribution to household and maintenance tasks. The children miss their father. Their three year old daughter has now become clingy and demanding and is suffering from separation anxiety because of her father's absence. Their 13 year old son has just commenced Year 8 at school and is increasingly rebellious and disrespectful of her authority in the absence of his father. Ms Clumpoint believes that her teenage son's deteriorating behaviour is because of the absence of Mr Clumpoint's strong male role model in the family and the discipline he provides. She is also missing the company and support of her husband and has insufficient money to travel to Townsville to visit

him in the foreseeable future. She believes that Mr Clumpoint is becoming increasingly frustrated and disconsolate with the situation. The special bail conditions have caused a fundamental breakdown in their family dynamics. She states that Mr Clumpoint's position as a night watchman and skill share tutor at the Palm Island Community School is still open and available but the position must be filled and will not remain vacant indefinitely; it will disappear if he is not soon allowed to return to Palm Island to take up this position.

- [24] The respondent has also filed a further affidavit from police officer Miles, who is one of the principal over-viewing officers with respect to the events at Palm Island on 26 November 2004. Police officer Miles described the current situation on Palm Island as to the community attitude and behaviour towards police as uneasy, but with police continuing attempts to be proactive within the community. He set out seven significant instances involving acts of violence directed at police or police property on Palm Island since the events of 26 November 2004. On 1 January 2005 the windscreen and passenger windows on a police vehicle were smashed; on 10 January 2005 four juveniles entered the new police demountable building under construction and poured 40 litres of vinyl adhesive across the floor; on 31 January 2005 the windows and panels of a police vehicle parked within the police compound were damaged when rocks were thrown at it; on 12 February 2005 two offenders taunted police and then threw rocks at a security officer and police officers at the construction site of police buildings; on 14 February 2005 some juveniles were observed at the scene of a grass fire adjacent to the new police complex; on 15 February 2005 glass beer bottles were thrown onto the driveway of the police compound and some individuals were seen fleeing on bicycles; on 20 February 2005 a patrolling police vehicle was damaged by thrown rocks.
- [25] The coronial inquest commenced on Palm Island on Monday 28 February 2005. Counsel informed us that the Palm Island hearings are expected to take three days and the inquest will then continue in Townsville for an estimated further five to seven days. We were also told that the committal proceedings concerning the offences alleged against Mr Clumpoint and others resulting from the events at Palm Island on 26 November 2004 will commence on 11 April 2005 in Townsville and are expected to take about one month.
- [26] The respondent continues to contend that it is too soon to allow Mr Clumpoint to return to Palm Island and that perhaps if things remain peaceful after the findings of the coronial inquiry are delivered his bail may then be safely varied.

### **Conclusion**

- [27] Under s 11(2) of the *Bail Act* the conditions of bail imposed must ensure that Mr Clumpoint appears in accordance with his bail and surrenders into custody<sup>11</sup> and whilst on bail does not commit an offence,<sup>12</sup> endanger the safety or welfare of members of the public<sup>13</sup> or interfere with witnesses or otherwise obstruct the course of justice.<sup>14</sup> Under s 11(2A) those conditions must not be more onerous than necessary having regard to the nature of the offence, Mr Clumpoint's circumstances and the public interest.<sup>15</sup>

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<sup>11</sup> Section 11(2)(a).

<sup>12</sup> Section 11(2)(b)(i).

<sup>13</sup> Section 11(2)(b)(ii).

<sup>14</sup> Section 11(2)(b)(iii).

<sup>15</sup> Section 11(2A).

- [28] We will consider first the relevant matters under s 11(2). Mr Clumpoint has not absconded whilst on bail in the past and has strong ties in the Palm Island community where he lives with his wife and children in their home which he built. He does not have a history of habitually committing offences whilst on bail and prior to his arrest on these offences had no convictions for some years. He has met his bail and its extensive conditions to date. The evidence does not suggest that Mr Clumpoint will not appear in accordance with his bail.
- [29] The learned primary judge rightly identified that any risk of reoffending would be related to the volatility of the situation on Palm Island if there was a return to group violence or disorder and that the likelihood of this would be increased with events the community would find stressful, like the impending coronial inquiry. This Court cannot predict the likelihood of whether or not there will be a repetition of group violence on Palm Island whilst Mr Clumpoint is on bail and, if so, whether Mr Clumpoint is likely to be part of it. Of course, these are possibilities about which the police are understandably concerned. On the other hand, the chair of the Palm Island Council, Ms Kyle, believes Mr Clumpoint's return to Palm Island will be viewed by the community as a recognition of improved relations between the police and the community. The Queensland Premier and some of his Ministers and their staff have visited Palm Island without any violent incidents. The Coroner has had positive and successful meetings on the island. Mr Clumpoint's previous criminal history does not suggest that he is predisposed to inciting violence against the police. The extraordinary events preceding 26 November 2004 and in particular the catalyst for them, namely, the death in custody at Palm Island of an Indigenous man, are, it is hoped, unlikely to be repeated whilst Mr Clumpoint is on bail. Although there can be expected to be some tension during the inquest into that death and perhaps during the anticipated committal proceedings for Mr Clumpoint and his co-accused, the Coroner's decision to hold part of the inquiry on Palm Island has assisted in further easing that tension. Police officer Miles' affidavit sets out seven incidents of violence towards police and police property. It does not also set out the prevalence of such offences on Palm Island before November 2004. In any case, the disorderly criminal conduct listed in that affidavit, while destructive of public property and utterly unacceptable, concerns relatively isolated incidents perpetrated by individuals, couples or small groups. It does not seem indicative of a repetition of the events of 26 November 2004. Whilst meeting his bail conditions in Townsville he does not seem to have shown any predisposition to incite others to offend. The condition banishing Mr Clumpoint from Palm Island was entirely appropriate when originally imposed only days after the events of 26 November 2004. Over three months have now passed and the evidence before this Court does not suggest that to allow Mr Clumpoint to return to his home and family on Palm Island is likely, in itself, to endanger the safety or welfare of members of the public.
- [30] The material before the Court suggests that Mr Clumpoint, although living in Townsville, has maintained links with the Palm Island community so that had he wished to interfere with witnesses he could have done so. There is no suggestion he has breached his bail conditions in this way. We are not persuaded that his return to his home and family on Palm Island will mean that he will be likely to interfere with witnesses or otherwise obstruct the course of justice, especially in the light of the relevant conditions of bail proposed by him. Were he determined to interfere with witnesses or otherwise obstruct the course of justice in this investigation and prosecution, he could do so from Townsville almost as effectively as from Palm Island.

[31] We turn now to consider under s 11(2A) whether the present conditions imposed under s 11(2) are more onerous than necessary having regard to the nature of the offence, the circumstances of Mr Clumpoint, and the public interest. The charged offence is extremely serious. The condition imposing banishment from Palm Island was a condition directly related to the nature of the offence. As noted, whilst it was entirely appropriate when imposed a few days after the events of 26 November 2004, with the passage of time and in the light of the information now before this Court, the justification for such a condition has greatly lessened. Mr Clumpoint's personal circumstances demonstrate that the condition of banishment from Palm Island is exceedingly onerous; it deprives him of the companionship and support of his wife, his ability to be a father to his children, his employment and financial independence and the right to live in his own home which he has built in his chosen community. Apart from actual imprisonment, it is difficult to imagine a more onerous bail condition. It is unquestionably in the public interest that there be no repetition of the events of 26 November 2004 on Palm Island. It is also in the Palm Island community's interest that Mr Clumpoint be permitted to return to his home, family and job and to rejoin their society. Because this will be seen as a demonstration of the easing of tensions between the police and the community and will assist his children's welfare and that of the family unit, his return to Palm Island now is likely to be in the interests not only of the Palm Island community but also the wider Queensland community. While it is impossible to be certain that if Mr Clumpoint returns to Palm Island he will not breach his bail, the balancing exercise that on the evidence before it this Court must undertake under the *Bail Act* (including the presumption of innocence and the principle that no person should be punished without conviction which underlies s 9) favours the conclusion that the bail condition preventing Mr Clumpoint from living on Palm Island is now more onerous than necessary. It should be removed.

[32] Of course, if the respondent becomes aware of materially changed circumstances, it can apply to a court for a variation of the conditions of Mr Clumpoint's bail or even revocation of that bail under s 30 of the *Bail Act*.

[33] It follows that we would:

1. Allow the appeal.
2. Grant the application to vary bail.
3. Order that the applicant appear and surrender himself into custody:
  - (a) at the Magistrates Court at Townsville on 10 March 2005 and on such other dates, times and places as a Magistrates Court may determine;
  - (b) before the criminal sittings of the court to which he may be committed in respect of the offence, or any offences, at the sittings specified by the court to which he is committed at the date, time and place fixed for the trial, notice of which shall be given to him by his solicitors, by the Director of Public Prosecutions, or by a person authorised by the Director of Public Prosecutions;

- (c) the applicant not depart from either of these courts without leave of the court and so often as leave is granted, return at the time appointed by the court and again surrender himself into custody.
- 4. The applicant shall reside at his home residence at 1 Butler Bay Road, Palm Island or at such other place or places as agreed in writing by the Director of Public Prosecutions.
- 5. The applicant shall not, directly or indirectly, communicate about the charges with any prosecution witness to the charges arising out of the events on Palm Island on 26 November 2004.