IN THE COURT OF APPEAL 99.356

SUPREME COURT OF QUEENSLAND

Appeal No 7123 of 1999

Brisbane

[Williamson v DPP (Qld)]

BETWEEN:

JOHN REGINALD WILLIAMSON

Appellant

AND:

THE DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)

Respondent

McPherson JA
Thomas JA
Derrington J

Judgment delivered 27 August 1999.

Separate reasons for judgment of each member of the Court, each concurring as to the orders made.

APPEAL ALLOWED. BAIL GRANTED IN THE TERMS STATED IN PARAGRAPHS 5 TO 12 OF THE NOTICE OF APPEAL WITH THE FOLLOWING ADDITIONAL CLAUSE - "REASONS FOR GRANTING BAIL: THOSE STATED IN THE COURT'S REASONS FOR JUDGMENT IN APPEAL NO 7123 OF 1999 PUBLISHED ON 27 AUGUST 1999".

CATCHWORDS: **CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - BAIL - GROUNDS FOR GRANTING OR REFUSING - BEFORE TRIAL - GENERALLY - court's power to refuse bail discussed - ss 9, 16 *Bail Act* 1980 considered - whether risk of failure to appeal - whether risk of re-offending.**

***Bail Act* 1980 ss 9, 16.**

***House v The King* (1936) 55 CLR 499 applied**

Counsel:	Mr A Glynn SC for the appellant. Mr M Byrne QC for the respondent.
Solicitors:	Robertson O'Gorman for the appellant. Director of Public Prosecutions (Queensland) for the respondent.
Hearing Date:	18 August 1999.

IN THE COURT OF APPEAL

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Brisbane

Before McPherson JA
Thomas JA
Derrington J

[Williamson v DPP (Qld)]

BETWEEN:

JOHN REGINALD WILLIAMSON

Appellant

AND:

THE DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)

Respondent

REASONS FOR JUDGMENT - McPHERSON JA

Judgment delivered 27 August 1999

1 I agree with the reasons of Thomas JA for allowing the appeal in this case, and with the order that is proposed by his Honour with respect to bail.

IN THE COURT OF APPEAL

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BETWEEN:

JOHN REGINALD WILLIAMSON

Appellant

AND:

THE DIRECTOR OF PUBLIC PROSECUTIONS (QUEENSLAND)

Respondent

REASONS FOR JUDGMENT - THOMAS JA

Judgment delivered 27 August 1999

1 On 19 July 1999 the appellant was arrested on charges arising out of an incident which had occurred on the afternoon of 16 February 1999 involving the breaking and entering of premises at Camp Hill. The incident culminated in a physical attack upon the owner of the premises and the stealing of a considerable quantity of valuable property. The appellant was remanded in custody, and on 30 July 1999 applied to a Supreme Court judge in chambers seeking bail. His application was refused. This is his appeal against that refusal.

2 The relevant charges are armed robbery with violence in company, entering a dwelling with intent, disabling to commit a crime, stealing, deprivation of liberty, serious

assault (ie on a female over 60 years old) and unlawful use of a motor vehicle with a circumstance of aggravation.

Strength of the Crown case[1]

3 The appellant was not physically involved in entering the premises or the events that occurred therein. The allegations against him are that he counselled and procured two other men to break and enter the premises and obtain property so that one of those men could pay a debt of $1,500 owed to the appellant for drugs ("speed") supplied by the appellant. It is further alleged that the appellant aided the two offenders to commit the crimes in question by driving them to the scene in his (the appellant's) motor vehicle, and by meeting them later and retrieving them and the proceeds of the stealing.

4 The complainant is a 63 year old widow who arrived home late in the afternoon to find that two men had broken through security bars on her house and were inside her premises. When she confronted them they reacted violently and threatened her with death if she did not comply with their demands. One of the men was armed with a metal bar. A pillow case was pulled over her head and tightened to the extent that she had trouble breathing. She was subjected to threats and foul language. The men were in the house for over an hour and eventually left the complainant tied up, making away with the stolen property in her car. Property in excess of $100,000 was stolen as well as personal treasures including items such as antiques and items of sentimental value.

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[1] See *Bail Act* 1980 s16(2)(d).

5 One of the men who committed these offences, Mr Boswell, has been dealt with. He provided a statement implicating the appellant and was sentenced under the procedure provided by s13A of the *Penalties and Sentences Act* 1992, presumably obtaining some benefit for his cooperation in that respect. Apart from his evidence against the appellant,

the only evidence implicating the appellant is the observation of a neighbour who observed the appellant's four wheel drive vehicle "surveilling" the house in a manner similar to that which the accomplice describes.

6 The statement provided by Mr Boswell alleges that not long before the commission of the crime Mr Boswell's brother, in the presence of Mr Boswell and the appellant, mentioned that he had recently painted a house that had antiques in it. His brother would not initially tell Mr Boswell the address, but Mr Boswell eventually ascertained where it was. As stated above, Mr Boswell was indebted to the appellant for $1,500 for "speed" supplied by the appellant. Mr Boswell describes the appellant as "a major speed dealer in the area". The appellant told him that if he got him some of the antiques that would cancel out the debt. There were subsequent conversations about clearing the debt and Mr Boswell's statement continues "I thought he meant that if I was to go and break into this place and get him some antiques that he would take them as payment". Further encouragement from the appellant included an offer of transport to the place and the provision of a bar and gloves and eventually driving past the house a few times before he dropped Mr Boswell and the other man off about three houses down the road. The arrangement was that Mr Boswell would ring the appellant on a mobile telephone when they had finished, that they were to get to somewhere else and that the appellant would then pick them up.

7 Boswell and his assistant (one Shane Bate) believed that no-one was home. They knocked on the door a couple of times and yelled to confirm this. No-one answered and they gained access by using the metal bar as a lever to remove a bolt between a screen and a window. They assembled a number of items of property inside the house and decided to attempt to carry out a small safe as well as various chattels. They were trying to find a key

to exit the premises when the owner came into the house and ordered them out. Boswell then threatened her with the bar and the personal violence and indignities ensued. They took the complainant's car and drove it to Carindale and eventually the stolen items were transferred into the appellant's four wheel drive vehicle. The proceeds were then divided. Mr Boswell had spoken to the appellant only once after that occasion.

8 When Mr Boswell made contact with the appellant after committing the crimes, he recalls saying to the appellant "What the fuck are you doing John? This has turned from a burg to a stick-up".

9 There is no evidence that the appellant was party to any unlawful purpose that involved the use of physical violence and Mr Boswell's statement suggests his intention was to assist in the breaking and entering of unoccupied premises. There is however considerable evidence of his planning and assistance in the breaking, entering and stealing. Whether the physical violence was a probable consequence of any purpose to which the appellant was a party is of course a jury question.

10 Having regard to the fact that the Crown case depends upon the acceptance of evidence of an accomplice and that there would seem to be some corroboration, the case against the appellant so far as the breaking, entering and stealing charges are concerned might be described as moderately strong. The case concerning his criminal liability for the acts of the others after the owner returned must however be regarded as less strong. If convicted on the former charges the appellant might well expect a custodial term and without wishing to influence any future decisions which will be based upon actual and more detailed evidence, his jeopardy might well be in the area of at least several years imprisonment. It would be considerably higher if he is found guilty of involvement in the more serious further offences.

Was the appellant obliged to show cause?

11 Section 9 of the *Bail Act* prima facie confers upon any unconvicted person who is brought before a court the right to a grant of bail. The court's obligation to grant bail is however "subject to this Act"[2]. The principal source of the court's power of refusal is s16. The main grounds for refusal to grant bail are satisfaction by the court that there is an unacceptable risk that the defendant would fail to appear, or satisfaction by the court that while released on bail the defendant would commit an offence[3]. Other recognised grounds are satisfaction that release of the defendant would endanger the victim or some other person or interfere with witnesses[4]. Another ground is that custody is desirable for the defendant's own protection[5].

12 There is a further provision which reverses the defendant's prima facie entitlement under s9, and, when applicable, requires the defendant to show cause why his or her detention in custody is not justified[6]. Relevantly to the present situation it provides:

> "Where the defendant is charged-
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> ...
>
> (c) with an indictable offence in the course of committing which the defendant is alleged to have used or threatened to use a firearm, offensive weapon or explosive substance
>
> ...

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2 Section 9.

3 Section 16(1)(a)(i) and s16(1)(a)(ii)(A).

4 Section 16(1)(a)(ii)(B) and (C).

5 Section 16(1)(b).

6 Section 16(3).

> the court or police officer shall refuse to grant bail unless the defendant shows cause why the defendant's detention in custody is not justified ...".

13 The difficulty in the present case lies in determining whether "the defendant is alleged to have used ... [an] offensive weapon". The relevant charges that have actually been laid against the appellant have been drawn in reliance upon ss7, 8 and 411 of the Criminal Code. One in particular alleges that the appellant stole from the complainant various property and that he was at the time armed with an offensive weapon namely a metal bar. Both sections 7 and 8 of the Code, which deem the non-active participant to have actually committed the offence, permit such an allegation to be made. However the "allegation" of the prosecutor in court (both before the chamber judge and here) is that this defendant did not personally use an offensive weapon. The question then is whether on the proper construction of s16(3)(c) this appellant is alleged to have used an offensive weapon.

14 In my view it would be unrealistic to construe this subsection in isolation from the basic provisions of the Criminal Code concerning parties to offences. Were the subsection to be read as a reference to no more than the actual physical acts of a particular defendant, an armed robbery in which, consistently with the plan, one offender uses a gun and the other assists him and puts the money into a bag, the former would have to show cause for the granting of bail while the latter would not. The development of the criminal law has shown an increasing recognition of the importance of the mental state of the offender, and in my view the limited construction advanced on behalf of the appellant is unrealistic. At the preliminary stage at which courts must grapple with the question whether bail should or should not be granted, there is usually little more upon which the court can act than the respective allegations of the Crown and the defendant. In my view, the words are to be construed in the wider sense that is bestowed upon the alleged facts by reference to ss 7 and

8 of the Code.

15 It follows that the appellant needed to show cause why his detention in custody was not justified.

Risk of failure to appear?

16 The appellant is aged 37. He has a criminal history which could not to this stage be described as serious. It has however brought him before courts on 10 separate matters over the past 20 years. He has always answered his bail. Six of the convictions are for relatively minor drug offences apparently involving his use of cannabis, although it is noted that there was one offence of supplying and another of producing a drug. His only custodial term was one month in 1985 for breach of a probation order. His other offences include one of dishonesty when he was 17, speeding when he was 21 and an incident involving illegal use of a firearm when he was 23.

17 His wife, from whom he is separated, has offered a substantial surety of $30,000 and a place to live. He has close family ties in this state including his four children with whom he maintains close and frequent contact.

18 This is not a case in which there is an unacceptable risk that the appellant might abscond or fail to appear. However, bail was not refused on that basis, and the Crown does not seek to support it on that ground. Rather, the only ground said to justify the refusal is that if he were granted bail there is an unacceptable risk that he would re-offend.

Risk of re-offending?

19 The learned chamber judge did not in his brief reasons advert to the question of

onus. However the only basis upon which bail was refused was his Honour's view that there was an unacceptable risk that the appellant whilst released on bail would commit an offence. This conclusion was prefaced by the comment:

> "The evidence, if accepted on trial, does reveal an unscrupulous person who cold bloodedly planned an exercise by which others, for the applicant's gain in respect of drug related offences, would relieve an elderly woman of her treasured possessions".

The evidence of course does not suggest that the appellant knew that the owner of the property in question was an elderly woman, but at all events it was fair to observe that on the Crown case the appellant would rightly be regarded as guilty of despicable conduct. That however does not say a great deal about the likelihood of re-offending. Counsel for the Crown submitted that there is reason to fear that if released the appellant would commit further drug offences. The only allegation of recent drug activity comes from the accomplice Mr Boswell and it is noteworthy that notwithstanding his making of that allegation some months ago the appellant has not been charged with any drug offences.

20 The appellant has of course been convicted on drug offences on six occasions over the past 16 years (the last occasion being possession of a drug in July 1997, in respect of which he was fined $400). There is no evidence to suggest that he re-offended or failed in any respect to comply with his obligations during any of the previous periods when he was granted bail.

21 No grant of bail is risk-free. The grant of bail however is an important process in civilised 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. This does not depend on the so-

called presumption of innocence which has little relevance in an exercise which includes forming provisional assessments upon very limited material of the strength of the Crown case and of the defendant's character. Recognising that there is always some risk of misconduct when an accused person or for that matter any person, is free in society, one moves to consideration of the concept of unacceptable risk.

22 In the present case the appellant must be well aware of the great damage he would do to his already vulnerable situation if he committed offences while on bail. Furthermore his wife would be subject to the loss of a substantial surety ($30,000) if this were to happen. The conditions proposed for a grant of bail include his residing in a house owned by his proposed surety, who would be expected to withdraw the surety if she became aware or even suspicious of offending behaviour on his part. It is common ground that the earliest possible time by which a trial could occur would be seven months and that it might well be between ten or even eleven months before he is brought to trial. The length of incarceration before trial is an important factor when a defendant attempts, as this appellant must, to show that his detention in custody is not justified.

23 The decision below is one which involves the exercise of a discretion, and this court will only interfere when the discretion can be seen to have miscarried, upon the well known principles stated in *House v The King*[7]. In my view, on the whole of the evidence placed before the court, including the appellant's former successful responses to bail, the very tenuous nature of the suspicion that he might re-offend before he is tried and the disincentives against re-offending that are provided by the proposed grant including the requirement of a substantial surety, the finding that there is an unacceptable risk that the appellant while released on bail would commit an offence was not reasonably open.

24 I would allow the appeal, and order that bail be granted in the terms stated in paragraphs 5 to 12 of the notice of appeal.

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7 (1936) 55 CLR 499, 504-505. Cf *Gronow v Gronow* (1979) 144 CLR 513, 534 and *Ex parte Maher* [1986] 1 Qd R 303, 313.

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Respondent

REASONS FOR JUDGMENT - DERRINGTON J

Judgment delivered 27 August 1999

1 The judgment of Thomas JA sets out all the circumstances and issues which need not be repeated.

2 Any interpretation of s. 9 of the *Bail Act* should reflect that it lies within legislation which is intended to have application on the merits according to certain conceptual criteria of a practical nature, rather than by strict literary construction.

3 With respect, I agree with the conclusion reached by Thomas JA and with his reasons on this issue and would add one further observation. The reference in s. 16(3)(c) to "an indictable offence in the course of committing which the defendant is alleged to have

used ... a firearm, offensive weapon or explosive substance" should be read broadly in order to meet the plain purpose of the provision in restricting bail in cases where a danger of serious violence might be a feature of the applicant's conduct if he is granted bail. That is to be measured by certain features of the offence in respect of which bail is sought, and, the use of a firearm or other offensive weapon to which the applicant for bail has been a party in the commission of the offence is relevant to this issue, even if the applicant was not the person handling it.

4 In this context, it would be wrong strictly to limit the connotation of the word "used" to a level that is impractical to the purpose of the provision. If in the commission of the offence it is alleged to have been used by the defendant through the agency of an accomplice, that would still come within the concept of using it in the commission of the offence in the broad sense which is appropriate to the legislative purpose.

5 The only other issue where further discussion is necessary relates to the question whether there was an unacceptable risk of the appellant's re-offending, and it follows from what has been said that the onus in this respect lies upon him.

6 The learned primary judge was very concerned as to the appellant's character by reason of the features which he described as revealed in that part of the Crown case which was strong. He said:

> "The evidence, if accepted on trial, does reveal an unscrupulous person who cold-bloodedly planned an exercise by which others, for the appellant's gain in respect of drug related offences would relieve an elderly woman of her treasured possessions.".

With the exception of the word "elderly", which was correct but not necessarily known to the appellant, this description was fair, and that exception is fairly irrelevant.

7 Although he was not elaborate in this explanation, the learned primary judge was

obviously moved by the combination of the appellant's involvement in drug dealing together with his planning and organisation of house-breaking and his inveigling of others, who owed him a drug debt, to perform the criminal acts while he ran less risk from a more remote position. It would lead to a higher risk of re-offending than if his proclivity were to commit the offence himself with greater danger of being caught. If again he were to use other persons to commit the act, it also suggests a more calculating mind that might be less deterred by any inhibition attached to his being on bail and his associated cold-bloodedness would reduce other inhibitions of a more natural character associated with remorse or fear. The concern of the learned primary judge in respect of these matters is understandable.

8 As against the totality of these factors, there are the countervailing factors mentioned in the judgment of Thomas JA. With respect, while I agree as to their existence, I am unfortunately not persuaded that their strength is as powerful as he would suggest for, if the appellant were as adroit in manipulation, as calculating, and as cold-blooded as the case against him suggests, the inhibitions referred to would have less force.

9 His obligation to show cause why he should have bail must require a varying level of onus depending upon the seriousness of the circumstances. In the present case, although his co-accused was armed, and indeed the weapon was supplied by the appellant, it was supplied primarily for the purpose of gaining entry to the building rather than for use as a weapon, though its possible use in that way might be foreseeable. Such a secondary status of that feature necessarily reduces its seriousness. In practical terms, it means that in showing cause, he does not have a very substantial obstacle to his persuasion of the Court of the unlikelihood of his re-offending with a weapon.

10 Of the factors referred to by Thomas JA, the combined effect of the uncertainty of conviction, such as it is, and the substantial delay before trial, and particularly the latter, is reasonably weighty. There is also no suggestion of his commission of offences while on bail on any prior occasion or of any other adverse indications than those adverted to by the learned primary judge. The risk is discerned only in respect of the appellant's general character by inference rather than by any direct or concrete feature.

11 There is certainly some risk, which conforms with the view of the learned primary judge, but having regard to its nature and all the other associated circumstances, it cannot be described as unacceptable. With some considerable disquiet as to upsetting the discretion of the primary judge, nevertheless I have concluded that the appeal should be upheld and I agree with the order proposed by Thomas JA.