[2014] WASC 262

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CRIMINAL
CITATION	**:**	SOLIMAN -v- THE STATE OF WESTERN AUSTRALIA [2014] WASC 262
CORAM	**:**	CORBOY J
HEARD	**:**	17 & 23 APRIL 2014
DELIVERED	**:**	23 APRIL 2014
PUBLISHED	**:**	22 JULY 2014
FILE NO/S	**:**	MBA 15 of 2014
BETWEEN	**:**	MAHAMMED SOLIMAN Applicant AND THE STATE OF WESTERN AUSTRALIA Respondent

Catchwords:

Criminal law - Application for bail - Whether there were extraordinary reasons for the grant of bail as a result of the State discontinuing the prosecution of various charges after the charges the subject of the application for bail had been laid

Legislation:

Bail Act 1982 (WA), pt C of sch 1

Result:

Bail granted

Category: B

Representation:

Counsel:

Applicant	:	Mr S Nigam
Respondent	:	Mr J Newton-Palmer

Solicitors:

Applicant	:	S C Nigam & Co
Respondent	:	Director of Public Prosecutions (WA)

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

Attenborough v The State of Western Australia [2005] WASCA 132
Firkins v Director of Public Prosecutions [2002] WASC 203
Milenkovski v The State of Western Australia [2011] WASCA 99; (2011) 42 WAR 99
R v Weston [2000] WASCA 389
Roberts v The State of Western Australia [2011] WASC 118
Samuel v The State of Western Australia [2004] WASCA 154
Stagno v The State of Western Australia [2013] WASC 338
The State of Western Australia v Marchese [2006] WASCA 153
Tieleman v The Queen (2004) 49 A Crim R 303; [2004] WASCA 285
Tregurtha v The Queen [2002] WASC 311
Williams v The Queen [2001] WASC 308
Wright v The Queen [2000] WASCA 236

1 **CORBOY J**:

(These reasons were delivered orally and have been edited from the transcript.)

2 The applicant was arrested in July 2013 and charged with having committed two offences: first, demanding property by making oral threats, contrary to s 397(2) of the *Criminal Code* (WA); second, aggravated robbery, contrary to s 392(d) of the *Criminal Code*. The applicant was granted bail in respect of those charges.

3 The applicant was charged with having committed further offences in December 2013. The first offence with which the applicant was charged in December 2013 was that he had in his possession a prohibited drug, methamphetamine, with intent to sell or supply to another, contrary to s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA). The second offence with which the applicant was charged was that he, not being a holder of a licence or permit entitling him to possess a firearm, carried a firearm, namely a double-barrelled shotgun, and a prohibited drug when not authorised to be in possession of that drug, contrary to s 19(1ab)(a) of the *Firearms Act 1973* (WA). The third and fourth offences with which the applicant was charged were that, not being a person exempted by s 8 or s 19(1aa) of the *Firearms Act*, he possessed 12-gauge shotgun pellets while not being the holder of a firearms licence or a permit entitling him to do so, contrary to s 19(1)(c) of the *Firearms Act*.

4 Those offences were alleged to have been committed while the applicant had been remanded on bail in respect of the first set of charges (the charges laid in July 2013). He applied for bail following his arrest on the second set of charges (the charges made in December 2013). That application was refused.

5 In January 2014, the Director of Public Prosecutions discontinued the prosecution of the first set of charges. The applicant remains in custody in respect of the second set of charges and is due to next appear for a committal mention hearing in the Magistrates Court on 15 May 2014. It is accepted by the respondent that the trial of the charges is unlikely to be held until the latter part of this year. The applicant has renewed his application for bail in those circumstances.

6 The statement of material facts in respect of the second set of charges alleges that the applicant was one of three passengers in a vehicle that was stopped and searched by the police on the afternoon of 4 December 2013. The applicant handed the police a package comprising several clipseal

bags containing methamphetamine. The total weight of the drugs was 12.19 g. Subsequent analysis suggested that the purity of the drugs was approximately 70%.

7 The police located a black bag in the front passenger side floor well. The bag contained a dismantled shotgun and two 12-gauge shotgun pellets. The applicant was occupying the front passenger seat of the motor vehicle at the time that it was stopped by the police.

8 The police attended at premises then occupied by the applicant later that evening. They located two 12-gauge shotgun pellets which the applicant admitted had belonged to him. He stated that he had obtained the two pellets from a farm some time earlier.

9 The applicant admits, for the purpose of this application, that he possessed the quantity of the methamphetamine the subject of the charges laid in December 2013. The quantity of methamphetamine found in his possession is such that he is deemed under the *Misuse of Drugs Act* to have possessed the drug with intent to sell or supply it to another.

10 The applicant maintains that he possessed the methamphetamine for personal use and so intends to plead not guilty at the forthcoming trial. The onus will, of course, be on him to prove that he did not intend to sell or supply the quantity of methamphetamine found in his possession.

11 Similarly, the applicant intends to plead not guilty to the remaining charges. He maintains that he was not aware that there was a firearm stored in the vehicle in which he was travelling as a passenger at the time that it was stopped and searched by the police.

12 Clause 3A of pt C of sch 1 to the *Bail Act 1982* (WA) provides that where an accused is in custody awaiting an appearance in court before conviction for a serious offence – in this case the offence alleged under s 6(1) of the *Misuse of Drugs Act* - and the serious offence is alleged to have been committed while the accused is on bail for another serious offence – in this case the aggravated robbery charge laid in July 2013 – the judicial officer in whom jurisdiction is vested shall refuse to grant bail for the serious offence on which the accused is held in custody unless he or she is satisfied that there are exceptional reasons why the accused should not be kept in custody. The judicial officer must also be satisfied that bail may be properly granted having regard to the provisions of cls 1 and 3 of pt C of sch 1.

13 In ***Milenkovski v The State of Western Australia*** [2011] WASCA 99; (2011) 42 WAR 99, the Court of Appeal recognised that cl 3A provided for a rebuttable statutory presumption against the grant of bail. McLure P observed that:

> Only cls 3A, 3C and 4A of pt C sch 1 of the *Bail Act* provide for a (rebuttable) statutory presumption against the grant of bail. That is indicated by the statutory expression that the judicial officer 'shall refuse to grant bail for the offence' unless satisfied of the specified matters.
>
> The statutory presumptions against the grant of bail in cls 3A, 3C and 4A require that the judicial officer be satisfied of two matters. The jurisdiction to grant bail does not arise unless and until the judicial officer is satisfied that bail may properly be granted having regard to the provisions of cl 1 and cl 3. In addition the judicial officer must be satisfied that there are exceptional reasons why the accused should not be kept in custody. If the judicial officer is not satisfied that bail may properly be granted under the general provisions in cl 1 and cl 3, it is not necessary to consider whether there are relevant exceptional reasons. This structure reflects the possibility that the exceptional reasons may not be relevant to or inform the answers to the mandatory questions in cl 1(a) to (g). There is no scope for the application of an exceptional reasons or circumstances test beyond those statutorily specified in cls 3A, 3C and 4A [36], [37].

14 The Court of Appeal also made a number of observations concerning cl 1 pt C in ***Milenkovski***. It is not necessary to refer to those observations in detail given a concession made by the respondent that it would be appropriate for the applicant to be granted bail if the court was satisfied that the requirement for extraordinary reasons specified by cl 3A of pt C had been met.

15 Nevertheless, there are two points about the application of cl 1 that should be noted. First, I am satisfied that the respondent's concession was appropriate, having regard to the matters stated in the applicant's supporting affidavit and the conditions on which he has proposed that bail be granted. Second, I have set out my understanding of the principles identified by the Court of Appeal in ***Milenkovski*** in ***Stagno v The State of Western Australia*** [2013] WASC 338 [21] - [24]. I have applied that understanding in determining that the applicant should be granted bail if the requirements of cl 3A are otherwise satisfied.

16 In ***Roberts v The State of Western Australia*** [2011] WASC 118, Murray J observed:

> The term 'exceptional reasons' is not defined, nor has the court sought to establish a closed list of circumstances which might constitute exceptional reasons. Clearly, it could not do so. There can be no closed list, but

> whatever the factual circumstances or circumstances relied upon may be, that circumstance alone or those circumstances in combination must be able to be described as exceptional in the ordinary meaning of the word [9].

17 In ***Tieleman v The Queen*** (2004) 49 A Crim R 303; [2004] WASCA 285 Murray J said (Steytler & Templeman JJ agreeing):

> 'Exceptional' is an ordinary adjective denoting that the thing to which it is applied is unusual or out of the ordinary, in some way special or an exception to the general run of cases [15].

18 It was submitted that a combination of matters provided exceptional reasons for why the applicant should be granted bail: the fact that the prosecution of the first set of charges was discontinued and the likelihood that the applicant would have been granted bail if he had been arrested only on the second set of charges; the anticipated delay in the trial of the charges; the possibility that the time spent by the applicant in custody on remand would exceed any likely sentence to be imposed if he was found guilty of the charges that have been alleged against him; the strength of the prosecution case which the applicant's counsel characterised as not being strong; the availability of a surety; and the fact that the respondent did not oppose bail being granted if exceptional reasons were demonstrated.

19 It is to be noted that some of those matters are most directly relevant to the considerations specified in cl 1 of pt C. Although matters concerning those considerations may also be relevant to cl 3A, they are unlikely, by themselves, or in combination, to provide extraordinary reasons for granting bail. The two matters that might provide extraordinary reasons that were relied on by the applicant were the fact that the first set of charges had been discontinued and the possibility that the applicant could spend longer in custody on remand if bail was not granted than any term of imprisonment that might be imposed if he was found guilty of the charges that have been alleged against him.

20 In ***Tregurtha v The Queen*** [2002] WASC 311, the applicant for bail had been charged in February 2001 with a serious offence. He had been granted bail. He was subsequently charged in October 2001 with another serious offence; an offence that was alleged to have been committed while he was on bail in respect of the February 2001 charge. The applicant was acquitted of the February 2001 charge in November 2002. He subsequently applied for bail in respect of the October 2001 charge.

21 Barker J noted that cl 3A of the *Bail Act* continued to apply, notwithstanding that the earlier serious offence had been tried and the applicant had been acquitted [12]. His Honour cited ***Wright v The Queen*** [2000] WASC 236 and ***Firkins v Director of Public Prosecutions*** [2002] WASC 203 as authority for that proposition.

22 His Honour further noted that it was held in ***Williams v The Queen*** [2001] WASC 308 and in ***Firkins*** that the disposition of a first charge could not, of itself, constitute an exceptional reason for granting bail in relation to a subsequent charge where it was alleged that the offence constituted by the subsequent charge had been committed while the applicant was on bail. However, it was held in ***Wright*** that there were exceptional reasons for granting bail where an earlier charge had been the subject of a *nolle prosequi*. Barker J noted that, in ***Wright***, Scott J had concluded that the fact that an earlier charge was no longer pending because of a *nolle prosequi* could be, at least in combination with other reasons, a relevant exceptional reason for the purpose of cl 3A of the *Bail Act*. Barker J observed that he was content to adopt that approach.

23 The third matter noted by Barker J in ***Tregurtha*** was that, on one view of cl 3A, Parliament had determined that exceptional reasons could never include the fact that an applicant for bail in respect of a second charge had been acquitted of the first charge. However, his Honour also noted an alternative view - that the policy behind cl 3A might be said to be that it is more probable that a person alleged to have committed a second serious offence is a higher bail risk than other offenders and can be trusted less easily to honour an undertaking to appear in court.

24 His Honour observed that if that was the policy underlying the clause:

> [T]hen if it is shown that an accused has been acquitted of an earlier serious offence the policy basis for excluding consideration of the acquittal as a possible exceptional reason for granting bail is difficult to justify [19].

25 His Honour expressed his preference for that approach to the interpretation and application of cl 3A and added:

> That is not to say that proof of acquittal of the earlier serious offence should automatically result in the court being satisfied that there are exceptional reasons. Rather, it is a factor that might be taken into account. In some circumstances it may be telling, in others it may be sufficient when taken into account with other reasons that might be considered exceptional. In some cases it may have no influence on the determination to be made; as in ***Firkins v The Director of Public Prosecutions*** [20].

26 His Honour went on to find that there were exceptional reasons in the circumstances under consideration, those reasons being a combination of the fact that the applicant had been subsequently acquitted of the charges alleged in February 2001 and the fact that there would be approximately a 17-month delay between when the applicant was placed in custody in respect of the second set of charges and when the trial of those charges was anticipated to occur.

27 I note in this case that there has been no explanation of the circumstances in which the Director discontinued the first set of charges against the applicant. However, it appears that discontinuance is to be treated as analogous to the filing of a *nolle prosequi* as had occurred in ***Wright*** and which Barker J considered reflected the correct approach to the interpretation and application of cl 3A.

28 As to the second of the matters primarily relied upon by the applicant as demonstrating extraordinary reasons - the anticipated delay between when the applicant was placed in custody on remand in respect of the second set of charges and the likely trial date of those charges - counsel for the applicant emphasised, in particular, the decision of the Court of Appeal in ***The State of Western Australia v Marchese*** [2006] WASCA 153.

29 In that case, the respondent had pleaded guilty to two counts of possession of a prohibited drug, methamphetamine and MDMA, with intent to sell or supply to another; one count of receiving stolen property; two counts of possession of a prohibited weapon; one count of possession of a pipe for use in smoking a prohibited drug, namely methamphetamine; one count of possession of a utensil for smoking cannabis and one count of possession of a prohibited drug, methamphetamine. The respondent was sentenced to a term of 2 years' imprisonment for the offence of possession of methamphetamine with intent to sell or supply and to a term of 16 months' imprisonment for the offence of possession of MDMA with intent to sell or supply. The two sentences were ordered to be served concurrently and the terms of imprisonment were suspended for 2 years. An appeal by the State against those sentences was dismissed.

30 It was submitted on behalf of the applicant in this matter that the decision in the Court of Appeal in ***Marchese*** suggested that any term of imprisonment that might be imposed should the applicant be found guilty could be suspended; alternatively, that there was a significant possibility that any term of immediate imprisonment imposed would be less than the

time that the applicant was likely to spend in custody on remand awaiting trial.

31 Steytler P in ***Marchese*** reviewed the sentences that had been imposed in a number of cases involving trafficking in methamphetamine and MDMA. Wheeler JA agreed with his Honour's reasons. Buss JA endorsed the principles that had been identified by Steytler P, although his Honour concluded that the sentence that had been imposed in that case was manifestly inadequate on the application of those principles and that the Court of Appeal ought to exercise its discretion to allow the State's appeal. Steytler P, in the course of his reasons, observed:

> Because trafficking in drugs such as methylamphetamine and MDMA is so seriously regarded by the courts, and by the legislature (as appears from the very significant penalties which had been provided for in the applicable legislation) it is very rare that anything other than a term of immediate imprisonment will be imposed. ***The State of Western Australia v Andela*** [2006] WASCA 77 [17] per McLure JA, and the cases there cited. However, there are exceptional cases [10].

32 His Honour then referred to ***Attenborough v The State of Western Australia*** [2005] WASCA 132; ***Samuel v The State of Western Australia*** [2004] WASCA 154 and ***R v Weston*** [2000] WASCA 389 as examples of exceptional cases. His Honour identified, on the other hand, a number of cases that exemplified the proposition that, in the vast majority of cases involving a significant quantity of serious drugs and especially in cases of commercial dealing, immediate sentences of imprisonment have been imposed.

33 Following a review of those cases his Honour concluded that the sentences of suspended imprisonment imposed by the sentencing judge were inadequate [24]. That was notwithstanding the fast track plea of guilty and the personal circumstances of the respondent, including that he was aged 24 years and had strong prospects of rehabilitation.

34 The State's appeal failed in ***Marchese***, not because the sentence was found to be within the range of sentences available to the sentencing judge in a proper exercise of his discretion, but because of the circumstances surrounding the State's appeal. The appeal was heard approximately 8 months after the sentence had been imposed and in circumstances where the respondent had made substantial progress in his rehabilitation pursuant to the conditions on which his term of imprisonment had been suspended. Steytler P concluded:

> In those circumstances, and not without some hesitation, I consider that the appropriate exercise of discretion would be to decline to interfere with the sentence imposed, even though I consider it to have been inadequate. I should add that, if the appeal had been heard promptly after the imposition of the sentence, I would have been inclined to allow it and impose a sentence of imprisonment [42].

35 Accordingly, in my view the reasoning of the Court of Appeal in ***Marchese*** does not support the proposition contended for by counsel for the applicant. Indeed, a review of the cases referred to in ***Marchese*** indicates that it was most likely that the applicant would be sentenced to an immediate term of imprisonment if found guilty of the charges alleged against him and that the term of imprisonment imposed would be likely to exceed the period that the applicant might spend in custody on remand awaiting trial.

36 Accordingly, I do not consider that the anticipated delay between when the applicant was first remanded in custody in December 2013 and the likely trial date of the charges alleged against him is such as to provide, in itself, extraordinary reasons for granting bail.

37 However, the offence charged under the *Misuse of Drugs Act* relies on a statutory presumption. If rebutted, the respondent would be liable to be convicted of possession, a less serious offence than that with which he has been charged. The quantity of methamphetamine is such that he might receive a suspended term of imprisonment on conviction for possession or a term of immediate imprisonment that approximated, or was less than, the period that he could spend in custody on remand awaiting trial.

38 It is not easy to determine the strength of the State's case on the material presently available. However, there were two other persons in the motor vehicle when it was stopped. The applicant was in a passenger seat and it is not alleged that he owned or was in possession of the motor vehicle. The quantity and purity of the methamphetamine in the applicant's possession might support an inference that he was dealing in the drug but it is not such a quantity as to make that inference compelling. In the circumstances, it cannot be said that the State's case is so strong that the prospects of the applicant proving possession simpliciter are remote.

39 In all of the circumstances, I consider that there are extraordinary reasons for the grant of bail in this case. Those reasons are, first, that the prosecution of the first set of charges alleged against the applicant in July 2013 was discontinued in January 2014; and second, that the nature of the

seriousness of the offence for the purpose of the *Bail Act* is such that it is possible that the applicant could be convicted of a lesser offence. The sentence to be imposed if convicted of that lesser offence might be either suspended or be for a term of imprisonment approximating or less than the term of the period that the applicant would be likely to spending custody on remand awaiting trial on the assumption that his trial occurred sometime late this year.

40 Accordingly, I am satisfied, first, that it is appropriate that bail be granted, having regard to the criteria specified in cls 1 and 3 of the *Bail Act* and, second, that there are exceptional circumstances for the purposes of cl 3A of the *Bail Act*. I am satisfied in regard to the matters specified in cl 1 of the *Bail Act*, having regard to the conditions that have been proposed by the applicant on which bail is to be granted.