Ebatarinja v The Queen [2000] NTSC 26

PARTIES:	CLIFFORD EBATARINJA and THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NOS	9929564 OF 2000
DELIVERED:	4 May 2000
HEARING DATES:	28 April 2000
JUDGMENT OF:	MILDREN J

REPRESENTATION:

Counsel:

Defendant:	K Kilvington
Respondent:	C Roberts

Solicitors:

Defendant:	Central Australian Aboriginal Legal Aid Service
Respondent:	Director of Public Prosecutions

Judgment category classification:	C
Judgment ID Number:	Mil00222
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Ebatarinja v The Queen [2000] NTSC 26

No 9929564 of 2000

BETWEEN:

CLIFFORD EBATARINJA
Defendant

AND:

THE QUEEN
Respondent

CORAM: MILDREN J

REASONS FOR DECISION

(Delivered 4 May 2000)

[1] This is an application for bail by the defendant who is charged with one count of aggravated dangerous act causing death whilst under the influence of alcohol.

[2] The defendant is about thirty-nine years of age. He is Aboriginal having been raised in Hermansburg. He speaks Arrernte as a first language.

[3] The victim in this matter was the defendant's defacto wife who was also Aboriginal.

[4] The defendant was originally charged with murder, grievous harm and aggravated assault. Following negotiations with the Office of the Director of Public Prosecutions on 6 April 2000, the Crown agreed to proceed only on the charge of dangerous act and the other charges were withdrawn. On that day the defendant was committed for trial.

[5] On 7 April 2000 the defendant applied for bail before Ms Deland SM but bail was refused. The matter is now to proceed as a plea but the facts have not yet been agreed fully between the Crown and counsel for the accused.

[6] The application for bail is opposed. The defendant has on four other previous occasions failed to answer bail and warrants for his arrest have been issued. The most recent occasion occurred when the defendant was bailed to appear on 4 January 2000 in the Alice Springs Court of Summary Jurisdiction in relation to this matter. The principal contention for the DPP is that the Crown is concerned that if granted bail he will not appear when required to do so.

[7] The defendant has made it plain that he wishes to obtain bail in order to have traditional punishment administered to him. He is particularly concerned that if he is not free to undertake traditional punishment in the usual form, which he believes will involve

spearing in the legs or thighs, that either the relatives of the deceased will punish one of the defendant's own relatives in accordance with Aboriginal tradition, or the Aboriginal elders will use Aboriginal magic to kill him. He believes that once the elders have sung him they will send a snake to find him wherever he may be and once the snake finds him he will get very sick until he dies.

[8] However, there is in fact no evidence that the deceased's family intend to carry out any form of traditional punishment. The current state of affairs appears to be that the deceased's family have made no decision on the matter one way or the other. Nevertheless I accept the possibility that if the defendant is granted bail this may have the effect of galvanising the deceased's family into making a decision on the matter one way or the other. I also accept that should the deceased's family decide to carry out traditional punishment in the form of corporal punishment upon the defendant he is willing to undergo it and wishes to do so.

[9] Mr Kilvington for the defendant submitted that the only relevant criteria in relation to this application are those set out in s24 of the *Bail Act*. He submitted that it was proposed that if the defendant were to be granted bail that the defendant would be sent to Gilbert Springs Outstation where he will be able to stay with relatives. That outstation is approximately thirty to forty kilometres from Hermansburg. It is only a very small community.

[10] I am satisfied that the appropriate persons have been consulted about whether the defendant would be welcome to stay at Gilbert Springs Outstation and they have agreed to accept him. Arrangements have been put into place for the Tangentyere Wardens Office to collect the prisoner from the Courthouse in Alice Springs and take him to Gilbert Springs and to return him to the Courthouse at the time when he is required to answer his bail.

[11] I think in those circumstances it is probable that the defendant will answer his bail, notwithstanding his previous failures to do so, and notwithstanding that there has been no satisfactory explanation given for his previous failures.

[12] The question of traditional punishment may be relevant to bail in three respects. First it may be suggested that under s24(1)(b)(iii) it is a factor relevant to the question of the need of the defendant to be free for any lawful purpose. Secondly, it may be suggested that it is relevant to another matter dealt with under s24(1)(b)(iv), ie. whether the defendant is in danger of physical injury or in need of physical protection and, thirdly, it may be suggested it is relevant to s24(1)(c), ie. the likelihood that the defendant will commit an offence whilst on bail.

[13] I was referred to the decision of Bailey J in the case of *Barnes* (1997) 96 A Crim R 593 which dealt with an application for bail by a defendant who was charged with murder in circumstances where the defendant wished to undergo traditional punishment. In that case there was evidence of the nature of the traditional punishment which would be carried out. Further in that case, because the applicant was charged with murder, the burden of proof as to the entitlement to bail rested upon the defendant. In that case, his Honour was in no doubt that the interests of the applicant would not be served by facilitating his release to be unlawfully stabbed and bashed before submitting to such sentences as may be imposed according to law. In the present case, there is no evidence that it is likely that the defendant if he were to be released would be unlawfully assaulted. There is evidence that if released and if the family chose to impose traditional punishment of some form, the defendant is willing to submit to it but it is not clear what the form of the punishment will be and for that matter, whether or not it will be unlawful.

[14] There is also evidence that the defendant is suffering significant anxiety whilst in custody because of his fear of the possibility that Aboriginal magic may be used to impose punishment upon him. Whatever else may be said about these beliefs, there is no doubt

that they are honestly and genuinely held and there is a chance that it may affect his health if he is not released.

[15] I therefore consider that on balance it is in the interests of the defendant to be released rather than to be kept in custody if that is reasonably possible.

[16] There is no evidence that the defendant if released is likely to commit an offence whilst on bail. It was suggested by Mr Roberts that if the traditional punishment carried out upon him amounted to an unlawful assault in that it caused him grievous harm, the defendant might be liable to be charged as an accessory. The difficulty with this argument is that there is in the first place no evidence that any assault of any nature will be carried out let alone whether there is any intent to cause grievous harm or even if grievous harm is likely to occur.

[17] I accept that courts ought not to grant bail in order to facilitate an unlawful act; however, in my view there is no evidence that any unlawful act is likely to occur.

[18] Bail will therefore be granted on conditions.
