PARTIES:	MATI TAMWOY
	AND
	THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION AT ALICE SPRINGS
FILE NO:	9708531
DELIVERED:	19 June 1998
HEARING DATES:	18 June 1998
JUDGMENT OF:	KEARNEY A/CJ

REPRESENTATION:

Counsel:

Applicant:	J. Birch
Respondent:	R. Goldflam

Solicitors:

Applicant:	Office of the Director of Public Prosecutions
Respondent:	CAALAS

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IN THE SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

No. 9508531

BETWEEN

MATI TAMWOY
Applicant

AND:

THE QUEEN
Respondent

CORAM: KEARNEY A/CJ

REASONS FOR DECISION

(Delivered 19 June 1998)

I rule today on the application by Mati Tamwoy of 12 June 1998 that he be granted bail. The application was argued yesterday.

Mr Tamwoy is presently in custody on charges under s192(3) of the *Criminal Code*. An offence under that provision is one of the offences specified in s8(1)(a)(iii) of the *Bail Act*; therefore s8(3), providing for an entitlement to bail, does not apply in this case. I accept the submissions of Mr Goldflam of counsel for the applicant that in that situation the onus still lies on the Crown to establish that bail should not be granted; see *Kissner* (unreported, Supreme Court of NSW, (Hunt CJ at CL), 17 January 1992), followed in the Territory in *Martin*, 23 October 1997 and *Watt*, 11 November 1997. The Crown did not contest this proposition; it accepted that it bore the onus.

Mr Birch of counsel for the Crown pointed out that the applicant faces 3 separate charges under s192(3). The first related to one Roberta Ebatarintja on 17 December 1997 at Hermannsburg. The second and third charges under s192(3) related to a woman said to be his wife by Aboriginal custom, Janie Brown, on 6 June 1998 at Alice Springs.

The applicant is on bail on the charge of 17 December 1997, though that bail is subject to a condition of residence which admittedly can no longer be fulfilled. It is common ground that he now seeks bail on that charge, or a variation of his existing bail as regards a residence condition, even though his conditional bail on that charge has not as yet been formally revoked.

The applicant also faces a charge of aggravated assault on 17 December 1997 upon one Rosalie Namatjira, his then wife under customary law. The prosecution allegations in relation to both charges of 17 December 1997 are set out in Exhibit P1. The applicant proposes to plead guilty to assaulting Rosalie Namatjira, but, Mr Goldflam informs me, denies that he used a weapon to assault her.

Bail history on the alleged offence of 17 December 1997

The applicant was arrested on 19 December 1997 for the alleged offences of 17 December, and was conditionally bailed by the police to appear in court on 30 December. One condition of his bail was that he not approach Rosalie Namatjira; see Exhibit P2. Exhibit P3 is an affidavit by Rosalie Namatjira in which she alleges that on 23 December, 3 days after the applicant was bailed, he breached that condition, and threatened her. Mr Birch relies on that allegation.

Mr Birch submitted that on 30 December the applicant had appeared in court, represented by Ms Liddle of CAALAS. The hearing on that day was adjourned to 31 December, on the question of bail; on 31 December the applicant did not appear, and a warrant issued for his arrest.

The applicant was arrested on 12 January 1998. Mr Birch said that his instructions were that on arrest the applicant explained to the

police that he had not appeared on 31 December, because he considered "it was a waste of time." Mr Birch relies on that.

I note that in par14 of the applicant's affidavit of 12 June 1998 he explained his failure to answer his bail on 31 December 1997 on the basis that he had "appeared unrepresented" on 30 December, and "was confused by the proceedings and offended by an untrue allegation" made in court by a police officer. Mr Birch submitted that in fact the applicant had not been legally unrepresented on 30 December. Mr Goldflam did not press the contention that the applicant was not legally represented on 30 December, but submitted that the applicant *believed* that to have been the case, even if he were mistaken in holding that belief. Mr Goldflam said that a lawyer from CAALAS had appeared for the applicant on 30 December, but the applicant had also spoken directly to the court on that occasion. I note that the Court file records the applicant as having appeared for himself on 30 December, and so I accept his account of an honest mistake in relation to the aspect of legal representation on that occasion, even though Mr Goldflam made it clear (see p13) that the applicant is well educated and familiar with legal processes.

On 14 January 1998 the court gave the applicant conditional bail, to appear on 21 January. This bail was successively enlarged to 26 January and 19 February. The applicant answered to his bail until 19 February, when he failed to appear and a warrant issued for his

arrest. As to his failure to appear on 19 February, the applicant in par15 of his affidavit deposed that he had been misinformed by a lawyer from CAALAS to the effect that he was not required to attend court on 19 February. He said that he believed he was required to attend court on 26 February, and in fact attended court on that day, and also "attended at the Alice Springs Police Station that day to find out when I was supposed to attend court." However, he said, his "enquiries were unsuccessful". Mr Birch submitted that if the applicant had attended at the police station on 26 February – he says there is no Police record of his having done so – he would have been arrested there pursuant to the warrant of 19 February. I consider that the probabilities are that that is correct.

The applicant was in fact arrested on 13 March, brought before a court, and bailed conditionally. He has since observed the conditions of that bail.

On 20 May he successfully applied to have a condition of his bail varied. Thereafter he was to reside at a pastor's residence, and not to approach the alleged victim or any prosecution witnesses. He has since complied with the condition that he report to the police. The pastor has since revoked his permission to reside on his premises, though he personally supports the applicant; consequently the applicant must seek fresh bail; see p2. The question is whether residence at the proposed outstation of Angatja should be substituted.

Bail history in relation to the alleged offences of 6 June1998

The essence of the two charges of 6 June 1998 under s192(3) is that on that night at the Todd River, where the applicant was with Janie Brown his present wife under customary law, he encouraged a young man to have sexual intercourse with Janie Brown without her consent, on 2 occasions, stating it was a punishment for her because she had slept with other men. See the precis of alleged facts in Exhibit P4.

The applicant was arrested on 8 June on these charges, and bail was refused; he has remained in custody until today.

Criminal history; s24(1)(a)(i) of the *Bail Act*

The applicant's criminal history shows that he has appeared on 6 occasions before the Court of Summary Jurisdiction in Alice Springs between July 1993 and 26 May 1998. This has resulted in 10 convictions, mainly for driving offences (including 3 for exceeding 0.08%, and 1 for driving while disqualified), and 3 assaults. As to the assaults, he received a suspended sentence of 3 months imprisonment on 5 July 1993 for an aggravated assault; was convicted without sentence being passed on 19 October 1993, for common assault; and for assault occasioning a woman bodily harm, was sentenced on 3 February 1995 to 18 months imprisonment with a direction that he be released after serving 8 months, on a 2 year good behaviour bond.

As to the most recent of these appearances, 26 May 1998, on charges of driving while exceeding 0.08% and while disqualified, Mr Birch submitted that this had resulted from the applicant's failure to appear on those charges at Hermannsburg on 23 March 1998, and the consequent issue and execution of a warrant for his arrest in relation thereto.

Other matters relevant to bail, relied on by the Crown

In par8 of the applicant's affidavit of 12 June 1998 in support of his application for bail, he deposed that he understood that the first available date for a committal hearing on the charges relating to 6 June, was "the latter part of 1998". He appears to be correct in that understanding. Mr Birch said that it would be "not before October". Mr Birch said that if the applicant were committed for trial in October, there was "some likelihood" that his trial could take place in November 1998 or in February 1999. The applicant had considered in par9 of his affidavit that it was "unlikely that this trial could take place before the latter part of 1999." I consider that presently there is a likelihood of trial in November 1998, and that is a significant factor at this time on the question of bail. That aspect is open to review.

Mr Birch emphasized the applicant's several failures to answer to his bail. I consider that this aspect carries considerable weight, despite Mr Goldflam's attempts (pp10-11) to offer explanations for those failures.

Mr Birch noted that at par12 of the applicant's affidavit, he had stated that he intended "to plead guilty to count two", the charge of aggravated assault on Rosalie Namatjira on 17 December 1997. Mr Birch submitted that there was a "strong likelihood" that this plea would result in the imposition of a custodial sentence on the applicant. I consider that this depends – see p3 - to a considerable extent on whether the prosecution can prove that a weapon was used by the applicant. There is a reasonable likelihood of a custodial sentence, particularly in light of the applicant's criminal history as regards assaults.

Mr Birch noted that at pars18-20 of the applicant's affidavit he detailed 2 occasions since 20 May on which he had admittedly failed to observe the condition of his bail that he reside at the pastor's residence. He had spent one night camped at the premises of a church. As to the night of 6 June 1998, he claimed to have spent it "looking for my wife … because I was worried about her."

In par26 of the applicant's affidavit he contends, with some detail, that his wife Janie Brown has been trying since 9 June to secure his release from custody on the charges relating to the night of 6 June. Mr Birch did not dispute this but submitted that his instructions were that Janie Brown had "told the police that she is scared of what the prisoner will do to her upon his release", in view

of what she had declared to have occurred on 6 June. Mr Goldflam informed me that Janie Brown had attended on him in court on 10 and 11 June and later, requesting that he arrange for the applicant's release from custody; I accept that assertion. It is apparently inconsistent with Janie Brown being in fear of the applicant.

The Crown submissions

Against this general background, Mr Birch submitted that there was "a strong likelihood" that, if bailed, the applicant would not appear in court, and would not comply with his terms and conditions of bail. Further, if granted bail, he might commit further offences, particularly in relation to proposed Crown witnesses.

In his affidavit of 13 June Mr Goldflam had affirmed that the applicant could reside at Angatja, an outstation of Amata in South Australia. He informed me that it was Janie Brown who had initiated the proposal to reside at Angatja. Mr Birch expressed concerns about the selection of that location, on the basis that it was outside the jurisdiction of the Territory courts and police, and in an area where persons were difficult to locate.

The submissions by the applicant

In his detailed submissions, Mr Goldflam sought to address and explain some of the factual allegations by the respondent, and to answer the concerns expressed by Mr Birch.

He submitted that the behaviour of Janie Brown in now seeking the applicant's release was not consistent with that of a woman "who is scared of being re-united with her husband". Her behaviour was contrary to that proposition. He submitted that the applicant had had no opportunity to threaten her. He also referred to par23 of the applicant's affidavit which reads:

> "On the morning of 7 June 1998, I was in Todd Mall, Alice Springs. My wife, Janie Brown, met me there and told me that she had been raped. She told me that she had tried to wake me up but that I had been drunk. I had been drinking the previous night. At about 10.30am on 7 June 1998 I attended with Janie Brown at the Alice Springs police station and asked to see the investigating officers in relation to the incident of the previous night. I was told that the relevant officers were busy, so I returned to the Topsy Smith Hostel, Alice Springs to paint with my wife and informed the police officer I spoke to I was going back over the river to paint."

Mr Goldflam noted that Mr Birch had not sought to controvert what was stated in par23, the material in which was relevant to whether Janie Brown perceived the applicant as a threat to her. I note that the material in par23 is not wholly constant with the account in the Police precis of events of 6 June 1998, in evidence as Exhibit P4.

Mr Goldflam offered explanations for the applicant's failures to answer to his bail. He said that the applicant contended that he had not approached Rosalie Namatjira on 23 December; rather, she had approached him, and he had produced witnesses to that effect to the

police at Alice Springs. He said that the police released him because they were not satisfied Rosalie Namatjira's allegation had been made out. He said that he was "offended" on 30 December, because these facts had not been properly put before the Court. Mr Goldflam asserted that the matter of the allegation by Rosalie Namatjira was "cleared up" on 12 January 1998, when the applicant was bailed. I do accept that that necessarily follows. I note that the court record shows that on 12 January, when the applicant told the court that he would plead guilty to having assaulted Rosalie Namatjira on 17 December 1997, his application for bail was opposed, but conditional bail was granted.

I have already referred to the applicant's explanation for having failed to answer his bail on 19 February; he said (p5) that he was misinformed as to his obligation, by CAALAS. That assertion could readily have been verified by CAALAS, but no attempt was made to do so. Mr Goldflam stressed that the applicant had answered his bail on 4 occasions, and had always complied with reporting conditions.

Mr Goldflam submitted that the 2 occasions on which the applicant had failed to comply with the residence condition – that he reside at the pastor's residence - were "extremely minor" in their nature. I do not accept that, as regards the second failure; had he observed that condition on the night of 6 June, the charges relating to the offences allegedly committed on that night would not have arisen.

As to the failure to appear at the Hermannsburg Court in March for the driving charges eventually heard in Alice Springs on 26 May 1998, Mr Goldflam submitted that those charges had been instituted in Hermannsburg by way of summons, the applicant was then in Alice Springs, and his instructions were that the existence of the summons had never been drawn to his attention. It is true that a summons need not be delivered personally upon the defendant named therein. Mr Goldflam submitted that, accordingly, the applicant's failure to appear in the Hermannsburg Court in March was not culpable. I consider that the position is too uncertain, to place any weight on this allegation by the Crown.

Mr Goldflam then specifically addressed the criteria for consideration spelled out in s24 of the *Bail Act***.**

He referred first to the material relevant to the matters referred to in s24(1)(a)(i) and (ii), including par7 of his own affidavit of 17 June. He said that the applicant had lived in the Pitjantjatjara area for 2½ - 3 years and had then run a camel project at Angatja. I accept that Mr Ilyatjara of Angatja is a responsible person who is experienced in dealing with persons facing criminal charges.

As to s24(1)(a)(iii), in relation to the s192(3) charge arising from the alleged incident of 17 December 1997, Mr Goldflam said that at

trial sexual intercourse would be admitted, and the only issue would be whether it was without consent. He submitted that I should not be persuaded that the evidence in relation to the charge was "particularly good".

As to the charges relating to 6 June 1998, he submitted that the Crown case was "rather sketchy", and appeared to be based on the complaint of Janie Brown, a person who had since been actively seeking the release of the applicant.

As to s24(1)(a)(iv), Mr Goldflam noted that the applicant, aged 40, was well educated. Mr Goldflam detailed his background, and what he had been doing since he came to Central Australia.
Mr Goldflam said that the applicant "understands the Western legal institutions rather well"; he submitted that this showed that "he would be probable to attend court." I do not see that that necessarily follows.

Mr Goldflam noted that alcohol lay at the root of the charges which the applicant had faced over the last 5 years; in this connection he relied on the fact that Angatja was a "dry community", and this would militate against the applicant committing further offences while on bail. I accept that as a reasonable proposition.

As to the matters in s24(1)(b), Mr Goldflam submitted that the 'time obliged to spend in custody' if bail were not granted, in subpar (i), was the most important matter. I note that the applicant's committal could not take place for about 4 months. I also note that in some measure the Crown controls the order in which criminal cases are presented for trial before the Court, and Mr Birch has indicated "some likelihood" of a trial in November 1998, some 5 months away. However, it is fair to say that the period which will elapse before trial may well be longer than 5 months. That matter is as yet indeterminate, but the Crown should seek to hold to October and November.

Further on matters in s24(1)(b)(i), Mr Goldflam relied on the different conditions in which remand detainees are held in prison in custody, as a relevant factor. Being held on remand means that a detainee cannot pass through the various stages which a sentenced prisoner can. I do not give much weight to that admitted fact.

As to s24(1)(c)(i), Mr Goldflam referred to his earlier submissions to the effect that the applicant had substantially complied with his various bail conditions. I should say I do not accept those submissions, because I do not consider that the facts substantiate them.

As to s24(1)(c)(ii), Mr Goldflam stressed that if it were a condition that the applicant reside at Angatja, the only person at risk of being "tampered" with was his wife Janie Brown, who does not wish to be kept apart from him. Further, the applicant understands his obligations in this regard, and would be prepared to abide by them. There is also his denial that he approached Rosalie Namatjira. I consider that the likelihood of the applicant interfering with the evidence of Janie Brown, if granted bail, is very real.

As to s24(1)(c)(iii), Mr Goldflam stressed that all of the applicant's previous encounters with the law stem from alcohol, and Angatja was a "dry" community. His residence there would reduce the possibility that he might commit a further offence while on bail.

Conclusions

The onus lies on the Crown to show that bail should not be granted, when reference is had exclusively to the matters set out in s24 of the *Bail Act.* The material relevant to those matters has been argued in considerable detail. I have already expressed my views on several of those matters.

The applicant faces very serious charges. While it is difficult to assess the strength of the evidence against him on the materials before me, it is clear enough as matters stand that the Crown has a

reasonable case on both sets of charges of 17 December 1997 and 6 June 1998.

I do not consider that the fact that Angatja is outside the Territory, thereby giving rise to some practical problems, should militate against its being selected as a suitable place for residence of the applicant.

I conclude that there is a fair likelihood that if the applicant is bailed, he will not appear in Court, or comply with the terms and condition of his bail. There is also a real likelihood of his tampering with the evidence of Janie Brown in relation to the charges of 6 June 1998.

At this time, and in the circumstances as they presently appear before me in relation to the periods which may elapse before committal and trial, I consider that bearing in mind only the matters referred to in s24, the Crown has discharged the onus it bears of establishing that bail should not be granted. The matter is open for review at any time, particularly when the dates for committal proceedings and trial "firm up".

At this time, the application for bail is refused.

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