

CITATION: *Director of Public Prosecutions v WB*
[2018] NTSC 80

PARTIES: DIRECTOR OF PUBLIC
PROSECUTIONS

v

WB

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: REVIEW under the *Bail Act* from
YOUTH JUSTICE COURT exercising
Territory jurisdiction

FILE NO: SCC 21835661, 21836080, 21835959,
21845244

DELIVERED: 14 November 2018

HEARING DATES: 14 November 2018

JUDGMENT OF: Grant CJ

CATCHWORDS:

CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE –
BAIL

Application under s 36A of the *Bail Act* for review of decision of the Youth Justice Court to release respondent on bail – reference in *Bail Act* to Local Court includes, in relation to a youth, a reference to Youth Justice Court – review to be dealt with as expeditiously as possible and by way of rehearing – s 8 of the *Bail Act* entitles respondent to be granted bail unless the court satisfied refusing bail is justified having regard to criteria in s 24 – no real risk respondent would not appear in court in respect of charges – no disparity between period in detention if bail refused and penalty likely imposed if respondent found guilty of serious offences charged – no need for respondent to be free to prepare for appearance in court, to obtain legal advice or for any other lawful purpose – clear and present risk that

respondent would commit further offence or breach of the peace if released on bail – lower risk to safety or welfare of community – alleged victim is a child and s 24(4) of the *Bail Act* requires particular care to be given to her safety – no risk assessment conducted in relation to respondent’s volatile substance abuse and bearing on behaviours and conduct – risks cannot at this stage be appropriately ameliorated by release on bail subject to conditions – decision of Youth Justice Court set aside and grant of bail refused.

Bail Act (NT) s 8, s 24, s 36A

Youth Justice Act (NT) s 53

REPRESENTATION:

Counsel:

Applicant: M Nathan SC

Respondent: M Aust

Solicitors:

Applicant: Office of the Director of Public
Prosecutions

Respondent: North Australian Aboriginal Justice
Agency

Judgment category classification: B

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Director of Public Prosecutions v WB [2018] NTSC 80
SCC 21835661, 21836080, 21835959, 21845244

BETWEEN:

**DIRECTOR OF PUBLIC
PROSECUTIONS**
Applicant

AND:

WB
Respondent

CORAM: GRANT CJ

EX TEMPORE REASONS FOR JUDGMENT

(Delivered 14 November 2018)

- [1] This is an application made under s 36A of the *Bail Act* for review of a decision of the Youth Justice Court made on 9 November 2018 to release the respondent to the application on bail subject to conditions.
- [2] That provision operates to stay the decision of the court below. The accused must not be released during the stay. The stay remains in place until this Court affirms or varies the decision, or on the expiry of three business days after the decision was made, whichever is the earlier. In effect, the provision gives the applicant three business days within which to prosecute the application for review, failing which the original decision will take effect.

- [3] When this matter initially came before this court on the evening 9 November 2018 it appeared to me that the review provision did not, on its face, have application to bail decisions of the Youth Justice Court given that it refers expressly and exclusively to decisions of the “Local Court”. Counsel for the applicant subsequently drew my attention in that respect to s 53(1A) of the *Youth Justice Act*, which provides in effect that a reference in the *Bail Act* to the Local Court includes, in relation to a youth, a reference to the “*Youth Justice Act*”. It is plain from the context that this should be a reference to “Youth Justice Court”. The provision must be read that way in order to avoid absurdity, and the respondent to the application does not suggest otherwise. However, the matter does require attention by the legislature.
- [4] Apart from that issue, s 36A of the *Bail Act* provides that a review is to be dealt with as expeditiously as possible and by way of rehearing. This Court is not bound by the rules of evidence in the conduct of the review, and may receive additional evidence or information for the purpose of conducting the review. Any decision as varied or substituted must conform to the *Bail Act*. In particular, the decision on review must be made in the application of the criteria stipulated in s 24 of that Act where relevant.
- [5] The respondent is charged with offences across four files. The first is being armed with the intent to unlawfully enter a building and damage to property on 16 June 2018. The second file relates to trespass and damage to property over the course of 23 and 28 July 2018. The third file relates to damage to property, aggravated unlawful entry and stealing on 4 August 2018. The

fourth file relates to unlawfully causing serious harm, conduct giving rise to a danger of death and intentionally causing serious harm. It is that fourth set of charges which assume primary relevance in this review. The last of those offences attracts a penalty of life imprisonment.

- [6] The presumption in this case is in favour of bail. Section 8 of the *Bail Act* operates to entitle the respondent to be granted bail unless the court is satisfied refusing bail is justified having considered the criteria in s 24. The onus of proof was and is on the applicant in both the application below and in this review. However, there is no special onus, burden or standard of proof.
- [7] The Court may also take into account any information which it considers credible in the circumstances, including hearsay evidence, for the purpose of determining the review.
- [8] Against that statutory background, it is necessary to consider the criteria set out in s 24 of the *Bail Act* and to determine whether bail ought be refused having regard to those criteria in their application to the circumstances which present.

Facts

- [9] This Court has received into evidence an affidavit made by a Crown law officer on 13 November 2018 in support of the application for review. That affidavit discloses the following relevant matters.

- [10] The respondent was undertaking diversion on the first three files until 30 October 2018, when the offending on the fourth file was allegedly committed. The matters were thereafter referred for prosecution.
- [11] On 1 November 2018, the respondent applied for bail. That application was opposed. The Youth Justice Court ordered a bail supervision assessment and remanded the youth in custody until 9 November 2018.
- [12] The respondent's legal representatives then made an urgent application for bail on 8 November 2018. A further bail assessment was ordered at that time and the application was adjourned to the following day. The first bail assessment came in that following morning and did not support a supervised order within the Elcho Island community. The second bail assessment was received later that day and found the respondent suitable to reside at Saltbush, subject to electronic monitoring and other conditions restricting his movement.
- [13] The Youth Justice Court subsequently granted bail for the respondent to reside at Saltbush subject to those conditions. The Youth Justice Court was informed in accordance with s 36A(1) of the *Bail Act* that a request for review of the decision would be made to this Court.
- [14] As I have already noted, the offences charged on the fourth file are alleged to have taken place on the 30 October 2018. The statement of alleged facts and witness statements presently to hand disclose the following matters in relation to that alleged offending.

[15] The respondent is a 16-year-old male. On the night of the 29 October 2018, the respondent and a group of friends were inhaling aerosol spray paint cans on the oval at Galiwinku. The alleged victim, who is a 12-year-old female, was also present, although not engaging in that activity. The respondent and the alleged victim have been a boyfriend-girlfriend relationship since about March 2018. At some time between 2:00 and 3:00 in the morning on 30 October 2018, after the group had moved to another location in Galiwinku, the victim and her friend decided to leave because the respondent and his friends had become intoxicated from inhaling the solvents.

[16] The victim started walking towards her home. The respondent then said to one of his friends, "Give me that machete, because I have to bash that little girl for not listening to me." The respondent then took the machete and walked after the victim. When he caught up with her, he swung the machete at the victim striking her in the right upper arm. That caused the victim to fall to the ground. The respondent then stood over the victim and continued to strike her with the machete in a chopping motion. He also used the flat side of the machete to slap the victim on side of her torso and upper legs. When the victim moved her arms in an attempt to protect her torso and legs, the respondent struck her with the sharp edge of the machete in a chopping motion to her face and head region.

[17] It is alleged that by these actions the victim suffered severe lacerations to her skull and arms, broken knuckles in her right hand, and multiple severed tendons in both hands. The victim was evacuated to Royal Darwin Hospital

and underwent emergency surgery. At this early stage at least, it seems that victim will have life-long discomfort and limited movement in both hands.

[18] The victim's friend saw this happening and was eventually able to push the respondent away. The respondent was subsequently arrested and refused to participate in an interview with police.

Application of the s 24 criteria

[19] It falls to consider the criteria set out in s 24 of the *Bail Act* against the background of those allegations.

[20] Section 24(1)(a) of the *Bail Act* requires the court to consider the probability of whether or not the respondent will appear in court in respect of the offences for which he has been charged, having regard only to certain specified matters.

[21] The first matter is the respondent's background and community ties as indicated by the history and details of his residence, employment and family situation, and, if known, his prior criminal record. As is apparent from the circumstances of this matter, the respondent is a traditional resident of Galiwinku with no real background and community ties outside the Northern Territory.

[22] The second matter for consideration in this context is that of any previous failures to appear pursuant to a bail undertaking. There are none advised.

[23] The third consideration is the circumstances of the offence, including its nature and seriousness, the strength of the evidence against the respondent, and the severity of the penalty or probable penalty. The allegations no doubt involve a serious offence or offences. I have already described the circumstances alleged in those allegations. There is also no doubt that the Crown case is a strong one. There are statements from two eyewitnesses, and the weapon used and the respondent's blood-stained shirt have been seized as evidence. That is before any consideration of evidence from the alleged victim. Even allowing for the respondent's youth, the penalty for this offending if the respondent is convicted will be substantial.

[24] However, given the respondent's background, circumstances and traditional affiliations, I do not consider that those matters bear in any significant way on the probability of whether or not the respondent will appear in court in respect of the offences for which he is charged. I do not consider there to be any real risk of non-appearance in that respect.

[25] Section 24(1)(b) of the *Bail Act* requires the court to consider the period that the respondent may be obliged to spend in custody if bail is refused, and the conditions under which he would be held in custody. If bail is refused the respondent will be remanded in custody until at least the preliminary examination mention date on 13 December 2018. It may be for longer. Ranged against that, the penalty if the respondent is convicted is likely to be a sentence of actual imprisonment, quite probably for an extended period. There is no great disparity between any period the respondent may spend in

detention in the near future and the penalty which would likely be imposed in the event the respondent was found guilty of one or more of the serious offences charged. In making that assessment, I am cognisant of the fact that the respondent is a youth and detention on remand should be a last resort. I am also cognisant of the fact that if the respondent is remanded it will be in the Don Dale facility, which is less than ideal.

[26] There is no suggestion in the circumstances of this case of a specific need for the respondent to be free in the interim period to prepare for his appearance in court or to obtain legal advice, or for any other lawful purpose. I will come to the question of the respondent's assessment, treatment and therapy shortly.

[27] So far as the other criteria in s 24 of the *Bail Act* are concerned, there is no specific evidence giving rise to concern about risk of interference with witnesses in the general sense. I will deal with the particular interests of the alleged victim shortly.

[28] However, the material suggests that the respondent has a history of abusing volatile substances. The offences charged on the first three files, which took place relatively recently over a period of almost two months, give rise to a substantial apprehension that the respondent is prepared to commit offences or breaches of the peace for the purpose of procuring volatile substances. It is alleged that the earlier conduct took place either when the respondent was under the influence of solvents or for the purpose obtaining

solvents. Moreover, the offending on the fourth file is alleged to have taken place while the respondent was intoxicated in that manner.

[29] A number of concerns arise from that history. The first is the very clear and present risk that the respondent would commit a further offence or breach of the peace if released on bail at this stage. The allegation that the respondent made a violent and unprovoked attack on the victim also gives rise to a general concern about other members of the community whose safety or welfare could be put at risk; although I would assess the level of that particular risk as relatively low in the circumstances.

[30] The risk on which the applicant places the greatest emphasis is the safety and welfare of the alleged victim in the event that the respondent is released on bail. I note in this respect that the alleged victim is a child and that her safety must be considered with particular care in this context. There is express provision to that effect in s 24(4) of the *Bail Act*.

[31] There is at least some evidence that the respondent has demonstrated a propensity to act violently towards the alleged victim before the incident the subject of the present charges. At this stage, she remains at the Royal Darwin Hospital. In making the assessment of the victim's interests it is necessary to bear in mind that the relationship between the respondent and the alleged victim is an emotional one. It is also material that the alleged attack was unprovoked and apparently motivated by the respondent's belief he had an entitlement to exercise dominion over the alleged victim.

- [32] The alleged victim will eventually be discharged to Galiwinku. Although there is no specific evidence suggesting that the respondent would seek any further engagement with the victim, either while she is at the hospital or in Galiwinku, there must necessarily be some concern about her safety at this present time. The general wards of the hospital are not a secure facility. Such risk or concern as now presents will dissipate once the alleged victim is returned to Galiwinku.
- [33] It is of particular significance that at this point in time, and at the time the decision to grant bail was made, no risk assessment or monitoring had been conducted in relation to the respondent's volatile substance abuse, whether his condition has stabilised, and the bearing of that condition on his behaviours and conduct in the short term. It is of note that the second bail assessment contemplated that a referral would be necessary to ensure a risk assessment was completed. It would seem me that such an assessment might more appropriately and usefully be conducted prior to any decision to release the respondent on bail given the circumstances of this alleged offending. While it can be accepted that Saltbush would be a better environment for counselling and therapy, that does not answer the question of the extent to which the respondent's condition presents a risk of violent conduct at the present time.
- [34] In making those risk assessments, I am cognisant of the fact that the bail order subject to this review provided for respondent to reside at Saltbush on various conditions that have been outlined in submission. As the applicant

has pointed out, however, Saltbush is not a secure facility and staff have no statutory or other power to physically restrain youths from absconding. Electronic monitoring is only effective in the event that the supervisee complies with conditions of monitoring. Although no specific evidence was called in relation to that matter, this Court is often called upon to deal with instances of youths absconding from residential facilities of this type and of supervisees removing electronic monitoring devices. I do not consider that in these circumstances, and at this time, the proposed residence at Saltbush would ameliorate the risks which present to the requisite degree. Of course, that situation may change in the manner I have indicated earlier in these remarks.

[35] Finally, the applicant directs attention to the risk that the respondent may be in danger of physical injury. There is some suggestion in a witness statement that the respondent will be subjected to some form of traditional discipline for his actions if he returns to Galiwinku. That concern was also given voice in the first bail assessment. I do not give that consideration any real weight for these purposes. In any event, that risk would not arise if the respondent is bailed to a location in Darwin.

[36] In my opinion, the risks I have identified do present in this case and cannot at this stage be appropriately ameliorated by a release on bail subject to conditions. Having regard to the relevant criteria, I am satisfied that a grant of bail should be refused at this stage.

[37] Accordingly, I make the following orders:

1. The decision of the Youth Justice Court made on 9 November 2018 granting the respondent bail is set aside.
2. The application for bail is refused.
