The Queen v JDT [2011] NTSC 39

PARTIES:	THE QUEEN
	v
	JDT
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	21021775
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The Queen v Wilson [2011] NTSC 15
R v Iskandar (2001) 120 A Crim R 302.

REPRESENTATION:

Counsel:

Applicant:	Mr Brock
Respondent:	Mr Nathan

Solicitors:

Applicant:	North Australian Aboriginal Justice Agency
Respondent:	Office of the Director of Public Prosecutions

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

The Queen v JDT [2011] NTSC 39
No. 21021775

BETWEEN:

The Queen
Respondent

AND:

JDT
Applicant

CORAM: BLOKLAND J

REASONS FOR BAIL REFUSAL

(Published 28 March 2011)

Introduction

[1] On 18 March 2010, I refused JDT (the applicant) bail pending his trial for the charge of murder. I gave brief reasons at that time and indicated formal reasons which now follow would be given. The catalyst for the bail application was the applicant turning 18 years of age while in custody with the consequent decision by the Director of Corrections to transfer him from Don Dale Detention Centre to a correctional facility for adults.[1]

[1] Affidavit of Trevor Joshua Brook, affirmed 10 March 2011.

[2] The applicant has been remanded in custody since his apprehension shortly after the alleged commission of the offence.[2] As he was a youth at the time of the alleged offending he has been held in detention at Don Dale Detention Centre. The trial is listed and due to commence in this Court on 9 May 2011.

[3] On 9 March 2011 the applicant turned 18 years of age. Unless the Director agreed to exercise his discretion in permitting the applicant to stay at Don Dale, he was to be transferred to the adult prison population at Berrimah Correctional Centre. Bail was sought as inquiries by the applicant's lawyers revealed the Director was not likely to recommend the applicant be remanded at Don Dale past his eighteenth birthday. During the course of the bail hearing (including an adjournment to obtain an institutional report), the Court was told the Executive Director of Correctional Services would not transfer the applicant to the adult prison, pending this decision.

Discussion of the Issues

[4] A charge of murder attracts the presumption against bail: S 7A(1)(a) *Bail Act* (NT). The applicant therefore is not to be granted bail unless he satisfies the Court that bail should not be refused.[3]

[5] Submissions on the correct approach to the application of the presumption against bail included a discussion of *The Queen v Wilson*[4] where recently

[2] The murder is alleged to have been committed between 21-22 June 2010. The applicant is also charged with one count of stealing arising at the same time as the murder charge. Youth Justice Court File 21021775 notes he was remanded in custody on 30 June 2010. According to the Institutional Report from Don Dale, he was admitted to detention on 1 July 2010.
[3] *Bail Act* (NT) s 7A(2).

Reeves J reviewed the authorities relevant to the identical provision in s 8A(2) *Bail Act* (NSW). In *Wilson*, Reeves J adopted the approach of the New South Wales authorities culminating in *R v Iskandar*[5] where Sperling J commented:

> In view of the authorities binding on me, I proceed on the basis that where s 8A applies, an application for bail should normally or ordinarily be refused. A heavy burden rests on the applicant to satisfy the Court that bail should be granted. The strength of the Crown case is the prime but not exclusive consideration. Count availing circumstances common to application for bail in the generality are to be accorded less weight than in the ordinary case. The application must be somewhat special if the Crown case in support of the charge is strong.

[6] The factors noted in the authorities[6] considered to be common to all bail applications are the circumstances that an applicant's continued incarceration will cause serious deprivation of their right to liberty, hardship and distress to the applicant and family, usually severe effects upon the applicant's business, employment finances and the ability to prepare their defence and support their family. Similarly it has also been noted that common to bail applications where the onus is reversed is the availability of sureties in circumstances where the application would be unlikely to be successful without a surety coming forward. These cases are instructive.

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[4] [2011] NTSC 15.
[5] (2001) 120 A Crim R 302 at para 14; applied in *Director of Public Prosecutions (Cth) v Germakain* (2006) 166 A Crim R 201, a Court of Appeal (NSW) decision.
[6] *The Queen v Wilson* (above) citing *R v Kissner* unreported, Supreme Court, New South Wales, No 70768 of 1992, 17 January 1992.

[7] It has been emphasised previously in this Court[7] that once it is found the presumption applies, the burden lies on the applicant to show that bail should not be refused. Further, in making that assessment the only matters which may be considered on the bail application are those matters set out in s 24 *Bail Act* (NT).

[8] The factors put forward as considerations in favour of granting bail in the face of the presumption against it are the applicant's youth and the fact that he has not been exposed to the adult prison population;[8] his limited criminal antecedents;[9] the asserted limited risk of offending when on bail; the low risk of issues of safety in relation to the witnesses or community;[10] his community ties and family support were also submitted to be indicative of the applicant being a low flight risk.[11] The conditions under which a person is to be held in custody is part of the criteria[12] relevant to bail and I accept transfer to the adult correctional facility is a relevant consideration.

[9] The strength of the Crown case was only touched on briefly by counsel for the applicant. Reasonable residential arrangements were put forward by the applicant's uncle Mr Freddy Ashley and his wife Ena Ashley who live in Darwin and are prepared and indeed urge the Court to allow the applicant to reside with them at their unit in The Narrows, Darwin. Mr Ashley's affidavit details the family's circumstances, the residence and his ability to

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[7] *Ross Emmett Wilkins*, No 9705625, 8 September 1997, Unreported Kearney J.
[8] S 24(b)(i) *Bail Act* (NT).
[9] S 24(1)(a)(ii) *Bail Act* (NT).
[10] S 24(3) *Bail Act* (NT).
[11] S 24(1)(a)(i) *Bail Act* (NT).
[12] S 24(b)(i) *Bail Act* (NT).

provide security.[13] Indicators that tend to militate against granting bail may well assume greater significance than ordinarily, (where the presumption is in favour, or neutral), as they must be considered in the context of whether they diminish the strength of factors that otherwise favour discharge of the presumption.

Application of the Principles to the Circumstances

[10] Although it is of concern that a young person be transferred to the adult prison, that circumstance is part of the legislative consequence[14] of the young person turning 18; unless a discretion by the Director is exercised in favour of keeping the young person at Don Dale. If that occurs, the young person may be directed to remain at Don Dale for up to six months.[15] The exercise of the discretion is not reviewable.[16] The Director must have regard to the interests of other detainees as well as the interests of the particular youth.[17] The Director may have regard to any other matter the Director considers appropriate.[18]

[11] It is not sought to review the Director's decision in these proceedings; or to examine whether the prohibition on review is valid in these circumstances. The applicant no longer has the benefit of the same protections that cover youths who have not attained the age of 18 years. For example, the general

[13] Affidavit Freddy Ashley, 9 March 2011.
[14] S 164(1) *Youth Justice Act* (NT) provides a detainee who turns 18 "must" be transferred within 28 days after turning 18.
[15] S 164(4) *Youth Justice Act* (NT).
[16] S 164(6) *Youth Justice Act* (NT).
[17] S 164(5)(a) *Youth Justice Act* (NT).
[18] S 164(5)(b) *Youth Justice Act* (NT).

principle that youths should be kept in custody for an offence (whether on arrest, in remand or under sentence) as a last resort and for the shortest appropriate period of time[19] is no longer strictly applicable, however young adults clearly retain the benefit of similar principles recognised by the Courts. Youth is still a factor to be considered under s 24 criteria *Bail Act* (NT). Although the conditions of custody are to change for the applicant, and I accept the changed conditions carry a risk of contamination with the adult remandees, that of itself, without some further specific information on how the conditions would be detrimental to the applicant himself is not enough to persuade me that the presumption is discharged.

[12] The bail application was adjourned to allow an institutional report to be provided by Don Dale Detention Centre to the Court. It appeared there should be some assessment on the applicant to ascertain whether there was any factor specific or relevant to him or his circumstances substantial enough to discharge the burden. In line with the authorities, the applicant needed to demonstrate there were sufficiently special or unusual circumstances.

[13] The applicant's youth and the fact that his uncle and aunty are prepared to have him reside with them in Darwin are the main strengths of his application. I have not been told a great deal about the strength of the Crown case; it would appear that the credibility of the primary witness at the scene will be substantially tested, however the Crown will be relying on

[19] *Youth Justice Act* s 4(c).

other supportive physical evidence tending to inculpate the applicant. The alleged offending occurred in circumstances where the applicant and other young men may have been subject to inappropriate sexual conduct on the part of the deceased. I do not know to what extent if any this may be a feature directed to the strength of the Crown case. Although this is nowhere near the strength of the Crown case as discussed by Reeves J in *The Queen v Wilson* where the Crown case was described as "unassailable" (given bail was sought after a plea of guilty and prior to sentence), I would describe the prospects of the Crown case here as more than reasonable. On the material before me, I would not suggest this is a strong Crown case, however neither is it weak given the submissions put by the prosecutor. I have proceeded on the basis it has more than reasonable prospects.

[14] There are a number of factors that operate against granting bail. First, the applicant has a previous court record for violence being an aggravated assault (male/female) committed on 15 August 2009 at Katherine. The assault comprised one strike with the applicant's fist to the victim's left jaw resulting in the victim losing consciousness after she fell to the ground. The applicant entered a plea of guilty on 15 February 2011 in the Youth Justice Court. From the information available to the Court it would appear he was mistakenly treated as an adult during the investigation and apprehension stage. That error was corrected with the plea being entered in the Youth Justice Court. He has no other previous Court record. He did not appear at his first Court appearance on 18 June 2010 and a warrant was issued. The

warrant was not executed until he appeared in custody charged with murder on 30 June 2010. In the circumstances, given it appears he did not receive the benefit of the protections he should have had as a youth at the time of the investigation and processing of the aggravated assault charge, I did not hold that particular failure to attend Court against him in the course of this bail application. The fact of this record for violence however committed within a year preceding the alleged murder, is a factor which weighs heavily against granting him bail.

[15] Further, the Don Dale institutional report, (which may have deficiencies as a result of the difficulties of psychological testing of Aboriginal people whose first language is not English), does not highlight any particular difficulty that this applicant has which would magnify the issue of being transferred to the adult correctional centre as a factor in favour of granting bail; nor does it show clearly that the applicant is able to comply with a regime of rules directed at behaviour management. Although this may not be a significant consideration in bail applications where the presumption is not against bail, the ability to comply with directions or conditions is obviously significant in this case. In his favour the applicant has shown an ability to study and work and was described as "self motivated". Regrettably, he has also been involved in incidents that involve violence or aggressive behaviour with consequential fluctuations in his assessment and classification. In many respects this mixed assessment is to be expected of young persons in detention who may have experienced difficulties, however it does not

provide the Court with the necessary degree of confidence that would assist in discharging the burden.

[16] It is in the applicant's favour that his uncle and aunty are sincerely concerned and want to help by having him reside with them and monitor him under a strict bail regime including curfews. It is noted that according to the Don Dale institutional report he had previously lived with them after his mother sent him to Darwin from Ngukurr when he was about 14 years of age. He then appears to have returned to Ngukurr to live with his grandmother and experienced difficulties such that family members perpetrated violence against him. Prior to this period of detention he was residing with another uncle in Katherine. The picture of how his possible residence with his uncle and aunty in Darwin would turn out is not clear. As a younger person, although not subject to any orders, he has previously left them and returned to Ngukurr. His history indicates he is drawn to the Ngukurr/Katherine area where he grew up.

[17] It is also noted that unlike an adult offender, for the crime of murder, if the applicant is found guilty, he does not face mandatory life imprisonment rather, he may be ordered to serve a shorter period of detention or imprisonment.[20] Despite this factor mitigating the ultimate penalty, there still exists the presumption against bail for youths who are charged with murder. Although the circumstance of custody has changed, given the other factors such as the previous aggravated assault and incidents while in Don

[20] S 82(3) *Youth Justice Act*.

Dale, the onus is not in my view discharged. I note the trial is not delayed and is due to commence in less than two months thus minimizing time spent on remand irrespective of the result of the trial. This is always a relevant factor.

Order

[18] I confirm the application for bail was refused.

[19] Given the proximity of the trial, I direct these reasons not be published on the Court website or elsewhere until the conclusion of the trial.