PARTIES:	STEVEN BARNES
	v
	THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	206/1996 (9606213)
DELIVERED:	13 October 1997
HEARING DATES:	3 October 1997
JUDGMENT OF:	BAILEY J

CATCHWORDS:

Criminal Law — Bail Pending — Charge of Murder — Traditional Aboriginal punishment — Whether Aboriginal defendant should be released on bail to receive such punishment prior to his pleading guilty to lesser charge of manslaughter — Applicant with burden of persuading court that bail should not be refused.

Bail Act, s7A(2).

Criminal Law — *Bail Act* — s24 criteria — Regard to be had to the needs of the person to be free for any "lawful purpose" — Whether the receipt of traditional punishment is a "lawful purpose" — Whether applicant can consent to bodily harm — Whether Court would be "condoning or facilitating" traditional punishment if bail were granted.

Bail Act s24(1)(b)(ii)
R v Minor (1992) 2 NTLR 183, @ 195–196.

Criminal law — *Bail Act* — s24 — Regard to whether applicant is "in danger of physical injury or in need of physical protection" — Applicant failed to satisfy Judge bail should not be refused.

Bail Act — s24(1)(b)(iv)

Legislation

Bail Act (NT) 1982, ss7A(2), 24(1)(a), 24(1)(b)(ii), (iii), (iv), 24(1)(c).

Cases

Attorney-General's Reference (No. 6 of 1980) [1981] QB 715 — Referred
R v Brown (1993) 2 All ER 75 — Referred
R v Jungarai (1981) 9 NTR 30 — Doubted
R v Minor (1992) 2 NTLR 183, @ 195 – 196 — Considered

REPRESENTATION:

Counsel:

Applicant:	Mr C Thomson
Respondent:	Mr M Carey

Solicitors:

Applicant:	NAALAS
Respondent:	Director of Public Prosecutions

Judgment category classification:	B
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BAI97029

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

206/1996 (9606213)

BETWEEN:

STEVEN BARNES

Applicant

AND

THE QUEEN

Respondent

CORAM: BAILEY J

REASONS FOR JUDGMENT

(Delivered 13 October 1997)

Background

On 3 October 1997 I refused the applicant's application for bail and indicated that I would publish reasons at a later date. I now set out my reasons for such refusal.

The applicant was committed to the Supreme Court on 7 October 1996 to stand trial on one count of murder. The particulars of the indictment, dated

4 November 1996, allege that the applicant murdered Cedric Ross at Darwin on 19 March 1996.

Mr Thomson, who appeared for the applicant, indicated that the applicant intends to plead guilty to the manslaughter of Cedric Ross, who was a nephew of the applicant. At the present time, no date has been fixed for the hearing of such a plea, which I understand the Crown stands ready to accept in answer to the indictment for murder. In the ordinary course of events, it can be expected that a plea date will be fixed within a matter of weeks rather than months.

The applicant has been remanded in custody since the date of the alleged offence, 19 March 1996 – i.e. a period in excess of eighteen months.

The basis of the application for bail advanced by Mr Thomson is for the applicant to be permitted to return to his community at Lajamanu and receive traditional punishment for the killing of his nephew.

In support of the application, Mr Thomson called two witnesses, Martin Johnston and the applicant.

Martin Johnston gave evidence that he is the president of the local Lajamanu Council and is authorised to speak on behalf of the traditional elders in the Lajamanu area about the present matter. He is a member of the applicant's extended family.

The evidence of Mr Johnston was to the effect that the killing by a man of his nephew is regarded very seriously under traditional Aboriginal law –

before the coming of European settlement, a person in the applicant's situation would have been "killed on the spot". Mr Johnston's evidence was that traditional punishment for the applicant had been discussed by members of the community at Lajamanu and the imposition of such punishment was important so that "peace can be obtained" and so that the "justice system is balanced between the white and the black" (systems of law). The punishment of the applicant would be carried out by approximately ten members of the close family of the applicant (which would include members of the deceased's family) and would comprise:

- spearing both of the applicant's legs four or five times, using single point sharp and shovel-nosed spears;

- punches with fists to the applicant's face and chest;

- blows to the applicant's head and back with the use of large heavy wood boomerangs; and

- similar boomerangs being thrown at the applicant who would have a small shield with which to protect himself.

Mr Johnston also expressed fears for the applicant's spiritual and physical wellbeing if he remained imprisoned without the proposed traditional punishment being carried out. He was concerned that the applicant might attempt to commit suicide if he continued to be held in custody without receiving traditional punishment.

In answer to questions from Mr Carey, on behalf of the Crown, Mr Johnston gave evidence that there was no community unrest at Lajamanu as a result of the death of the deceased at the applicant's hands. Mr Johnston accepted that there was a risk that the applicant could die as a result of the proposed traditional punishment (e.g. if an artery was accidentally cut by a spear). While it was expected that the applicant would be able to walk normally after two weeks, there was also a risk that the applicant could be crippled permanently. Mr Johnston also accepted that it was possible that the applicant might suffer permanent injury as a result of being hit upon the head with boomerangs.

The applicant gave evidence of his willingness to undergo traditional punishment for the sake of his family and himself. He was prepared to accept any punishment that the community decided to impose – even if this resulted in serious injury to him or his death. The applicant expected to receive traditional punishment regardless of whether the present application for bail was successful – that is, if bail was refused, he expected to be punished after any prison sentence which might be imposed upon him in connection with the death of his nephew.

The applicant is charged with murder. Section 7A(2) of the *Bail Act* provides that a person accused of such an offence "...is not to be granted bail unless the person satisfies an authorised member or court that bail should not be refused". Accordingly, the presumption in favour of bail (see section 8 of the Act) which applies to most offences in the Territory has no application to the present applicant. The effect of section 7A(2) is that the applicant bears

the burden (on a balance of probabilities) of persuading the Court that bail should not be refused.

Subject to that burden, the usual criteria to be considered in bail applications prescribed by section 24 of the Act applies to the present application. That provision limits the matters which a court may take into account in determining whether bail should be granted to an accused person.

In the present application, Mr Thomson relies upon section 24(1)(b)(iii) of the Act, i.e. it is submitted that the application should be granted having regard to the needs of the person to be free for any "lawful purpose" (aside from the needs of a person to be free to prepare for his appearance in court or to obtain legal advice or both: s24(1)(b)(ii)).

Mr Thomson submits that the receipt of 'traditional punishment' is a "lawful purpose" in relation to the present applicant and that the applicant's interests (his spiritual and physical wellbeing, together with the harmony of his close relatives and his community) will be advanced by his release on bail. Mr Thomson notes that section 24(1)(b)(iv) of the *Bail Act* also requires me to have regard to whether the applicant is "in danger of physical injury or in need of physical protection", but asserts that the applicant's consent to undergo traditional punishment negates any need to continue his incarceration on this basis. In Mr Thomson's submission, the applicant is free to consent to bodily harm and the release of the applicant on bail would in no way suggest that the Court condoned or facilitated what might occur by way of traditional punishment.

Mr Thomson referred me to the case of *R v Jungarai* (1981) 9 NTR 30 as a precedent for a successful bail application in circumstances similar to the present. Forster CJ (as he then was) bailed the applicant, who was charged with murder of another member of his tribe. His Honour concluded his reasons for judgment in the following terms:

> "I should also say that for the purpose of dealing with the application for bail I express neither approval nor disapproval of the course proposed to be taken by the family of the deceased, endorsed as it is by the community – including the family of the accused. Whether or not the proposed action constitutes an offence under the law of the land seems to me, for present purposes, to be irrelevant. The order for release on bail should not be interpreted as necessarily involving approval of what will happen nor, of course, should my failure to approve it be interpreted as disapproval. What will almost certainly happen is simply, for present purposes, an important fact to be considered."

It is to be noted, however, that this case was decided before the commencement of the present *Bail Act* – a matter which may be of some significance given his Honour's emphasis upon the desirability of resolving community unrest as a result of the killing and the "almost" certainty that prevailing unrest would not be resolved until traditional punishment had been inflicted upon the applicant. Similar considerations do not apply in the present application (in the light of Mr Johnston's evidence) – but even if they did, the exclusive criteria of section 24 of the *Bail Act* would now appear to preclude taking into account the welfare of the community in such a manner upon an application for bail (see section 24(1)(c) of the *Bail Act* and later in these reasons).

There is also another major distinction between *Jungarai* and the present application. The evidence of the tribal punishment to be inflicted in the application before Forster CJ was to the effect that it would consist of a single ceremonial spearing in the leg followed by banishment in the bush for a period. The evidence in the present application suggests that the physical punishment of the applicant is likely to be very much more severe.

In *R v Minor* (1992) 2 NTLR 183 at 195–196, Mildren J expressed the view that an assault is not unlawful if authorised by the "victim" unless the person committing the assault intends to kill or cause grievous harm. In his Honour's view, spearing in the thigh would not necessarily amount to grievous harm – and in the particular case before him there was no evidence to show that grievous harm was the likely result of what was proposed by way of traditional punishment. Mildren J went on to add:

> "I wish to make it clear that it is one thing for a court to take into account the likelihood of future retribution to be visited upon the accused, whether lawful or unlawful; it is yet another for a court to actually facilitate the imposition of an unlawful punishment. The reason why courts usually say that they do not condone 'payback' is because it is a form of corporal punishment, carried out by persons not employed by the State to impose punishment; not because the imposition of the punishment is necessarily unlawful. But I have no doubt that it would be quite wrong for a sentencing judge to so structure his sentence as to actually facilitate an unlawful act."

His Honour also added that to the extent that the contrary may be implied by the remarks of Forster CJ in *R v Jungarai*, supra, he would respectfully disagree.

For my part, I would respectfully endorse the remarks of Mildren J which I have quoted above and add that the substance of such remarks is applicable equally to a judge considering a bail application as to a sentencing judge. Whatever the context, it would be quite wrong for a judge to structure his judgment to facilitate an unlawful act.

In the absence of full argument, I express no view as to whether a person can lawfully consent to an assault falling short of one intended to cause grievous harm. It is clear from section 26(3) of the *Criminal Code* that a person cannot authorise or permit another to kill him or, except in the case of medical treatment, to cause him grievous harm – but the *Code* is silent on the extent to which a person can consent to lesser forms of harm, such as bodily harm.

In *R v Watson* (1986-87) 69 ALR 145, the Court of Criminal Appeal of Queensland held that consent is not recognised at law as a defence to a charge of assault occasioning bodily harm under that State's *Criminal Code* (and see *R v Raabe* (1985) 14 A Crim R 381). Similarly, consent is not a defence to such a charge at common law – see *Attorney-General's Reference (No. 6 of 1980)* [1981] QB 715 and see also *R v Brown* (1993) 2 All ER 75 (HL). I recognise the force of Mildren J's views to the contrary in *R v Minor*, supra, but in the present application it is not necessary to come to a concluded view on this issue.

The evidence in the present application is such that I am satisfied (on a balance of probabilities) that if the contemplated traditional punishment was

inflicted upon the applicant it would cause him grievous harm and there would also be a substantial risk that it could result in his death. The applicant cannot lawfully consent to the infliction of such punishment and the Court cannot facilitate what would amount to a crime. To the extent that the remarks of Forster CJ in *R v Jungarai*, supra, may be in conflict with this approach, I respectfully disagree with those remarks. In particular, I do not accept that in an application of the present kind that it is "irrelevant" whether the proposed traditional punishment constitutes an offence under the *Criminal Code*. I do not consider that a court can abrogate its responsibility to consider the interests of an applicant as to whether he is in danger of physical injury or in need of physical protection (section 24(1)(b)(iv) of the *Bail Act*) by a meek acceptance of the supposed inevitability of traditional punishment and a disclaimer as to the court's approval.

I am in no doubt that the interests of the applicant (section 24(1)(b)) would not be served by facilitating his release to be unlawfully stabbed and bashed before submitting to such sentence as may be imposed according to law.

Aside from the interests of the applicant, the other matters which I am required to take into consideration for the purposes of the present application are those referred to in section 24(1)(a) and (c) of the *Bail Act*, i.e. the probability of whether or not the applicant would appear in court in respect of the offence for which bail is being considered and the protection and welfare of the community, respectively.

As to the first matter, Mr Carey objected to the grant of the present application, in part, upon the basis that the applicant has on four occasions between 1989 and 1996 failed to answer bail and has been the subject of arrest warrants. While this is a matter I have taken into consideration, I would not refuse the application on this basis alone.

With respect to the "protection and welfare of the community", I am satisfied that it is not necessary or desirable to continue the applicant's detention in custody having regard to the matters referred to in section 24(1)(c) of the *Bail Act*. However, I note that the extent to which the protection and, in particular, the welfare of the community can be considered pursuant to section 24(1)(c) is expressly limited to the matters presented in sub-paragraphs (i) to (iv) of that provision. In particular, such matters do not extend to consideration of a particular community's "harmony" or any general beneficial effects which might flow to a community from the imposition of traditional punishment upon a person in the applicant's situation. I consider this is a matter worthy of some emphasis, lest it be suggested that the rejection of the present application is paternalistic or lacking in sensitivity to the increasing calls for reconciliation between the Aboriginal society and that of the wider Australian community. The exclusive criteria for consideration of bail applications provided by section 24 of the *Bail Act* does not allow consideration of any potential beneficial effects to the community generally or particular groups within the community which may flow from the grant of bail to a particular applicant. If such considerations are thought to be relevant, then the remedy lies in the hands of the legislature, not the courts.

In the light of the exclusive criteria prescribed by section 24 of the *Bail* Act, the applicant has failed to satisfy me that bail should not be refused. On the contrary, in the light of the evidence, I am satisfied that there are positive reasons – the applicant's need for physical protection – as to why he should continue in custody.

I also note that Mr Johnston expressed fears that the applicant might attempt suicide if the present application was refused. The applicant similarly expressed fears about harming himself if he remained in custody. No reasons were advanced as to why such fears have arisen after the applicant has spent more than eighteen months in custody. I have no doubt that the appropriate authorities will have due regard to the fears expressed and take appropriate action to ensure the applicant's continued wellbeing.