CITATION:	*Shortland v The Queen* [2021] NTCCA 10
PARTIES:	SHORTLAND, Harris John Kohu v THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	No. CA 15 of 2021 (21836887)
DELIVERED:	23 December 2021
HEARING DATE:	22 December 2021
JUDGMENT OF:	Brownhill J

CATCHWORDS:

CRIMINAL LAW – Appeal – Appeal Bail – *Bail Act 1982* (NT), s 23A – whether special or exceptional circumstances shown – prospects of success on appeal insufficient – bail refused

Bail Act 1982 (NT), *s 23A*
Criminal Code Act 1983 (NT), s 43BG, s 43BF, s 407(1), s 429
Criminal Code 1995 (Cth), s 307.2, s 311.4, s 311(7)
Criminal Code Regulations 2019 (Cth), r 14
Evidence (National Uniform Legislation) Act 2011 (NT), s 165(1)(d)
Misuse of Drugs Act 1990 (NT), s 5(1), s 8(1)
Sentencing Act 1995 (NT), s 55

GBF v The Queen (2020) 94 ALJR 1037, *King v The Queen* (1986) 161 CLR 423, *MacKenzie v The Queen* (1996) 190 CLR 348, *McRoberts v The Queen*

[2018] NTCCA 11, *Tran v The Queen* (2000) 105 FCR 182, *Witt v The Queen* [2018] NTCCA 9, referred to.

REPRESENTATION:

Counsel:

Applicant:	S Robson SC
Respondent:	M Chalmers SC

Solicitors:

Applicant:	Ward Keller
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
Number of pages:	25

IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

Shortland v The Queen [2021] NTCCA 10
No. CA 15 of 2021 (21836887)

BETWEEN:

HARRIS JOHN KOHU SHORTLAND
Applicant

AND:

THE QUEEN
Respondent

CORAM: BROWNHILL J

REASONS FOR JUDGMENT

(Delivered 23 December 2021)

Background

[1] By an indictment dated 2 December 2020, the applicant was charged with five counts, namely:

(a) between 16 October 2017 and 10 July 2018, importation of a marketable quantity of cocaine, contrary to s 307.2 of the *Criminal Code 1995* (Cth) ('*Cth Code*'), read with s 311.4 (count 1);

(b) between 15 December 2017 and 10 July 2018, supply of a commercial quantity of cocaine, contrary to s 5(1) of the *Misuse of*

Drugs Act 1990 (NT) ('*MDA'*), read with s 43BG of the *Criminal Code Act 1983* (NT) ('*NT Code*') (count 3);

(c) between 31 July and 14 August 2018, attempting to supply a commercial quantity of cocaine, contrary to s 43BF of the *NT Code*, read with s 5(1) of the *MDA* (count 4); and

(d) between 18 May and 10 July 2018, receiving or possessing $18,000 knowing it was obtained from the supply of a dangerous drug, contrary to s 8(1) of the *MDA* (count 5).

[2] On 29 October 2021, after a three week trial, the jury delivered verdicts of not guilty on counts 1 and 4 (the latter being a directed verdict) and verdicts of guilty on counts 2, 3 and 5.

[3] On delivery of the verdicts, the trial judge granted an application for leave to appeal the verdict on count 3 on the basis that it was inconsistent with the verdict on count 1. On 25 November 2021, an application for leave to appeal was filed seeking to enlarge the grounds of appeal to cover counts 2 and 5 and add to the grounds of appeal against the verdict on count 3. There are five proposed grounds of appeal. Leave to appeal on those grounds has yet to be granted. Without conceding the merits of any of them, the Director of Public Prosecutions has not opposed the grant of leave to appeal. It was argued on behalf of the applicant that this is indicative that leave will be granted. I do not accept that. Whether leave is granted will be a matter

for the Judge determining the application for leave and that prospect is largely irrelevant for the purposes of this bail application.

[4] For the purposes of this bail application, the grounds of appeal relied on were as follows:

(a) The verdicts of guilty on counts 3 and 5:

(i) are unreasonable and cannot be supported having regard to the evidence (ground 1(i));

(ii) are inconsistent with the verdict of not guilty on count 1 (ground 1(ii)); or

(iii) were reached as a result of the framing of the Crown case on count 5 in a manner that was not supported by the evidence and involved latent duplicity (ground 1(iii)); and

(b) The jury was not adequately and properly directed on the elements of the importation offence charged under count 2 and effectively directed as if the offence was one of strict liability (ground 2).

[5] On 17 December 2021, the applicant was sentenced to a total of six years and six months imprisonment, backdated to 8 October 2021, with a non-parole period of four years and three months.

[6] On 17 December 2021, the applicant filed an application for the grant of bail pending the outcome of the appeal. The application was

supported by an affidavit made by Mr Robson SC, the applicant's counsel at the trial and for the appeal ('Robson Affidavit').

Appeal bail

[7] This is an application in the appeal brought before the Court of Criminal Appeal and jurisdiction is usually exercised by three judges of the Supreme Court.[1] By s 429 of the *NT Code*, the powers of the Court of Criminal Appeal to grant bail may be exercised by a single Judge in the same manner as exercised by the Court.

[8] The Court's power to grant bail where an appeal is pending in the Court of Criminal Appeal against a conviction on indictment is confined to cases where it is established that special or exceptional circumstances exist justifying the grant of bail.[2]

[9] This application for bail is put on the basis that there are strong prospects that the appeal will be successful.

[10] In *McRoberts v The Queen* [2018] NTCCA 11, Southwood ACJ held (at [12]) that strong prospects that an appeal will be successful can, of themselves, constitute exceptional circumstances which justify the grant of bail pending appeal. His Honour distinguished (at [12]-[13]) between the case where it is possible to discern immediately a patent error in the below proceedings which indicates that the appellant has a

1 See s 407(1), *NT Code*.

2 See s 23A, *Bail Act 1982* (NT).

good chance of success on appeal, which may afford sufficient reason to grant bail, and what is encountered in most cases, namely where it is impossible to make any proper assessment of the prospects of success on appeal, which can only be viewed in a very preliminary and cursory manner. His Honour held (at [13]) that, standing alone, fairly arguable grounds of appeal, or even one which has reasonable prospects of success, cannot constitute exceptional circumstances justifying the grant of bail pending appeal. To be granted appeal bail, the applicant must be 'most likely to succeed on appeal', that is, there must be 'a ground of appeal which is most likely to succeed and one which can be seen without detailed argument'.

[11] His Honour also set out (at [16]-[19]) the competing matters of public policy operating when an application for appeal bail is made. Those remarks culminate with the observation that there will be injustice if an applicant serves time in custody which the appeal court subsequently concludes they should not have served, as such an outcome offends every principle of criminal justice and, if persuaded that there is a real risk of injustice of that kind, the court will strive to eliminate that risk.

[12] His Honour held (at [20]) that it is incumbent upon a convicted person to show the Court of Criminal Appeal that there is an issue of real substance about whether the trial process has in some significant way been flawed or that the jury verdict was unreasonable, and the onus is

on the convicted person to show why bail should be granted and that the reason for granting bail is exceptional.

Facts apparently undisputed

[13] It appears that the following facts were not disputed at trial. The applicant was living in Los Angeles and travelling back and forth to Alice Springs where he had previously lived and still maintained a financial planning business. He and Roshani Byerley ('Byerley') had been in a relationship, which involved meeting up when the applicant visited Alice Springs, communicating with each other and Byerley having access to a storage shed rented by the applicant in Alice Springs.

[14] In December 2017, Byerley came to the notice of Alice Springs police after a mobile phone belonging to Zianna Clarke ('Clarke') was seized. Byerley's name was stored in the phone as 'Coke girl' and text messages revealed an apparent cocaine supply by Byerley to Clarke on 16 December 2017. Police launched an investigation into Byerley.

[15] On 31 July 2018, a package addressed to Byerley's post office box in Alice Springs was intercepted by customs officers in Sydney, sent from Los Angeles on 16 July 2018. It contained a helmet with 40.2 grams of cocaine inside it. An inert substance was substituted for the cocaine in Sydney, the package was reconstructed and forwarded to Northern Territory police, who deposited it at the Alice Springs post office for

collection. At the time the package was sent from Los Angeles, the applicant was in Australia.

[16] On 13 August 2018, Byerley collected the package. She returned it to the parcel hatch a short while later after becoming suspicious that she was under police surveillance. She went home but returned to the post office and collected the package later that day. She drove to her workplace in Amoonguna and buried the inert substance and disposed of the packaging. She took the helmet and put it in the applicant's storage shed.

[17] On 14 August 2018, Byerley was arrested. A bank card in the name of the applicant was found in her unit during a search under warrant, as were two mobile phones and a small amount of cocaine. On that day, Byerley participated in an electronic record of interview but made 'no comment' answers. On 21 August 2018, she participated in a second interview and made a statement.

Byerley's statements

[18] Byerley's interview and statement implicated the applicant as the sender of the helmet package. She said that, in communications with the applicant via an encrypted communications application known as 'wickr', they had decided she should return to the post office, collect the package and bury its contents at Amoonguna until they decided what to do with what they thought was cocaine. Byerley also said that

the applicant had sent her two previous packages containing cocaine, secreted in a clock and a toy robot. She said that when the applicant had been in Alice Springs at the end of 2017, the two of them had formed a plan to import cocaine from the United States and sell it in Alice Springs. She said the clock package contained 15 grams of cocaine, which she had sold in Alice Springs. When the applicant returned to Alice Springs, she had given him his share of the proceeds, which he hid inside the clock. The only purchaser of the cocaine Byerley identified was Clarke.

[19] Byerley stated that the robot package had arrived in about June 2018. She used a 'drug kit' provided to her by the applicant to process the cocaine into deals of one gram each, yielding 20-21 deals. Byerley said she sold the cocaine and deposited the applicant's share of the proceeds into his bank account, to which the bank card related. Byerley only identified one person as a buyer of the cocaine from the robot package, Steven Hugen ('Hugen'). Byerley said she supplied him 4-5 grams in around June 2018. In a later statement, she said the supply to Hugen was 19 grams. This change was said to be based on text messages found by police on one of the mobile phones found during the search of Byerley's unit.

[20] Byerley said she sold the cocaine from the clock and robot packages for $500 per gram, with her share being $100 per gram and the rest going to the applicant.

The Crown case at trial

The relevant *Cth Code* provisions

[21] Section 307.2(1) of the *Cth Code* provides (relevantly) that a person commits an offence if: (a) the person imports a substance; and (b) the substance is a border controlled drug; and (c) the quantity is a marketable quantity.

[22] The term 'import' is defined by s 300.2, which provides that 'import' means import the substance into Australia and includes: (a) bring the substance into Australia; and (b) deal with the substance in connection with its importation. Cocaine is a 'border controlled drug' (s 301.4(a) and r 14 and Schedule 2, item 43 of the *Criminal Code Regulations 2019* (Cth) ('CCRs')).

[23] A marketable quantity of cocaine comprises 2 grams (ss 300.2, 301.11, item 1 and r 14 and Schedule 2, item 43 of the CCRs).

[24] Section 311.4(1) of the *Cth Code* provides that, in proceedings for an offence against s 307.2, the prosecution may prove the element of the offence relating to the quantity of border controlled drug by proving that the defendant was engaged in an organised commercial activity that involved repeated importing of border controlled drugs and that the relevant quantity of a border controlled drug was imported in the course of that activity. Section 311.4(2) provides that it is not necessary for

the prosecution to specify or prove the exact date of each occasion of import or the exact quantity imported on each occasion.

[25] The term 'organised commercial activity' is not defined.

[26] Section 311.7(1) provides that, if the prosecution intends to rely on s 311.4, the fact that it intends to do so must be set out in the charge and a description of the conduct alleged for the purposes of s 311.4 must be set out in the charge or provided to the accused within a reasonable time before the proceedings.

The conduct alleged

[27] In accordance with the requirements of s 311.7 of the *Cth Code*, the Crown provided the accused with particulars of the charges in the indictment.[3] A copy of those particulars was provided by the Crown to the jury at trial.

[28] Count 1 of the indictment indicates the prosecution's intention to rely on s 311.4. In its particulars, the Crown alleged an organised commercial activity involving the importation of the cocaine Byerley said was in the clock and robot packages. The particulars to count 1 stated that the clock package contained 15 grams of cocaine and the robot package contained 28 grams.

[29] Count 2 charged the importation of the cocaine in the helmet package.

3 Robson Affidavit, Annexure SAR1.

[30] Count 3 charged the applicant as an aider, abettor, counsellor or procurer of Byerley in her supply of a commercial quantity of cocaine from the clock and robot packages.

[31] Count 4 charged the attempted supply of cocaine from the helmet package.

[32] Count 5 charged receipt of the $18,000 in bank deposits as 'tainted property', that is, property obtained directly or indirectly from the commission of an offence against Subdiv 1 of Div 1 of Part II of the *MDA*. There was no particularisation of the offence said to have been committed. It appears to have been the position of both parties at trial that this referred to Byerley's supply of the cocaine from the robot package.

[33] The Crown's case depended heavily, but not exclusively, on Byerley's evidence. She had received a reduced sentence for agreeing to give evidence in the applicant's trial. The trial judge gave a reliability warning in accordance with s 165(1)(d) of the *Evidence (National Uniform Legislation) Act 2011* (NT). She was cross-examined for three days. Several motives for falsely accusing the applicant were put to her. Counsel for the applicant submitted that her evidence contained many inconsistencies, contradictions, vagaries and apparent recent inventions.

[34] Counsel for the respondent agreed that, in at least one way, Byerley's evidence was unreliable. In particular, for the purposes of this application, counsel for the respondent pointed to evidence given by the police officer in charge of the investigation. His evidence was to the effect that Byerley's evidence effectively that the robot package contained only 20-21 grams of cocaine was inconsistent with the evidence of $18,000 in bank account deposits because, on Byerley's evidence that the applicant received $400 for each gram she sold, that amount would have accounted for 45 grams of cocaine in the robot package. The officer expressed the view that Byerley's evidence about the quantity of cocaine in the robot package was unreliable. Counsel for the respondent submitted that, on the basis of the officer's evidence, it was reasonably possible to find that the robot package contained 45 grams of cocaine.

The defence case at trial

[35] As to counts 1 and 3, the issue was whether the clock and robot packages even existed and, if so, whether cocaine supplied by Byerley had come from the clock and robot packages which had been sent by the applicant or by someone he had arranged to send them.

[36] As to count 2, the issue was whether the applicant had been involved in the sending of the helmet package from Los Angeles, given that he was in Australia when the package was sent and there was no evidence about the person who sent the package or their connection to the

applicant. The Crown had intended to rely on DNA evidence attributing DNA found on the helmet to the applicant, but it was ruled inadmissible as it could not be established that the applicant's DNA had not been deposited on the helmet by secondary transference when Byerley stored it at the applicant's shed or when police removed it from there.

[37] As to count 5, the issue was proof that the money deposited into the bank account had been obtained from the commission of an offence against Subdiv 1, Div 1, Pt II of the *MDA*.

Grounds 1(i) and (ii)

[38] Counsel for the applicant argued that the only evidence about the clock and robot packages and any link between them and the applicant was from Byerley.

Inconsistent verdicts – ground 1(ii) and counts 1 and 3

[39] Put briefly, the test for factual inconsistency is one of logic and reasonableness.[4]

[40] Under s 307.2 of the *Cth Code*, without reference to s 311.4(1), to find the applicant guilty on count 1, the jury need only have found that the applicant had sent 2 grams of cocaine to Byerley. Her evidence was that he sent both the clock package and the robot package, each of which contained more than 2 grams of cocaine.

---

4 *MacKenzie v The Queen* (1996) 190 CLR 348.

[41] Counsel for the applicant argued that, in finding the applicant not guilty, the jury must have held a reasonable doubt that neither package was sent by the applicant to Byerley, and to find the applicant guilty on count 3, they must have found that the applicant had aided, etc Byerley's supply of cocaine by sending her the clock package or the robot package or both. There is thereby said to be an inconsistency between these two verdicts.

[42] As a matter of logic and reason, if the Crown case was that count 1 was committed by sending both the clock and the robot packages and not otherwise, the jury could logically and reasonably have held a doubt about the applicant having sent one package, but be satisfied that he had sent the other. On that basis, the jury could, logically and reasonably, have found that the applicant had aided, etc Byerley's supply of cocaine by sending her one or the other of the packages, but not both. There would then be no logical or reasonable inconsistency with the guilty verdict on count 3.

[43] That was the Crown case as set out in its particulars and as put in its closing address,[5] the latter emphasising that the evidence in relation to the robot package was probably stronger than the evidence in relation to the clock package because of Byerley's evidence that the bank

5 Transcript, pp 746-747; 749.

deposits were made after the robot package arrived and related to its sale, and because of the bank deposits themselves.

[44] By its reliance on s 311.4(1), the Crown particularised and put a case in which the applicant was involved in an organised commercial activity that involved repeated importing of drugs and that the marketable quantity of them was imported in the course of that activity. On that case, the repeated importing comprised the sending of both packages.

[45] Again, that was how the case was put in the Crown's particulars and the Crown's closing address.[6] It is also how the trial judge explained the case to the jury in the aide memoire, which identified an element of the offending in count 1 as being that the applicant 'imported cocaine twice into Australia by sending it from the USA to … Byerley (once in a package containing a clock and once in a package containing a toy robot)'.[7]

[46] Counsel for the applicant argued that such a case would have been contrary to the law because it conflated facilitation of proof of the element as to the quantity of drugs imported with what is required at law for proof of an offence against s 307.2. It was argued that, by the acquittal, the applicant has been acquitted of both acts constituting the 'rolled up' charge in count 1, and that acquittal on count 1 required the jury to have proceeded to determine the other counts on the basis that

6 Transcript, pp 745, 746.

7 Robson Affidavit, Annexure SAR4, [6(b)].

neither of those acts occurred, meaning there was necessarily inconsistency between the verdicts on count 1 and count 3.

[47] There are a number of complex issues arising from that argument. First, whether such a case would have been contrary to the law. That raises the sub-issue regarding the legal effect and operation of s 311.4(1) of the *Cth Code*, particularly what effect, if any, it has on the manner in which the quantity element in s 307.2 is to be established once the prosecution elects to proceed by proof of that element by proving the matters in s 311.4(1)(c) and (d). Given the possibility of unfairness to an accused (consistently with decisions such as *King v The Queen* (1986) 161 CLR 423 and *Tran v The Queen* (2000) 105 FCR 182) were the prosecution permitted to put a case at trial on the basis of proof of the matters in s 311.4(1)(c) but then permitted to put a case in closing which relied not on proof of the repeated importing under an organised commercial activity, but simply on a single instance of importing which on the evidence at trial could be found to be a marketable quantity, it seems to me that there is a real argument that s 311.4(1) should be construed as if it replaces the quantity element in s 307.2 rather than simply supplements it.

[48] Secondly, whether a charge on the basis of s 311.4(1) is a 'rolled up' charge that is to be treated in the same way as what counsel for the applicant put was an analogous charge, namely a charge of sexual

intercourse without consent comprising multiple acts each of which might be found individually to constitute that offence.

[49] Thirdly, whether an acquittal on a charge against s 307.2 read with s 311.4(1) is necessarily to be taken to be an acquittal of each and all of the acts of repeated importation put in the charge, including in this case where the case of the Crown and the trial judge's directions were effectively to the contrary.

[50] It may be that these are simply different ways of expressing the same essential issue. Even so, they demonstrate the complexities which the Court will have to address in determining this ground of the appeal. That, in turn, demonstrates that the asserted inconsistency between grounds 1 and 3 is not a matter which can be decided without detailed argument. Consequently, this is not a ground of appeal which can be seen to most likely succeed without detailed argument.

[51] Counsel for the applicant also argued inconsistency between counts 1 and 3 on the basis that the commercial quantity needed to be established for count 3 was 40 grams, which could not have been established on the basis of the importation of only one of the clock or the robot packages, given Byerley's evidence that the clock package contained 15 grams and the robot package contained 20-21 grams. Counsel for the respondent argued that, given the evidence of the bank deposits totalling $18,000 (which indicated supply of 45 grams on the

basis of Byerley's evidence that the applicant got $400 per gram she supplied) and the evidence of the police officer in charge of the investigation that Byerley's evidence about how much cocaine was in the robot package was unreliable, the jury could logically and reasonably have found that there was 45 grams of cocaine in the robot package and hence the applicant guilty on count 3 and not guilty on count 1. I accept the respondent's argument. On the basis of that evidence, there is no inconsistency.

[52] Particularly in light of the complex legal issues I have referred to, I do not accept that, in reliance on this proposed ground of appeal, there are special or exceptional circumstances that justify the grant of bail.

Inconsistent verdicts – ground 1(ii) and counts 1 and 5

[53] Section 41 of the *MDA* provides that if, in relation to a charge of an offence against s 8, the jury finds that the accused committed the offence in respect of some but not all of the property alleged by the prosecution, the person is not by reason only of that finding entitled to be acquitted, but rather must be found guilty of the offence in respect of the property so found.

[54] To find the applicant guilty on count 5, the jury must therefore have found that at least some of the $18,000 in the bank account was the proceeds of Byerley's supply of cocaine.

[55] On the basis of Byerley's evidence that the applicant's share of the proceeds of her supply of the cocaine was $400 per gram, $18,000 would require Byerley to have supplied 45 grams of cocaine. On Byerley's evidence as to the quantities of cocaine in the clock package and the robot package, the proceeds from them respectively would have been $6,000 and $8,000-$8,400. The proceeds from both packages together would have been $14,000-$14,400.

[56] On Byerley's evidence as to quantities, neither package could have yielded proceeds for the applicant of $18,000. Even both packages together could not have done so. However, s 41 of the *MDA* does not require that the jury be satisfied the entire $18,000 was from Byerley's supply of cocaine.

[57] In any event, for the same reasons relating to the asserted inconsistency between counts 1 and 3 and the reliability of Byerley's evidence as to the quantity of cocaine in the robot package, if the jury rejected her evidence on this point, and inferred from the amount of the bank deposits that the robot package contained 45 grams of cocaine, it was logical and reasonable for the jury to find the applicant not guilty on count 1 because only the robot package, and not both, of the packages were imported by the applicant and guilty on count 3 because the robot package contained 45 grams of cocaine. On that basis, there was no inconsistency.

[58] Consequently, I do not accept that, in reliance on this proposed ground of appeal, there are special or exceptional circumstances that justify the grant of bail.

Not supported having regard to the evidence – ground 1(i) and counts 3 and 5

[59] Whether it was open on Byerley's evidence for the jury to find that one but not the other of the clock and robot packages were sent, because of inconsistencies or discrepancies in her evidence, requires detailed argument and detailed assessment of both her evidence and the other evidence led in the case including the timing and amounts of the bank deposits, her communications with the applicant and text messages on her phone. In my view, it is not the kind of ground which falls within the scope of the 'strong prospects of success without detailed argument' basis for special or exceptional circumstances.

[60] The same applies to ground 1(i) in relation to count 5. A detailed review of Byerley's evidence, and inconsistencies or discrepancies therein, about the timing, quantity and recipients of supply transactions, the amount of various bank account deposits and their relation to her evidence about the division of proceeds between the applicant herself appears to me to be beyond the scope of the 'strong prospects of success without detailed argument' basis.

[61] Counsel for the applicant effectively conceded as much in oral argument.

Not supported having regard to the evidence / latent duplicity – ground 1(iii) and count 5

[62] There was no particularisation of the source of the cocaine said to have been supplied by Byerley and yielding the $18,000 in proceeds. The applicant was not put on notice that there was any source of cocaine other than the clock and the robot packages. In reliance on the acquittal on count 1, counsel for the applicant argued that: (a) there was no evidence of any alternative source of cocaine; and (b) count 5 had to relate to some other cocaine, giving rise to duplicity in the count by latent ambiguity.

[63] Effectively, this ground suffers the same difficulties as the grounds relating to inconsistency with count 1. The Crown did not put a case to the jury involving any other cocaine. As set out above, it submitted that the jury could find that the robot package contained 45 grams of cocaine.

[64] This ground does not give rise to special or exceptional circumstances justifying the grant of bail.

Ground 2 – no direction on the elements

[65] Ground 2 alleges that there was a substantial miscarriage of justice because the jury were not directed on the fault element applicable to the offence in count 2 nor the bases in law upon which liability could be fixed on the applicant for conduct committed by another person. Counsel for the applicant argued that the jury were directed as if the

applicant's guilt depended merely upon proof that he had arranged for another person to send the helmet package from Los Angeles to Australia, which was said to effectively be a direction of strict liability.

[66] Counsel for the applicant argued that the jury should have been directed about: (i) commission by proxy; (ii) liability as an aider, abettor, etc; or (iii) joint criminal enterprise, and should have been directed about the fault element for the element of the offence as to the substance being a border controlled drug, which is recklessness (s 307.2(2), *Cth Code*).

[67] Counsel for the respondent argued that no direction was necessary as regards commission of the offending by proxy or otherwise because what the Crown relied on was the effect of the words 'deal with the substance in connection with its importation' in the definition of 'import' as used in s 307.2. Its case at trial was put on the basis that arranging for someone else to post a package containing cocaine fell within those words. No issue with that construction of the words was taken by the defence at trial and counsel for the applicant declined, on this application, to engage in a detailed legal argument about the scope and effect of those words in that definition and whether they capture what was put by way of the direction.

[68] The fault element applicable to the offence in s 307.2 relates to the character of the substance as a border controlled drug and comprises recklessness (s 307.2(2)). Counsel for the applicant argued that a

failure to direct a jury about a fault element is a fundamental error going to the root of the proceedings. Reliance was placed on the decision in *Witt v The Queen* [2018] NTCCA 9. That case involved a direction being given which described the relevant fault elements as intention or foreseeability of consequences. The Court held that the latter aspect was erroneous and that the misdirection was fundamental.

[69] Counsel for the applicant argued that a failure to direct about a fault element at all was even worse. No authority was referred to for that proposition.

[70] I note that defence counsel at the trial did not seek any re-direction putting the fault element before the jury. To my mind, that supports a conclusion that, in the context of the trial as a whole, a re-direction was not required[8] because the absence of a direction about this fault element was not as fundamental as counsel for the applicant submitted. The trial as a whole included that the defence case on count 2 was a mere denial and there was circumstantial evidence in the Crown case linking the helmet package to the applicant, namely evidence in the form of communications between the applicant and Byerley which could be construed to relate to her collection of the package, and the package itself contained evidence of the link because it was posted from an area near where the applicant had lived in Los Angeles, and contained an

8 See *GBF v The Queen* (2020) 94 ALJR 1037 at [25] per the Court.

address and phone number which were very similar to those used by the applicant.

[71] In such circumstances, failure to give a direction about the fault element as to the nature of the substance in the package takes a far lower significance than the misdirection in *Witt v The Queen*. Its actual significance would require consideration of the evidence given in the trial as a whole and the judge's summing up as a whole. Again, this is not a ground of appeal which can be seen to most likely succeed without detailed argument.

[72] Consequently, I do not accept that, in reliance on this proposed ground of appeal, there are special or exceptional circumstances that justify the grant of bail.

Strong prospects and multiple counts

[73] Hiley AJ's sentence was made up as follows:

(a) four years on count 2, commencing 8 October 2021;

(b) six years on count 3, commencing 6 months after commencement of the sentence on count 2; and

(c) three years on count 5, concurrent with the sentence on count 3.

[74] A non-parole period of four years and three months was imposed, which was 70% of the sentence on count 3, as required by s 55(1) of the *Sentencing Act 1995* (NT).

[75] In these circumstances, as counsel for the applicant conceded in oral argument, the absence of strong prospects of success on all grounds effectively precludes a finding of special or exceptional circumstances which justify the grant of bail. Even if the applicant were to be successful in his appeal against the findings of guilt on two of the counts, he would nevertheless be imprisoned for a significant period of time in relation to the other. Even assuming that the appeal against conviction of the offence with the shortest sentence was the only one without strong prospects, the applicant would properly be subject to a sentence of three years imprisonment. The appeal will be heard and determined before the expiry of the term and what would be the appropriate non-parole period of one and a half years (applying ss 53 and 55 of the *Sentencing Act*).

Disposition

[76] The application for bail is dismissed.
