CITATION:	*The Queen v AF* [2017] NTSC 60
PARTIES:	THE QUEEN
	v
	AF
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21555366 & 21559875
DELIVERED ON:	3 August 2017
DELIVERED AT:	DARWIN
HEARING DATES:	28 April 2017
JUDGMENT OF:	BLOKLAND J

CATCHWORDS:
CRIMINAL LAW – Mental impairment – finding of not guilty by mental impairment following plea of not guilty by mental impairment – consequences of finding – relevant considerations – finding that AF unlikely to endanger himself or others – AF released unconditionally.

Criminal Code (NT) s 43C, s 43H, s 43I(2)(b), s 43ZLA(b), s 43ZM, s 43ZN. *R v Madrill* (2013) 275 FLR 449 applied.
The Queen v RFK [2013] NTSC 40 considered.

REPRESENTATION:

Counsel:

Crown:	J.Stuchbery
Accused:	J.Truman

Solicitors:

Crown:	J.Stuchbery
Accused:	J.Truman

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

The Queen v AF [2017] NTSC 60
No. 21555366 & 21559875

BETWEEN:

THE QUEEN
Appellant

AND:

AF
Respondent

CORAM: BLOKLAND J

REASONS FOR JUDGMENT

(Delivered 3 August 2017)

Introduction

[1] On 28 April 2017 AF pleaded not guilty by reason of mental impairment to 4 counts on indictment. These are brief reasons for accepting the pleas on that basis, dealing with the matter under Part IIA of the *Criminal Code* and ordering his unconditional release under s 43I(2)(b) of the *Criminal Code*, having had regard to s 43ZM and s 43ZN.

The history of the proceedings

[2] The conduct that is the subject of the charges took place on two dates. Counts 1 and 2, aggravated unlawful entry and aggravated assault, were

committed on 9 November 2015. Counts 3 and 4, making a threat to kill to two persons with intent to cause them fear, occurred on 5 December 2015.

[3] On 17 November 2015, AF was granted conditional bail in the Court of Summary Jurisdiction with a condition not to approach or enter any place where the victim in count two of the first indictment was living, working, staying or visiting. By the offending on 5 December 2015, he breached this condition in multiple ways by threatening her and offending again. He was arrested shortly afterwards and remanded in custody.

[4] AF was in custody from 5 December 2015 until 19 April 2016. During that period, he was diagnosed with chronic schizophrenia. He was seen while in custody by a psychiatrist on 14 March 2015. Dr Miach, the consultant forensic psychiatrist, reported[1] the schizophrenia was probably due to chronic methamphetamine use. He was treated immediately with antipsychotic medication, Olanzapine 5mg, twice per day. Prior to the diagnosis by Dr Miach, AF had been seen by Dr Ellis who found AF was experiencing auditory hallucinations. Dr Ellis considered AF to have been suffering from chronic paranoid schizophrenia that had been untreated for at least 10 years. Dr Miach commenced treating AF after first seeing him on 14 March 2016 at the 'at risk' cells of the Darwin Correctional Centre. He was referred to a psychiatrist as concern had been expressed about his mental state, as he was experiencing prominent auditory hallucinations and had expressed thoughts of self-harm. Once AF began treatment, Dr Miach stated

[1] Exhibit P3, Report of 1 December 2016.

he made consistent recovery. The intrusive and derogatory nature of the auditory hallucinations diminished.

[5] On 19 April 2016, AF was released from custody on bail with conditions that included directions as to residence, supervision, attendance and compliance with mental health treatment including medication, to be subject to testing for the presence of illegal drugs and not to have contact directly or indirectly with the victims or their families. On a number of occasions, the bail conditions were varied to suit changing circumstances. At the time of AF's release from custody, his medication was doubled to 10 mgs twice per day. He was still hearing voices but they were not as intrusive. He commenced weekly counselling services at Amity Drug and Alcohol Services and was followed up on a monthly basis at the Tamarind Centre. Dr Miach reported that his condition gradually improved.

[6] Reports were ordered on 31 August 2016 and 24 October 2016, pursuant to s 43G of the *Criminal Code*, requiring AF to be examined by a psychiatrist and the results of the examination to be reported to the Court on the question of mental impairment.

[7] Both Dr Tony Miach and Dr Mrigendra Das reported that at the time of the offending behaviours on 9 November 2015 and 5 December 2015, AF was suffering from acute symptoms of untreated paranoid schizophrenia. Both psychiatrists regarded his actions at the time of the offending, that included trespassing and confronting his next door neighbours, were based on his

delusional beliefs that the voices which were menacing in nature were coming from the neighbour's premises. Both psychiatrists stated it was clear he was suffering from psychotic experiences. Pursuant to s 43C of the *Criminal Code* both were of the opinion that as a result of his mental illness, AF was unable to know the nature and quality of his conduct as he genuinely believed that his next door neighbour was the source of the menacing and derogatory voices. In an attempt to obtain some relief from his mental anguish he took a hammer to threaten his perceived aggressors. He was unable to know the conduct was wrong as he could not reason with a moderate degree of sense or composure about whether the conduct, as perceived by reasonable people, was wrong. Further, he was unable to control his actions at the time.

[8] In the face of such clear evidence, it is unsurprising the parties sought to resolve the matter pursuant to s 43H of the *Criminal Code*. Section 43H provides that if the parties to a prosecution of an offence agree, the Court may, at any time during the trial of the offence, accept a plea and record a finding of not guilty of the offence because of mental impairment. On 28 April 2017, the plea was accepted by the Court to all counts on the basis of the agreement of the parties and the psychiatric material provided. It may also be noted that the agreed facts between the parties indicate behaviours and language that from a lay person's point of view well raise a suspicion, belief or likelihood of distorted thinking or a mental health problem.

[9] In accepting the plea of not guilty by reason of mental impairment I was referred to and respectfully adopt the construction of s 43H and associated parts of the *Criminal Code*, as set out by Barr J in *R v Madrill*.[2] In my view, the same course was clearly open and there was no matter identified that would or should prevent the Court from exercising the discretion to proceed accordingly.

The consequences of accepting the pleas of not guilty by reason of mental impairment

[10] As a result of acceptance of AF's pleas, the finding recorded was that he is not guilty because of mental impairment on all counts. Section 43I(2) of the *Criminal Code* directs the Court to either declare the person liable to supervision, or to order that the person be released unconditionally. When making this determination, the Court must apply the principle of the least restrictive means balanced against the protection of the community, as enshrined in s 43ZM of the *Criminal Code*: "In determining whether to make an order under this Part, the court must apply the principle that restrictions on a supervised person's freedom and personal autonomy are to be kept to the minimum that is consistent with maintaining and protecting the safety of the community."

[2] [2013] NTSC 23; 275 FLR 449.

[11] The matters the Court must take into account are set out in s 43ZN of the *Criminal Code*:

> (1) In determining whether to make an order under this Part, the court must have regard to the following matters:
>
> (a) whether the accused person or supervised person concerned is likely to, or would if released be likely to, endanger himself or herself or another person because of his or her mental impairment, condition or disability;
>
> (b) the need to protect people from danger;
>
> (c) the nature of the mental impairment, condition or disability;
>
> (d) the relationship between the mental impairment, condition or disability and the offending conduct;
>
> (e) whether there are adequate resources available for the treatment and support of the supervised person in the community;
>
> (f) whether the accused person or supervised person is complying or is likely to comply with the conditions of the supervision order;
>
> (g) any other matters the court considers relevant.

[12] Counsel for AF made detailed submissions in relation to each relevant consideration. Counsel for the Crown took a largely neutral position. Submissions from both counsel were constructive and very helpful.

[13] In respect of whether AF is likely to be a danger to himself or others because of his mental impairment, it is relevant to review the behaviour giving rise to the charges and what has occurred since that time.[3] As has been noted already, AF was likely to have been suffering from a mental illness for a period of 10 years before the diagnosis. Although not treated during that time, until the offending behaviour exhibited on 9 November 2015, there is no relevant criminal history. It is of concern that less than one month later, he again behaved in a threatening manner towards the victims, however he had still not been diagnosed with a mental illness. The connection of the mental illness with a previous serious drug problem is a concern, however, it is not the only part of AF's history that is relevant in the determination of whether he should be released unconditionally. The Information for Courts shows his previous court matters were primarily traffic offending of a regulatory nature and he has one previous conviction for drug possession. For all previous court matters he was dealt with by way of fine. Notwithstanding the significant long standing mental illness, there is no previous history of behaviours that are likely to endanger himself or another person. It should also be noted he is now 35 years old.

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[3] Counsel have referred me to Barr J's reasons in *The Queen v RFK* [2013] NTSC 40 and I have adopted a similar approach.

[14] It is relevant to also consider the gravity of the offending in question. In brief, the facts with respect to the conduct on 9 November 2015, are that AF was attempting to open, or break into, his neighbour's door. The victim yelled "stop, go outside". AF forced his way into the premises, swearing and telling the victim not to say anything. He was holding a hammer and a socket wrench. He verbally abused the victim while raising the hammer above his head and waving it towards her in a threatening manner. She ran outside but could hear him yelling to open the door. He was arrested shortly after.

[15] In relation to the charges on 5 December 2015, he again entered his neighbour's property, yelling at the occupants "I'm going to kill you and bash you". He was carrying a brown glass bottle in his hand. He continued to shout and swear at them. One of the victims left the premises and chased AF with a baseball bat. AF jumped back over the side fence and into his own yard. He then returned and beckoned one of the victims to come and speak with him. AF's hand was injured. He left again but continued to shout at the neighbours. All residents of the premises sought refuge by locking themselves inside an upstairs portion of the premises. AF was arrested shortly afterwards. He made statements to the police that may be indicative of distorted thinking at that time.

[16] While his offending conduct was of course serious and frightening, it is not in the most serious examples of conduct that might be considered in this context. That is not to diminish its significance or the impact on the victims.

Count one carries a maximum penalty of life imprisonment. However, it is important also to acknowledge that fortunately no physical harm was inflicted on any victim. The gravamen of the offending is in the threats to the safety of the victims, when they were in their own homes and should have felt safe.

[17] Given what has occurred since the offending conduct, I concluded it was unlikely AF would again endanger himself or another person due to his mental impairment. AF's overall history tends to indicate that, notwithstanding a long history of mental illness, likely to have been induced by drug use, conduct of this kind was highly unusual, indeed aberrant. Prior to the diagnosis of mental illness, the offending conduct is likely to have been regarded as simply stemming from uncontrolled anger. But that was not the case. There were indications from the material provided by members of his family that in the past AF had heard voices and asked other persons if they could hear them too. It is noted in the facts that when he spoke to police on 5 December 2017, he talked about a bird breaking the window.

[18] At the time of taking the pleas and hearing submissions, AF had been on bail conditions for over a year. The conditions were initially very strict, but were varied and relaxed somewhat in the immediate six months prior to the hearing. The compliance report from Community Corrections prepared for the Court proceedings of 24 October 2016, advised that AF had been highly compliant: all drug tests had been clear; after his diagnosis and release from prison he attended all appointments at Top End Mental Health; he was

compliant with medication and was undertaking Alcohol and Other Drugs counselling at Amity Community Services. He had not contacted the victims. Community Corrections noted at that time that AF "would benefit more from not being placed on an order and concentrate on employment and continuing counselling and Top End Mental Health appointments."

[19] At the time of the hearing AF had continued with counselling, improving his insight into the damage that previous drug use had done. He also received counselling about appropriate levels of alcohol, which was a matter raised by Dr Das. He was fully compliant with the requirements of Top End Mental Health Services. His case manager was present in Court for the hearing. He has been drug-free since his arrest on 5 December 2015. He had been drug tested in the community since his release on 19 April 2016. On becoming aware of his mental illness in March 2016, the material indicates he has worked hard to understand the illness and to comply with the recommended treatments including abstaining from taking drugs.

[20] While at the time of the offending behaviour, AF presented as a danger to the particular victims and there was a need for protection of persons from that danger, in my view, the risk was reduced to such a level that he could no longer be said to be a danger to any person.

[21] In terms of the nature of the mental impairment and its relationship to the offending conduct, it is clear from the psychiatric reports and the agreed facts that the behaviours resulting in the charges were completely the result

of paranoid schizophrenia, characterised by persecutory delusions, auditory hallucinations, disorganised behaviour and impaired insight.

[22] In terms of whether there are adequate resources available for treatment and support, Top End Mental Health Services and particularly the Tamarind Centre were able to continue support. There was also strong support from his family, particularly his brother, MF, and GG, his employer. MF provided very detailed information[4] to the Court about the family history, including deeply disruptive childhood events and the consequences of the death of their brother. Because of the circumstances, AF blamed himself for the death and did not appear to recover from the grief.

[23] Previously, AF had successfully completed an apprenticeship as an auto electrician. He had also volunteered at the Church attended by the family and at various community events. He is acknowledged in his family as being someone who can make useful things and is creative. After the death of their brother MF described significant social deterioration of AF, including drug use that consumed him. MF described indications some time prior to the offending that AF may have been hearing voices, but MF was not sure how to assist him. When AF was held on remand, the family arranged to have him seen by a psychiatrist. Since treatment, MF describes AF as being back to his "happy, fun loving, generous and caring character". MF has described the family dynamics in detail, including how the family intend to continue to assist him in practical ways.

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[4] Exhibit D1.

[24] Since his release on bail AF has been employed in a long term business as an auto electrician, initially part time to enable compliance with earlier bail conditions, but by the time of the hearing, he was working full time. His employer GG told the Court he is very happy to have AF as an employee. GG states AF is a dedicated worker and has been very helpful. He stated AF's 17 years of experience shows and he credits AF with increasing his clientele. He hopes to make AF a business partner.[5]

[25] Dr Miach reported AF has made an almost full recovery.[6] He noted AF's compliance and motivation to continue on the different trajectory of his life. Dr Miach suggested the Court not find AF liable to supervision. He stated AF has learnt his lesson and genuinely made changes for the better in his life, demonstrated in his attitude and employment. AF agreed to continue with psychiatric supervision on a monthly basis and to maintain his contact with Amity. At the time of the hearing, that was the position.

[26] Dr Das raised the issue of possible relapse, noting that the psychosis was linked to a long standing history of drug use.[7] Dr Das noted the illness is currently in remission. He did mention AF's alcohol use that he said is over the healthy recommended limits for an adult.[8] Dr Das also noted that even with treatment, there is the possibility of relapse that can be precipitated by psychosocial stress and life events. Counsel for the Crown emphasised this

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5 Exhibit D1.
6 Exhibit P3 at 9.2.
7 Exhibit P4 at 7.2.
8 Exhibit P4 at 7.1.

should be considered carefully by the Court, although without particularly urging a view contrary to the conclusion made at the time of the hearing.

[27] In my view, the risks Dr Das identifies are the risks attendant in every conceivable case involving mental impairment. The risk is so diminished in this case, particularly because of the motivation to stay in good health, being engaged in employment and back to living a normal life, that on balance, the residual risk cannot be said to be likely to materialise. The alcohol intake is an apparent reference to AF's history of consuming about six beers when drinking socially and AF is now ensuring two alcohol free days per week. Dr Miach has had longer term involvement with AF and does not express the same concerns. It is the case, as pointed out by counsel for the Crown, that Dr Miach does not engage expressly in the same terms of the description of risk as Dr Das, however it may be inferred that Dr Miach does not have significant concerns in respect of possible relapse. He has treated AF and has been closely engaged with his circumstances.

[28] All matters considered, it was concluded the offending episodes were an aberration, completely caused by the mental illness and essentially a full recovery has been made. There are supports and services available and AF is well motivated to continue to be reviewed voluntarily by Mental Health Services and access the available supports. He is back in full time employment. Balancing all of the considerations, it was concluded AF should be released unconditionally under s 43I(2)(b) of the *Criminal Code*.

[29] In terms of s 43ZN(2)(b) of the Code and informing the victims, counsel for the Crown provided detailed information to the Court outlining his discussions with the victims. He has advised the victims that AF was unwell at the time of the conduct.

[30] One victim was both relieved and happy that the diagnosis had been made and that steps were being taken for AF to be treated. The impact on the victims was severe at the time, resulting in them leaving the premises. Another victim was described by counsel as relieved and satisfied AF had been diagnosed and was receiving appropriate treatment.

[31] Counsel for the Crown did not take issue with respect to aspects of the response to the offending by AF, once he was treated. There were expressions of shame, remorse and sympathy for the victims, insight into his offending and the impact on the victims.

[32] I was persuaded on the material presented, and bearing in mind the neutral position taken by the Crown, that supervision was unnecessary. AF could not be considered a danger to himself or others.

[33] By prior arrangement, these reasons will be forwarded to counsel and will be available on the Court website in due course.
