In the matter of an application by Anthony [2004] NTSC 5

PARTIES:	ANTHONY, Jeremy
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20403462
DELIVERED:	17 February 2004
HEARING DATES:	12 and 13 February 2004
JUDGMENT OF:	MARTIN (BR) CJ

CATCHWORDS:

CRIMINAL LAW JURISDICTION, PRACTICE AND PROCEDURE – BAIL – ABORIGINALS

Application for bail – traditional punishment – whether lawful purpose for the grant of bail

Bail Act (NT) 1982, s 24; *Criminal Code Act* (NT) 1983, s 1.
Steven Barnes (1997) 96 A Crim R 593, considered.
Taikato v The Queen (1996) 186 CLR 454, considered.

REPRESENTATION:

Counsel:

Applicant:	S Southwood QC
Respondent:	A Elliott

Solicitors:

Applicant:	KRAALAS
Respondent:	DPP

Judgment category classification:	A
Judgment ID Number:	Mar0401
Number of pages:	16

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

In the matter of an application by Anthony [2004] NTSC 5
No. 20326538

IN THE MATTER of an Application for bail by:

JEREMY ANTHONY

AND:

IN THE MATTER of the Bail Act

CORAM: MARTIN (BR) CJ

REASONS FOR JUDGMENT

(Delivered 17 February 2004)

[1] The applicant is charged with the manslaughter of his wife and the alternative of doing a dangerous act that caused serious danger to life and thereby caused the death of his wife. The offence is alleged to have occurred on 6 December 2003 at Katherine. The applicant was arrested on 7 December 2003 and has remained in custody since that date. An application for bail was refused by a Magistrate. The oral committal is listed for 17 March 2004.

[2] The applicant is a 23 year old Walpiri Aboriginal man from Lajamanu, a community south west of Katherine. He and the deceased were married in a

cultural manner approximately four years ago. They have two young children. The deceased was from Yuendumu.

[3] The appellant speaks Walpiri as his first language. Kriol is his second language and English his third. He is a "proper Walpiri man" meaning that he is fully initiated in the Walpiri culture and traditional law. He regularly participates in ceremonial activities with his family and community in Lajamanu and the surrounding country.

[4] Counsel for the applicant submitted that the applicant is a good bail risk. The applicant has grown up in the Lajamanu community. His uncle, Mr Peter Jigili, gave evidence that he is willing to guarantee the applicant's attendance at court. Mr Jigili lives at Lajamanu and is also a "proper Walpiri man". He is prepared to have the applicant live with him and to ensure that the applicant does not drink alcohol and does not leave the Lajamanu community. Mr Jigili is able to ensure that the applicant has transport to Katherine for the purposes of the committal proceedings.

[5] Alternatively, if released on bail, the applicant is able to live with his elder sister at Ngukurr, a community east of Katherine which does not permit the consumption of alcohol within the community. The applicant's sister is married and the applicant has a good relationship with his brother-in-law. He will defer to his sister because she is older and his sister is able to ensure that the applicant attends at Katherine for the committal proceedings. The applicant has given an undertaking to the court that if he is released on bail

on condition that he lives at Ngukurr he will not leave that community during the period of bail.

[6] The application for bail is governed by the provisions of the Bail Act 1982 ("the Act"). Section 8 of the Act creates a presumption in favour of bail unless the applicant is charged with offences identified in s 8 or unless the applicant was on a suspended sentence which would be breached if the applicant is convicted of the offence charged. In April 2003 the applicant was sentenced to a period of imprisonment which was suspended. If convicted of the offence with which he is now charged, the applicant would be in breach of that suspended sentence.

[7] In these circumstances, there is no presumption in favour of bail. However, there is no presumption against the grant of bail. In the absence of a presumption, the Act is silent as to which party bears the onus of proof.

[8] Speaking very generally, in my opinion, in the absence of statutory direction the overall burden rests upon the Crown to persuade the court that bail should not be granted. This approach sits well with the general view that, absent statutory direction or good reason, persons who are presumed to be innocent should not be deprived of their liberty. Having made that general observation, however, it is appropriate to recognise that there may be occasions where particular facts or propositions are advanced by the applicant in respect of which an evidentiary onus will lie upon the applicant.

[9] All applications for bail are governed exclusively by the provisions of the Act. In particular, s 24 identifies the only criteria that the court is to consider. I emphasise that s 24 is quite specific and it is only the matters identified in s 24 that the court is permitted to take into consideration.

[10] The first matter to be considered is the probability of whether or not the applicant will appear in court in answer to the terms of the bail. Section 24(1)(a) directs the court to consider that probability having regard only to the matters identified in s 24(1)(a)(i)-(iv). These factors include the antecedents of the applicant, the circumstances of the offence, the strength of the evidence and any specific evidence indicating whether or not it is probable that the applicant will appear in court.

[11] As mentioned, the applicant is a "proper Walpiri man" who has grown up in the Lajamanu community. He has a record of prior court appearances dating back to 1995. On a number of occasions warrants have been issued because the applicant failed to appear at court when required to do so by summons or pursuant to a bail agreement. From 1995 until 2000 the applicant was convicted of a number of offences of dishonesty. His offending since that date has primarily centred on driving offences.

[12] Notwithstanding the applicant's prior record of offending and his previous failures to appear, having heard the evidence I am satisfied that if the applicant is granted bail he will probably appear at court when required to do so. Whether the applicant resides at Lajamanu or Ngukurr, provided

appropriate conditions are put in place, it is probable that he will answer his bail.

[13] The second criteria that s 24 requires the court to consider is "the interests" of the applicant. However, in taking into account the interests of the applicant, s 24(1)(b) requires the court to have regard only to the matters identified in s 24(b)(i)-(iv).

[14] Included in the matters to be considered in assessing the interests of the applicant is the period that the applicant may be obliged to spend in custody if bail is refused. The committal is listed to commence on 17 March 2004. If the applicant is committed for trial it is likely that the trial would not occur for many months.

[15] Section 24(1)(b)(iii)directs attention to the interests of the applicant having regard to his needs to be free "for any lawful purpose" being a lawful purpose in addition to the lawful purpose of preparing for his appearance in court and obtaining legal advice. I interpret "lawful purpose" as meaning a purpose not forbidden by law (*Taikato v The Queen* (1996) 186 CLR 454 at 460).

[16] Senior counsel for the applicant submitted that there is a need for the applicant to be free for cultural purposes, namely, undergoing lawful traditional punishment. It is the applicant's case that his family and the family of the deceased, together with the Elders of the Lajamanu community, have agreed upon the form of traditional punishment to be

administered to him and that the administration of the punishment is in his interests. The applicant consents to that punishment. He is concerned that if he does not undergo the punishment he may be cursed by Aboriginal magic which might kill him while he is in gaol. It was submitted that the administration of the punishment is also in the applicant's interests because his family may suffer reprisals for the death of the deceased if he does not undergo the punishment.

[17] The application plainly raises the difficult question as to whether it is permissible or appropriate for a court to grant bail in the knowledge that the applicant, once he is released from custody, will undergo traditional punishment. It also raises the question as to whether it is permissible or appropriate for a court to grant bail, not just with the knowledge that traditional punishment will follow release, but on conditions that will in substance facilitate the administration of the traditional punishment. In the matter under consideration I am asked to make orders which will require the applicant to live in the Lajamanu community under the supervision of his uncle, Mr Jigili. If I make such an order, in substance I will be facilitating the imposition of the traditional punishment by requiring the applicant to live in the community where it is intended that the punishment will be administered.

[18] In 1997 an application of a similar nature was made by Steven Barnes who was charged with the manslaughter of his nephew. Barnes had indicated he intended to plead guilty. The basis of the application was to enable Barnes

to return to his community at Lajamanu and receive traditional punishment for the killing. Barnes gave evidence of his willingness to undergo the punishment.

[19] Evidence was given that the community had discussed the punishment to be administered to Barnes and that punishment was important to the community. It was proposed that Barnes' legs would be speared four or five times. In addition, Barnes was to be punched in the face and chest and struck on the head and back with hard, heavy wood boomerangs. It was accepted that there was a risk that Barnes could die as a result of the punishment, for example, if an artery was accidentally cut by a spear. There was a risk that Barnes could be permanently crippled and that he might suffer permanent injury as a result of being hit on the head with the boomerangs. .

[20] Bailey J refused the application ((1997) 96 A Crim R 593). His Honour rejected a submission that the traditional punishment would be a lawful purpose for the purposes of the Act. His Honour endorsed the remarks of Mildren J in *R v Minor* (1992) 2 NTLR 183 at 195-196 which were made in the context of taking into account the likelihood of traditional punishment when arriving at an appropriate sentence. Mildren J said:

> "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."

[21] Bailey J observed that the remarks of Mildren J are equally applicable to a consideration of a bail application. His Honour added (596):

> "Whatever the context, it would be quite wrong for a judge to structure his judgment to facilitate an unlawful act."

[22] In *Minor* and *Barnes*, their Honours were careful to distinguish between courts merely having knowledge of the likelihood of traditional punishment being imposed and structuring orders for the purpose of facilitating the infliction of traditional punishment where that traditional punishment would be unlawful. I agree with their Honours that it is not permissible for a court to structure orders with a view to facilitating the unlawful infliction of traditional punishment. Similarly, it is not permissible for a court to structure orders in the knowledge that the effect of the orders will be to facilitate the infliction of unlawful traditional punishment.

[23] The reasons for these views are obvious. It is well recognised that the courts cannot condone unlawful acts. Similarly, courts cannot facilitate unlawful acts.

[24] Counsel for the applicant submitted that the evidence should satisfy me that the proposed traditional punishment will be lawful and, therefore, it is both permissible and appropriate for the court to make orders which would have

the effect of returning the applicant to the Lajamanu community where the punishment would be administered.

[25] As a matter of principle, courts have been reluctant to condone any form of traditional punishment that involves the infliction of physical violence, even if that infliction would be lawful because the recipient consents and is capable in law of consenting. In *Minor*, Mildren J identified the fact that the punishment is a form of corporal punishment administered by persons not employed by the State as a reason why courts usually do not condone such punishment. It is unnecessary to explore the reasons for the reluctance.

[26] In respect of bail applications, without either approving or disapproving of particular traditional punishment, circumstances might arise in which it would be permissible and appropriate for a court to grant bail on terms that would allow lawful traditional punishment to occur. It is necessarily impossible to attempt to define the circumstances in which such a course would be permissible or appropriate, but I have in mind as an example minor physical punishment to which the offender is capable in law of consenting. If the court was satisfied that for cultural reasons such lawful punishment would be of benefit to the applicant, the victim, the victim's family and the particular community, in my view it would be permissible for a court to structure orders in a way that would allow for the opportunity for such punishment to be inflicted. If the applicant and all others involved sought such a course and it was clear that such a course would both recognise traditional law and benefit all concerned, the court should be reluctant to

deny that course in a paternalistic approach based on moral values or views which are in conflict with the traditional law of the particular applicant and the applicant's community.

[27] As to the nature of the proposed traditional punishment, I have received both oral evidence and statements in documentary form. In a letter dated 8 December 2003, the Elders of the Walpiri people in Lajamanu who comprise the Lajamanu Community Government Council have stated that they seek bail for the applicant in order that he might return to Lajamanu where the matter can be dealt with according to customary practice. The letter states that the Elders know that if the applicant is not returned to the community there will be further violence between the families concerned and that this may be ongoing for many years. It is said that the punishment will be overseen and controlled by the Elders and if the matter is dealt with by customary practice it will resolve the problems between the families.

[28] Andrew Johnson, an Aboriginal Community Correctional Service office of the community, has stated in a letter that he has agreed to supervise the traditional punishment and that he will ensure that both a police officer and a medical assistant will be present. I accept it is likely that a medical assistant will be present, but I have doubts as to the presence of a police officer. Billy Bunter, an Elder of the community, gave evidence that there would be trouble if a police officer tried to stop the infliction of traditional punishment. If a police officer was present, that officer would be placed in

a most invidious position should the officer be of the view that the traditional punishment being inflicted was unlawful.

[29] In addition to Mr Bunter, I also heard evidence from Mr Tom Hargraves, a cousin of the applicant and a grandfather of the deceased. Mr Hargraves is a Walpiri Aboriginal man from Lajamanu. The third witness was the applicant's uncle Mr Jigili. In their own ways each of the witnesses was an impressive witness and I am satisfied that each was a truthful witness.

[30] As to the nature of the proposed punishment, Mr Bunter said that although the final detail of the punishment will be decided by the law and order judges who will be present at the time of punishment, it is expected that the applicant will be speared in each leg four times or less. Mr Hargraves thought it had been agreed that the applicant would be speared once in each leg. Mr Jigili thought it would be left to the Elders to decide the extent of the punishment once the applicant was returned to Lajamanu.

[31] I am satisfied that although there have been discussions involving the families of the applicant and the deceased, together with the Elders of the community, the exact nature and extent of the spearing has not yet been determined. Mr Bunter was a particularly impressive witness and from his evidence I am satisfied the Elders have in mind that the applicant should be speared up to four times in each leg. Blows with a nulla nulla might also be struck to the applicant's back.

[32] The Elders would decide who is to carry out the punishment. A number of people from the family of the deceased, and possibly the family of the applicant, would be involved. I accept the evidence of Mr Bunter that a pointed wooden spear would be used and I also accept his description of how the spearing is carried out. The applicant would be held by one person on each side of him. The point of the spear would be removed back from the side of the thigh a short distance and then thrust into the flesh to a distance of approximately one inch. The Elders, including those holding the applicant, would give guidance to those inflicting the punishment. I am satisfied, however, that those who would inflict the punishment have no experience in the administering of this type of traditional punishment.

[33] Mr Bunter has witnessed the administration of traditional punishment on a number of previous occasions. This includes the infliction of punishment upon Barnes when he was released from custody. I accept the evidence of Mr Bunter that the injuries would cause a lot of bleeding and a lot of pain. Mr Bunter said that Barnes was not walking too much after the administration of the punishment because it was too painful, but he got better in about two weeks. According to Mr Bunter if the applicant starts to get weaker the Elders will intervene and bring the punishment to a halt.

[34] Notwithstanding the evidence of Mr Bunter that he does not know of any occasion when traditional punishment has resulted in death or permanent injury, I am far from satisfied that the punishment to be administered to the applicant will result only in bodily harm as defined in s 1 of the Criminal

Code ("the Code"). Quite the contrary. I am satisfied that there is a significant risk that the applicant will suffer grievous harm as defined in s 1 of the Code. The applicant cannot authorise another person to cause him grievous harm (s 26(3) of the Code).

[35] As I have said, those who it is intended should administer the punishment are not experienced in the use of a spear to penetrate the thigh. They will include members of the deceased's family who are likely to be affected by the emotions aroused by the occasion. In those circumstances the repeated use of a pointed wooden spear to penetrate the side of the thigh to the depth of approximately one inch plainly raises the risk of severing an artery and of causing permanent injury. Serious infection is a real possibility.

[36] In my opinion, regardless of the applicant's consent and where the line is drawn between lawful and unlawful infliction of physical injury, there is a significant risk that the proposed traditional punishment will involve unlawful infliction of physical force and injury. For these reasons, the fact that the applicant and others within his community wish that the applicant should be released in order to undergo traditional punishment cannot be advanced as a valid reason in support of the grant of bail. In terms of s 24 of the Act, the need of the applicant to be free for the infliction of the particular traditional punishment is not a need to be free for a lawful purpose. In these circumstances it cannot be said that it is in the interests of the applicant that bail is granted in the sense that he has a need to be free for the lawful purpose of traditional punishment.

[37] Section 24(1)(b)(iv) requires the court to consider the interests of the applicant having regard to whether the applicant is in danger of physical injury or in need of physical protection. It is likely that the Legislature had in mind the protection of an applicant at risk of injury who does not consent to the infliction of physical violence or injury and, in some situations, the need to protect applicants from themselves. For example, it may be appropriate to take into account that an applicant is mentally impaired and at risk of committing suicide if released on bail.

[38] I doubt that the Legislature had in mind the circumstances with which I am concerned in this application. The applicant is not mentally impaired. He has voluntarily made a decision that he will submit to the administration of particular physical punishment. Nevertheless, the wording of s 24(1)(b)(iv) is wide enough to encompass these circumstances and I am required to take into account that the applicant is in danger of physical injury.

[39] Although I am required to take into account the danger of physical injury, when the court is dealing with an applicant who is not mentally impaired and who is well aware of the danger and willing to run the risk or to permit the danger of physical injury to come to fruition, there is a limit to the significance that the court can attach to the fact of such danger. In the face of such an applicant who makes a voluntary choice of this nature it is likely to be inappropriate for a court to keep such a person in custody for that reason alone where the case for bail has otherwise been made out. Again, it is impossible to define the circumstances in which bail should or should not

be granted, but it is an area in which the court should exercise great caution, before refusing bail on the basis of physical danger.

[40] The third criteria to be taken into account is identified in s 24(1)(c) as "the protection and welfare of the community". In considering that criteria, however, the court is required to have regard only to the matters specified in s 24(1)(c)(i)-(iv). Essentially, those matters are concerned with the possibility of danger to the community from the applicant.

[41] As mentioned, the applicant is concerned for the welfare of his family and the wider community should circumstances prevent the administration of the traditional punishment. The applicant's mother has moved to Darwin and does not feel able to return to Lajamanu until the punishment has been administered. However, the matters to which the court is permitted to have regard in considering the welfare of the community do not include the effects on the particular community or individuals within that community if the traditional punishment cannot be carried out.

[42] For the reasons I have given, in my opinion the applicant and his community's wish that he be free to undergo traditional punishment in respect of the death of the deceased is not a proper basis for the grant of bail. However, that is not the end of the matter. The question remains as to whether there is any other basis upon which bail should be granted.

[43] As I have said, I am satisfied that if the applicant is released on bail and is under the control of his uncle or his sister, he will attend probably at court

when required to do so. However, in substance an order granting the applicant bail on the condition that he reside with his uncle in Lajamanu would be an impermissible order involving a significant risk of facilitating the infliction of unlawful physical violence upon the applicant. On the other hand an order that requires the applicant to reside with his sister at Ngukurr does not facilitate such violence.

[44] The applicant will be granted bail on conditions that include requirements that he reside at Ngukurr with his sister and that he not attend at Lajamanu. I will hear counsel further as to the precise terms of the order.
