CITATION:	*PW v The Queen* [2019] NTCCA 15
PARTIES:	PW
	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:	CA 2 of 2019 (21743702)
DELIVERED:	20 June 2019
HEARING DATE:	18 June 2019
JUDGMENT OF:	Graham AJ

CATCHWORDS:

CRIMINAL LAW – Appeal – Appeal Bail – *Bail Act 1982* (NT) s 23A – whether special or exceptional circumstances exist – prospects of success of appeal – whether applicant serve majority or whole of sentence before appeal – "presumption of guilt" – requirements not satisfied – bail refused

Bail Act 1982 (NT) s 23A.

McRoberts v The Queen [2018] NTCCA 11; *Marotta v R* [1999] HCA 4

REPRESENTATION:

Counsel:

Applicant:	I Read SC
Respondent:	M Nathan SC

Solicitors:

Applicant:	Northern Territory Legal Aid Commission
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	B
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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

PW v The Queen [2019] NTCCA 15
No. CA 2 of 2019 (21743702)

BETWEEN:

PW

AND:

THE QUEEN

CORAM: GRAHAM AJ

REASONS FOR JUDGMENT

(Delivered 20 June 2019)

[1] On 19 September 2018, the applicant was found guilty of one count of maintaining a sexual relationship with a minor in aggravating circumstances and another count of aggravated assault of that same minor. On 22 November 2018, the applicant was sentenced to 16 years imprisonment with a non-parole period of 11 years and three months.

[2] The applicant has been in custody since the verdict.

[3] The minor was his nine year old niece.

[4] On 12 April 2019, he was granted leave to appeal against his conviction and that appeal is listed for hearing by the Court of Criminal Appeal on 27 August 2019.

[5] On 18 June 2019, an application was made for bail pending the outcome of the appeal which was supported by an affidavit sworn by the applicant's solicitor Mr Read SC. Upon the hearing of the application both Mr Read and counsel for the Crown, Mr Nathan SC, made oral submissions.

[6] The application for bail is limited by s 23A of the *Bail Act 1982* (NT). Bail must not be granted unless it is established that special or exceptional circumstances exist justifying the grant of bail.

[7] Counsel for the applicant argued that there were special or exceptional circumstances in this case. He conceded that there was no longer a presumption of innocence that existed, but the grounds that he put forward were argued not in the alternative, but rather in the totality.

[8] In the first place, it was argued that leave was granted to appeal despite opposition from the Crown. Secondly, it was argued that if the appeal was successful the applicant could expect an acquittal rather than a retrial. Thirdly and most importantly, it was argued that the applicant's case on appeal was extremely strong and was likely to succeed.

[9] Apart from the factors set out hereinbefore it was also argued that there were subjective factors that supported the granting of bail. It was pointed out that the applicant's partner and mother live in Perth. His father also lives in Perth in a nursing home. It was submitted that it was difficult for family to keep in touch with the applicant whilst he is in prison in Darwin. It was also noted he had no previous convictions.

[10] The Crown on the other hand argued that the applicant's case was merely arguable and not overwhelming and that it was clearly open to the jury to have convicted the applicant in the circumstances of the case.

[11] It is to be noted that the offences were historical. The minor alleged that the crimes took place in late 2009 to 2010 and a report was not made to police until March 2016. It was noted in the affidavit in support of the leave to appeal that there were significant levels of violence allegedly inflicted on the minor and there were brazen rapes alleged to have taken place in a house occupied by five adults and five children during a family reunion at Christmas. The minor gave evidence that she was raped at knifepoint and a cut was inflicted on her shoulder. It was alleged that she bled and vomited. The minor gave evidence at trial as did the applicant. The substantial ground of the appeal is that the verdict cannot be justified having regard to the evidence. Secondly, it was argued that an apparent deterioration in the complainant's behaviour over a period of years culminating in her involuntary hospitalisation having been put to the jury in the absence of expert evidence, led to the risk of the jury concluding that such deterioration was caused by the conduct of the accused.

[12] The Crown does not accept that there are strong grounds of appeal. It was pointed out to me that it was open to the jury to accept the minor's evidence that the offences took place. It was accepted that there was

some corroboration of her testimony in that there was a change in her behaviour at the time of the offences. This was attested to by her mother, father, grandmother and the wife of the applicant who was the minor's aunt.

[13] Defence counsel at trial had opened the case on the basis that if something had happened in the house, bearing in mind the florid nature of the allegations, the occupants of the house would surely have noticed. This led to the prosecution calling the evidence of changes in behaviour. There was also evidence led that the minor had complained to her grandmother about soreness of her vaginal region and was given some cream by her grandmother to apply. There was evidence of the minor's deteriorating mental state leading later to an involuntary admission to hospital in Perth. For some reason the defence at trial attacked the credit of the minor by asking her why she did not object to travelling to Perth to hospital when the applicant lived in Perth. The answer was that she had no choice, her admission to hospital was involuntary. The minor's mother was examined in chief about the changes in the minor's behaviour and subsequently the learned trial judge warned the jury against using this evidence impermissibly. There was, however, no application by the defence to discharge the jury.

[14] In considering the application of s 23A of the *Bail Act* there are two major matters that are generally relied on to establish special or exceptional circumstances. In the first place, there is the likelihood

that all or most of the custody or sentence will have been served prior to the hearing of the appeal. This matter is not apposite to this case, bearing in mind the length of the sentence. The second matter is the fact that there are strong prospects that the appeal will be successful and it is this ground that is the major limb of argument relied on by the applicant for bail. It was accepted that though the appeal itself is likely to be heard in August, it may be some time before a judgement is handed down.

[15] In the case of *Marotta v R*, Callinan J stated that for the grant of bail the appeal must raise a ground of real substance which would probably justify at least a retrial.[1] Moreover, in the case of *McRoberts v The Queen* [2018] NTCCA 11 (*McRoberts*), Southwood ACJ said at as follows:

> Where the prospects of success on appeal are put forward as a special circumstance what must be established is a ground of appeal which is most likely to succeed and one which can be seen without detailed argument. It is not sufficient to show a merely arguable ground of appeal, or even one which has reasonable prospects of success.[2]

[16] Therefore, one must examine the grounds of appeal, albeit in a brief and informal way, to ascertain whether the prospects of success in this case give rise to the level that would justify bail being granted.

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1 [1998] 160 ALR 525, 528.

2 At 6.

[17] It must also be remembered that the status of an appellant in an appeal is quite different to the status of a person awaiting trial. Again, to quote Southwood ACJ in the *McRoberts* case:

> The presumption of innocence is gone. In its place, there is what can be described as a presumption of guilt based on a further presumption that the trial has been conducted according to law and the jury has reached a verdict that was reasonably open on the evidence. The criminal justice system is an important part of the community fabric. The conviction and sentencing of wrongdoers is seen both as protecting the community and also properly punishing criminals. Public confidence in the administration of justice may well be weakened if too many defendants convicted of serious offences and sentenced to prison are seen to avoid serving the sentence forthwith by the simple expedient of filing a notice of appeal and been granted bail pending appeal.[3]

[18] In this case, both the complainant and the applicant gave evidence and clearly the jury accepted the complainant over the applicant. I do not conclude that the arguments raised by the applicant are so bright and clear-cut that without a detailed argument are very likely to succeed. I take into account the hardship to the applicant, particularly the fact that his family is in Perth and I have regard to the combination of factors raised in the application including the fact that he has no previous convictions. In my view, they do not displace the presumption of guilt and nor do they displace the presumption that the trial has been conducted according to law and the jury has reached a verdict reasonably open on the evidence. The applicant will argue that the conviction was unsafe and cannot be supported on the evidence. The

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3 Ibid, 8.

Crown will argue that the jury was entitled to accept the complainant's evidence and if there were forensic decisions made by the applicant's counsel at trial that undercut the defence, generally then a client is bound by his lawyer's decisions within our adversarial system.

[19] The bail application is refused.
