Suttie v The Queen [2013] NTSC 37

PARTIES:	SUTTIE, KRISTOPHER
	v
	THE QUEEN
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	21300439
DELIVERED:	21 March 2013
HEARING DATES:	11, 14 & 21 March 2013
JUDGMENT OF:	HILEY J

CATCHWORDS:

CRIMINAL LAW – Bail – Application for review of decision not to grant bail – presumption against bail – onus of proof lies with the Applicant to satisfy the Court that bail should not be refused – criteria to be considered in bail applications

Bail Act ss 7A(2), 24, 35
Misuse of Drugs Act ss 5, 9

R v Williams (2012) 32 NTLR 97, followed.
R v Wilson (2011) 29 NTLR 83, not followed.
R v JDT [2011] NTSC 39; *R v Mills* [1998] 4 VR 235, referred to.

REPRESENTATION:

Counsel:

Applicant:	James Anderson
Respondent:	Michael McColm

Solicitors:

Applicant:	NAAJA
Respondent:	ODPP

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

Suttie v The Queen [2013] NTSC 37
No. 21300439

BETWEEN:

Kristopher Suttie
Applicant

AND:

The Queen
Respondent

CORAM: HILEY J

REASONS FOR DECISION

Introduction

[1] On 21 March 2013 I allowed bail on certain conditions and I indicated that I would provide written reasons for the benefit of the parties. However, since these reasons may contain information that may be prejudicial to the trial I propose and order that these reasons be and remain confidential to and between the parties until the final disposition of the principal proceedings, or until further order of this Court.

[2] This is an Application under section 35 of the *Bail Act* for review of a decision of Magistrate Cavanagh made on 5 March 2013, refusing to grant bail to Mr Suttie (the **Applicant**). A review under s 35 is to be conducted

by way of re-hearing, and the Court is not constrained by the evidence before the learned magistrate (s 36).

[3] According to the Information for an Indictable Offence taken 4 January 2013,[1] Mr Suttie has been charged with six offences, in that he did unlawfully:

(a) supply MDMA, a dangerous drug specified in Schedule 2, to another person - contrary to s 5(2)(a)(iv) of the *Misuse of Drugs Act*:

(b) supply cannabis plant material, a dangerous drug specified in Schedule 2, to another person - contrary to ss s 5(1) & (2)(a)(iv) of the *Misuse of Drugs Act*;

(c) possess cannabis plant material, a dangerous drug specified in Schedule 2 - contrary to s 9(1) & (2)(f)(ii) of the *Misuse of Drugs Act*;

(d) possess Methamphetamine, a dangerous drug specified in Schedule 2- contrary to s 9(1) & (2)(f)(ii) of the *Misuse of Drugs Act*;

(e) possess MDMA, a dangerous drug specified in Schedule 2, and the amount of the dangerous drug was a commercial quantity, namely 48.9 grams - contrary to s 9(1) of the *Misuse of Drugs Act*;

(f) receive property, namely $6,995, obtained from the commission of an offence against s 5 of the *Misuse of Drugs Act*, knowing or believing it

[1] This is contained in the Committal Brief that is annexed to the affidavit of James Anderson (Ex A3).

to have been so obtained - contrary to s 6(1)(a) of the *Misuse of Drugs Act*.

[4] The first two offences are said to have occurred on the 31st of December 2012, and the others on the 3rd of January 2013. The maximum penalty for each of the first two offences is five years imprisonment, for the third and fourth offences 17 penalty units, for the fifth offence 14 years imprisonment, and for the sixth offence 25 years imprisonment.

[5] Because the fifth and sixth offences are punishable by terms of imprisonment of more than seven years, s 7A of the *Bail Act* applies, as a result of which bail is not to be granted "unless the person satisfies … [a] court that bail should not be refused."

Evidence and other materials

[6] The Applicant filed and read three affidavits in support of his application:

(a) Affidavit of Niel Suttie sworn 6 March 2013 (Exhibit A1);

(b) Affidavit of Michael Suttie sworn 6 March 2013 (Exhibit A2);

(c) Affidavit of James Anderson sworn 6 March 2013 (Exhibit A3).

[7] Mr Niel Suttie, the Applicant's father, also gave oral evidence, and he was cross-examined, mainly on his own criminal history and his suitability as a surety.

Charges and surrounding circumstances

[8] Most of the information concerning the alleged offences is contained in the committal brief, annexed to Mr Anderson's affidavit. Of course, the information advanced for the purposes of this bail review application and referred to in these reasons only stands as material used and taken into account for the purpose of this application.

[9] A search warrant was executed by police on 3rd January 2013 at a residence at 21 Grebe Crescent, Wulagi. There had been 7 people living there, namely 3 step-brothers, Vinh Tran, Toai Tran and ND (aged 14), their sister HD (aged 12) and their mother Ngan Kim, the Applicant and Dan Albino. However Mr Albino had gone to Adelaide a few days earlier and was not present when the police attended.

[10] The police seized various drugs and other materials and cash, and took photographs. At about 5pm the three step-brothers were arrested and taken to the Darwin watch house, and interviewed. The Applicant had been spoken to when the police executed the search warrant, but was not arrested until later that evening after further information was obtained, presumably from one or other of the three step-brothers. He had previously admitted to possessing cannabis found in his bedroom when the police spoke to him at the house.

[11] The committal brief contains a number of statutory declarations by various police officers, a statutory declaration by Vinh Tran, and records of interview of ND and the Applicant.

[12] The Applicant made a number of admissions in his record of interview. These include admissions that he had possessed some of the drugs, and that he had sold MDMA pills for Dan Albino. He said that the MDMA pills were owned by Dan Albino, and that they and the proceeds of sale were kept in a safe in the room occupied by ND. It is said that only ND and Dan Albino had access to the safe.

[13] The police also found, in the safe, a ledger book, which contained some entries with the name Kris opposite numbers and dates, in columns headed "pill no", "money" and "date". (See Exhibit R1). After 5 entries where there was a "?" under the date heading, there were another 8 entries showing various dates between 27th and 31st December 2012 under the date heading.

[14] According to ND, most of the pills and cash were contained in the safe, which belonged to him. Because the Applicant did not have the combination to the safe, when the Applicant wanted to sell pills, he (ND) would get them out of the safe for him, and he would also put into the safe any cash proceeds. The Applicant says that he only sold the pills on behalf of Dan Albino, the owner of the pills, to help him out, and that he did not retain any of the proceeds.

[15] The Crown has subsequently obtained access to the Applicant's mobile telephone, on which there appear to be text messages between the Applicant and a number of people apparently arranging to buy drugs from the Applicant, between 22nd and 26th December and also on 31st December 2012. (See Exhibit R2.)

[16] Following his interview on 3rd January Mr Suttie was charged with the various offences, and placed into custody. He remained in custody since that date. He unsuccessfully applied for bail on the 5th of March 2012.

Personal circumstances and criminal history

[17] The Applicant was born in Adelaide on the 17 December 1993. He has a brother, Michael Suttie, slightly older than him. His parents have separated. His brother Michael, and his father, Niel Suttie, have both travelled from Adelaide to Darwin since the Applicant was arrested, in order to assist the Applicant.

[18] The Applicant is of aboriginal descent. He attended St Peter's College in Adelaide as a boarder. He had a full scholarship to attend for tuition and board. He successfully completed year 12 in 2011, with an ENTER score of about 58. After school he attended university in Adelaide, through the Wilta Yerlo program, which is a preparatory course for Aboriginal students, preparing them for mainstream university study. He deferred his course because he was not sure what course he wished to study.

[19] He drove to Darwin in late 2012, with an ex school friend, Chris Lord / "Nuggett", and met up with some other school friends in Darwin. He also met Dan Albino, who he had previously met in Adelaide. The two of them moved into the house in Wulagi in about October.

[20] The Applicant worked for a short time as a kitchen hand at a restaurant, Hot Tamale, on the waterfront in Darwin, until just before Christmas. He says that he burned his hand on the deep fryer. After that, he went onto Centrelink benefits.

[21] His known criminal history comprises an offence of being unlawfully on premises when he was 18. He was not convicted for that offence. He says that he and a friend entered an unlocked shop in Chinatown Adelaide out of curiosity, and not with any intention to commit an offence. They were not charged with any other offence in relation to that incident.

[22] The Applicant says that he has obtained a Northern Territory driver's licence, and that he intends to continue living in the Northern Territory.

[23] As already noted, he admitted to the police that he had been using cannabis daily prior to his arrest.

[24] Since being in custody he has sought medical help, and he has been prescribed anti-depressants. He was also seeing a counsellor at the prison. He says that he wishes to remain abstinent from illicit substances after he is

released, and he believes that medication and counselling will assist him with this.

[25] He has been in protective custody in prison, allegedly following demands for money from other prisoners. His father has expressed some concern about his mental state.

[26] On 14th March 2013 the Court requested the Department of Correctional Services (the **Department**) to provide a Bail Supervision Report, to advise as to what residential rehabilitation facilities such as Banyan House would be suitable and available if the Applicant was granted bail. The Court also requested Banyan House to carry out an assessment of the Applicant for the purpose of assessing his suitability for admission to Banyan House.

[27] The Applicant was interviewed by a member of the Banyan House clinical team on 18th March 2013. On 19th March 2013 Salas Abraham, a counsellor at Banyan House provided a report (Exhibit A5). The report indicates that the Applicant was found suitable for entry into the Banyan House rehabilitation program, and that "Mr Suttie demonstrated motivation to examine and address the issues surrounding his substance misuse."

[28] The Bail Assessment Report from the Department of Correctional Services, dated 21 March 2013 (Exhibit A6) also indicates that the Applicant is "suitable for the rehabilitation program at Banyan House" and that he could "commence the program today." That report proposed a number of

conditions that could be imposed should the Court place Mr Suttie under the supervision of the Department, which had been discussed with Mr Suttie.

Relevant law

[29] As previously noted, s 7A(2) of the *Bail Act* requires the Applicant to satisfy the Court that bail should not be refused.

[30] Section 7A(2A) provides that s 7A(2) does not apply to a person who "is assessed to be suitable to participate in a program of rehabilitation that is prescribed by the Regulations."

[31] Although the Bail Assessment Report suggests that the Applicant is suitable to participate in a program of rehabilitation, for example at Banyan House, the Regulations do not include this as an appropriate program of rehabilitation for the purposes of s 7A(2A). Indeed, the Regulations do not specify any suitable program of rehabilitation for such purposes. (I mention that because this indicates that Parliament did contemplate that a person might be released on bail even where charged with serious offences of the kind set out in s 7A(1), where he or she is assessed as being suitable to participate in a program such as that proposed for the Applicant in this case.)

[32] Needless to say, the onus of proof referred to in s 7A(2) still remains on the Applicant.

[33] Notwithstanding the opinion of Reeves J in *R v Wilson* [2011] NTSC 15 to the effect that this subsection imposes a "heavy burden" on an applicant, I prefer to follow the construction of Kelly J in *R v Williams* [2012] NTSC 47 at [5]:

> *It seems to me that the plain words of s 7A do nothing more than cast an onus on the applicant to satisfy the court that bail ought not to be refused, and that in considering whether or not the applicant for bail has satisfied the onus, the court must (as in all other bail applications) take into consideration the matters set out in s 24 of the Act, and no others. If the applicant does not satisfy the onus, then bail should be refused.*

[34] This is consistent with the approach of other Judges of this Court, including Mildren J in several unreported matters, and Blokland J in *R v JDT* [2011] NTSC 39. In any event, the Crown did not object to me following this approach in the present matter.

[35] It is necessary, therefore to consider the criteria set out in s 24, and to determine whether or not the Applicant has satisfied the Court that bail ought not be refused, having regard to those criteria.

Section 24 factors

[36] **Section 24(1)(a)** requires the Court to consider the probability of whether or not the Applicant will appear in court in respect of the offences for which he has been charged, having regard only to the factors set out in the following subparagraphs.

[37] Subparagraph 24(1)(a)(i) requires the Court to have regard to the Applicants' "background and community ties, as indicated by the history

and details of [his] residence, employment and family situations and, if known [his] prior criminal record".

[38] Of particular relevance and importance in the present matter is that the Applicant successfully underwent and completed his education to year 12 (in 2011), at St Peters College in Adelaide, where he had been a boarder. This suggests to me that, given appropriate support and guidance, he does have the education and other skills sufficient and necessary to successfully establish himself in a worthwhile career and in the broader community, once the present matters have been concluded.

[39] Apart from the incident regarding unlawful entry of premises, which I do not regard as sufficiently relevant for present purposes, the Applicant presents as a person with a clean record. I consider it most unlikely that he will re-offend, if he successfully completes the rehabilitation courses offered, for example at Banyan House, and is given and takes up the opportunities provided to him already by his education.

[40] Of some concern however is the fact that he does not have any fixed place of abode in Darwin (or elsewhere in the Northern Territory) and does not have employment. Furthermore, his family situation seems somewhat uncertain. Although his father and his brother have both travelled to Darwin to assist him while he deals with these charges, I have not heard of or from any other family or friends in Darwin, or elsewhere, who can provide support to him if needed.

[41] His father, Niel Suttie, is living in a two-bedroom bungalow at Lambells Lagoon, and his brother Michael is also living on the same property. Presumably, the Applicant could live there also, if released on bail. However, the nature of the tenancy is somewhat uncertain.

[42] His father was prepared to enter into an agreement of the kind contemplated by s 27(2)(d). The fact that he has moved to Darwin to support his son during this process, and appears to be genuinely concerned about the Applicant's situation, is relevant. However, his criminal record, including a number of breaches of court orders and an outstanding warrant issued in South Australia, causes me to have considerable concern about him as a suitable companion and role model for the Applicant if he was released on bail and to reside with his father. Moreover, I would not consider him to be an "acceptable person" for the purposes of s 27(2)(d).

[43] However, I think it likely that his brother, Michael Suttie, may well be of considerable support to the Applicant if he is released on bail. He is a year or so older than the Applicant, went to school until year 11, and has been employed in various trades since leaving school. I was informed that he has applied for an apprenticeship in Darwin, with Group Training NT, and hopes to learn fitting and turning or diesel mechanics. I was told that he was a promising footballer, with the SAFL, until he sustained in a hip injury. Like his father, he has been present in Court on each occasion when this matter was mentioned. On the negative side, I understand that he no longer holds a

current driver's licence, having lost it due to earning an excessive number of demerit points. He is prepared to enter into an arrangement whereby he would forfeit $5,000 in the event that the Applicant is granted bail and does not honour his obligations thereunder. I do consider that he would be an "acceptable person" for the purposes of entering into a surety agreement under s 27(2)(d) of the *Bail Act*.

[44] Subparagraph 24(1)(a)(iii) requires the Court to have regard to "the circumstances of the offence (including its nature and seriousness), the strength of the evidence against the [Applicant] and the severity of the penalty or probable penalty."

[45] The most serious offences, and those which attract the operation of s 7A(2) thereby placing the onus upon the Applicant when seeking bail, are those subject of the fifth and sixth charges, namely, the possession of a commercial quantity of MDMA, and the receipt of almost $7,000, knowing or believing it to have been obtained from the commission of an offence under s 5 of the *Misuse of Drugs Act*.

[46] As noted by his counsel, the Applicant has already made a number of admissions, as a consequence of which he is likely to be found guilty of some of the other offences with which he has been charged. However he contended that the fifth charge (possession of a commercial quantity of MDMA) may well fail on account of the evidence suggesting that the

MDMA was kept in the safe, to which the Applicant did not have his own access.

[47] He also contended that the sixth charge (receipt of almost $7,000) should fail, inter alia, because the Information is to the effect that all the money was received on 3rd January, whereas the only evidence, namely the log book (and perhaps the text messages), suggests that the money was received at different times and not on third of January. However I do not find this contention very persuasive, as it would appear to be open to the Crown to redraw that charge to cover the period of time not confined to 3rd January.

[48] I do think that the evidence, if proven, is fairly strong in relation to all of the offences.

[49] However I think that the broader circumstances surrounding these dealings and the Applicant's participation and role compared to that of one or two of the other people also involved, his prior good record, his youth[2] and his education, and the strong prospect of his successful rehabilitation, may be such that the appropriate penalties may not be severe.

[50] Counsel have identified a number of other decisions of this and other courts to illustrate the kind of sentences that have been imposed in other matters involving the possession and supply of dangerous drugs. Whilst the penalty

[2] Cf *R v Mills* [1998] 4 VR 235 at 241 and *R v JDT* [2011] NTSC 39 at [8].

in each case will differ according to its own facts, and whilst it is not possible or appropriate for me on a bail application to express a firm view about the likely penalties should the Applicant be convicted of the offences, I think that the penalties are likely to be at the lower end of the scale in terms of the time to be spent in actual custody.

[51] The Applicant has already been in custody for almost 3 months. Although in remand, I gather that, when not in protective custody, he has been in the same part of the prison as others who have already been convicted and sentenced. While in protective custody I understand he has enjoyed even less freedoms than other prisoners.

[52] At this stage, it is not known when his charges will be dealt with. He has not yet been committed for trial. Assuming that he pleads not guilty to one or more of the charges, resulting in a jury trial, the matter may not be concluded for another 4 months or more. Were he to remain in custody, awaiting trial, he may well serve more time in prison than the time he is eventually required to serve after conviction and sentencing.

[53] There is no evidence or suggestion to the effect that the Applicant has ever failed to appear in court, as envisaged by subparagraph 24(1)(a)(ii).

[54] Nor is there any specific evidence indicating whether or not it is probable that the Applicant will appear in Court - cf subparagraph 24(1)(a)(iv).

[55] The Crown has submitted that because of his recent and few Territory connections, there is little incentive for the Applicant to comply with bail obligations and to appear in court when required. However, on the contrary, I consider it unlikely that he would prejudice his chances of a successful and happy future life by breaching his bail.

[56] I note that Parliament has contemplated that a person may be released on bail but placed under stringent conditions designed to minimise the risk of the person not appearing in court when required. The Applicant has indicated a willingness to agree to and comply with a number of such conditions.

[57] The conditions contemplated by Parliament include conduct agreements whereby the accused person wears a monitoring device and or allows the use of other devices necessary for the effective operation of the monitoring device. (S 27A(1)(ia).) However I understand that such devices are not yet available, but that the Department is agreeable to a condition being in place that gives an officer from the Department the right and ability to check on a person's attendance at his residence or other designated place at any time.

[58] Such conditions, many of which I have now imposed, all go towards increasing the probability of the Applicant appearing in court when required.

[59] **Section 24(1)(b)** requires the Court to consider the interests of the Applicant, having regard only to the factors set out in the following subparagraphs.

[60] Subsection 24(1)(b)(i) requires the Court to have regard to "the period that the Applicant may be obliged to spend in custody if bail is refused and the conditions under which [he] would be held in custody". As already noted, I have considered the period of time that the Applicant may be obliged to spend in custody if bail is refused, and weighed this against his probable penalty if convicted of the offences.

[61] I am also conscious of the fact that although on remand, when not in protective custody he would probably be in custody with other persons who have been convicted and imprisoned. I think that the "risk of contamination" whilst in such custody[3] is not justified in the present circumstances where the Applicant can have the benefit of the rehabilitation program to be provided by Banyan House.

[62] As to subsection 24(1)(b)(ii) the Court has not been told of any specific need for the Applicant to be free to prepare for his appearance in court or to obtain legal advice.

[3] Cf *R v JDT* [2011] NTSC 39 (Blokland J) at [11] and R v Williams [2012] NTSC 47 (Kelly J) at [12(b)(i)].

[63] As to subsection 24(1)(b)(iii) if the Applicant were to participate in the rehabilitation program at Banyan House, he would need to be free for that purpose.

[64] As to subsection 24(1)(b)(iv) I understand that the Applicant was in protective custody from 3 January, apparently as a result of threats made to him.

[65] There has been no evidence to the effect that, or suggestion that, the Applicant would interfere with evidence, witnesses or jurors (cf **s 24(1)(c))** or that there would be any risk as a result of his release on bail to the safety or welfare of any victim or other person of the kind referred to in **s 24(1)(e).**

[66] I have considered the risk of the Applicant committing an offence, or other breach of the kind set out in **s 24(1)(d)**. I very much doubt that he will commit a serious offence, and I think that he sufficiently understands the seriousness of his predicament as to make it unlikely that he will commit any other offence, breach of the peace or breach of any bail conditions.

Conclusion

[67] Having regard to the criteria set out in s 24 of the *Bail Act*, I consider that the Applicant has satisfied the Court that bail ought not to be refused. Accordingly I allowed the Application for Review and granted bail to the Applicant, on a number of conditions. I also considered it appropriate to

accept the offer of Michael Suttie to enter into a surety agreement under s 27(2)(d) whereby he agrees to forfeit $5000 if the Applicant fails to comply with his bail undertaking.

[68] The conditions of bail reflect those set out in the Bail Assessment Report (Exhibit A6) and some of those previously proposed by counsel for the Applicant (in Exhibit A4). The Applicant indicated to the Court that he understands those conditions and is prepared to consent to and comply with them.

[69] The orders then will be:

(a) Application for review allowed.

(b) Bail is granted subject to:

(i) the Applicant entering into a bail undertaking and agreement to appear at the Court of Summary Jurisdiction in Darwin on the 27th March 2013 at 10:00 AM or at any other time and place to which the proceedings are adjourned or referred, to comply with the conditions set out in sub-paragraph (c) below and to forfeit $1000 if he does not keep his undertaking and agreement;

(ii) Michael Suttie entering into an agreement under s 27(2)(d) of the *Bail Act* to forfeit the sum of $5000 if the Applicant does not keep his undertaking or comply with the conditions of his bail.

(c) The conditions referred to in sub-paragraph (b) above are that:

(iii) The Applicant will be subject to the supervision of a Probation Officer, and will obey reasonable directions.

(iv) The Applicant will not associate with any person specified in a direction by a Probation Officer.

(v) The Applicant will not frequent any place or district specified in a direction by a Probation Officer.

(vi) The Applicant will, at the direction of a Probation Officer, immediately enter into the Banyan House residential rehabilitation program.

(vii) The Applicant will not consume a dangerous drug, and will submit to testing as directed by a Probation Officer for the purpose of detecting the presence of dangerous drugs.

(viii) The Applicant will not leave the Northern Territory.

(ix) The Applicant must reside at Banyan House between 9pm and 6am.

(x) The Applicant may only leave Banyan House between 6am and 9pm in accordance with the rules of Banyan House, and in the company of a staff member of Banyan House.

(xi) The Applicant is to follow all rules and regulations of Banyan House.

(xii) The Applicant is to comply with all lawful requests and directions.

(xiii) The Applicant will not discharge himself from that facility without permission from the Court or the Officer in Charge of Banyan House.

(xiv) The Applicant is to submit to testing for alcohol or illicit drugs at the request of a staff member.

[70] As already indicated, I direct that these reasons not be published until the final disposition of the principal proceedings, or until further order of this Court.