

CHILDRENS COURT OF QUEENSLAND

CITATION: *R v GSR* [2023] QChC 36

PARTIES: **THE KING**
v
GSR
(defendant/applicant)

FILE NO: 25 and 26 of 2023

DIVISION: Childrens Court of Queensland

PROCEEDING: Bail Application

ORIGINATING COURT: Childrens Court of Queensland

DELIVERED ON: 20 December 2023

DELIVERED AT: Maroochydore

HEARING DATE: 14 and 15 December 2023

JUDGE: Long SC, DCJ

ORDER: **Adjourn the further consideration of this application until 9:00am on 23 January 2024, pending the provision of any further information including, but not limited to, the result of the NDIS application and engagement of any additional supports and interventions as available to the applicant in the community.**

Direct that the parties are to file and serve any further materials to be relied upon, by 3:00pm on 22 January 2024.

CATCHWORDS: CRIMINAL LAW – JURISDICTION, PRACTICE AND PROCEDURE – APPLICATION FOR BAIL – Where the defendant/applicant applies for bail on various charges before the Childrens Court – Whether the defendant/applicant poses an unacceptable risk of the relevant kind – Whether it is not practicable to adequately mitigate that risk by imposing particular conditions of release on bail – Whether the respondent has evidence to rebut the presumption in s 29(2) of the Criminal Code that the defendant/applicant is not criminally responsible for the offending – Whether the defendant/applicant is at risk of being held in detention beyond a period which is appropriate for the offending.

LEGISLATION: *Criminal Code Act 1899* (Qld) s 29(2)
Youth Justice Act 1992 (Qld) ss 48AA, 48AAA, 48AF, 59, 208 and 219

CASES: *BDO v The Queen* (2023) 97 ALJR 377
RP v The Queen (2016) 259 CLR 641

COUNSEL: L Bull for the Applicant/Defendant
 S Masoumi for the Respondent/Crown
 A Benfer for the Chief Executive

SOLICITORS: ATSILS for the Applicant/Defendant
 Office of the Director of Public Prosecutions for the
 Respondent/Crown
 Youth Justice for the Chief Executive

Introduction

- [1] The applicant applies for bail in relation to charges which are both indicted in the Childrens Court of Queensland (Judge’s Jurisdiction) and also in the Childrens Court of Queensland (Magistrate’s Jurisdiction), at Maroochydore. This Court is empowered to grant bail on all charges, pursuant to s 59(1) of the *Youth Justice Act 1992* (“YJA”), if it is appropriate to do so.
- [2] The applicant who was born on 4 March 2011 and therefore presently aged 12 years, is presently remanded in custody in respect of all of the offences.
- [3] By indictment 26 of 2023 she is charged, conjointly with her older sister, with three offences of robbery in company and an offence of assault occasioning bodily harm in company, all allegedly committed on 4 February 2023 and a further charge of assault occasioning bodily harm and also common assault allegedly committed on 5 February 2023.
- [4] By indictment 25 of 2023 the applicant is charged, again with her sister and another juvenile co-accused, with a sequence of offences committed between 10 and 12 March 2023, being torture, deprivation of liberty, stealing, burglary and stealing and attempting to pervert justice. It is to be understood that the primary allegation in this indictment, of torture, together with the ancillary charges, relates to a serious matter. It involves an allegation of the applicant being involved in luring the complainant in respect of this offending to the home of the applicant and her sister, where they and another young female co-accused are alleged to have tortured her for approximately four hours, from 9.00 pm on 11 March to about 1.00 am on 12 March 2023. The allegation is of repeated and intentional infliction of acts of violence and mental, psychological and emotional pain and suffering on the

complainant. They are alleged to have walked the complainant to her home where they entered and stole her belongings. The attempt to pervert justice is alleged in terms of their importuning of the complainant to lie to her mother and the specific lies of the applicant's older sister to the complainant's mother about what had occurred. The complainant in this matter is noted to have suffered some significant facial swelling and bruising, to the point of her eyes being almost swollen shut, extensive bruising to her scalp, defensive bruising to her arms and hands and various superficial cuts to her legs and in the crook of her left arm. She was found to have suffered fractures in a scaphoid and a carpal bone and it may be expected that there is also emotional harm.

- [5] A difficulty with the prosecution summary of facts, which is provided in the materials presented for the applicant,¹ is that it tends to generalise assertions as to the combined outcome of the conduct of the three girls in torturing the complainant, with many descriptions that "they" did or said various things, without further discernment. Whilst it is necessary to understand that the prosecution case against the applicant is premised on her presence and support for what occurred, it can also be noted that in contrast to specific notations of acts of violence perpetrated by both of her co-accused against the complainant and the use of knife by one of them, to threaten and inflict the noted cuts upon the complainant, the particularly noted conduct of the applicant is in respect of her recording some aspects of the offending conduct of the others and verbalising some support for what was occurring, in addition to the allegation that she initially lured the complainant to come to their house. Similarly, in respect of the ancillary offending, it is the applicant's continued presence with her co-accused and support for the further particular acts of her co-accused, which is the apparent premise of the prosecution case against her. However and in respect of the summary similarly provided in respect of the offending charged in the other indictment, it is to be noted that there are specific notations of the active involvement of the applicant in use of personal violence towards more than one of the complainants involved.²
- [6] Before turning to the further charges which are before the Childrens Court of Queensland (Magistrate's jurisdiction), it may be noted that the applicant has been

¹ Affidavit of L J Bull, filed 8/12/23, Ex. A.

² Affidavit of L J Bull, filed 8/12/23, Ex. A.

remanded in detention in respect of those charges which are now indicted before this Court from 22 March to 10 May 2023, a total of 49 days. The indictments were presented in this Court on 7 September 2023 and by 14 September 2023, when the matters were called over, the Court was advised of knowledge of the problems which had by then emerged and are reflected in some of the further charges which are before the Court in its magisterial jurisdiction. For present purposes and before turning to the circumstances of those charges, it is only necessary to note that the applicant remained on bail in respect of the indicted offences until the undertaking was revoked on 26 October 2023, at the request of the applicant's legal representatives. By then she was in custody, having been charged with further offences.

- [7] The applicant is charged with 30 offences of breach of bail between 21 August 2023 and 1 October 2023. These relate to the circumstances where she and her sister did not comply with their bail obligations in respect of a curfew and not leaving their place of residence except in the company of their mother or another adult, as such breaches were identified in that period. It is also alleged that the applicant was involved, in that period, in the commission of the following further offences:

- entering a dwelling (an open garage) with intent on 6 September 2023;
- entering premises (two cars) with intent on 6 September 2023;
- stealing on 6 September 2023;
- unlawful use of a motor vehicle on 7 September 2023; and
- a further offence of unlawful use of a motor vehicle between 7 and 11 September 2023.

She is also now remanded in custody in respect of charges of unauthorised dealing with shop goods on 7 March 2023, entering premises (a car) and committing an indictable offence (stealing a wallet containing a bank card) on 9 March 2023, eight allegations of fraud on 9 March 2023 (using a stolen bank card to buy shoes, drinks and McDonalds totalling approximately \$540). Each of those offences are alleged to have been committed jointly with her sister. There is an allegation of assault occasioning bodily harm in company committed on 12 March 2023, alleged in

respect of her involvement in the use of violence to a juvenile on a bus, by her other co-accused in respect of the torture indictment.

- [8] Upon her apprehension in relation to the later offending, the applicant has also not had bail in respect of these additional charges in the Magistrates jurisdiction of this Court and has, from 13 October 2023 and for some 68 days now, been detained in custody.

Applicable principles

In terms of the application of Part 5 of the *YJA*, it is accepted that, notwithstanding the history of the prior granting of bail in respect of the charges in the indictment charging the offence of torture and related offences, the applicant is in a show cause position pursuant to s 48AF of the *YJA* in respect of those charges. Before the alleged commission of those offences, she had been charged with offences alleged to have occurred on 4 and 5 February 2022 and had appeared before the Childrens Court. It would therefore appear that the same situation pertains in relation to the offence of assault occasioning bodily harm alleged to have occurred on 11 March 2023, but it is not understood that s 48AF is otherwise separately engaged in respect of any other charge.³ The provision in subsection (2) of s 48F is as follows:

“(2) A court or police officer must refuse to release the child from custody unless the child shows cause why the child’s detention in custody is not justified.”

- [9] In the context of the provisions of Part 5 of the *YJA*, this means that the applicant now bears the onus of proof in respect of the application of s 48AAA and in particular subsections 2 and 3, which provide as follows:

“48AAA Releasing children in custody—risk assessment

...

- (2) The court or police officer must decide to keep the child in custody if satisfied—
- (a) if the child is released, there is an unacceptable risk that the child will commit an offence that endangers the safety of the community or the safety or welfare of a person; and

³ Having regard to the definition of “prescribed indictable offence” in Schedule 4 of the *YJA*.

- (b) it is not practicable to adequately mitigate that risk by imposing particular conditions of release on bail.
- (3) Also, the court or police officer may decide to keep the child in custody if satisfied that, if the child is released, there is an unacceptable risk that—
 - (a) the child will not surrender into custody in accordance with a condition imposed on the release or a grant of bail to the child; or
 - (b) the child will commit an offence, other than an offence mentioned in subsection (2)(a); or
 - (c) the child will interfere with a witness or otherwise obstruct the course of justice, whether for the child or another person.”

[10] For the purpose of deciding those particular issues, s 48AA is applicable in providing for matters to which the Court either must or may have regard. Here, there is no suggestion of engagement of s 48AA(2) in terms of any aspect of involvement with or promotion of terrorism. By s 48AA(1), that section is made applicable as follows:

- “(1) This section applies if a court or police officer is making any of the following decisions in relation to a child in custody in connection with a charge of an offence (the *alleged offence*)—
 - (a) whether there is an unacceptable risk of a matter mentioned in section 48AAA(2);
 - (b) whether there is an unacceptable risk of a matter mentioned in section 48AAA(3);
 - (c) whether to release the child despite being satisfied there is an unacceptable risk of a matter mentioned in section 48AAA(3);
 - (d) whether to release the child without bail or grant bail to the child;
 - (e) whether the child has shown cause under section 48AF(2) why the child’s detention in custody is not justified.”

The necessarily separate identification of these decisions does not mean that there will be necessarily discreet and separate consideration of them or that the same or similar considerations cannot inform each decision to be made. For instance, s 48(5) provides that:

- “(5) In deciding whether there is an unacceptable risk of a matter mentioned in section 48AAA(3), the court or police officer may—
 - (a) consider whether a condition could, under section 52A, be imposed on a grant of bail to the child; and
 - (b) have regard to the effect on the risk of imposing the condition.”

And as has been noted, by s 48AAA(2) the mandate to keep a child in custody requires determination of not just that there is an unacceptable risk of the relevant kind but also that “it is not practicable to adequately mitigate that risk by imposing particular conditions of release on bail”. Further, s 52A(2) allows for the imposition of conditions where there is satisfaction of risk of the child doing a thing mentioned in s 48AAA(2) or (3) and that “the condition is necessary to mitigate the risk”. However, it is also provided that the Court must be satisfied that:

- “(c) the condition does not, having regard to the following matters of which the court or police officer is aware, involve undue management or supervision of the child—
 - (i) the child’s age, maturity level, cognitive ability and developmental needs;
 - (ii) the child’s health, including the child’s need for medical assessment or medical treatment;
 - (iii) for a child with a disability—the disability and the child’s need for services and supports in relation to the disability;
 - (iv) the child’s home environment;
 - (v) the child’s ability to comply with the condition.”

Ultimately and in conjunction with the other ancillary decisions which are noted, it is the decision in s 48AAA(1)(d) which will be the critical determination.

- [11] However, s 48AA(4) does distinguish between matters to which the Court may have regard in making any of the decisions mentioned in s 48AA(1) and some additional matters to which regard may be had in making the decision mentioned in s 48AA(1)(d).⁴ In this instance and as some relevant considerations have been noted, some particularly noted matters in s 48AA(4)(a) are:

- “(i) the nature and seriousness of the alleged offence;
- (ii) the child’s criminal history and other relevant history, associations, home environment, employment and background;
- (iii) the history of a previous grant of bail to the child;
- (iv) the strength of the evidence against the child relating to the alleged offence;
- (v) the child’s age, maturity level, cognitive ability and developmental needs;”

Additionally and pursuant to s 48AA(4)(b)(i), regard may be had to principle 18 of the Youth Justice Principles, which provides that:

⁴ Although, s 48AA(4)(a)(viii) allows for regard to “any other relevant matter”.

“A child should be detained in custody for an offence, whether on arrest, remand or sentence, only as a last resort and for the least time that is justified in the circumstances.”

The application

- [12] Particularly in terms of seeking to demonstrate why the applicant’s detention in custody is no longer justified, there is particular reliance placed upon her young age and what is suggested as a particular weakness in the prosecution case against her, as far as it relates to the application of s 29 of the *Criminal Code* and the necessity to prove her capacity to know that she ought not to have done the relevant act. There is also a broader contention that she is at risk of spending too much time on remand. It is further contended that any risks posed by a grant of bail can be sufficiently mitigated by the imposition of strict conditions, including a proposed conditional bail program.

- [13] The respondent opposes any grant of bail and particularly points to the history in respect of the charging of the applicant, including the most recent history leading to her return to custody, as evidencing that there is an unacceptable risk that if released, the applicant will commit further offences, including “an offence that endangers the safety of the community or the safety or welfare of a person”.

- [14] It must be accepted as contended for the respondent that an immediately not promising starting point in addressing the applicant’s position, is that the proposal for release on bail and only proposal which can be presently put forward, is to essentially return this child to the same situation where all of this offending allegedly occurred, including the events which have led to her more recent detention after her release under essentially similar conditions of bail. In that respect it is the effect of these more recent difficulties which assumes some importance, rather than as pointed out for the applicant, a period of some three months from May to August 2023, when it is contended there was some apparent stability under the bail conditions.

- [15] Some relevant considerations in this context also arise from the report of a psychological assessment conducted in respect of the applicant in September this

year.⁵ That was for the purpose of supporting an application for NDIS funding for specifically identified interventions, identified as required to support the applicant in the context of her family circumstances with her mother. It was noted that the applicant's presentations supported diagnoses of an autism spectrum disorder, Level 2 (ASD-2) and moderate intellectual development disorder, each described as being permanent and life-long, in the context of a prejudicial childhood which had been marked by turbulent familial relationships, exposure to domestic violence and alcohol misuse as a coping response by parents. A particularly striking assessment in terms of her intellectual development disorder, is the notation of a cognitive profile which "falls in the very low range, being exceeded by 97% of her peers". Otherwise, the following observations may be noted:

- (a) the applicant was noted to struggle to intercept new methods and in displaying rigidity and inflexibility in thinking and to follow her own personal guidelines for conduct, in an inflexible manner;
- (b) that the chronic and pervasive nature of her disability together with her impaired insight and antisocial views suggests several challenges for treatment which she requires in terms of multidisciplinary support;
- (c) it was further noted that without that support, the applicant risks the formation of "pervasive personality – related concerns, formation of a criminogenic cycle, academic decline, deterioration, continued social exclusion and isolation, personal harm or even fatality";
- (d) the applicant was noted to have often utilised substances to regulate emotions and to have antisocial and pro-criminal views meaning that she is likely to continue to interact with others with similar views, with a stated opinion that "without assisted support, [the applicant] risks exploitation, social isolation, and the formation of a criminogenic cycle"; and
- (e) as a matter particularly attracting the attention of the respondent's submissions, there was also the notation of the applicant's thought content being characterised by violence and aggression, making comments such as "I will kill them" when being questioned about potentially vulnerable situations and the notation that she often carries knives when accessing the community,

⁵ Ex. 2.

as a form of perpetuation of self-preservation and inability to recognise other means of dealing with confrontational situations.

- [16] The strength of the evidence against the applicant in respect of the alleged offences, is a consideration to which regard may be had,⁶ as has been noted. For the applicant it is contended that there is weakness in the prosecution case in terms of rebutting the presumption in s 29(2) of the *Criminal Code* that the applicant is not criminally responsible for the alleged offending. As is correctly contended for the applicant, that would entail the production of evidence by the prosecution to enable a conclusion that the applicant was able to understand, at the time, that what she was doing was, in each instance, morally wrong.⁷ This has been recognised as not being a low standard.⁸ It is also recognised that disability suffered by a child may affect any knowledge or ability to understand that the conduct is morally wrong.⁹ For the applicant, there is also reference to the observations in *RP v The Queen*,¹⁰ as to the prospective limitations of attempting to draw inferences as to understanding of moral wrongness, from the circumstances of the offending conduct and similarly in reliance on demonstrated concerns as to secrecy in respect of offending behaviours.¹¹
- [17] The prosecution relies upon the nature, circumstances and seriousness of the offending in this context, and also upon the fact that prior to the March offending, the applicant had been the subject of police action for the offences committed on 4 and 5 February 2023, including by being charged and released on bail on 5 February 2023. There is also reference made to her being previously cautioned by police for a number of offences involving wilful damage, trespass, enter premises and commit an indictable offence and unauthorised dealing with shop goods, on two separate occasions in December 2022. It is further pointed out that school records indicate several past instances of cautioning for bullying and use of physical violence towards classmates, with notation that material is being obtained from teachers who dealt with such instances.

⁶ Section 48AA(4)(iv).

⁷ *BDO v The Queen* (2023) 97 ALJR 377 at [21]-[22].

⁸ *Ibid* at [48].

⁹ *Ibid* at [23].

¹⁰ (2016) 259 CLR 641 at [35].

¹¹ *Ibid* at [33] and see also *BDO v The Queen*, at [48].

- [18] For the applicant, it is correctly pointed out that, in terms of all of the cautions to which reference is made, the Court does not have any evidence as to what actually occurred and that, as must be accepted, there is the pall which is cast over this issue by the psychological assessment of intellectual disability. As must be accepted and whilst this will continue to be investigated on each side, it is not appropriate, at this stage, to regard the prosecution case as to the rebuttal of the presumption in s 29(2), as necessarily being a strong one.
- [19] Moreover, the particular concern which arises in the absence of any such rebuttal, is that the applicant cannot be regarded as criminally responsible for what she is alleged to have done and therefore not amenable to the youth justice processes, including by being further held in detention. It is notable, in this respect, that such consideration appears to underpin s 48AA(4)(b)(ix), in permitting regard to the “desirability of releasing children under 14 years from custody due to their vulnerability and community expectations that children under 14 are entitled to special care and protection”.
- [20] A related issue is the contention for the applicant as to the risk of her being held in detention beyond a period appropriate to her offending, assuming her criminal responsibility is established. Such is a mandatory consideration, engaged by s 48AA(3).
- [21] Notwithstanding the apparent seriousness of the applicant’s alleged offending, particularly including but not limited to the torture offence, her age and the absence of any other juvenile criminal history are important considerations. Further, it must be kept in mind that the principles to be applied to any sentencing of the applicant will include that:
- (a) pursuant to s 208 of the *YJA*, a detention order can only be made against a child if the court, after considering all other available sentences and taking into account the desirability of not holding a child in detention, is satisfied that no other sentence is appropriate in the circumstances of the case; and
 - (b) even if a detention order is so considered appropriate, it will be necessary to consider the suspension of that detention, upon the making of a conditional release order, the purpose of such an option being described in s 219 of the *YJA*, as being “to provide for an option instead of the detention of a child by

allowing a court to immediately release the child into a structured program with strict conditions”.

The likelihood of the adoption of a release upon a conditional release program, will necessarily be influenced by the extent to which there has been pre-sentence detention. And it can be noted that upon any view, for a 12-year-old child, that is already at a level of some significance in this context. It is both difficult and unnecessary, at this stage, to attempt any prediction of the likely outcome in any sentencing of the applicant, as that eventuality will necessarily depend upon many yet to be, at least fully, identified factors.

- [22] The concern which is identified in respect of rebuttal of the presumption in s 29(2) of the *Criminal Code* raises the prospect that the issues in respect of the applicant’s circumstances will not fall under the auspices of the youth justice system, but rather perhaps as issues relating to the care and protection of children. However and notwithstanding the weight attaching to the submission made for the applicant in respect of undermining the strength of the prosecution case in this respect, the fact of the matter is that the evidence of the applicant’s cognitive disability is not such, at this stage, to necessarily foreclose prosecution rebuttal of the presumption against criminal responsibility and whilst the matter remains unresolved, the applicant remains amenable to the youth justice system.
- [23] In that context and in the application of the principles as have been noted, there must remain an obvious concern pursuant to s 48AAA(2) as to the unacceptability of risk of further offending conduct of the applicant. That is, given her past conduct, particularly as indicted in this Court and the noted observations in the psychological report, including as to a predilection to carrying knives for self-preservation, extends to an unacceptable risk that the applicant “will commit an offence that endangers the safety of the community or the safety or welfare of a person” (whether or not she is ultimately criminally responsible for it).
- [24] Also discernible is an unacceptable risk that she will commit some other offence. As noted, the concern arising pursuant to s 48AAA(2) is not, contrary to the respondent’s submissions, to be found in aspects of the applicant’s most recent alleged offending. In that respect, it is necessary that there be some discernible risk of more than subjective concerns as to intrusion upon a person’s safety or welfare,

as a victim of offending, such as may be related to intrusion into a residence or offending in respect of someone's property. The distinction, in respect of the separate treatment of particular offending in s 48AAA(2), must relate to a more objective or direct discernment of risk of conduct endangering the safety of the community or the safety or welfare of a person, because of predilection to creating such general danger or risk of community harm or risk of use of violence, in particular, to any person. It may also be necessary to consider the prospect of offending which is calculated to cause emotional harm to another person.

- [25] The difficulty then confronting this application is in discernment of appropriate mitigation of those risks by the imposition of conditions in any bail undertaking. The proposal put forward is rightly the subject of the criticism that it is essentially proposing the same conditions as were in place when the recent breaches of bail and the further offending occurred; albeit that, as noted for the applicant, there was a period from May to August 2023 when there was apparent compliance with those conditions. The only difference specifically noted in the submissions for the applicant, is the proposal to return to schooling on campus, rather than at home, but this would not be an engagement to be expected before late January 2024. It may also be observed that the applicant would not be returning, at least at this stage, to a home environment which included the presence of her sister, with whom she is alleged to have committed most of her offences.
- [26] A further potential consideration pursuant to s 48AA(4)(a)(vi) is as to any indicated willingness of a parent or other person to support the child to comply with bail conditions or to notify the Chief Executive or a police officer of any change of the child's personal circumstances that may affect the child's ability to comply with the imposed conditions or as to any breach of those conditions. Obviously and as evidenced in the materials before the Court, the re-engagement with the proposed conditional bail program and the intensive involvement of dedicated case workers, would lead to such an expectation. It is to be noted that the Court was provided with specific acknowledgement of the proposal for such management over the pending Christmas and New Year period (subject to public holidays), in anticipation of any grant of bail. However, the application, as far as the circumstances and position of the applicant's mother, with whom she is proposed to return to live and in whose care much of the circumstances noted as having detrimental effect upon the

development of the applicant, have occurred, did not extend beyond hearsay acknowledgement of the mother's willingness to "have the applicant home and support her on bail", in circumstances where she is not working and has been making recent enquiries for the enrolment of the applicant in local schools, and her advice that the applicant is "no longer under the care of child safety".¹²

- [27] Obviously, the mitigation of the risks involved in any further grant of bail to the applicant would need to be subject to the proposed conditions, including the conditional bail program. The essential point of the psychological assessment was to support an application for NDIS funding in respect of further specifically identified supports for what was then in place and interventions to assist in the identified aspects of dysfunction in the applicant's life. That application is noted as still being progressed by the Intensive Case Management team which would be involved in any further conditional bail program to be engaged with the applicant, with expressed hope of resolution in the New Year.¹³ Any availability of the recommended further resources in engagement with the applicant may be an important consideration in terms of mitigation of the risks of her further release on bail, in conjunction with any other developments or expectations in respect of dealing with her alleged offences.

- [28] For the reasons which have been noted, it is not appropriate for there to be a grant of bail to the applicant as matters stand. As is specifically provided in s 48AAA(4) and (5), a child may be remanded in custody in circumstances where "the court has information indicating there may be an unacceptable risk of a matter mentioned in subsection (2) or (3), but does not have enough information to properly consider the matter".

Conclusion

- [29] Accordingly the appropriate orders, in these circumstances, is to adjourn the further consideration of this application until 9:00am on 23 January 2024, pending the provision of any further information including, but not limited to, the result of the NDIS application and engagement of any additional supports and interventions as

¹² Affidavit of LJ Bull, filed 8/12/23, at [16].

¹³ See Ex. 5.

available to the applicant in the community. It is directed that the parties are to file and serve any further materials to be relied upon, by 3:00pm on 22 January 2024.