SUPREME COURT OF QUEENSLAND

CITATION:	*Re AFR* [2020] QSC 118
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED EX TEMPORE ON:	3 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	3 April 2020
JUDGE:	Lyons SJA
ORDER:	**1. Application for bail refused**
CATCHWORDS:	CRIMINAL LAW — PROCEDURE — BAIL — AFTER CONVICTION — GENERALLY — where the applicant was convicted of one count of rape after a five-day trial and sentenced to six years imprisonment – where the applicant applied to the Court of Appeal to appeal against his conviction – where the appeal date has been set for 13 May 2020 – where the applicant applies for bail pending the hearing and determination of that appeal – whether there are strong grounds for concluding that the appeal will be allowed – whether the sentence imposed is likely to have been substantially served before the appeal is determined – whether the applicant has demonstrated exceptional circumstances in the context of the ongoing COVID-19 pandemic *Bail Act* 1980 (Qld), s 8, s 16 *Ex parte Maher* [1986] 1 Qd R 303, cited *Edwards v The Queen* (1993) 178 CLR 193, cited *Hanson v Director of Public Prosecutions* [2003] QCA 409, cited *Re Broes* [2020] VSC 128, cited
COUNSEL:	B Power for the applicant C Wallis for the respondent
SOLICITORS:	Fisher Dore for the applicant Office of the Director of Public Prosecutions for the respondent

HER HONOUR (delivered *ex tempore*): This is an application for bail. On 24 October 2019, he was convicted in the District Court of one count of rape after a five-day trial. He was sentenced to six years imprisonment. He has been in prison since that date. He is presently housed at Capricornia, near Rockhampton. He has

applied to the Court of Appeal to appeal against his conviction. The appeal date has been set for 13 May 2020, and at the present time, there is no reason why that cannot proceed on that date.

He applies for bail pending the hearing and determination of that appeal. In essence, counsel for the applicant argues that his appeal against conviction has good prospects of success, the determination of the appeal may not occur for months, that with the present circumstances with respect to COVID-19, the situation in prison at the moment is risky, and there is a public interest in reducing the number of prisoners. It is also argued that the applicant is prepared to comply with very strict conditions, essentially including a 24-hour curfew to remain at his home, particularly to assist with the care of his children.

There is no doubt the Court has jurisdiction to grant bail pending an appeal. Section 8 of the *Bail Act* 1980 (Qld) sets out the relevant provisions, and as Thomas J indicated in *Ex parte Maher*,[1] subsections (1) and (5) of section 8 give jurisdiction to a Court to grant bail to an offender who wishes to an appeal against his conviction or sentence, and significantly, it was said the only area into which the legislature has entered, relevant to such applications, is the negative area of section 16 which requires that if certain features are present, the Court is not to grant bail. Those factors are well-known, and are set out in section 16(1). Essentially they relate to failing to appear, committing further offences or interfering with witnesses.

Section 16(2) then sets out the other relevant matters the Court has to have regard to. The authorities indicate that bail pending appeal is exceptional. However, it is also clearly accepted that in some cases it may be possible to discern immediately a patent error in the proceedings below, which indicates that the applicant has a good chance of success on appeal, and that, as such, that may afford sufficient reasons to grant bail. That is particularly so in relation to some applications for special leave to the High Court which are successful. That may give some indication of a good chance of success on appeal.

In this case, I note that initially the ground of appeal against conviction was on the basis that the conviction was unreasonable. There is a new ground now, which is that the Judge erred in directing the jury in relation to lies. This was a trial in relation to one count of rape, and the essential allegation was the applicant had sex with the complainant whilst she was asleep, and without her consent. The background was she was working as an au pair for the applicant and his wife. The main issue in contention relates to a pretext phone call. In that phone call with the complainant, the applicant stated that he did not have any real memory of the preceding night, and did not remember having sex with her. However, he did not deny that he may have had sex with her. In the call, the complainant asked, "Can you please tell me why you had sex with me last night in my room? Why did it happen?" The applicant answered, "I think I was very drunk, I guess."

As counsel before the applicant points out, that call was relevant to the Prosecution case in one of two ways. If the applicant was speaking the truth in the call, then he had no real memory of the previous night, and was not in a position to dispute the

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1 [1986] 1 Qd R 303

complainant's account in a positive way, or if he had not been truthful in the call, and when he spoke to the complainant he did have a positive memory of what occurred, then being untruthful about the state of his memory, it is argued, was a falsehood, which went to his credit with regard to his evidence to the jury contradicting the complainant's account. Counsel for the applicant argues that instead of relying on the pretext call in those ways, the Prosecution relied upon the admitted falsity of the applicant's statement to the complainant that he did not remember sexual intercourse as being a lie told in consciousness of guilt. Counsel argues that this was not a case where it was open to contend that this was an *Edwards* lie. In addition to it not being open to have been an *Edwards* lie, counsel argues that there was a further defect in this summing up. In *Edwards v The Queen*,[2] the High Court held that where the Prosecution relied on a false statement made by a defendant as circumstantial evidence of guilt, the trial Judge had to identify the circumstance as an event said to indicate that the lie constitutes an admission of guilt. Counsel argues this was not done in the present case.

Furthermore, counsel had sought to exclude the phone call in a pre-trial ruling which was rejected, with the trial Judge ruling that it was admissible, partly because the applicant's comments are indicative of a guilty conscience and are capable of being interpreted as lies. This was a ruling which the applicant contends was an error, and that if the Court of Appeal finds that there was an error to rule the pretext phone call contained an *Edwards* lie, then there is no further requirement on the applicant to demonstrate that there was a miscarriage of justice. It would be a matter for the Crown to show the proviso should be applied.

I accept there is evidence to indicate the trial was finely balanced. There were a number of directions given to the jury, and on the material before me, it would seem that there was the need to replay the complainant's evidence. One of the matters the jury sought assistance about was a direction on lies during the pretext phone call and with the wife. Counsel argues that the directions permitting the jury to use the applicant's falsehood as an Edwards lie were then repeated to the jury, and the verdict given was a majority verdict on the 24th of October, which was some time after the jury was sent out in the afternoon of the 22nd of October. Clearly, it is difficult in the current circumstances, and on the material before me, to predict the outcome of an appeal against conviction. I have to accept that there is an arguable case, and it is probable that if the applicant is successful, that a new trial would be ordered. The applicant's counsel argues that the applicant was on bail prior to trial, and it would be appropriate to grant him bail, particularly where here, he would essentially be in home detention.

Counsel also argues that the current circumstances in relation to COVID-19 are relevant, and relies on the reasons outlined in the recent Victorian Supreme Court decision of *Re Broes*[3] to indicate that the virus can impact on the grant of bail, and in particular, the circumstances are referred to by Lasry J, where he indicated that there are sometimes circumstances where the current COVID-19 pandemic could amount to exceptional circumstances. I also accept that the material before me indicates that the applicant was complying with his bail conditions. If he is granted bail now, he

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2 (1993) 178 CLR 193

3 [2020] VSC 128

would reside with his family. His wife supports the application, and indicates that his assistance would be required at home, particularly to assist with some matters in relation to the care of a daughter who has some medical conditions. Accordingly, counsel argues that it has been shown that the circumstances have been satisfied in relation to the granting of bail, that there are exceptional circumstances, and that there are positive reasons why it is appropriate to grant bail.

I have considered this application with some care. It is clear, however, that the applicant has no prima facie right to bail, as counsel for the DPP points out. In particular, I have had regard, again, to the reasons in *Hanson v Director of Public Prosecutions*,[4] and it is clear that a grant of bail after conviction should only be exercised where the applicant can show exceptional circumstances. Otherwise, there is a risk of proliferation of appeals without merit, and it is against the public interest that convicted offenders are seen to be penalised, and it would encourage applications for bail, which would really mean that there are preliminary hearings of subsequent appeals. Having read the decision of Hanson, it is important to note that there should be very strong grounds for a successful appeal, particularly in terms of where any custodial period is in danger of being served before the determination of the appeal. There must be strong grounds.

Having read through the material in this case, the real issue, as counsel for the Crown points out, was the issue of consent, and that the lie was really just one element of that whole issue. It does not necessarily mean that if there were innocent explanations in relation to the falsehood, it would not deprive the jury of a finding of guilt in relation to the other aspects of the evidence that were before them. If the lie was capable of the use ascribed to it, it was for the jury to make a determination as to whether it demonstrated a consciousness of guilt. An *Edwards* direction is, in fact, a protective direction to guard against misuse. That direction was given. I am advised it was in accordance with the bench book direction, and that the direction was appropriate, and the jury was properly warned.

As I have said, whilst the ground is arguable, at this point in time I cannot conclude that there are strong prospects of success. In relation to the term of imprisonment he is likely to serve, it cannot be established in this case, given he has only served five months, that there is any danger that he would serve considerably longer in custody before his appeal was determined. So as I have said, the appeal is in almost a month's time. I accept that the applicant had no prior criminal convictions prior to offending, and there was no risk of interfering with witnesses. He has complied with bail previously. However, on the material before me, I am not satisfied that the applicant has established that, in this case, even in the current environment, there are exceptional circumstances such that he should have bail pending the determination of this appeal. In all the circumstances, the application is refused.

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4 [2003] QCA 409