

*Judge wants
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Law Society*

1260

R E G I N A

v

J THOMAS

Hearing: 20 September 1984

Counsel: W.J. Wright for Applicant
J.M. Conradson for Defendant

Judgment: 20 September 1984

ORAL JUDGMENT OF HOLLAND, J.

The Crown have applied for an order revoking the bail granted to the defendant, J Thomas, who has been arrested on a charge of rape and is at the moment awaiting the hearing of depositions in the District Court.

When the matter was first called in the District Court he was refused bail, but it is apparent from the papers that the District Court Judge at the time said that he might have been disposed to have granted bail if he was empowered under the Summary Proceedings Act to impose terms other than reporting. The Summary Proceedings Act restricts substantially terms that may be imposed by the District Court when granting bail. The matter then came before this Court, and of course this Court has inherent jurisdiction in regard to matters of liberty of the subject. This Court granted bail in his own recognisance of \$2,000 with one surety of \$1,000 but subject to the following conditions:-

- (1) He was to report each Monday and Friday at 7 p.m. to Dunedin Central Police Station;
- (2) He was to reside at 9 Bereford Street, Dunedin;
- (3) He was not to visit the home of the complainant or to

approach or communicate with her in any way, either directly or indirectly.

That bail was granted on 30 August 1984.

There was evidence before the Court that the complainant, following the granting of bail to the defendant, received telephonecalls when no-one spoke. On 10 September however, only 11 days after bail was granted and the conditions imposed she received a telephonecall from the defendant. The defendant has filed an affidavit in which he makes it clear that he did telephone her, and he clearly placed some pressure on her to withdraw her allegations of rape. The defendant following this, and obviously knowing what he had done was wrong, advised his surety that he had made a breach of the condition of bail. The surety took the very proper step of referring the matter to the police, and the result was that the surety was discharged by the District Court; the defendant was taken into custody because he did not then have an appropriate surety, and he remained in custody for three or four days until another surety was obtained. He is now at large and the Crown seeks an order of this Court to revoke the bail on the grounds that he has made a breach of a condition of bail and on the submission of the Crown is likely to do so in the future.

I am not sure that the District Court has jurisdiction to release a surety from a bond given to this Court, but no point is made of that and another surety has been obtained and the defendant again obtained his freedom. I am far more troubled about the jurisdiction of this Court to revoke bail. The inherent jurisdiction is to ensure the liberty of the subject from the excesses of power of the executive. The effect of the revocation of bail in the exercise of the inherent jurisdiction has the result that a man at liberty

is to be taken into custody and that would not normally be a matter in respect of which this Court could claim inherent jurisdiction or would want to claim inherent jurisdiction.

I adjourned the matter yesterday and asked for authorities as to the powers of the Court to revoke bail. The researches of counsel and of myself have been unable to find a case in the United Kingdom or New Zealand where bail granted by this Court is revoked because of breach of a condition. It normally does not arise because if a person on bail commits another offence he may be arrested on that offence and the question of bail on that offence is considered afresh. Here this defendant has not committed any crime. What he has done is fail to comply with a condition. In a Victorian case, R v Hill (1967) V.R. 556, that Court decided to revoke bail. It is difficult to understand why it was such a material matter because there the offender had committed further offences and one would have thought that the simpler issue was whether he should be granted bail on those offences rather than have his bail revoked.

I am satisfied, however, that it would make a nonsense of the law for the Court not to have jurisdiction to deal with this man. He has been granted his liberty as a result of the jurisdiction exercised and clearly acknowledged by this Court. He was granted his liberty on terms. He has failed to comply with those terms so that I am impressed with the argument of counsel for the Crown that in reality the Court is not considering placing him back in custody. All the Court is considering is whether or not the indulgence granted to him should be continued. Although there is no authority of any Court other than the one in Victoria where this

jurisdiction has been exercised, I am satisfied there is jurisdiction and it is important that there is jurisdiction so that people granted bail on terms know not only that those terms must be observed but that there are appropriate sanctions if they are not.

Having decided that I have jurisdiction I now turn to the merits of the matter.

The defendant and the complainant were living together as man and wife for a substantial period. There is now an allegation of rape. If rape occurred it is no less rape because they had been living together. But I emphasise that the allegation of rape in this case is one between two persons who not only knew each other but had had an intimate relationship over a substantial period. It is perhaps not surprising that a defendant in those circumstances is distraught, and distraught to a level where he cannot behave logically and reasonably. The complainant in this case is entitled to the protection of the law and that was endeavoured to be obtained by the condition imposed on the granting of bail.

I have heard counsels' submissions. I am impressed that the defendant volunteered the information to his surety. Counsel has also taken unto himself the burden that he need not necessarily have done by telling me that the defendant communicated with him on the Sunday, a day before this breach of the bail terms occurred, and said he wanted to discuss matters with him. An appointment was made on the Tuesday. It was obvious that this man was troubled. This is not a case where it seems to me there is a great need to protect the public. There is a need to protect the complainant. There is also a need to protect the process of law to ensure that this trial continues in a proper way and without witnesses or

complainants being harrassed. This man does not appear to have any other offences and I do not regard there as being any risk to anyone other than to the complainant. There was no suggestion of violence. The communication was by telephone. I am not suggesting that the complainant did not have good cause to be frightened and to be disturbed. Nor am I suggesting that the behaviour of the defendant can in any way be excused. Worse, I am told that it arose because he was affected by liquor. I am satisfied, however, that it arose not only because he was affected by liquor, but because he was distraught at the situation which he found himself in and he is having difficulty still in adjusting to the fact that what he did might have been rape.

An accused person is entitled to the presumption of innocence until he has been proved guilty. There are occasions when because of the gravity of the offence, the risk of future offending or the interference with the trial or other grave matters the liberty of an accused person has to be lost. I do not regard this as a case where that situation has occurred, notwithstanding the breach of the condition of bail. The defendant has offered to undertake to reside in Invercargill. I do not propose to add such a condition. The telephone from Invercargill is just as effective as the telephone from Dunedin, and the result will be that the defendant will be away from his friends and supporters and will not be able to carry on in his job which he is at present able to do. I am prepared to take the risk of allowing him his liberty until his trial. The technical position is that he is remanded on bail until 25 September when depositions are to be taken. It will be for that Court to decide whether bail should be renewed, but unless there is something different shown from the depositions

than is known at the present moment there seems to be no reason why he should not have bail until his trial. That, however, is for the committing Court.

I want to address one or two remarks now to the defendant. There is a limit to how long this Court can go on granting you indulgences. I am assured by your counsel that you know the enormity of what you did. You not only did that as far as yourself is concerned but you have rendered other people who are awaiting trial like you at risk of getting bail because every time someone who is granted bail and offends the argument for them to be let at their liberty weakens. So you have not just let yourself down, you have let everyone down. No matter what you feel about this woman, it is vital that you have no communication with her and I also want to make it clear that if there should be any breach of this condition another application for revocation for bail will not result in the very kind result that has occurred to you on this occasion.

The application for revocation of bail is dismissed.

A D Holland