EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

IN THE DISTRICT COURT
AT ROTORUA

CRI-2016-063-000824
[2016] NZDC 3472

CAMERON HAWKE
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing:	24 March 2016 [In Chambers]
Appearances:	T Braithwaite for the Appellant Sergeant J Broom for the Respondent
Judgment:	24 March 2016

JUDGMENT OF JUDGE M A MacKENZIE
[Appeal against bail refusal]

Introduction

[1] The defendant, Cameron Hawke, faces the following charges:

- 23 February 2016 – contravening a protection order
- 24 February 2016:
  - (i) Contravening a protection order;
  - (ii) A charge of male assaults female;
- 26 February 2016 – contravening a protection order

[2] On 11 March 2016, the defendant sought and was declined bail by Community Magistrate J Best. He now appeals that decision.

[3] The police remain firm in their opposition to bail.

Background

[4] The circumstances of the alleged offending as set out in the police summary of facts is of three separate incidents over a period of days involving the defendant and the complainant, Ms Elwes. Ms Elwes is the complainant in relation to all the charges the defendant faces.

Incident 1

[5] The first alleged incident occurred on Tuesday 23 February 2016 at approximately 9.30 pm when the defendant arrived at an address on [name of road deleted], Rotorua. The address was a friend of the complainant's, and the victim was there. The defendant arrived at the address unannounced, forcing his way into the house. The complainant's friend was present, because the summary of facts asserts that the friend intervened after an assault, including the defendant placing his right arm around the victim's neck and holding her in a headlock. After the complainant's friend told him to let her go, he did so and then left the address.

Incident 2

[6] The next day, 24 February 2016, at approximately 5.00 pm, the complainant was at a commercial premises, [name of premises deleted]. The defendant arrived at [name of premises deleted] whilst the complainant was there and allegedly assaulted the complainant (I will refer to this further later in this judgment). The summary of facts says that two employees at [name of premises deleted] approached the defendant, which caused him to cease assaulting the complainant.

Incident 3

[7] On Friday 26 February 2016, the complainant was at her home address. She was asleep in bed and awoke to find the defendant sitting on the windowsill in her bedroom watching her sleep. The victim got such a fright she yelled and swore at the defendant who grabbed her, hugging her and telling her to calm down. There was an argument about the complainant's phone and then the defendant pushed her onto the bed and held her down. She told him she was going to call police and his response was, "If police come and I go to jail you're coming too. I've got something planned for you." At that point a friend of the complainant's arrived and told the defendant to leave, but he refused to do so.

[8] The police say that the complainant suffered injuries during these incidents, including bruising to her back, upper thighs and arms. She is also said to have suffered two bumps to her head from the defendant pulling her hair and marks to her as a result of being placed in a headlock.

[9] The defendant denies that any of violence occurred, that he never contacts the complainant and only sees her when their children require and the victim contacts him for that purpose.

Decision of Community Magistrate

[10] Bail was declined by Community Magistrate Best on 11 March 2016. The Community Magistrate considered the mandatory factors in s 8 Bail Act 2000 ("the Act") and considered that all three of the mandatory risks set out in s 8(1) existed. The Community Magistrate also considered s 8(4) and (5) and taking the risks identified in terms of s 8(1), coupled with victim's views and the need to protect any victim of alleged offending, declined bail.

Approach to appeal

[11] Appeals against a refusal to grant bail by a Community Magistrate are brought under s 41(1) Bail Act. The appeal is to be conducted by way of re-hearing;

refer s 41(7) of the Act. The Supreme Court in *Wong v R* [2009] NZSC 64 at [1] confirmed that bail decisions involve the exercise of discretion. In accordance with *Dodd v R* [2011] NZCA 490 (at [26] and [27]), on an appeal, the defendant must establish that the judicial officer:

(a) Made an error of principle; or

(b) Failed to take into account all relevant matters; or

(c) Took into account irrelevant matters; or

(d) Was plainly wrong.

Appellant's submissions

[12] Mr Braithwaite has filed fulsome and wide-ranging submissions. His submissions can be distilled into the following propositions:

(a) That the Community Magistrate incorrectly applied facts in the s 8 balancing exercise.

(b) That the Community Magistrate failed to consider any of the s 8(2) discretionary factors, and in particular, difficulties with what the appellant says to be the strength of the evidence.

(c) That bail conditions can sufficiently mitigate any identified risks.

Analysis

[13] I accept that it is not evident, on the face of it, that Community Magistrate Best considered two relevant matters when determining the question of bail. They are firstly the discretionary matters in terms of s 8(2) and secondly, whether bail conditions would sufficiently mitigate the identified risks. It may be that the Community Magistrate did consider those matters, but if so, he did not articulate that he had taken those matters into account.

[14] Accordingly, I approach this matter afresh, and address the case for bail de novo in accordance with *Toby v Police* HC Auckland CRI-2005-044-4728, 16 August 2005; *Carr v Police* [2015] NZHC 2853 and *Roberts v Police* [2015] NZHC 446. One of the flow on consequences is that I was asked to take into account various new matters, and I record that I have done so (and against the police opposing that approach), on the basis that I am considering bail de novo. I have taken into account various matters, including:

(a) Text messages said to have been sent by the complainant to the defendant's phone, currently in his mother's possession;

(b) A document signed by a Kelly Ellison about the [name of premises deleted] incident;

(c) A letter from the defendant's mother;

(d) The complainant's criminal history.

[15] I was also provided with a victim impact statement by Sergeant Broom.

The law

[16] The defendant is not bailable as of right. However, he must be released by a Court pursuant to s 7(5) unless I am satisfied there is just cause for continued detention. Sections 7 and 8 Bail Act say:

> "**7 Rules as to granting bail**
>
> (1) A defendant is bailable as of right who is charged with an offence that is not punishable by imprisonment.
>
> (2) A defendant is bailable as of right who is charged with an offence for which the maximum punishment is less than 3 years' imprisonment, unless the offence is one against section 194 of the Crimes Act 1961 (which relates to assault on a child, or by a male on a female) or against [section 49] of the Domestic Violence Act 1995 (which relate to contravention of a protection order).
>
> (3) Repealed.

(4) Despite anything in this section, a defendant who is charged with an offence punishable by imprisonment is not bailable as of right if the defendant has been previously convicted of an offence punishable by death or imprisonment.

(5) Subject to sections 9 to 17, a defendant who is charged with an offence and is not bailable as of right must be released by a court on reasonable terms and conditions unless the court is satisfied that there is just cause for continued detention."

"**8 Consideration of just cause for continued detention**

(1) In considering whether there is just cause for continued detention, the court must take into account—

(a) whether there is a … risk that—

(i) the defendant may fail to appear in court on the date to which the defendant has been remanded; or

(ii) the defendant may interfere with witnesses or evidence; or

(iii) the defendant may offend while on bail; and

(b) any matter that would make it unjust to detain the defendant.

(2) In considering whether there is just cause for continued detention under subsection (1), the court may take into account the following:

(a) the nature of the offence with which the defendant is charged, and whether it is a grave or less serious one of its kind:

(b) the strength of the evidence and the probability of conviction or otherwise:

(c) the seriousness of the punishment to which the defendant is liable, and the severity of the punishment that is likely to be imposed:

(d) the character and past conduct or behaviour, in particular proven criminal behaviour, of the defendant:

(e) whether the defendant has a history of offending while on bail, or breaching court orders, including orders imposing bail conditions:

(f) the likely length of time before the matter comes to hearing or trial:

(g) the possibility of prejudice to the defence in the preparation of the defence if the defendant is remanded in custody:

(h) any other special matter that is relevant in the particular circumstances.

(3) Repealed.

(4) When considering an application for bail, the court must take into account any views of a victim of an offence of a kind referred to in section 29 of the Victims' Rights Act 2002, or of a parent or legal guardian of a victim of that kind, conveyed in accordance with section 30 of that Act.

[[(4A) When considering an application for bail, the court must not take into account the fact that the defendant has provided, or may provide, information relating to the investigation or prosecution of any offence, including any offence committed or alleged to have been committed by the defendant.]]

[[(4B) However, despite subsection (4A), the court may take into account the cooperation by the defendant with authorities in the investigation or prosecution of any offence if that cooperation is relevant to the court's assessment of the risk that the defendant will fail to appear in court, interfere with witnesses or evidence, or offend while on bail.]]

(5) In deciding, in relation to a defendant charged with an offence against [[section 49]] of the Domestic Violence Act 1995, whether or not to grant bail to the defendant or allow the defendant to go at large, the court's paramount consideration is the need to protect the victim of the alleged offence.]"

Discussion

[17] The overall thrust of the appellant's submissions is that the s 8(2) discretionary factors outweighed any of the mandatory s 8(1) risks (although the existence of any of those risks is not accepted on behalf of the appellant). As such, the appellant could be released on appropriate bail conditions.

Are any of the s 8(1) risks engaged?

[18] The police opposition to bail is that all three of the s 8(1) mandatory risks are engaged, to a greater or lesser degree. The appellant disagrees. I agree with Community Magistrate Best that the three mandatory risks in s 8(1) are engaged, and for the following reasons:

(a) Risk of failing to appear:

(i) The police say there is a risk of failing to appear on the basis that the defendant was actively avoiding detection and arrest,

to the point that they were required to seek a warrant for the defendant's arrest in lieu of summons. That, coupled with his history of convictions for breaching Court orders and/or sentences means that the risk is real, notwithstanding the fact that the defendant does not have any previous convictions for failing to appear. I accept that this is a risk despite the submission to the contrary. It is not a long bow to think that the defendant's convictions for not complying with sentences, combined with a warrant in lieu of summons, creates a risk. However, in and of itself, it would not be a reason to deny bail, as it could be managed by a condition to report to police.

(b) Interfering with witnesses:

(i) This is the high note of the police opposition. The appellant says that this is not a credible risk, on the basis that the defendant has no convictions of that nature and is entitled to the presumption of innocence. Mr Braithwaite urges caution in terms of the family violence history, based on the hearsay nature of such documents. I accept that submission about the family violence history, although it is somewhat ironic in that the appellant himself wishes the Court to take into account himself hearsay documents and a Google search. To assert that there is no risk of interference with witnesses based on a lack of a relevant conviction history in that regard is somewhat one dimensional.

(ii) There is a risk of interference with witnesses, given:

- Notwithstanding the presumption of innocence, the Court is entitled to take into account the factual narrative underpinning the charges. On the face of it, the charges indicate an evolving series of events over a period of days, with the defendant going to places where the complainant

was; the home of the friend of the complainant's, a commercial premises and the complainant's home.

- The most concerning allegation is that of the complainant waking up to find the defendant in her bedroom. Whilst the defendant believes the complainant to lack veracity (and I will deal with that in terms of the s 8(2) factors), the presence of the defendant at these various locations is capable of independent verification from others present, according to the summary of facts.

- Whilst applying a liberal dose of caution to the family violence records, they paint a picture of a toxic and dysfunctional relationship between the complainant and the defendant. In a little over two and a half years, there have been 16 family violence reports. It is true that earlier this year a police safety order (PSO) was served on the complainant. However, the family violence records also indicate that in 2013, a PSO was served on the defendant, which, according to the records, he breached.

- Mr Braithwaite was concerned that Community Magistrate Best placed weight on the family violence history without those having been disclosed to counsel. That submission now falls away because the family violence history was on the file, and it would seem that it has been disclosed to Mr Braithwaite.

- Mr Braithwaite wished to tender to the Court some copies of text messages apparently sent by Ms Elwes to the defendant, provided by the defendant's mother to Mr Braithwaite, she being in possession of the defendant's phone. For understandable reasons, Sergeant Broom opposed the Court taking those text messages into account

on the basis that reliability of those text messages was in question. That is a fair point, in that the three text messages are but a snapshot, and neither the police nor the Court had access to the phone. Given those matters, I place little, if any, weight on the text messages, as the true context is unclear.

(iii) Thus, based on:

- The evolving nature of the alleged incidents between the complainant and the defendant in February 2016;
- The defendant has put himself in a position of going to locations where the complainant is, coupled with the fact that the police case is capable of independent verification;
- All of this despite the fact that there is a protection order in place; a Court order which the Court expects to be complied with;
- The many family violence callouts;
- The fact of a previous police safety order which, according to the family violence records, was breached,

I assess that there is a credible risk of the defendant contacting the complainant.

(c) Offending on bail:

(i) The defendant does have a history of offending whilst on bail, but not recently. I consider that there is a risk of offending whilst on bail, but not based on his history of doing so. The risk of offending whilst on bail is interwoven, as Community Magistrate Best noted, with the risk of

communicating with the complainant. The risk derives from the possibility of ongoing contact between the defendant and the complainant, as evidenced by the alleged events which form the basis of the charges.

The discretionary factors

[19] I turn to consider the discretionary factors, given that there are s 8(1) factors which are engaged. As was said in *Dodd v R* [2011] NZCA 490, s 8 of the Act sets out a range of mandatory and discretionary factors for the Court when considering whether there is just cause for continued detention (at [22]).

[20] Whilst Mr Braithwaite refers to a number of the s 8(2) discretionary factors, particular emphasis is placed on:

- The strength of the evidence;
- Time to trial;
- Likely outcome if found guilty.

[21] In *Rewa v Police* [2015] NZHC 247, careful attention was paid to the approach to the s 8(2) discretionary considerations. The point made in *Rewa v Police* is that the considerations listed in s 8(2) are discretionary. It is worth setting out in full paragraphs [23]-[25] of that decision because they are germane to this bail appeal:

> "[23] This submission fails to recognise the discretionary nature of the considerations listed in s 8(2). In contrast to the mandatory language used in s 8(1), which lists considerations 'the court must take into account', s 8(2) uses the discretionary term, 'may.' The wording of this provision permits the court to take any of the matters in ss (2)(a)-(h) into account when considering whether there is just cause for continued detention under s 8(1). It does not compel the judge to consider as primary matters s 8(2)(b) (the strength of the evidence and the probability of conviction or otherwise) or s 8(2)(f) (the likely length of time before the matter comes to hearing or trial), as the appellant submits. Nor does this provision dictate what level of consideration is required by the Court. It must follow therefore that,

in the circumstances here, the alternative submission that Judge Smith 'failed to give adequate weight' to these two discretionary matters has little substance.

[24 Although a matter of statutory discretion, in practice, courts do put significant weight on the likely length of time that will elapse before trial. The quasi-compulsory nature of this consideration is due to its connection with the right to be tried without undue delay and the right to be presumed innocent under ss 25(b) and (c) of New Zealand Bill of Rights Act 1990 (NZBORA). In *Dodd v R* and *R v Hereora*, the Court of Appeal clarified that:

> 'Generally speaking, the longer the delay, the more difficult it will be to find there is just cause for continued detention. Where the delay is very lengthy, it will often become a compelling, but not necessarily overwhelming, factor in favour of the grant of bail.'

[25] However, even where 'undue delay' in terms of the NZBORA has been established, the granting of bail will not be automatic. The delay must be considered along with all the other circumstances to determine whether just cause for detention exists. This assessment will be more finely balanced where the pre-trial delay is extensive but the nature of the offence, or the defendant's prior record, is such that a lengthy custodial sentence will inevitably follow conviction."

Strength of the evidence

[22] The submission is robustly made that the complainant, Ms Elwes, is a person who lacks veracity. Mr Braithwaite was awaiting her criminal history. I asked the registrar to provide me with a copy of Ms Elwes' criminal history. He wished the Court to place weight on anecdotal information, including a Google search, said to be indicative of Ms Elwes' lack of veracity. The Court acts on cogent evidence and not sketchy detail. Anecdotal information or a Google search is not evidence.

[23] A bail appeal is not the time to embark into mini trial or an assassination of a complainant's character. What Mr Braithwaite is, in reality, submitting is that there will be issues as to the complainant's veracity to be tested. This is a case where, on the face of it, the veracity rules in s 37 Evidence Act 2006 may apply, but that will require an application, and a judicial ruling, pre-trial and in accordance with the heightened relevance test set out in s 37. This appeal is not the forum to consider and determine that issue.

[24] This is not a case, on the face of it, where the police are reliant necessarily on the complainant's statement. Sergeant Broom says there are photographs of the complainant's injuries. The summary of facts indicates, as I have already outlined, that there are a number of potential witnesses, given the presence of other people during the three alleged incidents Mr Braithwaite tendered a hearsay document from a Kelly Ellison relating to the [name of premises deleted] incident, the purpose of which was to indicate to the Court is that all is not as Ms Elwes would have the police and Court believe. Be that as it may, as I pointed to Mr Braithwaite, on the face of it, the defendant's own evidence (if he is intending on bringing it) would indicate a breach of the protection order, not in the way the police assert (physical violence). The defendant going to and remaining at a place where the complainant is, is a breach of the standard conditions of a protection order. And of course, the consequence of a jury trial election is that it is for the Crown to determine the nature of the charges in the Crown charge list.

Time to trial and other mandatory considerations

[25] In my view, the one relevant consideration in terms of the discretionary matters is the issue of time to trial, which has vexed me. The one discretionary factor which is pertinent is the question of time to trial, a jury trial election having been made. That inevitably means some delay before a trial date. *Dodd v R* confirms that the right to be tried without undue delay under s 25(b) New Zealand Bill of Rights Act is an important right. That, coupled with the presumption of innocence, are important considerations in deciding whether bail should be granted and for the reasons articulated at paragraph [23] of *Dodd v R*.

[26] Does the inevitable delay to trial outweigh the s 8(1) risks, coupled with the two other mandatory considerations set out in s 8(4) and (5)? The Court must take into account the victim's views. The opposition to bail sets out that the complainant is frightened. The Court's paramount consideration, according to s 8(5), is to ensure the safety of the victim of alleged offending. Given the nature of these incidents and charges, coupled with the defendant's criminal history which includes violence and the family violence records, and the mandatory nature of these two provisions, s 8(4) and (5) must weigh heavily in the balance.

Likely outcome

[27] Mr Braithwaite submits that a custodial sentence is a possibility, if convicted, but that a community based sentence is the more likely outcome, given the kind of violence and a lack of previous convictions for contravening the protection order, which in a sense is interwoven with the submission regarding time to trial. The issue in reality is whether any sentencing outcome would be disproportionate if the defendant spent a lengthy period of time in custody.

[28] The Court does not share the same optimism as counsel, when the factual matrix of the current charges is considered, coupled with the defendant's criminal history (which includes violence offending and non-compliance with sentence). Deterrence is the primary objective of sentencing for protection order breaches; *Palmer v Police* [2015] NZHC 143, and is likely to be a concern also in relation to the male assaults female charge.

Other factors

[29] As was said in *Rewa v Police*, the s 8(2) factors are discretionary. I have considered the other matters referred to, but they are not matters which carry weight; they would not tip the scales either for, or against, a grant of bail.

Outcome

[30] I consider whether bail conditions would appropriately mitigate the risks. I am not convinced that bail simpliciter would appropriately mitigate the risks identified, particularly when the mandatory considerations are put into the mix, given that the main risk is interference with the complainant and the proposed bail address is only 7.6 kilometres from the complainant, and against a context where the facts suggest that the defendant has gone to various locations where the complainant is present over a period of successive days. The complainant's views and the paramountcy of the need to protect the victim of the alleged offence are important considerations. After all, the High Court has noted that protection order breaches are prosecutions on behalf of the community.

[31] Mr Braithwaite sought to tender a letter from the defendant's mother, which I accepted against opposition from Sergeant Broom. It is illuminating. The defendant's mother believes the complainant to be a person of bad character and referred to matters irrelevant to the charges the defendant faces. The letter raises, on the face of it, some questions marks about the suitability of the proposed bail address.

[32] Therefore, I am not satisfied that stringent bail conditions to the address proposed with a non-association condition and possibly a curfew in terms of bail simpliciter would sufficiently mitigate the risks that I have identified in terms of s 8(1), coupled with the two mandatory considerations, as I have articulated in s 8(4) and (5). The time to trial is a relevant factor, but does not outweigh the mandatory considerations.

[33] This is a case for consideration of electronic bail. My concerns about the [name of suburb deleted] address might not be so pressing if there was electronic bail. As I have said, the complainant is 7.6 kilometres from the defendant. In terms of bail simpliciter, that is quite frankly too close. However, different considerations apply in terms of electronically monitored bail and bail simpliciter is declined. It is open to the defendant to apply, however, for electronic bail forthwith.

M A MacKenzie
District Court Judge