



Common Law Division Supreme Court New South Wales

Case Name: R v Spiteri-Ahern; R v Barber; R v Zraika (No 2)

Medium Neutral Citation:

Hearing Date(s): 22 August 2017

Date of Orders: 28 August 2017

Date of Decision: 28 August 2017

Jurisdiction: Common Law

Before: Rothman J

Decision: Crown application dismissed.

Catchwords: CRIMINAL PROCEDURE – orders sought restricting movement of accused in respect of whom the Court has dispensed with bail – no evidence to support risk warranting interference; HUMAN RIGHTS – right of public (including accused) to gain access to public spaces unless good reason disclosed to restrict same.

Legislation Cited: Bail Act 2013

Category: Procedural and other rulings

Parties: 2014/00180060:
Regina (Crown)
Louise Catherine SPITERI AHERN (Accused)

2014/00180279:
Regina (Crown)
April BARBER (Accused)

2014/00235123:
Regina (Crown)
Amin ZRAIKA (Accused)

Representation: Counsel:
2014/00180060:
D Patch (Crown)
J Trevallion (Accused)

2014/00180279:
D Patch (Crown)
A Francis (Accused)

2014/00235123:
D Patch (Crown)
Dr R Webb (Accused)

Solicitors:
2014/00180060:
Office of the Director Public Prosecutions (Crown)
Archbold Legal Solutions (Accused)

2014/00180279:
Office of the Director Public Prosecutions (Crown)
Bannisters Lawyers (Accused)

2014/00235123:
Office of the Director Public Prosecutions (Crown)
Macquarie Lawyers Burwood (Accused)

File Number(s): 2014/00180060; 2014/00180279; 2014/00235123

EX TEMPORE JUDGMENT

- 1 The Crown has applied for an order from the Court restricting the rights of an accused, Mr Zraika, to utilise one of the toilets open to the public and now, it seems, other areas of the Court's precincts.
- 2 The background to the application is that the Crown Prosecutor was utilising the male toilet when Mr Zraika entered the toilet facility. This caused the Crown Prosecutor some concern. It is not suggested that the accused, Mr Zraika, uttered any threat or was concerned in any conduct that was threatening or improper.
- 3 The application by the Crown is made orally and is not supported by any evidence. Nevertheless, for present purposes, I accept that the Crown Prosecutor, Mr Patch, had genuine concerns as to his vulnerability and safety.
- 4 The accused, Mr Zraika, faces a charge of concealing a serious indictable offence and is being tried in a judge alone trial with two other accused, against whom the charges are murder and accessory before the fact to murder respectively. The offence with which Mr Zraika is charged, if proved, carries a maximum penalty of two years imprisonment and, in the absence of co-accused, may have been heard in the Local Court. This is a re-trial caused by the discharge of the jury empanelled.
- 5 A bail authority, being the Local Court, dealing with this and another charge against Mr Zraika, originally, that is, on 2 October 2014, granted bail on conditions which, having examined them, were not particularly onerous and, on 3 July 2015, at the conclusion of the first trial, RS Hulme AJ dispensed with Mr Zraika's bail. In order for Mr Zraika to have his bail dispensed with, the Court was required to assess bail concerns under s 17 of the *Bail Act 2013*, being concerns as to the failure to appear; the commission of a serious offence; the endangerment of the safety of any victim, individual or the community; and; the interference with witnesses or evidence.

- 6 It should be noted that the Crown, in its case against Mr Zraika on the substantive charge, does not allege the occasioning of any violence. Section 18 of the *Bail Act* mandates the consideration of certain criteria in the assessment of concerns.
- 7 The decision to grant bail by the Local Court was not sought to be reviewed by the Crown. The judgment of RS Hulme AJ to dispense with bail likewise was not the subject of any application for review. In those circumstances, the Court is requested to infringe the liberty of a person judged not to be an unacceptable risk to the safety of any member of the community and by the assessment of RS Hulme AJ for there to be no bail concerns as described above: See ss 20 and 20A of the *Bail Act*.
- 8 As earlier stated, the Crown's ore tenus application is devoid of any evidence in support. Mr Patch alleges the facts from the Bar Table, together with an allegation that there was "some interaction" during the last trial between stakeholders, being the victim's family and friends, and one or more of the accused. The nature of the interaction is not described and no one seeks, even by allegation from the Bar Table, to apportion fault for such interaction, if it occurred, and whatever its nature.

Jurisdiction

- 9 The Crown has not sought to address the Court on its jurisdiction to make such an order. Nor has it pointed to any basis in jurisdiction. Any order, if made, would deal with restrictions on the use of public facilities in the precinct of the Court.
- 10 I accept, without deciding, that the inherent jurisdiction of the Court, as a superior court of record, to make orders to facilitate the smooth and expeditious conduct of proceedings, may allow such an order. Otherwise, I could revoke the order dispensing with Mr Zraika's bail and order him into custody or grant him bail on conditions that included those suggested by the Crown Prosecutor. I have serious doubts about either basis, particularly as to the latter, in the absence of a bail review.

Discretion

- 11 I have not heard from the legal representatives of the accused other than cursorily. They, like the Court, initially treated the application with some disdain.
- 12 They were, in the absence of evidence, entitled so to do. There is nothing before the Court by way of evidence, or otherwise, that would warrant the Court taking a different view of the risk posed by Mr Zraika than did RS Hulme AJ.
- 13 I accept that Mr Patch, on behalf of the Crown, puts the application seriously, (as he described it). I would comment that, if that were not the case, it should not have been put at all.
- 14 But the issue is one which must arise in every trial in which an accused is on bail or not in custody. If the Crown or its representatives feel vulnerable, then steps should be taken to have the government provide private entries and facilities for the Crown and its witnesses. Otherwise, public facilities and thoroughfares are available for the public, and the Court is not prepared to restrict the liberty of the accused in the circumstances before it.
- 15 When I announced the decision to reject the application, Mr Patch sought to reagituate the issue because his instructing solicitor saw the accused in the foyer of the Court and they were in each other's vicinity. I can imagine the accused may well have also been seen in a nearby street or coffee shop as well.
- 16 Ultimately, short of custody, or some order disallowing the accused from being within a certain distance of any witness or representative of the Crown, these circumstances can arise. While I urge all of the stakeholders to have regard to what may be the sensibilities of other participants in the trial, the Court is not prepared to make any order requiring sensitivity or restricting liberty. For those reasons I made the orders I earlier announced, dismissing the Crown's application.
