

Advice on Bail Application

This advice pertains to your application for court bail pursuant to the *Bail Act 1978* in respect of your arrest approximately two months ago. In respect of the denial of police bail,¹ it may have been justifiable as you were intoxicated during the evening in question.²

No right or presumption to bail

Although there is a right and presumption for bail created by sections 8 and 9 respectively of the *Bail Act*, you are not eligible under either of those sections.

Exemptions

Section 9A(1)(a) precludes those who are accused of a domestic violence offence be excluded from the section 9 presumptions. You have been charged under sections 59 and 61 of the *Crimes Act 1900*, and together with the fact that you have had an intimate relationship, and have lived together, with Bruce, the alleged victim, this qualifies as a domestic violence offence.³ Furthermore, police transcripts indicate that you have been violence to Bruce in the past.⁴

Additional criteria

Section 32(1) of the *Bail Act* provides additional criteria that a court may examine in determining whether bail should be awarded. No other criteria may be examined.⁵ However, you should be aware that the court's overarching principle is that of whether you, the accused, are likely to reappear before the court later.⁶

Supportive factors

Supporting factors include:

- **Strength of evidence:** As it provides an indication of the likelihood that you will reappear, the court is entitled to take into account the nature of the Crown's evidence.⁷ Although this advice will discuss the nature of the

¹ *Bail Act 1978*, Part 3

² *Ibid*, s 32(1)(b)(iv)

³ *Crimes Act 1900*, s 4 – *Bail Act 1978*, s 4 defines a *domestic violence offence* in terms of the *Crimes Act 1900*

⁴ *Bail Act 1978*, s 19A(1A)(b)

⁵ *Ibid*, s 32(1)

⁶ Howie R & Johnson P, *Annotated Criminal Legislation NSW*, 2004-2005 ed, Butterworths, Sydney, 2004 (hereafter referred to as *Annotated Legislation*), section [9-905.15]

⁷ *Ibid*, s 32(1)(c)(i); *R v Wakefield* (1969) 89 WN (Pt 1) NSW 325 at 330

evidence *at a later point*, in brief, the Crown's evidence is, arguably, not altogether conclusive.

- **Your child:** The birth of your child brings about responsibilities that must be performed outside of the confines of prison.⁸ If your parents are financially incapable of looking after the child, as you allege, it is in the best interests of the child that you, its mother, are able to care for it.
- **Your health and wellbeing:** Your distressing situation may render you at a higher risk of depression, and the confines of jail may exaggerate this.⁹ Furthermore, two months must be quite long for you; any more is arguably unjustified.¹⁰ After all, it is not the intent of bail to exist for punitive reasons.¹¹
- **Legal advice:** Subject to qualifications, a person should be able to prepare a legal defence.¹²

Negative factors

Opposing factors include:

- **Community ties:** You are unemployed, and you have only moved back in with your parents recently.¹³
- **Criminal record:** Your record of two shoplifting offences acts against you, although they are not serious.¹⁴
- **Protection of others:** The court may refuse bail to protect Bruce, and the woman that you allege to have been with him, given the history of violence.¹⁵ Your denial of the existence of the ADVO supports this. In addition, the prospect that you will commit an offence (of breaching the ADVO) is a negative criterion, so strong that it overrides your right to liberty.¹⁶
- **Penalties:** If convicted you face up to 7 years in jail¹⁷, and fined up to \$5500¹⁸. It may be argued that it is tempting to flee due to such high penalties.

Outcome

If the court awards bail, it may attach conditions to the bail.¹⁹ Appropriate conditions that may be proposed to negate some of the objections to the awarding of court bail include:

⁸ *Bail Act 1978*, s 32(1)(a)(i)

⁹ *Ibid*, s 32(1)(b)(v)

¹⁰ *Ibid*, s 32(1)(b)(i)

¹¹ *Annotated Legislation*, section [9-905.10]

¹² *R v Walters* [1979] 2 NSWLR 284 at 285 per Cross J

¹³ *Bail Act 1978*, s 32(1)(a)(i)

¹⁴ *Ibid*, s 32(1)(b)(vi)

¹⁵ *Ibid*, s 32(1)(b1)(i)-(ii)

¹⁶ *Ibid*, s 32(2)(a)-(b)

¹⁷ *Crimes Act 1900*, s 59

¹⁸ *Ibid*, s 562AB; one penalty unit is \$110 – *Crimes (Sentencing Procedure) Act 1999*, s 17

¹⁹ *Bail Act 1978*, s 36

- **Accommodation for people on bail:**²⁰ This would reduce the risk to both Bruce and the general community²¹, while allowing you to nurture your child.
- **Alcohol assessment:**²² You may be required to participate in intervention programs. However, the court may only consider this option if the first condition is insufficient.²³

Together with the strong case for freedom in respect of the care of your dependant child, in conclusion, there is a possibility for success for your bail application, which is likely to include conditions as outlined above.

²⁰ *Ibid*, s 36(2)(a1)

²¹ *Ibid*, s 37(1)(b)-(c) – conditions must serve a specified purpose

²² *Ibid*, s 36A(1)

²³ *Ibid*, s 37(3)

Advice on Charges

This advice will outline your liability and possible defences for the charges laid against you, under sections 61, 562AB and 59 of the *Crimes Act 1900*. Issues with admissibility of evidence will be discussed at the end.

Section 61 charge

The offence

Assault is “any act which intentionally causes another person to apprehend immediate and unlawful person violence and the actual intended use of unlawful force to another person without his consent”²⁴; that is, it combines the two “traditional” charges of assault and battery into the one term. This charge is a common assault, whereas the section 59 charge, which will be considered later, is an aggravated assault. The onus is on the prosecution to prove it beyond a reasonable doubt.

Evidence

The Crown may seek to use the following events as bases for this charge:

- The **offending graffiti** that allegedly alarmed Bruce as he entered the apartment
- Your **words over the telephone**

Offending graffiti

External elements

A positive act,²⁵ which creates an apprehension of immediate physical violence,²⁶ is required for assaults that do not involve physical violence. The Crown would submit that Kate was the creator the graffiti, and that Bruce, the victim, apprehended immediate physical violence due to that act.

There are issues of evidence as to which of your’s or Bruce’s version of events is the preferred one. However, your version of events can cast a reasonable doubt over the prosecution’s version of events based on Bruce’s testimony. Your claim that Bruce was accompanied by another woman supports the idea that the accusations levelled at you may be more rightly assigned to the woman that you allege was present in the apartment. In particular, you note that they were arguing; in the course of the argument, it is not unreasonable that the woman tied up Bruce and created the spray paint. The supposed evidence that you were inside the apartment are easily refuted:

²⁴ *Fagan v Commissioner of Metropolitan Police* [1969] 1 QB 439

²⁵ *DPP v Rogers* [1953] 2 All ER 644 at 645 per Lord Goddard CJ

²⁶ Note 24

- **Handbag:** Bruce identifies the handbag as belonging to you. However, you have not identified the handbag.
- **Fingerprints:** Although the existence of your fingerprints on the chair indicates that you were at some stage involved in the event

It is therefore possible that the actus reus cannot be proven beyond a reasonable doubt; this applies for the other accusations that focus on the events of that evening.

Internal elements

The prosecution needs to show that you either intended to cause Bruce to fear immediate physical violence, or that you were subjectively reckless. Arguably, you may have drawn the graffiti for some other reason. For recklessness, due to the history of violence, the Crown may argue that you knew that Bruce would fear, but you proceeded nonetheless.

Defence of automatism

Automatism is a common law defence, that connotes the state of a person who, though capable of action, is not conscious of what he is doing.²⁷ You would claim that the combination of the lack of food for a diabetic, and the shock of seeing the woman there, produced a malfunctioning of the mind.²⁸ There is an evidentiary burden on you here, as there is a presumption that acts are voluntary.²⁹

The elements here are external, such as the failure of the intake of food, as in *R v Quick v Paddison*. It is not self-induced; peer pressure no doubt lead to this event. An ordinary person³⁰, even without the emotional features of the accused, if placed in the position of the accused would have experienced such a malfunction of the mind. It is clearly sane as opposed to insane automatism – caused by the trauma of an event as confronting as seeing another woman in what you believe to be your house.

Words over the telephone

Words may constitute threatening conduct if they are of sufficient imminence³¹; they evidently were threatening to Bruce since he sought an AVO against Kate. In addition, the phone calls were of a continuing nature, which may also constitute assault.³²

²⁷ *Bratty v Attorney-General for Northern Ireland* [1963] AC 386 at 409

²⁸ *R v Falconer* (1990) 171 CLR 30

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Barton v Armstrong* [1969] 2 NSW 451

³² *Zanker v Vartzokas* (1988) 34 A Crim R 11

Section 59 charge

The offence

This is like section 61 but with an additional requirement of actual bodily harm. The prosecution will allege that you made Bruce unconscious, gagged him and then tied him onto the chair with rope.

External elements

As mentioned earlier, there are issues with the actus reus; you may not have actually committed those alleged actions. That aside, prima facie, the facts support “bodily harm”; although it is not permanent, it is beyond merely transient (Bruce is knocked out).³³

Internal elements

There is no need for the prosecution to prove specific intent for the bodily harm. Another issue is one of consent, which negates mens rea. Kate alleges that Bruce allowed her to keep a key to the apartment, showing that he wants to keep the relationship with her; however, consent does not extend to bodily harm.³⁴

Section 562AB charge

The offence

Section 562AB is a charge of stalking and intimidation. The prosecution may allege that her approach to his apartment on that evening constitutes stalking.

External elements

Prima facie, you stalked Bruce as you frequented his place of residence.³⁵ The prosecution is not required to prove that the person actually feared harm.³⁶

Internal elements

The prosecution is required to show (beyond reasonable doubt) that you had intent to cause physical or mental harm.³⁷ Consent may apply here – this would negate any suggestion that she intended to cause him physical or mental harm through her actions.

Defences

As before, there may be a defence of automatism; she walked to the apartment suffering from a malfunctioning of the mind. In addition, there may be an

³³ *R v Donovan* [1934] 2 KB 498 at 509

³⁴ *Ibid.*

³⁵ *Crimes Act 1900*, s 562A

³⁶ *Ibid.*, s 562AB(4)

³⁷ *Ibid.*, s 562AB(2)

honest and reasonable mistake of fact³⁸ – that the apartment was her home. For a person who has just suffered much upheaval, such confusion is indeed reasonable, even for a person who is not intoxicated.

Admissibility of evidence

The factual basis for this charge is the circumstantial evidence that you were involved in the assault of Bruce, but this has doubtful issues as indicated previously; this is in addition to your admission that you went to Bruce's flat that evening. It may be possible to deny admission for that piece of evidence if it was improperly obtained.³⁹ Particularly problematic the police's interview which lasted for five hours; the maximum period is four hours⁴⁰, and it is unlikely that they legitimately extended it⁴¹ since it was in the evening (and the courts are closed). However, if you were not arrested when you were picked up by the police, this may not be an issue since you were merely an invitee; however, it has been held that in certain circumstances through the acts of the police⁴² (such as if the police had clear suspicions on you⁴³) that it constitutes an arrest regardless.

Drugs charge

The offence

It is an offence to be in possession of a prohibited drug.⁴⁴ Marijuana, a cannabis extract⁴⁵, is prohibited.⁴⁶

External elements

Generally, the drug is in your possession if it is "o one's own knowledge, physically in one's custody or under one's physical control"⁴⁷ The prosecution is required to negate possession on the part of any other person, such as other occupants of the house.⁴⁸ Although Bruce has identified that it is your bag, it is in his house; the bag may have remained in the apartment since your departure, with him being the only one in control over it since then, creating a reasonable doubt.

Internal elements

³⁸ As established in *Thomas v R* (1937) 59 CLR 279

³⁹ *Evidence Act (NSW) 1995*, s 138(1)(a)

⁴⁰ *Crimes Act 1900*, s 356D

⁴¹ *Ibid*, s 356G(1)

⁴² *R v S and J* (1983) 32 SASR 174

⁴³ *Crimes Act 1900*, s355(2)(a)

⁴⁴ *Drug Misuse and Trafficking Act 1985*, s 10(1)

⁴⁵ Miller B F & Keane C B, *Encyclopedia and Dictionary of Medicine, Nursing and Allied Health*, W. B. Saunders Company, Philadelphia, 1987.

⁴⁶ Schedule 1 to Note 45

⁴⁷ Lord Diplock in *DPP v Brooks* [1974] 2 WLR 899 at 902, cited with approval in *He Kaw Teh v R* (1985) 157 CLR 523

⁴⁸ *R v Filippetti* (1978) 13 A Crim R 335

There is much doubt over whether you put the drugs there; knowledge is important for the existence of the necessary intent, which is required to be shown by the prosecution.⁴⁹

ADVO

Legislation has created apprehended domestic violence orders,⁵⁰ and Bruce is eligible to apply for one, for he has been in a domestic relationship with her in the past, and there are reasonable grounds for harassment, molestation and stalking,⁵¹ as evidenced by police reports.

The problematic area is one of notice. Although you did not attend the hearing, it does not provide evidence as to whether you were summonsed under section 562AF; it is conceivably an interim order,⁵² which does not have such a requirement. However, it is required that you be serviced with an order at some time,⁵³ and on the facts, that is not clear. It is beneficial that you cannot be convicted of contravening an ADVO if you were not aware of it.⁵⁴

Even if an ADVO did not previously exist, it now exists since you have been charged with a domestic violence offence.⁵⁵

Tentative Conclusion

You would appear to be free from all charges due to reasonable doubt as to the identity of the attacker, or the possessor of the drugs. In the alternative, your mental state is insufficient through automatism. The ADVO is legitimate, but further facts are required to ascertain whether you knew of its existence.

⁴⁹ *Saad v R* (1987) 70 ALR 667

⁵⁰ *Crimes Act 1900*, s 562AD

⁵¹ *Ibid*, s 562AE(1)

⁵² *Ibid*, s 562BB

⁵³ *Ibid*, s 562J

⁵⁴ *Ibid*, s 562I(1)

⁵⁵ *Ibid*, s 562BF