



Supreme Court
New South Wales
Common Law Division

Case Title: Konneh v State of NSW (No.3)

Medium Neutral Citation: [2013] NSWSC 1424

Hearing Date(s): 02/09/2013

Decision Date: 27/09/2013

Jurisdiction: Civil

Before: Garling J

Decision: Order that the separate questions be answered as follows:

Question 1: Upon the facts identified in paragraphs 1-3 of the Agreed Statement of Facts, is s 50(1)(a) of the Bail Act 1978 capable of application so as to afford a defence to the plaintiff's claim?

Answer: No

Question 2: If the arrest of any group member occurred in circumstances where that group member was not subject to any grant of bail under the Bail Act, whether conditional or unconditional, is s 50(1)(a) of the Bail Act capable of application so as to afford a defence to the group member's claim?

Answer: No

Question 3: Upon the facts identified in paragraphs 4-7 of the Agreed Facts, is s 50(1)(a) of the Bail Act capable of application so as to afford a defence to Mr Moffitt's claim?

Answer: Yes, depending upon the facts, matters and circumstances established by the evidence.

Question 4: If the arrest of any group

member occurred in circumstances where that group member was subject to a grant of bail under the Bail Act, but he or she was arrested on the basis of an alleged breach of a bail condition which did not exist, is s 50(1)(a) of the Bail Act capable of application so as to afford a defence to the group member's claim?

Answer: Yes, depending upon the facts, matters and circumstances established by the evidence.

Order that the costs of the hearing of the separate questions be costs in the cause.

Catchwords:

PRACTICE AND PROCEDURE - determination of separate questions - questions to be determined under r 28.2 of the Uniform Civil Procedure Rules 2005 in advance of all other questions.
REPRESENTATIVE PROCEEDINGS - State of NSW vicariously liable for conduct of police officers. TORT - claim for damages against State of NSW for wrongful arrest, false imprisonment and assault.
STATUTORY INTERPRETATION - whether s 50 of the Bail Act 1978 provides a complete defence to wrongful arrest, false imprisonment and assault

Legislation Cited:

1 William & Mary Sess 2c
Bail Act 1978
Civil Procedure Act 2005
Imperial Acts Application Act 1969
Interpretation Act 1987
Law Enforcement (Powers and Responsibilities) Act 2002
Statute of Westminster of 1275 (3 Edw 1)
Uniform Civil Procedure Rules 2005

Cases Cited:

Al-Kateb v Godwin [2004] HCA 37; (2004) 219 CLR 562
Carr v Western Australia [2007] HCA 47; (2007) 232 CLR 138
Clelland v The Queen [1982] HCA 67; (1982) 151 CLR 1
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297
Director-General Department of Corrective Services v Mickelson (1992) 26 NSWLR 648

Gifford v Strang Patrick Stevedoring Pty Ltd
[2003] HCA 33; (2003) 214 CLR 269
Potter v Minahan [1908] HCA 63; (1908) 7
CLR 277A1-
Project Blue Sky Inc v Australian
Broadcasting Authority [1998] HCA 28;
(1998) 194 CLR 355
Trobridge v Hardy [1955] HCA 68; (1955) 94
CLR 147
Zaravinos v State NSW [2004] NSWCA 320;
(2004) 62 NSWLR 58

Texts Cited:

B Donovan, The Law of Bail: Practice,
Procedure and Principles (Legal Books,
1981)
P B Maxwell, On the Interpretation of
Statutes (Sweet & Maxwell, 4th ed, 1905)
William Blackstone, Commentaries on the
Laws of England (Clarendon Press, Oxford,
1765 - 1769)

Category:

Principal

Parties:

Musah Konneh (P)
State of New South Wales (D)

Representation

Counsel:

M B J Lee SC/ R Francois (P)
M T McCulloch SC / D Villa (D)

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Maurice Blackburn (P)
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File number(s):

2011/187125

JUDGMENT

- 1 On 18 June 2013, the Court ordered, pursuant to r 28.2 of the Uniform Civil Procedure Rules 2005 ("UCPR") that the following questions be determined separately, and in advance of all other questions.

2 **Question 1:** Upon the facts identified in paragraphs 1-3 of the Agreed Statement of Facts, is s 50(1)(a) of the *Bail Act* 1978 capable of application so as to afford a defence to the plaintiff's claim?

3 Those agreed Facts are as follows:

- “1. On 14 August 2010, Senior Constable Ngoc Tran and Constable Matthew Lord arrested Mr Konneh for an alleged breach of bail.
2. Mr Konneh was released on 15 August 2010.
3. At the time of his arrest and at all times on 14 and 15 August 2010, Mr Konneh was not subject to any grant of bail under the *Bail Act* 1978 (NSW), whether conditional or unconditional.”

4 **Question 2:** If the arrest of any group member occurred in circumstances where that group member was not subject to any grant of bail under the *Bail Act*, whether conditional or unconditional, is s 50(1)(a) of the *Bail Act* capable of application so as to afford a defence to the group member's claim.

5 **Question 3:** Upon the facts identified in paragraphs 4-7 of the Agreed Facts, is s 50(1)(a) of the *Bail Act* capable of application so as to afford a defence to Mr Moffitt's claim?

6 Paragraphs 4-7 of the Agreed Facts are in the following form:

- “4. On 16 September 2010, Mr Moffitt entered into a bail undertaking that included conditions of bail. One of the conditions of bail was that he was not to be absent from premises at 13/2 Flide St Caringbah between the hours of 7pm and 6am unless in the company of Diana Gibbs (**Moffitt Curfew Condition**).
5. On 8 October 2010, Magistrate Blewitt at Kogarah Children's Court varied the Moffitt Curfew Condition so as to impose a condition that Mr Moffitt not be absent from premises at 13/2 Flide St Caringbah between the hours of 9pm and 7am unless in the company of Diana Gibbs (**Varied Moffitt Curfew Condition**).
6. On 4 November 2010, one or more police officers arrested Mr Moffitt for breach of bail on the basis of the arresting

officer's or officers' belief that Mr Moffitt was not permitted to be absent from premises at 13/2 Flide St Caringbah at the time of 8pm without being in the company of Diana Gibbs.

7. By virtue of the Varied Moffitt Curfew Condition, Mr Moffitt was permitted to be absent from premises at 13/2 Flide St Caringbah between 7.01am to 8.59pm on 4 November 2010, without being in the company of Diana Gibbs.”

- 7 **Question 4:** If the arrest of any group member occurred in circumstances where that group member was subject to a grant of bail under the *Bail Act*, but he or she was arrested on the basis of an alleged breach of a bail condition which did not exist, is s 50(1)(a) of the *Bail Act* capable of application so as to afford a defence to the group member's claim?

Group Proceedings

- 8 It is necessary, in order to provide the context for this judgment, to have an understanding of the underlying proceedings.
- 9 On 7 June 2011, Mr Musa Konneh brought proceedings against the State of NSW, claiming damages, including aggravated damages, for wrongful arrest, false imprisonment and assault.
- 10 The Statement of Claim pleaded that the proceedings were brought by Mr Konneh on his own behalf, and, pursuant to Pt 10 of the *Civil Procedure Act 2005*, as a representative proceeding.
- 11 The group members on whose behalf the proceedings are brought by Mr Konneh, are described in this way, namely, persons who:
 - “(a) were detained by a member of the NSW Police Force for only a breach of a bail conditions or bail conditions; and
 - (b) the alleged breach of the bail condition or bail conditions related to an alleged offence or offences which were being or had been prosecuted in the Children's Court of NSW; and

- (c) at the time of the detention, were not then subject to the bail condition or bail conditions which were alleged to have been breached.”

- 12 The State of NSW, which accepts that it is vicariously liable for the conduct of each the police officers who undertook the arrest of the plaintiff, Mr Konneh, and the group members including Mr Moffitt, relies upon s 50(1) of the *Bail Act* as a complete defence to the allegations.
- 13 In order to prove the defence, should the provisions of s 50 of the *Bail Act* apply to the facts agreed, and the issues pleaded, then it would be necessary for the State to prove the state of mind, and reasonableness of the belief, of each of the arresting officers at the relevant times. These factual issues do not fall for determination in this judgment.
- 14 However, if the provisions of s 50 of the *Bail Act* are not applicable, and could not afford a defence, then the costs and expense of preparation of the proceedings, the length of the proceedings and the complexity of them, would be significantly less.
- 15 It was for those reasons that the Court ordered that the identified questions be separately determined.

The Bail Act 1978

- 16 The *Bail Act* is the legislation which is central to the answers to the separate questions.
- 17 The Act applies to a person, whether or not they have attained the age of 18 years: s 5.
- 18 Section 7 of the *Bail Act* provides that when bail is granted to a person in respect of an offence, and the person enters into the bail undertaking whether with or without conditions,

“... the person is, subject to this Act, entitled to be released ... and to remain at liberty in respect of the offence, until the person is

required to appear before a Court in accordance with the person's undertaking."

19 The Act provides that in respect of some offences there is a right to be released on bail, and in respect of other offences, there is a presumption against bail, or else a presumption against bail in particular aggravating circumstances for offences. There is also a presumption in favour of bail for certain offences.

20 Section 10 of the *Bail Act* provides that a Court may dispense with bail. Section 11 provides that the effect of such bail being dispensed with, is that:

"... the person is entitled to be and to remain at liberty in respect of the offence, until the person is required to appear before a court in respect of the offence."

21 Part 7 of the *Bail Act* deals with non-compliance with undertakings and conditions. Sections 50 and 51 fall within Part 7.

22 Sections 50 and 51 are in the following form:

"50 Arrest for absconding or breaching condition

- (1) Where a police officer believes on reasonable grounds that a person who has been released on bail has, while at liberty on bail, failed to comply with, or is, while at liberty on bail, about to fail to comply with, the person's bail undertaking or an agreement entered into by the person pursuant to a bail condition:
 - (a) a police officer may arrest the person without warrant and take the person as soon as practicable before a court, or
 - (b) an authorised justice may:
 - (i) issue a warrant to apprehend the person and bring the person before a court, or
 - (ii) issue a summons for the person's appearance before a court.
- (2) The court before which the person is brought or appears may:
 - (a) release the person on the person's original bail, or
 - (b) revoke the person's original bail and otherwise deal with the person according to law.
- (3) If the court revokes the person's original bail, the court or any other court before which the person is brought or appears:

- (a) may grant bail to the person in accordance with this Act, or
 - (b) may (notwithstanding anything in this Act) refuse to grant bail to the person and by warrant commit the person to prison.
- (3A) A court is not to revoke or refuse to grant bail under this section unless satisfied that the person has failed, or was about to fail, to comply with the person's bail undertaking or agreement. For that purpose, the court may take into account any evidence or information which the court considers credible or trustworthy in the circumstances.
- (4) Nothing in this section limits the rights of an accused person in custody to apply for bail.
- (5) In this section, 'court' does not include an authorised justice who is not an authorised justice employed in the Department of Courts Administration.

51 Offence of failing to appear

- (1) A person who fails without reasonable excuse (proof of which lies upon the person) to appear before a court in accordance with the person's bail undertaking is, on summary conviction, guilty of an offence against this section.
- (2) A person convicted of an offence against this section is liable to the same penalties as are by law provided for the offence in respect of which the person failed to appear, but no sentence of imprisonment imposed pursuant to this section shall exceed 3 years and no fine so imposed shall exceed 30 penalty units.
- (3) Proceedings for an offence against this section shall be dealt with:
- (a) by the court dealing with the offence in respect of which the person failed to appear, constituted in the same way,
 - (b) where the court referred to in paragraph (a) is the Court of Criminal Appeal, Supreme Court or District Court-by that Court constituted in any other way, or
 - (c) in any case-by the Local Court.

..."

History of Bail

23 Whilst bail historically developed as a matter of common law, it first commenced to be the subject of statutory regulation in England in 1275. That statute, the Statute of Westminster of 1275 (3 Edw1) specified the offences for which bail was available, and the offences for which bail was not available, with the three considerations for a grant of bail being:

- (1) the seriousness of the offence;

- (2) the likelihood of the accused's guilt; and
 - (3) the "outlaw" status of the offender which included considerations such as the accused's background, marital status, the length of time the accused had resided at their current address, and other related matters: see B Donovan, *The Law of Bail: Practice, Procedure and Principles* (Legal Books, 1981) 24.
- 24 Until 1978, bail in NSW was governed by a mixture of common law principles and various legislative provisions.
- 25 In July 1976, the NSW Attorney-General established a Bail Review Committee, which reported in August 1976. As a consequence of one of the recommendations of that Committee, the law relating to bail in NSW was consolidated and codified into the *Bail Act 1978*.
- 26 The *Bail Act* abolished any common law powers to grant bail: s 62.

Principles of Statutory Interpretation

- 27 Because the answers to the separate questions involve understanding and interpreting some of the provisions of the *Bail Act*, which is now a code, it is convenient to re-state the central principles of statutory interpretation which are engaged in this case:
- (a) the starting point for statutory interpretation is to engage in a purposive construction, that is, to prefer a construction which promotes the purpose and/or object underlying an Act: s 33 *Interpretation Act 1987*; *Carr v Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at [5]-[6] per Gleeson CJ;
 - (b) the primary object of legislative interpretation is to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions of the statute: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69] and [71] per McHugh, Gummow, Kirby and Hayne JJ; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, Mason and Wilson JJ at 320; and

- (c) the heading of a part of an Act is taken to be a part of the Act: s 35(1) of the *Interpretation Act*. A heading may be referred to, in order to assist in resolving any uncertainty about the meaning of the language used: *Director-General Department of Corrective Services v Mickelson* (1992) 26 NSWLR 648 at 654D per Kirby P;
- (d) it is well established that a statute should not be assumed to abrogate existing fundamental rights in the absence of clear language: *Gifford v Strang Patrick Stevedoring Pty Ltd* [2003] HCA 33; (2003) 214 CLR 269 at [36] per McHugh J.

28 This last tenet of statutory interpretation needs some elaboration. In *Zaravinos v State NSW* [2004] NSWCA 320; (2004) 62 NSWLR 58, Bryson JA (with whom Santow JA and Adams J agreed) said at [23]:

“A statute which authorises the detention of a person must be strictly construed, because the law places a high value on personal liberty: see *Williams v The Queen* [1986] HCA 88; (1986) 161 CLR 278 at 292 and 296 (Mason and Brennan JJ); *Smith v Corrective Services Commissioner of NSW* [1980] HCA 49; (1980) 147 CLR 134 at 139.

29 Deane J said in *Clelland v The Queen* [1982] HCA 67; (1982) 151 CLR 1 at page 26:

“It is of critical importance to the existence and protection of personal liberty under the law, that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed.”

30 These statements reflect the fact that the right to personal liberty is “... *the most elementary and important of all common law rights*”: *Trobridge v Hardy* [1955] HCA 68; (1955) 94 CLR 147 at 152 per Fullager J. Blackstone, in his commentaries on the Laws of England (Clarendon Press, Oxford 1765, Book 1) suggested that if the preservation of personal liberty was arbitrarily put to one side “... *there would soon be an end of all other rights and immunities*”.

31 The principle is of long standing. In *Potter v Minahan* [1908] HCA 63; (1908) 7 CLR 277, O'Connor J cited with approval, this passage from the 4th Edition of Maxwell on Statutes:

“One of these presumptions is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares ... either in express terms or by implication. Or, in other words, beyond the immediate scope and object of the Statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness ...”.

- 32 As Gleeson CJ said in *Al-Kateb v Godwin* [2004] HCA 37; (2004) 219 CLR 562 at 577:

“Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.”

- 33 It will be necessary to keep these principles in mind when considering the true meaning and effect of s 50 of the *Bail Act*.

Extrinsic Materials

- 34 Section 34 of the *Interpretation Act*, permits the Second Reading Speech of the Minister to be considered in interpreting the provision of an Act, if it is capable of assisting in the ascertainment of the meaning of the provision, but only in the limited circumstances provided by s 34(1)(a), and s 34(1)(b) of the *Interpretation Act*.

- 35 It is convenient to set out what was said about Part 7 of the *Bail Act*, including s 50, by the Minister when making the Second Reading Speech which was delivered on 14 December 1978. The Attorney-General said:

“Part VII is concerned with non-compliance with undertakings and conditions. In order to ensure that accused persons released on non-financial bail conditions will appear, and that legitimate community interests are otherwise protected, the Bill contains a number of important provisions in clauses 50-53. If a police officer believes on reasonable grounds that a person on bail has failed to comply with, or is about to fail to comply with, a bail undertaking or agreement, he may arrest the person without warrant, a provision

which will assume importance where the offender has moved interstate. Failure to appear on bail without reasonable excuse is made a separate criminal offence under clause 51, for which the penalty is not to exceed the penalty for the offence with which the accused was originally charged, and shall in any event not exceed three years imprisonment or a penalty of \$3,000.”

The present law is unsatisfactory because an accused person who absconds suffers no punishment other than forfeiture of any bail money that may have been lodged on his behalf. Specific power is given to Courts to deal with the offence summarily, and to make the penalty for absconding cumulative upon any sentence imposed for the substantive or any other offence. Such a major innovation measure is required as the police and the Courts will not be able to make full use of non-financial forms of release unless an effective sanction, other than the forfeiture of money, is provided.”

36 In concluding the Speech, the Attorney-General said:

“These bail provisions are important measures which will substantially improve the administration of criminal justice in New South Wales. They attempt to strike the necessarily delicate balance between the right of an unconvicted accused person to be at liberty while awaiting determination of the charge on the one hand, and the protection and welfare of the community on the other. Each of these factors has had to be considered and balanced in framing this very important legislation. Although it is perfectly true that the community must be protected against dangerous offenders, one must not lose sight of the circumstances, first, that when bail is being considered, one is confronted with an alleged crime and an unconvicted accused person, and second, that the liberty of the subject is one of the most fundamental and treasured concepts in our society.”

Submissions of the State

37 The State submits that s 50 ought be interpreted in a way which has the consequence that if the police officer forms a belief, on reasonable grounds, that a person has been released on bail, and that they have failed to comply with a condition of that bail, then an arrest is not unlawful.

38 The State submits that coherently with the well understood pre-conditions of the power of arrest at common law, which power is now found in the *Law Enforcement (Powers and Responsibilities) Act 2002*, the possibility that a police officer may be mistaken about the basis upon which the power of arrest is being exercised, is catered for by ensuring that the police officer has a reasonable ground for the belief.

- 39 The State submits that in forming a reasonable belief of a police officer that a person has failed to comply with their bail undertaking, or an agreement entered into by that person pursuant to a bail condition, there are many ways in which the arresting police officer could be mistaken including:
- (a) the police officer could be mistaken about whether or not the person was subject to any bail conditions at all;
 - (b) the police officer could be mistaken as to the identity of the person;
 - (c) the police officer could be mistaken about whether the person was subject to a particular type of bail condition (eg a curfew);
 - (d) the police officer could be mistaken about the precise terms of a particular type of bail condition (eg curfew commences at 9pm, but the police officer believes it commences at 7pm);
 - (e) the police officer could be mistaken about whether or not the person has conducted themselves in a way that breached a bail condition.
- 40 The State submits that the nature of the mistake quoted in sub-paragraph (a) above, namely that the police officer could be mistaken about whether or not the person was subject to any bail conditions at all, is the nature of the mistake covered by the first two separate questions. It submits that the third and fourth separate questions describe a mistake of the kind to be found in sub-paragraph (d) above, namely whether the police officer was mistaken about the precise terms of a particular type of bail condition.
- 41 Ultimately, the State submits that s 50 of the *Bail Act* is clear in its meaning, and that it entitles a police officer to form a reasonably based, yet mistaken, belief that a person has failed to comply with a bail undertaking or a bail condition, and therefore arrest that person.
- 42 The State submits that unless any mistakes of the kind to which reference has been made at [39] were permitted to be made by a police officer, then

the section would have the effect that some honest and reasonably grounded mistakes by a police officer would not expose the officer to any action as a consequence of an arrest, whereas other mistakes would expose an officer to action. The State submits that such an interpretation would be unworkable in practice.

- 43 The State submits that the primary purpose of an enactment relating to bail is to provide liberty to people who would otherwise remain in custody pending the outcome of criminal proceedings against them. It submits that, therefore, the *Bail Act* is not an enactment that impinges upon the common law right to liberty. Rather, it submits that the *Bail Act* is an enactment that confers liberty where otherwise there would be none. For this reason, it submits that the principle of statutory interpretation, to which attention is given above in [27]-[32] above, is not applicable to the *Bail Act*.
- 44 The State further submits that the concern of the law with an individual's liberty, is amply catered for, in the interpretation for which it contends, by the Court's consideration of whether or not the information available to the individual police officer constituted "*reasonable grounds*" for the relevant belief. It submits that that concern with liberty does not warrant departure from the purposive construction for which it contends.

The Submissions of the Plaintiff

- 45 The plaintiff submits that on the plain and ordinary meaning of the words in s 50 of the *Bail Act*, the section confers a power of arrest only in relation to a "*person who has been released on bail*". He submits that the description of "*a person who has been released on bail*" is an essential and objectively determined precondition for the application of the section.
- 46 Secondly, to the extent that there is any ambiguity, or lack of clarity about the meaning of the section, the plaintiff submits that having regard to the appropriate principles of statutory construction, a meaning which sustains the plaintiff's right to be at liberty ought be preferred over one which would more readily permit his arrest and detention.

- 47 Thirdly, he submits that such a construction is appropriate so as to give content, and a relevant sphere of operation, to the provisions of s 50(2) of the *Bail Act*. He submits that s 50(2) prescribes, exclusively, the powers that can be exercised by the Court in relation to a person who has been arrested under s 50(1)(a) of the *Bail Act*. If that person when arrested, was not a person who had been released on bail, the Court could not exercise any of the powers in s 50(2). For example, the plaintiff submits the Court could not revoke bail if none existed, nor could the Court release a person on his or her original bail if there was no original bail. The plaintiff submits that such a result would be absurd and illogical. Coherence in the interpretation of the provisions within the *Bail Act* suggests that his interpretation is correct.
- 48 Insofar as the section affects the third and fourth separate questions, the plaintiffs submit that the additional and objectively determined pre-condition to the operation of s 50(1)(a) of the *Bail Act* in its application to circumstances of an arrest, is that the bail condition for a breach of which a person was arrested, has to be a condition that did actually apply to the person's bail. The plaintiff submits that therefore the arresting officer's belief relates only to the conduct of the person, and not to the existence or terms of the particular bail condition.
- 49 The plaintiff points to the heading to Part 7, which is "*Non-Compliance with Undertakings and Conditions*", as confirming his interpretation of the provisions of s 50. He submits that the heading demonstrates that the conduct which is sought to be regulated is non-compliance with a bail undertaking or a bail condition, and accordingly, the reasonable belief of an arresting officer must go to the issue of non-compliance and not to the existence of the bail condition.
- 50 The plaintiff submits that the other provisions of Part 7 are coherent with the construction for which he contends.

51 Shortly put, the plaintiff submits that the sphere of permissible mistake of an arresting officer extends only to whether the person has engaged in particular conduct and not to the existence or content of the bail undertaking itself or of any of the conditions imposed. He submits that the existence of a bail undertaking, and the content of any bail undertaking or condition is (as with the question of whether the person is a person who has been released on bail) an objectively determined criterion.

Discernment

52 Some features of the issue seem undoubtedly to be clear.

53 The first is that a police officer has a power to arrest a person at common law, without a warrant, and has a power in accordance with the *Law Enforcement (Powers and Responsibilities) Act* to do so as well. But, leaving aside a question of a breach of the peace, those powers are exercisable only where a criminal offence has occurred, or where one is reasonably suspected to have occurred.

54 Secondly, bail is a statutorily controlled concept. It involves a Court releasing a person, conditionally or unconditionally, upon their agreement or undertaking to present themselves at Court on the next relevant date. No criminal offence is created with respect to bail, unless and until a person fails to appear at Court, and does not have a reasonable excuse for that non-appearance. In those circumstances, a criminal offence is created by s 51 of the *Bail Act*. But, a breach of any other bail condition is not a criminal offence.

55 Thirdly, the purpose of the *Bail Act* was to codify the law with respect to bail, and thereby to set out the basis for a grant of bail and the basis upon which conditions might be imposed. Section 37 restricts the basis for the imposition of conditions on bail. To the extent that s 37(2) provides that conditions shall not be imposed “... *that are any more onerous for the accused person than appear ... to be required*”, the section reflects the long-standing prohibition on excessive bail contained in 1 *William & Mary*

Sess 2c (The Bill of Rights) which remains in limited force pursuant to the *Imperial Acts Application Act 1969 - s 6*.

- 56 Fourthly, the power of arrest granted by s 50 of the *Bail Act*, is a specific creature of statute. It is different from other powers of arrest for police officers, including the common law power of arrest. The reason that the power of arrest is different is because no criminal offence is committed where there has been a breach of a bail condition or agreement, or where there is an apprehended breach of that bail condition or agreement, other than where there has been a failure to appear at court. Accordingly, the power of arrest does interfere with an individual's right to be at liberty. The individual has that right, in the circumstances of the proceedings with which this judgment deals, because they are not on bail and, accordingly, have the long standing common law right of liberty. Alternatively, the individual is entitled to be at liberty pursuant to the grant of bail and by reason of the provision of s 7 of the *Bail Act*. It is only if there is a breach of a condition, or an apprehended breach, that the right to liberty is interrupted.
- 57 The interpretation contended for by the State has the effect that, assuming the belief of an arresting police officer is a reasonable one, a person's right to be at liberty can be interrupted by an arrest by a police officer exercising the power granted under the *Bail Act*, even where a person is not subject to the *Bail Act*.
- 58 It would be a significant abrogation of a person's fundamental right to be at liberty if a police officer was entitled to arrest them on the mistaken belief that they were the subject of a grant of bail, unless there is a clear indication in the words in the *Bail Act* that this is so.
- 59 It seems to me that it is appropriate to construe this statute strictly because it provides a police officer with the capacity to deprive an individual of their liberty. As Gleeson CJ said in *Al Kateb*: see [32], there needs to be a clear manifestation by unambiguous language which indicates that the

legislature has consciously decided to curtail the right of the individual to be at liberty.

60 If, as submitted by the State, the legislature intended to make applicable the reasonable belief of an arresting police officer as to the fact that a person was on bail, and had failed to comply with an agreement or and undertaking, then different words and syntax were required. There needed to be a conjunction between the phrase "... *person released on bail*", and the use of the phrase "... *fail to comply with ...*" an agreement or undertaking, and, as well, a deletion of the qualifying word "*who*" in the section.

61 To give effect to the submissions of the State, s 50(1) should read as follows:

"Where a police officer believes on reasonable grounds that a person ~~who~~ has been released on bail and has, while at liberty on bail, failed to comply with, or is, while at liberty on bail, about to fail to comply with, the person's bail undertaking or an agreement ..."

62 Such drafting would make it plain that the legislature was extending the arresting police officer's reasonable belief to both the fact that the person had been released on bail, and also whether there had been a failure to comply with an agreement or undertaking.

63 However the section is not framed in that way. The use of the phrase "... *a person who has been released on bail ...*" makes it plain, so it seems to me, that the section has no application, unless the person has been released on bail. These introductory words to s 50 suggest directly that the pre-condition to the exercise of the power in s 50 to arrest an individual, is that the individual must have been released on bail, that is, subject to the code enacted by the *Bail Act*. Whether or not a person has been released on bail, is a question which can be answered objectively. That is, is the person subject to a grant of bail or not?

64 The application of the principles of statutory interpretation, to the words and syntax used in s 50(1) of the *Bail Act*, lead without more, to the

conclusion which I have expressed. In particular, the need to interpret strictly, any provision of legislation which restricts personal liberty, is engaged.

65 This conclusion is fortified by the provisions of s 50(2) of the *Bail Act* which do not have any work to do unless the person who is brought before the Court, is actually on bail.

66 The alternative courses open to a court posed in s 50(2), both assume the existence of a person's original bail. If a person has been arrested, who is not on bail, then there is no specific provision which addresses that circumstance. It seems to me that if, consistently with the defendant's submission with respect to s 50(1), the legislature contemplated that a person who was not on bail might be reasonably, but mistakenly, arrested, then one would expect to see in s 50(2) an alternative as to the Court's capacity merely to discharge or release the individual, without any reference to the individual's bail. No such reference exists.

67 It may be argued that it is obvious that a court would release a person wrongly arrested. So much may be accepted. However, given that this is a statute which is a code, and which as I have found, curtails an individual's right to be at liberty, then one would have expected specific words to have been provided which assisted to demonstrate the consciousness of the legislature to the events which the State contends are covered by s 50(1).

68 Hence, I agree with the submissions of the plaintiff that the work done in s 50(2) can only be effective if the person is actually subjected to a grant of bail.

69 In the result, since the first two separate questions are directed to whether the fact that a person has been released on bail or not, is not susceptible to the reasonable belief of the arresting officer, the answers to Questions 1 and 2 must be in the negative.

- 70 The next issue is whether the same approach ought be taken with respect to Questions 3 and 4, which raise issues concerning breaches, or possible breaches of conditions of bail. In other words, can a police officer have a reasonable but mistaken belief that a particular condition exists and is applicable to the person who is being arrested?
- 71 The purpose of the creation of the power of arrest in s 50 is to detain people who, having been granted conditional bail, either do not, or at least appear to be about to fail to, comply with their bail conditions. Conditional bail is the end result of an exercise of balancing an individual's right to be at liberty, and the need for the protection of the community, whilst ensuring that the administration of justice takes place without undue interruption.
- 72 However, given that this is a particular form of arrest which has been created by the *Bail Act*, it is essential that the person effecting the power of arrest is doing so because there has been, or is about to be, a breach of a bail condition or an undertaking
- 73 It is clear that an assessment of whether someone is about to breach a bail condition, involves an assessment of both fact and intention. Minds may differ about the facts and the intention. That is why the legislation permits, coherently with the common law power of arrest, that the arresting officer is entitled to effect the arrest if he or she forms a belief on reasonable grounds that the conduct of the person about to be arrested has, or else will, constitute a breach of a condition of bail.
- 74 It seems to me that there is no reason why the facts, matters and circumstances which are subject to the arresting officer's belief on reasonable grounds, should not include the content and terms of the conditions which it is believed have been, or are about to be, breached. Whether in circumstances such as those set out in paragraphs 4 to 7 of the Statement of Agreed Facts, the arresting officer's belief is based on reasonable grounds, will be a matter to be determined having regard to the evidence, and all of the relevant facts, matters and circumstances.

- 75 It seems to me that once a person has been released on conditional bail, the essential pre-condition of s 50(1) of the *Bail Act* has been fulfilled, namely, that there is a person "... *who has been released on bail*". An arresting police officer then has to determine whether as a matter of fact or intention, the person has breached or is about to breach, a condition of a bail agreement or undertaking.
- 76 The words used in s 50(1) are capable of applying the issue of reasonable belief to the failure, or threatened failure to comply with conditions. Necessarily, so it seems to me, that must include a reasonable belief as to what the terms of a particular condition are.
- 77 In circumstances where the terms of the condition are capable of being readily objectively ascertained, it may be very difficult for an arresting officer who has a mistaken belief as to those terms, to demonstrate that such belief was one held on reasonable grounds, however, that must be, in each case, a matter for evidence.
- 78 Approaching the matter in this way, does no damage to the principle of coherence. Section 50(2) is capable of full and complete operation. The deleterious effect on a person's liberty is protected by the need for the arresting officer to demonstrate that a belief on reasonable grounds was held.
- 79 It follows from this conclusion that Questions 3 and 4 should be answered in the affirmative.

Orders

- 80 I order that the separate questions be answered as follows:

Question 1: Upon the facts identified in paragraphs 1-3 of the Agreed Statement of Facts, is s 50(1)(a) of the *Bail Act* 1978 capable of application so as to afford a defence to the plaintiff's claim?

Answer: No

Question 2: If the arrest of any group member occurred in circumstances where that group member was not subject to any grant of bail under the *Bail Act*, whether conditional or unconditional, is s 50(1)(a) of the *Bail Act* capable of application so as to afford a defence to the group member's claim?

Answer: No

Question 3: Upon the facts identified in paragraphs 4-7 of the Agreed Facts, is s 50(1)(a) of the *Bail Act* capable of application so as to afford a defence to Mr Moffitt's claim?

Answer: Yes, depending upon the facts, matters and circumstances established by the evidence.

Question 4: The arrest of any group member occurred in circumstances where that group member was subject to a grant of bail under the *Bail Act*, but he or she was arrested on the basis of an alleged breach of a bail condition which did not exist, is s 50(1)(a) of the *Bail Act* capable of application so as to afford a defence to the group member's claim?

Answer: Yes, depending upon the facts, matters and circumstances established by the evidence.

81 I order that the costs of the hearing of the separate questions be costs in the cause.
