

Re S [2005] TASSC 89 (19 September 2005) – Supreme Court of Tasmania

‘Assault’ – ‘Bail’ – ‘Emotional and psychological abuse’ – ‘Following, harassing, monitoring’ – ‘Physical violence and harm’ – ‘Presumption of innocence’ – ‘Risk assessment tool’ – ‘Risk factor - strangulation’

Proceeding: Application for bail

Facts: The applicant was arrested following a complaint that he assaulted his partner. She alleged that he had taken her car keys. When she asked for them back, he verbally abused her, grabbed her throat and pushed her backwards. The complainant stated that the applicant kept a gun on the property (though this was not untoward because it was a farming property with livestock) and that she lived in fear of her partner’s threats. The applicant denied the allegations and stated that he did not see the complainant on the day in question. He alleged that the complainant made threats against his safety and that she made the assault complaint maliciously in an attempt to force him to pay her money. Following his arrest, an application for a family violence order (FVO) was made. The applicant had no history of violence or prior convictions. The police officer completed a ‘Tasmania Police Family Violence Risk Assessment Screening Tool’. This involved a subjective assessment provided by the complainant and was part of a whole of government response to domestic and family violence instituted in Tasmania in 2004 ([18]). While the applicant was in the remand centre, the complainant called and asked to speak to the complainant. She indicated that she was willing to drop the assault charge if she was paid money that she was owed.

Issue: Whether bail should be granted.

Decision and Reasoning: Bail was granted. The Court held that various problems with duplication within the risk assessment, the mixture of protective legislation within the criminal law and the mandatory nature of the legislation meant that a court is inhibited in its assessment of future risk, especially in the case of an unrepresented defendant. There was evidence that the phone message from the complainant while the applicant was on remand could be construed, 'as a form of pressure designed to enhance a financial outcome favourable to the maker', which would be contrary to the *Family Violence Act 2004 (Tas)*. Section 12 of the Act creates a presumption against bail for a person charged with a family violence offence unless the court is satisfied that release, "would not be likely to adversely affect the safety ... of an affected person". At [23], Slicer J made some general comments on the effectiveness of the statutory scheme, noting concerns that the public must have confidence in the administration of the scheme and that public confidence is diminished when an arbitrary approach is taken. By tasking the courts to assess the future risk of a person, reliable primary material must be put before the court to deal with issues such as deprivation of liberty and consequences to the family unit. Slicer J also noted the risk that, 'deprivation of liberty is seen as a sanction imposed for unproven conduct.'

The Court held that it is not possible to determine the merits of the domestic violence complaint at first instance and that it remained an issue for trial. His Honour also noted tensions between the presumption of innocence and the need to protect victims. In applying this to the facts, his Honour granted bail on the provision of a surety and the imposition of residential, geographical and contact provisions.