

POLICE

(*New Zealand Law Reports*, 1961, page 261)

IN THE SUPREME COURT

DEVON v. POLICE

Supreme Court, Auckland. 3 October, 27 October 1960.
Shorland, J.

Police Offences—Frequenting Public Place With Felonious Intent—Intent Must be Directly Related to Place Frequented and Time of Frequenting—Police Offences Act 1927, s. 52 (j).

It is implicit in the wording of s. 52 (j) of the Police Offences Act 1927 that the felonious intent there referred to should be one directly related to the place frequented and the time of the frequenting.

A mere act of preparation (not amounting to an attempt) which is carried out in a public place for the commission of an offence elsewhere is not an unlawful act and a present intention to commit an act which is not unlawful cannot be a felonious intent for the purposes of s. 52 (j).

APPEAL from a decision of the Magistrate's Court at Auckland convicting the appellant of being

deemed to be a rogue and vagabond within the meaning of s. 52 (j) of the Police Offences Act 1927, in that being a suspected person he did frequent a public place to wit Puriri Road with a felonious intent.

M. Robinson, for the appellant.

Cleal, for the respondent.

Cur. adv. vult.

SHORLAND, J. The undisputed facts are as follows: The appellant believing that a certain married lady had been guilty of misconduct, and seeking to make improper use for his own evil ends of his supposed knowledge of the lady's assumed guilt, wrote and placed in the lady's letter box a letter in the following terms:

Dear Beautiful,

Unless you would like your husband to know of a certain sailor and a cardigan which he received it would be to your advantage to be at the bus shelter at Bogue's Corner on the first Plunket night after 8 p.m. The same performance will of course be carried out, somewhere. If not the first then the second night.

The lady in question was in fact quite innocent of the allegation contained in the appellant's letter. On receiving the letter she immediately showed it to her husband, and the Police were promptly notified.

By arrangement with the Police the lady kept the appointment, a constable being secreted at the site. The lady was to signal by dropping a book as soon as she had verified that the writer of the letter had accosted her.

The lady arrived at the bus shelter specified in the appellant's letter at 8.15 p.m. on the night which had been indicated. The appellant was already at the scene, but other people were also there waiting for a bus. At 8.20 p.m. the bus arrived and all people other than the lady and the appellant boarded the bus. When the bus moved off the appellant, who was some 15 ft from the lady, asked her if she was waiting for somebody. After further conversation, the lady satisfied herself that the appellant was the writer of the letter she had received, whereupon she dropped her book. The constable emerged and requested the lady to retire.

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Thereafter the appellant, after receiving an appropriate warning, made a written statement to the Police. The portion of the statement relevant for present purposes is as follows:

It was my intention to ask the woman to come to my house in Lancaster Road. My wife was not home so I knew that I would not be disturbed. When at the house I intended asking the woman to have sexual intercourse with me. If she refused I was going to threaten her. I was going to say that if she did not let me have sexual intercourse with her I would tell her husband that she had a sailor at her house while her husband was away. I do not think that I would have told her husband that she had had sexual relations with the sailor if she refused me.

The substance of the charge against the appellant was that being a suspected person he had frequented the particular bus stop with a felonious intent. The accused's statement was the only evidence of his alleged felonious intent.

It is to be noted that at the bus stop the intention of the appellant was to request the lady to come to his house where he knew he would not be disturbed. Any intention to extort consent to intercourse by threat had relationship to the accused's house and not to the bus stop.

A felonious intent is an intent to commit an indictable offence: See *Berry v. Ritchie* [1932] N.Z.L.R. 1315; [1932] G.L.R. 604.

I agree with the learned Magistrate that having regard to what has been laid down in *Pyburn v. Hudson* [1950] 1 All E.R. 1006, and *Cohen v. Black* [1942] 2 All E.R. 299, the appellant was on the facts a "suspected person" so far as the constable was concerned.

I assume for the purposes of the present case that intercourse had with consent extorted by threats other than threats of bodily harm would constitute rape, and that an intent to extort consent to intercourse by any threat which, in fact, sufficed to extort a consent which would not otherwise have been given is a felonious intent within the meaning of s. 52 (j) of the Police Offences Act 1927. The relevant words of s. 52 (j) under which the appellant was charged are:

... Being a suspected person ... frequents ... a public place [i.e., the bus stop] ... with a felonious intent.

In my view, it is implicit in the wording of the section that the felonious intent is one which is directly related to the particular place which is "frequented", and to the time of "frequenting".

One section of the Vagrancy Act 1824 (G.B.) 18 *Halsbury's Statutes of England*, 2nd ed., 202, from which the present legislation stems, included in the list of vagabonds,

"persons found in or upon any dwellinghouse, warehouse, coachhouse, stable or outhouse, or in any inclosed yard, garden or area for any unlawful purpose".

Although "with felonious intent" is more limited than "unlawful purpose" in that the former is confined to indictable offences, I think that in respect of requiring a direct relationship between the place and time of "frequenting" and the "felonious intent", the phrase "with felonious intent" is analogous to the phrase "for an unlawful purpose".

Furthermore, an act remotely leading towards the commission of an offence – an act falling short of what in law constitutes an attempt, and going no further than mere preparation as distinct from an attempt – does not constitute any offence at law, let alone an indictable offence: See *R. v. Eagleton* (1855) Dears 376, 515; 169 E.R. 766, 826. An act of mere preparation falling short of an attempt is not an unlawful act, and a present intention to commit an act which is not an unlawful act cannot be an intention to commit an indictable offence, or in other words, cannot be a "felonious intent" within the meaning of those words as used in the section under consideration.

In broad outline, the present case, in material facts, resembles the unreported case of *R. v. Brook* decided by the Court of Appeal on 9 June 1959. In delivering the judgment of the Court of Appeal, North, J., said, *inter alia*: "A letter naming a meeting place some two days ahead and containing a threat of exposure if 'the assignation be not kept is, in our opinion, too remote from the commission of sexual intercourse 'with an extorted consent to constitute an attempt to 'commit that crime'".

In *R. v. Mackie* [1957] N.Z.L.R. 669, the Court of Appeal reviewed the earlier decisions dealing with attempts and the requirements of the law as to the ingredients necessary to constitute an attempt are therein dealt with. I think it is clear from what is laid down in *R. v. Mackie* (*supra*) and the cases therein referred to that the act of endeavouring to persuade the lady to accompany the appellant to a secluded place is too remote from the appellant's objective in the event of attaining the seclusion of his home – namely, the commission of sexual intercourse with extorted consent, to constitute in law an attempt to commit that offence. Such acts as were intended to be carried out at the bus shelter were mere acts of preparation, falling short of an attempt to commit an offence, and they were not therefore unlawful acts.

Finally, the case of *Goundry v. Police* [1954] N.Z.L.R. 692, and the authorities therein referred to, deal with the question of what constitutes "frequenting". These authorities establish that resorting only once to a place can constitute "frequenting" if it is shown that the offender was at the place long enough to carry out the prohibited purpose or to give effect to the particular felonious intent. Although these decisions are concerned with what constitutes "frequenting", it is, I think, implicit in the reasoning upon which they proceed that the felonious intent with which a suspected person may be charged with frequenting a specified place is one which has a direct relationship with that place, and thus enables the Court to determine whether or not a single resorting to the place amounts to a "frequenting", by applying the test of whether or not the offender was there for a sufficient time to give effect to his felonious intent. I think these authorities are consistent only with the conclusion reached that the felonious intent envisaged by the subsection is one

which is directly related to the place and time of the "frequenting", and that they therefore support this conclusion.

In the present case, the only intent admitted by the appellant and proved against him in respect of his resorting to the bus shelter was the intention of endeavouring to prevail upon the lady to go with him to the seclusion of his house. The intention at the bus shelter was to carry out an act in preparation for the attempting later at another place of an offence against the law. Such act in preparation was no more than mere preparation, which, because it fell short of the legal requirements of an attempt, was not an unlawful act.

There is therefore no proof that at the time when the Police intervened the appellant had resorted to the bus shelter for the purpose, or with the intention, of there committing an unlawful act, let alone an indictable offence. It follows that the appellant was not proved to have frequented the bus shelter with felonious intent.

The appellant's conduct was most reprehensible, but as has been said of the vagrancy sections of the criminal law, they are not intended as a convenient method for supplying a hiatus in the evidence of proof of some offence. See *In re Dean* (1924) 18 Cr. App. R. 133; *R. v. Cadwell* (1927) 20 Cr. App. R. 60.

The appeal must be allowed accordingly.

Appeal allowed.

Solicitor for the appellant: *M. Robinson* (Auckland).

Solicitor for the respondent: *Crown Solicitor* (Auckland).
