

9. CRIMINAL DIVISION – CUSTODY & BAIL

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Some of the material in sections 9.3 & 9.4 is taken, with her kind permission, from a private research paper entitled "A Digest of Bail Cases", prepared by former Deputy Chief Magistrate Jelena Popovic. The paper is not available to the public. The cases in this Digest mostly relate to adults but the principles are also broadly applicable to children. However, apart from those cases in which issues of principle are discussed, most of the cases turn on their particular facts and are of limited use as precedent.

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9.0 Major amendments to the Bail Act in 2018

Following a review of the operation of the Act by Mr Paul Coghlan, stage one of major amendments to the Bail Act 1977 [No.9008] ('the **BA**') came into operation on 21/05/2018, stage two on 01/07/2018 and stage three on 01/10/2018. The amendments commencing on 01/07/2018 included a substantial renumbering of sections. Those commencing on 01/10/2018 primarily involved terrorism-related circumstances and amendments to **BA**/ss.4AA & 4A-4D. The other major amendments are as follows:

- **Purpose:** New s.1A provides that the purpose of the **BA** is to provide a legislative framework for the making of decisions about whether a person should be granted bail.
- **Guiding principles:** New s.1B provides that it is the intention of Parliament that the **BA** is to be applied and interpreted having regard to the importance of-
 - (a) maximising the safety of the community and persons affected by crime to the greatest extent possible; and
 - (b) taking account of the presumption of innocence and the right to liberty; and
 - (c) promoting fairness, transparency and consistency in bail decision making; and
 - (d) promoting public understanding of bail practices and procedures.
- **"Bail decision maker"** is defined in s.3 as a court, a bail justice, a police officer or the sheriff or a person authorised under section 115(5) of the *Fines Reform Act* 2014 empowered under the **BA** to grant bail, extend bail, vary the amount of bail or the conditions of bail or revoke bail.
- **"Prosecutor"** in relation to an application under the **BA** includes the informant, a police prosecutor and any other person appearing on behalf of the Crown.
- **"Schedule 1 offence"** means an offence specified in Schedule 1 of the **BA** for which a bail decision maker must refuse bail unless **exceptional circumstances** exist that justify the grant of bail. The Schedule 1 offences are listed in section 9.2.4 below.
- **"Schedule 2 offence"** means an offence specified in Schedule 2 of the **BA** for which a bail decision maker must refuse bail unless the accused shows a **compelling reason** [formerly described as the accused being required to show cause] why his or her detention in custody is not justified or in circumstances set out in ss.4AA(2) & (3) **exceptional circumstances** exist that justify the grant of bail. The Schedule 2 offences are listed in section 9.2.5 below.
- **"Surrounding circumstances"** is defined in s.3AAA and involves a non-exhaustive list of considerations which a bail decision maker must take into account.
- **"Vulnerable adult"** is defined in s.3AAAA as a person 18 years of age or more who has a cognitive, physical or mental health impairment that causes the person to have difficulty in (a) understanding their rights; (b) making a decision; or (c) communicating a decision. Certain provisions of the **BA** which prevent a police officer or bail justice from granting bail do not apply to a vulnerable adult. The definition is limited to adults as all children are similarly exempted.
- **Flowcharts:** 4 illustrative flowcharts which have no legal effect are contained in s.3D of the **BA**.
- **Tests for granting bail:** Section 4 of the **BA** is completely rewritten and makes it clear that where there are two tests involved, they are to be applied in a 'two stage' process: first the reverse onus test and then the unacceptable risk test.
- **Accused affected by alcohol/drugs:** New ss.4(4D)-4(4G) permit a bail decision maker to adjourn a bail hearing for a limited time where an accused appears to be seriously affected by alcohol and/or drugs and to remand the accused in custody in the interim.
- **Family violence:** New ss.4(4H)-4(4I) require a bail decision maker to enquire about family violence and to consider the risk of family violence.
- **Bail conditions:** Section 5 has been redrafted to refer specifically to bail undertakings and to improve its structure and wording. A new s.5AAA relates to conduct conditions, including a condition inconsistent with a family violence order or notice [s.5AAA(3)]. New s.5AAB re sureties.
- **Powers of various bail decision makers to grant or refuse bail:** Section 10 sets out the power of a police officer, sheriff or authorised person. Section 10A sets out the power of a bail justice. Sections 12 & 13 set out the power of a court.
- **Where bail decision maker not authorised to grant bail:** New ss.10(5A) to 10(8) of the **BA** increase the circumstances in which an accused person can only seek bail from a court.
- **"Police remand":** New s.10AA provides that where police refuse bail to a person other than a child, Aboriginal person or vulnerable adult, they may hold the accused for up to 48 hours instead of taking the accused to a bail justice.
- **Court's power to place on bail or remand a person before it on summons:** New s.12B.

9.1 Child in custody

The following table lists those provisions of the Children, Youth and Families Act 2005 (Vic) [No.96/2005] [as amended] ('the **CYFA**') and the Bail Act 1977 [No.9008] [as amended] ('the **BA**') which set out the duties & powers of the arresting police officer, a court and a bail justice in relation to a child who is in custody.

SECTION	ACTION WHERE ACCUSED CHILD IS IN CUSTODY
CYFA/ s.346(2)	If a child is arrested and taken into custody by a police officer, the child must be: <ul style="list-style-type: none"> (a) released unconditionally [with or without being charged]; or (b) released on bail by a sergeant of police or officer in charge of a police station [BA/s.10]; or (c) brought before the Court; or (d) if the Court is not sitting at any convenient venue, brought before a bail justice- within a reasonable time but not later than 24 hours after being taken into custody.
CYFA/ s.346(3)	If bail may only be granted to a child by a court [BA /s.13] s.346(2) does not apply and the child must be brought before the court as soon as practicable and- <ul style="list-style-type: none"> • no later than the next working day after being taken into custody; or • if the proper venue of the Court is in a region of the State prescribed under the CYFA, within 2 working days.
BA/ s.12(4)(a)	If a court refuses bail to a child, the court must not remand the child in custody for longer than 21 clear days.
BA/ s.10A(6)	If a bail justice refuses bail to a child, the bail justice must remand the child in custody to appear before a court- <ul style="list-style-type: none"> • on the next working day or within 2 working days if next day not practicable; or • if the proper venue of the Court is in a region of the State prescribed under the CYFA, within 2 working days.
BA/s.12(5) FURTHER REMAND	If a child in custody is brought before a court on the expiry of a period of remand in custody, the court must not remand the child in custody for a further period longer than 21 days. This power is not restricted to one further remand but applies to any number of further remands.

9.1.1 Prescribed regions for 2 day bail justice remand

Regulation 23(1) & Schedule 3 of the Children, Youth and Families Regulations 2017 [S.R. No.19/2017] lists 48 councils, covering the whole of rural & regional Victoria, whose municipal districts are prescribed regions for the purposes of 2 day bail justice remands under s.10A(6)(b)(ii) of the **BA**.

9.1.2 Placement of remanded child

If a child is remanded in custody by a court or a bail justice, s.347(1) of the **CYFA** and reg.23 & Sch.3 of the Children, Youth and Families Regulations 2017 provide that the child must be placed:

(i)	in a remand centre; THE COURT HAS NO POWER TO DIRECT IN WHICH CENTRE A CHILD IS TO BE PLACED	The remand centres established under ss.3 & 478(a) of the CYFA are: <ul style="list-style-type: none"> • Malmsbury Youth Justice Precinct – Males aged 15 and over • Parkville Youth Justice Precinct – Males aged 15-18 • Parkville Youth Justice Precinct – Males aged 10-14 • Parkville Youth Justice Precinct – Females aged 10-17
(ii)	in a prescribed region of the State, in a police gaol or other suitable place if the period of remand is not more than 2 working days.	Regulation 23(1) & Schedule 3 of the Children, Youth and Families Regulations 2017 [S.R. No.19/2007] lists 48 councils, covering the whole of rural and regional Victoria, whose municipal districts are prescribed regions for the purposes of s.347(1) of the CYFA . Special rules governing the detention of children in police gaols are set out in s.347(2) of the CYFA . Section 347(3) provides that it is the responsibility of the Chief Commissioner of Police to make sure that s.347(2) is complied with.

9.1.3 Breach of Children's Court sentencing order

Section 420 of the **CYFA** provides, in effect, that a person who:

- has been arrested in accordance with a warrant issued; or
- has appeared before the Court in answer to a notice to appear served-

in respect of an alleged breach of a Children's Court sentencing order may be remanded or bailed and the **BA** applies, subject to s.346 of the **CYFA**, as if the person was an accused person. The use of the word "person" makes it clear that s.420 applies to a person alleged to have breached a Children's Court sentencing order, whether or not the person is still a child within the meaning of the definition of "child" in s.3(1) of the **CYFA**. This is consistent with the procedures set out in the respective breach provisions in ss.366, 371, 384, 392 & 408 of the **CYFA**.

Because s.420 is expressed to be subject to s.346 and the **BA**, the 21 day maximum remand period referred to in s.420(2) only applies to remand by the Court. The maximum period of remand by a bail justice is until the next working day or, if the proper venue is in a prescribed region of the State, not later than the second working day: see s.10A(6) of the **BA**; see also *LD v Victoria Police* [Supreme Court of Victoria, unreported, December 1996] per Hampel J.

9.2 Bail - Legislation

9.2.1 Differences between child & adult

Section 346(6) of the **CYFA** provides that, to the extent that it is not inconsistent with s.346, the Bail Act 1977 (Vic) ('the **BA**') applies to an application for bail by a child. Most of the former provisions of s.346 have been transferred into the **BA** by the Bail Amendment Act 2016 (Vic). However, the amended **BA** does create some additional significant differences between adults and children:

SECTION	DIFFERENCES BETWEEN APPLICATION TO CHILD & ADULT
BA/s.3B(1)	Additional considerations which a bail decision maker must take into account in making a determination under the BA in relation to a child [see section 9.2.2 below].
BA/s.3B(2)	In making a determination under the BA in relation to a child, a bail decision maker may take into account any recommendation or information contained in a report provided by a bail support service [see section 9.5.16 below].
BA/s.3B(3)	Bail must not be refused to a child on the sole ground that the child does not have any, or any adequate, accommodation.
BA/s.5AA(2)	The Court, at the first hearing following the grant of bail at which the child is present, must ensure that conditions of bail for a child imposed by a bail justice, police officer, sheriff or person authorised under s.115(5) of the Fines Reform Act 2014 comply with- <ul style="list-style-type: none"> • BA/s.5AAA(2)(a) [i.e. must be no more onerous than is required to achieve the purposes of BA/s.5AAA(1) re attendance, not reoffending, not endangering public safety or welfare and not interfering with witnesses or otherwise obstructing the course of justice]; bail conditions fixed by a police officer in January 2014 that the accused "may have access to laptop between 6pm & 9pm provided he performs regular household chores including vacuuming house, keeping room clean, taking rubbish out as directed by dad" and "do dishes every night" would fail this test; • BA/s.5AAA(2)(b) [i.e. must be reasonable having regard to the nature of the alleged offence and the circumstances of the accused]; and • BA/s.5AAA(2)(c) [i.e. must, subject to s.5AAA(3), be consistent with each condition of a family violence intervention order, safety notice or recognised DVO to which the accused is subject].
BA/s.5AA(3)	The Court may make any variations to the conditions of bail necessary for the purposes of BA/s.5AA(2) .
BA/s.10(3) & s.10(4)	If a police officer, sheriff or person authorised under s.115(5) of the Fines Reform Act 2014 (Vic) considers whether to grant bail to a child under s.10 of the BA , the bail decision maker must ensure that a parent or guardian of the child or an independent person is present during the proceeding. Such independent person may take steps to facilitate the granting of bail, for example by arranging accommodation.
BA/s.10A(3) & s.10A(4)	A bail justice who is considering an application for bail in respect of a child must ensure that a parent or guardian of the child or an independent person is present during the hearing of the application. Such independent person may take steps to facilitate the granting of bail, for example by arranging accommodation.
BA/s.10A(6) & s.12(4)(a)	Maximum remand periods (detailed above) are different for a child.
BA/s.10AA	These provisions do not apply to a child, a vulnerable person or an Aboriginal person.
BA/s.12(5)	Maximum further remand period for a child re-remanded by the Court is 21 clear days.
BA/s.12B	This provision does not apply to the Children's Court.
BA/s.13, 13A	Certain of these provisions do not apply to child, vulnerable person or Aboriginal.
BA/s.16B	If, in the opinion of a bail decision maker granting bail to a child, the child does not have the capacity or understanding to enter into an undertaking of bail, the child may be released on bail if the child's parent or some other person enters into an undertaking...to produce the child at the venue of the court to which the hearing of the charge is adjourned or the court to which the child is committed for trial.
BA/s.24(3A)	Despite s.24(3) of the BA , the maximum period for which a court may remand a child arrested under s.24(1) in relation to a breach or likely breach of bail is 21 clear days.
BA/s.30A	It is no longer an offence for a child to contravene a conduct condition of bail.

9.2.2 Additional considerations in bail determinations for children

Section 3B(1) of the **BA** – introduced by the Bail Amendment Act 2016 (Vic) [No.1/2016] – incorporates the very significant difference between bail determinations for a child and for an adult contained in recommendations 128 & 129 of the Law Reform Commission's 2004 Review of the Bail Act. Section 3B(1) provides-

"In making a determination under the **BA** in relation to a child, a bail decision maker must take into account (in addition to any other requirements under the **BA**)-

- (a) the need to consider all other options before remanding the child in custody; and
- (b) the need to strengthen and preserve the relationship between the child and the child's family, guardians or carers; and
- (c) the desirability of allowing the living arrangements of the child to continue without interruption or disturbance; and
- (d) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
- (e) the need to minimise the stigma to the child resulting from being remanded in custody; and
- (f) the likely sentence should the child be found guilty of the offence charged; and
- (g) the need to ensure that the conditions of bail are no more onerous than are necessary and do not constitute unfair management of the child."

Items (b), (c), (d) & (e) are in largely identical terms to the sentencing considerations for a child contained in ss.362(1)(a) to (d) of the **CYFA**.

Commenting on s.3B in *Re SD* [2019] VSC 369, a case of a 17 year applicant, Lasry J said at [19]:

"This application highlights the significant tension that exists in these applications. On the one hand, the criminal law is doing everything it can to make allowances for the youth of an alleged offender and to give them the opportunity to pursue a prosocial lifestyle. On the other hand, the [MC] matter alleges very serious offending that is violent and random, and would be terrifying from the point of view of the victim and the community."

In *Re E.A.* [2016] VSC 378 the applicant was a 17 year old boy of Sudanese descent who came to Australia with his parents via Egypt when he was 5. He was in a show cause situation, having been charged with a number of counts of aggravated burglary, intentionally causing injury and theft of motor vehicle arising from two separate home invasions in the company of 4 other young men on 23/04/2016. At the time he was on bail after a deferral of sentence on 06/04/2016 on similar serious charges. He was also on bail for affray said to have occurred at Federation Square on 12/04/2016. T Forrest J noted at [11]-[12] that he was required to take into account the seven considerations in s.3B(1) of the **BA** and that he was entitled, pursuant to s.3B(2) to take into account evidence of a proposed intensive bail support program which the applicant could be placed on if he was successful in obtaining bail. Factors supporting the application included "the applicant's youth, his stable family background, his academic accomplishment (he is obviously a bright young man), and the Youth Justice Support". In refusing bail, T Forrest J said at [16]-[18]:

"I consider that the applicant's offending, if proven, is very serious, bordering upon grave. I consider that the submission (or foreshadowed submission) that time served (2 months' detention) is sufficient to deal with the applicant's criminality is misconceived.

...In my view, the applicant, despite his youth and **despite my earnest consideration of the factors in s.3B of the Act**, despite his lack of prior history and his sound family background, has failed to show the necessary cause. He was on two sets of bail at the time that he is alleged to have committed these offences. The conditions that were attached to those grants of bail required that he remain at home during curfew hours and that he not associate with a number of the young men who are now his co-accused in the instant offending.

At the time of the alleged commission of these offences he was awaiting sentence for serious offending involving a home invasion. There is a strong case, in my view, that he has participated in two more home invasions involving the vicious assault of residents within those homes. **It gives me no pleasure to remand a child in custody, and I regard it as a last resort. The applicant, however, is 17; he is not 12 or 14, and, in my view, represents a danger to public safety.**"

See also *DPP v SE* [2017] VSC 13 esp. at [30]-[35]; *Re BKT* [2018] VSC 240 at [17].

In *Re JO* [2018] VSC 438 the applicant was a 13 year old boy who had been remanded in custody on charges of criminal damage and assault arising out of events that were said to have occurred at the residential care facility where he was residing. At the time he was on separate grants of bail for five outstanding sets of offences so he was also charged with committing an indictable offence whilst on bail. In finding that exceptional circumstances existed, T Forrest J said at [14]-[15]:

“Whilst the burden of demonstrating ‘exceptional circumstances’ is, as I have said, a stringent one, the age of the applicant weighs heavily in his favour. **Children are rightly afforded a special status by the Act and any assessment of ‘exceptional circumstances’ in the case of a child must be viewed through the prism of s 3B(1).** In the case of an adult, a combination of circumstances may fall short of constituting exceptional circumstances, while the same combination when considered in the case of a child may achieve a wholly different outcome. The suite of considerations enumerated in s 3B(1) make the evaluation of any determination under this Act, including the ‘exceptional circumstances’ test, a different exercise in the case of a child.

I am satisfied that the applicant has demonstrated exceptional circumstances. In particular, I am satisfied that a combination of the following factors operate to meet that stringent test:

- (a) The applicant’s very young age and his difficult circumstances;
- (b) Bail is not opposed [subject to the Court concluding that exceptional circumstances exist and appropriate conditions are imposed];
- (c) The support offered by Youth Support and Advocacy Service, his mother, DHHS and the Supervised Bail Program;
- (d) The potential of a *doli incapax* defence.

I am also satisfied that the prosecution have not established that the applicant is a s 4E unacceptable risk provided relatively strict conditions are part of his bail undertaking.”

In *Re TP* [2018] VSC 748 Champion J noted at [48]-[51] that special considerations apply to children, even those charged with serious offending; specifically s.3B(1)(a) of the **BA** requires the Court to consider all other options before a child is remanded into custody.

In *Application for Bail by JR* [Supreme Court of Victoria-Lasry J, February 2017] the applicant was a 16 year old boy charged with aggravated burglary, theft of a motor vehicle x 3, driving at a dangerous speed and reckless conduct endangering serious injury x 2, these offences representing “the continuation of a pattern of serious conduct by him”. The applicant had a very substantial criminal history despite his age, “a terrible record for one so young”. Moreover there had been “multiple previous breaches of various orders of the Children’s Court, demonstrating the unwillingness of the applicant to comply with such orders”. While on remand at the Grevillea Unit of Barwon Prison the applicant was attacked, requiring his admission to hospital at Geelong for treatment of his injuries, including a neck fracture at C7. He was later transferred to Malmsbury YJC where he was initially held in an isolation room without any contact with others. Subsequently he was able to be out of his room for 7-8 hours per day and outside in the open air for 1 hour per day but was not able to access Parkville College or the programs department. Youth Justice initially did not support the release of the applicant on bail but given the applicant’s immediate past history, his injury and his father’s illness, they supported this application for bail. In granting bail with strict conditions Lasry J said:

“My initial reaction to this application was to refuse bail, for reasons that are obvious. The applicant has a terrible history of prior offending...However, I remain conscious of the significance of s.3B of the *Bail Act*. These are not just words in a statute. They have an important role when it comes to children in custody. That section requires me to carefully consider whether there is some other option to remanding the child in custody.

The applicant gave evidence about his motivation and willingness to comply with conditions. We will see how that goes. He is far too young to give up on, but he has used up much of the goodwill of a large number of judicial officers, police, departmental officers and members of the public. His conduct simply has to change. If it cannot change, then bail is out of the question, and what becomes of him then is a matter for a Children’s Court magistrate.

...Section 3B(1)(a) of the *Bail Act* requires me to consider all other options before remanding a child in custody. Counsel for the respondent has submitted there are no other options. With respect, and after consideration, I do not yet agree. With s.3B particularly in mind, I have come to this conclusion. I am not prepared to release the

applicant on bail indefinitely. I propose to impose on him a level of judicial supervision by me, which may in fact last until the applicant's matters are dealt with in the Children's Court...I am satisfied that the applicant has shown cause why his detention in custody is not justified, but only for a period of two weeks. I am persuaded that the risk he poses can be made acceptable for that period also...On 09/03/2017 I will resume hearing the matter to determine whether the interim order for bail should be continued. Whether or not that occurs will depend on what I am told about the applicant's compliance during the two-week period."

In *Re FA* [2018] VSC 372 at [23] in granting bail to a 16 year old girl charged, *inter alia*, with assisting an offender ultimately charged with culpable driving to avoid apprehension and with theft of a motor vehicle, Priest JA said:

"It is a serious thing to consign a child to custody or detention pending the resolution of a criminal charge (or charges), particularly where — as here — it is far from a foregone conclusion that the child will receive a sentence involving detention consequentially upon a finding of guilt. **Indeed, in my view, the custody or detention of a child should be avoided unless unavoidable.**"

In *Re HAH* [2019] VSC 776 the applicant was a 13 year old boy who had an IQ of 47 which placed him in the bottom 0.1% of cognitive functioning compared to children of the same age. He also had a diagnosis of post-traumatic stress disorder and attention deficit hyperactivity disorder. Throughout his infancy and early childhood, he was exposed to significant trauma in the home, including family violence, physical abuse, neglect and sexual abuse. His parents are said to have suffered from untreated mental health issues that impacted their ability to care for the applicant and his siblings. He had not had contact with his father since 2012 and has occasional phone contact with his mother, although there are no plans for reunification. He has been in the care of DHHS on a care by Secretary order since the age of 8 and was also supported by Child Protection, Berry Street and the National Disability Insurance Scheme. He was charged with theft of a phone "in a most infantile way" at a time when he was already on bail in relation to two outstanding matters and charged on summons in respect of two others. The majority of these matters involved incidents relating to his conduct at the therapeutic residential unit where he resided. He accordingly fell into the "exceptional circumstances" category. Having been refused bail by the Children's Court, he had been on remand for 8 days. Given the applicant's age and intellectual disability Lasry J granted bail on an undertaking pursuant to **BA/s.16B** entered into on HAH's behalf by Jane McDonald of DHHS, who was effectively his legal guardian. At [26] his Honour said:

"As has been stated in previous decisions of this Court, the influence of s 3B is such that the assessment of 'exceptional circumstances' is different in the case of a child than it is for an adult. This means that a child may meet the requisite threshold through a combination of circumstances, including the considerations set out in s 3B, whereas an adult with the same combination of circumstances may fall short: See *Re JO* [2018] VSC 438 [14]. See also *Application for Bail by LT* [2019] VSC 143 [37]; *Re CT* [65]."

Although he ultimately found no exceptional circumstances and the 17yo child was an unacceptable risk, Tinney J said in *Re DR* [2020] VSC 282 at [53]: "The authorities make it clear that in the case of a child, the consideration of every aspect of bail needs to occur through the prism of s.3B(1)".

9.2.3 *Prima facie* entitlement to bail and exceptions thereto – Flow charts

Prior to 01/07/2018 s.4(1) of the **BA** picked up the common law rule enunciated by Cussen J in *R v Sefton* [1917] VR 259 at 261-2 and gave a person accused of an offence, whether adult or child, a *prima facie* entitlement to bail except in the limited circumstances where-

- the accused was required to show **exceptional circumstances** under s.4(2)(a); or
- the accused was required to **show cause** under s.4(4); or
- the accused was an **unacceptable risk** under s.4(2)(d); or
- the case was **adjourned for further inquiries or pre-sentence report** in the circumstances in s.4(1)(c).

In *Woods v DPP* [2014] VSC 1 at [34] Bell J said:

"Reflecting the importance of the presumption of innocence and the prosecutorial onus of proof as well as the right of all persons to liberty and freedom of movement at common law, s 4(1) has always provided, and still provides, that accused persons being held in custody have a presumptive entitlement to bail, as at common law: *Light* [1954] VLR 152,

157 (Sholl J). However, the presumptive entitlement to bail is displaced in the circumstances specified in s 4(2) (exceptional circumstances) and 4(4) (show cause)."

Prior to 01/07/2018 the **BA** was complicated enough, leading the majority of the Court of Appeal to say in *Robinson v R* (2015) 47 VR 226; [2015] VSCA 161 at [47]:

"Finally, we would draw attention to — and endorse — the recommendation of the Victorian Law Reform Commission, in its 2007 Report entitled *Review of the Bail Act 1997*, that the reverse onus tests should be removed altogether. This reform would greatly simplify Victorian bail law, without weakening it in any way. The Commission's reasoning is compelling:

'We recommend the removal of reverse onus tests so all bail decisions are made on the basis of unacceptable risk. We do not believe this will alter the outcome of bail decisions because decision makers have told us unacceptable risk is always the ultimate test. Reverse onuses apply to a small number of offences, many of which do not commonly come before the court.'

Far from adopting that dicta and the recommendation of the Victorian Law Reform Commission, in the 2018 **BA** amendments the reverse onus tests have been retained, the number of offences to which a reverse onus applies have been increased and the **BA** has become significantly more complex. As and from 01/07/2018 section 4 of the **BA** was completely rewritten and as and from 01/10/2018 those amendments were themselves significantly amended. However s.4 still reflects the common law rule that a person accused of an offence, whether adult or child, has a *prima facie* entitlement to bail except in the significantly expanded circumstances now detailed in the **BA**. Section 4 and the qualifying ss.4AA, 4A, 4C, 4D & 4E now read as follows and s.3D now contains the illustrative flow charts depicted on later pages which are intended only as a guide to the decision-making process.

s.4 Entitlement to bail

A person accused of an offence, and being held in custody in relation to that offence, is entitled to be granted bail unless the bail decision maker is required to refuse bail by the **BA**.

s.4AA When 2 step tests apply

- (1) The **step 1 – exceptional circumstances test** applies to a decision of whether to grant bail to a person accused of a Schedule 1 offence.
- (2) The **step 1 – exceptional circumstances test** also applies to a decision of whether to grant bail to a person accused of a Schedule 2 offence if—
 - (a) the person has a terrorism record as defined in s.3AAB; or
 - (b) the court considering whether to grant bail determines under s.8AA that there is a risk that the person will commit a terrorism or foreign incursion offence as defined in s.3; or
 - (c) the offence is alleged to have been committed—
 - while on bail, on summons or at large awaiting trial in respect of any Schedule 1 offence or Schedule 2 offence; or
 - during the period of a community correction order in made respect of any Schedule 1 or Schedule 2 offence or while otherwise serving a sentence for any such offence or while released under a parole order made in respect of any Schedule 1 offence or Schedule 2 offence; or
 - (d) the offence is an offence of conspiracy to commit, incitement to commit or attempting to commit an offence in a circumstance set out in paragraph (c).
- (3) The **step 1 – show compelling reason test** applies to a decision of whether to grant bail to a person accused of a Schedule 2 offence if subsection (2) does not apply.
- (4) The **step 1 – show compelling reason test** also applies to a decision of whether to grant bail to a person accused of an offence that is neither a Schedule 1 nor a Schedule 2 offence if—
 - (a) the person has a terrorism record as defined in s.3AAB; or
 - (b) the court considering whether to grant bail determines under s.8AA that there is a risk that the person will commit a terrorism or foreign incursion offence as defined in s.3.

s.4A Step 1 – exceptional circumstances test

- (1) This section applies if, under s.4AA(1) or (2), the **step 1 – exceptional circumstances test** applies to a decision of whether to grant bail.
- (1A) The bail decision maker must refuse bail unless satisfied that exceptional circumstances exist that justify the grant of bail.
- (2) The accused bears the burden of satisfying the bail decision maker as to the existence of exceptional circumstances.
- (3) In considering whether exceptional circumstances exist, the bail decision maker must take into account the surrounding circumstances.
- (4) If the bail decision maker is satisfied that exceptional circumstances exist that justify the grant of bail, the bail decision maker must then move to **step 2 – unacceptable risk test**.

s.4C Step 1 – show compelling reason test

- (1) This section applies if, under s.4AA(3) or (4), the **step 1 - show compelling reason test test** applies to a decision of whether to grant bail.
- (1A) The bail decision maker must refuse bail unless satisfied that a compelling reason exists that justifies the grant of bail.
- (2) The accused bears the burden of satisfying the bail decision maker as to the existence of a compelling reason.
- (3) In considering whether a compelling reason exists, the bail decision maker must take into account the surrounding circumstances.
- (4) If the bail decision maker is satisfied that a compelling reason exists that justifies the grant of bail, the bail decision maker must then move to **step 2 – unacceptable risk test**.

s.4D Step 2 – unacceptable risk test

- (1) A bail decision maker must apply the **unacceptable risk test** if–
 - (a) at step 1 (section 4A) the bail decision maker is satisfied that **exceptional circumstances** exist that justify the grant of bail for a person; or
 - (b) at step 1 (section 4C) the bail decision maker is satisfied that **a compelling reason** exists that justifies the grant of bail for a person.
- (2) For the application of the unacceptable risk test, the prosecutor bears the burden of satisfying the bail decision maker as to the existence of a risk of a kind mentioned in s.4E(1)(a) and that the risk is an unacceptable risk.
- (3) On applying the unacceptable risk test, the bail decision maker must refuse bail if required to do so by s.4E.

s.4E All offences – unacceptable risk test

- (1) A bail decision maker must refuse bail for a person accused of any offence if the bail decision maker is satisfied that there is an **unacceptable risk** that the accused would, if released on bail–
 - (i) endanger the safety or welfare of any person; or
 - (ii) commit an offence while on bail;
 - (iii) interfere with a witness or otherwise obstruct the course of justice in any matter; or
 - (iv) fail to surrender into custody in accordance with the conditions of bail.
- (2) The prosecutor bears the burden of satisfying the bail decision maker as to the existence of a risk of a kind mentioned in s.4E(1) and that the risk is an unacceptable risk.
- (3) In considering whether a risk mentioned in s.4E(1) is an unacceptable risk, the bail decision maker must–
 - (a) take into account the **surrounding circumstances**; and
 - (b) consider whether there are any conditions of bail that may be imposed to mitigate the risk so that it is not an **unacceptable risk**.

s.3AAA – “SURROUNDING CIRCUMSTANCES”

- (1) If the **BA** provides that a bail decision maker must take into account the **surrounding circumstances**, the bail decision maker must take into account all the circumstances that are relevant to the matter including, but not limited to, the following–

- (a) the nature and seriousness of the alleged offending, including whether it is a serious example of the offence;
 - (b) the strength of the prosecution case;
 - (c) the accused's criminal history;
 - (d) the extent to which the accused has complied with the conditions of any earlier grant of bail;
 - (e) whether, at the time of the alleged offending, the accused-
 - (i) was on bail for another offence; or
 - (ii) was subject to a summons to answer to a charge for another offence; or
 - (iii) was at large awaiting trial for another offence; or
 - (iv) was released under a parole order; or
 - (v) was subject to a community correction order made in respect of, or was otherwise serving a sentence for, another offence;
 - (f) whether there is in force-
 - (i) a family violence intervention order made against the accused; or
 - (ii) a family violence safety notice issued against the accused; or
 - (iii) a recognised DVO made against the accused;
 - (g) the accused's personal circumstances, associations, home environment and background;
 - (h) any special vulnerabilities of the accused, including being a child or an Aboriginal person, being in ill health or having a cognitive impairment, an intellectual disability or a mental illness;
 - (i) the availability of treatment or bail support services;
 - (j) any known view or likely view of an alleged victim of the offending on the grant of bail, the amount of bail or the conditions of bail;
 - (k) the length of time the accused is likely to spend in custody if bail is refused;
 - (l) the likely sentence to be imposed should the accused be found guilty of the offence with which the accused is charged;
 - (m) whether the accused has expressed support for the doing of a terrorist act or a terrorist organisation or for the provision of resources to a terrorist organisation;
 - (n) subject to s.3AAA(2), whether the accused has, or has had, an association with-
 - (i) another person or a group that has expressed support of the kind referred to in paragraph (m); or
 - (ii) another person or a group that is directly or indirectly engaged in, preparing for, planning, assisting in or fostering the doing of a terrorist act; or
 - (iii) a terrorist organisation.
- (2) A bail decision maker must not take into account any of the matters in paragraph (n) above unless satisfied that the accused had the requisite knowledge.

s.8A – REFUSAL OF BAIL – ANY OFFENCE – INSUFFICIENT INFORMATION

A bail decision maker may refuse bail for a person accused of any offence if satisfied that it has not been practicable to obtain sufficient information for the purpose of deciding the matter because of the shortness of the period since the commencement of the proceedings for the offence.

s.8B – REFUSAL OF BAIL – OFFENCE INVOLVING SERIOUS INJURY– UNCERTAINTY AS TO DEATH OR RECOVERY

A bail decision maker may refuse bail if at the time of deciding an application for bail by a person accused of an offence of causing injury to another person it is uncertain whether the person injured will die or recover from the injury.

s.8AA – COURT TO MAKE PRELIMINARY DETERMINATION IF TERRORISM RISK ALLEGED

This new section requires the Court – before determining whether to grant bail – to determine whether there is a risk that the accused will commit a terrorism or foreign incursion offence as defined in s.3 if–

- the person has not been arrested on a fine enforcement warrant; and
- the step 1 – exceptional circumstances test does not apply by operation of s.4AA(2)(a), (c) or (d); and

- the prosecutor states that he or she has terrorism risk information as defined in s.3AAC in respect of the accused and alleges that this information shows that there is a risk that the accused will commit a terrorism or foreign incursion offence.

'ONE STEP' PROCESS FOR BAIL DETERMINATION REJECTED – ASMAR NOT GOOD LAW

Between 2005 & 2018 there had been a divergence of opinion between various judicial officers in the Supreme Court as to whether showing a compelling reason (showing cause) was a 'one step' or a 'two step' process.

The traditional approach to the former s.4(4) of the **BA** was that cases where an accused was required to show a **compelling reason** why his or her detention in custody was not justified involved a 'two step' process: ❶ the burden was on the accused to show such a compelling reason; and ❷ if the accused did so, bail must be granted unless the prosecution established that there was an **unacceptable risk** that if released on bail, the accused may commit one of the proscribed acts. On this model the onus shifts from the accused in the first step to the Crown in the second. The leading case was *DPP v Harika* [2001] VSC 237 {MC11/01} where at [41] & [44]-[48] Gillard J said:

"Any person accused of an offence is entitled to bail. That is the general rule laid down by s.4(1) of the Act. However, in some circumstances, the right to bail is abrogated and instead, the applicant must prove to the satisfaction of [the] Court 'why his detention in custody is not justified'. See s.4(4). The applicant for bail has the burden of proving that his detention in custody is not justified...

However, that is not the end of the inquiry. If he establishes cause, the Court shall refuse bail if it is satisfied there is an unacceptable risk that if the applicant is released on bail, he may commit one or more of the prohibited acts set out in s.4(2)(d). These include failing to answer bail, committing another offence whilst on bail or interfering with a witness. The factors that must be weighed in considering the question of unacceptable risk are set out in s.4(3). It is noted that the Court must consider all relevant matters, and the list of specified ones is not exhaustive. The Court is bound to consider the nature and seriousness of the offence, the background of the accused, the history of previous grants of bail, the strength of the evidence against him, and also the attitude, if expressed to the Court, of the alleged victim. As I have already stated, this list is not exhaustive. The burden of establishing unacceptable risk lies upon the Crown.

The two inquiries can overlap, in the sense that the unacceptable risk factors have to be weighed, when considering whether the applicant for bail has shown cause.

The Act does not define what is meant by the phrase 'shows cause why his detention in custody is not justified'. It is trite to observe that all relevant circumstances must be weighed, leading to the conclusion that the detention in custody is not justified. In considering the issue of cause, the Court must not overlook the object of s.4(4)."

Other cases in which the 'two step' process has been adopted include-

- *Re Mark Clifford Hayden* [2005] VSC 160 at [10] per Kellam J;
- *Bail Application by Michael Paterson* [2006] VSC 268 at [26]-[27] per Gillard J;
- *Woods v DPP* [2014] VSC 1 at [55]-[56].

The 'one step' process was first propounded by Maxwell P in *Re Fred Joseph Asmar* [2005] VSC 487. In that case the applicant and the Crown had been "united in submitting that the correct approach was that set out by Gillard J in *DPP v Harika*". However, at [17] Maxwell P said:

"I think it is important to make clear that once the applicant for bail shows cause that his detention is not justified, that is the end of the inquiry. There is no second step. Nor, therefore, is there any shift of onus. Where s.4(4) applied, the applicant bears the onus from start to finish, of showing that his/her detention is not justified."

Other cases in which the 'one step' process has been adopted include-

- *Watts v DPP* [2007] VSC 275 at [5] Bongiorno J;
- *Re Magee* [2009] VSC 384 at [12] per J Forrest J;
- *Re Lawson Odum* [2008] VSC 319 at [10] per Lasry J;
- *Re George Dickson* [2008] VSC 516 at [4] per Lasry J;
- *Re Gruevski* [2013] VSC 349 at [6] per T Forrest J;
- *RS* [2013] VSC 350 per Elliott J;
- *Bail Application – Bunning* [2013] VSC 618 at [35]-[38] per Kaye J.

Robinson v R (2015) 47 VR 226; [2015] VSCA 161 was an appeal from a decision of Forrest J who had refused bail to an alleged trafficking conspirator and drug debt enforcer. The Court of Appeal [Maxwell P, Redlich & Priest JJA] allowed the appeal and granted bail on strict conditions. The cases of *Asmar*, *Harika* & *Woods* were widely traversed. Redlich JA concluded at [46] that the construction of s.4(4) was a matter that ought to be considered by a 5 member bench, but "in the meantime, there is every reason to be confident that, barring some unusual circumstance, bail decisions under s.4(4) can continue to be made without the question of construction creating any difficulty." Priest JA concluded at [82]: "It is unhelpful and unnecessary to concentrate on whether the consideration of bail in a case such as the present is a 'one-step' or a 'two-step' process. There is but one issue for determination, as to which the interested parties bear different burdens."

The dilemma has now been resolved by Parliament. The bail process is now conclusively defined as a 'two-step' process. As and from 01/07/2018 the **BA** has been amended in the way set out above to make it clear that both the exceptional circumstances test and the show compelling reason test involve a 'two step' process. The decisions which adopted a 'one step' process – first propounded by Maxwell P in *Re Fred Joseph Asmar* [2005] VSC 487 – are no longer good law. The 'two step' process may be summarized as follows:

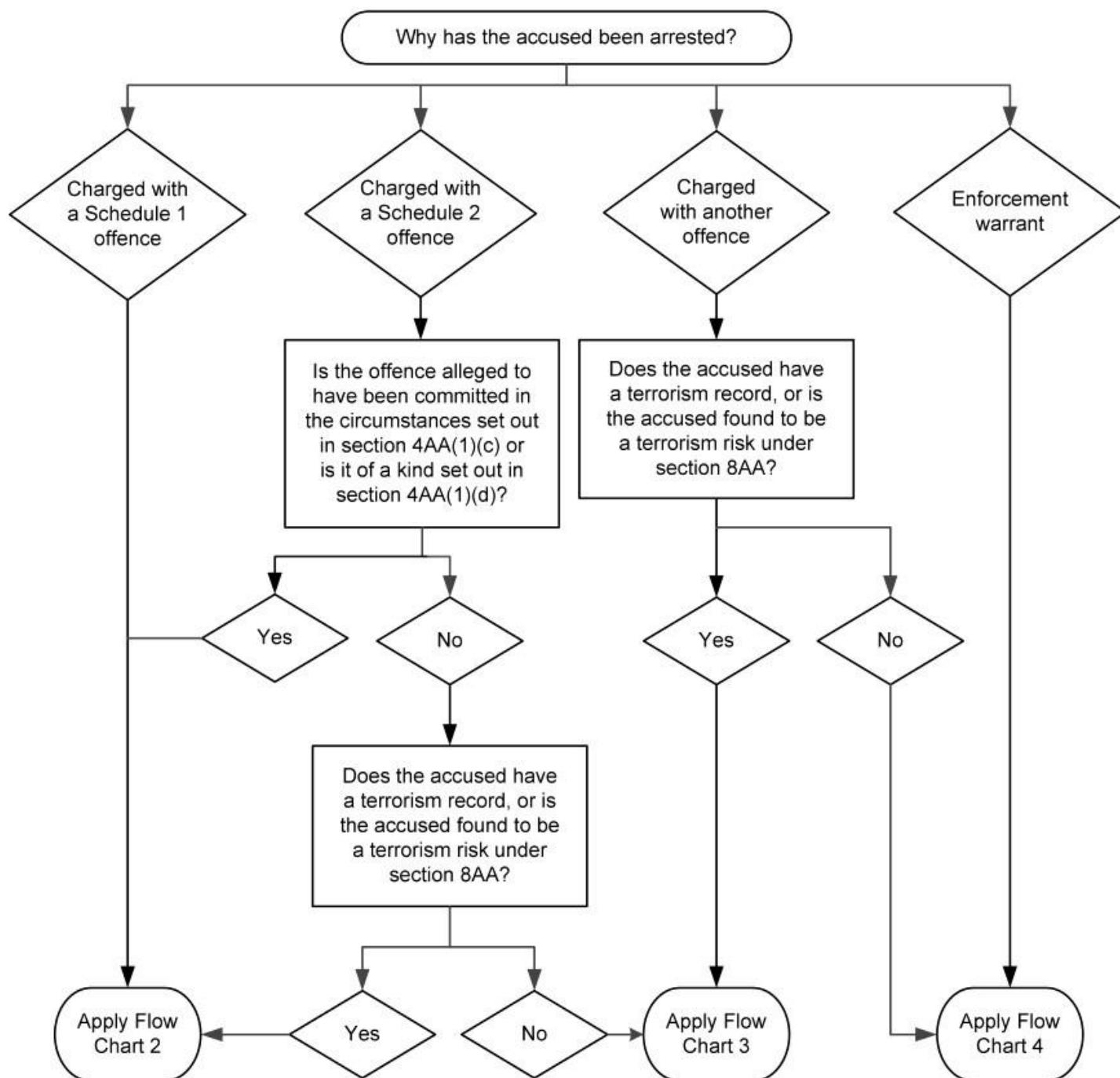
s.4	A person in custody is entitled to bail (see <i>R v Sefton</i> [1917] VLR 259 at 261-2; <i>Woods v DPP</i> [2014] VSC 1 at [34]) unless:	
STEP 1 – SCHEDULE 1 OR SCHEDULE 2 OFFENCE AND/OR TERRORISM RECORD/RISK		
ss.4AA + 4A	Exceptional circumstances	Onus is on accused to show exceptional circumstances if- <ul style="list-style-type: none">• offence is Schedule 1; or• offence is Schedule 2 and-<ul style="list-style-type: none">➤ accused is awaiting trial, on a CCO, serving a sentence or on parole for a prior Schedule 1 or Schedule 2 offence; or➤ offence is conspiracy, incitement or attempt to commit the offence in the above circumstances; or➤ accused has a terrorism record or there is a risk accused will commit a terrorism offence.
ss.4AA + 4C	Show compelling reason	Onus is on accused to show a compelling reason if- <ul style="list-style-type: none">• offence is Schedule 2 and accused is not awaiting trial, on a CCO, serving a sentence or on parole for a prior Schedule 1 or Schedule 2 offence;• offence is not Schedule 1 or Schedule 2 but accused has a terrorism record or there is a risk accused will commit a terrorism offence.
STEP 2 – FOR ANY OFFENCE		
ss.4D + 4E	Unacceptable risk	Onus is on prosecutor to satisfy bail decision maker that, taking into account the “surrounding circumstances”, accused is an unacceptable risk of- <ul style="list-style-type: none">• endangering the safety or welfare of any person; or• committing an offence whilst on bail; or• interfering with a witness or obstructing the course of justice; or• failing to appear.
S.4E(3)	The bail decision maker must consider whether there are conditions of bail that may be imposed to convert the risk from unacceptable to acceptable .	

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SECTION 3D(2)

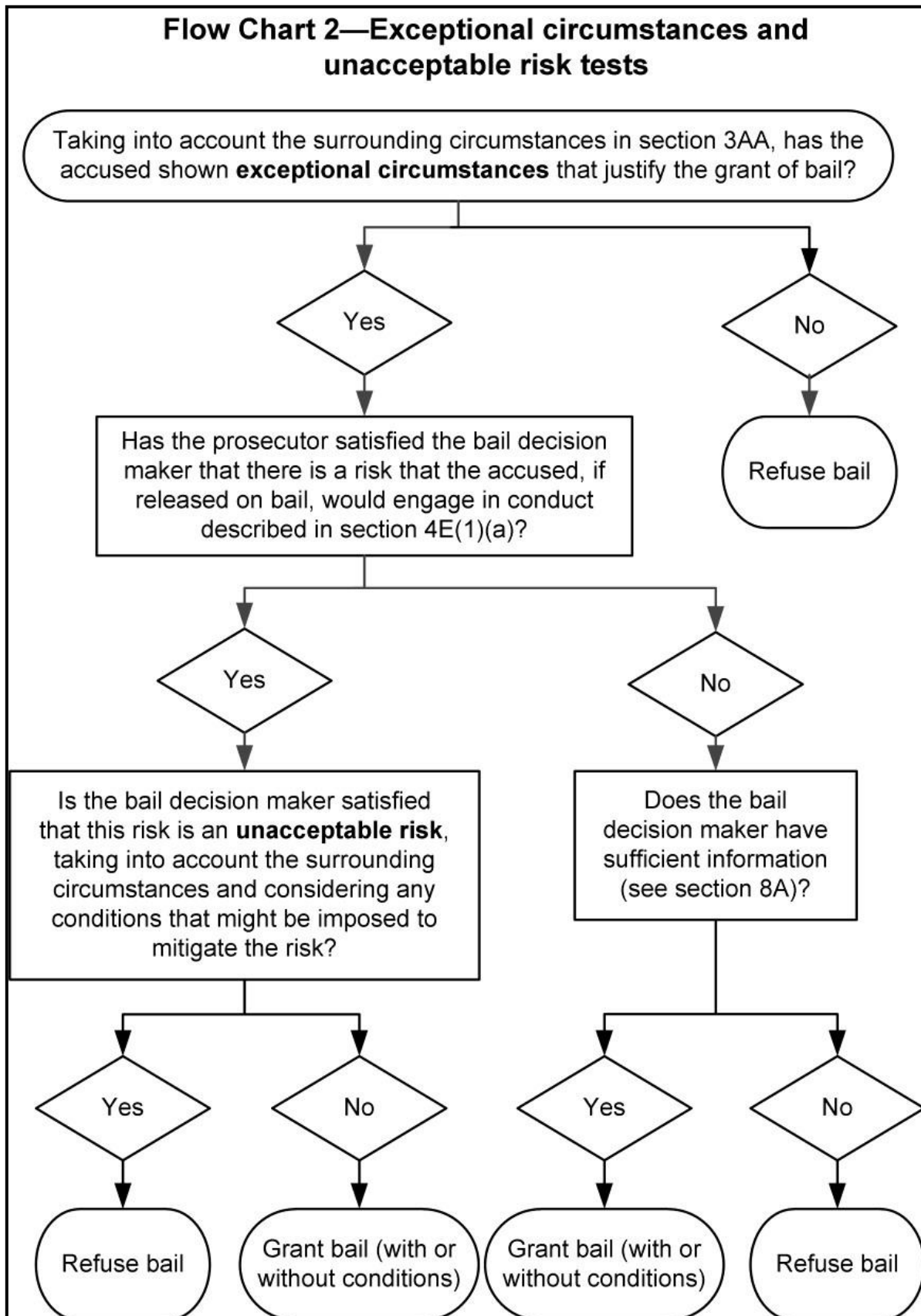
FLOW CHART 1 SHOWS THE PROCESS FOR DETERMINING WHICH TESTS ARE TO BE APPLIED IN DECIDING WHETHER TO GRANT BAIL TO A PERSON

Flow Chart 1—Which tests apply?



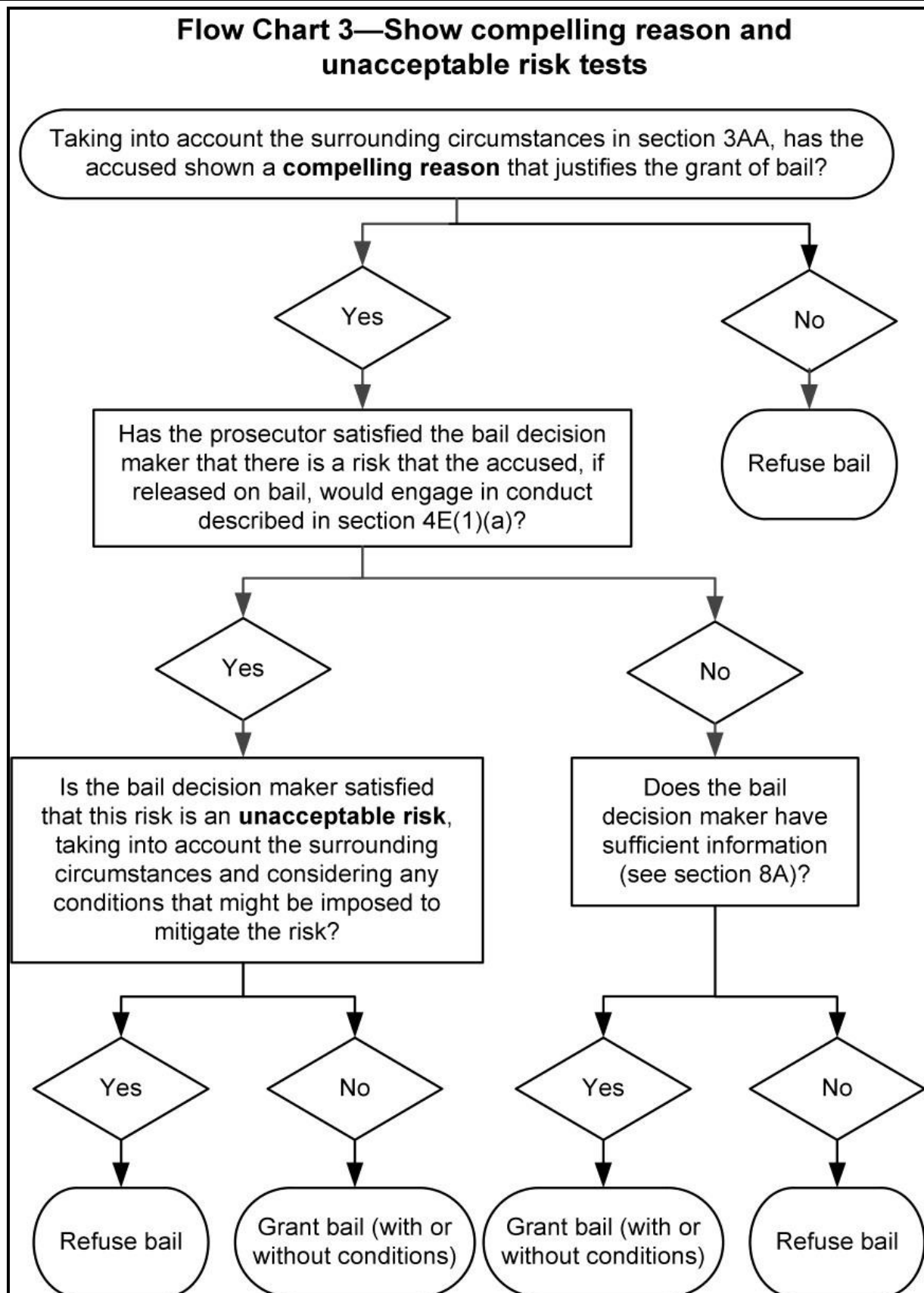
SECTION 3D(3)

FLOW CHART 2 SHOWS THE PROCESS FOR APPLYING THE STEP 1 – EXCEPTIONAL CIRCUMSTANCES TEST AND THEN THE STEP 2 – UNACCEPTABLE RISK TEST



SECTION 3D(4)

**FLOW CHART 3 SHOWS THE PROCESS FOR APPLYING THE STEP 1 –
SHOW COMPELLING REASON TEST AND THEN THE STEP 2 –
UNACCEPTABLE RISK TEST**



SECTION 3D(5)
FLOW CHART 4 SHOWS THE PROCESS FOR APPLYING
THE UNACCEPTABLE RISK TEST ALONE

Flow Chart 4—Unacceptable risk test

Has the prosecutor satisfied the bail decision maker that there is a risk that the accused, if released on bail, would engage in conduct described in section 4E(1)(a)?

Yes

Is the bail decision maker satisfied that this risk is an **unacceptable risk**, taking into account the surrounding circumstances and considering any conditions that might be imposed to mitigate the risk?

Yes

Refuse bail

No

Grant bail (with or without conditions)

No

Does the bail decision maker have sufficient information (see section 8A)?

Yes

Grant bail (with or without conditions)

No

Refuse bail

9.2.4 Step 1 – exceptional circumstances test

Sections 4A(1) & (1A) of the **BA** – read in conjunction with ss.4AA(1) & (2) – provide that a bail decision maker must refuse bail for a person accused of–

- a **Schedule 1** offence; or
 - a **Schedule 2** offence in the circumstances set out in s.4AA(2)–
- unless satisfied that **exceptional circumstances** exist that justify the grant of bail.

Section 3AA of the **BA** provides that an offence that is both a Schedule 1 offence and a Schedule 2 offence must be taken to be a Schedule 1 offence.

SCHEDULE 1 OFFENCES CA=Crimes Act 1958 (Vic), DPCSA=Drugs, Poisons & Controlled Substances Act 1981 (Vic)	
1. Treason. 2. Murder. 3. [NOW CONTAINED IN s.4AA(2)(c)] A Schedule 2 offence that is alleged to have been committed by the accused– <ul style="list-style-type: none"> • while on bail, on summons, awaiting trial or on parole in respect of any Schedule 1 offence or Schedule 2 offence; or • during the period of a community correction order in respect of any Schedule 1 or Schedule 2 offence or while otherwise serving a sentence for any such offence or while released under a parole order made in respect of an Schedule 1 offence or Schedule 2 offence. 4. Aggravated home invasion [CA, s.77B]. 5. Aggravated carjacking [CA, s.79A]. 6. Trafficking in a large commercial quantity [DPCSA, s.71] or in a commercial quantity [DPCSA, s.71AA] of a drug of dependence. Cultivation of a large commercial quantity [DPCSA, s.72] or a commercial quantity [DPCSA, s.72A] of a narcotic plant. Conspiracy to commit any of the above offences [DPCSA, s.79].	7. An offence against ss.71(1), 72(1) or 79(1) of the DPCSA as in force before the commencement of the 2001 amendments. 8. Additional drug offences involving a commercial quantity of drugs of dependence or narcotic goods under ss.302.2, 302.3, 303.4, 303.5, 304.1, 304.2, 305.3 or 305.4 of the Criminal Code (Cth). 9. Additional drug offences involving a commercial quantity of drugs of dependence or narcotic goods under ss.307.1, 307.2, 307.5, 307.6, 307.8 or 307.9 of the Criminal Code (Cth). 10. An offence against ss.231(1), 233A or 233B(1) of the Customs Act 1901 (Cth) involving a commercial quantity of narcotic goods. 11. An offence against s.4B(1) or 21W of the Terrorism (Community Protection) Act 2003 (Vic). 12. Conspiracy to commit, incitement to commit or attempt to commit an offence listed in Schedule 1.

ss.13 – TREASON, MURDER AND CERTAIN OTHER OFFENCES

Section 13 of the **BA** provides–

- (1) Only the Supreme Court may grant bail to a person charged with treason.
- (2) Only the Supreme Court, or a court on committing the person for trial, may grant bail to a person accused of murder.
- (3) Subject to s.13(4), only a court may grant bail to a person accused of any other offence to which the step 1 – exceptional circumstances test applies under s.4AA(1) or (2).
- (4) Section 13(3) does not apply if the step 1 – exceptional circumstances test applies only because of s.4AA(2)(c) or (d) and–
 - (a) the accused is a child, a vulnerable adult or an Aboriginal person; or
 - (b) the offence to which s.4AA(2)(c) or (d) relates is an offence referred to in item 1 or 30 of Schedule 2 (and not referred to in any other item of Schedule 2) or an offence of conspiracy, incitement or attempt to commit such an offence;
- (5) Only a court may grant bail to a person accused of an offence against a provision of Chapter 4 Division 72A or Part 5.3 or 5.5 of the Criminal Code of the Commonwealth. [See also s.15AA of the Crimes Act 1914 (Cth).]

9.2.5 Step 1 – show compelling reason test

Sections 4C(1) & (1A) of the **BA** – read in conjunction with ss.4AA(3) & (4) – provide that a bail decision maker must refuse bail for a person accused of–

- a **Schedule 2** offence; or
 - an offence in the circumstances set out in s.4AA(4)–
- unless satisfied that a **compelling reason** exists that justifies the grant of bail.

SCHEDULE 2 OFFENCES CA=Crimes Act 1958 (Vic), DPCSA=Drugs, Poisons & Controlled Substances Act 1981 (Vic)	
1. An indictable offence alleged to have been committed by the accused- <ul style="list-style-type: none"> • while on bail, on summons, awaiting trial or on parole in respect of any other indictable offence; or • during the period of a community correction order in respect of any indictable offence or while otherwise serving a sentence for any such offence or while released under a parole order. 2. Manslaughter. 3. Child homicide. 4. Causing serious injury intentionally in circumstances of gross violence [CA, s.15A]. 5. Causing serious injury recklessly in circumstances of gross violence [CA, s.15B]. 6. Causing serious injury intentionally [CA, s.16]. 7. Threat to kill [CA, s.20] that is also a family violence offence. 8. See next page. 9. Rape [CA, s.38(1)]. 10. Rape by compelling sexual penetration [CA, s.39(1)]. 11. Assault with intent to commit a sexual offence [CA, s.42(1)]. 12. Abduction or detention for a sexual purpose [CA, s.47(1)]. 13. Sexual penetration of a child under the age of 12 [CA, s.49A(1)]. 14. Sexual penetration of a child under the age of 16 except where the child was 12 years of age or more and the accused was not more than 2 years older than the child [CA, s.49B(1)]. 15. Persistent sexual abuse of a child under the age of 16 [CA, s.49J(1)]. 16. Abduction or detention of a child under the age of 16 for a sexual purpose [CA, s.49P(1)]. 17. Incest in circumstances other than where both people are aged 18 or over [CA, ss.50C(1), 50D(1), 50E(1), 50F(1)]. 18-20 See next page	21. Kidnapping [CA, s.63A]. 22. Armed robbery [CA, s.75A(1)]. Aggravated burglary [CA, s.77]. Home invasion [CA, s.77A]. Carjacking [CA, s.79]. Arson causing death [CA, s.197A]. Intentionally or recklessly exposing emergency worker, custodial officer or youth justice custodial officer to risk by driving [CA, ss.317AC, 317AD, 317AE, 317AF]. Damaging emergency service vehicle [CA, s.317AG]. Culpable driving causing death [CA, s.318(1)]. Dangerous driving causing death or serious injury [CA, ss.319(1) or 319(1A)]. Dangerous or negligent driving while pursued by police [CA, s.319AA(1)]. 23. Any indictable offence in the course of committing which the accused, or any person involved in the commission of the offence, is alleged to have used or threatened to use a firearm, offensive weapon, or explosive as defined by CA, s.77. 24. Trafficking in a drug of dependence to a child [DPCSA, s.71AB]. Trafficking in a drug of dependence [DPCSA, s.71AC]. Cultivation of narcotic plants [DPCSA, s.72B]. Conspiracy to commit any of the above 3 offences [DPCSA, s.79(1)]. 25. Trafficking in a drug of dependence [DPCSA, s.71(1)]. Cultivation of narcotic plants [DPCSA, s.72(1)]. Conspiracy to commit any of the above 2 offences [DPCSA, s.79(1)]. 26. An offence against ss.302.2, 302.3, 303.4, 303.5, 304.1, 304.2, 305.3, 305.4, 306.2, 307.1, 307.2, 307.5, 307.6, 307.8, 307.9, 307.11, 309.3, 309.4, 309.7, 309.8, 309.10, 309.11, 309.12, 309.13, 309.14 or 309.15 of the Criminal Code (Cth). 27. An offence against ss.231(1), 233A or 233B(1) of the Customs Act 1901 (Cth) involving a commercial or trafficable quantity of narcotic goods. 28-29 See next page 30. An offence against the BA . 31. Conspiracy to commit, incitement to commit or attempt to commit an offence listed in Schedule 2.

ADDITIONAL SCHEDULE 2 OFFENCES

CA=Crimes Act 1958 (Vic); DPCSA=Drugs, Poisons & Controlled Substances Act 1981 (Vic)

FVPA=Family Violence Protection Act 2008 (Vic)

PSIA=Personal Safety Intervention Orders Act 2010 (Vic)

SSOA=Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)

8. Stalking [CA, s.21A(1)] and-
 - (a) the accused has within the preceding 10 years been convicted or found guilty of an offence against s.21A(1) in relation to any person or an offence in the course committing which the accused used or threatened to use violence against any person; or
 - (b) the bail decision maker is satisfied that the accused on a separate occasion used or threatened to use violence against the person whom the accused is alleged to have stalked, whether or not the accused has been convicted or found guilty of, or charged with, an offence in connection with that use or threatened use of violence.
18. Contravening a family violence intervention order or family violence safety notice [FVPA, ss.37, 37A, 123 or 123A] in the course of committing which the accused is alleged to have used or threatened to use violence and-
 - (a) the accused has within the preceding 10 years been convicted or found guilty of an offence in the course of which the accused used or threatened to use violence against any person; or
 - (b) the bail decision maker is satisfied that the accused on a separate occasion used or threatened to use violence against the person who is the subject of the order or the notice, whether or not the accused has been convicted or found guilty of, or charged with, an offence in connection with that use or threatened use of violence.
19. Persistent contravention of family violence intervention notices and orders [FVPA, s.125A(1)].
20. Contravening a personal safety intervention order [PSIA, s.100] in the course of committing which the accused is alleged to have used or threatened to use violence and-
 - (a) the accused has within the preceding 10 years been convicted or found guilty of an offence in the course of which the accused used or threatened to use violence against any person; or
 - (b) the bail decision maker is satisfied that the accused on a separate occasion used or threatened to use violence against the person who is the subject of the order or the notice, whether or not the accused has been convicted or found guilty of, or charged with, an offence in connection with that use or threatened use of violence.
28. An indictable offence that is alleged to have been committed while the accused is the subject of a supervision order, or interim supervision order, within the meaning of the SSOA.
29. An indictable offence, and the accused, at any time during the proceeding with respect to bail, is the subject of a supervision order, or interim supervision order, within the meaning of the SSOA.

9.2.4/5 Meaning of “serving a sentence” for the tests in 9.2.4 & 9.2.5

Under s.4AA(2)(c) of the BA the **exceptional circumstances** test applies to a person accused of a Schedule 2 offence if, *inter alia*, the offence is alleged to have occurred while the person was “**serving a sentence**” for any Schedule 1 or Schedule 2 offence. Under s.4AA(3) read in conjunction with item 1 in Schedule 2 the **compelling reason** test applies to a person accused of any indictable offence if, *inter alia*, the offence is alleged to have occurred while the person was “**serving a sentence**” for any indictable offence.

In *Application for Bail by Allen Matemberere* [2018] VSC 762 the adult applicant had been charged with a series of offences related to armed robbery. Shortly before offending the applicant had received a 12 month adjourned undertaking without conviction pursuant to s.75 of the Sentencing Act 1991 for unrelated offending. The question arose whether the subsequent offending had occurred while the applicant was “**serving a sentence**” for the purpose of s.4AA(2)(c)(v) of the BA. While acknowledging that his interpretation could give rise to seemingly odd consequences, Weinberg JA adopted the reasoning of Kaye J in *WBM v Chief Commissioner of Police* (2010) 27 VR 469, 475 and held that the applicant was indeed “**serving a sentence**”. Accordingly, the applicant had to satisfy the exceptional circumstances threshold if he was to be granted bail. He did not satisfy that test and bail was refused. At [30]-[31] his Honour said:

“In my opinion, the entire tenor of the **BA**, in its present form, manifests a legislative intention to make it significantly more difficult for individuals who allegedly offend again, having previously been dealt with for other offences, to be granted bail. The extrinsic material, to which I was referred, uses the term ‘undergo’ as synonymous with ‘serve’, and it is in that sense that I think s 4AA(2)(c)(v) should be construed

I accept that this interpretation can give rise to seemingly odd consequences. For example, an offender who is fined is plainly not serving a sentence. That is true, even if he or she is given time to pay, or can pay, by instalments. Yet, an adjourned bond under s 75, which theoretically is more lenient than a fine, produces the paradoxical result that a further offence during the period of that bond triggers the exceptional circumstances requirement for bail, whereas the fine does not. That seems to me to be an inexorable result of the language the legislature has chosen to use.”

By analogy, a child who is on probation, a youth supervision order, a youth attendance order or a youth control order at the time of the subsequent offending might also be deemed to be **“serving a sentence”** within the meaning of s.4AA(2)(c) and item 1 in Schedule 2 if those provisions actually apply to children at all. On the other hand, it is at least arguable that “a community correction order” which cannot be made for children limits to adults the operation of the phrase “or otherwise serving a sentence”.

9.2.6 Additional powers of a bail decision maker

Sections 8(3) & 8(4) of the **BA** empower a bail decision maker to adjourn the hearing of a matter for up to 4 hours if satisfied that the accused appears to be seriously affected by alcohol or another drug or a combination of drugs and to remand the accused in custody in the interim.

Sections 8(5) & 8(6) of the **BA** empower a bail decision maker to adjourn the hearing of the matter for one further period of up to 4 hours if satisfied that the accused still appears to be seriously affected by alcohol or another drug or a combination of drugs and to remand the accused in custody in the interim.

Section 12B of the **BA** provides that if a person subject to a summons to answer to a charge for an offence is before a court (other than the Children’s Court) and the hearing is to be adjourned, the court may, on an application by the prosecutor or on its own initiative, remand the accused in custody or grant the accused bail.

9.2.7 Bail application where possible family violence issue

Section 5AAAA(1) of the **BA** requires a bail decision maker considering the release on bail of an accused to make inquiries of the prosecutor as to whether there is in force a family violence intervention order or a family violence safety notice or a recognised DVO made against the accused.

Section 5AAAA(2) of the **BA** requires a bail decision maker considering the release on bail of an accused charged with a family violence offence to consider-

- (a) whether, if the accused were released on bail, there would be a risk that the accused would commit family violence; and
- (b) whether that risk could be reduced by the imposition of a condition or the making of a family violence intervention order.

9.2.8 Requirement for reasons when bail granted for Schedule 1 or 2 offence

Section 12(3A)(a) of the **BA** requires a court granting bail for a Schedule 1 offence to include in the order a statement of reasons for granting bail.

Section 12A of the **BA** requires a bail decision maker who grants bail for a person accused of a Schedule 2 offence to-

- (a) if a court, include in the order a statement of reasons for granting bail; or
- (b) in any other case, provide a statement of reasons as required by the regulations.

9.2.9 Accused (not child, vulnerable adult or Aboriginal) on 2 or more bail undertakings

Section 13A of the **BA** provides that only a court may grant bail to a person (other than a child, vulnerable adult or Aboriginal person) who is accused of a relevant Schedule 2 offence – as defined in s.13A(3) – and who is already on 2 or more undertakings of bail in relation to other indictable offences.

9.2.10 Accused with terrorism record

Section 13AA of the **BA** provides that only a court may grant bail to a person who has a terrorism record [as defined in s.3AAB], irrespective of the offence of which the person is accused.

9.3 Bail – History, Questions, Factors & Principles

History

In *Renate Mokbel v DPP (Vic) and DPP (Cth)* [2006] VSC 487 at [33]-[34] Gillard J said:

“English law has for many hundreds of years recognized the right of an accused person to bail. It is a right recognized in Australian law. The *Bill of Rights of 1689* (Imp) provided that excessive bail was not permitted and that the conditions of bail should not be set to deter the release of the accused pending trial. The right to a grant of bail is enshrined in s.4(1) of the *Bail Act* 1977. However, that right may be abrogated in certain circumstances. An accused person who is bailed is obliged to comply with the conditions of the bail, the most important of which is the requirement to attend at the place and on the date specified in the bail order.”

In *Bail Application by Michael Paterson* [2006] VSC 268 at [13]-[21] Gillard J traced the history of the law relating to bail in Victoria, noting at [20] that “the common law, in so far as it is not dealt with by any provision of the **BA** still applies” and at [47] that “the *Bail Act* does not constitute a complete code of the law relating to bail”. See also *Renate Mokbel v DPP (Vic) and DPP (Cth)* [2006] VSC 487 at [40], *R v Anderson* [1978] VR 322 and *R v Clarkson* [1981] VR 165.

Questions

The cardinal rule is that there are no overriding rules. Each case has to be considered on its own merits. The bail decision maker hearing a bail application must consider the following questions-

1. Is the accused charged with an offence which requires him or her to show **exceptional circumstances**?
2. Is the accused in a **show compelling reason** situation?
3. Is the accused an **unacceptable risk** if released on bail of-
 - o failing to surrender himself into custody in answer to his/her bail; or
 - o committing an offence whilst on bail; or
 - o endangering the safety and welfare of any person; or
 - o interfering with witnesses or otherwise obstructing the course of justice whether in relation to himself/herself or any other person?

In hearing a bail application by a child the judicial officer must also take into account the 7 matters detailed in s.3B(1) of the **BA**, four of which are in largely identical terms to the sentencing considerations for a child contained in ss.362(1)(a) to (d) of the **CYFA**. See section 9.2.2 above.

Factors

Factors which may militate against the granting of bail, either alone or in combination, include-

- nature & seriousness of offence(s)
- prior criminal history
- history of failing to appear
- current level of drug dependency
- number of current sets of bail and on what sorts of charges
- risk of flight
- risk of committing further offences
- risk to witnesses/co-accused
- with serious assaults: possibility that victim may die
- with drugs: quantity, purity, value
- whether the alleged offending breaches any current orders, e.g. parole, probation, youth supervision order, youth attendance order
- strength of prosecution case
- likelihood of term of imprisonment if charge(s) proved
- domicile

Factors which may militate in favour of the granting of bail, either alone or in combination, include-

- nature & seriousness of offence(s)
- weakness of prosecution case
- age

- delay
- lack of or minimal prior criminal history
- lack of or minimal history of failing to appear;
- number of current sets of bail and on what sorts of charges
- not a risk of flight - factors tying to jurisdiction
- not an unacceptable risk of committing further offences
- not an unacceptable risk to witnesses/co-accused
- appropriateness or otherwise of detention - e.g. psychological/psychiatric issues, disability etc.
- state of health, both physical and mental
- home & family
- school or employment
- support
- ongoing treatment in place
- conditions in cells
- cultural factors, e.g. Koori heritage, language etc.

Principles

1. The guiding principles in the **BA** are contained in s.1B(1):

- “(1) The Parliament recognises the importance of-
- (a) maximising the safety of the community and persons affected by crime to the greatest extent possible; and
 - (b) taking account of the presumption of innocence and the right to liberty; and
 - (c) promoting fairness, transparency and consistency in bail decision making; and
 - (d) promoting public understanding of bail practices and procedures.”

Section 1B(2) provides that it is the intention of Parliament that the **BA** be applied and interpreted having regard to the principles in s.1B(1).

In *Re Ceylan* [2018] VSC 361 Beach JA said at [32]:

“Immediately it should be observed that, in applying and interpreting the Act, s.1B requires regard to be had to two competing considerations: on the one hand, safety of the community; and on the other, the presumption of innocence and the right to liberty. In an individual case there will be competing factors that tell in favour of bail (s.1B(1)(b) of the Act), and others that tell against a grant (s.1B(1)(a)).

2. A case cited as *Woods v DPP* [2014] VSC 1 involved four unrelated applications for bail which raised common issues. In the very detailed judgment, part of which considered the relationship between bail and human rights, Bell J discussed a number of principles relating to bail together with some illustrative cases. These principles include:

- **Human rights – Individual facts and circumstances must be properly considered:**

[3] “Everyone charged with a criminal offence is presumed to be innocent and the prosecution must prove the guilt of the accused beyond reasonable doubt. Consistently with that presumption and prosecutorial onus of proof [see *Lee v NSW Crimes Commission* (2013) 87 ALJR 1082 per Kiefel J], bail ensures the liberty and other human rights of persons arrested on criminal charges. In Victoria, those rights are to be found in the common law and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The provisions of the *Bail Act* governing the entitlement of accused persons to bail and the conditions on which it may be granted have been designed to take those rights into account. Liberty and human rights under the common law and the Charter are the proper context within which those provisions are to be understood and applied. Because these rights are not absolute, they do not prevent the refusal of bail to an accused who, for example, represents an unacceptable risk of failing to appear at trial or pre-trial hearings, committing offences on bail, endangering the safety or welfare of the community or interfering with witnesses.”

[8] “Turning from the common law to the Charter, it specifies the human rights to freedom of movement in s 12 and liberty and security of the person in s 21. Each of these rights is potentially engaged by the provisions of the *Bail Act* and when deciding whether or not to grant bail to a person under arrest on criminal charges and impose conditions of bail.” See also ss.10(c), 13(a), 16(1), 19(2) & 25(1) of the *Charter*.

[20] “It can be seen that decisions about entitlement to bail and the conditions of bail potentially can raise serious human rights issues which require consideration by the court or decision-maker concerned. In that consideration, it is important to note that, under

s 7(2), the human rights in the Charter are not absolute and may be subject to limits prescribed by law which are reasonable and demonstrably justified in a free and democratic society. By that provision, a limitation may be found justified after the following factors are considered:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.”

[29] “As can be seen from the decisions of the European Court of Human Rights and that of Refshauge J in *Seears* [2013] ACTSC 187, a fundamental requirement of human rights law in the context of bail is that the individual facts and circumstances must be properly considered before the severe step of depriving the accused of his or her liberty is taken. The need to approach the determination of applications for bail in this way is well established in this court. For example, in *Re Moloney* [Supreme Court of Victoria, unreported, 31/10/1990] Vincent J was determining an application to which the exceptional circumstances test applied. Of the need to take all of the circumstances into account, his Honour said at p.1:

‘A number of decisions which have been handed down by judges in this court ... make it clear that such circumstances may exist as a result of the interaction of a variety of factors which of themselves might not be regarded as exceptional. What is ultimately of significance is that, viewed as a whole, the circumstances be regarded as exceptional to the extent that, taking into account the very serious nature of the charge to which they are applicable, the making of an order admitting the person to bail would be justified.’

Applying that approach in *Re Whiteside* [1999] VSC 413, another exceptional circumstances case, Warren J (as the Chief Justice then was) stressed at [14] that ‘each case will be different and each set of facts and circumstances will need to be considered and weighed up before determining whether or not exceptional circumstances are made out’. As we will see, this approach is generally followed not just in the application of the exceptional circumstances test but also in cases to which the show cause and unacceptable risk tests...apply.”

For further discussion of the relationship between bail and human rights, see sections 9.4.4.3 & 9.4.10.

- **The Primary Purpose of Bail:**

[30] “Under the *Bail Act*, the court is required to take into account a number of matters which always include whether the accused represents an unacceptable risk of failing to answer bail, committing offences on bail, endangering the safety or welfare of the public or interfering with witnesses (s 4(2)(d)). **Without in any way doubting the importance of the other considerations, the primary purpose of bail is to ensure the attendance of the accused at his or her trial and the associated preliminary hearings:** *Cozzi* (2005) 12 VR 211, 217 [33] (Coldrey J); *R v Watson* (1947) 64 WN (NSW) 100 (Herron J), approved *R v Light* [1954] VLR 152, 155-7 (Sholl J). As was held in *R v Mahoney-Smith* [1967] 2 NSW 154 in the Supreme Court of New South Wales by O’Brien J, ‘the grant or refusal of bail is determined fundamentally on the probability or otherwise of the applicant appearing at Court as and when required’: *Mahoney-Smith* at 158. *R v Sefton* [1917] VLR 259 was decided in our court under the common law. Cussen J held at 262 that, in ‘ordinary cases’, bail was granted ‘if by taking recognisances ... appearance can be practically ensured’. In *R v Light* [1954] VLR 152, also a common law case, Sholl J held at 157 this to be the ‘first matter of consideration’. It was described as ‘the primary question’ by Gillard J in *Re Paterson* (2006) 163 A Crim R 122, 127 and by Eames J in *Director of Public Prosecutions v Ghiller* [2000] VSC 435 at [43]. Both of these cases were decided under the *Bail Act*. This dicta from *Ghiller* was cited with approval in *Asmar* [2005] VSC 487 at [15] per Maxwell P and in *Re Metekingi* [2012] VSC 366 at [22] per Robson J.”

See also *Bail Application by Michael Paterson* [2006] VSC 268 where Gillard J stated at [53]: “[T]he primary matter in any bail application concerns the question of the accused person answering bail. That, in my view, is the most important issue and always has been.”

- **Safety of the Community:**

[33] “An important purpose of the criminal law is to ensure the safety of the community. Members of the public look to the government and the courts for protection against crime and the just punishment of offenders. While the first consideration in bail applications is whether the accused will appear to answer the charges, whether he or she would commit further offences on bail, endanger the safety or welfare of the public or interfere with witnesses are mandatory statutory considerations (s 4(2)(d)). This too is the position at common law, as expounded in leading authorities such as *Light* [1954] VLR 152, 155-7 (Sholl J), followed in *Paterson* (2006) 163 A Crim R 122, 127-8 [30] (Gillard J).and *R v Watson* (1947) 64 WN (NSW) 100, 102 (Herron J).”

- **The Principle of Personal Liberty is Wider than Freedom from Unlawful Detention:**

[5] “As to personal liberty, it has foundational significance in the scheme of the common law. This was explained by Mason & Brennan JJ in *Williams v The Queen* (1986) 161 CLR 278 at 292...”

[7] “In relation to bail, it is apposite to recollect that the principle of personal liberty is wider than freedom from unlawful detention. It encompasses freedom from unlawful restraint upon movement as well.” See *Ruddock v Vadarlis* (2001) 110 FCR 491 per French J.

[8] “Turning from the common law to the Charter, it specifies the human rights to freedom of movement in s 12 and liberty and security of the person in s 21. Each of these rights is potentially engaged by the provisions of the *Bail Act* and when deciding whether or not to grant bail to a person under arrest on criminal charges and impose conditions of bail.” See also ss.10(c), 13(a), 16(1), 19(2) & 25(1) of the Charter.

3. Unless there are unusual or compelling reasons for the Crown not being in an informed position, the prosecution should be ready to deal with a bail application once a charge is laid. In *R v Griffey* [2006] VSC 86, where the applicant was charged with murder of her estranged husband, the “main thrust of the argument presented by the Crown was that the bail application had been made with almost indecent haste”, namely 22 days after arrest and before the statements of witnesses were available. In granting bail, King J strongly rejected this submission and said that in a number of bail applications that she had heard in the Supreme Court the summary of the case prepared by the informant was the only material that was available. Her Honour continued at [7]-[9]:

“Once the police have made a decision to arrest and charge a citizen, it cannot be that the Crown can then say, we are taken by surprise, we’re not ready to argue the merits of the application...”

Bail is the right of an accused person. It shall be refused only on certain criteria and with certain offences, but it is clearly the right of a person to apply for bail at any time. No applicant must wait until the Crown say that they are ready and that this is a suitable time for them to have the application heard. The court must presume therefore that unless there are unusual or compelling reasons for the Crown not being in an informed position, for example awaiting the results of toxicology or DNA testing, those who provide the Crown with the information necessary to deal with these matters, that is the police officers involved in the decision to arrest and charge any applicant, must be able to provide to the Crown a clear, cogent synopsis of the basis of that arrest and the strength of the case against the applicant.”

9.4 Bail - 'Exceptional circumstances', 'Show compelling reason', 'Unacceptable risk'

In *Woods v DPP* [2014] VSC 1 at [34] Bell J said:

“Reflecting the importance of the presumption of innocence and the prosecutorial onus of proof as well as the right of all persons to liberty and freedom of movement at common law, s 4(1) has always provided, and still provides, that accused persons being held in custody have a presumptive entitlement to bail, as at common law: *Light* [1954] VLR 152, 157 (Sholl J). However, the presumptive entitlement to bail is displaced in the circumstances specified in [s 4A (exceptional circumstances), s.4C (show compelling reason) & ss.4B/4D/4E (unacceptable risk)].”

9.4.1 Exceptional circumstances

In *DPP (Cth) v Tang & Others* (1995) 83 A Crim R 593 at 596 [MC11/96], Beach J said:

"'Exceptional' is a word commonly used in legislation. One definition of it in the New Shorter Oxford dictionary is 'of the nature of, or forming an exception, unusual, out of the ordinary, special'. Webster's dictionary contains the following definition: 'Relating to, or forming an exception, out of the ordinary, out of the ordinary course, unusual, common, extraordinary'. In my opinion it does not matter which of these definitions one chooses to accept."

However in *DPP v Tong* [2000] VSC 451 [MC43/00] at [23]-[24] McDonald J eschewed reliance on a definition in favour of a more instinctive approach:

"[23] In my view it is not appropriate for the court to seek to define the expression 'exceptional circumstances' as applicable to s. 4(2)(a) or (aa) of the Bail Act 1977. It is more appropriate for the court to examine the facts in each case in order to determine whether 'exceptional circumstances' exist as would warrant the grant of bail to a person to whom s. 4(2)(a) or s. 4(2)(aa) of the Bail Act 1977 applies.

[24] In *Beljaev v DPP* the Full Court in its judgment said at pp.34-35:

'A decision to grant or refuse bail must necessarily be to a very considerable extent a matter of impression or an instinctive synthesis of the considerations involved.'

In *Re Michael Barbaro* [2004] VSC 404 at [8] and *MacDonald v DPP* [2004] VSC 431 at [7] Morris J adopted the same approach, saying in the latter case: "I agree with decisions of this Court which are to the effect that it is dangerous to seek to define what is meant by 'exceptional circumstances'."

In *DPP (Vic) v Cozzi* (2005) 12 VR 211; [2005] VSC 195 at [18]-[19] Coldrey J also eschewed a definition-based approach and approved the approach adopted by Vincent J in *Moloney's Case*:

"[18] The concept of exceptional circumstances is, itself, an illusive one. The phrase itself is not defined in the *Bail Act 1977*, although some Judges have essayed a definition. In *Tang & Ors* (1995) 83 A Crim R 593, 596 Beach J made reference to dictionary definitions of the word 'exceptional'. His Honour found that whatever definition is used, the applicant for bail 'bears the onus of establishing that there is some unusual or uncommon circumstance surrounding his case before a court is justified in releasing him on bail.' In the course of argument the decision of Kaye J in the case of *In the Matter of a Bail Application by Ismail Muhaidat* [2004] VSC 17 was cited. In it his Honour remarked:

'The question of what are exceptional circumstances have been canvassed before. Effectively the applicant has to establish circumstances right out of the ordinary. They have to be exceptional to the ordinary circumstances which would otherwise entitle the applicant to bail.' (p.2)

[19] On the other hand in *Re the Matter of Application for Bail by John Denis Moloney* [Supreme Court of Victoria, unreported, 31/10/1990] Vincent J, a most experienced judge, pointed out that it was not possible to identify in any general definition what factual situations constituted exceptional circumstances. His Honour stated:

'A number of decisions which have been handed down by Judges in this Court, however, make it clear that such circumstances may exist as a result of the interaction of a variety of factors which of themselves might not be regarded as exceptional. What is ultimately of significance is that viewed as a whole, the circumstances can be regarded as exceptional to the extent that, taking into account the very serious nature of the charge to which they are applicable, the making of an order admitting the person to bail would be justified.'

In *DPP (Vic) v Koumis* [2006] VSC 416 at [28] Coldrey J expanded on his reasoning in *DPP (Vic) v Cozzi* (2005) 12 VR 211:

"In *DPP v Cozzi*, I expressed the view that in considering exceptional circumstances lack of any positive findings in relation to the factors listed in s.4(2)(d) of the Act could be taken into account. However, as is clear in the scheme of the legislation, more is required that the lack of findings of an unacceptable risk before exceptional circumstances may be regarded as having been demonstrated."

In *Re Sanerive* [Supreme Court of Victoria, unreported, 03/07/1986], Vincent J held that in determining whether or not exceptional circumstances exist:

"It is relevant to have regard to the circumstances and strength of the case against the accused. It is necessary to refer to the whole of the situation which exists in each such case and to take into account the general criteria which are employed in the consideration of bail generally."

In *MacDonald v DPP* [2004] VSC 431 at [8] Morris J took the same view: "To look at each circumstance separately and then identify whether that circumstance is exceptional, and then seek to make a conclusion on that basis, is to fail to have regard to the reality that circumstances must be assessed as a whole." See also *DPP (Cth) v Marijan Banda* [2000] VSC 542 per Beach J; *Re Moloney* [Supreme Court of Victoria, unreported, 31/10/1990] per Vincent J; *DPP v Justin Noel Waters* [2004] VSC 303 at [8] per Habersberger J; *Tran v DPP* [2004] VSC 296 per Redlich J at [15] citing *R v Cox* [2003] VSC 245; *DPP (Cth) v Thomas* [2005] VSC 85 at [5] per Teague J. In *IMO an Application for Bail by Cardona* [2005] VSC 186 at [14] Kellam J rejected the prosecution contention "that a combination of circumstances cannot constitute exceptional circumstances [as] not consistent with established authority". In *DPP (Cth) v Stephen Zane Abbott* (1997) 97 A Crim R 19 at 27 {MC2/98} Gillard J said:

"I do not doubt for one moment that in the end the court must consider the totality of factors put forward and consider the question whether in all the circumstances they are exceptional."

However, it must be noted that in *Abbott's Case* Gillard J did require the accused to identify each of the component factors upon which he relied as a constituent of 'exceptional circumstances'.

In the case of *CG* [2005] VSC 358R at [19] Kaye J also considered that exceptional circumstances might arise from the totality of individually unexceptional circumstances:

"The Bail Act does not define what are exceptional circumstances. Clearly, in order to be exceptional the circumstances must be something which lies out of the ordinary. While previous rulings on bail applications provide some assistance, each case, of necessity, must be determined according to the particular facts of the case. In an appropriate case while no individual circumstance standing alone is exceptional, nonetheless exceptional circumstances may arise from the combined effect of those circumstances working together."

In relation to exceptional circumstances, Tinney J said in *Re Afram* [2018] VSC 708 at [24]-[25]:

[24] "The authorities emphasise how difficult it may be to establish the existence of exceptional circumstances. For example, Justice Champion in *Re CT* [2018] VSC 559, a case involving a bail application by a child, stated at [64]:

'The Act does not define what may amount to exceptional circumstances. It is well established that, 'in order to be exceptional, the circumstances relied on must be such as to take the case out of the normal, so as to justify the admission of the applicant to bail.' It has been observed that 'the hurdle confronted by an applicant in establishing exceptional circumstances is a high one.' That having been said, it is not an impossible standard to reach.'

[25] Priest JA in *Re Gloury-Hyde* [2018] VSC 393 had this to say:

The concept of exceptional circumstances is an elusive one. But as Beach JA observed in *Ceylan* [2018] VSC 361 at [46], it is well established that exceptional circumstances for the purposes of the Act may, in an appropriate case, consist of a combination of a number of circumstances relating both to the strength of the prosecution case against the applicant and the personal circumstances of the applicant. One matter that has often been regarded as important in this context, is the absence of factors pointing to the applicant presenting an unacceptable risk in any of the ways contemplated by the Act."

In *Re TP* [2018] VSC 748 the Court held:

- At [33]: Although the provisions considered in *Re CT* have been amended, the term 'exceptional circumstances' remains and there is no reason to depart from previous analyses of it.
- At [48]-[51]: Special considerations apply to children, even those charged with serious offending' specifically s.3B(1)(a) of the **BA** requires the Court to "consider all other options before a child is remanded into custody."

In *Michael Barbaro's* case the applicant was charged with a string of offences, two of which - cultivation of & trafficking a commercial quantity of cannabis - fell within former s.4(2)(aa) of the **BA**. Counsel for the applicant queried whether there was evidence that the quantity of cannabis alleged to have been cultivated or trafficked was of a commercial quantity. Morris J said at [4]-[5]:

"[A]ssuming that there is a paucity of evidence as to whether the quantity of the drug cultivated or trafficked was of a commercial quantity, it does not follow that this would take the matter outside of the reach of s.4(2)(aa) of the Bail Act 1977 (and hence mean that exceptional circumstances need not be shown) because that section turns on what the person is *charged* with. In this case Mr Barbaro is charged with two offences that fall within that provision... However, I do accept that if the evidence before the Court casts significant doubt on the likelihood that a person would be convicted of cultivating or trafficking in a drug of commercial quantity, that would be relevant to whether or not exceptional circumstances exist. If this were not so the provisions of s. 4(2)(aa) of the *Bail Act* 1977 could be abused by bringing charges against a person who had cultivated a drug, or had trafficked in a drug, less than a commercial quantity, but specifying in the charge that it was of a commercial quantity in order to trigger a more rigorous test in relation to bail."

Where the prosecution satisfies the judicial officer that the offence charged falls within an 'exceptional circumstances' category, the onus is on the accused to prove that exceptional circumstances exist: *Beljajev v DPP* (1998) 101 A Crim R 362; *DPP (Cth) v Tang* (1995) 83 A Crim R at 595.

In *MacDonald v DPP* [2004] VSC 431 at [9] Morris J held that the matters referred to in s.4(2)(d) of the **BA** relating to unacceptable risk are also relevant to the question of exceptional circumstances. Thus his Honour emphasised that a starting point, but only a starting point, for the determination of whether exceptional circumstances exist might be that there is an acceptable risk that if the applicant was released on bail she will answer bail, not commit offences whilst on bail, not endanger the safety or welfare of members of the public and not interfere with witnesses or otherwise seek to obstruct justice.

In *Re John Whiteside* [1999] VSC 413 Warren J cautioned against setting too high a hurdle for the applicant in determining exceptional circumstances. See also *R v Griffey* [2006] VSC 86 at [33] per King J. Nevertheless the cases illustrate that the 'exceptional circumstances' test is very stringent. In *Re Michael Barbaro* [2004] VSC 404 at [7], [17] & [21] Morris J thrice described it as a "high hurdle". The hurdle at its highest is to be found in the case of *YSA v DPP* [2002] VSCA 149 [Court of Appeal, unreported, 26/09/2002]. In that case, at the completion of a committal hearing, a magistrate had committed the accused for trial on charges of trafficking and conspiracy to traffick in a commercial quantity of heroin but had also found exceptional circumstances and granted bail. That decision was appealed by the DPP under s.18A of the **BA**. The magistrate had found that the following facts, when looked at together, amounted to exceptional circumstances-

- "(a) the respondent has no prior convictions;
- (b) the respondent has lived in Australia for 29 years and has a family including 3 children although he was not cohabiting with his wife at the date of his arrest;
- (c) the respondent has a residence in Caulfield, albeit subject to a contract of sale and a [pending] requirement to vacate;
- (d) the respondent had been in custody for 10 months and could be in custody for a further 10 months awaiting trial;
- (e) the respondent's health is not good;
- (f) the respondent can supply a surety of \$300,000;
- (g) one co-accused has already been released on bail;
- (h) the respondent conducts a business in the Hallam area and had an offer of other employment; and
- (i) the case against the respondent is not bound to succeed."

Holding that there were no exceptional circumstances, the Supreme Court allowed the DPP's appeal and revoked bail. His Honour said:

"Whilst undoubtedly the learned Magistrate was entitled to the view that the factors he identified were factors to be taken into account by him in favour of releasing the respondent on bail, can it be said that they constitute exceptional circumstances which can properly be described as unusual or out of the ordinary? In my opinion they cannot."

The respondent appealed. The Court of Appeal (Phillips, Chernov & Vincent JJA) dismissed the appeal, holding that "the judge was perfectly correct, with respect, in arriving at this conclusion".

The stringency of the 'exceptional circumstances' test is further illustrated by the case of *R v S* [2003] VSC 314, decided on 28/08/2003. The applicant was a suspended detective senior sergeant who had

been a member of the police force for over 30 years. He had been charged with conspiracy to traffick a commercial quantity of pseudo ephedrine hydrochloride, conspiracy to traffick and trafficking of a drug of dependence, theft and making a threat to kill 3 persons, including the police officer who was in charge of the investigation which had led to the applicant's arrest. He was remanded in custody on 17/03/2003 having been refused bail by a magistrate on that date. An application to the Supreme Court for bail had been refused by Balmford J on 01/04/2003. A further application for bail was made before Williams J in August 2003 in which senior counsel for the applicant submitted that exceptional circumstances existed by reason of the following matters:

- (i) the applicant's background;
- (ii) his family situation - the sole surviving parent of 3 children aged 22, 19 & 13 - counsel referring to principles set out in *Wirth* (1976) 14 SASR 291 at 295-6 per White J; *Edwards* (1996) A Crim R 510 at 516 per Gleeson CJ and *Holland* [2002] VSCA 118 per Eames J;
- (iii) the likely period of delay before trial - held not to be of the duration feared by the applicant;
- (iv) the conditions under which he was presently incarcerated - in protective custody with 3 other protected prisoners with the applicant alone and the 3 others as a group having alternate rostered periods of 5½ hours per day during which they were free to move about the unit and use the common facilities;
- (v) the risk to his safety whilst in custody;
- (vi) the lack of strength in the prosecution case; and
- (vii) the effect of incarceration on the applicant's health - symptoms of stress and demoralisation as well as mild to moderate depression of mood.

A surety of \$190,000 was available and the applicant was prepared to submit to a form of house arrest for 23 hours each day. Nevertheless, bail was refused, Her Honour holding that neither alone nor in combination did the factors relied on constitute exceptional circumstances. Further Her Honour held that the applicant was an unacceptable risk of committing offences if released on bail, namely of killing the police officer in charge of the investigation, the proposed 23 hour home arrest being insufficient to render the risk acceptable rather than unacceptable. [On 15/03/2004, after a 6 week committal, Bolger M released the applicant on bail, having found exceptional circumstances constituted primarily by a delay of nearly 3 years between arrest and expected trial date and the conditions under which he was held on remand.]

There have, however, been a number of cases in which the hurdle for an accused required to show exceptional circumstances has not been set quite as high as Williams J did in *R v S*. For example, in *Andrea Mantase* [Supreme Court of Victoria, unreported, 21/09/2000] Vincent J granted bail to an applicant charged with attempted importation and importation of ecstasy and possession of a prohibited import in a commercial quantity. His Honour held that a combination of circumstances in that case amounted to exceptional circumstances, particularly-

- delay, including the fact that if the accused remained on remand the length of pre-sentence detention would approximate to the length of any prison sentence likely to be imposed,
- the accused's ties to Australia;
- the accused's employment and the fact that he had no priors; and
- the fact that his wife had recently suffered a miscarriage and needed his support.

In the course of his reasons in relation to delay, Vincent J said:

"...if our community, as it must do for good reasons on many occasions, is to detain individuals in custody prior to the determination of their guilt, then that period must be as short as reasonably practicable. Periods of 18 months or so of detention prior to the conduct of trials is by any form of reckoning extremely long. It is not to the point to say, in effect, that such periods represent the norm and, therefore, cannot constitute part of the matrix of exceptional circumstances. This, in effect, ultimately negates the very justification for detention prior to the determination of guilt. What I mean by this is that such detention must be directed to serving the ends of justice and not itself constituting a potential source of injustice."

His Honour went on to say:

"[D]etention in custody is not now, and never has been...anything other than a seriously unpleasant experience for those individuals who are subjected to it. It is one thing to await at liberty the conduct of a trial for a period of 18 months, that being stressful enough of itself. It is quite another for that period to pass whilst detained under a restrictive prison type regime. This aspect of detention seems to receive almost no attention...when consideration is given to applications of the present kind."

A very strong judicial statement in relation to delay was made by Crockett J in *George Pietrobon* [Supreme Court of Victoria, unreported, 13/01/1988]. The accused was charged with trafficking and conspiracy to traffic in a drug of dependence, his Honour categorising the evidence available to the Crown as "comprehensive", the case as "a strong one", the offences as "extremely serious [carrying] maximum penalties that are substantial". The accused had been on remand for 5 months and "unavoidable delay in the analysis of drugs and handwriting exhibits" was advanced as a reason for an adjournment for an unknown period (of at least another 4 months) prior to committal. Crockett J said:

"There must come a time in my view when the delay, part of the system and all as it may be, must be treated as inordinate so that notwithstanding the strength of the Crown case, the likelihood of conviction, the likelihood of the imposition of a severe penalty, a person must be treated as innocent until proved guilty can no longer be held in custody at the whim of the authorities and without any assurance as to when his committal proceeding or his trial may be expected to proceed... If it means, as it inevitably does, that because of such delays persons who are probably lawbreakers are released into the community further to break the law or to abscond or to engage in other types of lawless behaviour, then society will simply have to accept that risk because the price to be paid for its avoidance in holding persons in custody for inordinate periods of time without trial, is a price which I do not believe the community should be asked to pay."

And in *R v Medici* [Supreme Court of Victoria, unreported, 27/07/1993] where the accused had been in custody for 14 months and it was likely to be a further 10 months before his trial was complete, Ashley J found that the delay was so great that his continued detention in custody was not justified. In *Re Carter* [Supreme Court of Victoria, unreported, 31/03/1982] Marks J held that the holding in custody for 10 months of an accused charged with murder without a committal having been held "sufficiently transgresses the principles of justice" to be regarded as an exceptional circumstance. See also *R v Edwards* (1988) 35 A Crim R 465 and *R v Stephen Allan Cox* [2003] VSC 245, in the latter of which Redlich J pointed out at [18] that there have been a number of recent decisions of the West Australian Supreme Court dealing with legislation in almost identical terms in which similar observations have been made: see *Fawcett v R* [2002] WASC 285; *Outman v R* [2000] WASC 303 and *Pinkston v R* (2000) 119 A. Crim R. 462. In *Outman v R* at [28], Hasluck J after referring to *Alexopoulos v R* and *Pinkston v R* said:

"These cases suggest that delay should be measured not against the state of the court list in any particular jurisdiction, but having regard to objective criteria based on the concept that a humanitarian society recognising the presumption of innocence will find abhorrent the idea that people are kept in custody for such an undue time without trial."

By contrast, in *DPP v Radev and Zayat* [1999] VSC 284, Beach J held that the fact that the accused had been in custody for 7 months and it was likely to be a further 7 or 8 months before their trial was complete did not establish any "unacceptable delay" on the part of the DPP. And in *DPP v Parker* [Supreme Court of Victoria, {MC25/94}, 19/08/1994], where the accused had been in custody for 32 months, Mandie J said that he was not "in full sympathy" with the statement by Crockett J in *Pietrobon's Case* "that society had to take the risk in some of these cases that persons who are lawbreakers should nevertheless be released into the community because the system was such that persons had to wait inordinate periods of time for trial", his Honour referring to "the mandate of Parliament in a case such as this [that the] Court is required to refuse bail unless the accused person shows cause why his detention in custody is not justified".

In 2020 the issue of "delay" received new impetus as a consequence of the disruption caused to the operations of the courts by the so-called COVID-19 pandemic and consequential State government health directions. In *Re Diab* [2020] VSC 196 the 29 year old applicant with a limited criminal history was charged with offences including attempted murder, discharging a firearm being reckless as to the safety of a police officer, common assault, theft of a motor vehicle and going equipped to steal. His Honour considered that the sentence to be imposed should the applicant be found guilty of the offences (even assuming he was acquitted of the attempted murder charge) was likely to be greater than the length of time he would spend on remand if bail was refused. Bail was refused on the basis that exceptional circumstances were not found and the applicant was an unacceptable risk in any event. On the issue of delay caused by the COVID-19 pandemic Beach JA said at [38]:

"The way in which COVID-19 may be relevant in the establishment of exceptional circumstances has been discussed in a number of recent decisions of this Court: see *Re Broes* [2020] VSC 128, [35]-[42] (Lasry J); *Re McCann* [2020] VSC 138, [39], [40] (Lasry J); *Re Tong* [2020] VSC 141, [33], [34] (Tinney J); *Re El-Refei (No 2)* [2020] VSC 164, [17]-[27] (Incerti J); *Re Velluto* [2020] VSC 188, [47]-[48]; *Re Nicholls* [2020] VSC 189,

[32]-[39] (*Nicholls*) (Incerti J).. More generally, the way in which the current health crisis may be relevant in a bail application has also been discussed: see *Re JK* [2020] VSC 160, [19]-[26] (Hollingworth J); *Re JB* [2020] VSC 184, [40] (Kaye JA); *Nicholls* [2020] VSC 189, [32]-[39]. See also *Rakielbakhour* [2020] NSWSC 323, [15]-[19].. The following propositions have emerged:

- (1) Delay in trials due to COVID-19 may establish exceptional circumstances, particularly (but not limited to) where the delay is likely to lead to an accused spending more time on remand than the likely sentence.
- (2) The existence of the current COVID-19 health crisis will not, however, give rise to exceptional circumstances in all cases. The crisis is simply one of the surrounding circumstances that a bail decision maker must take into account in considering an application for bail.
- (3) The relevance of the COVID-19 crisis is that it may make time in custody very difficult and/or significantly more difficult than usual. Moreover, to the extent that correctional facilities are not permitting visitors, there may be greater isolation for those on remand. Additionally, the extent to which the crisis may impede education and/or rehabilitation opportunities is a matter capable of being relevant and, to that extent, would need to be taken into account.
- (4) In any individual bail application, in the absence of agreement between the parties, much will depend upon the evidence of the effect of the crisis so far as it concerns the circumstances of the applicant for bail."

In the case of *Memery* [2000] VSC 495 the applicant had been charged with murder, albeit in circumstances where a defence of self-defence was open. Stating at [31] that "it has been recognised by this court that a weak Crown case may constitute exceptional circumstances", Gillard J held that if there was sufficient evidence to satisfy the court that there were good prospects that a defence of self-defence would be upheld, with the result of an acquittal or, at worst, a verdict of manslaughter, then the applicant would be *prima facie* entitled to bail. In *Rick Anthony Waters* [2005] VSC 443 Hollingworth J applied this dictum in granting bail to an applicant charged with murdering his father in circumstances where a defence of provocation was "strongly open". In *R v Serrano* [2005] VSC 500 Harper J referred with approval to this dictum but held that the Crown case was not weak and refused bail.

In *IMO an Application for Bail by Amer Haddara* [2006] VSC 8 at [20]-[23], Osborn J – although not finding present exceptional circumstances for an applicant charged with terrorism offences – issued a warning in relation to the conditions in which accused persons were held:

"As a general rule an accused person who enjoys the presumption of innocence but is held in custody pending trial should be kept in conditions which are as humane as are reasonably practicable...In the present case the applicant is held in seriously confined conditions...In my view the conditions in which the applicant is confined are such that if such confinement continued for a protracted period pending trial it might be regarded as constituting exceptional circumstances. It cannot be said, however, that at present the conditions under which Mr Haddara is being held constitute exceptional circumstances."

In *DPP (Cth) v Pasquale Barbaro* (2009) 20 VR 717; [2009] VSCA 26 the accused had been charged with very serious offences relating to drug importation and trafficking. A magistrate initially refused his application for bail but three months later granted bail subject to very restrictive conditions. On appeal by the Commonwealth DPP, Forrest J ordered that bail be revoked. An appeal by the accused pursuant to s.17(2) of the Supreme Court Act 1986 (Vic) was dismissed. The Court of Appeal (Maxwell P, Vincent & Kellam JJA) agreed. In the appeal the DPP had effectively conceded that the exceptional circumstances threshold had been satisfied on the basis that the accused's trial would not begin until more than two years after he was charged. The delay was attributed to the complexity of the circumstances underlying the charges and to the scale of the evidence – in particular transcripts of telephone intercepts – underpinning the Crown case. At [6] the Court of Appeal said:

"As the magistrate recognised, however, the establishment of exceptional circumstances does not create an entitlement to bail. Even if the applicant for bail satisfies the court that exceptional circumstances exist which justify bail, bail must nevertheless be refused if the prosecution establishes unacceptable risk. See *Beljajev v DPP* (1998) 101 A Crim R 362; *Re Waters* [2005] VSC 443 (unreported, Hollingworth J, 26 October 2005) at [5]."

It was common ground that the issue raised by the Director's appeal from the magistrate was whether it was reasonably open to conclude that the accused did not represent an unacceptable risk of flight were he to be granted bail. The Court of Appeal agreed with Forrest J that it was not reasonably open.

In *Re JO* [2018] VSC 438 the applicant was a 13 year old boy. T Forrest J said at [14]:

"Whilst the burden of demonstrating 'exceptional circumstances' is, as I have said, a stringent one, the age of the applicant weighs heavily in his favour. **Children are rightly afforded a special status by the Act and any assessment of 'exceptional circumstances' in the case of a child must be viewed through the prism of s 3B(1).** In the case of an adult, a combination of circumstances may fall short of constituting exceptional circumstances, while the same combination when considered in the case of a child may achieve a wholly different outcome. The suite of considerations enumerated in s 3B(1) make the evaluation of any determination under this Act, including the 'exceptional circumstances' test, a different exercise in the case of a child."

In *Re HAH* [2019] VSC 776 the applicant was a 13 year old boy who had an IQ of 47, diagnoses of post-traumatic stress disorder and attention deficit hyperactivity disorder and had been in the care of DHHS on a care by Secretary order since the age of 8. He was charged with theft of a phone "in a most infantile way" at a time when he was already on bail in relation to two outstanding matters and charged on summons in respect of two others. The majority of these matters involved incidents relating to his conduct at the therapeutic residential unit where he resided. He accordingly fell into the "exceptional circumstances" category. In granting bail Lasry J said at [26]:

"As has been stated in previous decisions of this Court, the influence of s 3B is such that the assessment of 'exceptional circumstances' is different in the case of a child than it is for an adult. This means that a child may meet the requisite threshold through a combination of circumstances, including the considerations set out in s 3B, whereas an adult with the same combination of circumstances may fall short: See *Re JO* [2018] VSC 438 [14]. See also *Application for Bail by LT* [2019] VSC 143 [37]; *Re CT* [65]."

In *Re MI* [2019] VSC 347 the 28 year old applicant was charged with importing and attempting to possess commercial quantities of a border controlled drug, in total 50 kilograms of cocaine. In determining that he had not shown exceptional circumstances pursuant to ss. ss 4A(1), 4A(1A) & 4AA of the **BA**, Macaulay J – after referring to dicta of Beale J in *Re Reker* [2019] VSC 81 at [39], Kaye J in *DPP v Muhaidat* [2004] VSC 17 at [13]-[14], Beach JA in *Re Ceylan* [2018] VSC 361 at [45], Champion J in *Re CT* [2018] VSC 559 at [65], Priest JA in *Re Gloury-Hyde* [2018] VSC 393 at [30] & [35] and Lasry J in *Armstrong v R* [2013] VSC 111 at [31] – held at [52]-[53]:

"In my judgment, taken in combination, the circumstances relied upon fall short of amounting to exceptional circumstances. Sadly, circumstances of family and personal hardship, disruption of business, financial hardship, and the experience of anxiety and depression at being in custody (and the consequences it brings) are not, in combination, circumstances that are so out of the ordinary for those placed in custody, especially for the first time. Bail must therefore be refused."

In *Re Sisper* [2019] VSC 362 the 42 year applicant who had no prior convictions and was in practice as a chiropractor was charged with importing a commercial quantity of a border controlled drug, attempting to possess a commercial quantity of a border controlled drug, trafficking a drug of dependence, possessing a drug of dependence, and dealing with property suspected of being proceeds of crime. The drug was cocaine. Beach JA refused bail, both because the applicant had not shown exceptional circumstances and because he was an unacceptable risk: see [51]. In relation to exceptional circumstances, Beach JA said at [43]:

"Recently, in *Re Reker* [2019] VSC 81 at [39], Beale J, citing Kaye J in *DPP v Muhaidat* [2004] VSC 17 at [13]-[14], referred to the meaning of exceptional circumstances in the following terms:

"Effectively, the applicant has to establish circumstances right out of the ordinary. They have to be exceptional to the ordinary circumstances which would otherwise entitle the applicant to bail. Ordinary circumstances consist of circumstances such as hardship to the accused or to his family, disruption of his work and similar matters."

In *Re Granata* [2020] VSC 879 the applicant was charged contravening a control order pursuant to s.104.27 of the *Criminal Code (Cth)*, the maximum penalty for which is 5 years' imprisonment. In the course of finding exceptional circumstances and granting bail, T Forrest JA said at [22]-[25]:

"Over the years, in State and federal contexts, courts have used, inter alia, adjectives such as, 'uncommon', 'unusual', 'atypical', 'abnormal' and 'extraordinary' [*R v Naizmand* [2016] NSWSC 836, [8] (Harrison J)] and phrases such as, 'out of the ordinary' [*Hammoud* [2006] VSC 516, [3] (Bongiorno J)].

I do not propose to come up with an adjective of my own, and I doubt that the adjectives that I have set out above are interchangeable. 'Uncommon' circumstances would, in my view, set the bar lower than Parliament intended, and 'extraordinary' circumstances would set the bar higher than Parliament intended.

'Exceptional' is a normal English word in common use and with its own well-understood meaning. I shall apply it in that sense. I accept that it is a flexible concept and that a combination of factors may constitute exceptional circumstances where, individually, they may not reach that level. I was taken to the New South Wales case of *R v Naizmand* as a very rare example of a bail application linked to the control order offence. With respect, I disagree with that part of Harrison J's analysis of the phrase 'exceptional circumstances' in that case, in which his Honour observed at [8]: 'In the nature of things, the reference to circumstances being exceptional is literally a reference to the regularity with which they might be expected to occur, not necessarily a reference to the nature or quality of the circumstances in question.'

Applying this logical process, an unanticipated event with widespread catastrophic consequences such as, for instance, the deferral of all court hearings for, say, five years, would not, in itself, be exceptional because it would apply to all prisoners on remand. **In my view, the term 'exceptional' is used in a broader sense than to connote mere arithmetic. If, for example, an event is rare, it could be exceptional. But so could it be if it were 'unexpected' or 'outstanding' or 'bizarre' or, dare I say it, 'exceptional'. My point is that, where Parliament has left a phrase undefined and where the liberty of its subjects are concerned, courts ought to be cautious in construing that phrase too narrowly."** [emphasis added]

9.4.1.1 SOME CASES IN WHICH EXCEPTIONAL CIRCUMSTANCES WERE FOUND AND BAIL WAS GRANTED

George Gustav Hofer

[Supreme Court of Victoria, Smith J, unreported, 09/12/1991]

The accused was charged with offences arising from importation of 500kg of cannabis with a street value of \$15 million and was arrested with 10kg of cannabis in his car. The offences were committed while he was on bail for theft, trafficking and possession & use of false documents. The accused was a 51 year old married man with 2 adult daughters and a grandchild. His Honour held that exceptional circumstances did exist arising from a combination of:

- (i) prior and likely future delay (expected to be 17 months);
- (ii) health of accused and need for treatment for his back (report from orthopaedic surgeon tendered);
- (iii) the accused's wife was under particular and unusual stress.

Arthur Hastings Brown

[Supreme Court of Victoria, Hampel J, unreported, 23/04/1987]

Accused was charged with murder involving explosives. His Honour held that the following factors in combination amounted to exceptional circumstances:

- antecedents & work record;
- family situation and financial needs;
- probable delay before trial;
- likelihood of appearing on bail;
- likelihood of not committing further offences whilst on bail;
- likelihood of not interfering with witnesses;
- need for preparation of defence; and
- circumstantial nature of the case against the accused.

Luscombe

[Supreme Court of Victoria, Harper J, unreported, 22/06/1993]

His Honour found exceptional circumstances constituted by the "appalling conditions" of the custodial facilities and released the accused on bail notwithstanding a strong Crown case and grave concern in relation to the accused attempting to contact witnesses or committing offences whilst on bail: "[O]therwise the [accused] might continue to be held for an indefinite period in accommodation which is not suited to the long-term incarceration of persons awaiting trial".

John Denis Moloney

[Supreme Court of Victoria, Vincent J, unreported, 31/10/1990]

Accused was charged with murder. His Honour identified a number of factors relevant to a determination of whether exceptional circumstances existed and held that although none of the factors would of themselves constitute exceptional circumstances, they did so when taken in conjunction in this case:

- strength of prosecution case;
- period during which accused likely to remain in custody prior to committal proceedings or trial;
- prior criminal history (relevant for a variety of purposes, including whether or not the accused:
 - has a propensity to violent crime or repeated crime;
 - has failed to comply with previous grants of bail;
 - has a propensity to engage in irresponsible or anti-social behaviour generally; or
 - is likely to interfere with witnesses);
- stable residence; and
- stable income.

Susan Elizabeth Freeman

[Supreme Court of Victoria, Coldrey J, unreported, 07/03/1997]

Accused was charged with murder of her husband. The evidence was equivocal, there being some suggestion that he had committed suicide. His Honour found exceptional circumstances based on a combination of the following factors, the first of which he categorized as the most important factor:

- the equivocal nature of the evidence supporting the prosecution case;
- the exemplary background of the accused;
- the difficulty of getting appropriate psychiatric treatment from the treating psychiatrist while the accused was in custody;
- the effect of her incarceration on the accused's business;
- delay; and
- the fact that there was no risk of failing to appear.

Alexopoulos

[Supreme Court of Victoria, Hampel J, {MC15/98}, 23/02/1998]

Accused was charged with importation of 3kg of heroin. The case against him was circumstantial based on false denials. Accused relied on a combination of factors to show "exceptional circumstances", including-

- defacto's drug and alcohol problem which incapacitates her in relation to the care of their 7 year old child;
- elderly parents in poor health who relied on accused to help run their business.

However the primary factor on which the accused relied was delay. Hampel J said:

"In my opinion where exceptional circumstances which substantially depend on delay are raised, they cannot be measured simply by what is the normal or usual delay at any particular period of time. Judges of this court have, over the years, said that long delays are simply not acceptable, quite apart from what may be normal or usual. There was a time when senior judges in this court thought that anything over a year, as a rule of thumb, would be treated as being exceptional or inordinate. I think there must be some objective criteria which does not depend purely on what the position is at the particular time because of delays in the system or lack of resources. It must be objective criteria based on the concept that we are a humanitarian society which respects the presumption of innocence and finds abhorrent the idea that people are kept in custody for undue time without trial. The Bail Act, I think, must be interpreted in that context and not simply by what happens to be the unhappy norm at this time."

Based on these factors, his Honour granted bail, noting that the evidence against the accused was not so "overwhelming" as to make him "a flight risk".

R v Nadim Ahmad

[Supreme Court of Victoria, Teague J]

[2003] VSC 209

The 64 year old accused was charged with possession of and trafficking in a commercial quantity of ecstasy. Held: Exceptional circumstances found comprising "delay and health and life expectancy problems" of the accused.

R v Stephen Allan Cox

[Supreme Court of Victoria, Redlich J]

[2003] VSC 245

A former police detective sergeant was charged with trafficking in and conspiracy to traffick in a commercial quantity of heroin. His Honour held that the following factors in combination amounted to exceptional circumstances, although he noted at [23] that factors 6 & 7 considered in isolation would not have been sufficient to warrant the granting of bail:

1. the Crown case was not particularly strong;
2. the applicant was previously of good character;
3. one of the co-accused had been granted bail and other serving members charged with serious offences had also been granted bail;
4. protective custody is a more onerous form of incarceration: see *R v ZMN* [2002] 4 VR 537 at [13] & [24];
5. there was an anticipated delay of uncertain duration, possibly exceeding 18 months before trial;
6. applicant was a married man with 3 children aged 10, 9½ & 6 and prospect of employment in a real estate agency; his close ties to the jurisdiction meant that he was not a risk of absconding;
7. the applicant's psychiatric condition - a depressive condition - had been exacerbated by the stress arising from the risks associated with a police officer being on remand within the prison system and the gloomy prognostications of the length of time for which he might remain there before his trial.

The Crown had opposed bail for the additional reason that the applicant was an unacceptable risk of interfering with witnesses if released on bail. His Honour held at [3] that no persuasive evidentiary basis had been provided for this assertion and released the applicant on bail.

DPP v Bernath

[Supreme Court of Victoria, Williams J]

[2003] VSC 304

Accused was charged with possession and trafficking of a commercial quantity of amphetamine and conspiracy to traffick a commercial quantity. He had a prior conviction for drug trafficking in 1995 for which he had received 4 years' imprisonment. He had not breached parole and had never breached bail. A magistrate had found exceptional circumstances based upon an anticipated delay of uncertain duration before trial. After referring to *DPP v Tong* [2000] VSC 451, *Medici* [Supreme Court of Victoria-Ashley J, unreported, 27/09/1993], *R v Alexopoulos* [Supreme Court of Victoria-Hampel J, unreported, 23/02/1998], *R v Kantzidis* [Supreme Court of Victoria-Smith J, unreported, 09/08/1996], *R v Mantase* [Supreme Court of Victoria-Vincent J, unreported, 21/09/2000], *R v Cox* [2003] VSC 245 per Redlich J, *Mokbel v DPP* [2002] VSC 127 per Kellam J and *YSA v DPP* [2002] VSCA 149, Williams J held at [23] that "the learned Magistrate did not err in his finding at an early stage that exceptional circumstances justifying bail existed by reason of the uncertain period of anticipated delay of at least 2 years at the time of the application". Further, Her Honour found at [29] & [32] that there was not an unacceptable risk that the applicant would fail to appear or would re-offend while on bail.

Bilal Ozdemir

[Supreme Court of Victoria, Lush J, unreported, 28/08/1970]

The accused was charged with murder. The judge viewed the Crown case as very weak. The accused was unable to communicate effectively in English. His Honour found that the accused had discharged the onus of proving exceptional circumstances: "For this man to be kept in gaol for 6 months until the inquest in the situation in which he can scarcely communicate with any other human being is specially oppressive".

R v Hai Minh Nguyen

[Supreme Court of Victoria, Warren CJ]

[2003] VSC 508

The 22 year old applicant was charged with 9 other co-accused with trafficking a commercial quantity of heroin, possession of heroin and possession of property being the proceeds of crime. The ring-leader of the group was said to be supplying multiple 350 gram blocks of heroin for between \$105,000 & \$115,000 each throughout suburban Melbourne. The applicant was said to be obtaining heroin from

others higher up the chain and driving the supplier to numerous locations to meet customers and sell heroin to them. The applicant was a heroin user and had prior convictions for trafficking heroin. The Chief Justice found that exceptional circumstances were made out by:

- the preparedness of the applicant, as a condition of bail, to submit to the Bail Advocacy Program operating out of the Melbourne Magistrates' Court which Her Honour:
 - categorized at [18] as appearing "in many respects to be quite onerous so far as a participant is concerned"; and
 - considered at [19] "would be of assistance to the applicant and would facilitate his compliance with any condition that might be attached to bail";
- the undesirability of retaining a person of the applicant's age in custody for a period that could prove to be as long as two years before trial and which might deprive the applicant of opportunities for rehabilitation and personal betterment that could ultimately be put before a court on sentence if appropriate and necessary (at [24]);
- the stabilising effect of his girl-friend on the applicant's previous drug addiction (at [13]); and
- the provision of a surety of \$50,000 (at [26]).

Of these matters the Chief Justice described compliance with and participation in the Bail Advocacy Program at [24] as "pivotal".

Nicola Docmanov

[Supreme Court of Victoria, Hampel J, unreported, 13/05/1998]

The applicant, a Canadian citizen, was charged with importing a commercial quantity of cocaine. His Honour held that although it would be unusual to grant bail to a foreign national in an 'exceptional circumstances' case, the following factors in combination warranted the applicant's release on bail on very strict conditions:

- the circumstantial nature of the case against the accused;
- significant delay before trial (expected to be 14-16 months);
- the applicant was 24 years old and had a good work history and family background;
- the applicant's father was prepared to come to Australia and provide a \$100,000 surety; and
- the applicant had a sister-in-law in Victoria prepared to provide accommodation and a surety.

MacDonald v DPP

[Supreme Court of Victoria, Morris J]

[2004] VSC 431

The applicant was charged with murdering her husband and had made admissions to having shot him. The Crown conceded that if the Court was satisfied that exceptional circumstances existed, the applicant was not an unacceptable risk on any of the grounds set out in s.4(2)(d) of the **BA**. Morris J found exceptional circumstances based on a combination of the following factors:

- the applicant was an acceptable risk in relation to the matters in s.4(2)(d) of the **BA**;
- the Crown did not actively oppose bail;
- the family of both the applicant and the deceased supported the granting of bail;
- the applicant had no priors and was said to have a caring, gentle and co-operative nature;
- the applicant had 5 children aged between 9 & 2½ who were presently in the care of her parents, both in their late 60s and with health problems;
- delay, particularly relevant in relation to the 2½ year old child;
- evidence that increasingly during the later part of the marriage the deceased acted in a controlling way towards the applicant and from time to time engaged in aggressive or even violent conduct in relation to the children and the applicant.

DPP (Vic) v Cozzi

[Supreme Court of Victoria, Coldrey J]

(2005) 12 VR 211

[2005] VSC 195

The 55 year old respondent was charged with cultivating a commercial quantity of cannabis, cultivating a large commercial quantity of cannabis, possessing cannabis and trafficking a large commercial quantity of cannabis. A magistrate "who has great practical experience of the system", being satisfied there were exceptional circumstances, granted him bail on certain conditions. The DPP appealed. The appeal was dismissed, Coldrey J holding that the following factors in combination were capable of constituting exceptional circumstances:

- the prospective delay;
- the respondent's stable residence;
- his ties to the jurisdiction;
- his family support;
- his bail history; and

- his health (type 2 diabetes, high cholesterol, ferritin, gastritis, a fatty liver and a thyroid nodule).

IMO an Application for Bail by Cardona

[Supreme Court of Victoria, Kellam J]

[2005] VSC 186

The 62 year old applicant was charged, *inter alia*, with conspiracy to traffick in a commercial quantity of psuedoephedrine. He had been granted bail by a magistrate some days after his arrest, that magistrate being satisfied that there were exceptional circumstances. The conditions were subsequently relaxed by another magistrate. However, a third magistrate, after conducting the committal refused bail on the basis that the applicant had not shown exceptional circumstances. Kellam J granted bail, holding that the following factors in combination did demonstrate exceptional circumstances:

- the applicant's age;
- his stable residence and ties to the jurisdiction;
- the likely delay of not less than 12 months prior to trial;
- his bail history evidenced by compliance for 18 months with the previous bail conditions, especially the condition involving ongoing psychological treatment; and
- his health (likelihood of fundoplication surgery in the near future).

R v Griffey

[Supreme Court of Victoria, King J]

[2006] VSC 86

The applicant charged with the murder of her husband from whom she had been amicably separated for some years. The applicant and the deceased continued to run the family business and to reside in the family home together for some of the week. The Crown case was purely circumstantial. The Crown relied on motive and opportunity, the motive being a life insurance policy which would rescue the business of the applicant and the deceased from its problems, the opportunity being the fact that the applicant was the last person to see the deceased alive. King J granted bail, holding that the following factors in totality did demonstrate exceptional circumstances:

- the strength of the Crown case which her Honour categorized at [22] as “barely arguable”;
- delay even though no “extraordinary delay” was expected [decision of Redlich J in *Stephen Allan Cox* [2003] VSC 245 referred to with approval]; and
- the support offered to the applicant by her three children and the impact on them.

Re Harold Taylor

[Supreme Court of Victoria, Bongiorno J]

[2007] VSC 41

The applicant was charged with the murder of his three month old baby daughter one week before. Bongiorno J granted bail, holding that the following factors in combination constituted exceptional circumstances:

- the Crown case could not be said to be strong, particularly with respect to the mental element of murder; the current evidence before the Court was that the pathologist could not exclude the possibility that the injuries from which the child died were caused by accident;
- incarceration under protection because the applicant was charged with the murder of a small child was likely to be for a period of more than 12 months and to be more of a hardship than if the applicant was not under protection; and
- the applicant's prior history, employment, apparent stability of residence and capacity to provide a significant surety had eliminated any fears of failing to appear.

IMO bail applications by Leanne Elizbaeth Walker & Jamiee Lee Hurle

[Supreme Court of Victoria, Osborn J]

[2008] VSC 493 & 494

The applicants were charged with drug trafficking and associated offences. There was a significant delay – not attributable to the applicants - in the finalization of evidence, resulting in there being no probability of the cases being tried within two years of the date of arrest. Leanne Walker is the mother of Jamiee Lee Hurle and is also the mother of young children. Jamiee Hurle is the mother of infant children. The Crown did not oppose a finding that exceptional circumstances existed which justified the granting of bail. In respect of each applicant, Osborn J said at [6]-[7]:

“In my view the probable delay which is, from the point of this Court as a supervisory court, totally unacceptable, does constitute exceptional circumstances when it is coupled with a series of other factors. First, the applicant has young/infant children, and the proposed delay is in my view doubly unacceptable in these circumstances. It is apparent that imprisonment will cause hardship not only to the applicant who is herself at this stage

to be presumed innocent, but also to her children as they progress through highly significant years in terms of their own personal development. These factors also fall to be evaluated in a context where an appropriate place of residence for the applicant is available, and it is proposed that she will undertake drug counselling and, if appropriate, drug rehabilitation treatment during the course of bail. A surety is also available for the applicant.”

Angelo Venditti v R

[Supreme Court of Victoria, Bongiorno J]

[2008] VSC 604

The applicant was charged with murder. There was what Bongiorno J described as an “exposed weakness in the Crown case”. In granting bail, his Honour said at [9]:

“That a combination of factors can amount to exceptional circumstances for the purposes of s 13(2)(b) is well accepted. There is no reason to exclude the weakness of the Crown case as being a contributor to that combination. Indeed, if...the Crown case could not succeed on the material before the court, this would, of itself, constitute an exceptional circumstance.”

His Honour found exceptional circumstances comprised of the weakness in the Crown case, the probable delay before trial and the extreme conditions of the applicant’s incarceration. Further, that the risks of flight, of interfering with witnesses and of committing offences whilst on bail can be accommodated by the imposition of strict bail conditions and adequate sureties.

DPP v Leon Borthwick

[Supreme Court of Victoria, Cummins J]

[2009] VSC 102

The 19 year old applicant was charged with murder, the offence alleged to have been constituted by the applicant deliberately driving at the deceased using his car as a lethal weapon. The applicant said that the collision with the deceased was accidental. Although his Honour concluded that the prosecution case was a substantial one – “certainly not weak” – he found exceptional circumstances constituted by a combination of factors:

- the age of the applicant;
- the applicant’s lack of prior convictions;
- the fact that if not granted bail the applicant would be held in an adult prison;
- the delay until committal and if committed before trial.

His Honour also found that any risk of interference by the accused with witnesses could be met by imposing strict conditions on bail.

Nikola Andreevski v R; Jovan Ogrizovic v R

[Supreme Court of Victoria, Coghlan J]

[2009] VSC 115

The applicants, respectively aged 20 & 18, were charged with murder, attempted murder and affray. In the course of finding that exceptional circumstances existed his Honour said at [7]-[10]:

- I do not regard the Crown cases as weak but it was certainly less strong in the case of Andreevski.
- “[I]t was unusual to find young men involved in this sort of activity who have no prior convictions and I regard that feature of the case as very important.”
- The parents called impressed me with the support they will give their sons. In addition Andreevski’s family have been able to find him work.
- “[T]he very earliest a trial would proceed is July 2010...I suspect that 18 months to 24 months before trial is more realistic. In these circumstances I am faced with the probability of young first offenders spending two years or more in an adult prison before trial. That would as a matter of justice be undesirable, and undesirable in community terms.”

His Honour concluded at [11] that “in all, the features of the case, including the limited role played by each of these applicants, their age, their lack of prior convictions and delay, amount to exceptional circumstances.” Such risk as exists could, in his Honour’s view, “be satisfactorily ameliorated by the imposition of suitable conditions”.

Mrnjaus & Ors v R; Garcia & Anor v R

[Supreme Court of Victoria, Coghlan J]

[2009] VSC 147 & 149

The applicants were charged with murder and attempted murder. Their limited role in the incident, lack of or limited prior convictions, youth, family support and delay amounted to exceptional circumstances. All applicants were granted bail.

For a further case in which exceptional circumstances were found within s.15AA(1) Anti-Terrorism Act 2004 (Cth) and bail granted by the Chief Magistrate was confirmed notwithstanding two DPP applications for revocation, see *DPP (Cth) v Thomas* [2005] VSC 85 per Teague J and [2005] VSC 435R [currently restricted] per Cummins J at [22]. In the former case Teague J rejected the DPP submission that the Chief Magistrate had accorded undue weight to a psychiatrist's report, holding at [31]:

“On a bail application, a report from a psychiatrist stating that the circumstances of incarceration are having substantial adverse consequences on the mental health of the remandee could never be taken lightly. It obviously has the potential to be a significant contribution to a finding of exceptional circumstances.”

Nathan Scott

[Supreme Court of Victoria, T Forrest J]
[2011] VSC 674

The applicant was charged with murder in circumstances where it is alleged that he had deliberately run down the deceased. He had been in custody for 8 months and had turned 19 two days before being taken into custody. He was refused bail by Kaye J after being on remand for 1½ months on the basis that he had failed to demonstrate exceptional circumstances and was an unacceptable risk of interfering with witnesses. T Forrest J found that the applicant was no longer an unacceptable risk of interfering with witnesses or committing further offences. His Honour concluded that the applicant had demonstrated exceptional circumstances based on the following four factors:

- The applicant was extremely young. He has been imprisoned in adult gaol for the last 8 months and was recently transferred to the maximum security Barwon Prison for a time for purely logistical reasons. “Barwon Prison is no place for a 19 year old on remand and with only Children’s Court prior convictions.”
- The applicant has accommodation available with the H family. His Honour was impressed with the candour of Mrs H and her determination to assist the applicant.
- The prosecution case is “not overwhelming by any means” on the charge of murder.
- Delay of 15-18 months before trial by itself is not an inordinate delay and alone it would not constitute exceptional circumstances but it should be given modest weight in combination with other factors.

Hang Cao

[Supreme Court of Victoria – Hollingworth J]
[2015] VSC 198

The accused was charged with cultivating a commercial quantity of cannabis. Risk of flight and reoffending were not unacceptable. Delay was also a factor considered. But the central issue was that the applicant’s 8 year old child had experienced learning difficulties and was seeing a psychologist while the parents were in custody. His psychological wellbeing would likely be impacted by long separation from his parents. In holding that exceptional circumstances had been established and granting bail her Honour said at [47]:

“Sentencing and bail considerations are not identical. However, as a matter of principle, the fact that a young child may otherwise be left without parental care for a substantial period of time may constitute exceptional circumstances for the purpose of a bail application.”

Hall v Pangemanan

[Supreme Court of Victoria – Croucher J]
[2018] VSC 533

The 37 year old applicant was charged with being drunk in a public place and breaching a curfew condition of bail. These offences were allegedly committed while being on bail for identical offences. The applicant suffered from Smith-Magenis syndrome, a genetic developmental disorder caused by a chromosomal abnormality. He had been diagnosed with a mild to moderate intellectual disability and lived in supported accommodation. He had previously been found to be unfit to plead, which state is likely to be permanent. Even if he was fit to plead, he would not be imprisoned if found guilty. He had an alcohol abuse problem and had a high risk of being drunk in a public place if released on bail. However, in the circumstances this was not an unacceptable risk. He was incapable of complying with a curfew and with many other bail conditions. Bail was not opposed by the prosecution. Exceptional circumstances – “the same threshold that applies to a person charged with murder or a terrorism offence” – was found and the applicant was granted bail on his own undertaking with a static address. His Honour added:

- At [21]: The nature of the applicant’s offending is not serious and does not pose a risk of harm to the public. It is a nuisance and hard work for the police and others but the risk of harm is very low.

- At [25]: “The notion of unacceptable risk as it applies to bail does not concern merely any risk of reoffending. Rather, it is a question of whether such risk as there might be is unacceptable. The law recognises situations in which a comparatively low level of risk of some very serious crime might amount to the relevant level of unacceptable risk to require a refusal of bail. But, equally, a high risk of the occurrence of something comparatively minor might not amount to an unacceptable risk, because it is a risk that the community will tolerate. In Mr Hall’s case, that type of risk has been tolerated a long time, with great inconvenience to the police no doubt, but nevertheless it is something which has to be tolerated, because the alternative is not acceptable. The alternative is that a man like him remains in custody for days, weeks, or months on end, for something which does not even warrant gaol in the first place. Common sense says that we cannot keep locking people up in those circumstances.”

TP

[Supreme Court of Victoria – Champion J]
[2018] VSC 748

The 17 year old applicant was charged with aggravated home invasion, false imprisonment, making threats to kill, theft of a motor vehicle, armed robbery, burglary, theft x2 and committing an indictable offence whilst on bail x3. Noting at [48]-[51] that special considerations apply to children, even those charged with serious offending; specifically s.3B(1)(a) of the **BA** requires the court to “consider all other options before a child is remanded into custody”, his Honour considered that all other options had not yet been exhausted. Youth Justice were prepared to engage with TP and he had not previously been offered intensive bail. TP had the support of his parents and at the time of the alleged offending he had been adversely affected by the death of his aunt. At [49]-[54] his Honour considered that conditions could be imposed to ameliorate substantially the risk of granting TP bail.

DB

[Supreme Court of Victoria – Lasry J]
[2019] VSC 53

The 13 year old applicant was charged with a number of Schedule 2 offences which were extremely serious in volume and nature. These included home invasion (stealing), aggravated burglary (person present), theft (x4), criminal damage (x4), possession of controlled weapon, theft of motor vehicle (x2), burglary (x4), theft from a motor vehicle (x4), reckless conduct endangering life (x2), reckless conduct endangering serious injury (x2), using cannabis, failing to stop vehicle after accident, careless driving, unlicensed driving, failing to stop at traffic lights and committing an indictable offence whilst on bail. The applicant had no criminal history but some recent charges had been withdrawn on the basis of the presumption of *doli incapax*. Release on a supervised bail program was supported by Youth Justice. The application was opposed by the prosecution. In finding at [47] that exceptional circumstances were established “if only by the age of the applicant”, his Honour referred to the decisions in *Re Whiteside* [1999] VSC 413 per Warren J, *Maloney* (31/10/1990) per Vincent J, *DPP (Vic) v Cozzi* [2005] VSC 195 per Coldrey J, *R v Chung* [2015] VSC 487 per Lasry J and especially *Re JO* [2018] VSC 438 at [14] where T.Forrest J said:

“Whilst the burden of demonstrating ‘exceptional circumstances’ is, as I have said, a stringent one, the age of the applicant weighs heavily in his favour. Children are rightly afforded a special status by the Act and any assessment of ‘exceptional circumstances’ in the case of a child must be viewed through the prism of s 3B(1). In the case of an adult, a combination of circumstances may fall short of constituting exceptional circumstances, while the same combination when considered in the case of a child may achieve a wholly different outcome. The suite of considerations enumerated in s 3B(1) make the evaluation of any determination under this Act, including the ‘exceptional circumstances’ test, a different exercise in the case of a child.”

Having found that exceptional circumstances were established “if only by virtue of the age of the applicant”, Lasry J held that although the applicant was a risk if granted bail, it was not an unacceptable risk that could not be ameliorated by conditions.

NB

[Supreme Court of Victoria – Lasry J]
[2019] VSC 37

The 16 year old applicant was charged with a number of Schedule 2 offences, including 4 counts of armed robbery and 1 count of robbery, alleged to have been committed while he was on bail for other indictable offences. He had no criminal history and had stable accommodation with his mother and stable schooling arrangements. The likely sentence, if custodial at all, was held to be unlikely to exceed the time he had already spent on remand. The application was only formally opposed. Applying and approving the above dicta of T Forrest J in *Re JO* [2018] VSC 438 at [14], Lasry J found

that exceptional circumstances were established. The applicant was held not to be an unacceptable risk and bail was granted.

Rebecca Dillon

[Supreme Court of Victoria – Maxwell P]

[2019] VSC 80

The 23 year old applicant who had a full scale IQ of 61 and was of Aboriginal heritage but did not identify as Aboriginal was charged, inter alia, with criminal damage, causing a false fire alarm to be given and committing an indictable offence whilst on bail for persistent breaches of a family violence intervention order. The applicant was unlikely to receive a custodial sentence and exceptional circumstances were conceded by the respondent. Her pattern of behaviour demonstrated a risk of reoffending but it was held not to be an unacceptable risk and bail was granted on various conditions.

Timothy Logan

[Supreme Court of Victoria – Elliott J]

[2019] VSC 134

The 36 year old applicant was charged with multiple offences, including child stealing, false imprisonment and committing an indictable offence whilst on bail (to which he intended to plead not guilty) and a number of other offences, including theft of motor vehicle, exceed prescribed concentration of alcohol and two counts of breaching an alcohol interlock conditions (to which he intended to plead guilty). At [52]-[53] Elliott J noted that if the contested charges were not made out, as counsel for the applicant submitted was likely, then the time already spent in custody would exceed the applicant's likely sentence. Counsel for the prosecution did not submit to the contrary, save for asserting this did not constitute exceptional circumstances given the severity of the charges, particularly the contested charges. At [66]-[72] Elliott J found exceptional circumstances existed for multiple reasons including the time already spent in custody issue and including the fact that the applicant was being subjected to serious, repeated violence whilst incarcerated. Further there was no unacceptable risk of the sort identified by the prosecution, provided that appropriate conditions were imposed.

LT

[Supreme Court of Victoria – Elliott J]

[2019] VSC 143

The 16 year old applicant with a criminal history for violence-related offending was charged with recklessly causing injury and unlawful assault whilst on bail for Schedule 2 offences. The applicant was of Aboriginal descent. Noting that ss.3A & 3B of the **BA** were applicable to the applicant as an Aboriginal child and citing dicta of Vincent J in *Moloney* [SCV, 13/10/1990] and of T Forrest J in *Re JO* [2018] VSC 438 at [14], Elliott J found that exceptional circumstances existed. His Honour also found at [69]-[70] “with the considerable assistance of those who appeared and those who gave evidence at the hearing...[including] the unsworn evidence of the applicant's grandmother's intended involvement, including the plan to relocate the applicant” that “appropriate conditions can be imposed so that any risk presented by the applicant may be properly characterised as an acceptable risk.”

LD

[Supreme Court of Victoria – Priest JA]

[2019] VSC 457

The 16 year old applicant who had no prior convictions and had been diagnosed with ADHD was charged with commission of Schedule 2 offences, including aggravated burglary, when he was already on bail for Schedule 2 offences. Holding “albeit by a whisker” that he had demonstrated exceptional circumstances, Priest JA said at [35] that the factors that combine to establish exceptional circumstances are:

- he is 16, has no criminal priors and is unlikely to receive a sentence of YJC detention;
- he has been assessed as suitable to remain on Youth Justice Supervised Bail and may be suitable for Youth Justice Intensive Bail;
- he has the support of community agencies including Youth Justice and YSAS;
- he has family support including stable accommodation with his family; and
- he is vulnerable in custody (see [33]) and has been the target of others, casing him to isolate himself.

At [36] his Honour held – “not without some hesitation” – that “any relevant risk presented by the applicant can be mitigated by conditions, so as to render the risks acceptable.”

DR

[Supreme Court of Victoria – Champion J]
[2019] VSC 151

The 16 year old applicant – aged 15 at the time of the offending – was born in Sudan and spent time in a refugee camp with his family following the death of his father. The applicant, his mother and two older siblings migrated to Australia in 2007. He was charged with numerous serious offences, including aggravated home invasion, aggravated burglary and recklessly causing injury, these alleged offences having occurred while he was on bail for other indictable offences. At the time of arrest and incarceration in remand in August 2018 the applicant was completing year 10 at school. A report from a forensic psychologist in October 2018 assessed the applicant in remand and concluded he indicated symptoms of depression. A report dated 06/03/2019 from a consultant psychiatrist, Dr Lester Walton, opined that the applicant suffers from chronic complex post-traumatic stress disorder (PTSD) and had experienced mental disturbance of ‘quasi-psychotic proportions with distortion of perception and a degree of paranoia’ but concluded the applicant is not currently suffering from a diagnosable psychotic illness, and does not require active psychiatric treatment at present. Youth Justice had assessed the applicant as unsuitable for bail due to his non-compliance with previous supervised bail, his behaviour in custody which had involved 9 incidents, two of which allegedly involved assaults on staff members, and the serious nature of his charges. Youth Justice considered the applicant to be at a high risk of reoffending due to his inability to regulate anger, his responses when challenged, and his resistance to participation in rehabilitation programs. Applying dicta of Hollingworth J in *Hang Cao v DPP* [2015] VSC 198 at [7] and of T Forrest J in *Re JO* [2018] VSC 438 at [14] and taking into account the age of the applicant, his limited criminal history, his strong family support and the 212 days he had spent on remand [“there is a realistic possibility” that he would not receive a longer custodial sentence] as well as the matters in s.3B of the **BA**, Champion J found exceptional circumstances existed. Further, his Honour considered that strict conditions can be imposed to ameliorate the risks of granting the applicant bail to an acceptable level.

Zackariah Gloury-Hyde

[Supreme Court of Victoria – Priest JA]
No.1 - [2018] VSC 393

The accused ZGH had been charged with Schedule 1 drug offences. He had established exceptional circumstances – principally the nature and extent of his acquired brain injury and its consequences for his functioning when taken with other factors such as the availability of treatment. His Honour had also concluded that any unacceptable risk of ZGH committing an offence while on bail was amenable to strict conditions. Accordingly his Honour granted bail.

No.2 - [2018] VSC 520

Following his release ZGH breached a conduct condition of bail that he participate in the Hader Clinic 90-day residential treatment program...and follow all lawful instructions and directions of Mr JO & Dr KY”. Breach of a conduct condition of bail is a Schedule 2 offence. The breach involved ZGH failing to follow lawful directions by engaging in sexual activities with a female patient in his room and visiting another male patient’s room. However, Mr JO gave favourable evidence in relation to ZGH returning to the Hader Clinic program. Notwithstanding ZGH’s breach of a conduct condition, his Honour was satisfied that the exceptional circumstances which existed at the time he granted bail remained extant. Furthermore he was confident that any relevant unacceptable risk is capable of amelioration by the imposition of the kind of strict conditions that the Court attached to the original grant of bail. His Honour refixed bail with 15 conditions and refused the OPP’s application to revoke bail.

SD

[Supreme Court of Victoria – Lasry J]
[2019] VSC 369

The accused – aged 17 with a criminal history – was charged with multiple offences including armed robbery, aggravated burglary and aggravated carjacking, offences described by Lasry J as “serious, violent and random”. On 31/05/2019 Lasry J found exceptional circumstances made out upon “applying the principles set out in the CYFA and the **BA**, coupled with the delay and the bail program that has been assembled with some considerable effort”. His Honour granted bail, holding that risk could be mitigated by appropriate conditions. However, on 21/06/2019 SD’s bail was revoked “due to several breaches of conditions”.

KN

[Supreme Court of Victoria-Tinney J]
[2020] VSC 35

The applicant was a 15 year old child alleged to have committed three successive robbery-related offences with co-offenders. The succeeding offences were in breach of bail. He had no prior convictions, a good history at school with prospects of resuming education and good support from his family and from Youth Justice. If he was found guilty of the offences he would be unlikely to receive a sentence of detention. This was the first time the applicant had been in custody save for a matter of hours on remand. He had found being in custody a shocking experience, made all the worse by being the victim of a recent assault, his facial injuries still evident in Court. Citing dicta of Kaye J in *DPP v Muhaidat* [2004] VSC 17 at [13] and of T Forrest J in *Re JO* [2018] VSC 438 at [14], his Honour found that exceptional circumstances existed. Perhaps the most critical factor was KN's age, his Honour noting at [41]: "The seriousness of the alleged offending, the repeated and escalating nature of it in spite of multiple undertakings of bail, the strength of the case against the applicant, and a number of other matters, would dictate that were it not for the young age of the applicant, a grant of bail would be highly improbable." At [52]-[53] Tinney J concluded:

"[I]n the end, it has weighed heavily on my mind, in considering the unacceptable risk test, that the applicant may be at a critical juncture in his life. He is 15 years old with what could be a promising life in front of him. A reasonable education and the opportunities that may present are still things within his grasp. He has not been in trouble in the past. He has the prospect of turning things around. The law would require that he be given every opportunity to do so. With considerable hesitation, and taking account of all of the circumstances, I have concluded that there are stringent conditions of bail which will be such as to ameliorate the risk posed by the applicant to an acceptable one."

[Bail was subsequently breached by reoffending: see *KN (No.2)* [2020] VSC 490 in section 9.4.1.3),

Broes

[Supreme Court of Victoria – Lasry J]

[2020] VSC 128

The 32 year old applicant was charged with trafficking in a drug of dependence while on bail for an earlier such charge. She was therefore required to show exceptional circumstances. She otherwise had no prior criminal history and her period on remand was her first time in custody. In granting bail Lasry J said at [46]-[47]:

"Given the extraordinary circumstances in which we now find ourselves, I have come to the conclusion that an already significant delay will be likely exacerbated by the consequences of COVID-19, and I am therefore satisfied that exceptional circumstances have been established. As to the acceptability of release the applicant on bail, I am also satisfied that the imposition of conditions will ameliorate any risk that is involved in her being released."

McCann

[Supreme Court of Victoria – Lasry J]

[2020] VSC 138

This was the third bail application by the 27 year old applicant charged with trafficking in a commercial quantity of methylamphetamine. He had been on remand for 787 days and a trial listed to commence in the County Court on 04/05/2020 had been adjourned indefinitely on account of the COVID-19 pandemic. As Lasry J put it "The already unacceptable delay in this case will increase dramatically." In granting bail on strict conditions, Lasry J said at [39]-[41]:

[39] "There is no prospect of a trial in May of this year as a result of the present pandemic and, in all likelihood, little prospect of a trial this year at all. Should the applicant's trial begin in February 2021, it would result in a period of pre-trial custody of more than three years. Consistently with my first ruling in relation to COVID-19 in *Broes*, this is a delay that well and truly establishes the existence of exceptional circumstances.

[40] I will again speculate on what might occur once the virus spreads into the prison system as it is a matter that I need to keep firmly in mind when considering these circumstances. Once that occurs, as I said in *Broes*, it is overwhelmingly likely that the prisons will be locked down in a way that will make time in custody very difficult for all prisoners. In my opinion, it is going to be necessary to recalibrate the status of those in custody to determine who should be retained in custody and whether any others should be released. That will of course be a matter for the Department of Corrections and the Victorian Government.

[41] Another consequence of this delay on this applicant in particular is that he is not receiving medication for his ADHD whilst in custody. I note the observations made by Croucher J in *Bchinnati v DPP (Vic) (No 2)* [2017] VSC 620 about the increased hardship on applicants who are subject to lengthy delays and left untreated. In that matter,

Croucher J granted bail to the applicant after a second application, finding that exceptional circumstances existed, partially due to the significant impact delay had on the applicant's mental health."

Nicholls

[Supreme Court of Victoria – Incerti J]

[2020] VSC 189

The 43 year old applicant was charged with multiple indictable offences, including trafficking in a large quantity of a drug of dependence (with respect to three drugs), unlawfully possessing two firearms, dealing with proceeds of crime and refusing to comply with directions to provide information and/or assistance to allow police to access devices seized at his premises. He had been refused bail in the Magistrates' Court. Having been charged with Schedule 1 offences he was required to show exceptional circumstances. It was conceded by the respondent that the applicant's chronic asthma renders him more vulnerable due to the increased risk of him becoming seriously ill if he becomes infected by the COVID-19 virus and that COVID-19 has had an impact on the applicant and all other prisoners in relation to their access to employment, rehabilitation programs, time outdoors and activities out of their cells. Incerti J found the exceptional circumstances existed and granted bail with one surety in the sum of \$1,500,000 and various conditions including a period of residential rehabilitation and a requirement to attend for judicial monitoring to review bail at the end of the rehabilitation program. At [39] Incerti J made it clear – as she had in *El-Refei [No.2]* [2020] VSC 164 – that extra delay in the criminal process due to the COVID-19 pandemic was not **of itself** an exceptional circumstance but was a factor to be taken into account in conjunction with other surrounding circumstances, including the applicant's special vulnerability, in determining whether exceptional circumstances existed.

JF

[Supreme Court of Victoria – Tinney J]

[2020] VSC 250

The 16 year old applicant was charged with reckless conduct endangering life, thefts of motor vehicles and robberies of soft targets. The offences were allegedly committed in five episodes spanning one month. The applicant had no criminal history although the most recent offending was committed only three days after being granted bail on stringent conditions, including a curfew. It was his first time in custody and Youth Justice were still supportive of bail. He had strong family support and a stable home. The offending was unlikely to attract a custodial sentence. Educational opportunities were restricted in YJC because of COVID-19. Exceptional circumstances were found and bail was granted.

Felicia Thomas

[Supreme Court of Victoria – Croucher J]

[2020] VSC 206

The 44-year old Aboriginal woman was charged with burglary and dishonesty offences and assaults and other offences during the period of a community correction order. She had been refused bail twice by the Magistrates' Court and had been on remand for over 2 months. She had a long criminal record and a history of illicit drug use but had never previously been imprisoned. She had had a 6-year period of abstinence until the last 2 years. For the first 7 weeks in custody she had not been prescribed anti-depressant and anti-psychotic medications and her mental health had been deteriorating. She was also suffering from untreated cervical bleeding and a lump in her breast. COVID-19 related delays meant that, if ultimately convicted but not bailed, any resulting prison sentence was likely to exceed and sentence imposed. Bail was not opposed by the respondent. Bail was granted on her own undertaking with conditions.

JS

[Supreme Court of Victoria – Coghlan JA]

[2020] VSC 447

The applicant, a 15 year old child who suffered from autism, ADHD and substances abuse issues, was charged with trafficking in cannabis to a child and related offences. At the time of the alleged offending he was on bail or charged on summons in respect of 6 additional matters. In total he faced 37 charges arising from offending said to have occurred between 22/10/2019 and 04/06/2020. He had been in the care of DHHS since January 2019 and was living at a residential care unit, an arrangement preceded by his mother relinquishing care of him and his grandparents being unable to take over long-term caring responsibilities. Relying on delay, COVID-19 factors and s.3B of the **BA** as discussed in dicta of T Forrest J in *Re JO* [2018] VSC 438 at [14], Coghlan JA was satisfied that exceptional circumstances had been demonstrated. In granting bail, his Honour was not persuaded

that the risk of reoffending “would be unacceptable if conditions were put in place to prevent that”. At [68] his Honour noted:

“I observed in the proceedings that cases such as these do not fit well into the criminal justice system and they are cases that are essentially, at the end of the day, about child welfare. Of course, those propositions are of little consolation to the victims of the alleged offending.”

Byron Exner

[Supreme Court of Victoria – Coghlan JA]

[2020] VSC 453

The 55 year old applicant, who worked for 25 years as a Victoria Police member, was charged with offences of stalking, trespass x 2, contravention of a family violence intervention order x 3 involving two separate complainants who are each former partners of the applicant. He had been on remand for over 4 months. At [10] & [11], his Honour set out the relevant principles for “exceptional circumstances” by adopting dicta of Kaye J in *DPP v Muhaidat* [2004] VSC 17 [13] and Lasry J in *Re Brown* [2019] VSC 751 [65]. His Honour found exceptional circumstances based on:

- any period he spent on remand would exceed any sentence he would likely receive if convicted;
- there are arguable issues in relation to the charges;
- the applicant has accommodation available;
- his performance on the CCOs prior to his incarceration was good; and
- his mental health may be deteriorating while he remains in custody.

Further, his Honour was satisfied that with the imposition of appropriate conditions the applicant would not be an unacceptable risk.

John Assaad

[Supreme Court of Victoria – Lasry J]

[2020] VSC 561

The 25 year old applicant was charged with conspiracy to murder x 2 and incitement to murder x 2. The charges relate to an agreement between the applicant and his father to engage the services of a ‘hitman’ to murder the applicant’s estranged wife and a pastor at the applicant’s church. His Honour concluded that “based on the likely delay of two or more years before this trial can be heard, the applicant’s lack of prior convictions, and the circumstantial nature of the prosecution case that exceptional circumstances that would justify a grant of bail have been established.”

Abrhm Chol

[Supreme Court of Victoria – Lasry J]

[2020] VSC 580

This 19 year old applicant had a diagnosed intellectual disability with intellectual functioning in the extremely low range. He also had a history of substance use, including use of cannabis and Xanax. He was charged with aggravated home invasion, theft of a motor vehicle (three counts), theft, assault with a weapon (three counts), reckless conduct endangering life, possessing a drug of dependence, committing an indictable offence whilst on bail, armed robbery, and recklessly causing injury. At [32] his Honour said:

“[T]his Court has previously considered that the youth of an applicant, especially when facing an extended period of remand in adult custody, is of some weight in determining whether exceptional circumstances have been made out. This is particularly so when combined with other factors, including weaknesses in the prosecution case, delay, or vulnerability in custody.”

At [59] his Honour found exceptional circumstances on the basis of the strength of the prosecution case, the delay and the vulnerability of the applicant regarding his age and intellectual disability. His Honour, being concerned about the applicant’s “most serious criminal history for a man so young”, granted him provisional bail and set up a regime of judicial monitoring of the applicant’s compliance. At the 4th such hearing his Honour, upon being informed by both parties that there were no allegations of breach and the applicant has been progressing positively, determined that further judicial monitoring was not required.

JS

[Supreme Court of Victoria – Kaye JA]

[2020] VSC 606

After her arrest, this 17 year old applicant had attempted to asphyxiate herself whilst detained at Parkville Youth Justice Centre. She was facing charges of aggravated burglary x2, committing an indictable offence (burglary) while on bail, attempted aggravated burglary, burglary, theft of a motor

vehicle x 2, attempted theft from a motor vehicle, and five charges of theft. She was also charged with traffic offences arising from the circumstances in which she was pursued and arrested, including unlicensed driving, dangerous driving, careless driving and failing to stop. She had been in custody for 29 days. At [55] his Honour said:

“[T]he assessment of whether exceptional circumstances exist in this case must be viewed in light of the fact that the applicant is a child. Taking that circumstance, and the other circumstances into account, and notwithstanding that the applicant committed the offences with which she is currently charged while already subject to four sets of bail, I am persuaded that she has established the existence of exceptional circumstances in this case, which would justify the release of her on bail.”

Lindim Aliti

[Supreme Court of Victoria – Coghlan JA]

[2020] VSC 647

This 18 year old applicant was charged with a stabbing murder of the 20 year old deceased in the context of a series of physical altercations between groups of associates known to the applicant and the deceased. The deceased's family was strongly opposed to the granting of bail. In finding exceptional circumstances and granting bail on 15 conditions, including judicial monitoring, his Honour said:

“[T]here are three particular features of the case that weigh heavily in favour of the applicant. First, his age. Second, his lack of criminal history. Third, the fact that he suffers from epilepsy and on the evidence of Professor Cook (from whom a report was provided) that although he has not had any recent episodes of direct epileptic activity, it is not possible to predict with any certainty what might happen in the future. Further, there is risk associated with his condition when he sleeps alone, which is the condition that would apply to him when he is in custody and he might then become subject to the condition known as Sudden Unexplained Death in Epilepsy. Evidence was led on behalf of the applicant that, when he was ordinarily residing at home, the family ensured that he did not sleep alone. In relation to present circumstances arising from the COVID-19 pandemic, the conditions for prisoners are, in general, more difficult than they would otherwise be. The applicant is subject to lockdown at short notice and he has no access to in-person visits from his family. The only in-person visits that he might have would be as a result of being visited by his legal advisers.”

Noah Zreika

[Supreme Court of Victoria – Coghlan JA]

[2020] VSC 648

This 18 year old applicant was charged with a large number of connected aggravated burglaries, burglaries and thefts on residential and commercial premises across Melbourne with 6 co-accused between 1 December 2019 and 31 March 2020. He had initially been granted bail but that bail was revoked due to alleged reoffending. His Honour found exceptional circumstances were made out on the basis of the applicant's submissions and granted conditional bail with one surety in the sum of \$5,000.

Emmanuel Deng

[Supreme Court of Victoria – Coghlan JA]

[2020] VSC 686

The 20 year old applicant was born in a refugee camp in Ethiopia to Sudanese parents who relocated to Australia a year later. He was charged with affray, armed robbery, intentionally causing injury x 2, theft of a motor vehicle, violent disorder and robbery and with contravening a CCO. There were 7 coaccused, 6 of whom fall within the Children's Court. The applicant was recently assessed as displaying symptoms of PTSD. His Honour found exceptional circumstances from a combination of the weakness of the Crown case, the circumstances of detention in the face of the COVID-19 pandemic and the support of the Youth Justice Bail Support Program. Further, if he was to remain in custody until the hearing listed on 15/02/2021, the period of remand would “quite likely exceed any sentence he was likely to receive, particularly a sentence potentially in combination with another CCO”.

Tomas Cugurno-Pfabe

[Supreme Court of Victoria – Taylor J]

[2020] VSC 687

The 26 year old applicant was charged with statutory murder, the foundational charge being armed robbery. The prosecution case with respect to armed robbery appears to be very strong but the case

for statutory murder faces a significant hurdle as to causation. Her Honour said at [54]: “I accept that the applicant has shown favourable personal circumstances. The availability of treatment and support in the community is of some weight, particularly in combination with delay, his absence of a criminal history and that the applicant is in custody for the first time. In my consideration of exceptional circumstances, I also take into account my ultimate finding that there are an absence of factors to suggest the applicant poses an unacceptable risk if granted conditional bail.”

Harry Dickenson

[Supreme Court of Victoria – Elliott J]

[2020] VSC 721

This 26 year old applicant was charged with murder in the circumstances of “a drug deal gone wrong” and had spent 300 days on remand. The deceased was alleged to have been shot at the time he approached the applicant’s residence and an eye witness has given evidence that the deceased himself was armed with a sawn-off shot gun. His Honour found exceptional circumstances from a combination of the real and substantive issues that have been raised in relation to the weaknesses of the case against the applicant and the very substantial supports that have been put in place if bail were granted. At [45] his Honour noted: “Further, despite the very chequered background of the applicant, much of it has a very strong connection with his previous ongoing drug use. In the strict regime that has been put in place, any ability to take drugs has effectively been curtailed as any lapse will be almost immediately be detected and will result in bail being breached and the applicant being placed on remand again.”

AP, IT, NT, DP & JR

[Supreme Court of Victoria – Coghlan JA]

[2020] VSC 730

On 16/06/2020 during a fight in the carpark of Brimbank Shopping Centre a 15 year old boy was stabbed once to the chest and died. On 22/10/2020 11 persons – 9 children and 2 young adults were charged with his murder. Initially between 17/06/2020 and 06/08/2020 the coaccused were charged with the less serious charges of violent disorder and affray. All 9 children were bailed on these charges either by police or by the Children’s Court. Both adult coaccused were remanded in custody. These 5 bail applications by the 5 youngest co-accused proceeded on 28/10/2020. The ages of the 5 applicants at the date of the alleged offending were: AP 13y6m, IT 13y5m, NT 14y6m, DP 14y5m & JR 13y6m. It is not alleged that any of these 5 delivered the fatal blow. Three of the remaining child coaccused were 16y and the fourth was 17y. The 2 adult coaccused were 20y & 23y. In finding exceptional circumstances and granting bail to each of the 5 applicants Coghlan J noted at [41]-[50]:

- **Delay:** The Crown conceded a probable delay of about 2 years. Coghlan J said of this: “I regard a two year delay for a young or very young offender as being extreme. That is particularly so for a group of applicants who have not previously being incarcerated (except for a brief period on remand).”
- **COVID-19 Pandemic:** Conditions for all persons detained in Victoria are more onerous than they ordinarily would be. In particular, it is not possible for persons to have visitors, particularly onerous for young offenders.
- **Nature of detentions:** Persons of the age of the applicants would not ordinarily be detained in a Youth Justice Centre even while serving a sentence. The possibility of exposure to older young men with substantial involvement in the criminal justice system is possible.
- **Youth:** All very young and *doli incapax* will be raised for AP, IT & JR.
- **Performance on bail:** Although there have been some breaches of bail, individual compliance has been quite good.
- **Youth Justice Bail Support Program:** Each applicant has had substantial support. Access to schooling is much improved. No applicant has committed any further offence.
- **Absence of Prior Convictions:** None of the applicants have prior convictions although some had prior involvement with the youth justice system.
- **Section 3B of the BA.**

VN, AK, CN

[Supreme Court of Victoria – Coghlan JA]

[2020] VSC 782

VN [aged 16y6m], AK [aged 16y2m] & CN [aged 17y7m] were three of the remaining four youth coaccused. In finding exceptional circumstances and granting bail on strict conditions to each of these 3 accused, Coghlan JA said that his reasons in VSC 782 should be read in conjunction with his earlier reasons in VSC 730.

The 16 year old Aboriginal applicant who had been diagnosed with mental health issues was charged with armed robbery and other Schedule 2 offences while on bail for a Schedule 2 offence. Exceptional circumstances were established. Held that there was no unacceptable risk for applicant to be released on bail with 13 conditions.

Other cases in which exceptional circumstances were found and bail was granted include:

- *Douglas Victor Jensen* [2006] VSC 450 (Hollingworth J-murder);
- *Re Sleiman* [2020] VSC 469 (Lasry J-multiple charges including intentionally causing injury x 2, threat to kill, possession of prohibited weapon, false imprisonment, kidnapping, trafficking MDMA; bail subsequently revoked due to alleged offending);
- *Re Ning* [2020] VSC 609 (Lasry J-35 year old Chinese national resident in Australia since 2004 with two infant children charged with trafficking in a large commercial quantity of methylamphetamine in context of her involvement in a large-scale drug-trafficking syndicate);
- *Re Denaye Whitfield* [2020] VSC 632 (Taylor J-statutory murder & armed robbery);
- *Re Oldis* [2020] VSC 769 (Tinney J-23 year old charged with statutory murder & armed robbery – parity with co-accused *Whitfield* – “the hurdles in connection with causation and proof of complicity which were commented on by Taylor J applied ever more in the case of the applicant”);
- *McNamara v DPP* [2020] VSC 844 (Croucher J-59 year old Aboriginal man charged with manslaughter of a 63 year old co-resident of a rooming house – after excessive drinking session, a verbal argument erupted – deceased refused to leave applicant’s room – applicant punched deceased to face – deceased spat blood at applicant – applicant punched deceased to face again – deceased suffered fractured nose, facial bruising and heavy bleeding – after treatment and some delay, applicant called 000 – after arrival, police left deceased sitting in chair, untreated, for some time – deceased had difficulty breathing and lost consciousness – despite attempts to revive by police, fire and ambulance officers, deceased died at scene – cause of death described as “aspiration of blood complicating blunt force injuries to the face, in the setting of alcohol intoxication and hepatic cirrhosis” – *Post mortem* alcohol concentration in blood and vitreous humour of 0.47 and 0.57 g/100 mL respectively – applicant had no prior convictions for violence – fresh accommodation with friend – counselling and health services arranged – delay – deceased’s family not opposed to bail – whether there was an arguable defence relating to causation – bail granted on own undertaking, with conditions;
- *Re Raffoul* [2020] VSC 848 (Croucher J-36 year old applicant charged with conspiracy to import, alternatively an attempt to possess, a commercial quantity of border-controlled drug (methamphetamine) and failing to comply with court order to assist in accessing electronic devices – unrelated charge of dealing with proceeds of crime (\$1.18 million) – very serious allegations but arguable defences – delay of at least 2½ years until joint trial of principal charges with co-accused – separate trial on unrelated charge likely to follow joint trial – adverse impact on applicant’s autistic child, employees and contractors without bail – no prior convictions – strong ties to jurisdiction – electronic monitoring via ankle bracelet offered – bail granted on own undertaking, with four sureties totalling \$2 million, and stringent conditions
- *Re Kake* [2020] VSC 852 (Beale J-applicant and complainant had been in a relationship for 17 years and had 5 children – charged with 38 offences including persistent contravention of a family violence intervention order and threatening and assaulting the complainant, causing her to suffer various injuries including bruising to her stomach, methyl and face and swelling to her knuckles – applicant on CCO at the time – complainant and 4 of the children had relocated to New Zealand);
- *Re Wei Yu Boo* [2020] VSC 882 (Lasry J-charges including trafficking in a large commercial quantity of methylamphetamine and possession of child abuse material – applicant a low level member of drug syndicate was a Malaysian citizen on a bridging visa – potential delay of 3 years – exceptional circumstances established – unacceptable risk can be mitigated by conditions;
- *Re Brett* [2021] VSC 10 (Incerti J- unopposed application for bail by 36 year old applicant charged with a string of burglaries and associated offences whilst serving a CCO – parties consented on the application being determined ‘on the papers’.

9.4.1.2 SOME CASES IN WHICH EXCEPTIONAL CIRCUMSTANCES WERE NOT FOUND AND BAIL WAS REFUSED

Anton Majeric

[a co-accused of *Alexopoulos* {MC15/98}]

[Supreme Court of Victoria, Gillard J, {MC31/98}, 10/07/2002]

His Honour held that the following factors, individually and taken together, did not constitute exceptional circumstances:

- delay;
- 'parity' with co-accused *Alexopoulos* (a third co-accused was not on bail);
- lack of legal aid for trial; and
- financial hardship of incarceration:

"While I accept the general thrust of what [Hampel J in *Alexopoulos*] said as to the effect of inordinate delay, each case must be considered in relation to its own set of circumstances, and the question of delay is but one factor which must be weighed up with all other circumstances in determining whether or not exceptional circumstances have been shown."

DPP (Commonwealth) v Thinh Tanh & Others

[Supreme Court of Victoria, Beach J, unreported, 06/12/1995]

The accused were charged with importation of a commercial quantity of heroin (5kg with a street value of \$12 million). A magistrate had taken the view that the time the accused had already spent in custody and the delay to trial constituted an exceptional circumstance and released the accused on bail. On appeal by the DPP bail was revoked. Beach J said:

"In my opinion the normal delay which occurs in this State between arrest and committal, and committal and trial, cannot of itself amount to an exceptional circumstance. If there is inordinate delay, it very well may. But that is not the situation in the present case."

Adam Malkoun

[Supreme Court of Victoria, Nathan J, unreported, 25/03/1988]

The mere fact that it was unlikely that the committal proceedings would be concluded in 2 months' time, did not constitute an exceptional circumstance which would warrant the grant of bail.

Tarek Sleiman

[Supreme Court of Victoria, Heidgan J, unreported, 05/03/1992]

The accused was caught red-handed trafficking > 30g of heroin. A psychologist assessed the accused as being significantly depressed with some suicidal ideation. His Honour was not persuaded that the accused's psychological state constituted exceptional circumstances when weighed against the seriousness of the alleged offence, likely punishment and strength of the Crown case.

Mee Tangiamnat

[Supreme Court of Victoria, Smith J, unreported, 13/12/1991]

The accused was a 20 year old Thai charged with importing 1.2kg of heroin while on parole for armed robbery & false imprisonment. His Honour held that delay and the facts that the accused had been cooperative with the police and could offer a surety of \$50,000 did not amount to exceptional circumstances.

Ilie Tundrea

[Supreme Court of Victoria, Ormiston J, unreported, 22/06/1988]

The accused had been charged with trafficking and conspiring to traffick heroin. Bail had been granted until the committal proceedings. The Magistrate who presided over the committal declined to grant bail to the accused but bail was granted to 2 co-accused. That decision was upheld, his Honour holding that, given the seriousness of the offence and the strength of the case, the following factors did not amount to exceptional circumstances:

- substantial delay in the trial; and
- that the accused could resume his tiling business and support his wife and family.

His Honour also doubted that the likelihood of an accused attending his trial was a factor relevant to exceptional circumstances.

Ryan Leigh Johns

[Supreme Court of Victoria, Nettle J]

[2002] VSC 436

A 19 year old accused was charged with murdering an 18 year old by a tae-kwondo style kick to the head outside a hotel which caused the victim to fall to the ground on his head causing massive and ultimately fatal head injuries. His Honour found that a combination of age & personal circumstances of the accused (stable home with mother and offer of employment), the alleged weakness of the Crown case (accused alleging self-defence) and delay did not, alone or in combination, amount to exceptional circumstances.

DPP v Cuenco

[Supreme Court of Victoria, Warren CJ]

[2003] VSC 485

The 41 year old applicant was charged with murder and attempted murder of workmates employed at the Australia Post Letter Centre in Dandenong. Counsel for the applicant submitted that exceptional circumstances were made out by a combination of:

- (i) the applicant's lack of prior criminal history;
- (ii) the applicant's clear and impressive work record;
- (iii) the lack of strength in the Crown case in that there appeared at this point to be a clear defence of self-defence and provocation open to him;
- (iv) the likely period of approaching 18 months delay before trial;
- (v) the fact that DNA samples are being obtained and analysed which could support the applicant's version of events;
- (vi) the applicant's psychological condition, said by a forensic psychologist to require on-going psychological treatment;
- (vii) the applicant's family support and ties; and
- (viii) the fact that there was no risk of the applicant not answering bail or interfering with witnesses.

In refusing bail, the Chief Justice was "not satisfied at this point in time that exceptional circumstances have been made out". She considered the application to be premature, noting at [28]:

"It is appropriate in the circumstances of this matter, including some of the conflicting descriptions of events, that the police have the opportunity to complete their investigation, including compiling witnesses reports and also obtaining the necessary DNA analysis. Once these matters are to hand a more appropriate consideration can be made of the Crown case. If, however, it transpires that there were unnecessary delays in the preparation of the Crown case and the obtaining of the DNA analysis it may potentially put the applicant in a different position."

Ismail Muhaidat

[Supreme Court of Victoria-Kaye J]

[2004] VSC 17

The 23 year old applicant was charged with murder. Counsel for the applicant asserted 3 matters constituted exceptional circumstances:

- (i) the lack of strength in the prosecution case;
- (ii) the impending birth of the applicant's child in about 3 weeks' time; and
- (iii) the likely period of delay before trial.

In refusing bail, Kaye J held that exceptional circumstances were not made out. His Honour did not find that the Crown case was weak. In relation to the other issues he said at [36]:

"[The impending birth] is a circumstance which is of the character or type which can affect a number of applicants for bail. It is not, in my view, alone or indeed in combination at this stage with questions of potential and not actual delay, an exceptional circumstance. That is not to say that the court is unsympathetic to the accused people, their families and in particular their children where, as a result of matters which are not of their making, delays occur which mean that they might not be brought for trial for some time."

At [16]-[17] his Honour sounded a strong caution about giving detailed reasons in a bail application on the issue of the strength of the Crown case:

[16] "It is well established that at this stage in considering the question of bail, I should say as little as possible on the ultimate prospects of the Crown case. There are a number of very good reasons for that. Firstly, and of course most importantly, if the applicant is committed to trial then it is essentially the province of the jury to pass on the issue of guilt or otherwise. For a judge at this stage to do so, in any terms other than what is strictly necessary, would be both unjust and would also, in my view, prejudice the due administration of justice."

[17] Secondly, where an applicant faces a joint trial there is always the prospect that the case against him might either weaken or strengthen at the trial, depending quite often on the attitude of the co-accused. The co-accused, for various reasons, can either seek to implicate an applicant or indeed on rare occasions support the applicant for reasons of their own."

Michael Barbaro

[Supreme Court of Victoria-Morris J]

[2004] VSC 404

The applicant was charged with a string of offences, two of which - cultivation of & trafficking a commercial quantity of cannabis - required him to show exceptional circumstances. Counsel for the applicant asserted the following matters constituted exceptional circumstances:

- (i) the lack of strength in the prosecution case;
- (ii) a co-offender in relation to some of the charges had been granted bail;
- (iii) the applicant needed health care in relation to asthma and bowel problems;
- (iv) the applicant's wife and family were suffering as a result of him being in custody;
- (v) the likely period of delay before trial.

His Honour was not persuaded that any of items (i) - (iv) constituted 'exceptional circumstances' in this case. In relation to item (iv) his Honour said at [13]:

"There is evidence that Mr Barbaro's wife and family are suffering as a result of him being in custody. I find that evidence easy to accept. When a person is placed in custody it not only affects that person but it usually has a very significant and substantial impact upon that person's loved ones and family. But I cannot be satisfied that that is an "exceptional" circumstance. Rather, I think that this type of impact upon loved ones and family is a common result of a person being in custody. I doubt that the Parliament had in mind that this would be embraced within exceptional circumstances. It may be that family circumstances could sometimes amount to exceptional; but this is not such a case."

His Honour was much more troubled about item (v), the issue of delay. Counsel for the applicant postulated that the delay before a committal was held could be as much as 12 months, with the trial a further 12 months away. The prosecutor submitted it was premature to regard delay as sufficient to establish exceptional circumstances at that stage. At [15]-[16] his Honour said:

"It does not follow that a case based upon delay can never succeed if it is brought shortly after a person is placed in custody. Surely the matter turns on the evidence that is available, and the probabilities. The delays that have been outlined to me seem quite unacceptable in a civilised society, with a modern criminal justice system. These delays seem to be partly in collating evidence, partly within the various court systems, and partly in the prosecution area. It is important that *all* those who have power over the matter do what they can to ensure, not only that persons charged with serious offences are brought to justice, but also that the process of justice is expeditious and fair. It remains possible that the times set out above might be abbreviated by various actions on the part of those responsible; not just in advancing this case at the expense of other cases; but, indeed, in advancing all cases, so as to promote a more expeditious criminal justice system."

Nevertheless, although acknowledging that the case advanced by the applicant in relation to delay was a powerful one, his Honour refused bail, holding at [17] that he was "not sufficiently satisfied at this stage that the possible delay in the trial is sufficient to establish exceptional circumstances which...constitutes a high hurdle".

Michael Sullivan

[Supreme Court of Victoria, Young CJ, {MC17/82}, 11/02/1983]

The applicant was charged with, inter alia, conspiracy to import heroin and trafficking heroin. His de facto wife's funeral was to take place on the day after the bail application and permission to attend the funeral had been denied by the Minister responsible for Corrections. His Honour held that the following matters did not discharge the onus:

- (i) the contention that the applicant had "dried out" on remand;
- (ii) the applicant's age (36) and lack of criminal history;
- (iii) the applicant's 77 year old mother required assistance in the care of the applicant's child; she had previously been assisted by the applicant's brother who had recently died; the child had a deformed foot which required daily manipulation and exercise;
- (iv) the applicant's poor health (asthma, test of thyroid, liver and kidney function); and
- (v) the impending funeral of his defacto.

Ashley Douglas Carroll

[Supreme Court of Victoria-Beach J]

[2002] VSC 180

The applicant and a co-accused were charged with murder. The primary matter on which the applicant relied in his bail application was that he would be defending the charge on the basis of self-defence. His Honour considered this did not constitute exceptional circumstances notwithstanding other factors including the deceased's prior history of violence.

Tran v DPP

[Supreme Court of Victoria-Redlich J]

[2004] VSC 296

The 22 year old applicant and a number of co-accused were charged with murder arising from a violent altercation outside the Salt Nightclub. The evidence against the applicant was largely circumstantial, the DPP acknowledging that the state of the evidence does not allow the prosecution to identify with accuracy either the total number of participants involved in the pursuit of the deceased or how many weapons were used or what the precise actions of each of the accused were. The Crown case included an allegation the accused made a false denial borne of a consciousness of guilt, when he told the investigators that he did not know the identity of the persons who had got into his car. The Crown also relied on blood spatter on the applicant's clothing. In addition to the suggested weakness of the Crown case, the applicant also relied on delay. Redlich J was satisfied that there was neither a sufficient risk of the applicant absconding nor of him offending or interfering with witnesses if released on bail. Nevertheless his Honour refused bail, saying at [26]-[29]:

"[26] A sufficiently weak Crown case can constitute exceptional circumstances. Some analysis and assessment of the circumstantial evidence to which the parties have referred me is called for. The stronger the prosecution case, the more cogent other circumstances said to be exceptional would need to be.

[27] Where s. 13 is applicable and upon scrutiny of the Crown case it appears that it has reasonable prospects of success and there is an absence of other circumstances which can be characterised as exceptional, bail will not ordinarily be granted.

[28] Based upon the arguments advanced before me, it appears that the jury will have to determine whether the Applicant's presence outside the nightclub; the removal of weapons from his car, if that be what the video reveals; the presence of the Applicant in his motor car at the scene of the murder on at least two separate occasions; the use of his vehicle to leave the scene by two of those who apparently attacked the deceased; the disappearance of the weapons used to attack the deceased; the arrival of the Applicant in his motor vehicle outside the Como Hotel, where other accused were together, and the bloodstains on the Applicant's clothes, might reasonably be explained by a series of innocent hypotheses.

[29] My appraisal of the evidence to which I was referred and the submissions made leads me to conclude that the Crown has reasonable prospects of demonstrating that the competing hypotheses raised by counsel for the Applicant are untenable. That is to say on the arguments as presented the Crown's case cannot be described as weak. My present view is that the strength of the prosecution case and the relatively short period of delay before the commencement of the trial do not constitute exceptional circumstances."

CG

[Supreme Court of Victoria-Kaye J]

[2005] VSC 358R

The 18 year old applicant and a number of co-accused were charged with murder arising from a violent altercation at Dandenong. In the course of that altercation the 24 year old deceased was kicked, punched and stomped on by all the accused and at one stage he was struck with an umbrella. The attack lasted approximately five minutes. The deceased was left incapacitated on the ground, breathing heavily and moaning. The Crown alleged that ten minutes later the applicant and a 17 year old co-accused PS returned to the scene of the attack and found the deceased in the same position. The applicant then dropped a large ceramic pot plant weighing 21.5kg on to the deceased's head and then dropped a second full plastic pot plant on to the deceased's head. At the same time PS is alleged to have kicked and stomped on the deceased. Counsel for the applicant submitted that a combination of eight factors constituted exceptional circumstances:

1. the applicant's youth;
2. his lack of any previous criminal history;
3. the requirement that he be held in restrictive protective custody in an adult prison;

4. the expected delay – assessed by Kaye J as being potentially 18 months – if the applicant was committed for trial;
5. the stressors on the applicant and his family particularly arising from his detention in custody including the fact that the applicant was to some extent suffering from psychological problems including depression and anxiety;
6. the Crown case against the applicant was not “open and shut”;
7. the co-accused PS had been granted bail by the Supreme Court;
8. the applicant, if released, would be unlikely to abscond or re-offend.

At [34]-[52] Kaye J analysed each of these factors and found that neither individually nor in combination did they amount to exceptional circumstances. Bail was thus refused.

Amer Haddara

[Supreme Court of Victoria-Osborn J]

[2006] VSC 8

The applicant was required to establish exceptional circumstances having been charged with an offence under s 102.3 of the *Criminal Code* 1995 (Cth) of intentionally being a member of a terrorist organisation knowing that the organisation was a terrorist organisation. In finding that the matters relied on by the applicant did not at present constitute exceptional circumstances, Osborn J held:

- (i) the Crown case could not be characterised as a weak *prima facie* case;
- (ii) the oppressive and onerous conditions in remand, including restricted access to legal representatives, did not constitute exceptional circumstances at the moment, they might be considered exceptional circumstances if they continued for a protracted period;
- (iii) strong ties to the jurisdiction, strong family ties and good employment prospects did not transform the case into having ‘exceptional circumstances’; and
- (iv) at present he could not conclude that the delay would be such as to constitute exceptional circumstances.

Boris Beljaiev

[Supreme Court of Victoria-King J]

[2006] VSC 259

The applicant was charged with murder of a business associate who had been a co-accused in earlier drug importation charges of which the applicant had been acquitted. King J held that the following matters, in combination, did not amount to exceptional circumstances:

1. the Crown case, a circumstantial case which depended on the credibility and accuracy of a number of the witnesses, was neither as strong as the Crown stated nor as weak as the defence submitted;
2. the applicant’s extraordinary legal history, of lengthy trials, grants of bail, revoking of bail, and subsequent acquittals;
3. the applicant’s relatively poor health;
4. the effect of the applicant’s incarceration on his “quite amorphous” business interests;
5. deprivation of contact with the applicant’s wife and son; and
6. potential delay.

Ante Vucak

[Supreme Court of Victoria-Kaye J]

[2009] VSC 167

The applicant was charged with murder, attempted murder and affray. The applicant was 18 years old and was one of 9 young men, whose ages ranged from 15 to 20 years, who had been charged with those offences. He came from a good family, had no previous convictions and at the time of the offences he was employed as an apprentice toolmaker. He was being held on remand in an adult prison. Notwithstanding that seven of the co-accused had been granted bail, Kaye J refused bail, saying at [52]:

“The role of the applicant, standing at the forefront of the planning and the leading of the armed confrontation by nine young men at a public reserve, using dangerous weapons, in a confrontation in which one man was killed and another seriously injured, is a matter of real concern. In the context of such a serious case, I do not consider that the matters such as youth, delay, background and being kept in an adult prison, while they are weighty, are sufficient to be properly characterised as exceptional.”

R v Rich (Ruling No. 19)

[Supreme Court of Victoria-Lasry J]

[2008] VSC 538

The applicant was charged with murder and armed robbery. The “lynchpin” of his application for bail was that he needed to have access to the internet in order to prepare his defence by using it to retrieve data to support his alibi defence. In holding that the accused had not demonstrated exceptional circumstances, his Honour said: “Assuming it exists, the evidence indicates that there are at least two alternative means by which this data can be accessed despite the accused being in custody.”

DPP v Paul Dale

[Supreme Court of Victoria-Cummins J]

[2009] VSC 107

The applicant was charged with murder of an alleged police informant. He was a serving police officer at the time of the alleged offence. Cummins J accepted that exceptional circumstances can be made out by a single factor or a combination of factors which take the case outside “the norm”: *Mustica v DPP* [2006] VSC 441. His Honour found that:

- he could not be satisfied that the prosecution case was weak;
- the applicant’s family circumstances and the state of his business affairs did not constitute exceptional circumstances: *Memory v DPP* [2000] VSC 495;
- the applicant’s “difficult” custodial arrangements – housed on his own in the high security unit at Barwon Prison – were primarily for his own protection, did not handicap him in the preparation of his defence and did not at present constitute exceptional circumstances;
- no untoward delay has yet developed in this case.

Whether taking these matters individually or collectively, his Honour was not satisfied that exceptional circumstances are made out. Moreover, the circumstances of the killing of the deceased, alleged against the applicant for the purpose of eliminating a witness against him, led his Honour to find that the applicant would pose an unacceptable risk even if exceptional circumstances had been made out.

Bail Application – Jason Yuen

[Supreme Court of Victoria-Coghlan JA]

[2014] VSC 197

The applicant had indicated an intention to plead guilty to trafficking a commercial quantity [almost 1kg] of methylamphetamine and trafficking in 9kg of cannabis and 28g of cocaine. At [7] Coghlan JA said: “In this case, the question of a substantial sentence has passed from possibility to real certainty. It follows that it would not be appropriate to reason that there is virtually no risk of absconding as against concluding that there is a risk based upon avoidance of the inevitable consequence.”

Omer v DPP

[Supreme Court of Victoria-Croucher J]

[2016] VSC 762

The applicant was charged with trafficking in a commercial quantity of drugs of dependence, namely methylamphetamine (about 150g pure) and 1,4-butanediol (3,852 litres), the latter valued at nearly \$4 million. He had a prior criminal history of using and trafficking drugs. There was an expected delay of up to 2 years between arrest and trial. There were weaknesses in some aspects of the Crown case. The applicant had offered a surety of \$180,000. Some coaccused were on bail and others were not. In refusing bail, Croucher J drew at [5]-[6] a distinction between exceptional circumstances, showing cause and unacceptable risk:

[5] “While, in light of Mr Omer’s criminal history and the circumstances of the alleged offences, I am satisfied that there is some risk that, if released on bail, he would commit an offence of drug-trafficking and thereby endanger others, I am not satisfied that such risks are at an unacceptable level given among other things, the strict bail conditions that could be put in place and the availability of a substantial surety.

[6] However, I am not satisfied there are exceptional circumstances which justify a grant of bail. While it will be cold comfort to Mr Omer, I reach this conclusion with some hesitation. The expected delay between his arrest and his trial in the County Court is in the order of two years. That unfortunate period of delay, when combined with the availability of a surety and strict conditions, weaknesses in some aspects of the prosecution case and all other considerations, is such that, were this a case in which Mr Omer only had to show cause why his detention is not justified, I would have granted bail. But the test is a higher one than that. As compelling as those factors may be, and as troubling as it is that it is almost commonplace that a person has to wait two years without bail for a trial on serious charges, those factors, either alone or in combination do not, in my judgment, amount to exceptional circumstances. Accordingly, I must refuse the application.”

Murat Kaya

[Supreme Court of Victoria-Elliott J]

[2016] VSC 712

The 25 year old applicant was charged with one terrorism offence, namely preparations for incursions into foreign countries – originally thought to be Syria or Northern Iraq but subsequently believed to be the Philippines – for the purpose of engaging in hostile activities. The applicant is a tiler by trade who has owned and operated his own business for 4-5 years. He has no prior criminal history, is married and has a young child. He has stable accommodation and strong ties to Melbourne. He offered a surety of \$300,000. In refusing bail Elliott J held at [40]-[55] that the following were not exceptional circumstances, either alone or collectively-

- the delay to date together with the expected delay – 18 months to 2 years in the submission of the applicant – given that terrorism cases of their nature are likely to be long and involved;
- a surety of \$300,000, given the nature and gravity of the charge;
- the ability of the court to set appropriate conditions of bail;
- the fact that the applicant had no plans to commit any terrorist act in Australia;
- the fact that the applicant had been placed in a protection unit as a direct consequence of the charge;
- the fact that the charge would need to be amended in the way set out in [53].

Finally his Honour held at [59]:

“Further, given the alleged stated desires of the applicant and his association with Islamic State, even though there is no evidence of any previous intention to cause harm to anyone in Australia, in my view, the evidence when looked at as a whole demonstrates there is an unacceptable risk that if bail were granted the applicant would commit an offence whilst on bail, or endanger the safety or welfare of members of the public.”

Luke McNally

[Supreme Court of Victoria-Champion J]

[2018] VSC 522

The 34 year old applicant was charged with 11 charges relating to trafficking in and possession of methylamphetamine and precursor chemicals, 20 charges of reckless conduct endangering serious injury and further charges of resisting police, unauthorized possession of a weapon and ammunition and arson. The applicant – who identifies as indigenous – has a criminal history in Queensland, including a number of prior offences of possession of drugs and weapons, and at the time of the alleged offending in Victoria was on bail for a large number of matters in Queensland, including two charges on which he was awaiting sentence in the Supreme Court. Some of the pending Queensland matters related to illicit drugs of dependence. The prosecution alleged that the applicant is the head of a drug syndicate involved in importing ephedrine from China and manufacturing and trafficking methylamphetamine on a large scale. The applicant had been in custody for a little over 7 months and was facing a contested committal in a month's time. There were two co-accused facing a much smaller number of charges. One had been charged on summons with one count of trafficking methylamphetamine. The other was charged with trafficking and possession of methylamphetamine and MDMA and had been granted bail on his own undertaking with conditions. In refusing bail his Honour held that-

- the prosecution case could not be said to be a weak one but appeared to indicate a well organised syndicate and sophisticated drug manufacturing operation;
- there will not be a significant delay in concluding the committal;
- the applicant's criminal history had some significance; he currently faces outstanding charges in Queensland and was on bail from Queensland courts at the time of his alleged offending in Victoria;
- the applicant is unemployed with few connections to Victoria;
- his proposal to attend a residential drug treatment facility and provide a substantial surety come nowhere near amounting to exceptional circumstances, either individually or in combination with all other relevant factors.

CT

[Supreme Court of Victoria-Champion J]

[2018] VSC 559

The 16 year old applicant was charged with robbery (x2), affray, theft (x3), intentionally causing injury, recklessly causing injury, assault by kicking and assault in company. At the time of the alleged offending the applicant was on bail and on summons in respect of six outstanding sets of charges. He was also subject to a 12 month probation order following a finding of guilt of offences of affray, unlawful assault (x2) and committing an indictable offence whilst on bail. He was refused bail in the Children's Court and had been in remand for about 7 weeks. He was reported as having been

involved in six incidents whilst on remand, including threatening and assaulting other youths and staff. Youth Justice did not support bail but was willing to supervise the applicant should he be granted bail. Both parties accepted that the step 1 – exceptional circumstances test applied pursuant to what has become s.4AA(2)(c) of the **BA**. In finding that the applicant had not established exceptional circumstances, Champion J stated at [78]-[79]: “While acknowledging the allegations are unproven, the bail history of the applicant suggests that he has defied court bail orders on multiple occasions this year. The extent of this allegation gives me little confidence that the applicant would comply with a bail order from this Court. Further I am not of the opinion that stringent bail conditions would alleviate the risk that the applicant would offend whilst on bail and be a danger to members of the community.”

BA

[Supreme Court of Victoria-Tinney J]
[2018] VSC 665

The applicant was a 14 year old Aboriginal child who had “a troubling recent history of offending”. He was charged with aggravated home invasion, aggravated burglary and attempted aggravated burglary in circumstances where he and 2 co-accused entered residential premises at night after one of the co-accused had kicked down the front door. The 2 co-accused were carrying items that looked like Tasers. One co-accused demanded car keys from an occupant and then kicked him with a karate-style kick resulting in a head wound that required 13 stitches. The applicant was on bail for other alleged offending and was also on a 12 month youth supervision order. Bail was refused, no exceptional circumstances having been made out and in any event would have been refused on the basis that there was an unacceptable risk that the applicant would commit further offences on bail: “His escalating poor behaviour and seeming unwillingness to modify his behaviour raise powerful concerns that he may represent a danger to the community.”

Sarah Azimi

[Supreme Court of Victoria-Tinney J]
[2020] VSC 118

The 33 year old applicant had been charged with aggravated carjacking and had been granted bail with conditions including that she not contact witnesses for the prosecution other than the informant. Within a week she is alleged to have engaged in a text message exchange with one of the victims in the aggravated carjacking, as a result of which she was arrested and charged with attempting to pervert the course of justice, harassing a witness and related bail offences. She has two children, aged 11 and 6, for whom she was the primary and only carer. The children are currently living with their maternal grandparents, but are said to be ‘traumatised’ by their lack of contact with their mother. While the applicant was unemployed at the time of her arrest, she has a history of employment which includes eight years working as a pharmacy manager. The applicant has no criminal history and this is her first time in custody. Notwithstanding her strong family support and the expectation that she would spend “at least 18 months on remand, even stretching up to 2 years”, his Honour found that exceptional circumstances were not established and bail was refused.

Lado

[Supreme Court of Victoria-Tinney J]
[2020] VSC 132

The applicant was a 19 year old youth charged with robbery, intentionally causing injury and committing an indictable offence whilst on bail. He had prior convictions in the Children’s Court for armed robbery, carjacking and affray. CISP support was available but the Youth Justice report was unfavourable. Exceptional circumstances were not established but the applicant was held to be an unacceptable risk in any event.

El-Refei [No.2]

[Supreme Court of Victoria – Incerti J]
[2020] VSC 164 [07/04/2020] – Bail previously refused: see [2020] VSC 65 [24/02/2020]

On 20/12/2019 the 46 year old applicant was charged with offences including aggravated home invasion with a firearm, possessing a firearm being a prohibited person, intentionally causing serious injury and possessing methylamphetamine. He had been refused bail by the Magistrates’ Court on 23/12/2019 and by Incerti J on 24/02/2020. It was conceded that new facts and circumstances had since arisen by virtue of unexpected further delay caused by the impact of the COVID-19 pandemic on the justice system. At [19]-[21] Incerti J accepted that the COVID-19 pandemic “poses a risk of court dates being postponed and anticipated periods of remand being extended”. However, citing Tinney J in *Re Tong* [2020] VSC 141 at [33], her Honour said at [23]: “It should not be thought that the current health crisis facing our community will in every case be a matter which will lead to a conclusion of the existence of exceptional circumstances, less still that it will necessarily lead to a grant of bail.” The

serious offences charged, the applicant's significant criminal history between 2014 & 2019 including driving, theft, drug and weapons related offences, his poor performance on bail and while on community correction orders all militated against a conclusion that the circumstances surrounding his further application for bail were exceptional. Further he remained an unacceptable risk of endangering public safety and committing further offences if released on bail. Bail was refused.

DR

[Supreme Court of Victoria – Tinney J]

[2020] VSC 282

The 17 year old child applicant was charged with aggravated home invasion and other offences. He had a prior criminal history involving offences of violence and was on Youth Justice supervised bail and was subject to a youth supervision order at the time of the offending. He was also in breach of a curfew. The period on remand was unlikely to exceed any sentence imposed in the event he was found guilty. Although Youth Justice was still supportive and the applicant had family support and stable accommodation, bail was refused on the basis that he had failed to show exceptional circumstances. Further he was an unacceptable risk in any event.

IH

[Supreme Court of Victoria – Tinney J]

[2020] VSC 325

The 14 year old Aboriginal child applicant with a relatively low cognitive level was charged with armed robbery, aggravated home invasion and other serious offences. He was on bail and was subject to a youth supervision order at the time of the offending. His Honour considered that "it cannot be concluded in this case that the period on remand would exceed the likely period of incarceration" in the event he was found guilty. Although Youth Justice was still supportive and the applicant was on a family reunification order and had supervised accommodation and supports available, bail was refused on the basis that he had failed to show exceptional circumstances. Further he was an unacceptable risk in any event.

Shannon Taylor v DPP

[Court of Appeal – Priest, T Forrest & Weinberg JJA] [2020] VSCA 142

On appeal from a refusal of bail by Lasry J [2020] VSC 146

The 31 year old appellant was charged with offences including trafficking in a commercial quantity of a drug of dependence, methylamphetamine; being a prohibited person in possession of a firearm and committing an indictable offence whilst on bail. Although Lasry J was satisfied that "exceptional circumstances have been established, primarily on the basis of the inordinate delay that will occur, along with the impact that COVID-19 is likely to have on the prison population", he nonetheless refused bail because "there is an unacceptable risk that the applicant will continue to offend whilst on bail": see [2020] VSC 146 at [51] & [54]. The remandee's appeal on the unacceptable risk issue was dismissed.

Other cases in which exceptional circumstances were not found and bail was refused include:

- *R v Kristofer Simpas* [2006] VSC 180 (Harper J-murder);
- *DPP (Vic) v Koumis* [2006] VSC 416 (Coldrey J-trafficking commercial quantities of drugs);
- *Douglas Victor Jensen* [2006] VSC 450 (Hollingworth J-murder);
- *Re Shoue Hammoud* [2006] VSC 516 (Bongiorno J-terrorism offences);
- *Re Ezzit Raad* [2006] VSC 330 (Bongiorno J-terrorism offences);
- *Re Shaun Benporath* [2007] VSC 375 (Curtain J-murder);
- *Re James Alexander Hipworth* [2007] VSC 565;
- *Re Turner* [2008] VSC 193 (Hollingworth J-murder of her former de facto);
- *Pak v DPP* [2008] VSC 529 (Harper J-trafficking and conspiracy to traffick drugs);
- *Re Daniel Sazdov* [2008] VSC 605 (Cavanough J-murder and other offences of violence);
- *Re Horty Mokbel* [2008] VSC 608 (Bongiorno J-serious drug offences);
- *DPP v Morison* [2008] VSC 609 (Cummins J-murder);
- *Dunne v The Queen* [2009] VSC 148 (King J-murder);
- *Re Susanne Chopin* [2009] VSC 313 (Harper J-trafficking in a commercial quantity of cocaine);
- *Re Eileen Creamer* [2009] VSC 460 (Whelan J-murder/12-18 months delay/accused suffering depression/no strong ties to Victoria);
- *Re Ahmed Hablas* [2010] VSC 429 (Williams J-murder);
- *Re Erol Ramazanoglu* [2012] VSC 645 (Coghlan J-attempt to possess commercial quantity of cocaine & methamphetamine/dispute in relation to accused's medical treatment/unacceptable risk of failing to appear);

- *Re Carl Redenbach* [2012] VSC 646 (Coghlan J-possession of commercial quantity of GHB, receiving stolen goods/delay not sufficient/unacceptable risk of failing to appear).
- *Bail Application – Dalton* [2013] VSC 690 (Kaye J-conspiracy to traffick large commercial quantity of methamphetamine and other charges/alleged weakness of prosecution case not accepted/unacceptable risk of reoffending).
- *Re Duc Truong Nguyen* [2014] VSC 631 (Bongiorno J-trafficking in commercial quantity of cannabis/delay not sufficient to constitute exceptional circumstances);
- *The Queen v Chung, Chi Thanh* [2015] VSC 487 (Lasry J-large commercial quantity of drugs/principles/delay/whether surety relevant);
- *Re Afram* [2018] VSC 708 (Tinney J-aggravated home invasion & armed robbery – use of handgun – previous breach of conditions of bail – serious prior conviction for being a prohibited person in possession of firearms – combination of circumstances relied on, including availability of residential treatment for drug addiction of applicant – exceptional circumstances not shown – unacceptable risk in any event);
- *Re Frank* [2018] VSC 718 (Champion J-murder/case against applicant not weak although self-defence appears to be arguable/strength of prosecution case will likely be clearer after the committal hearing);
- *Re Ghanim* [2019] VSC 358 (Lasry J-19 year old applicant charged with aggravated home invasion, home invasion and numerous other offences/applicant was on youth parole at time of alleged offences/release on supervised bail program not supported by Youth Justice/significant criminal history/prior convictions for bail offences/exceptional circumstances not established/unacceptable risk);
- *Re K M Nguyen* [2019] VSC 698 (Almond J-traffick not less than a large commercial quantity of methamphetamine & heroin in a substantial business/delay not sufficient to constitute exceptional circumstances [26]/parity not made out [41]);
- *Re Anthony Bertucci* [2020] VSC 88 (Tinney J-38 year old applicant charged with 18 counts of contravention of a family violence intervention order and one count of persistent contravention of a FVIO – complainant was his partner of 10 years and mother of his 3 children with whom he was now reconciled and who supported his application – after having been granted bail by a magistrate he failed to appear and was bailed by police and then failed to appear again – he was subsequently charged with recklessly causing injury, 2 counts of unlawful assault, a further charge of contravention of a FVIO and committing an indictable offence whilst on bail – favourable attitude of complainant to grant of bail important but not determinative – exceptional circumstances not established – unacceptable risk in any event – bail refused).
- *Re Velluto* [2020] VSC 188 (Tinney J-36 year old applicant charged with dishonesty and other offending allegedly committed while on bail – significant criminal history showing poor compliance with court orders – drug problem – exceptional circumstances not established notwithstanding delay including COVID-19 considerations – unacceptable risk in any event – bail refused).
- *Re Sepehrnia* [2020] VSC 247 (Tinney J-27 year old applicant with extensive criminal history charged with rape and other offences committed against two consecutive domestic partners and committed during the period of a community correction order – at time of second rape on bail for first rape – applicant already remanded for 252 days – notwithstanding delay and COVID-19 implications exceptional circumstances were not established – unacceptable risk in any event – bail refused).
- *DPP v Lee* [2020] VSC 275 (Tinney J/DPP appeal against magistrate's grant of bail - respondent charged with importing a commercial quantity of a border controlled drug, attempting to possess a commercial quantity of a border controlled drug, and failing to comply with an order under s 3LA *Crimes Act 1914* (Cth) – not reasonably open for magistrate to be satisfied of exceptional circumstances – appeal allowed – order granting bail set aside – fresh application for bail on new material refused).
- *Re Mazzitelli* [2020] VSC 288 (Tinney J-42 year old applicant charged with family violence offences and attempting to pervert the course of justice – some criminal history including convictions for failing to answer bail and breaching conditions of bail – bail granted and revoked on two previous occasions in this case – continuing use of illicit drugs by applicant in breach of conditions of bail – exceptional circumstances not established – unacceptable risk in any event – bail refused).
- *Re Barker* [2020] VSC 321 (Champion J – 27 year old applicant charged with aggravated carjacking, armed robbery, reckless conduct endangering life, arson, common law assault and possessing a drug of dependence – alleged offences committed while applicant on a Community Correction Order – significant criminal history including breach of CCO and 8 breach of bail offences – if convicted applicant likely to face a sentence of imprisonment exceeding the delay before the case is finalised – unacceptable risk in any event – bail refused).

- *Re Hamad* [2020] VSC 440 (Tinney J – 25 year old Irqai born Australian citizen charged with murder intentionally causing injury and attempting to pervert the course of justice – plan by applicant and others to assault victim with baseball bats over a drug debt – victim ambushed in front yard of property and then shot dead by coaccused HA – threats to co-offender HO and his family to have that co-offender accept responsibility for the murder – strength of prosecution case – notwithstanding delay and onerous conditions of remand due to COVID-19 exceptional circumstances not established – unacceptable risk of applicant endangering safety of co-offender HO and family if bail granted).
- *Re Baker* [2020] VSC 460 (Coghlan JA – 53 year old applicant with a 32 year history of heroin addiction charged with murder of his former partner – applicant relied primarily on asserted weakness of the prosecution case – his Honour referred to dicta of Kaye J in *Re John McDonald* [2010] VSC 217 cited with approval by Beach JA in *Re Sam* [2017] VSC 91 but ultimately held that the prosecution case, albeit circumstantial, was not a weak one – bail refused).
- *Re McHenry* [2020] VSC 462 (Coghlan JA – 24 year old applicant charged with intentionally causing injury, armed with criminal intent, theft of motor vehicle, attempted burglary and other offences at a time at which he was serving a CCO imposed in the County Court following convictions for aggravated home invasion and intentionally causing injury – case not regarded as weak – exceptional circumstances not made out).
- *Re Scott Goldsworthy* [2020] VSC 500 (Lasry J- accused with no prior criminal record charged with rape, family violence and persistent contravention of Family Violence Intervention Order – delay and impact of COVID-19 not sufficient to establish exceptional circumstances).
- *Re Hokafonu* [2020] VSC 543 (Coghlan JA- charges of attempted murder and possession of an unregistered handgun – exceptional circumstances not established).
- *Re AM* [2020] VSC 569 (Tinney J- 18 year old applicant charged with murder (common law and statutory) arising from planned robbery with gang connection – applicant on bail and subject to probation at time for earlier violent offending – poor bail history and noncompliance with conditions of probation order – unfavourable report by Youth Justice but bail support still on offer – numerous violent incidents since applicant in custody - questionable strength of prosecution case – family support available – case fast tracked into Supreme Court but 18 month delay still likely – onerous conditions in custody – exceptional circumstances not established – unacceptable risk in any event).
- *Re Shane McKay* [2020] VSC 558 (Tinney J- 27 year old Aboriginal applicant facing dishonesty, assault, breach of family violence intervention order, drugs and reckless conduct charges – applicant had significant criminal history and poor compliance with previous CCO orders and was on multiple grants of bail at time – strong support from former foster mother and stable residence on offer plus CISP support – exceptional circumstances not established – unacceptable risk).
- *Re James* [2020] VSC 602 (Tinney J – 36 year old applicant charged with attempting to possess a commercial quantity of methylamphetamine {180kg with purity of 80.3%} – notwithstanding delay, the offer of substantial sureties and availability of residential drug treatment exceptional circumstances not established – unacceptable risk in any event – bail refused).
- *Re Cohrs* [2020] VSC 607 (Coghlan JA- 41 year old applicant charged with the shotgun murder of his mother just hours after he had allegedly fatally shot his brother – exceptional circumstances not established – unacceptable risk in any event – bail refused).
- *Re Dixon* [2020] VSC 665 (Tinney J – attempted murder by applicant and two co-offenders – victim shot to head from close range – applicant an Irish national extradited from NSW after the shooting – case reasonably strong – surety unsatisfactory – although delay likely to be over 2 years exceptional circumstances not established – unacceptable risk in any event – bail refused).
- *Re Wilio* [2020] VSC 677 (Tinney J – 23 year old applicant charged with murder by use of double-barrelled shotgun from close range in the context of a planned armed robbery – case of reasonable strength – delay not excessive – exceptional circumstances not established – unacceptable risk in any event – bail refused).
- *Re MM* [2020] VSC 691 (Jane Dixon J – 33 year old applicant charged with trafficking in a large commercial quantity of amphetamine and other drugs and firearms offences – notwithstanding the availability of a place at a residential rehabilitation facility and the anticipated delay due to COVID-19, exceptional circumstances not established – unacceptable risk in any event – bail refused).
- *Re Rahman* [2020] VSC 748 (Coghlan JA – 18 year old applicant charged with murder and statutory murder – phone evidence re involvement – able to do VCE exams in custody –refused).
- *Re De Camillis* [2020] VSC 761 (Tinney J – 35 year old applicant charged with family violence offending while on bail for other offences – long history of criminal offending and breaches of bail).
- *Re JL* [2020] VSC 785 (Jane Dixon J – 51 year old applicant on charges relating to family violence against his former intimate partner whilst on a CCO – offending with a knife – despite availability of a place at residential rehabilitation facility and anticipated delay due to COVID19 pandemic, exceptional circumstances not found – unacceptable risk in any event – bail refused).

- *Re Jason Roberts* [2020] VSC 793 (Beach JA – applicant convicted of murder of two police officers - irregularity in applicant's trial – on-disclosure of material evidence to defence, giving rise to serious departure from proper process affecting fundamental fairness of trial – applicant's conviction quashed and new trial ordered – applicant in custody for more than 20 years before order quashing convictions made – strong Crown case – existence of exceptional circumstances not established – bail refused).
- *Re Omar Kakar* [2020] VSC 806 (Beach JA – 32 year old applicant with substance abuse problem and a criminal history was charged with aggravated carjacking, theft of motor vehicle (3 charges), reckless conduct endangering life, prohibited person possessing or using firearm (2 charges), threat to kill, possessing ammunition without a licence, possessing a drug of dependence (3 charges), aggravated burglary, theft and committing an indictable offence while on bail – exceptional circumstances not made out – unacceptable risk in any event – bail refused).
- *Re Candice Harper* [2020] VSC 855 (Priest JA-44 year old applicant with a “significant and concerning criminal history” charged with murder and affray – strong prosecution case with CCTV footage showing the involvement of all the accused including the applicant in the commission of the offences – circumstances “fall a long way short of being exceptional” – unacceptable risk in any event – bail refused).

9.4.1.3 SOME CASES IN WHICH EXCEPTIONAL CIRCUMSTANCES WERE FOUND BUT BAIL WAS REFUSED BECAUSE ACCUSED WAS DEEMED AN UNACCEPTABLE RISK

KN (No.2)

[Supreme Court of Victoria-Tinney J]

[2020] VSC 490

The applicant was charged with robbery, attempted robbery and related offences which allegedly occurred while on bail on similar charges granted by Tinney J in [2020] VSC 35. The applicant was still assessed as suitable by Youth Justice for supervised bail. His Honour found exceptional circumstances but refused bail on the basis that the respondent had established unacceptable risk.

Albert Biba

[Supreme Court of Victoria-Beale J]

[2020] VSC 536

The applicant was charged with murder and cultivating a commercial quantity of cannabis. He established exceptional circumstances but was found to be an unacceptable risk of absconding whilst on bail: *Barbaro v CDPP* (2009) 20 VR 717; [2009] VSCA 26 referred to.

Benjamin Zohs

[Supreme Court of Victoria-T Forrest JA]

[2020] VSC 827

The 29 year old applicant with a long standing history of illicit drug use was charged with aggravated burglary, theft and committing an indictable offence whilst on 2 separate grants of bail. Exceptional circumstances established by the applicant's medical history (particularly his predisposition to pneumothoraces), his psychological history and the risks that are presented in confinement by the pandemic virus. However, bail was refused primarily on the basis of the applicant's extensive prior criminal history and history of breaching supervisory orders, his Honour saying: “I cannot conceive of conditions that would ameliorate, to an acceptable level, the risk of committing further offences or the risk of failure to answer his bail.”

9.4.2 Relationship of Exceptional circs, Show compelling reason & Unacceptable risk

It is clear from the decisions of Kellam J in *Beljajev v DPP* and the *Mokbel Cases* that even though an accused has established the existence of **exceptional circumstances**, bail might still be refused if the prosecutor satisfies the Court that the accused is an **unacceptable risk** of committing one of the four proscribed acts now set out in s.4E(1)(a) of the **BA**. That is now also clear from s.4B of the **BA**.

In *Beljajev v DPP* (1998) 101 A Crim R 362 the accused had been charged with trafficking in a commercial quantity of heroin between 1988 & 1989, between which dates the Crown alleged 13 incidents of heroin trafficking involving some 10.9kg of uncut heroin, of an average purity of 72%. The case was thus in the 'exceptional circumstances' category. The accused's grounds for bail were that:

- the present and anticipated future delay constituted an exceptional circumstance; and
- he was not an unacceptable risk; and
- the Crown case was not strong.

Kellam J found for the accused on the first ground but against him on the others.

1. His Honour held that the accused had demonstrated **exceptional circumstances** based on delay. Reviewing the Supreme Court cases of *Tundrea* [20/06/1988], *Tang* (1995) 83 A Crim R 593, *Alexopoulos* [23/02/1998], *Kantzidis* [August 1996] & *Medici* [27/09/1993], Kellam J said (at pp.368): "In my view it is clear that delay between arrest and final disposition can of itself constitute exceptional circumstances." His Honour continued (at pp.369-70):

"I am satisfied in the circumstances before me that the applicant has demonstrated that there exist exceptional circumstances which would, in the absence of other factors, justify the granting of bail based upon the issue of delay. It is well over 9 years since the applicant was first arrested and charged with the offences upon which he is to be retried. He has spent nearly 3 years in custody and the overwhelming likelihood is that if he is not granted bail he will spend at least several months in custody before the commencement of a trial. If no further order granting bail is made by the trial judge, he could spend almost 4 years in custody before any verdict is obtained."

2. However, despite that finding, his Honour held that the accused was an **unacceptable risk** of failing to appear and accordingly refused bail. His Honour accepted (at p.370) that "the onus of demonstrating that there is such an unacceptable risk is carried by the prosecution. See *Medici* at p.8." After reviewing the evidence, his Honour concluded (at p.376):

"It appears to me on the material presently before me, that there is a risk that the accused man will fail to surrender himself into custody and answer to his bail and a risk that he may commit further offences whilst on bail. The question which has troubled my mind, is whether that risk can be said to be unacceptable. Putting together all of the circumstances, which I am satisfied are established, and notwithstanding the heavy burden that this places upon the applicant, in the light of my conclusion that his time spent in custody to date is, in the circumstances exceptional, I conclude that there is an unacceptable risk that if the applicant were to be released on bail he would fail to surrender himself into custody in answer to his bail. I therefore refuse the application."

On 24/08/2001 *Antonios Mokbel* had been charged with 11 counts of trafficking over a period in excess of 10 months contrary to the Drugs Poisons and Controlled Substances Act 1981 (Vic) and one count of importing approximately 2kg of cocaine contrary to s.233B(1)(d) of the Customs Act 1901 (Cth). The subsequent Court appearances provide a graphic illustration of the non-static nature of the relevant circumstances:

- On 07/09/2001, after a 3 day bail hearing, a magistrate granted him bail on stringent conditions with a surety of \$1 million.
- On 01/10/2001 Cummins J allowed DPP appeals and revoked bail: see *DPP v Antonios Mokbel* [2001] VSC 403 {MC10/01}.
- On 26/04/2002 Kellam J dismissed a further application for bail, holding that no relevant new facts or circumstances had been established and, in any event, exceptional circumstances had not been established by the applicant: see *Mokbel v DPP* [2002] VSC 127 at [64]-[65].
- On 09/08/2002 Kellam J dismissed a further application for bail. The State committal earlier foreshadowed to commence on 15/07/2002 had not materialized, the committal being affected by the investigation of former officers of the Victoria Police Drug Squad, and had been tentatively relisted to commence on 25/11/2002. The Commonwealth committal was listed to commence on 16/10/2002. His Honour held: "Whether the [State] committal will take place in time for the trial to commence within 2 years of the date of arrest is now highly speculative." See *Mokbel v DPP* (No. 2) [2002] VSC 312 at [17]. And at [18]:

"It is clear that delay between arrest and final disposition can of itself constitute an exceptional circumstance. A civilised society, as we profess to be, cannot tolerate its citizens being detained for inordinate periods without the allegations made being determined by the process of trial."

After referring to a number of authorities, his Honour held (at [29]) that the applicant had established that exceptional circumstances constituted by delay did exist. However, his Honour also found (at [37]-[38]) that there was an unacceptable risk that the applicant if released on bail would fail to answer the charges or would commit an offence whilst on bail or would interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or some other person, the prior conviction of the applicant for attempting to pervert the course of justice being a matter of significance. Accordingly, his Honour refused bail (see [40]). Nevertheless his Honour added a cautionary rider (at [41]), a rider which succinctly encapsulates the proposition that the

unacceptability of risk is not to be measured in isolation from other criteria, one of which is the length of delay before trial:

"Notwithstanding the conclusion reached by me on the facts of this particular case...our society will not, and should not, tolerate what is effectively the indefinite detention awaiting trial of persons such as the applicant whilst an investigation such as that currently under way takes place. The issue of detention by reason of unacceptable risk is an issue which must be balanced with the likelihood of the allegations against an accused man being brought before a court in the near future. **The question of unacceptable risk is to be judged according to the proper criteria, one of which is the length of delay before trial. That is, although the risk might be objectively the same at different times, the question of unacceptability must be relative to all the circumstances, including the issue of delay.** This view appears to be supported by a decision of Crockett J in *R v Pietrobon* [Supreme Court of Victoria, unreported, 13/01/1988]."

- However, on 04/09/2002 Kellam J - after reiterating (at [6]) that "whether or not [the] risk is unacceptable requires to be balanced against the period that the applicant will otherwise spend in custody awaiting trial" and after taking into account "the precautionary measures that can be taken by way of conditions" - found that the balance had changed. His Honour was satisfied that if bail was not granted the applicant would have been incarcerated for a period of at least 18-19 months before committal and there was a high probability that he would not come to trial in less than 3 years from his arrest. His Honour accordingly found that the risk was no longer unacceptable and released the applicant on bail with sureties to a total value of \$1 million and stringent conditions, including reporting to a police station twice each day. See *Mokbel v DPP (No. 3)* [2002] VSC 393. At [13]-[14] his Honour said:

"As Vincent J said in *R v Medici* [unreported, 27/09/1993], this is not an occasion 'for the Court to act as Pontius Pilate by washing its hands of the matter'. As I have said previously, it is not sufficient to say 'we will wait and see'. The community will not tolerate the indefinite detention of its citizens with no prospect of charges being tried within a reasonable period. Accordingly, despite the nature of the offences with which the applicant is charged, and despite the serious reservations that I have expressed about the granting of bail, the situation facing the applicant cannot be allowed to exist indefinitely."

In *Robinson v R* [2015] VSCA 161 Priest JA, concurring "after considerable hesitation" with the judgment of Maxwell P & Redlich JA, cited with approval at [84] dicta of Redlich J (as he then was) in *Haidy v DPP* [2004] VSC 247. In that case Redlich J himself cited with approval at [18] the following dicta of Kellam J in *Mokbel v DPP (No.3)* at [10]:

"The question of unacceptable risk is to be judged according to proper criteria, one of which is the length of delay before trial; that is, although the risk might be objectively the same at different times, the question of unacceptability must be relative to all the circumstances, including the issue of delay."

In *Melas* [Supreme Court of Victoria, unreported, 06/03/1997], the applicant had been charged with serious drug offences, putting him into the 'exceptional circumstances' category, and his trial had been delayed. Coldrey J found that, notwithstanding the delay, which was considerable, evidence that the applicant had attempted to bribe a prison officer and had created an 'escape kit' rendered him an unacceptable risk of failing to appear and bail was refused.

In *Application for Bail of Kevin Ng* [2007] VSC 191 Curtain J found at [23]-[24] the existence of exceptional circumstances constituted by the applicant's age and lack of prior convictions but refused bail at [25]-[27] on the basis that the applicant was an unacceptable risk of flight and of committing further offences if granted bail.

In *Re Joseph Chucks Unumadu* [2007] VSC 258 Bongiorno J found exceptional circumstances constituted by delay but refused bail on the basis that the applicant was an unacceptable risk of flight and of interfering with witnesses or otherwise obstructing justice.

In *Pak v R* [2008] VSC 529 the applicant had been charged with trafficking and conspiracy to traffick drugs in July 2008. In November 2008 his application for bail was based on two propositions: first that the prosecution case was very weak and secondly that the likely delay between arrest and committal and any ultimate trial would be such as to constitute exceptional circumstances. At [4] Harper J said of this:

"The two propositions fit together. The weakness or strength of the prosecution case forms a prism through which the court must evaluate the meaning in the particular case of the expression 'exceptional circumstances'. A circumstance which might qualify as exceptional where the prosecution case is weak would not so qualify or not necessarily so qualify if the prosecution case is strong."

His Honour refused bail on the grounds that the delay on which the applicant relied did not yet constitute exceptional circumstances. Some 6 months later in May 2009 he re-applied for bail on the basis that a delay in the provision of transcript material meant that a committal had been adjourned until September 2009 making it likely that any trial would not take place until the second half of 2010. In *Pak v R* [2009] VSC 211 Coghlan J accepted that "both new and exceptional circumstances existed, principally because of the question of delay but also taking into account the whole of the circumstances of the case". However bail was refused because his Honour was "satisfied on the balance of probabilities that the applicant was an unacceptable risk of re-offending whilst on bail".

In *Re Application for Bail by Tyler Foxwell* [2013] VSC 716 Dixon J found that a likely delay which the prosecution conceded was "substantial" in combination with the youth of the applicant who had no prior convictions and had family support constituted exceptional circumstances. However, his Honour refused bail, holding there was an unacceptable risk of reoffending arising from the applicant's substantial untreated substance abuse issues.

9.4.3 Exceptional circumstances - Bail unopposed by informant not a conclusive factor

In *Re John Whiteside* [1999] VSC 413 the applicant and co-accused had been charged with murder after assaulting a man they had been told had raped a woman. The informant gave evidence he did not have a strong opinion with respect to bail, the applicant having no prior convictions and having waited at the scene until the police arrived. The prosecutor did not vigorously oppose bail. Warren J said:

"That of itself would not be sufficient for me to form the view that exceptional circumstances were made out or otherwise. It is a matter of assessing all circumstances before I can determine whether or not exceptional circumstances can be made out."

Ultimately her Honour found exceptional circumstances based on a combination of matters, including the lack of real opposition to bail, the applicant's co-operation with authorities, employment, delay, family support and his lack of priors. Her Honour then assessed that the accused was not an unacceptable risk and released him on bail.

In *DPP v Justin Noel Waters* [2004] VSC 303 the 20 year old applicant had been charged with murder arising out of the death of a person with whom he had had an altercation at a railway station. He had already been in custody for 4 months. The prosecution indicated formal opposition only to bail, the charge being one which carried the onus of exceptional circumstances. Habersberger J, noting the very close similarity with the case of *Whiteside*, granted bail taking into account all of the circumstances including:

- the circumstances of the offence and the fact that the actual charge was being reviewed by the DPP;
- the applicant's age, employment, lack of priors and ties to the community;
- the "lack of real opposition from the Crown"; and
- the "particularly important" factor of delay: "[T]he fact that a person who may subsequently be found innocent may be held in custody for a period of some 16 or more months pending trial is most undesirable and does not do our society credit".

In *Azzopardi* [Supreme Court of Victoria, Gillard J, unreported, 23/07/2003] the applicant had been charged with murder of her 5 week old child. His Honour found exceptional circumstances were made out by the following 3 matters:

- given the strong indication of post-natal depression, the applicant might be acquitted of murder and found guilty of the alternative of infanticide;
- the applicant's fragile health was better managed in the community with her family than in protective custody in prison; and
- non-opposition by the Crown:
"[W]hilst the Crown has reminded the Court that it is a matter for the Court whether or not exceptional circumstances exist which justify the granting of bail, the Crown has indicated that it does not oppose this application, and that is also a factor that I take into account."

[Leanne Azzopardi subsequently pleaded guilty to the charge of infanticide and on 06/12/2004 Kellam J placed her on a community-based order for a period of 18 months: [2004] VSC 509.]

9.4.4 Show compelling reason (previously show cause) / Unacceptable risk

In a case which falls within s.4C of the **BA**, the burden is on the accused to **show a compelling reason** why his or her detention in custody is not justified. It is now clear from ss.4D & 4E that if the bail decision maker is satisfied that a compelling reason exists that justifies the grant of bail for a person accused of a Schedule 2 offence, the bail decision maker must refuse bail if satisfied that there is an **unacceptable risk** that the accused, if released on bail, would-

- endanger the safety and welfare of any person; or
- commit an offence whilst on bail; or
- interfere with a witness or otherwise obstruct the course of justice in any matter; or
- fail to surrender into custody in accordance with the conditions or bail.

In *Re Ceylan* [2018] VSC 361 the 49 year old accused – who had a criminal history going back to 1993 which included failing to answer bail and failing to comply with a CCO and who in 2001 when faced with serious fraud charges had used a false passport to flee to Turkey and had not returned to Australia until 2007 – was charged with fraudulently inducing persons to invest money, obtaining property by deception (7 charges), negligently dealing with the proceeds of crime (6 charges), making a false document (13 charges), possessing methylamphetamine, possessing cannabis and committing an indictable offence while on bail. He had been on remand for just over 3 months. At the time he was arrested he was on bail for another indictable offence, possessing methylamphetamine. Beach JA refused bail, holding at [53] that the applicant had not shown compelling reason why his detention in custody was not justified. His Honour also held at [54] that there was an unacceptable risk that the applicant, if released on bail, would commit further offences while on bail. In relation to the applicant's submission on delay, Beach JA said at [51]:

“The potential for delay in this case is plainly less than desirable, and not at all satisfactory. Every effort needs to be made by the prosecution to ensure that delay is kept to a minimum. I would not foreclose the possibility of an inordinate delay at some point down the track tipping the balance in favour of the applicant being released on bail. That said, the current prospective delay is not such as to show compelling reason why the applicant, with his history, should be released on bail.”

At [37]-[44] Beach JA discussed dicta of Crennan J in *Paduano v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 143 FCR 204 at [31], [32] & [37]-[39], of the Full Court of the Federal Court in *Babicci v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 141 FCR 285 at [21]-[24], of the High Court in *Plaintiff M64/2015 v Minister for Immigration & Border Protection* (2015) 258 CLR 173 at 187-188 & 197, of Ashley and Priest JJA in *Gul v The Queen* [2017] VSCA 153 at [48] and of Weinberg, Whelan & Priest JJA in *DPP v Hodgson* [2016] VSCA 153 on the meaning of the words and phrases ‘compel’, ‘compelling’, ‘compelling reasons’, ‘substantial and compelling reasons’ and ‘substantial and compelling circumstances’ in various other pieces of legislation. At [46]-[47] Beach JA concluded:

“[46] It is well established that exceptional circumstances within the meaning of [s.4A] of the Act may, in an appropriate case, consist of a combination of a number of circumstances relating both to the strength of the prosecution case against the applicant and the personal circumstances of the applicant. **Similarly, an inquiry under [s.4C] as to whether an accused shows compelling reason why his or her detention in custody is not justified is an inquiry that involves a consideration of all of the relevant circumstances including the strength of the prosecution case and the history and personal circumstances of the accused.** When one takes account of all of the matters required to be taken into account in a particular application, the question becomes whether there is compelling reason why the particular applicant's detention is not justified. **For an applicant to show ‘compelling reason’, a synthesis or balancing of all relevant matters must compel the conclusion that the applicant's detention in custody is not justified.**

[47] While one must be careful not to substitute other expressions for the language used in the Act, **compelling reason** would likely be shown if there existed forceful, and therefore convincing, reason showing that, in all the circumstances, the continued detention of the applicant in custody was not justified [See cases of *Paduano* & *Plaintiff M64/2015*.] It is not, however, necessary for an applicant required to show compelling reason, to show a reason which is irresistible or exceptional. Such a requirement would place the bar at too high a level in a scheme where the exceptional circumstances test exists as the most onerous test under the Act...While again one should guard against substituting the statutory language, in terms of responsibility, **‘compelling reason’** in

[s.4C] of the Act might appropriately be described as reason which is difficult to resist.”

This test was approved by the Court of Appeal in *Rodgers v The Queen* [2019] VSCA 214 at [43]:

- “(1) For an applicant for bail required to show a compelling reason, a synthesis or balancing of all relevant matters (including those identified in s.3AAA) must compel the conclusion that the applicant’s detention in custody is not justified.
- (2) It is not, however, necessary for an applicant required to show a compelling reason, to show a reason which is irresistible or exceptional.
- (3) A compelling reason is one which is forceful and therefore convincing – a reason which is ‘difficult to resist’: *Re Alsulayhim* [2018] VSC 570 [27]-[28] (Beach JA); see also *Re Ceylan* [2018] VSC 361 (Beach JA).”

As Riordan J noted in *Re Kurt Gaylor* [2019] VSC 46 at [15] in the course of applying the above test enunciated by Beach JA in *Re Ceylan*:

“The statutory provisions which were applied in *Re Ceylan* were subsequently amended on 1 July 2018, 3 September 2018 and 1 October 2018. However, the current provisions were considered by Beach JA in the recent bail decision of *Re Alsulayhim* [2018] VSC 570. As to the impact of the intervening amendments to the Act he held at [28]-[29]:

‘While the statutory language is slightly different, the expression ‘compelling reason’ remains. Having considered s.4C in context, there is no reason to depart from the analysis or holding in *Ceylan* concerning the proper construction of the expression “compelling reason”...Put shortly, the applicant in the present case, if he is to be successful, must establish a compelling reason (in the sense of a reason that is forceful and therefore convincing) that justifies the grant of bail.”

9.4.4.1 How does an accused show compelling reason (show cause)

In *Re Mustafa Tilki* [2003] VSC 483 at [11] Warren CJ commented that there seem to be few authorities as to how the question of showing cause should be approached, most of the authorities relating to cases where exceptional circumstances were required to be made out. Her Honour cited with approval from *DPP v Harika* where at [60]-[64] Gillard J discussed the concept of **showing cause**:

[60] In determining the issue of cause, it is necessary, at the outset, to identify the factors which led the Legislature to decree that bail should be refused. What those factors are, will depend upon the circumstances of each case.

[61] The relevant factors on the application by the respondent were, first, a weapon had been used during the commission of the alleged offence, which showed a propensity to resort to violence; secondly, the presence of the weapon provided the potential to cause serious physical and/or mental injury to a victim; thirdly, the probabilities are high that upon conviction, the respondent would be sentenced to a substantial term of imprisonment which may encourage him not to answer bail; and finally, there is a risk of the commission of another similar-type offence.

[62] These seem to me to be the relevant factors which underpin the decision by the Legislature to refuse bail where a person, in the commission of an indictable offence, uses an offensive weapon. There may be other factors which would be relevant.

[63] The respondent, as an applicant for bail, had to provide cogent evidence to answer these concerns before it could be said that his detention in custody was not justified. In considering the factors, the background of the respondent, his prior convictions, the strength of the case against him, and the history of previous grants of bail, were all relevant.

[64] His detention would not be justified if it was established that the risk of repeat offending was extremely remote, that the case against him was weak, that the probabilities were that he would not be sentenced to a term of imprisonment, that the use of violence was completely out of character, and that the possibility of re-offending, using a weapon, was remote. In considering the issue of cause, it is necessary to consider the applicant's past in making an assessment of whether he should be detained.”

See also *DPP v Haidy* {aka *Vasailley*} [2004] VSC 247 where Redlich J said at [8]:

"In circumstances such as the present, Parliament has prescribed that where an indictable offence has allegedly been committed whilst on bail for an indictable offence, the onus rests upon the Applicant to show cause why he should not be detained in custody. See for example: *DPP v Parker* [1994] MC 166 per Mandie J; *R v Buckle* [2003] VSC 352; *DPP v Tilki* [2003] VSC 483. In *DPP v Harika* [2001] VSC 237 at [60-66] Justice Gillard explored the circumstances which might give rise to establishing sufficient cause."

In *Woods v DPP* [2014] VSC 1 at [51] Bell J said:

"By the express terms of s 4(4)(a)-(d), the onus of showing cause is on the applicant: *DPP v Harika* [2001] VSC 237, [41] (Gillard J); *Haidy* [2004] VSC 247, [8] (Redlich J); *Asmar* [2005] VSC 487, [11] (Maxwell P). **Again the precise nature of that onus has not yet been explored. As with exceptional circumstances, the considerations which may be relevant to showing cause are not specified. Each case must be assessed according to its own facts and circumstances.** A particular factor or (more usually) a combination of factors may result in an accused showing cause: *Harika* [2001] VSC 237, [47] (Gillard J)."

A good illustration of **showing cause** can be seen in the judgment of Croucher J in *MA v EM* [2014] VSC 11. In that case, the 16 year old applicant who had a mild intellectual disability had initially been bailed several times on successive sets of charges of dishonesty and driving offences. He had pleaded guilty to those charges in the Children's Court and sentence had been deferred. During the deferral period he had been charged with further offences of theft from cars, theft of petrol and unlicensed driving allegedly committed while on bail. At [12] Croucher J said that the informant opposed bail on the grounds that MA was an unacceptable risk of committing further offences but-

"...conceded that MA had 'shown cause', particularly given his youth and lack of prior convictions. In light of those and other factors, I accept that concession. The other factors include the fact that MA's intellectual disability is still under investigation and the fact that, were he found guilty of the new charges, it is extremely unlikely that MA would receive a custodial sentence let alone be sentenced to a term of more than the 20 days he had already spent in custody. Further, also relevant to whether cause had been shown were the matters to be discussed [in relation to the issue of unacceptable risk]."

In *Re Rodgers* [No 2] [2019] VSC 760 the 34 year old applicant who had no prior criminal history was charged with 33 offences against his wife and her children. He was required to show a **compelling reason** for granting bail. He had been refused bail in the Ballarat Magistrates' Court and by Tinney J on appeal: see *Re Rodgers* [2019] VSC 553. His appeal to the Court of Appeal had been refused: see *Re Rodgers* [2019] VSCA 214. Subsequently he had refused summary jurisdiction and consequently his trial which had been anticipated in about January 2020 was unlikely to be listed before October 2020. Beach JA granted bail, holding at [30]:

"There are matters in the surrounding circumstances that do not tell in the applicant's favour. These matters have been referred to before and include the seriousness of the allegations of strangulation and the fact that the complainant is afraid of the applicant and does not want him released on bail. Having synthesised all of the relevant circumstances — including those enumerated in s 3AAA of the Act — I have come to the conclusion, however, that the applicant has now established a compelling reason justifying the grant of bail. The lack of a negative bail history, the modesty of the applicant's criminal history, his personal circumstances, his financial circumstances to which extensive reference has already been made in the earlier reasons for judgment, the time he has already spent in custody, the period of any likely sentence and the material and recommendations in the CROP report, taken together, in my view establish a compelling reason justifying why the applicant should now be granted bail."

The cases discussed above in paragraphs 9.4.1 to 9.4.3 in which the applicant succeeded in showing exceptional circumstances are also of general relevance to the issue of showing cause, since in some respects the issues overlap and the "hurdle" is higher in the exceptional circumstances category.

9.4.4.2 Where likelihood of sentence is less than the time already spent in custody

Two of the "surrounding circumstances" in s.3AAA(1) of the **BA** that a bail decision maker is required to take into account are:

- (k) the length of time the accused is likely to spend in custody if bail is refused;
- (l) the likely sentence to be imposed should the accused be found guilty of the offence with which the accused is charged.

In *Re Johnstone [No 2]* [2018] VSC 803 the 38 year old accused – who had no prior convictions and who did not enjoy perfect mental health – was charged with making a threat to kill a neighbour with whom he had been in dispute for some time, with contravening a personal safety intervention order, with committing an indictable offence whilst on bail and with contravening a conduct condition of bail. He had been in custody for 4 months. Beach JA granted bail, holding at [20] & [24] respectively-

- that it was a compelling reason that it was “very unlikely that the applicant will (if convicted) be sentenced to a term of imprisonment of the length of the time he has already served in custody”; and
- that he was “not satisfied that there is an unacceptable risk of the kind referred to in s.4E which cannot be appropriately mitigated by specific bail conditions tailored to the present circumstances”.

In discussing generally the weight to be given to the likelihood of any sentence being less than the time already spent in custody, Beach JA said at [18]-[19]:

[18] “The fact that an applicant for bail might have already spent more time in custody than they are likely to be sentenced to on conviction is a very relevant circumstance in determining whether bail should be granted. Generally, and all other things being equal, the fact that an applicant for bail has already spent more time in custody than would be required by any sentence that might ultimately be imposed for the relevant offending, is a compelling reason justifying the grant of bail: Cf. *Re Magee* [2009] VSC 384 [20] where Forrest J concluded that the fact that an applicant for bail would likely serve more time on remand than would result from being convicted and sentenced was relevant in determining whether that applicant had shown cause why his continued detention in custody was not justified. See also s.1B(1)(b) of the Act, which requires the Act to be applied having regard to the importance of ‘the presumption of innocence and the right to liberty’. For such a circumstance not to constitute a compelling reason in a particular case, one would expect there to be other significant countervailing factors or circumstances affecting the synthesis required to be performed in order to determine whether a compelling reason within the meaning of s.4C of the Act exists.

[19] That is not to say that the likelihood of any sentence being less than time already spent in custody is determinative in favour of an applicant for bail who is required to satisfy the compelling reason test. The issue is an important one in the synthesis. However, it cannot determine the question. First, that is not what the Act says. Secondly, to allow the issue to be determinative would admit of the possibility of a particular applicant ignoring bail conditions on the assumption that bail would not be revoked because of the existence of an earlier (and perhaps lengthy) period of time in custody.”

See also *Re DR* [2019] VSC 151, [56] (Champion J); *Re Dillon* [2019] VSC 80, [41] (Maxwell P); *Re Logan* [2019] VSC 134, [72] (Elliott J); *Re Fleming* [2019] VSC 615 (Lasry J); *Re DG* [2019] VSC 622, [15] & [63] (Zammit J); *Re Barda* [2019] VSC 716, [24] & [39] (Weinberg JA); *Re Rodgers [No 2]* [2019] VSC 760, [29]-[30] (Beach JA).

However, in *Re Dib* [2019] VSC 11 at [10] Lasry J noted that the Court must still determine the matter notwithstanding the respondent’s concession that there was “a real likelihood that, if refused bail, the applicant would spend longer in custody than he would be likely to be sentenced to by a court for these offences.”

9.4.4.3 Unacceptable risk

In *DPP v Haidy* [aka *Vasailley*] [2004] VSC 247 Redlich J postulated a test of unacceptable risk which is clear and concise. At [18] his Honour held that “**the question of unacceptability [of risk] must be relative to all the circumstances**”. This is now described in s.4E(3)(a) as “[taking] into account the surrounding circumstances” as defined in s.3AAA(1) of the BA. His Honour held:

"Onus where a similar offence committed whilst on bail"

[12] The prosecution bears the legal onus to establish an unacceptable risk under s.4(2)(d)(i) of the Act. Where the Applicant has allegedly committed a similar offence within a short time after being granted bail, the prominent hypothesis arises that the Applicant will offend again if released. The Applicant thus has an evidentiary onus of persuading the court that he is not an unacceptable risk.

Degree of risk required

[14] Bail when granted is not risk free. *Williamson v DPP (Qld)* [1999] QCA 356.

[15] As the offender's liberty is at stake, a tenuous suspicion or fear of the worst possibility if the offender is released will not be sufficient. *Dunstan v DPP* (1999) 107 A Crim R 358; [1999] FCA 921 per Gyles J at [56]; *Williamson v DPP (Qld)*.

[16] **It is not necessary that the prosecution establish that the occurrence of the event constituting the risk is more probable than not. There are recognised conceptual difficulties associated with applying the civil standard of proof to future events. *Davies v Taylor* [1974] AC 207 at 212; *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 325 per Gleeson CJ. To require that the risk be proved to a particular standard would deprive the test of its necessary flexibility. What must be established is that there is a sufficient likelihood of the occurrence of the risk which, having regard to all relevant circumstances, makes it unacceptable. Hence the possibility an offender may commit like offences has been viewed as sufficient to satisfy a court that there is an unacceptable risk. *R v Phung* [2001] VSCA 81; *MacBain v Director of Public Prosecutions* [2002] VSC 321 per Nettle J.**

[17] Such an approach is consistent with the view adopted by the Full Court of the Federal Court in *Dunstan v DPP* (1999) 107 A Crim R 358; [1999] FCA 921 per Gyles J...

Circumstances other than degree of risk

[18] To assess whether the risk is unacceptable the court is required to have regard to the matters set out in s.4(3) of the Act and all other relevant matters. Some of those matters may not bear upon the degree of risk. The degree of likelihood of the occurrence of the event may be only one factor which bears upon whether the risk is unacceptable. Thus the time which will elapse before the offender's trial has been held to be a factor which may bear upon whether the risk is unacceptable. *Mokbel v DPP (No. 2)* [2002] VSC 312 per Kellam J at [41]. *Skura; Application for Bail; Mokbel v DPP (No. 3)* [2002] VSC 393.. As Kellam J was to say in *Mokbel (No. 3)* at [10]:

'The issue of detention by reason of unacceptable risk is an issue which must be balanced with the likelihood the allegations against an accused man then brought before a court in the near future. The question of unacceptable risk is to be judged according to proper criteria, one of which is the length of delay before trial; that is, although the risk might be objectively the same at different times, the question of unacceptability must be relative to all the circumstances, including the issue of delay.'

[19] His Honour's view accords with the common law position explained in *R v Martin* [1973] VR 854 and with the broad principle that public interest considerations may lead to bail being granted though the risk is relatively high or refused though the risk be minimal. *R v Wakefield* (1969) 89 WN (Pt 1) (NSW) 325."

In *Robinson v R* [2015] VSCA 161 the judgments of Redlich JA & Priest JA both referred with approval to the above dicta from *DPP v Haidy*. In particular Redlich JA said at [65]:

"It may be acknowledged that any grant of bail must carry some risk. Subsection 4(2)(d)(i) is prefaced on the assumption, however, that there are some risks which are acceptable; and that, in certain situations, what might initially be an unacceptable risk may be rendered an acceptable risk (for example, by the imposition of appropriately restrictive conditions of bail)."

In the Queensland Court of Appeal in *Williamson v DPP (Qld)* [1999] QCA 356 Thomas J at [21] emphasised the important distinction between an **unacceptable risk** and **any risk**:

"No grant of bail is risk-free. The grant of bail however is an important process in civilised societies which reject any general right of the executive to imprison a citizen upon mere allegation or without trial. It is a necessary part of such a system that some risks have to be taken in order to protect citizens in these respects. This does not depend on the so-called presumption of innocence which has little relevance in an exercise which includes forming provisional assessments upon very limited material of the strength of the Crown case and of the defendant's character. Recognising that there is always some risk of misconduct when an accused person, or for that matter any person, is free in society, one moves to consideration of the concept of unacceptable risk."

In granting bail in *Re Application for Bail by Patricia Mitchell* [2013] VSC 59 at [11], T Forrest J discussed the legal principles in relation to unacceptable risk as follows:

"The legal principles that I must apply are clear enough. The question of whether the applicant is an unacceptable risk of re-offending is not a discrete question in an application, nor is it necessarily determinative. It must be considered with all the other factors relevant to bail against the background that the applicant is *prima facie* entitled to bail. Those other factors *inter alia* are these:

- (a) the likely seriousness of that re-offending;
- (b) the likely sentence that could be imposed should the applicant be convicted of the offences upon which bail is sought;
- (c) whether and to what extent the applicant is a flight risk;
- (d) whether and to what extent the applicant is a risk of interfering with witnesses;
- (e) the fact that, if there is re-offending, the criminal process will deal with that; and
- (f) any personal factors that may attach to the applicant."

Although he was "satisfied that there is a real prospect that the applicant will re-offend whatever conditions are imposed", his Honour granted bail on the basis that the applicant had spent nearly seven weeks on remand and it is "unlikely that she would be sentenced to a longer term of imprisonment for the current offences".

In *Fred Joseph Asmar* [2005] VSC 487 at [25] Maxwell P spoke of the difficulty of measuring risk:

"As to the risk of criminal behaviour if bail were granted, it is widely recognized that the prediction of future dangerousness is notoriously difficult: see e.g. *Veen v R* (1979) 143 CLR 458 at 463-5 per Stephen J; *Kable v DPP* (1996) 189 CLR 51 at 122-3 per McHugh J; *Attorney-General v David* [1992] 2 VR 46 at 61-2 per Hedigan J; *Fardon v Attorney-General (Qld)* (2004) 78 ALJR 1519 at 1542-3 [123]-[125] per Kirby J. Making predictions is difficult enough when the person has been found guilty of relevant, recent criminal conduct. How much more difficult it is when – as will always be the case with a bail application – the applicant for bail is presumed to be innocent of the matters charged."

And at [26] Maxwell P approved the following dicta of Fox J in *Burton v R* (1974) 3 ACTR 77 at 78:

"It is not normally a factor of any great weight adverse to the granting of bail that an accused person may possibly commit a crime while he is on bail. It should not readily be assumed that he might commit an offence, or further offence. If he does, he can be dealt with by the criminal law. There are, however, situations in which the consequences of any crime he commits while on bail may be so serious and have such a widespread effect that the possibility that he may commit a crime while on bail is an important consideration."

In *Woods v DPP* [2014] VSC 1 at [25], [27] & [28] Bell J discussed the concept of unacceptable risk when seen through the prism of human rights legislation and sounded various cautions, noting especially the need for appropriate evidence-based determinations focusing on the individual circumstances of the applicant:

[25] "It is established that the bail authority must carefully consider the facts and circumstances of the individual case and determine whether the continued detention of the accused is justified: *Matznetter v Austria* (1979–80) 1 EHRR 198, [8]-[9]; *Clooth v Belgium* (1992) 14 EHRR 717, [40]; *Yagci and Sargin* (1995) 20 EHRR 505, [50]; *Panchenko v Russia* [2005] ECHR 72, [106]. As was held in *Clooth v Belgium* (1992) 14 EHRR 717, [44], reliance by the prosecution on 'general and abstract' considerations and a 'stereotyped formula', without more, will be insufficient. Particular allegations, such that

the accused would disturb public order, must be based on facts reasonably capable of showing that kind of threat: *Letellier v France* (1992) 14 EHRR 83, [51]. Moreover, generalised concerns that an accused might abscond are not regarded as sufficient justification for refusing bail. For example, in *W v Switzerland* (1994) 17 EHRR 60, [33] the court stated:

‘the danger of absconding cannot be gauged solely on the basis of the severity of the possible sentence; it must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify pre-trial detention: see, as the most recent authority, *Tomasi v France* (A/241-A): (1993) 15 EHRR 1, [98]. In this context, regard must be had in particular to the character of the person involved, his morals, his assets, his links with the State in which he is being prosecuted and his international contacts: see *Mutatis Mutandis, Neumeister v Austria* (No. 1) (A/8): (1968) 1 EHRR 91, [10].’

Similarly, reference to a person’s record of prior offending is not sufficient, without more, to justify a conclusion that he or she might re-offend: *Muller v France* [1997] ECHR 11. The apprehension of danger associated with re-offending must be ‘plausible’ and refusal of bail must be ‘appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned’: *Clooth* (1992) 14 EHRR 717, [40]. Lack of a fixed residence (eg homelessness) or of work or family ties are relevant but not determinative: *Sulaoja v Estonia* (2006) 43 EHRR 36, [64].”

[27] “[C]ontinued detention is not compatible with human rights under art 5(3) [of the *Convention for the Protection of Human Rights*] unless the bail authority has considered alternative measures for ensuring the appearance of the accused at trial: *Jablonski v Poland* [2000] ECHR 685, [83]-[84]. Thus, in *Sulaoja v Estonia* (2006) 43 EHRR 36, [64] the court held that the detention violated the human rights of the applicant because guarantees of appearance at trial and a prohibition on him leaving his place of residence were not considered.

[28] “The *Human Rights Act 2004* (ACT) is very similar to the Victorian Charter. Human rights have been taken into account in the ACT in relation to bail. For example, in *Re Seears* [2013] ACTSC 187 Refshauge J was required by the *Bail Act 1992* (ACT) to take the likelihood of reoffending into account. After examining the jurisprudence of the European Court of Human Rights, his Honour said this of that requirement at [29]:

‘Thus, the fear of future offending must not be assumed merely from the applicant’s antecedents and the view of the risk must be reasonably held. This will require a court not merely to assess the risk of reoffending but also to consider other avenues such as bail conditions which may achieve the end desired, namely public safety, which must be made effective. It is not merely a function of viewing the criminal record of the applicant but looking at all the circumstances and coming to a view of the statutory test, namely ‘the likelihood of committing an offence’, particularly having regard to the well-known difficulty in making exact predictions of recidivism and dangerousness.’”

In *Re FA* [2018] VSC 372 the applicant was a 16 year old girl who had been charged with assisting an offender EV aged 19 years to avoid apprehension, with theft of a Lexus motor vehicle which had earlier been stolen in the course of an aggravated burglary and with possessing and using cannabis and methylamphetamine. In granting bail, Priest JA said at [22]-[26]:

“Ultimately, the respondent has failed to persuade me that the putative risks cannot adequately be addressed by the imposition of strict conditions.

It is a serious thing to consign a child to custody or detention pending the resolution of a criminal charge (or charges), particularly where — as here — it is far from a foregone conclusion that the child will receive a sentence involving detention consequentially upon a finding of guilt. **Indeed, in my view, the custody or detention of a child should be avoided unless unavoidable.**

In the present case, there seems little doubt that, should he be convicted of the charges that he faces, EV will receive a sentence involving his detention. The same cannot, however, confidently be said in FA’s case. Self-evidently, the two charges against her of assisting an offender are far from being the worst examples of that particular offence, far

more serious examples of such offending routinely coming before the courts. A similar observation might be made of the theft charge (the drugs charges being minor). Given that FA was aged 15 years at the time of offending, and is now only 16, it would be surprising if she received a sentence involving her further detention, particularly given that she has already been detained for 77 days.

In determining to grant bail, I do not ignore FA's prior breaches of the criminal law and her failures to comply with court imposed sanctions and orders (in particular, her failure to answer bail and her commission of an indictable offence whilst on bail). Nor do I ignore her extensive and unhappy history of involvement with the DHHS, or the opposition to bail of the families of the victims of EV's culpable driving. FA's circumstances are, however, the source of some sympathy. There is little doubt that she has had a traumatic childhood, has become ostracised from her parents and has struggled with her mental health and drug use, those circumstances having influenced her past behaviour.

Importantly, however, the evidence demonstrates FA's new and positive involvement with Youth Justice, which provokes some optimism that she may be able to turn her life around. More to the point, perhaps, that new and positive involvement with Youth Justice, coupled with the strategies that have been put in place to ameliorate the risks that FA will commit further offences, endanger a person or fail to answer bail, have persuaded me that the putative risks are capable of being rendered acceptable by the imposition of appropriately strict conditions of bail."

In *Ali El Nasher v DPP* [2020] VSCA 144 – in allowing an appeal against a refusal of bail by Tinney J – the Court of Appeal highlighted the balancing exercise imposed by s.4E in the evaluation of the acceptability or unacceptability of risk and "after anxious consideration...concluded that the respondent has failed to demonstrate that the appellant presents any of the identified forms of unacceptable risk". The Court "reached this conclusion upon the appellant agreeing to the imposition of a very stringent set of conditions." At [51]-[52] Priest, T Forrest & Weinberg JJA said [emphasis added]:

[51] "What constitutes an acceptable risk (or conversely, an unacceptable risk) will always be a question of fact and degree. There are 14 variables in s 3AAA ('surrounding circumstances') that must be considered, together with subsets within some of those variables; the weight given to those variables and their interaction with each other will vary from case to case. The end result will be a product of an informed, intuitive evaluation, and reasonable minds may well differ on that result.

[52] **Whilst we have considered each relevant surrounding circumstance, we have given significant weight to the nature and seriousness of the alleged offending, the strength of the prosecution case and the length of time the appellant is likely to spend in custody if bail is refused. We consider it likely that the appellant will spend up to three years in custody before his trial is completed.** We consider it high on inevitable (on the current evidence) that, should the prosecution see fit to proceed with them despite their obvious weakness, he would be acquitted of attempted murder and the causing serious injury charges. We consider he has, at the least, a real prospect of acquittal on attempting to intentionally cause serious injury simpliciter or in circumstances of gross violence. If these conclusions are correct, the appellant may well have served all or nearly all of any sentence that may be imposed on the 'attempt' alternatives or the minor charges (charges 5 to 8) before his guilt or otherwise on any of those charges is determined. This prospect weighs powerfully in the mix on the question of unacceptable risk. If the case were stronger, or the delay less than anticipated in this case, then other factors pulling in the opposite direction would likely assume more significance in the s 4E exercise."

9.4.4.4 SOME CASES IN WHICH COMPELLING REASON (CAUSE) WAS SHOWN AND BAIL WAS GRANTED

Michael Kanfouche

[Supreme Court of Victoria, Smith J, unreported, 04/04/1991]

Notwithstanding that the Crown case was very strong, his Honour found that the applicant had shown cause by the following factors in combination, though none of them alone would have sufficed:

- the applicant would have been in custody for 12 months before a trial had taken place;
- the serious state of the applicant's health; and
- the applicant's lack of English.

An appeal to the Appeal Division was dismissed.

Phillip Michael Groch

[Supreme Court of Victoria, Coldrey J, unreported, 13/06/1996]

The applicant was in a show cause situation, having been charged with stalking and having priors for violence within the last 10 years. His Honour found that cause was shown by a combination of matters including the applicant's first job prospect for 5 years and permanent accommodation. His Honour was also satisfied that the imposition of conditions prohibiting the applicant from attending at the complainant's address and requiring him to abstain from alcohol minimised the risk of re-offending.

R v Ilsley

[Supreme Court of Victoria, Williams J]

[2003] VSC 332

The applicant was in a show cause situation, having been charged with an offence of aggravated burglary involving use of a firearm and with cultivation of a narcotic plant. He had been in custody for more than 12 months. It was common ground that the DNA testing would delay the applicant's trial until approximately 2 years after his arrest. At [9]-[15] her Honour discussed a number of delay cases: *R v Medici* [Supreme Court of Victoria, Ashley J, unreported, 27/07/1993], *R v Alexopoulos* [Supreme Court of Victoria, Hampel J, {MC15/98}, 23/02/1998], *R v Kantzidis* [Supreme Court of Victoria-Smith J, unreported, 09/08/1996], *R v Mantase* [Supreme Court of Victoria-Vincent J, unreported, 21/09/2000], *R v Cox* [2003] VSC 245 per Redlich J, *Mokbel v DPP* [2002] VSC 127, *Mokbel v DPP* (No. 2) [2002] VSC 312 & *Mokbel v DPP* (No. 3) [2002] VSC 393 per Kellam J and *YSA v DPP* [2002] VSCA 149 per Phillips, Chernov & Vincent JJA. At [16] her Honour concluded that "the authorities referred to establish that a delay of two years between arrest and trial might, in combination with other factors, in the context of a particular case, constitute the requisite exceptional circumstances." Her Honour went on to hold at [17] & [24] that cause was shown by delay and by the availability of a permanent place of residence and at [32] that the applicant was not an unacceptable risk of failing to appear. In relation to housing her Honour said at [24]: "The availability of a permanent place of residence [his parents' home] was of some significance in the determination of whether the applicant had shown cause why his detention is not justified. His situation compared favourably with that of an applicant not assured of accommodation."

Jason Ghiller

[Supreme Court of Victoria, Eames J]

[2000] VSC 435

This was a high profile case, the accused being said to have committed the offences in the company of his uncle Debs, who was subsequently charged with the murder of police officers Silk & Miller. The DPP appealed against a grant of bail to the accused who had been charged with a series of armed robberies and with attempted murder and intentionally causing serious injury. The magistrate had found that cause was shown by a combination of factors:

- age of accused at time of alleged offences (15 to 18) cf. his age at time of application (24);
- absence of priors or allegations of subsequent offending;
- delay;
- strong family ties, permanent address and employment.

His Honour held that the magistrate was not manifestly in error in determining that these factors discharged the onus and in concluding the accused was not an unacceptable risk of absconding. The appeal was dismissed.

Williamson v DPP (Qld)

[Court of Appeal, Queensland]

[1999] QCA 356

The applicant had been charged with armed robbery with violence in company. The victim, a 63 year old widow, arrived home to find two men had broken into her house. She was threatened with violence and had a pillow slip placed over her head and tightened. The applicant and his co-offender remained in the house for an hour. They left the victim tied up when they left taking her possessions in her car. The applicant was refused bail in the Supreme Court of Queensland and appealed to the Court of Appeal. The appeal was allowed for the following reasons at [23]:

"...[O]n the whole of the evidence placed before the court, including the appellant's former successful responses to bail, the very tenuous nature of the suspicion that he might re-offend before he is tried and the disincentives against re-offending that are provided by the proposed grant including the requirement of a substantial surety, the finding that there is an unacceptable risk that the appellant while released on bail would commit an offence was not reasonably open."

DPP v Stewart

[Supreme Court of Victoria-Morris J]

[2004] VSC 405

The 18 year old applicant had been in custody for 1½ months on 2 charges of armed robbery. His Honour held that cause was shown by the following 6 factors in combination:

- applicant had just turned 18;
- applicant suffers from an intellectual disability, possibly affected by "chroming";
- grandmother was offering her home and will provide love and care to the applicant;
- offences occurred during a period of transition between provision of services being provided to him as a person under 18 and adult services; and
- there are a number of support networks that are willing to assist the applicant in the community, namely Department of Health & Human Services, West Care & an aboriginal co-operative designed to deal with substance abuse; and
- there was a prospect that if convicted the appropriate sentence might be less than the remand period.

At [11] his Honour noted the relevance of the conditions of bail to the question of 'unacceptable risk':

"What is an unacceptable risk must be considered in the context of the conditions to which bail will be subject if bail is granted. In this case the conditions I propose will require a great deal of support from other people, which will be freely given. I think with that support there is a sufficient prospect of reducing the risk to one that is acceptable rather than unacceptable."

Baris Nezif

[Supreme Court of Victoria-Habersberger J]

[2005] VSC 17

The applicant was charged with aggravated burglary, intentionally causing injury to his wife, unlawful assault on his wife and brother-in-law and criminal damage to the wall of the house owned by his wife and himself. The alleged offences occurred shortly after the applicant and his wife resumed cohabitation after a short separation. He was in a show cause situation because of the charge of aggravated burglary [s.4(4)(c)]. His Honour held that cause was shown, taking into account:

- affidavits from the applicant's wife and mother-in-law asking that he be granted bail;
- the applicant's family was by and large dependent on the applicant's income to meet a very substantial mortgage on their home;
- the application was supported by a programme put forward by a bail support programme operating out of Melbourne Magistrates' Court; and
- the applicant was able to undergo an assessment for the development of an anger management plan with the Creative Living Centre.

Fred Joseph Asmar

[Supreme Court of Victoria-Maxwell P]

[2005] VSC 487

The 28 year old applicant was charged with three counts of false imprisonment, three counts of making threats to kill, three counts of making threats to inflict serious injury, two counts of unlawful assault, one count of possession of an unregistered firearm and one count of impersonating a member of the police force. It was alleged that at about 2.30am the applicant had got out of a vehicle holding a black handgun. He pointed the gun at three victims who had been performing and videotaping 'slide outs' in a Ford Laser Coupe, swore at them and threatened to shoot them. He told the victims to get down on their knees which they did. He looked at the licence of one of the victims and then told them to go home and not come back. He was in a show cause situation because of his alleged threat to use a firearm. His Honour held that cause was shown, holding that:

- the risk of the applicant committing another offence whilst on bail was small;
- if bail were refused the applicant would be in custody awaiting trial for something in the range of 14-16 months; and
- there were very powerful reasons – including the applicant's family circumstances - for thinking that the applicant would comply strictly with the bail conditions, including a condition that he not have any contact with prosecution witnesses.

R v Weaver

[Supreme Court of Victoria-Nettle JA]

[2006] VSC 102

The 42 year old applicant was charged with making a threat to kill and with an offence against s.22 of the Crimes (Family Violence) Act 1987. Three months before he had been convicted of similar

charges. Pursuant to s.4(4)(ba) of the **BA** he was in a show cause situation. In granting bail Nettle JA took into account evidence of good character of the applicant, his new relationship and the severe economic consequences for the applicant's business if he was to remain in custody. At [27] His Honour held that the risk of re-offending and the risk of possible harm to the victim "may be reduced to an acceptable level by imposing [appropriate] conditions".

Griffiths v DPP

[Supreme Court of Victoria-Bongiorno J]

[2007] VSC 268

The 35 year old applicant was charged with a number of indictable offences, the most serious of which was probably blackmail but also including threats to kill and breach of an intervention order. He had prior convictions for driving offences. He had been in custody for about 1½ months awaiting a committal some 6 months hence. In holding that the applicant had shown cause, Bongiorno J noted that:

- if the applicant were convicted it is not beyond the bounds of probability that he would receive a non-custodial sentence and even if he received a custodial sentence it is not unlikely that he would have served at least as long on remand if he were not bailed;
- the police informant's concerns as to the applicant interfering with witnesses or committing further offences if he is bailed could be allayed by releasing the applicant on bail subject to non-contact conditions and by placing him under the effective supervision of his aunt.

Kelly Michael Gray

[Supreme Court of Victoria-Bongiorno J]

[2008] VSC 4

The applicant was charged with aggravated burglary and associated charges, including possession of an unregistered .38 calibre firearm, arising from a home invasion in which the occupant was alleged to have been assaulted by the applicant with a baseball bat or similar weapon. He had one relevant prior conviction 13 years before for assault occasioning actual bodily harm for which he was sentenced to 2 years gaol. Bail had been refused by a magistrate 6 weeks before. In holding that the applicant had shown cause, Bongiorno J noted that:

- though for obvious reasons it is generally inappropriate for a court to canvass the strength of the Crown case on a bail application, there was certainly a case against the applicant to be considered by a jury;
- the delay which may well attend the finalization of the case was such that the applicant might serve more time on remand than his ultimate sentence, this being a significant matter on any consideration of bail at common law or in light of the Charter of Human Rights and Responsibilities Act 2006;
- there was no real risk of the applicant fleeing the jurisdiction; and
- there was little tangible evidence that the applicant would re-offend or interfere with witnesses.

Michael O'Connor

[Supreme Court of Victoria-Cummins J]

[2008] VSC 233

The applicant, who was 19 years old, had been charged with two sets of offences. The first dating from 19/10/2007 involved charges of aggravated burglary, intentionally/recklessly causing serious injury, assault with a weapon and assault in company. A magistrate had originally granted him bail on those charges on 21/01/2008 but he had not reapplied for bail when committed to stand trial on those charges on 12/05/2008. While on the original bail he was charged with offences of intentionally/recklessly causing injury, assault in company and assault by kicking allegedly committed on 26/04/2008. In granting the applicant bail in relation to both sets of charges, Cummins J noted:

- The youth of the applicant "of itself would not justify bail".
- It was a combination of youth, significant support both from family and in the form of a rehabilitation program prepared for the applicant by a psychologist and the likelihood of significant delay which satisfied his Honour that the applicant had shown cause.

Lawson Odlum

[Supreme Court of Victoria-Lasry J]

[2008] VSC 319

The applicant was 21 years old and had no prior convictions. He had been charged with a number of offences including attempted murder, intentionally causing serious injury, threat to kill, possess a prohibited weapon, possess a controlled weapon and possess amphetamine. The charges arose out of an alleged "road rage" incident. Bail had been refused by a magistrate 10 weeks before. In holding that the applicant had shown cause, Lasry J noted that:

- The applicable principles were set out by Maxwell P in *Re Fred Asmar* [2005] VSC 487.
- The alleged offending was “not a step in a pattern of violence but [was] almost inexplicably isolated”.
- The accused’s mother, a conscientious and honest witness with a positive influence on her son, gave an undertaking that she would notify the informant if she became aware of a breach of any conditions of bail.
- The accused had had a consistent work history and there was a high chance of him obtaining employment if he was released on bail.
- The accused had been accepted for the Court Integrated Services Program (CISP) at Melbourne Magistrates’ Court.

Kylie Vickers

[Supreme Court of Victoria-Cavanough J]
[2009] VSC 202

The applicant was facing summary prosecution of drug and other offences allegedly committed whilst on bail. There were five matters which in combination satisfied his Honour that the applicant had shown cause and reduced any risk of re-offending “to a level beneath the unacceptable”:

1. The period during which she would be held in custody pending the hearing was likely to exceed any sentence of imprisonment if she was found guilty of the offences [see *R v Gray* [2008] VSC 4 per Bongiorno J; *Re Walker* [2007] VSC 129 per Cavanough J; *R v Hildebrandt* [2006] VSC 198 per King J].
2. The applicant’s detoxification while in custody.
3. The fact that her “on and off partner” was in custody.
4. The applicant had been assessed as suitable for the Magistrates’ Court CREDIT bail program; even though the applicant had been through that program previously, his Honour expected it to have some beneficial effect on her future conduct, particularly in combination with the fact that she has now experienced relatively lengthy custody for the first time;
5. The set of special conditions upon which she was to be released on bail.

At [18] Cavanough J also referred with approval to the dicta of Eames J in *DPP v Jason Ghiller* [2000] VSC 435 at [43] – approved by Maxwell P in *Re Asmar* [2005] VSC 487 at [15] & [25] – that even in a show cause situation “the primary question relevant to a grant of bail is whether a person will meet the conditions of bail and attend at the trial, and as required.”

Luke Clegg

[Supreme Court of Victoria, Hollingworth J]
[2012] VSC 317

The applicant was charged with 6 counts of burglary, 6 counts of theft and 1 charge of attempted theft allegedly committed while he was on bail for other offences. In granting bail, Hollingworth J imposed conditions which she was satisfied converted an unacceptable risk into an acceptable one:

“Certainly, given the applicant’s history, it is fair to say that he has not demonstrated any particular respect for the law in the past. However, I have no doubt that his drug addiction and intellectual impairment have played some role in that. In the circumstances, it cannot be said that there is no risk of the applicant committing further offences, or breaching his bail; but, given the very rigorous conditions of bail which I propose to impose, I am satisfied that those risks are not unacceptable.”

Roque Pasqua

[Supreme Court of Victoria-Lasry J]
[2013] VSC 132

The 50 year old applicant was charged with two sets of offences. The first set included possession, trafficking and use of methylamphetamine, retention of stolen goods, dealing with property suspected of being the proceeds of crime and failing to answer bail. The second set included receiving stolen goods, possessing drugs of dependence and breach of a suspended sentence. He was in a show cause situation pursuant to ss.4(4)(a) & 4(4)(ca) of the **BA**. The applicant had already been in custody for 6 months. His Honour was told by the informant that the delay in the matter being heard could be as great as another 12 months whilst he waits for forensic analysis of material seized from the applicant when he was arrested, a situation described by his Honour as “an extraordinary state of affairs”. The applicant had family support and had been approved for participation in the Court Integrated Services Program. In granting bail Lasry J said at [23]:

“It would seem to me that the use of this program and what appears to be a desire on the part of the applicant to submit himself to the program and to do something about his addition to drugs and other circumstances to which I have referred leave me in a position

where although there is a risk in his release on bail, as there is in most cases, that risk can be ameliorated by conditions which will make the risk acceptable.”

RS

[Supreme Court of Victoria, Elliott J]
[2013] VSC 350

The applicant who was aged 16y 2½m had until recently had no criminal record. Over a period between 07/05/2013 and 26/06/2013 he was arrested and charged on four separate occasions. The offences included 4 counts of obtaining financial advantage by deception, 3 counts of obtaining property by deception, 5 counts of theft from a motor vehicle, 1 count of theft and 1 count of possessing a prohibited weapon. In addition on 14/05/2013 and again on 05/06/2013 the applicant was arrested for breaching the curfew condition on bail on which he had been released. He had been remanded in custody on 26/06/2013 and on 03/07/2013 an application for bail was refused by the Children’s Court. In the Supreme Court a youth justice worker and gave evidence in support of bail being granted. Although opposing bail, the informant was “very supportive of the applicant and quite sympathetic to his circumstances”. In granting bail, Elliott J said at [20]-[21]:

“I have decided that the applicant’s detention is not justified and that it is appropriate to grant bail in the circumstances. Given that the level of support which is now being made available to the applicant, together with the applicant’s change of attitude in relation to drug use and counselling, I believe his prospects have been considerably improved. Further, the applicant is obviously respectful to the authorities, including the police. If he is required to report regularly to a local police station it is likely that will substantially reduce the risk of reoffending.

I am also persuaded that, given he has already spent approximately 2 weeks on remand, there is a real prospect that his term of imprisonment might be as long or even longer than the length of time he might spend imprisoned in the event that he were to plead guilty to the charges laid against him: see *In the matter of an Application for Bail by Patricia Mitchell* [2013] VSC 59, [12]. Finally, if the applicant was to be held until the trial of his offences, there is a real basis for being concerned that the extended period of incarceration would have a significantly deleterious effect on him.”

Nicholas Kiourellis

[Supreme Court of Victoria, Bell J]
[2014] VSC 1 at [109]-[119]

The applicant who was aged 20y 7m had no criminal history. He had been on remand for several days on charges including 3 counts of trafficking a drug of dependence (MDMA ecstasy). Bail had been refused on the basis that he had not shown cause and was a risk of further offending. He comes from a supportive and loving family. His offending was related to drug addiction which appears to be related to an untreated mental illness of unknown severity. Bell J held that with support and appropriate conditions of bail the risk of reoffending to support his drug dependence could be acceptably managed. Only modest reporting was required as the applicant is not a flight risk. There should be a residential condition for the applicant to reside at the address of his family to minimise the risk of relapse and further offending. There is no need for a surety or curfew.

MA

[Supreme Court of Victoria, Croucher J]
[2014] VSC 11

Applicant aged 16 with mild intellectual disability – Applicant initially bailed several times on successive sets of charges of dishonesty and driving offences – Applicant pleaded guilty to those charges in Children’s Court – Sentence deferred until April 2014 to allow further assessment by Client Disability Services – Applicant charged with further offences of theft from cars, theft of petrol and unlicensed driving allegedly committed whilst on bail – Applicant has shown cause why detention not justified – Respondent has not shown an unacceptable risk of offending on bail – Bail granted on own undertaking with conditions including curfew, direction to attend school and prohibition on driving a motor vehicle.

Peter John Hewat

[Supreme Court of Victoria, Rush J]
[2014] VSC 240

Applicant who had two other sets of charges pending had had bail refused in Supreme Court. Subsequently he had received suspended sentences of imprisonment on those two other sets of charges. Rush J held at [16] that the risk of the applicant re-offending is lessened in circumstances where he is subject to two suspended sentences. Applying the reasoning of Kellam J in *Mokbel v*

DPP (No 3) [2002] VSC 393 at [6], Rush J held at [17] that the lengthy delay in obtaining a date for trial of the current offences, which had not yet been subject to a committal hearing, was “a significant factor in determining it is appropriate to grant the applicant bail.”

Michael Murray

[Supreme Court of Victoria, Garde J]

[2014] VSC 249

Applicant, who was the Victorian commander of the Comanchero Motorcycle Club, was charged with offences of making a threat to kill, assault and attempting to pervert the course of justice allegedly committed when he was on bail for charges of possessing drugs of dependence (testosterone and human growth hormone) and firearms offences. He was therefore in a show cause situation. After referring to the cases of *DPP (Cth) v Barbaro* (2009) 20 VR 717, *Woods v DPP* [2014] VSC 1 & *Re Hewat* [2014] VSC 240, Garde J held that the accused had shown cause: “The significant delay to trial of 12-18 months tips the scale in favour of granting bail, albeit bail only on the most stringent conditions.” These included a surety of \$1 million, daily reporting to police and a curfew between 9pm and 6am each day.

TM v AH & Ors

[Supreme Court of Victoria – Croucher J]

[2014] VSC 560 – a most compassionately written judgment

Applicant is an Aboriginal boy aged 14 with a significant intellectual disability: “IQ has been estimated at 70 when aged six, 50 when aged eight, 52 when aged 11 and as low as 43 when aged 12. As recently as last year, a psychologist opined that he was *doli incapax*. He reads but barely at the level of a prep child. He does not understand concepts such as time, in terms of the hour of the day, but recognised sunset and sunrise. He finds difficulty grasping the notion that his case in this Court was adjourned from a Friday to the next Wednesday. A psychologist has advised that any spoken instruction must be given to TM in brief sentences presenting just one idea at a time.” Referring to s.3A of the **BA** [as to which see section 9.4.11 below] Croucher J said: “TM’s ties to his family and home are strong, yet he is a long way from them at the moment and has been in that situation for nearly six months.” The applicant was refused bail by a magistrate pending appeal against a 10 month sentence of detention in YRC and in respect of several other charges for offences, some of which were allegedly committed while on bail. TM was held to have shown cause based on his tender age, his intellectual disability, his lack of prior convictions, the requirements of s.3A of the **BA**, the reasonable prospect that he will receive a non-custodial sentence on appeal and on the outstanding charges as well as the proposed regime put in place for his release, all of which compelled the view that his further detention in custody was not justified. Further these same considerations, particularly the plan for his release together with the conditions of bail imposed, led to Croucher J being satisfied that there was not an unacceptable risk that TM would commit offences or endanger his own or the public’s safety if released on bail with conditions including residence, a curfew, a prohibition on driving a motor vehicle and compliance with directions of the Department of Health & Human Services.

Robinson v R

[Court of Appeal – Maxwell P, Redlich & Priest JJA]

[2015] VSCA 161

Forrest J had refused bail to an alleged trafficking conspirator and drug debt enforcer who wrote to a co-accused from prison indicating that he needed to get out of prison so that he could make money to pay his lawyer. His Honour held that the applicant had not shown cause despite a probable 2 year delay, the availability of a surety of \$50,000 and the availability of residential rehabilitation at Recovery OZ. The Court of Appeal allowed the appeal and granted bail on strict conditions. The issue of delay was very significant. The investigation had produced 30,000 telephone communications resulting in approximately 6,000 pages of transcript, 1,000 hours of surveillance material, 100,000 mobile calls and over 100 statements. The case was not likely to be ready/reached until late 2016 resulting in the accused being in custody for some 2 years prior to trial. At [87] Priest JA concluded:

“Against the background of a two year delay in the matter coming to trial, it is unjust to keep the applicant in custody in circumstances where the risk of re-offending and interfering with witnesses can, in my view, adequately be addressed by appropriately strict conditions. Appropriately restrictive conditions will render the putative risks acceptable. Once such conditions are in place, given the delay, it is not open to conclude other than that the applicant has satisfied the burden of showing cause why his detention in custody is not justified.”

Luke James

[Supreme Court of Victoria – Rush J]

[2015] VSC 175

The 24 year old applicant had been placed on 3 CCOs and was non-compliant as well as reoffending. Additionally, he had produced falsified documentation from his employer explaining non-attendance at mandatory appointments. He was charged, *inter alia*, with trafficking and possession of several types of drugs and released on bail in August 2014. He was further charged on summons with offences including possession of scales, cash and a baseball bat in December 2014. In March 2015, he was charged with trafficking ice and ecstasy, being in possession of proceeds of crime as well as a prohibited weapon. He was refused bail at Ringwood Magistrates' Court. On appeal, Rush J granted him bail due to his age and the fact that he had been in custody for the first time. His Honour's reasons included at [10]:

“Thirdly, on 7 April 2015, Credit Bail assessed the applicant as a suitable candidate for their program. Ms Joanne Spanos, of Credit Bail, gave evidence at the applicant's bail hearing in April that she would be willing to provide increased support to the applicant, with a particular focus towards addressing his drug abuse problem. The applicant has also been deemed suitable to participate in a rehabilitation program conducted by Mr Kerry Cussen, who is a drug and alcohol counsellor at SalvoCare. Senior Constable Hutchinson agreed this program would be rehabilitative if complied with. The support and supervision being offered by Credit Bail and SalvoCare is an imperative ingredient to any grant of bail. It is put that the application will take active steps to address his drug addiction and therefore continue to remain drug free as he has been since he entered remand four to five weeks ago. Additionally, the applicant understands any breaches of the stringent conditions imposed ensuring participation in these programs, including non-attendance at appointments, will be reported to the Court immediately and will be a breach of bail conditions.”

Nguyen v R

[Supreme Court of Victoria – T Forrest J]

[2015] VSC 69

Ms Nguyen was 25 years old and 4 months pregnant and had several priors for trafficking. She was charged, along with her co-accused, with possession of 311g of heroin, 52g of ice (valued at \$123,000), a taser, a police baton, a hunting knife, an imitation gun, \$22,845 in cash and a hydraulic heroin press among other paraphernalia. His Honour was satisfied that the delay before coming to trial was likely to be significant. At [14] his Honour said: “After anxious consideration, I consider that the applicant's current circumstances, and the supports offered to her if released on bail, are sufficient to mitigate the high risk of her re-offending to an acceptable level.” Included amongst those supports was an integrated services program which had been prepared for the applicant and which included level 2 intermediate case management by the CISP team.

Giurguis

[Supreme Court of Victoria – Priest JA]

[2015] VSC 242

Mr Giurguis was charged with digital penetration, threats to kill, false imprisonment, stalking, indecent assault and unlawful assault. The accused and the complainant had renewed a distant friendship and began using ice together. The accused became obsessed with the complainant. The allegations of the two incidents are chilling. At [47] his Honour said: “[T]he applicant does not pose an unacceptable risk in the manner posited by the respondent. Any risk may be adequately controlled by conditions of bail.”

SG v TA

[Supreme Court of Victoria – Croucher J]

[2015] VSC 264

This was an application for bail by a 15 year old boy charged with robbery, theft and blackmail and with committing those indictable offences while on bail. The applicant has prior and subsequent findings of guilt. His Honour held that the applicant had shown cause why his detention was not justified and the respondent had not shown that the applicant was an unacceptable risk of offending or interfering with the course of justice if bailed. At [20] & [32] his Honour said:

[20] “In my view, it is far preferable, from both the applicant's and the community's perspectives, that a boy of the applicant's age and history be in the community furthering his education and employment prospects than housed in a detention centre with older

and probably more criminally-experienced boys and risking the contamination that sometimes occurs in such an environment.

[32] In particular, the following matters, in combination, satisfy me that the applicant's detention in custody is not justified and that such risks as the informant is concerned about were bail to be granted are not unacceptable: the accommodation and support provided by the applicant's parents; the applicant's youth; his impressionability in detention; the weaknesses in the prosecution case; the preparedness of Youth Justice to supervise him; the applicant's behaviour while in detention; the educational regime proposed upon his release; the potential employment opportunity his brother is seeking; the real risk that, if bail were refused, the time spent in custody before the ultimate hearing could exceed any penalty imposed upon a finding of guilt; and the proposed conditions of bail."

Re BKT

[Supreme Court of Victoria – Champion J]

[2018] VSC 240

The 16 year old applicant was charged with theft [allegedly having snatched a mobile phone] and committing an indictable offence whilst on bail. He had been refused bail and remanded in custody by the Children's Court 7 days before. He was in a show cause situation, having been on bail at the time of the alleged offence. In granting bail with strict conditions Champion J took into account the matters in s.3B(1) of the Bail Act relating specifically to children and also that the respondent did not resist the conclusion that cause had been shown by the applicant, subject to the Court's ruling and the imposition of suitable bail conditions. His Honour also found that the prosecution had not demonstrated that the applicant was an unacceptable risk.

Riko Tomas

[Supreme Court of Victoria – Croucher J]

[2016] VSC 476

The applicant was charged with attempted murder, affray and other offences against the person. He was alleged to have been part of a group of men who attended business premises to remonstrate with another person. A co-accused fired a handgun, grazing the head of the complainant. At the time the applicant was on bail on other charges. His Honour held it was a weak case against the applicant on the charge of attempted murder and there was a significant risk that he may spend more time in custody than any sentence likely to be imposed if convicted of a lesser alternative offence. Although he had prior convictions, including several for failing to appear on bail, his Honour held that the applicant was not an unacceptable risk of offending, of failing to appear on bail or of interfering with witnesses. Bail was granted with two sureties, daily reporting to police and other conditions.

DA

[Supreme Court of Victoria – Emerton J – 26/07/2018]

The 17 year old applicant – who has an IQ of 56 and has been diagnosed with an intellectual disability and a speech articulation disorder – lived with his parents and six siblings, the family having migrated from the Sudan in 2005. He had no prior criminal history. He had been charged, *inter alia*, with 2 counts of robbery and one of attempted robbery, the alleged offences having been committed while he was in bail on charges including attempted robbery, assault with intent to rob and affray. The prosecution conceded that the applicant was unlikely to receive a custodial term if found guilty. Her Honour found there was a compelling reason for the grant of bail and was satisfied that any risk of reoffending could be "mitigated by the imposition of conditions requiring him to reside with his family, remain at home at night, avoid using public transport or frequenting public transport facilities and to obey directions given to him by or through the Foundation and YUP".

JM

[Supreme Court of Victoria – Champion J]

[2019] VSC 156

The 16 year old applicant was charged with aggravated burglary, theft, criminal damage, unlawful assault, obtaining property by deception, attempting to obtain property by deception, handling stolen goods, unlicensed driving and marking graffiti without consent. He had a special vulnerability, having a history of deliberate self-harm and suicidal ideation, including attempted suicide by drug overdose. He has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Post-Traumatic Stress Disorder (PTSD), has substance abuse issues and remains at risk of self-harm. Support and treatment services were available in the community. Bail was not opposed by the respondent. Unacceptable risk was not demonstrated and bail was granted subject to conditions.

JK

[Supreme Court of Victoria – Hollingworth J]

[2020] VSC 160

The 19 year old applicant had been in custody since he was charged with murder when he was 17 years old. On 11/03/2020 he was acquitted of the murder of a Mr B. His co-accused was found guilty of that murder. The jury was discharged after being unable to reach a verdict against JK on the statutory alternative of manslaughter. He will face a new trial on a fresh indictment for manslaughter at a later date. JK has never denied being involved with JF in an assault on Mr Bourke but he denies being responsible for Mr Bourke's death. His defence at trial was that he had not inflicted (or agreed to the infliction of) any serious blows, and had withdrawn from the attack before the fatal blows were struck, after trying to stop JF from further assaulting Mr Bourke. It is clear that the jury was divided on the question of whether or not JK had effectively withdrawn. JK had a minimal criminal history. He had adequate supervision and support on bail and his application was supported by Youth Justice. Her Honour found that a compelling reason was shown and any relevant risks were able to be managed by bail conditions, including judicial monitoring. On the issue of the State of Emergency caused by the COVID-19 pandemic her Honour said at [22]-[26]:

[22] "Apart from delay, the pandemic affects this bail application in two important respects.

[23] First, the Malmsbury facility where JK is currently being held has suspended all personal visits. JK can no longer see his family every week, as he has done throughout his time in custody. There is no indication as to when personal visits may resume but, based on public statements by the government, one would have to think that is many months away. True it is that the pandemic is forcing many families to communicate via phone or audio-visual links, but the effects of actual physical separation from family can be more acute for young persons than adults. Section 3B(1)(b) of the Bail Act expressly recognises the importance of strengthening and preserving such relationships in the case of accused who are children.

[24] Secondly, the pandemic has affected JK's opportunities to continue with education and training. Whilst in custody, JK has been receiving an education through services provided at Malmsbury by Parkville College. He recently completed his VCAL to Year 11. Prior to the pandemic, he was proposing to continue on with further study through Parkville. Schooling through Parkville has ceased in line with Department of Education requirements.

[25] It may be the case that Parkville or Malmsbury will find a way of offering educational activities during the pandemic, but at the moment there is no evidence as to when that might be, or what form it might take. On the other hand, the Youth Justice report sets out various online educational and training opportunities that would be immediately available to JK, were he to be released on bail.

[26] Once again there is a statutory imperative to have regard to the desirability of allowing educational and training opportunities for children to continue without interruption or disturbance."

David Chambers

[Supreme Court of Victoria – Tinney J]

[2020] VSC 758

The 38 year old applicant with no prior convictions was charged with family violence offending against his domestic partner including reckless conduct endangering life arising from application of pressure to throat of complainant causing laryngeal fracture – serious offending and reasonably strong prosecution case – onerous conditions due to COVID-19 and mental state of applicant on remand due to withholding of prescription medication - custody a particularly aversive and salutary experience in this case – delay – relationship now ended and situation in which offending arose no longer in existence – availability of employment, stable accommodation, and drug support for applicant – compelling reason established – unacceptable risk not made out – bail granted on stringent conditions.

Other cases in which compelling reason (cause) was shown and bail was granted include:

- *Luke Aaron Self* [2005] VSC 108 (Hollingworth J);
- *Shane Peter Walker* [2007] VSC 129 (Cavanough J);
- *Re Joshua Barban & Karl Anthony Barban* [2007] VSC 335 (Hollingworth J);
- *Re Mae Loc Tran* [2008] VSC 191 (Hollingworth J-desirability of accused undertaking intensive drug addiction treatment);

- *IMO bail application by Mahmoud Kheir* [2008] VSC 492 (Osborn J-trafficking drugs/possession of firearms/delay);
- *Re Paul Hanlon Flood* [2010] VSC 605 (Lasry J-aggravated burglary/cause shown by commitment of the applicant's carer/"The applicant is at a final turning point.");
- *Re Mark Anthony Handler* [2013] VSC 166 (Kaye J-applicant a qualified industrial chemist charged with multiple counts of trafficking amphetamines/cause shown by previous good character of applicant, no unacceptable risk of re-offending and delay of 18-24 months before trial);
- *Sanchez v DPP* [2013] VSC 707 (Croucher J-applicant initially bailed on charges of stalking, breach of IVO, burglary and theft/further charges of aggravated burglary, breach of IVO and others allegedly committed whilst on bail/delay-if not granted bail applicant would spend about 21 months in custody before trial-bail granted with surety of \$10,000 and conditions including curfew, daily reporting and weekly counselling);
- *Smith v DPP* [2014] VSC 60 (Croucher J-multiple counts of car theft, arson, reckless conduct endangering life and other offences/bail granted with surety of \$5,000 and on very strict conditions "which might be thought to be akin to house arrest" including curfew, twice daily reporting and prohibition on driving car);
- *Application for Bail by Ibrahim El-Sayah* [2016] VSC 716 (Jane Dixon J-21 year old applicant facing 17 charges including burglary x 9 and theft x 5/bail granted with one surety of \$15,000 and on very strict conditions);
- *Application for Bail by Jaydon Reynolds* [2016] VSC 730 (Elliott J-21 year old applicant facing 7 charges including trafficking in a commercial quantity of a drug of dependence/bail granted with one surety of \$100,000 and on very strict conditions including residence at Odyssey House);
- *Re Alsulayhim* [2018] VSC 570 (Beach JA-31 year old international student with no prior criminal history charged with unlawful assault, sexual assault, sexual assault by compelling sexual touching (x2), rape by compelling sexual penetration (x3), rape (x3), false imprisonment (x2) and detention for a sexual purpose (x2) arising out of events involving one complainant alleged to have occurred on the one day/bail granted on conditions with one surety of \$200,000);
- *Re Walker* [2018] VSC 804 (Champion J-22 year old man with moderate intellectual disability and vulnerable in custody charged with stalking, using a carriage service to menace, threat to kill, threat to harass, committing an indictable offence whilst on bail and using a carriage service to procure a child under 16 (in the form of a police officer pretending that identity) for sexual activity/bail not opposed and granted with conditions);
- *Re McAsey* [2019] VSC 88 (Champion J-51 year old Aboriginal man on summons for possessing child pornography was charged with aggravated burglary and attempted armed robbery; compelling reason shown by lack of relevant criminal history, stable marriage, employment history, financial hardship to wife if bail refused to her financial provider and prosecution case not "open and shut".
- *Mohamed* [2019] VSC 83 (Champion J-20 year old man charged with armed robbery/no criminal history/family support/employment & study/bail granted with conditions allowing applicant to return to Western Australia).
- *Re Neskovski* [2019] VSC 447 (Beach JA-28 year old man charged with dangerous driving causing death, failing to stop after a motor vehicle accident, careless driving and culpable driving causing death/no prior convictions, employed for 9 years in father's business, issues between the parties capable of being contested, already in custody for 6m and likely to be a further 12m if not bailed/bail granted on conditions with one surety of \$75,000);
- *Re DG* [2019] VSC 622 (Zammit J) – 16 year old boy charged with rape, false imprisonment and unlicensed driving/youth justice not supporting bail/family support/time on remand may exceed any sentence imposed/compelling reason established/bail granted on conditions including judicial monitoring, albeit not by the Supreme Court but by the Children's Court which had refused bail);
- *Re Mallouk* [2019] VSC 661 (Lasry J-23 year old man charged with a series of burglaries in which ±\$100,000 worth of cigarettes were stolen and ±\$650,000 damage was caused to burgled premises/at time applicant was on CCO/supportive family and accommodation/17 month delay/compelling reason established/bail granted on conditions);
- *Re Ebertowski* [2019] VSC 676 (Lasry J-41 year old man charged with trespass, criminal damage, unlawful assault and possession of a poison/bail not opposed/compelling reason established/bail granted on conditions);
- *Re Koshani* [2019] VSC 678 (Ashley J-38 year old man charged with 14 charges arising in a domestic setting, including threat to kill x 3, assault x 3/compelling reason shown arising from a combination of factors including the departure of one complainant from Australia with no planned return date, the length of period in custody compared with likely sentence, availability of secure and supervised accommodation and secure employment and applicant's willingness to engage in relevant programs with health professionals);

- *Re Mihalitsis* [2020] VSC 6 (Weinberg JA-41 year old man charged with intentionally causing serious injury in circumstances of gross violence and related offences/offending occurred in context of heightened state of methamphetamine addiction/likely lengthy delay between arrest and any trial/no relevant prior convictions/compelling reason shown, *inter alia*, by evidence of strong family support and that the applicant if bailed would be provided with comprehensive treatment services designed to deal with his drug addiction and personality disorder).
- *Re JB* [2020] VSC 184 (Kaye JA-16 year old boy charged with multiple offences including theft, handling stolen goods, reckless conduct endangering serious injury while on bail – COVID-19 pandemic relevant to delay and to making any period of remand more onerous – risk a difficult issue but not unacceptable given the applicant's age and circumstances).
- *Re Guinane* [2020] VSC 208 (Tinney J-31 year old man charged with family violence offending – compelling reason conceded by respondent – delay and onerous custodial conditions caused by COVID-19 – delay likely to exceed any custodial sentence – limited prior convictions and first time in custody – able to live with supportive mother and engage in employment and counselling – not unacceptable risk – bail granted with strict conditions).
- *Re Che Ashton* [2020] VSC 231 (Elliott J-33 year old man charged with Schedule 2 offences: aggravated burglary, rape and assault with intent to commit a sexual offence – significant ongoing delay as a result of COVID-19 pandemic – compelling reason established – unacceptable risk not established by respondent – bail granted with conditions).
- *Re Hu* [2020] VSC 285 (Incerti J-34 year old man charged with the serious offence of causing an unauthorised impairment of an electronic communication – he was on bail for a similar offence – compelling reason shown by delay in proceedings due to the COVID-19 pandemic, no criminal history and the length of time in custody if bail refused was likely to be longer than any sentence imposed – no unacceptable risk – bail granted with special conditions).
- *Re Brzezowski* [2020] VSC 294 (Tinney J-45 year old man charged with family violence offending and subsequent contravention of a family violence intervention order and breach of conditions of bail – violent and sexual offending alleged – modest criminal history but some previous allegations of family violence – a full year on remand would be a significant period of time for a case which, whilst admittedly serious, will remain in the summary stream, especially significant in light of the current onerous conditions as a result of the COVID-19 pandemic – compelling reason established – unacceptable risk not proved – bail granted with strict conditions).
- *Re Karl Bacash* [2020] VSC 365 (Champion J- applicant was facing 17 charges including rape, administration of an intoxicating substance for a sexual purpose, possess morphine, theft and receiving stolen goods arising from 3 separate rape investigations – applicant had targeted vulnerable, intoxicated females in the early hours of the morning in inner city Melbourne – applicant had no prior criminal history and an ill elderly mother – compelling reason established and bail granted with strict conditions).
- *Re Lily Goodwin* [2020] VSC 459 (Coghlan JA- applicant charged with drug trafficking and related offences – application unopposed – compelling reason established by virtue of potential delay, the likely sentence to be imposed if convicted, the lack of priors and other matters personal to the applicant).
- *Re Yousif Elias* [2020] VSC 502 (Priest JA-applicant was a youthful offender charged with Schedule 2 offences – first time in custody – conditions of custody onerous due to COVID-19 pandemic – bail granted on strict conditions).
- *Re Brett Taylor* [2020] VSC 526 (Coghlan JA-applicant charged with rape x 4 and assault x 2).
- *Re Marco Gastello* [2020] VSC 548 (Coghlan JA-applicant charged with rape x 2 – significant delay).
- *Re AK* [2020] VSC 625 (Lasry J-17 year old applicant [16 at the time of the alleged offending] was charged with theft of a motor car and offences relating to a police pursuit, including dangerous or negligent driving when pursued by police, reckless conduct endangering life, speed dangerous, failing to render assistance after an accident and intentionally causing serious injury – compelling reason established by a combination of the applicant's personal circumstances, the fact that he is a child, that he has no formal criminal history and has the support of Youth Justice – bail granted on conditions including judicial monitoring and an 8pm-5am curfew).
- *Re Griffin* [2020] VSC 626 (Lasry J-27 year old applicant charged with 9 offences including aggravated burglary and intentionally causing serious injury in circumstances of gross violence previously refused bail {see [2020] VSC 312} – New facts established being acceptance in residential drug rehabilitation program – compelling reason found – conditional bail granted on an interim basis).
- *Turner v Lill* [2020] VSC 812 (Croucher J-37 year old applicant charged with dishonesty offences, including counterfeiting, and driving offences while on bail – in custody 2½ months – criminal history for similar offending – bed available at Odyssey House for long-term residential rehabilitation program – compelling reason found – bail granted to Odyssey House).

- *Re Gurkan* [2020] VSC 855 (Kaye JA-32 year old applicant charged with intentionally causing serious injury, reckless conduct endangering life and firearms offences – no relevant prior convictions – applying dicta of Beach, Kaye and Ashley JJA in *Rodgers v The Queen* [2019] VSCA 214 compelling reason was established by a combination of factors including delay and family and business responsibilities of the applicant – unacceptable risk not established – conditional bail granted).
- *Clarke v Scanlon* [2021] VSC 19 (Croucher J-38 year old applicant charged with recklessly causing injury to and threatening to kill her partner's 61 year old father, recklessly causing injury to a police officer and other offences – applicant mentally unwell at the time and appears to remain so – family violence intervention order now in place – inpatient assessment order made – no prior convictions – suitable care and accommodation away from partner's father – bail not opposed – mental impairment defence may be available – imprisonment extremely unlikely if ever convicted).

9.4.4.5 SOME CASES IN WHICH A COMPELLING REASON WAS SHOWN BUT BAIL WAS REFUSED BECAUSE ACCUSED DEEMED AN UNACCEPTABLE RISK

Re Dib

[Supreme Court of Victoria, Lasry J]

[2019] VSC 11

The 33 year old applicant was charged with 23 offences including stalking, using a carriage service to harass, threatening to inflict serious injury x 2, theft of a motor vehicle, handling stolen goods, driving while disqualified x 2, reckless endangering life and using a handgun without a licence. It was agreed between the parties that his offences fell within Schedule 2 of the **BA**. The application was opposed although “the respondent effectively conceded that a compelling reason had been established based on the considerations identified in ss.3AAA(1)(k)-(l) of the **BA**...[namely] there was a real likelihood that, if refused bail, the applicant would spend longer in custody than he would be likely to be sentenced to by a court for these offences.” Based on that and on the applicant's obligations to support his family and business interstate, his Honour found that a compelling reason was established. However, the applicant's prior criminal and bail history demonstrated an indifference to orders of courts and his Honour considered that proposed conditions of bail did not mitigate to unacceptable the risk of the applicant endangering the safety of another, committing another offence, obstructing justice or failing to surrender. Hence bail was refused.

Re Hughes

[Supreme Court of Victoria, Lasry J]

[2019] VSC 750

The 35 year old applicant, who had been diagnosed with schizoaffective illness and bipolar type episodes, was receiving compulsory inpatient treatment for an episode of psychosis and was subject to a community treatment order, was charged with assault and threatening to assault his treating psychiatrist. He had an extensive criminal history and a history of breaching court orders. Applying dicta of Beach, Kaye and Ashley JJA in *Rodgers v The Queen* [2019] VSCA 214 as to the relevant principles when considering the compelling reason test, Lasry J found that test was satisfied by virtue of the applicant's mental health. However his Honour was satisfied that “consideration of the surrounding circumstances, coupled with the applicant's significant history of noncompliance with court orders and his criminal history”, rendered the risk of releasing him on bail unacceptable.

Re Richardson

[Supreme Court of Victoria, Taylor J]

[2020] VSC 289

The 40 year old applicant was charged with 19 offences including intentionally causing injury, assault with a weapon, aggravated burglary, stalking, attempting to pervert the course of justice and harassing a witness. Considering all of the surrounding circumstances, her Honour was persuaded that a best case minimum delay of two and a half years to a trial date coupled with the currently restrictive nature of custodial arrangements as a consequence of the COVID-19 pandemic did demonstrate a compelling reason that justifies the grant of bail. However, the applicant had been charged a total of 458 times by police. His adult criminal history dated from 1998 and included convictions for burglary, armed robbery, intentionally causing injury, false imprisonment and trafficking methylamphetamine. He also had an extensive history of driving offences, seven prior convictions for failing to answer bail, seven convictions for committing an indictable offence whilst on bail and one prior conviction for contravening a condition of bail. He had been named as the respondent to intervention orders 20 times. He had served several periods of imprisonment. Her Honour stated at [75]: “[H]is demonstrated history of failing to answer bail and committing further offences on bail tells against any reasonable expectation that he will surrender into custody in accordance with bail conditions. The

applicant has, over many years, disregarded the authority of the police and courts. He is adept at making himself difficult to find.” Accordingly her Honour was satisfied that he was an unacceptable risk and bail was refused.

Re Lowe

[Supreme Court of Victoria, Tinney J]

[2020] VSC 584

The 35 year old applicant was facing charges including armed robber, theft, burglary and committing an indictable offence whilst on bail. A handgun was allegedly used in the armed robbery. The applicant was on two grants of bail at the time and had a significant criminal history including breaches of court orders. His trial was not likely to be heard for almost 3 years. Compelling reason was established. However he had no formal bail support and there was a lack of stability in the arrangements proposed should he be released on bail. Accordingly he was held to be an unacceptable risk and bail was refused.

**9.4.4.6 SOME CASES IN WHICH COMPELLING REASON (CAUSE) WAS NOT SHOWN
AND BAIL WAS REFUSED**

DPP v Phillip Anthony Harika

[Supreme Court of Victoria, Gillard J]

[2001] VSC 237

DPP appeal against magistrate's decision to grant bail to 24 year old accused charged with armed robbery in circumstances where he threatened with a blood-filled syringe a woman who was 6 months pregnant. His Honour revoked the accused's bail, holding that the magistrate had failed to give any or any sufficient weight to the following factors and that accordingly her discretion had miscarried:

- the risk of re-offending;
- the prosecution case was very strong;
- the offences had been committed while the accused was on bail;
- the accused's appalling criminal record which included violent offending;
- the accused's history of failing to appear on bail at least 3 times;
- the accused's history of drug addiction; and
- the accused had breached previous court orders.

DPP v Nathan Fallon

[Supreme Court of Victoria, Beach J]

[2001] VSC 136

DPP appeal against magistrate's decision to grant bail on 27/02/2001 to a 20 year old accused charged with several different sets of offences:

1. 08/12/2000 arrested and bailed in relation to burglary and other property offences but failed to appear on 31/01/2001; was arrested on 10/02/2001 and re-bailed to 20/02/2001;
2. 13/01/2001 arrested and bailed in relation to 2 burglaries, thefts, car thefts & drug offences but failed to appear on 16/02/2001;
3. 10/02/2001 arrested and charged with 3 burglaries and 3 thefts;
4. 26/02/2001 charged with offences of handling stolen property (valued in excess of \$70,000) which were allegedly committed on 08/02/2001.

The accused had received 6 Children's Court good behaviour bonds for 18 offences over 6 appearances between August 1993 & December 2000. His Honour revoked the accused's bail, holding that the accused "was clearly an unacceptable risk of committing further offences" and that "the order made by the Magistrate on 27/02/2001 to release the respondent on bail was manifestly the wrong order to make."

DPP v Hop Nguyen

[Supreme Court of Victoria-Habersberger J]

[2004] VSC 302

The applicant, aged 22, had pleaded guilty to one count of armed robbery. Armed with a syringe filled with his own blood he approached a 72 year old grandmother walking on her own and carrying a bag over her shoulder, held up the syringe and demanded her bag. He then pulled the bag away from her and ran off but was chased by other people in the vicinity and caught and held until police arrived. The applicant had been involved with heroin use since about the time of leaving school and had a history of mental illness, possibly schizophrenia, for which he had received in-patient treatment. Habersberger J accepted that a comprehensive support network could be put in place, including drug treatment, family support, family accommodation, psychiatric services. The applicant had been in

custody for 3 months and had made 2 unsuccessful applications for bail in the Magistrates' Court. In holding that the applicant had not shown cause and refusing bail, his Honour said at [14]-[16]:

"My concern is that, given that within seven days of being released from the psychiatric institution he committed this offence, presumably having resumed heroin use, that the same will occur were I to release him on bail.

The circumstances of the cowardly attack on the elderly lady are such that the ground in the *Bail Act* which requires the applicant to persuade me that he is not an unacceptable risk that if released on bail he would endanger the safety or welfare of members of the public weighs very heavily in my mind.

The onus being on the applicant to show cause, I regret to say that in the circumstances of this sad case I am not persuaded that he is not an unacceptable risk of either re-offending or endangering the safety or welfare of members of the public. Indeed, I am satisfied that there is such a risk."

Benito Maccia

[Supreme Court of Victoria, Beach J]

[2002] VSC 205

The applicant, aged 62, was charged with 27 offences, including incitement to murder, extortion, stalking and criminal damage in circumstances in which it was alleged he had hired a co-accused to extort money from members of one family. The co-accused had pleaded guilty, had been sentenced to 4 years imprisonment and had indicated an intention to give evidence against the applicant. The 3 matters on which the applicant relied were:

- his age, lack of priors and personal circumstances;
- the financial deterioration of his business; and
- delay in the provision of tapes and transcripts which had the consequence of delaying the trial.

These matters were held not to be sufficient to show cause, particularly given the strength of the Crown case, the likely term of imprisonment and the risk of interference with witnesses.

Harry Buckle

[Supreme Court of Victoria, Kellam J]

[2003] VSC 352

The applicant, aged 51 and with no prior convictions, was charged with conspiracy to cause an explosion and other offences related to possession of explosives, allegedly to cause serious damage to the premises of a business rival. Relied on in support of his application were his age, lack of priors, long marriage with 3 children, the effect on his family and his business of his incarceration, his depressive illness and likely delay before trial. Refusing bail, Kellam J said: "[W]here the case against the applicant is, in my view, strong, where there is a high probability that he will be sentenced to a term of imprisonment of some considerable length if convicted, where the potential for harm caused by his alleged behaviour was great, and where [his] alleged behaviour was highly unpredictable and irrational, but at the same time apparently carefully planned, the applicant has failed to allay the concerns which induced the legislature to refuse bail in these circumstances and he has failed to show cause why his detention in custody is not justified."

Ian David Peter Dauer

[Supreme Court of Victoria, Nathan J, {MC2/85}, 23/02/1985]

The accused, a police officer, was charged with 2 sets of offences: (1) kidnap, false imprisonment and assault occasioning actual bodily harm; (2) conspiracy to pervert course of justice, theft & deception. He had made 5 unsuccessful bail applications to the Supreme Court. At the end of a committal on the first set of charges, a magistrate granted bail. On DPP appeal, bail was revoked. Nathan J said:

"The learned magistrate should have given great weight to the fact that 3 judges of this Court, on a fact situation...in no way markedly different...were of the view that the seriousness of the threats made by Dauer in respect of Crown witnesses was sufficiently close and proximate as to constitute an unacceptable risk and to result in the refusal of the bail application."

Nathan J also held that the magistrate "fell into error" when determining that the risk of interference with witnesses should be balanced against deprivation of the accused's liberty which was already quite lengthy:

"[I]t is an absolute point for him to consider whether the witnesses are at risk or not. That is not to be balanced by way of some process against the liberty or otherwise of the accused man. The proximity of the risk is to be objectively assessed and if it is unacceptable, then indeed bail should be refused."

His Honour also considered that the Magistrate:

- had failed to take properly into account the nature and seriousness of the offences or the strength of the evidence against the accused;
- had misdirected himself on the possible length of the delay before the matter came to trial and the conditions of the remand facilities at Pentridge.

Michael Hall

[Supreme Court of Victoria, Coldrey J, unreported, 04/03/1997]

The applicant had been charged with 8 counts of armed robbery, 2 counts of car theft and one of robbery. He had been a heavy heroin user for many years with numerous prior convictions (including 11 for fail to appear) and may have owed the Parole Board 18 months. He had been assessed as suitable for treatment as an inpatient at Odyssey House. Previously he had been an inpatient at Windana and had discharged himself twice. His Honour held that the applicant had failed to show cause and there was an unacceptable risk that he would fail to appear on bail.

Mustafa Tilki

[Supreme Court of Victoria, Warren CJ]

[2003] VSC 483

The applicant had been charged with aggravated burglary, two counts of conduct endangering life, three counts of common law assault and two offences under the Firearms Act. He was required to show cause under s.4(4)(c) of the **BA** because of the nature of the charges. He had a number of prior convictions dating back to 1990. The Crown opposed bail on the sole ground that there was an unacceptable risk that the applicant, if released, would interfere with witnesses. The main factors relied on by the applicant were delay and the poor prospects of the case being found proved against him in view of the statements made by the victims. In refusing bail, the Chief Justice said at [12]:

"[T]he applicant engaged in a terrifying sequence of events. These circumstances of themselves demonstrate a propensity to resort to violence. In the course of the circumstances of the allegation the applicant used a gun and, worse, pointed the gun at the head of another. This demonstrates the potential of the applicant to cause serious physical and/or mental injury to a victim. These circumstances of themselves dissuade me from sufficient satisfaction that the applicant has shown cause."

At [13] the Chief Justice agreed with the prosecutor that the appropriate time to consider the applicant's submission on potential delay was after the committal.

DPP v Haidy

[Supreme Court of Victoria, Redlich J]

[2004] VSC 247

The applicant had been charged with trafficking in cannabis and associated charges alleged to have been committed while he was on bail on similar charges of trafficking in cannabis. He failed to show cause. In refusing bail, Redlich J said at [10]:

"[I]t would be quite common to find that the family of an alleged offender suffers hardship and distress as a consequence of the offender being detained in custody. To constitute sufficient cause to grant bail, something more is required than the financial and emotional hardship experienced by the Applicant's family as a consequence of his absence."

See also *Re Michael Barbaro* [2004] VSC 404 at [13] per Morris J.

Peter Alan Heenan

[Supreme Court of Victoria, Whelan J]

[2005] VSC 49

The 51 year old applicant, a successful businessman, was charged with a number of offences including attempted murder, intentionally causing serious injury, aggravated burglary, false imprisonment and rape. The principal victim was his estranged wife. The applicant had a very extensive history of driving offences and at the time of the alleged offences against his wife he was serving a 6 month period of imprisonment by way of intensive correction order. Counsel for the applicant referred to him as "a man of means, steady employment, fixed accommodation, and strong connections to Melbourne". Categorizing the applicant as a man with "a demonstrated history of failing to comply with requirements placed upon him by the law", Whelan J held-

- (i) that there was an unacceptable risk that the applicant would commit offences or interfere with a witness; and
- (ii) applying dicta of Gillard J in *DPP v Harika* [2001] VSC 237 at [63]-[64], that the applicant had not shown cause why his detention in custody was not justified.

[Supreme Court of Victoria, Bongiorno J]

[2005] VSC 516

On a further application for bail some 10 months later Bongiorno J also held that the applicant had not shown cause why his detention in custody was not justified.

DPP v Henderson

[Supreme Court of Victoria, Bongiorno J]

[2005] VSC 512

The applicant, described as a “career criminal”, had been on remand awaiting trial on charges including trafficking in drugs of addiction, possession of a number of unregistered firearms and 14 counts of handling stolen goods. He had been on remand for 21 months and his trial was not fixed for 4 more months. He was in a show cause situation and he had a lengthy criminal history. Although holding that “the delay to which Mr Henderson has been subjected is unacceptable” and that “delay itself can, in some circumstances, constitute just cause and even exceptional circumstances in relation to the question of bail”, His Honour held that in light of the charges he was facing, his antecedents and the fear of the informant in respect of witnesses, the applicant had not shown cause.

Michael Paterson

[Supreme Court of Victoria, Gillard J]

[2006] VSC 268

The applicant, aged 39, was charged with two categories of offences. The first was one count of burglary and two counts of theft which allegedly occurred on 24/05/2001. The second was one count of making a threat to kill, one count of recklessly threatening serious injury and one count of harassing a witness. The victim was Constable Shannon Thompson and the alleged offences occurred after a hearing was completed in Geelong Magistrates’ Court involving the applicant’s defacto wife. The applicant had been in custody since 11/01/2006. A trial on the second offences was listed in a further 6 weeks. The applicant had been refused bail on 24/02/2006 by the Geelong Magistrates’ Court and in the Supreme Court on 12/04/2006 by Osborn J. He had numerous prior convictions, commencing with a Children’s Court appearance when he was aged 13. He had 15 pages of priors. Gillard J said: “His criminal record is appalling.” In refusing bail Gillard J said at [11]-[12]:

“The matter of substantial concern is the applicant’s past history of failing to answer bail. He has been involved in court appearances going back over many years for failing to appear whilst on bail. [His Honour listed 12 such failures]...[I]t is a bleak history and shows that a person who thumbs his nose at authority must be a matter of grave concern on any application for bail.”

David Peter O’Blein v R

[Supreme Court of Victoria, Bongiorno J]

[2009] VSC 6

The 20 year old applicant was charged with armed robbery, theft and possession of an unregistered firearm. His Honour found that the applicant was an unacceptable risk and regrettably refused bail while commenting that it was unfortunate that the system does not allow someone the applicant’s age to be remanded in a youth training centre pending trial:

[5] “His personal history is tragic, as is the case with so many young men who find themselves in his position. He was a ward of the State from a very young age until he turned 18, and, in that capacity, was housed and, ostensibly, at least, cared for by a large number of different people. A psychologist who has examined him said that he told him that he had been in 80 foster homes! Whether that is hyperbole or not, it would at least give some indication of his tragic upbringing. He complained to the psychologist of having been sexually assaulted by his grandfather, and, in more recent times, being the subject of hallucinations. At the age of 16 he fathered a child with a young woman. This child died, tragically, very shortly after birth.

[6] The result of this is that, by the age of 20, he has accumulated a large number of prior convictions, some of them, if not in the most serious categories, are certainly anti-social behaviour which the community cannot and will not tolerate.

[7] The submission put on his behalf is that it is possible that when he goes before the County Court in five or six weeks time, the judge will deal with him by way of youth training centre disposition; that his present conditions are inappropriate at Port Phillip Prison; that he has been the subject of assaults, the latest indeed within the last 24 hours; and that he ought to be bailed in the meantime.

[8] It is indeed unfortunate that the system does not provide for someone of his age to be able to be remanded in a youth training centre pending his trial. But that is apparently the situation. The difficulty he faces here is that he must demonstrate that his continued incarceration is not justified. Such justification might be found if one could be satisfied

that he did not present an unacceptable risk of doing one or other of the things which remand in custody pending appearance in Court is designed to avoid, namely, the commission of offences, absconding, and interference with witnesses. There is probably no real problem concerning witnesses, although the police informant seemed to think that there was. In a case where an accused is going to plead guilty one can hardly think that there is likely to be. Except where there is a most irrational motive to interfere with witnesses.

[9] However, this young man's history gives one no confidence that he will not offend whilst he is on bail...

[10] The community must be protected. Whilst one can have every sympathy with the appalling way in which this young man was brought up by the State, that is not an excuse, even if might be a reason. In the circumstances I am not satisfied that the applicant has demonstrated that his continued incarceration is unjustified and accordingly bail will be refused."

Darren Haffner v R

[Supreme Court of Victoria, Coghlan J]

[2009] VSC 116

The applicant was charged with armed robbery and theft. He was on two sets of bail at the time of being charged and was therefore in a show cause position. He had breached his previous bail by not residing at the stated residence, failing to report and associating with co-accused. He had a significant criminal history. His Honour refused bail, holding that the applicant had not shown cause and also holding that "the applicant represents an unacceptable risk of re-offending, particularly when his pattern of alleged offending is examined".

Julie Huynh

[Supreme Court of Victoria, Cummins J]

[2009] VSC 163

The applicant aged 28 was charged with intentionally causing serious injury, alternatively recklessly causing serious injury, to her 3½ year old daughter and with perjury and perverting the course of justice. She had been in custody for 15 months. A committal was listed in 2 months' time. Referring to the analysis of Kellam J in *Mokbel v DPP (No 3)* (2002) 133 A Crim R 141 at 142-143 and the decision of the Court of Appeal in *Commonwealth DPP v. Barbaro (Attorney-General for Vic. Intervening)* [2009] VSCA 26 at [41] Cummins J said at [4]: "The present matter has been the subject of extensive delay, which is a matter which has concerned me." Nevertheless, his Honour considered that the applicant had failed to show cause why she ought to be granted bail, saying at [16] & [18]:

"It is for the Magistrate to determine at committal, which is two months' time, the question of the strength of the case against the applicant. I cannot do so at this juncture where I simply look at the papers...

I do not rest upon risk of flight or interference with witnesses. Rather, I consider the gravity of the charges against her, the nature and ambit of the case against her if proved, and the circularity afflicting the case put presently by the applicant as to her not being the inflictor of injuries not being a full answer to the charges, are such that the application ought to be refused."

Mohammad El Ali

[Supreme Court of Victoria, Curtain J]

[2013] VSC 216

The applicant aged 32 was charged with possession of material for the purposes of trafficking; possessing a prescribed precursor chemical; possessing a drug of dependence (amphetamine); trafficking a drug of dependence (amphetamine); unlicensed possession of ammunition; cultivating a narcotic plant and possessing the same; possessing a drug of dependence (MDMA); three charges of possession of an unregistered handgun; dealing with property suspected of being the proceeds of crime; three charges of being a prohibited person possessing a firearm and possessing a precursor chemical (iodine) in a quantity not less than the prescribed quantity. The offences arose from the police attendance at the applicant's residence to check whether he was complying with bail conditions. They heard a commotion and a female in distress and upon entering the residence they found a large clandestine amphetamine laboratory. The applicant had been the subject of two intervention orders taken out by the very people whom it was proposed will support him if granted bail, his father and the mother of his children. Her Honour refused bail, stating at [20]:

"[T]he the history of significant drug use, combined with the fact that he was on bail for serious offences when he allegedly committed these serious offences, demonstrate that

the applicant is an unacceptable risk of re-offending while on bail, in that he may either relapse into drug use and/or commit further offences.”

Lirim Salievski

[Supreme Court of Victoria, Bell J]

[2014] VSC 1 at [102]-[108]

The applicant who was aged 35y had been on remand for 6 months on charges including two counts of aggravated burglary, armed robbery, blackmail, extortion and using a firearm in the commission of an offence. In refusing bail, Bell J said at [108]:

“The charges brought against him are very serious and the circumstances alleged involve crimes of violence against persons and property using firearms and standover tactics. The applicant is a mature man and has an extensive criminal history. He has served several terms of imprisonment. Witnesses are fearful and reluctant to cooperate with police. On the current evidence, the applicant has not shown cause why his detention is not justified and, on what is presently before the court, I think he is an unacceptable risk. The conditions proposed do not satisfy me that he would not be an unacceptable risk. With the committal process about to commence, it is not appropriate that I should go deeply into the strength of the prosecution case. The committal magistrate will be in a better position to assess that. The applicant should not be granted bail in advance of the committal. The application is therefore dismissed.”

Toby Mitchell

[Supreme Court of Victoria, King J]

[2015] VSC 144

The applicant was the former national sergeant at arms of the Bandidos Outlaw Motorcycle Gang and although no longer a part of that organisation, it was alleged by the police that he still has significant connections and associations to other outlaw motorcycle gangs and organised crime entities both domestically and internationally. He was charged with 17 charges, including 4 counts of extortion, blackmail and a number of counts of threat to kill or inflict injury. King J said of the Crown case: “On the material, I am not satisfied that it is a weak crown case, neither is it a strong one, it falls somewhere in the middle, and doesn’t significantly add or detract from the show cause situation.” However her Honour refused bail, saying at [62]:

“As indicated, it is my view that there are currently no conditions that will ameliorate, to an acceptable level, the risk of the applicant interfering with witnesses, and being involved in other crimes associated with that interference. I am not presuming that the applicant would perform any such task himself, but he is, as his counsel accurately expressed it, from a milieu that don’t respect or view the police in the same way as the majority of the community, they have a contempt for the police, and the laws they enforce. It is that connection and his ability to speak to those people, and organise or make arrangements concerning witnesses that cannot be controlled, as there are no conditions that can, in reality, control the phones on which he would or could speak if released on bail, the persons who he could contact and the arrangements he could make with those people. Whilst he is in custody, those matters are to a very large degree under surveillance. His calls are recorded, he is not able to mix with many other prisoners, and his visits are supervised and controlled.”

Her Honour added at [65]: “The matter of bail should be reconsidered by the magistrate hearing the committal, who will be in a position to form an assessment of the reliability, accuracy and truthfulness of the complainant, as well as the evidence of the independent civilian witnesses.”

Re B H; An application for Bail

[Supreme Court of Victoria, Keogh J]

[2016] VSC 369

The applicant – aged 17 years at the time of the alleged offending – was charged with 7 counts of theft of a motor vehicle, 8 counts of theft, 2 counts of aggravated burglary, arson, 2 counts of assault police, resist police, 2 counts of reckless conduct placing a person in danger of serious injury, fraudulent use of a number plate, 3 counts of burglary and 2 counts of unlicensed driving. He was in a show cause position due to the charges of aggravated burglary. He had an extensive recent criminal history. At the time of the alleged offending he was on youth parole. It was accepted by each witness that his history of offending was directly related to his use of methylamphetamine. Bail was refused, Keogh J stating at [23]: “I am satisfied that the applicant represents an unacceptable risk of (a) committing further offences if released on bail; and (b) endangering the safety or welfare of members of the public if released on bail. I cannot conceive of any conditions that would act to reduce those risks to an acceptable level.”

Re Kazim Kuzu: An application for Bail

[Supreme Court of Victoria, Elliott J]

[2016] VSC 710

The 31 year old applicant was charged with multiple indictable offences – including criminal damage x 4, assault with a weapon, 13 contraventions of family violence intervention orders, 3 threats to kill & stalking – whilst on bail. He had prior convictions and had previous commissions of indictable offences whilst on bail. He used methylamphetamine regularly. He had secured a place at a residential drug treatment facility but its location was proximate to the complainant. For this reason, despite strong family support, the applicant was an unacceptable risk of committing further offences and accordingly had failed to show cause. Bail was refused.

Re Casper De Waij

[Supreme Court of Victoria – Jane Dixon J]

[2016] VSC 805

The 23 year old applicant was charged with multiple indictable offences including trafficking in ecstasy (88 tablets) and 15g of ketamine. At the time of the offending he was on bail on a charge of being a prohibited person in possession of a firearm and he was on a 12month CCO for charges of assault and driving while his authorization was suspended. He had been released from prison only 4 months before. He had been diagnosed with a borderline personality disorder. He had been offered a place at a drug and alcohol rehabilitation facility but – in contrast with the circumstances found by the Court of Appeal in *Robinson's Case* (2015) 47 VR 226 [50] – drug addiction was not 'central to his offending behaviour'. The applicant was held not to have shown cause and to be an unacceptable risk of re-offending if released on bail. Bail was refused.

Re Roberts

[Supreme Court of Victoria – Taylor J]

[2018] VSC 554

The 32 year old applicant was charged with 64 offences, including rape, unlawful assault, contravene family violence intervention order and use a carriage service for child pornography material. The complainant for most of the alleged offences was the applicant's ex-partner, the mother of their children. In refusing bail Taylor J noted at [57]-[59]:

"I am not satisfied that that risk of family violence, were the applicant released on bail, could be sufficiently mitigated by the imposition of a bail condition that the applicant was to comply with existing FVIO (s.5AAA(2)(b)). This is so even though the informant agreed in cross examination that he is in regular contact with the complainant and he would expect her to tell him if she had been contacted by the applicant.

There is nothing in the history of the applicant's behaviour, over quite some years, towards the complainant and in the face of multiple court orders that provides any foundation for optimism that the applicant would desist from family violence if released. It follows that, in all the circumstances, I am not satisfied that the applicant has shown a compelling reason why his continued detention is not justified."

Re Mongan

[Supreme Court of Victoria – Tinney J]

[2018] VSC 638

The 39 year old applicant was charged with aggravated burglary, false imprisonment, recklessly causing injury, threat to kill and assault. The victim was his estranged wife, the mother of the couple's 3 sons aged 12, 10 & 8. The alleged offences – which included allegations of gaffer taping his wife's mouth and hitting her head against the ground a number of times – occurred little more than a week after he had completed a Men's Behavioural Change program and only about 6 weeks after he had been placed on a bond after pleading guilty to 2 charges of contravening a family violence intervention order in which the protected person was his wife. The applicant was a qualified accountant and a teacher and was enrolled in a law course. In refusing bail, his Honour found that no compelling reason existed and was also satisfied that unacceptable risk had been established.

Re Abaker

[Supreme Court of Victoria – Tinney J]

[2018] VSC 718

The 20 year old applicant with no criminal history was charged with armed robbery involving the use of a loaded handgun, drug trafficking and dishonesty offences. The level of IQ of the applicant – said to be 54 – was an important matter relied upon but other evidence called into question the validity of the test result. The offending was categorised as serious and there was no inordinate delay.

Other cases in which Compelling reason (cause) was not shown and bail was refused include:

- *Edward Charles Wilson* [2006] VSC 178 (Hargrave J/agg burg x 2+serious injury);
- *O'Reilly v DPP* [2007] VSC 76 (Curtain J/affray+kidnapping+aggravated burglary);
- *Michael Ansell* [2007] VSC 82 (Bongiorno J/breach intervention order+cause injury);
- *Waleed Haddara v DPP* [2007] VSC 274 (Bongiorno J/kidnapping+aggravated burglary); [2008] VSC 298 (Whelan J/further bail application);
- *Watts v DPP* [2007] VSC 275 (Bongiorno J/aggravated burglary+attempted armed robbery+armed robbery x 4);
- *Re George Dickson* [2008] VSC 516 (Lasry J/armed robbery x 25);
- *IMO an application for bail by Dalibor Dobrosavljevic* [2009] VSC 170 (Kaye J/kidnapping, armed robbery and aggravated burglary in the context of a campaign by applicant and co-accused against victim).
- *IMO an application for bail by Ahmed Chkhaidem* [2009] VSC 216 (Osborn J/repeated assaults on ex-wife plus breach of intervention order and breach of bail conditions);
- *Re Houssein Hawli* [2009] VSC 606 (Whelan J/intentionally causing serious injury, threat to kill and false imprisonment in family situation where the applicant allegedly used a weapon/priors including 3 convictions for failing to answer bail);
- *Re Kazem Hamad* [2010] VSC 585 (Hollingworth J/kidnapping, false imprisonment, intentionally causing injury, recklessly causing injury/applicant on bail for other offences);
- *Re Marcus Aaron Held* [2012] VSC 648 (Curtain J/ attempted rape, indecent assault, intentionally causing serious injury & contravening a family violence intervention order);
- *Bail Application – Bunning* [2013] VSC 681 (Kaye J/146 counts of Medicare fraud of which 104 were committed whilst on bail on other charges – 46y.o. disgraced former policeman addicted to morphine);
- *Re Jan Visser* [2013] VSC 736 (Dixon J/extremely serious drug offences – allegation that applicant was unable to prepare his defence adequately if in custody not accepted);
- *Re PI* [2014] VSC 64 (Hollingworth J/6 offences including false imprisonment and intentionally causing serious injury in which the victim was the applicant's former domestic partner);
- *Re Application for bail by Christopher Sharp* [2016] VSC 238 (Coghlan JA/armed robbery & possess amphetamine – accused already on bail for offences of dishonesty and violence);
- *Re Abdullah (Bail Application)* [2016] VSC 745 (Priest JA/aggravated burglary, attempted armed robbery, extortion, unlicensed possession of a handgun, threat to inflict serious injury x 2);
- *Re Garou* [2018] VSC 418 (Champion J/theft, burglary, aggravated burglary, theft of motor vehicle, criminal damage, handling stolen goods, dealing with property suspected of being proceeds of crime, possessing cartridge ammunition, possessing firearm, possessing cannabis, using amphetamines, making a false report to police, unlicensed driving, failing to stop vehicle on request, obtaining property by deception, committing an indictable offence whilst on bail and contravening a conduct condition of bail – proposed conditions do not ameliorate unacceptable risk).
- *Re Mongan (No.2)* [2019] VSC 119 (Tinney J/aggravated burglary, false imprisonment and assault charges) – adult applicant making a second application for bail – no compelling reason shown and in any event unacceptable risk of the matters set out in section 4E(1)(i) to (iii).
- *DPP v Chesterman (a pseudonym)* [2020] VSC 255 (Tinney J/DPP appeal against magistrate's grant of bail - respondent charged with incest and other offences against 3 of his 4 daughters – not reasonably open for magistrate to be satisfied of a compelling reason in justification of bail – appeal allowed – order granting bail set aside – fresh application for bail refused).
- *Re Griffin* [2020] VSC 312 (Jane Dixon J/26 year old man with a “long-entrenched addiction to methamphetamine that has subsisted despite living at home with his family and holding down employment” and “a significant problem with anger and impulse control” charged with 9 offences including aggravated burglary and intentionally causing serious injury in circumstances of gross violence – Court unable to say that applicant is likely to spend more time on remand than if convicted and sentenced in respect of the core offences – compelling reason not shown – unacceptable risk in any event – bail refused); subsequently granted bail by Lasry J with condition to reside in residential rehabilitation program: see [2020] VSC 312 and section 9.4.4.4 above).
- *Re Krishna Menon* [2020] VSC 565 (Champion J/56 year old applicant charged with sexual penetration of his 9 year old grandniece, criminal damage, making threats to kill and resisting an emergency worker on duty – strong prosecution case – despite prospects of delay and the impact of COVID-19 on custody compelling reason not shown – unacceptable risk in any event).
- *Re SS* [2020] VSC 618 (Tinney J/41 year old applicant on supervision order ('SO') under *Serious Offenders Act 2018* after completion of sentence for murder charged with 11 counts of contravening the conditions of a supervision order and two counts of committing an indictable

offence whilst on bail – compelling reason not shown – unacceptable risk in any event – bail refused);

- *Re Rajasekar* [2020] VSC 774 (Tinney J – 37 year old applicant of Sri Lankan/Tamil origin with alcohol problem charged with arson endangering life after disagreement with co-tenants about money – on CCO at time of fire – notwithstanding delay, vulnerable state of applicant in custody and CISP support compelling reason not made out – unacceptable risk in any event – bail refused);
- *Re Brown* [2020] VSC 870 (Beach JA – 49 year old applicant charged with aggravated burglary, making threat to kill, stalking, trespass, criminal damage, aggravated assault, use of a carriage service to menace, harass and offend and theft – No compelling reason justifying grant of bail – Applicant an unacceptable risk of endangering the safety or welfare of any person and of committing an offence while on bail.

9.4.4.7 SOME CASES IN WHICH ACCUSED WAS HELD NOT TO BE AN UNACCEPTABLE RISK AND BAIL WAS GRANTED

William Archibald Smith

[Supreme Court of Victoria-Coldrey J, unreported, 25/03/1997]

The prosecution contended that the applicant was an unacceptable risk of interfering with witnesses. The informant deposed that this "belief was grounded principally on the fact that the applicant was a member of a motor cycle club known as 'Coffin Cheaters' and the informant's belief that motor cycle gangs have a reputation for interfering with witnesses". No evidence was called that the applicant had interfered with witnesses in this or any other case. His Honour took the view that the informant's belief was no more than an assertion. The applicant had no priors for violence, had a home and mortgage, a stable relationship and a steady job. His Honour was satisfied that the applicant did not constitute an unacceptable risk of interfering with witnesses.

Tomac Letowski

[Supreme Court of Victoria-Coldrey J, unreported, 13/03/1997]

This case illustrates, like *Mokbel v DPP (No. 3)*, the way in which whether or not a risk is unacceptable depends on all of the circumstances, including the conditions in which the accused is detained in custody. In this case the 17 year old applicant had initially been deemed to be an unacceptable risk of committing further offences and of failing to appear on bail: he had 2 priors for failing to appear. He was to have been kept in the juvenile section of the Remand Centre but was in fact held in Pentridge with adult offenders. Bail was no longer opposed. His Honour held: "Whilst the risk was said to remain, in all the circumstances of the case it could not be categorized as unacceptable."

Mark Douglas

[Supreme Court of Victoria, Kaye J]

[2005] VSC 344

The applicant was 19 years & 11 months old. He was charged with and had pleaded guilty to 6 counts of driving while suspended on various dates between November 2004 & March 2005, his licence having been suspended in November 2004 & December 2004. Describing the applicant's record as "quite extraordinary", His Honour said at [24]-[25] that "standing alone and if not offset by any other factors, that record would truly create an unacceptable risk of re-offending if the applicant were released on bail....This is a matter which has given me great cause for concern. It is very tempting at this stage simply to rely on the record of the applicant as indicating that he is an unacceptable risk and as investing me with really no confidence that he will obey the law if he is now released. On the other hand, I am impressed by the fact that the applicant is, by and large, not a person of criminal background, that he has been exposed to circumstances which must surely have revealed to him a very sharp lesson as to what happens to those who think the law is not there to be obeyed....He is a young man with a bright and promising future". Balancing these factors His Honour held, with "hesitation", that the applicant was not an unacceptable risk of re-offending while on bail or of failing to answer his bail.

Paul Richard Worland

[Supreme Court of Victoria, Kaye J]

[2005] VSC 179

The 17 year old applicant had been charged with armed robbery, assault, unlawful imprisonment and kidnap, amongst others. The incidents occurred when he was with other youths and had been drinking. Bail had been granted with conditions, *inter alia*, that he not drink alcohol, not associate with co-accused, not contact witnesses and comply with Juvenile Justice directions. The applicant breached the conditions and was charged with 'street type offences' including drinking alcohol under-

age and on railway premises. Bail was revoked for failure to comply with bail conditions. Since being incarcerated, the applicant had been held in the Melbourne Custody Centre and the Moonee Ponds cells. His Honour was ultimately reassured that the applicant was not an unacceptable risk of committing further offences whilst on bail due to the support of his aunt and of a Juvenile Justice officer. His Honour also expressed concern about the unsuitability of the custodial arrangements and the likely delay in the matter coming to trial.

Gregg James Hildebrandt

[Supreme Court of Victoria, Bongiorno J]

[2004] VSC 549

[Supreme Court of Victoria, King J]

23/09/2005

[Supreme Court of Victoria, King J]

[2006] VSC 199

The applicant, who was charged with conspiracy to murder, had a *prima facie* right to bail. He was refused bail by Bongiorno J on 18/11/2004. He was being held on remand at Barwon Prison in circumstances which involved him being locked down in his cell for 22½ hours a day and with extremely restrictive access to legal advisers and family visits which were “few and highly constrained”, circumstances which Bongiorno J described as “quite unacceptable”. His Honour continued: “This society does not pay lip service to the presumption of innocence; it is a real presumption and we do not lock up innocent people for 22½ hours a day.” Nevertheless his Honour refused bail, holding that the applicant presented an unacceptable risk of offending again and perhaps of absconding. His Honour also remarked that if something were not done about the circumstances in which the applicant was held on remand, the case for granting him bail “may become overwhelming”. A further bail application was refused by King J on 23/09/2005. However, on 31/05/2006 King J granted bail, finding that the further delay before trial and the conditions on which he was being held on remand – by that stage locked in his cell for 18 hours a day – now outweighed those factors which made him an unacceptable risk. At [11] her Honour said:

“The factors that make him an unacceptable risk have to be weighed against the fact that he is a man presumed to be innocent, who has currently spent two years on remand and will spend a minimum of at least two years eight months on remand prior to his case being heard. Not only that, the period of time that he has spent on remand has been in onerous conditions as referred to during the last bail application...Whilst I accept that the conditions may well be necessary for the safe management of prisoners within that unit, it does not make the conditions less onerous.”

Deng Mawn

[Supreme Court of Victoria, Bell J]

[2014] VSC 1 at [120]-[133]

The applicant who was aged 21y 7m had been in custody for 20 days. This was his first experience of being in custody. He and his family were refugees from South Sudan and had arrived in Australia in 2005. He has been diagnosed with PTSD and struggled with alcohol abuse. He had limited formal education and spoke barely functional English. He was charged with one count of robbery, two counts of intentionally causing injury, two counts of recklessly causing injury, three counts of assault, one count of assault with intent to rob and one count of theft. These arose from two separate incidents on 04/12/2014 which occurred when the applicant was severely affected by alcohol. The prosecution intended to uplift the charges into the committal stream but was unable to provide a firm indication of when a committal hearing might be. The applicant was subject to a community corrections order. His YSAS youth worker gave impressive evidence in support of the application for bail. The applicant had a *prima facie* entitlement to bail and one of his co-accused had already been granted bail. Bail was opposed on the ground of unacceptable risk of reoffending. In granting bail, Bell J said at [130]-[132]:

“I think that risk can be mitigated to an acceptable degree by conditions. The applicant’s offending is related to his refugee background, social circumstances and alcohol dependence. As a young refugee with very limited education and English language skills, he is highly vulnerable. On the evidence, he is confronting the challenges of his past and immigration to Australia. I agree with Mr Barwick that he has the capacity to play a positive leadership role in his community. The applicant may have refugee-related PTSD, which may be behind his alcohol dependence. He is strongly engaged with YSAS and the youth worker spoke highly of him. His mother and brother were in court to support him. He has a good home to go to and is committed to his rehabilitation. The YSAS support amounts to an intensive bail support program and the applicant consents to participation.

Due to the severity and nature of the offending and the risk of him reoffending, there must be conditions...including conditions relating to alcohol abuse...I think the applicant is capable of observing a no-alcohol-consumption condition and is genuinely committed to doing so. Such a condition should be imposed to mitigate the risk of re-offending. As a further control, he should submit to a preliminary breath test when required by the police. Protection of the community is a strong consideration here. Hopefully these conditions will also assist in his rehabilitation. I was informed that he could and would conveniently report daily to the police as the local station is near YSAS which he already attends daily. That condition can be liberalised if it interferes too much with the applicant's daily life and, given progress, becomes unnecessary.

The police sought a condition excluding the applicant from the Sunshine shopping precinct for the protection of the community. I think this would impose greater constraints upon his freedom of movement that the circumstances require. It would prevent him from going to an important place of contact between people generally, and young people particularly, in the local area. Having regard to the conditions of bail, I think he is not likely to engage in street crime in the precinct. I will impose a condition excluding him from the Brimbank Library, which is a relatively confined area and the scene of one episode of his alleged violent offending."

Re Farah

[Supreme Court of Victoria, Tinney J]
[2018] VSC 649

The accused was not in a show compelling reason situation as common law kidnapping is not a Schedule 2 offence. In granting bail, his Honour said at [41]: "I consider that the stringent conditions I have imposed are sufficient to control and reduce the risks in question to the level of being acceptable ones."

Other cases in which the accused was held not to be an unacceptable risk and bail was granted are *Jerome Gelb* [2007] VSC 39 (Bongiorno J); *Re Menna* [2018] VSC 538 (Champion J); *Re Shadi Farah* [2018] VSC 649 (Tinney J); *Re Busari* [2020] VSC 572 (Tinney J).

9.4.4.8 SOME CASES IN WHICH ACCUSED WAS HELD TO BE AN UNACCEPTABLE RISK AND BAIL WAS REFUSED

John Victor Morgan

[Supreme Court of Victoria, Beach J, {MC32/94}, 16/06/1994]

This was a DPP appeal against magistrate's decision to grant bail to an accused charged with conspiracy to murder and incitement to murder his wife in order to have access with his children. The accused and his wife had been through acrimonious Family Court proceedings in which his wife was granted custody of the children and the accused's access was reserved. Restraining orders were also made. There was a strong Crown case involving 2 taped meetings between accused and undercover police officer posing as a 'hit man'. The DPP contended that bail should be revoked due to:

- the seriousness of the offences;
- the strength of the case;
- the accused would commit further offences whilst on bail;
- the premeditation involved;
- the fact that the accused had had a deep commitment to his wife being murdered and there was nothing to indicate that he was no longer in that frame of mind.

Held, revoking the accused's bail- The magistrate was in error in considering that the accused was not an unacceptable risk of committing further offences whilst on bail.

Dorothy Marie Skura

[Supreme Court of Victoria-Teague J]
[2003] VSC 207

The applicant, a 38 year old Canadian national in Australia on a temporary visa, was charged with incitement to murder her husband. She indicated she would be pleading guilty and her plea was listed to be heard in 2 months from the date of the bail application. Teague J noted that the applicant had a *prima facie* entitlement to bail under the **BA** but that position was affected by the common law position that there would be no presumption of entitlement to bail following a plea of guilty. The applicant's husband was substantially reconciled with her and was willing to have her return to the family home. Teague J held that notwithstanding a number of significant matters which went in the applicant's favour, bail should be refused. At [9] his Honour said:

"Given the combination of the proximity of the hearing date of the plea, and the substantial prospect of a significant term of imprisonment, I have concluded that there is an unacceptable risk that the applicant would not surrender herself, and accordingly the application is refused."

[The applicant was subsequently sentenced by Bongiorno J to 7 years imprisonment with a non-parole period of 4½ years: [2003] VSC 290. The Court of Appeal allowed an appeal against that sentence and re-sentenced the applicant to 6 years imprisonment with a non-parole period of 3 years: [2004] VSCA 53].

Mario Rocco Condello

[Supreme Court of Victoria-Teague J]

[2004] VSC 409

The applicant was charged with conspiracy to murder and incitement to murder Carl Williams, George Williams and another person and possession of a handgun. His co-accused were a solicitor, George Defteros, and a registered police informer described as "166". The applicant was *prima facie* entitled to bail. The factors in the applicant's favour included his age, state of health, no convictions for 20 years and no priors for violence or false passports, delay of up to 18 months, unsatisfactory conditions of remand, no history of failing to appear, no evidence of recent drug trafficking or criminal activity, significant ties to the jurisdiction, preparedness to accept stringent conditions and the strength of the prosecution case considering it relied heavily on the evidence of "166". However His Honour refused bail, concluding that the applicant was an unacceptable risk of failing to appear and committing further offences whilst on bail. The following factors, taken cumulatively, led his Honour to find the applicant an unacceptable risk:

- the serious nature of the charges;
- the priors, though not recent, were serious and some had occurred overseas;
- in the taped conversations the applicant had expressed interest in obtaining false passports and had expressed animosity to the Williams' family members, the price on whose heads was \$150,000;
- intermittent use of the name "Michael Oliver" to whom false details had been ascribed;
- acquisition of overseas assets such as a villa in Nice on which up to \$100,000 had been spent on renovations;
- acquisition of large monetary assets in Australia coupled with "opaque" details of how those assets were acquired and unsupported by the small amount of taxable income declared;
- the applicant's occupation was variously described by counsel as "funeral director", "investor", "conveyancer" and "lender".

Fergus O'Hea

[Supreme Court of Victoria-Kaye J]

[2005] VSC 127

[Supreme Court of Victoria-Mandie J]

[2005] VSC 314

The applicant was charged with two counts of intimidating a witness, two counts of harassing a witness and one count of conspiracy to pervert the course of justice. He was on parole at the time of the alleged offences and had a history of failing to meet previous bail orders. Despite the applicant having a *prima facie* entitlement to bail, both Kaye J & Mandie J refused his separate applications for bail, holding that there was an unacceptable risk that he would interfere with witnesses or otherwise obstruct the course of justice. Mandie J concluded that he was not confident that any conditions of bail would adequately protect the witnesses in question.

Matthew Johnson

[Supreme Court of Victoria-King J]

[2006] VSC 157

The applicant, who was a serving police officer at the time of the alleged commission of offences involving, *inter alia*, aggravated burglary, trafficking cannabis, blackmail, bribery and extortion and who was a suspended police officer at the time of the alleged making of threats to kill, was held to be an unacceptable risk of interfering with witnesses or otherwise obstructing the course of justice and an unacceptable risk of committing further offences if released on bail, more particularly offences in respect of the witnesses.

Paul Ronald Tilyard v R

[Supreme Court of Victoria-Coghlan J]

[2009] VSC 117

The applicant was charged with using a carriage service to access and transmit child pornography material, using a carriage service to groom persons under 16 years of age and possession of child pornography. He had come to the notice of the authorities by publishing on a photo sharing website an album of photographs containing 164 images of 2 young boys. These images had been taken at the applicant's home and depicted a young friend of the applicant's son with whom he had become besotted. Subsequently other child pornography comprising about 40,000 images and 150 videos were recovered by police from the applicant's home. It also became clear that the applicant had been corresponding with another young boy, also a friend of his son, by email. Some of this was specifically sexual in use of language and amounted to an invitation to engage in sexual activity. A psychologist considered the applicant to be at moderate risk of re-offending and having very limited insight into his conduct. The applicant was held to be an unacceptable risk and bail was refused.

KWLD v DPP

[Supreme Court of Victoria-Croucher J]

[2016] VSC 709 – 28/11/2016

The 22 year applicant – who was a resident of Western Australia – was charged with grooming for sexual conduct with a child under 16 and with failing to comply with reporting conditions as a registered sex offender. He had been in custody since October 2015 and his trial in the County Court had been adjourned to commence in February 2017. New charges of grooming had also been laid recently. The applicant alleged that his dental health was not being adequately addressed while in custody. He had prior convictions for child sexual offences. The applicant was held to be an unacceptable risk of offending on bail and of failing to appear and bail was refused.

Other cases in which the applicant had a prima facie right to bail but was held to be an unacceptable risk include:

- *Re Kelmendi* [2008] VSC 31 (Lasry J/unacceptable risk of failing to appear and re-offending);
- *Ferman v R* [2008] VSC 612 (Coghlan J/prohibited person in possession of unregistered firearm/unacceptable risk of endangering the public and re-offending);
- *DPP v Richardson* [2009] VSC 87 (Cummins J/despite extensive delay applicant an unacceptable risk of re-offending and of failing to appear);
- *Re Guirguis* [2018] VSC 430 (Champion J/charges of threatening to kill his children, rape, rape by compelling sexual penetration and sexual assault/despite delay, unacceptable risk of reoffending);
- *Re LK* [2019] VSC 349 (Macaulay J/charge of extortion/bail previously revoked for failure to comply with conduct conditions/continued association with members of outlaw motorcycle gang/trial imminent/unacceptable risk/bail refused);
- *Re Leigh-Jones* [2019] VSC 845 (Weinberg J/44 year old applicant with extensive criminal history and suffering from paranoid schizophrenia charged with reckless conduct endangering persons and possessing an explosive device/previous contraventions of bail conditions/no bail conditions able to ensure adherence to medication plan/bail refused (s.4E).

9.4.5 Whether or not conditions of bail an element of showing compelling reason

There was a conflict in the authorities as to whether or not bail conditions can be taken into account as an element of showing compelling reason.

In *Re Michael Sullivan* [Supreme Court of Victoria, {MC17/82}, 11/02/1983] Young CJ held that they could not, drawing a sharp distinction between the imposition of conditions and the determination of whether cause had been shown:

"The conditions of bail are matters to be considered once it has been decided that bail should be granted and the onus imposed upon the applicant...is not, in my view, discharged by a contention that if bail were granted conditions of the most stringent character might be imposed."

However, in *DPP v Harika* [2001] VSC 237 {MC11/01} at [46] Gillard J held that the inquiries as to show cause and unacceptable risk can overlap. In *Re Fred Joseph Asmar* [2005] VSC 487 Maxwell P went further, holding that they were both part of the one inquiry. It is inherent in his judgment that the question of appropriate conditions is part of the same inquiry. In *Mokbel v DPP (No. 3)* [2002] VSC 393 at [6] Kellam J noted that "whether or not [the] risk is unacceptable requires to be balanced against the period that the applicant will otherwise spend in custody awaiting trial. In this regard, there is also to be brought into account the precautionary measures that can be taken by way of conditions." And in *DPP v Stewart* [2004] VSC 405 at [11] Morris J said: "What is an unacceptable risk must be considered in the context of the conditions to which bail will be subject if bail is granted." A combination of these four dicta leads to the conclusion, contrary to that of Young CJ in *Re Michael*

Sullivan, that the conditions of bail can be taken into account in determining whether an accused has shown cause. In *Re Joshua Barban & Karl Anthony Barban* [2007] VSC 335, Hollingworth J said at [40]: "Both applicants appear to present some risk to the community in terms of re-offending...I am prepared to grant bail, albeit subject to very strict bail conditions. Those conditions will, I hope, have the effect of reducing to an acceptable level the risk that the applicants present."

See also *R v Weaver* [2006] VSC 102 (Nettle JA); *Shane Peter Walker* [2007] VSC 129 (Cavanough J); *Griffiths v DPP* [2007] VSC 268 (Bongiorno J); *Kylie Vickers* [2009] VSC 202 (Cavanough J); *Spiteri v DPP* [2014] VSC 566 (Bongiorno J); *Robinson v R* [2015] VSCA 161 (Redlich & Priest JJA).

Section 4E(3)(b) of the **BA** – dating from 01/07/2018 – now provides that in considering whether a risk mentioned in s.4E(1)(a) is an **unacceptable risk**, the bail decision maker must consider whether there are any conditions of bail that may be imposed to mitigate the risk so that it is not an unacceptable risk.

9.4.6 Refusal of bail where person seriously injured

Section 8B of the **BA** provides that if an application for bail is made by or on behalf of a person accused of an offence of causing injury to another person, a bail decision maker may refuse bail if at the time of deciding the application it is uncertain whether the person injured will die or recover from the injury.

9.4.7 Bail pending pre-sentence or other report

In *Re Durose* [1991] 1 VR 176 {MC15/90} J.H. Phillips J held that where an accused had pleaded guilty to a charge of indecent assault on a 4 year old girl, no error was shown in a magistrate refusing bail pending completion of a pre-sentence report, having regard to the unclear reasons for the commission of the offence and the possibility of public disquiet in the relevant neighbourhood.

In *AW v R* [2013] VSC 56 the 16 year old applicant had been arrested in respect of four bench warrants issued in relation to her repeated failures to attend court on offences including assault in company, burglary, theft, obtaining property by deception and five charges of failing to answer bail. She had pleaded guilty and was remanded in custody by a Magistrate pending the completion of a pre-sentence report pursuant to s.571 of the *CYFA*. In granting bail on strict conditions, Curtain J said: "No doubt, [the] very experienced Magistrate was concerned, and not without justification, that AW, if she remained at large, would not attend for interview and assessment with Youth Justice and thereby further frustrate the process." There were significant differences between AW's case before the Magistrate and her case before Curtain J, including evidence from AW's step-father that he would ensure that AW attended court on the return date and a re-scheduling of the Youth Justice assessment to the day after bail was granted.

9.4.8 Bail pending appeal against conviction or sentence

In relation to appeals against conviction or sentence of the Magistrates' or Children's Court, cl.4(2) of Sch.6 of the Magistrates' Court Act 1989 provides that on an application for bail by the appellant the Court must either grant or refuse bail as if the appellant was accused of an offence and being held in custody in relation to that offence and the **BA** applies with any necessary modification.

The test is much more stringent in the case of an application for bail pending the hearing of an appeal against conviction or sentence of the County Court or Supreme Court. Presumably this is because of the legal principle - not always easy to substantiate in practice - that the conviction is "presumptively correct and not merely provisional" [*Chamberlain v R* [No.1] (1983) 153 CLR 514 at 519] whereas most appeals against conviction or sentence of the Magistrates' (or Children's Court) are by way of hearing *de novo* in the County Court.

In *R v Quoc Kinh Phung* [2001] VSCA 81 the applicant had been convicted of trafficking heroin on a retrial and was sentenced to 5 years imprisonment with a non-parole period of 3 years. A total of 1,246 days of pre-sentence detention was reckoned as already served. He again appealed against sentence and applied for bail pending the hearing of the appeal.

At [8] Batt & Chernov JJA said:

"It is well established that in order to obtain bail pending the hearing of an appeal, an applicant must show very exceptional circumstances. Where the sentencing disposition has been by way of imprisonment with a non-parole period, it is the service of an unexceptional portion of the head sentence, not the non-parole period, which relevantly is

the factor calling for consideration, though it is only one of the factors: *Re Jackson* [1997] 2 V.R. 1 at 2-3 and *Re Pennant* [1997] 2 V.R. 85 at 86."

The applicant had a lengthy and significant prior history (40 priors from 15 court appearances, including trafficking, 3 x intentionally causing serious injury and 4 x fail to appear). In refusing bail, Batt & Chernov JJA said at [11]:

"The offence of which he has been convicted, presumptively correctly and not merely provisionally [*Chamberlain v R* [No.1] (1983) 153 CLR 514 at 519] is a very serious one. Further, his prior convictions for trafficking and offences of violence raise the possibility - we put it no higher - of the commission of like offences if he were released on bail. In other words, there is an unacceptable risk that the applicant if released on bail would commit an offence or endanger the safety or welfare of members of the public. More importantly, the four prior convictions for failing to appear in accordance with an undertaking of bail, coupled with the possibility of cancellation of his permanent visa, satisfy us that there is an unacceptable risk that the applicant if released on bail would fail to surrender himself into custody in answer to his bail. In this regard we note that the Crown opposed the application. Finally, on an application such as this, in contradistinction, for instance, to a trial, we think that we can take note of the fact that the Parole Board apparently considered the applicant, at least at the time of its decision, not suitable for release under supervision."

In *Kathleen MacBain v DPP* [2002] VSC 321 the applicant had been sentenced in the County Court to 3 years imprisonment with a non-parole period of 2 years on counts of attempted theft and causing injury recklessly. These arose from an incident in which the applicant had attempted unsuccessfully to steal the bag of an 80 year old woman in the process using such force that the victim fell and fractured her left hip. However an appeal against conviction had been allowed and the applicant was awaiting retrial. Accordingly, since the conviction had already been quashed, Nettle J did not apply the "presumptively correct" formulation of *Chamberlain's Case*, saying at [15]: "I cannot...overlook the fact that she has now been incarcerated for 18 months in respect of charges on which she has not been convicted and therefore must be presumed to be innocent". Though the applicant had a lengthy prior criminal history (90 convictions from 15 court appearances) Nettle J granted bail, holding at [17]:

"I reach the view that if conditions [of the kind suggested by counsel for the applicant and counsel for the Crown] are imposed the risk that the applicant would not appear and the risk that she would re-offend whilst on bail may be reduced to a level which should be regarded as acceptable in all the circumstances."

This appears to be a case, like *Mokbel v DPP* (No. 3) [2002] VSC 393 & *Re Tomac Letowski* [Supreme Court of Victoria-Coldrey J, unreported, 13/03/1997], in which although the risk might be objectively the same at different times, the question of unacceptability must be relative to all of the circumstances. Thus, an objectively unacceptable risk had become an acceptable one in the face of the injustice of keeping the applicant in custody for any longer.

In *Re Pinkstone's Application* [2003] HCA 46 the applicant sought bail pending the hearing in the High Court of an application for special leave to appeal against conviction on charges of supplying and attempting to supply speed and cocaine. Kirby J considered a number of matters, including the applicant's need to work to fund counsel of his choice to conduct his High Court appeal. At [24] his Honour held, refusing bail:

"[W]hen I weigh the still relevant considerations mentioned in the earlier bail applications, especially the past conduct involving the false passport and the earlier evasion of authority and take into account the seriousness of which the applicant was convicted, the technical nature of the point raised by him which does not amount to an assertion of innocence and the applicant's otherwise lack of links with Western Australia to which he would have to return if special leave were refused, or being granted, if an appeal were rejected, my view is that bail should not be granted at this time."

In *In the Matter of an Application for Bail by Jack Zoudi* (2006) 14 VR 580; [2006] VSCA 298 a court of five found that the likelihood that a non-parole period will have expired before an appeal was heard constituted an exceptional circumstance and granted bail: At [2]-[4] the Court said:

[2] "Bail pending appeal will only be granted where exceptional circumstances are shown. The phrase 'very exceptional circumstances' is also commonly used, but the approach is the same whichever form of words is used. *Re Clarkson* [2986] VR 583 at 584 per Murray, Brooking and Vincent JJ. It has long been accepted in this Court that, in determining whether exceptional circumstances exist, it is relevant to consider the likely expiry, before the appeal is heard, of the whole or a substantial portion of-

- (a) the non-suspended portion of a partly-suspended sentence: *Re Pennant* [1997] 2 VR 85; *Re Schaefer* [2006] VSCA 268; or
- (b) the period after which the applicant is to be released on recognisance: *Re Crawley* [unreported, Court of Appeal, 05/08/1998] per Callaway JA.

[3] The question which occasioned the convening of a bench of five was whether the likely expiry of a non-parole period was likewise a relevant consideration...[T]he view which has prevailed since 1997 is that the expiry of the non-parole period is not relevant for this purpose. The ground of distinction which has been relied on is that the release of the applicant after the expiry of the non-parole period depends upon a favourable exercise of discretion by the Parole Board. This means that, unlike the position with a partly suspended sentence and release on recognisance, the date of release is uncertain: *Re Pennant* [1997] 2 VR 85.

[4] In our view, this distinction should no longer be maintained. For the purposes of determining whether exceptional circumstances exist, the expiry of the non-parole period should – unless it appears that the applicant will not be released at or about that time – be treated as a relevant consideration of the same kind as the expiry of the non-suspended portion of a partly-suspended sentence.”

In *Re John William Ash* [2010] VSCA 117 the applicant sought bail pending appeal against conviction and sentence. He had been sentenced to a partially suspended term of imprisonment and the non-suspended portion was likely to have been served before the appeal was heard. Maxwell P & Neave JA – applying *Re Pennant* [1997] 2 VR 85 and *Re Zoudi* (2006) 14 VR 580 – found there were exceptional circumstances and granted bail.

In *Victor Martin (a pseudonym) v The Queen* [2019] VSCA 15 the applicant for bail pending appeal had recently been diagnosed with a life-threatening disease with very limited life expectancy. The hearing of the appeal had been brought forward to accommodate the applicant’s prognosis. Bail was refused, exceptional circumstances not being established.

In *Cvetanovski v DPP* [2020] VSCA 126 the appeal was unlikely to be dealt with until after the expiry of the non-parole period. There was no suggestion that the applicant was unlikely to be released at the expiration of the non-parole period or that the applicant poses an unacceptable risk. Maxwell P, Beach & Weinberg JJA held that exceptional circumstances were established and – applying *Re Zoudi* (2006) 14 VR 580 – granted bail pending appeal.

In *Zirilli v The Queen* [2020] VSCA 261 the appeal against conviction was based on the discovery that the applicant’s former counsel (on previous bail application and special mention) was, at the time, acting as a police informer in relation to the drug offences of which applicant was ultimately convicted. Counsel for the applicant had conceded that reasonable prospects of success, alone, were insufficient to constitute exceptional circumstances, rather that strong prospects of success would be needed. In holding that exceptional circumstances had not been made out and distinguishing *Cvetanovski v The Queen* [2020] VSCA 126, the Court of Appeal (McLeish & Weinberg JJA) held that the applicant’s prospects on two of the three charges were no more than reasonable and that even success in relation to the most promising charge would leave intact a substantial non-parole period to be served.

The dicta from *Zoudi’s Case* and *Cvetanovski’s Case* discussed above was approved and applied by the Court of Appeal in *Agresta v The Queen* [2020] VSCA 334 where in granting bail to the appellant Maxwell P & Emerton JA asked “the *Zoudi* question, ‘Is there a risk that success on the conviction appeal might be rendered nugatory?’”

Other cases in which appeal bail was refused include the following:

- *In the Matter of an Application for Bail by Robert Jack Schaefer* [2006] VSCA 268 (Maxwell P & Buchanan JA);
- *Re Slobodan Pandevski* [2007] VSCA 84 at [17]-[22] (Maxwell ACJ & Eames JA);
- *Re DBA* [2008] VSCA 138 (Maxwell P & Nettle JA);
- *Re Tara Egglestone* [2014] VSC 666 (Beach JA).

Other cases in which appeal bail was granted include the following:

- *In the Matter of an Application for Bail by Darryn Garlick* [2006] VSCA 275 (Maxwell P & Nettle JA);
- *Re Momsilovic* [2008] VSCA 183 (Maxwell P & Weinberg JA).

9.4.9 Relevance of the standard of medical care in custodial facility

In *IMO an Application for Bail by Little Joe Rigoli* [2005] VSCA 325 the applicant sought bail pending appeal on the grounds that he suffered from a medical and a psychological condition and that the standard of medical care in custody warranted a grant of bail. The appeal was listed to be heard in 4 weeks time. In refusing bail, Maxwell P – with whom Charles JA agreed – said at [5]-[6]:

“This Court must be mindful of the international human rights guarantees in relation to treatment of prisoners. I will not elaborate them now. Suffice it to say that there is an obligation to ensure adequate and appropriate medical care for any person in the custody of the State. See, for example, Article 10 of the *International Covenant on Civil and Political Rights*; United Nations Committee on Economic, Social and Cultural Rights, *General Comment No 14 on the Right to the Highest Attainable Standard of Health* at [34]; *The Standard Minimum Rules for the Treatment of Prisoners* (Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977) at [22]-[26]; *The Basic Principles for the Treatment of Prisoners* (Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990) at [9]. If, as is suggested in some of the material, the facilities made available for the medical and psychological care of prisoners are said to be deficient in some respect, that is not a matter which this Court can ordinarily investigate on a bail application. A court of law is peculiarly unsuited to evaluating the adequacy of the treatment of a particular person having a particular condition, whether medical or psychological. Whether the care in a particular case is adequate or not is a matter for expert opinion. Accordingly, in my view, it would be a rare case indeed in which this Court would come to the view that the standard of medical care provided to a person in custody fell so far below what was required as to warrant a grant of bail pending appeal where bail would not otherwise be granted [T] his Court would only intervene on a medical issue where there was such obvious neglect of the human rights of the prisoner - that is to say, of his entitlement to adequate and appropriate medical care - that intervention by means of a bail order was justified.”

9.4.10 Relevance of the Charter of Human Rights and Responsibilities Act 2006

In *IMO an Application for Bail by Kelly Michael Gray* [2008] VSC 4 at [9]-[12], Bongiorno J applied the Charter in determining that the applicant had shown cause:

“In the absence of accurate information, the Court is thrown back on an educated guess as to when a case will be heard. Whether an accused person should or should not be granted bail should never depend upon a guess by the judicial officer determining the question, no matter how experienced that judicial officer might be.

This situation is the more unsatisfactory in light of the requirement of those sections of the *Charter of Human Rights and Responsibilities* which require persons accused of crime to be tried without unreasonable delay and released if that does not occur: ss.21(5)(b) & (c) of the *Charter of Human Rights and Responsibilities Act 2006*. Although neither counsel mentioned the Charter in his or her submissions and no argument based on its provisions was put, either by the applicant or by the Crown, the provisions referred to would appear to be highly relevant to the question of bail – not only because of the specific reference in s 21(5)(c) to the consequence of unreasonable delay, namely, release of the prisoner, but also because of the guarantee of trial without unreasonable delay conferred by s 25(2)(c). Counsel for the Crown dismissed the Charter as being irrelevant to the question of bail. She referred to the prohibition against arbitrary arrest and detention [s.21(2) of the Charter] but did not advert to the provisions referred to above nor to their possible interaction with s 21(3) – the provision which prohibits deprivation of liberty other than according to law.

Resorting to the best estimate this Court can make...it could not be said, at least at this stage, that this matter will be finalised before the end of 2008...That a person may serve more time on remand than his ultimate sentence is a significant matter on any consideration of bail at common law. It is of even greater significance now in light of the existence of the Charter and the provisions to which I have referred. If the Charter in fact guarantees a timely trial, the inability of the Crown to provide that trial as required by the Charter must have an effect on the question of bail. It would be difficult to argue that a trial which may well be not held until after the applicant had spent more time in Custody than he is likely to serve upon a sentence would be a trial held within a reasonable time. The only remedy the Court can provide an accused for a failure by the Crown to meet its Charter obligations in this regard (or to ensure that it does not breach those obligations

so as to prejudice the applicant), is to release him on bail - at least the only remedy short of a permanent stay of proceedings: see *Martin v Tauranga District Court* (1995) 2 NZLR 419 at 425 per Cooke P; *R v Morin* [1992] 1 SCR 771; (1992) 71 CCC (3d) 1."

In refusing bail in *Re George Dickson* [2008] VSC 516 Lasry J distinguished the case of *Kelly Michael Gray* at [18]-[20] and said at [22]:

"There are, in my opinion, a number of matters that point to a refusal of bail and where that is the case, whilst it is appropriate to take the terms of the Charter into account and give full effect to the right referred to, that must be done against the scheme of the Bail Act and its relevant provisions. For the reasons I have already referred to, whilst the delay in the trial until June 2009 is most regrettable, in the particular circumstances of this case, the delay is significantly less prejudicial to the applicant than might normally be expected. I do not consider the provisions of the Charter materially affect the role of delay in this particular application."

See also *R v Rich (Ruling No. 19)* [2008] VSC 538 at [28] per Lasry J.

In *DPP (Cth) v Pasquale Barbaro* [2009] VSCA 26 counsel for the accused argued that attention must be paid to s.21(5)(c) & 25(2)(c) of the Charter, relating to the right of an accused to be brought to trial without unreasonable delay. Counsel also relied on the above dicta of Bongiorno J in *IMO an Application for Bail by Kelly Michael Gray* [2008] VSC 4 at [9]-[12]. Counsel for the DPP (Cth) conceded that the Charter was applicable to an application for bail in respect of Commonwealth offences. This was the first time that such a concession had been made. The submission for the accused was that the Court of Appeal should view the provisions of the Charter as 'informing' the application of the provisions of the BA. Counsel did not contend that the provisions of the Charter would require any modification of the approach set out by Kellam J in *Mokbel v DPP (No.3)* [2002] VSC 393. Counsel for the Victorian Attorney-General, who intervened in the proceeding pursuant to s.34 of the Charter, submitted that the Charter did not require any departure from the existing approach to the treatment of delay as an issue in bail applications. At [41] the Court of Appeal agreed:

"In our view, the Attorney-General's submission is correct. Indeed, as we have noted, the submission for Mr Barbaro was in substance no different. Of course, as Kellam J pointed out in *Mokbel v DPP (No 3)*, there will be circumstances where the actual or anticipated delay is of such a magnitude that risks which would, in other circumstances, be regarded as unacceptable may properly be viewed as acceptable. As Kellam J said, the community will not tolerate the indefinite detention of persons awaiting trial. Whether, and when, the delays in a particular case can be so characterised will depend on the circumstances. Suffice it to say that, as things stand at present, this is not such a case."

A case cited as *Woods v DPP* [2014] VSC 1 involved four unrelated applications for bail which raised common issues. In a very detailed judgment, part of which discussed the relationship between bail and human rights, Bell J said at [3]:

"Everyone charged with a criminal offence is presumed to be innocent and the prosecution must prove the guilt of the accused beyond reasonable doubt. Consistently with that presumption and prosecutorial onus of proof, bail ensures the liberty and other human rights of persons arrested on criminal charges. In Victoria, those rights are to be found in the common law and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). The provisions of the *Bail Act* governing the entitlement of accused persons to bail and the conditions on which it may be granted have been designed to take those rights into account. Liberty and human rights under the common law and the Charter are the proper context within which those provisions are to be understood and applied. Because these rights are not absolute, they do not prevent the refusal of bail to an accused who, for example, represents an unacceptable risk of failing to appear at trial or pre-trial hearings, committing offences on bail, endangering the safety or welfare of the community or interfering with witnesses."

In *IMO an Application for Bail by HL* [2016] VSC 750 at [56]-[79] Elliott J discussed the relationship between the *Bail Act* and the *Charter*. At [59]-[60] his Honour cited with approval the aforementioned dicta of Bell J in *Woods v DPP* and added: "As the Charter itself recognises, the human rights it enshrines are subject to such reasonable limits as can be demonstratively justified in a free and democratic society." And at [58] his Honour stated:

“[T]he rights identified in the Charter do not usurp the provisions of the *Bail Act*. As was observed in *Re Dickson* [2008] VSC 516, [22] (Lasry J), the terms of the Charter must be taken into account and the court must give full effect to the relevant right or rights, but that must be done within the scheme of the *Bail Act*.”

At [66] his Honour concluded: “In short, no ambiguity or competing interpretation was identified in any provision of the *Bail Act* which might have been said to have been affected in its proper construction by any human right the subject of the Charter. At [71] his Honour rejected the Attorney-General’s contrary submission and held that s.25(3) of the Charter – which provides that a child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child’s rehabilitation – was applicable to bail proceedings.

The applicant who was 16 years old had been charged with offences including armed robbery, theft of a motor vehicle and assault with a weapon while on bail. The evidence then before Elliott J disclosed that the applicant had been placed in solitary confinement for 23 hours a day in a facility that was formerly Barwon adult prison. He had been denied educational programs, appropriate recreational programs or other amenities consistent with an environment appropriate for the rehabilitation of a child even though there was no evidence that he had been involved in the riots which had caused substantial damage at Parkville on 13-14/11/2016. In those circumstances his Honour proceeded on the assumption that since the applicant’s detention at Barwon Children’s Remand Centre his rights under ss.17(2), 22(1) & 22(3) of the Charter had been infringed. Nevertheless at [96] his Honour held that any bail conditions, including a strict curfew, are not likely to provide the appropriate protection to the community and accordingly at that stage the applicant had not shown cause. However, given that he found some of the evidence about the applicant’s incarceration at Barwon to be “deeply concerning”, his Honour did not refuse bail absolutely but adjourned the bail application for about 1 week remanding the applicant in custody in the meantime. His Honour also directed the informant to file and serve an affidavit deposing to the conditions at Barwon as at 16/12/2016 and the particular circumstances pertaining to the applicant in the week ending 16/12/2016.

9.4.11 Relevance of Aboriginality

Section 3A of the **BA** provides that in making a determination under the Act in relation to an Aboriginal person, a bail decision maker must take into account (in addition to any other requirements of the Act) any issues that arise due to the person’s Aboriginality, including-

- (a) the person’s cultural background, including the person’s ties to extended family or place; and
- (b) any other relevant cultural issue or obligation.

For the purposes of the **BA** “Aboriginal person” is defined in s.3 to mean a person who-

- (a) is descended from an Aboriginal or Torres Strait Islander; and
- (b) identifies as an Aboriginal or Torres Strait Islander; and
- (c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Island community.

Paragraph (h) of the definition of “surrounding circumstances” in s.3AAA of the **BA** that a bail justice must take into account refers to “any special vulnerability of the accused, including being a child or an Aboriginal person, being in ill health or having a cognitive impairment, an intellectual disability or a mental illness”.

Section 10AA of the **BA** [police remand] does not apply to an arrested person who is an Aboriginal person.

Sections 13(3) of the **BA** – providing that only a court may grant bail to a person accused of any Schedule 1 offence other than treason or murder – does not apply to an Aboriginal person in certain circumstances.

Section 13A of the **BA** – providing that only a court may grant bail to a person accused of a relevant Schedule 2 offence and who is already on 2 or more undertakings of bail in relation to other indictable offences – does not apply to an Aboriginal person.

When considering bail for an Aboriginal person charged with a Commonwealth offence, a court must have regard to s.15AB(1)(b) of the Crimes Act 1914 (Cth).

In *Re Chafer-Smith: An Application for Bail* [2014] VSC 51, the applicant – who identified as an Aboriginal person and had turned 18 the day before her alleged offending – was charged with offences involving life-endangering driving. She had allegedly participated in a police chase in which

she turned her headlights off, drove on the wrong side of the road at 120kph on Peninsula Link and appeared to drive her vehicle at police. Her vehicle came to a stop following a collision in which there were no injuries. Her passenger told police that he had repeatedly asked her to pull over but she told him that police would abandon the chase if she drove dangerously enough. Multiple sets of registration plates, ID papers, live and spent ammunition and knuckledusters were found in her car. The applicant had 5 separate warrants for failing to appear in the Children's Court. In the applicant's favour were the following:

- she had stable accommodation with her supportive mother and was her mother's full-time carer;
- she had detoxed from ice after one month's incarceration;
- Youth Justice support was now in place;
- Psychologist Aaron Cunningham had assessed her as having a diagnosis of Autism Spectrum Disorder (making her even more susceptible in adult custody); and
- she was her mother's full-time carer.

In refusing bail, T.Forrest J said at [27]:

"I have considered the applicant's Aboriginality, as I must under s.3A of the Bail Act. I am obliged to take into account any issues that arise therefrom. I accept that Aboriginal Australians are very significantly overrepresented in our prisons and I consider that if this were a marginal case where a decision to grant bail or refuse it was a close run thing, then s.3A considerations may well operate to determine the application in the applicant's favour."

However, his Honour considered there were no conditions that would reduce to an acceptable level-

- the applicant's risk of committing further offences; and
- her risk of endangering safety and welfare of the public.

His Honour regarded the driving behaviour as indicative of the applicant's indifference to the safety of the public, her passenger and herself. The risks of further offending in this manner could lead to catastrophic consequences. Those risks outweighed the s.3A considerations, the applicant's youth, difficult personal circumstances, psychological health and strong family.

In *DPP v Hume* [2015] VSC 695 Hollingworth J took into account the applicant's Aboriginal kinship obligations to his mother but determined that these were not sufficient to overcome the prosecution objections that the applicant represented an unacceptable risk.

In *TM v AH & Ors* [2014] VSC 560 the applicant TM was a 14 year old Aboriginal boy with an intellectual disability. After receiving a custodial sentence he was refused bail by a magistrate who held TM to be an unacceptable risk. In determining that TM had shown cause by a combination of factors and was not an unacceptable risk, Croucher J said at [31]-[32]:

"I am satisfied that TM has shown cause why his detention in custody is not justified. In particular, I am satisfied that TM's tender age, his intellectual disability, his lack of prior convictions, the requirements of s 3A of the *Bail Act*, the reasonable prospect that he will receive a non-custodial sentence on appeal, and on the outstanding charges, and the proposed regime put in place for his release all, in combination, compel the view that his further detention in custody is not justified.

Secondly, in view of the same considerations, and particularly the plan put in place for his release, together with the conditions of bail I intend to impose, I am not satisfied that there is an unacceptable risk that, if granted bail, TM will commit offences or endanger his own or the public's safety. In fact, I am positively satisfied that, while there will always be a risk of those things occurring, that risk is not unacceptable in the present case."

In *An Application for Bail by Patricia Mitchell* [2013] VSC 59, in granting bail to a 22 year old Aboriginal woman charged with six dishonesty offences described by T Forrest J as "trivial when compared with other cases that come before this Court in this type of application", his Honour said at [13]:

"I have been required to take into account the applicant's Aboriginality, by virtue of s 3A of the *Bail Act* 1977. In the context of this application I would have granted bail regardless of any impact from that provision. That said, over policing of Aboriginal communities and their overrepresentation amongst the prison population are matters of public notoriety."

In *Kirby v The Queen* [2013] VSC 602 Dixon J granted bail after taking into account at [7] the strong family ties of the Aboriginal applicant with the local community.

In *Re AB* [2016] VSC 446, T Forrest J granted bail to a 13 year old Aboriginal boy charged with offences including aggravated burglary, burglary, theft, theft of a motor vehicle, unlicensed driving, criminal damage, reckless endangerment and possession of a drug of dependence. At [15]-[16] his Honour stated that the community had a “vital interest in his rehabilitation at this early stage of his life. AB would be under the care of 2 DHS workers and a therapeutic worker while on bail.”

In *DPP v SE* [2017] VSC 13 the applicant was a 17 year old Aboriginal male with an intellectual disability who lived in a community-based residential facility under a child protection order. He pleaded guilty to theft of a motor vehicle and committing an indictable offence whilst on bail. The magistrate adjourned the sentencing hearing for 8 days to obtain a pre-sentence report and refused bail in the interim. In granting bail Bell J referred at [24]-[27] to the five above-mentioned cases and at [29] & [37] to the case of *DPP v Woods* [2014] VSC 1 discussed below and stated at [34]:

“The considerations specified in s 3B in relation to children generally are closely connected with the considerations specified in s 3A in relation to Aboriginal persons. In the case of an application for bail by an Aboriginal child, the purpose of the two provisions overlap and they must therefore be read and applied together. The Aboriginality of such an applicant will often need to be taken into account under s 3A when considering the matters specified in s 3B. In the present case, Aboriginal cultural issues were taken into account [by me] under s 3A as regards the considerations specified in s 3B(1)(b) because bail would facilitate, but continued remand would have frustrated, the intended contact with SE’s Aboriginal family in Queensland. That was a significant consideration because, on the evidence in the reports that were provided to the court, maintaining that contact was an important aspect of SE’s developing individual and group identity as a young Aboriginal and would contribute to SE’s rehabilitation.”

After holding at [44]-[45] that SE had shown cause and at [48] that he was not an unacceptable risk of reoffending, Bell J stated at [49]:

“Moreover, taking into account that SE was an Aboriginal person aged 17 years with an intellectual disability, detention on remand was highly undesirable because of the high risk of physical and psychological harm and negative formative influence to which SE would be exposed (see generally ss. 3A and 3B). In this connection, I noted that the magistrate had recorded that SE had been the victim of an assault when previously in detention on remand and had special vulnerabilities that gave rise to protective issues...Release on conditional bail was the clearly preferable option (see s 3B(a)).

In *Re Brent Reker, Tara Egglestone and Pierce Williams* [2019] VSC 81 Beale J allowed a Director’s appeal against a grant of bail by a magistrate in circumstances where the magistrate had failed to give adequate reasons. In revoking bail, his Honour held that exceptional circumstances did not exist to warrant the grant of bail and that each of the respondents was an unacceptable risk. At [69] his Honour noted that Ms Egglestone’s aboriginality “is an important consideration [b]ut...it does not swamp all other considerations”.

In *Re Martyn Moore* [2019] VSC 344 the applicant was an 18 year old Aboriginal with IQ of 70 who was charged with aggravated carjacking, armed robbery and other offences. He had been on remand at the Parkville Youth Justice Precinct for 5 months. At the time of the alleged offending he was 17 years old. He had been extradited to Victoria on 27/12/2018 having completed a term of imprisonment and parole period in New South Wales. A term of 9 months imprisonment was imposed on the 20/01/2018 at the Children’s Court. On 17/07/2018 he was paroled. On 23/08/2018 his parole was breached and he was returned to custody to serve the remainder of the term of imprisonment. The alleged offending occurred between 11/08/2018 & 14/08/2018 whilst the applicant was subject to parole in New South Wales. The Applicant generally resided with his mother and brother in Dareton, New South Wales. The applicant’s case was that he should be granted bail with a condition that he reside at and participate in the Bunjilwarra residential program at Hastings, described by Priest JA at [35]-[36] as follows:

“The Bunjilwarra program provides a safe and supportive environment for young Aboriginal people to manage their alcohol and other drug problems through participation in therapeutic and structured programs designed to assist them to develop their living skills, and to strengthen their cultural identity and spiritual wellbeing. It aspires to assist young Aboriginal people to improve their physical, social and emotional wellbeing, and to strengthen their connection to family, community and culture, through the use of a holistic recovery model which includes individual and group therapy, as well as recreational, educational and vocational activities. The program also seeks to aid young Aboriginal people to develop alternative behaviours and coping strategies, and skills for resilience

and reintegrating into the community, based on therapeutic community principles and Aboriginal cultural practices.

In the evening, residents of Bunjilwarra are supervised by an active night-shift staff member whose responsibility it is to conduct regular perimeter checks and to monitor the alarms on all external doors of the client dormitories. If any door is open, the alarm system is activated and alerts the staff member and a security company who will telephone the service directly to report the activation to Bunjilwarra management. If the applicant discharged himself, or was discharged by staff, prior to the completion of the program, Youth Justice would be immediately contacted."

In granting bail with a Bunjilwarra residence and program attendance condition, Priest JA referred to ss.1B, 3AAA, 3A, 3B, 4AA, 4A & 4E of the **BA** and said at [39]-[40]:

"Recognising that the exceptional circumstances test is a stringent one, I am of the view that the applicant has satisfied the burden of showing that exceptional circumstances exist that justify the grant of bail. In my opinion, the fact that the applicant is a child; Aboriginal; and influenced by cognitive deficits which make him vulnerable in custody; coupled with the availability of a structured environment in which he will be taught to develop alternative behaviours and coping strategies based on therapeutic community principles and Aboriginal cultural practices, combine to satisfy the exceptional circumstances test.

So far as the suggested unacceptable risks that the applicant will fail to answer bail; commit an offence on bail; or endanger the safety or welfare of persons; are concerned, although I acknowledge that the applicant does present a substantial risk in each of the three ways advanced by the respondent, I consider that those risks can be acceptably ameliorated by strict conditions. Of course, I do not ignore the seriousness of the applicant's offending, or the fact that the firearm has not been recovered, but, as I have said, any relevant risk presented by the applicant can be mitigated by conditions, so as to render the risks acceptable."

In *Re LW* [2019] VSC 616 the applicant was a 16 year old Aboriginal boy who has an IQ of 53 and was in the care of DHHS on a care by Secretary order. His mother has a history of involvement with DHHS in relation to alcohol misuse, emotional and physical abuse and family violence. She provides 'sporadic' support to LW. Having been charged with two counts of theft of a motor vehicle and two counts of committing an indictable offence whilst on bail, he was required to show exceptional circumstances. The respondent conceded exceptional circumstances but opposed bail on the basis of unacceptable risk. Lasry J granted bail – "with some considerable hesitation – on various conditions including judicial monitoring by Shepparton Children's Court. His Honour said, *inter alia*:

[1] "In many respects, this applicant represents the consequence of the failings of our society. The applicant is a child, he is Indigenous, and he is intellectually disabled. As such, this application confronts the Court with very difficult and, at times, conflicting considerations."

[20] "As will become apparent, it seemed to me on reading the materials provided in this application that a key to the future of this applicant is held by the Aboriginal Community. I have had the very great benefit of assistance in this hearing from representatives of that community, which I will turn to shortly.

[50] "Ultimately, in applying the provisions of the Act to this applicant who is not only [a child] but Indigenous, I am driven to the conclusion that the applicant has established exceptional circumstances and, therefore, qualifies for a grant of bail to that degree. Without too much hesitation, I am willing to put the faith of this Court in the Indigenous community.

[51] Enquiries were made over the last 24 hours and, through the cooperation of the County Court Chief Judge and Judge Taft, I have been favoured with information from Aunty Pam Pederson, a significant Aboriginal elder, and Luke Elgey, the applicant's support worker. They took the view that significant part of the answer to the applicant's difficulties may well lie in his Indigenous background and the willingness of his community to support him.

[52] Aunty Pam Pederson is a Yorta Yorta Elder, an advocate in the Koori Court system and an Aboriginal community leader. She has spent some time speaking to the applicant to make him understand the importance of his compliance with any bail conditions which might be imposed. She also impressed upon him the significance of the assistance that is being offered to him by the Indigenous community. I am persuaded that, given a

reasonable degree of intensity of effort on the part of the Indigenous community, the applicant can be made to comply with what will be quite strict bail conditions.

[53] I acknowledge that the conclusion that I have reached — with some considerable hesitation — that the applicant should be released on bail is, in part, driven by a desire on my part that this boy not be left on the scrap heap of life. I am a most reluctant adherent to the choice between the applicant returning to custody or becoming a habitual offender. There must be another way. I suspect that Aunty Pam Pederson, in particular, agrees that there is another way. It is time society paid more attention to the ability, insight and influence of the Indigenous community. I propose to take that step. I propose to put my faith in those around the applicant who will support him, who will make him understand the importance of his heritage, who will encourage him, and who will facilitate his connection with people to steer him away from the kind of offending that he has been apparently pursuing until now.”

In *Re Foster* [2020] VSC 62 Taylor J granted bail to a 20 year old Aboriginal man with a turbulent upbringing, a history of polysubstance abuse and a diagnosis of attention deficit hyperactivity disorder who was charged with theft of a motor vehicle, possessing a drug of dependence, possessing an imitation firearm and two counts of committing an indictable offence whilst on bail. He was subject to an adjourned undertaking consequent upon convictions for property and bail offences at time of alleged offending and had a history of non-compliance with bail orders. In granting bail Taylor J said at [33]-[36]:

[33] “In my view, the applicant has demonstrated exceptional circumstances. The concession of the respondent on this issue was both appropriate and fair. Although the test is stringent, the combination of the applicant’s youth, Aboriginality and his clear desire to attend Bunjilwarra to address his drug issues and explore his culture coupled with the likely delay to any final hearing of the charges demonstrate satisfaction of the exceptional circumstances test.

[34] Given his past history and drug issues, the applicant does present a significant risk of endangering the safety or welfare of persons, committing an offence while on bail and failing to answer bail if he is admitted to bail. However, in my view that risk can be mitigated by conditions, so as to render the risk acceptable.

[35] The availability of a place at Bunjilwarra is pivotal to this finding. The evidence establishes that Bunjilwarra is a purpose built 12-bed residential rehabilitation and healing service based in Hastings. Admission is voluntary and the formal program is three months long, but is flexible in time. The program is designed to achieve three outcomes for young Aboriginal people. First, to provide a safe and supportive environment to manage alcohol and/or drug issues through active participation in therapeutic programs targeted at development of living skills and strengthening of cultural identity and spiritual wellbeing. Second, improvement of physical, social and emotional wellbeing and strengthening of connection to family and community. Third, development of alternative behaviours, coping strategies and resilience for reintegration into the community. The program is based on therapeutic principles and Aboriginal cultural practices. These include, by way of example, counselling sessions, Narcotics Anonymous sessions, case management support, gym sessions, Landcare work, men’s business, women’s business and Koori art.

[36] It is also of significance that the applicant self-referred to the program prior to the alleged offending. Mr Dawson said that the workers at the program, through previous contact, had an understanding of the applicant’s strengths and weaknesses and would tailor the applicant’s sessions and activities accordingly.”

In *Re Dwayne Kennedy* [2020] VSC 187 (Kaye JA), the applicant had failed to attend court while on bail. There had been an apparent miscommunication whether he was required to attend Court in the light of Practice Direction No.3 of 2020 issued by the Magistrates’ Court in the circumstances of the COVID-19 pandemic. The bail application was not opposed by the prosecution. Kaye JA found that exceptional circumstances were established and that the alleged charges did not pose a risk of harm or danger to the public. In the course of granting bail on the applicant’s own undertaking Kaye JA said at [4]:

“(1) The applicant is an Aboriginal man. He is the son of a Dja Dja Wurrung and Yorta Yorta woman and of a Mutti Mutti man. His Aboriginality is relevant by reason of s 3A of the *Bail Act*. In particular, the relevant issues that arise from the applicant’s Aboriginality include:

- (a) As I have already mentioned, the applicant and his family are grieving the loss of his sister, and his period of remand prevents him being with family and community during the period of grief. Part of the grieving process for the applicant's community involves being in the company of family for extended periods after the loss. In that context, the prohibition on visits by family members and others to prison would render the applicant's period of remand even more onerous.
 - (b) As an Aboriginal man, the applicant belongs to a particularly vulnerable section of the community, who are over-represented in the criminal justice system, and who also have poorer health outcomes than non-Aboriginal persons. In that connection, while he is in custody, the applicant may be at greater risk of serious infection from the COVID-19 virus than otherwise.
- (2) The applicant has an acquired brain injury and symptoms of severe cognitive and mental health issues. Those factors make him vulnerable in the confines of a custodial environment. In addition, they would render a period of custody more onerous for him.
- (3) If the applicant is released on bail, he has available to him culturally appropriate assistance and treatment through the Rumbalara Aboriginal Cooperative. In addition, he has accommodation available to him, as he will be residing with his mother in her home in Mooroopna."

9.4.12 Relevance of youth

In *DPP v Woods* [2014] VSC 1 the applicant Wayne Woods (a pseudonym) was aged 17y 3m and had been on remand at a YJC for 2 weeks. He was charged with attempted burglary, theft of a screwdriver, intentionally/recklessly causing serious injury, affray and assaulting/hindering a protective services officer at Malvern Railway Station in company with a large group of others. At the time he was on bail for other charges of theft and property damage. He had breached the curfew and other conditions and had been involved in inappropriate Facebook activity. Bail had been refused on the basis that he had failed to show cause and was an unacceptable risk of reoffending. A Youth Justice case manager gave impressive evidence in the Supreme Court on his behalf. The prosecution case was "not weak" and the applicant had been offending and breaching bail. However, he came from a stable family, was supported by his parents and had been attempting to rehabilitate himself. Youth Justice was prepared to supervise his participation in an intensive bail program and to supervise any conditions of bail. In finding that the applicant had **shown cause** and was **not an unacceptable risk**, Bell J said at [96]-[100]:

[96] "I accept the prosecution submissions that the applicant's behaviour and apparent pattern of offending would suggest that he is at risk of committing further offences on bail. Without proper supervision and rehabilitation, he might endanger the safety and welfare of members of the public. He is not at risk of failing to surrender himself into custody or interfering with witnesses or obstructing the course of justice. Having regard to the evidence of his Youth Justice case officer, I am satisfied that the risks which do exist can be well managed by release on bail and appropriate conditions, with which he agrees. With these conditions, he would not be an unacceptable risk.

[97] "Taking into account that the applicant is a youth, that he has not previously been in criminal custody and that, on proper conditions, he would not be an unacceptable risk if released on bail, I find that he has shown cause why his detention in custody is not justified."

[98] On the evidence, release of the applicant on his own undertaking with only a condition to appear is out of the question. He presents with risks of re-offending which can and should be managed. Conditions are needed to reduce the likelihood of him committing further offences and endangering the safety or welfare of members of the public whilst on bail. Release with conduct conditions is therefore warranted. Having regard to the applicant's changed attitude and circumstances, these conditions are likely to be kept. A curfew condition is necessary in the circumstances but might be relaxed if the applicant becomes a lesser risk, and I expect he will. A security or deposit of money would not significantly contribute to managing these risks.

[99] Taking into account the requirement that the conditions should be no more onerous (in content and number) than necessary for the purposes of bail and reasonable, there should be conditions as to residence, curfew (for less than 12 hours within a 24 hour period, as required by s 5(2B)), participation in an intensive support program, not

contacting co-accused or witnesses (except the informant) and not attending Malvern train station. There is no need for a surety.

[100] I will not impose a condition that the applicant not use public transport at all, as requested by the prosecution. He is a young person who is not old enough to drive a motor vehicle and moves about by bus, tram and train. Imposing a condition that he not use public transport at all would impede his freedom of movement to an extent which would not be warranted for any legitimate purpose of bail. There will be a condition that he not attend the Malvern train station where the main victim works."

In the course of his judgment at [95] Bell J placed significant weight on the fact that the applicant was a child:

"The applicant is a child and his long-term rehabilitation must be a strong consideration. The detention of young people on remand can have deleterious consequences for them and the community which are out of all proportion to the purpose of ensuring appearance at trial and protecting the community. It separates them from their families and the community, disrupts their education and employment, causes them to associate with other young offenders at a vulnerable time in their lives, often (as in the present case) leads to them being held in a police lock-up rather than a youth detention facility, deprives them of access to therapeutic programs and increases the risk of them being given a sentence of incarceration: see Kelly Richards and Lauren Renshaw, 'Bail and remand for young people in Australia: A national research project' (Research Paper No 125, Australia Institute for Criminology, 2013). Despite these powerful considerations supporting bail for young people, there will be cases where refusing bail is demanded as a last resort by even stronger countervailing considerations. This is not one of them."

See also *SG v TA* [2015] VSC 264 at [20] where Croucher J said:

"In my view, it is far preferable, from both the applicant's and the community's perspectives, that a boy of the applicant's age and history be in the community furthering his education and employment prospects than housed in a detention centre with older and probably more criminally-experienced boys and risking the contamination that sometimes occurs in such an environment."

In *Re JO* [2018] VSC 438, in granting bail to a 13 year old boy who had been remanded in custody on charges of criminal damage and assault arising out of events that were said to have occurred at the residential care facility where he was residing, T Forrest J said at [14]:

"Whilst the burden of demonstrating 'exceptional circumstances' is, as I have said, a stringent one, the age of the applicant weighs heavily in his favour. **Children are rightly afforded a special status by the Act and any assessment of 'exceptional circumstances' in the case of a child must be viewed through the prism of s 3B(1).** In the case of an adult, a combination of circumstances may fall short of constituting exceptional circumstances, while the same combination when considered in the case of a child may achieve a wholly different outcome. The suite of considerations enumerated in s 3B(1) make the evaluation of any determination under this Act, including the 'exceptional circumstances' test, a different exercise in the case of a child."

In *Re LJ* [2019] VSC 765 the 12 year old indigenous applicant was charged with affray, committing an indictable offence while on bail, unlawful assault and possessing a controlled weapon. At the time of the alleged offending he was on bail for three outstanding matters, including serious violent offences. At [20] Lasry J cited the aforementioned dicta of T Forrest J in *Re JO* on the operation of s.3B(1) of the **BA** in determining the existence of exceptional circumstances. At [40] his Honour concluded that exceptional circumstances had been established and that the risk posed by LJ's release could be reduced to an acceptable level through the imposition of conditions. At [39] his Honour said:

"It seems to me sad and, indeed, almost unthinkable that a 12-year-old Aboriginal child could be held for an imprecise and possibly lengthy period of remand prior to the matters with which he is charged being dealt with."

In *Re FA* [2018] VSC 372, in granting bail to a 16 year old girl charged, *inter alia*, with assisting an older offender ultimately charged with culpable driving to avoid apprehension and with theft of a motor vehicle, Priest JA said at [23]:

"It is a serious thing to consign a child to custody or detention pending the resolution of a criminal charge (or charges), particularly where — as here — it is far from a foregone conclusion that the child will receive a sentence involving detention consequentially upon a finding of guilt. **Indeed, in my view, the custody or detention of a child should be avoided unless unavoidable.**"

In *Re Gloury-Hyde* [2018] VSC 393, in granting bail to a 23 year old man, Priest JA said at [35]:

"I consider the right to liberty to be of particular importance when the court is faced with a relatively young man such as the applicant, possessing his physical, psychological and cognitive attributes. Indeed...the nature and extent of the applicant's ABI, and its consequences for his functioning, which — when taken with other factors such as the availability of treatment — establish exceptional circumstances justifying a grant of bail."

See also the material set out in sections 9.2.1 & 9.2.2 above (including the extensive references to s.3B of the **BA**) and section 9.5.14 below.

9.5 Bail - A Miscellany

9.5.1 Whether the principle of 'parity' applies to bail applications

In *DPP (Cth) v Stephen Zane Abbott* (1997) 97 A Crim R 19 at 29 {MC2/98} Gillard J, after referring to *Lowe v The Queen* (1984) 154 CLR 606, said of the principle of parity of sentencing:

"The rationale for the principle is based on equal justice so that as between co-offenders there should not be marked disparity which gives rise to a 'justifiable sense of grievance'. But as the High Court has emphasized the principle only applies if 'like can be treated alike'. There must be such a degree of similarity between the co-offenders that they should be treated equally."

His Honour held (at p.29) that the principle could be applied in a qualified way to bail applications:

"The same sense of grievance leading to the appearance of injustice could result from the different treatment of co-accused on applications for bail. To that extent I am prepared to hold that the principle is relevant to the questions of exceptional circumstances as required by ss.4(2)(a) & (aa), the question of the applicant showing cause why his detention in custody is not justified under s.4(4) and also in relation to the inquiry concerning unacceptable risk factors required by s.4(2)(d) of the Act. However, in my view it would indeed be rare for the principle to have any relevant weight in bail applications because the circumstances invariably at all levels of determination are peculiar to the particular applicant."

And later his Honour said:

"In my opinion the principle can apply but it must be established that things are equal as between the co-offenders...[T]he principle can be stated - where other things are equal applicants for bail should receive the same decision; where other things are not equal the bail applications may be dealt with differently. In my opinion a manifestly wrong decision to grant bail could not be used as a basis for the application of the parity principle in another bail application."

In *Browne-Kerr* [Supreme Court of Victoria, unreported, 10/08/1993] the applicant allegedly committed offences of trafficking and conspiracy to traffick cannabis whilst on bail for similar drug charges and for deception and theft charges. His wife, daughter and live-in mother-in-law had health problems. The co-accused was also on bail for the similar drug charges and had been granted bail in respect of this matter. He was "in a situation virtually indistinguishable from the applicant". Giving weight, *inter alia*, to the principle of parity, Coldrey J granted bail:

"Ultimately the factors of parity, the applicant's current family situation and the probable ancillary effect of that on his conduct, together with and to a lesser extent, the apprehended delay in the resolution of these matters, cause me to conclude, but I must say not without some hesitation, that sufficient cause has been shown to justify the granting of bail on stringent conditions."

In *Re Michael Barbaro* [2004] VSC 404 at [10] Morris J expressed his in-principle agreement with the concept of "parity" in relation to bail:

"It is a valid principle that where two people are charged with the same offence and their circumstances are the same, what goes for one is relevant as to what goes for the other."

In the case of *CG* [2005] VSC 358R at [50] Kaye J approved the concept of parity in relation to bail for co-accused:

“It is, I consider, important that where two persons who have been accused with the crime have significantly similar circumstances that they should be treated the same in respect of bail, all other matters being equal.”

However in that case Kaye J found that all other matters were not equal as between CG and his co-accused PS.

In *IMO an Application for Bail by Ante Vucak* [2009] VSC 167 the 18 year old applicant was one of 9 young men whose ages ranged from 15 to 20 years and who had been charged with murder, attempted murder and affray. Seven of the co-accused had been granted bail. Kaye J impliedly accepted the concept of parity in relation to bail but refused the applicant bail on the basis that his role was greater than that of the co-accused. At [34]-[45] Kaye J categorized the applicant as having:

- “organised the attendance at the reserve of the co-accused and organised that they be armed with weapons”;
- “on arrival at the reserve...continued his role as the leader of the pack...he either led or was at the front of the charge of young men towards the [victims and] had struck the first blow and did so in circumstances where the deceased man was unarmed”.

In *DPP v Yaakov Shentzer* [2002] VSC 217 the respondent, a co-accused of Det Sgt Rozenes, had been charged with 3 counts of trafficking, 2 counts of conspiracy to traffick and one count of possession of a drug of dependence. He had been released on bail by a magistrate. Beach J allowed an appeal by the DPP pursuant to s.18A of the **BA**. His Honour was of the view that Rozenes had established exceptional circumstances based on evidence that specific threats had been made against him, his wife and family after it became apparent that prisoners had gained access to his personal identification number and had discovered his personal details. Those circumstances did not apply to the co-accused Shentzer. His Honour therefore found that the co-accused's release was not "a factor of significance" so far as Shentzer was concerned. His Honour went on to find that the prosecution case was strong and that the respondent was an unacceptable risk of failing to appear due to his strong family infrastructure overseas.

In *Re Edward Charles Wilson* [2006] VSC 178 Hargrave J was not satisfied that all other matters were equal between the unsuccessful 30 year old applicant and his 22 year coaccused who had been granted bail.

In *Re Joshua Barban & Karl Anthony Barban* [2007] VSC 335 at [38] Hollingworth J took into account the question of parity with a co-offender who had played a substantial role in the offences, had relevant prior convictions but had been granted bail.

In *IMO an Application for Bail by Kelly Michael Gray* [2008] VSC 4 at [15], Bongiorno J said:

“The principle of parity, as such, is one normally associated with sentencing. It is inapt to apply it to the grant of bail unless in doing so all that is intended to be conveyed is that like cases should be treated alike - a fundamental requirement of the rule of law of which the principle of parity in sentencing is but one example. That is what Gillard J meant by his reference to equal treatment in *Abbott* (1997) 97 A Crim R at 29. But the examination of the available facts required in a bail application, ranging from the circumstances of the offence to the personal circumstance of the alleged offender, his associations, employment, family responsibilities and much more (usually on very sparse evidence), make any attempt at realistic comparison with an alleged co-offender somewhat difficult. This is particularly so where only one of those parties is before the court, and that known of the other is, of necessity, limited.”

In *Re Politis* [2019] VSC 780, the 24 year old applicant had been charged with trafficking in not less than a commercial quantity of a drug of dependence and possession of a drug of dependence. A coaccused had been granted bail. The respondent did not oppose bail and submitted that any risk could be made acceptable with appropriate bail conditions. In granting bail Zammit J noted that the principle of parity was of relevance. After citing the aforementioned dicta of Gillard J in *DPP (Cth) v Stephen Zane Abbott* (1997) 97 A Crim R 19 – and noting that it was cited with approval in *Re Wilson* [2006] VSC 178 [18]–[19] (Hargrave J); *Gray v DPP (Vic)* [2008] VSC 4 [15] (Bongiorno J); *Bchinnati v DPP (Vic) (No 2)* [2017] VSC 620 [69]–[70] (Croucher J); *Re Saputra* [2017] VSC 433 [15] (Lasry J) – her Honour said at [23]–[24]:

[23] “In considering the requirement to establish that ‘things are equal’ as between cooffenders, Gillard J expressed the view at [29] that ‘it would indeed be rare for the principle to have any relevant weight in bail applications because the circumstances invariably at all levels of determination are peculiar to the particular applicant’. In *Bchinnati v Director of Public Prosecutions (Vic) (No 2)* [2017] VSC 620 at [70] Croucher J stated of the application of the parity principle to bail applications, ‘[i]n some cases, however, the circumstances of two accused are sufficiently similar that, if bail had been granted to one, it would be wrong to refuse bail to the other, or at least the grant of bail to one would be a relevant consideration on the application of the other’.²⁷ In that case, Croucher J found at [73] that it would be ‘wholly unfair’ to deny bail to the applicant in circumstances where the co-accused was granted bail for what his Honour regarded as ‘related but comparatively far more serious allegations of the same type’.

In *Gant v The Queen* [2016] VSCA 340 at [20] the Court held that if a co-accused with weaker arguments for bail is granted bail, it would be ‘wrong to differentiate’ the outcome for the other coaccused. That is, in circumstances where one co-accused, with weaker arguments for bail, is granted bail, the other co-accused (all other matters being equal) should also be granted bail.”

In *Re O’Shea* [2019] VSC 791 the applicant who had been charged with the murder in 2007 of the deceased wife of a coaccused who had been granted bail by the Supreme Court [see *Re Petrov* [2019] VSC 705]. In granting bail, Zammit J repeated at [31]-[32] the analysis in relation to parity which she had set out in *Re Politis* [2019] VSC 780.

In *Re Noah Zreika* [2020] VSC 648 at [74] Coghlan JA said [emphasis added]:

“I think I have got to the point where it seems to me that we should look at what has happened to [coaccused] Meikhail. There is a significantly stronger case against him than there is against the applicant. Meikhail is on bail. The distinction that exists between them is that the applicant is accused of interfering with a witness and put, essentially on the basis that he did so at the behest of Meikhail. Meikhail is, as yet, to be charged with that offending. **Although principles of parity are not predominant in questions of bail, I think it is very difficult to say that, given the balance of the prevailing circumstances, that this man should be refused bail.**”

In *Re Oldis* [2020] VSC 769 the applicant was one of 4 coaccused charged with s.3A murder and armed robbery in relation to an alleged drug ‘rip-off’. In finding exceptional circumstances and granting bail Tinney J noted that two coaccused had been granted bail by Taylor J and the prosecution cases against those coaccused were stronger than that against the applicant. The respondent had made no assertion of risk against the applicant. On the issue of parity Tinney J said at [41] that:

“The decisions of many judges of this Court make it plain that the principle of parity may be relevant in bail applications. Parity is of course a long-established principle of sentencing. It has been held to be appropriate for a variant of this principle to apply in bail applications.”

His Honour went on at [42]-[52] to refer to a number of cases in which a statement of the principle of parity in bail had been made, including several of the cases cited above and the case of *Bail application by Fadi Haddara* [2014] VSC 284. See also *Re Nagy* [2020] VSC 878 where Taylor J referred with approval at [52] to “the careful analysis” of Tinney J in *Re Oldis* in granting bail to the 4th coaccused.

9.5.2 Evidence in bail applications

Pursuant to s.8 of the **BA**, in any proceedings with respect to bail-

- (a) the bail decision maker may, subject to paragraph (b), make such inquiries on oath or otherwise of and concerning the accused as the bail decision maker considers desirable; nothing in this paragraph prevents the application of Part 3.10 of the Evidence Act 2008;
- (b) the accused shall not be examined or cross-examined by the bail decision maker or any other person as to the charged offence and no inquiry shall be made of him as to that offence;
- (c) the prosecutor may, in addition to any other relevant evidence, submit evidence, whether by affidavit or otherwise-
 - to prove that the accused has previously been convicted of a criminal offence;
 - to prove that the accused has been charged with and is awaiting trial on another criminal offence;
 - to show that there is a risk that the accused may subject another person to family violence;

- to prove that the accused has previously failed to surrender himself into custody in answer to bail; or
 - to show the circumstances of the alleged offence, particularly as they relate to the probability of conviction of the accused;
- (d) the bail decision maker may take into consideration any relevant matters agreed upon by the prosecutor and the accused or his or her legal practitioner; and
- (e) the bail decision maker may receive and take into account any evidence which the bail decision maker considers credible or trustworthy in the circumstances.

It is clear that in bail applications, the Court is not bound by the rules of evidence. In *R. v Sanghera* [1983] 2 VR 130 the informant gave opinion evidence that the applicant was an unacceptable risk of failing to answer bail, such opinion being based on what the informant had been told by "members of the applicant's community". McGarvie J held (at p.131) that pursuant to s.8(e) of the Act, "it is open to the Court to receive any relevant evidence, whether admissible under the rules of evidence or not, which it may consider credible or trustworthy, and to take that evidence into account if in fact the Court considers it credible or trustworthy in the circumstances." However though his Honour admitted that evidence he did not deem that the applicant was an unacceptable risk.

9.5.3 Bail undertaking, Conduct conditions & Sureties

BAIL UNDERTAKING

Section 5(1) of the **BA** provides that a grant of bail must require the accused to enter into a written undertaking to surrender into custody at the time and place of the hearing or trial specified in the undertaking and not to depart without leave of the court and, if leave is given, to return at the time specified by the court and again surrender into custody.

Section 5(1A) provides that an accused who enters into an undertaking is under a duty to attend court for the hearing or trial specified in the undertaking and surrender into custody on so attending.

Section 5(2) empowers a bail decision maker, on granting bail, to release the accused-

- (a) on their own undertaking without any other condition; or
- (b) on their own undertaking with conduct conditions; or
- (c) with a surety or sureties for a specified amount or a deposit of money of a specified amount, with or without conduct conditions.

Section 5(3) provides that any surety that is required must also enter into an undertaking to pay the specified amount if the accused fails to comply with the undertaking entered into by them.

Section 28 of the **BA** permits one undertaking of bail for multiple charges.

CONDUCT CONDITIONS

Section 5AAA of the **BA** sets out the following stipulations about **Conduct conditions**:

- (1) A bail decision maker considering the release of an accused on bail must impose any condition that, in the opinion of the bail decision maker, will reduce the likelihood that the accused may-
 - (a) endanger the safety or welfare of any person; or
 - (b) commit an offence while on bail; or
 - (c) interfere with a witness or otherwise obstruct the course of justice in any matter; or
 - (d) fail to surrender into custody in accordance with the conditions of bail.
- (2) If a bail decision maker imposes one or more conditions, each condition and the number of conditions-
 - (a) must not be more onerous than is required to reduce the likelihood that the accused may do a thing mentioned in subsection (1)(a) to (d); and
 - (b) must be reasonable, having regard to the nature of the alleged offence and the circumstances of the accused; and
 - (c) subject to subsection (3), must be consistent with each condition of each family violence intervention order, family violence safety notice or recognised DVO to which the accused is subject.
- (3) A bail decision maker may impose a condition that is inconsistent with a condition of a family violence intervention order, family violence safety notice or recognised DVO if the bail decision maker is satisfied that the proposed condition will better protect the safety or welfare of-
 - (a) an alleged victim of the offence with which the accused is charged; or
 - (b) a protected person (within the meaning of the Family Violence Protection Act 2008).

NOTE: If it is not possible to comply with both a bail condition and an IVO or safety notice, the latter prevail to the extent of the inconsistency: FVPA/ss.175AA, 175AB & 175AC.

- (4) Without limiting ss.4(5) or 5(2), a bail decision maker may impose all or any of the following conditions about the conduct of an accused-
- (a) reporting to a police station;
 - (b) residing at a particular address;
 - (c) a curfew (not exceeding 12 hours within a 24 hour period) imposing times at which the accused must be at their place of residence;
 - (d) that the accused is not to contact specified persons or classes of persons [e.g. witnesses, alleged victims or co-accused];
 - (e) surrender of the accused's passport;
 - (f) geographical exclusion zones, being places or areas the accused must not visit or may only visit at specified times [e.g. gaming venues, venues that sell alcohol or points of international departure];
 - (g) attendance and participation in a bail support service (as defined in s.3);
 - (h) that the accused not drive a motor vehicle or carry passengers when driving a motor vehicle;
 - (i) that the accused not consume alcohol or use illegal drugs;
 - (j) that the accused comply with any existing intervention orders;
 - (k) any other condition that the bail decision maker considers appropriate to impose in relation to the conduct of the accused.

Section 17 details the obligation of a bail decision maker to cause the accused to be given a notice setting out the obligations of the accused concerning the conditions of bail and the consequences of failure to comply with those conditions.

In *Re McCann* [2020] VSC 138 – summarized in section 9.4.1.1 above – Lasry J released the 27 year old applicant on bail with 16 conditions, one of which was that he was “not to be absent from his place of residence unless in the immediate presence of his mother, Ms Mona McCann, and only when:

- a) attending scheduled medical, psychological or psychiatric appointments;
- b) attending a scheduled appearance at the County or Supreme Court;
- c) attending at the Narre Warren police station for the purposes of reporting;
- d) attending at Centrelink;
- e) attending at a healthcare facility to obtain emergency medical treatment; or
- f) traveling directly to, or returning directly from, any of those locations.”

The writer believes that this condition – which was consented to by both the applicant and the respondent – can only be lawful in the face of s.5AAA(4)(c)-

- if it is able to be classified as a ‘home detention’ condition rather than a ‘curfew’ condition; or
- if s.5AAA(4)(c) is interpreted as a prohibition against a bail decision maker imposing a longer than 12 hour curfew in any 24 hour period **without any exceptions attached to the condition.**

In *X5* [Children’s Court of Victoria-Gibson M, 01/04/2020] her Honour conducted a 5-headed bail application by videolink during the State of Emergency caused by the COVID-19 pandemic. The applicants were 5 youths who had been in a stolen car with an adult. At least one of the people in the car had flu-like symptoms in circumstances where they were clearly not self-isolating but were out and about allegedly committing offences in breach of an existing curfew condition. Her Honour refused bail to 2 of the youths [who will be isolated on remand] and granted bail to the other 3. In granting bail she imposed a condition that each of the 3 self-isolate at home for 14 days. The writer does not consider that her Honour was in breach of s.5AAA(4). She was not imposing a **curfew** in the traditional sense. She was imposing a **public health condition** which she regarded as necessary in order to satisfy the unacceptable risk test in s.4E(1)(a)(i) of the Act: “A bail decision maker must refuse bail for a person accused of any offence if satisfied that there is a risk that the accused would, if released on bail, endanger the safety or welfare of any person.”

In *Re Johnstone (No 2)* [2018] VSC 803 Beach JA ultimately accepted the Crown’s submission that he should include a condition of bail that the applicant comply with all of the conditions of the personal safety intervention order [PSIO] to which he was the respondent. At [26]-[27] his Honour said:

“Plainly, the applicant is by the force of the PSIO itself required to comply with its terms. A breach of the PSIO would constitute a basis for remanding the applicant again into custody. Ordinarily, one would not make an order requiring a person to comply with another order: see *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39,49-50; *Duthie v Nixon* (2015) 47 VR 355, 366 [32]-[33]. In the present case, however, I think there is a basis for making it a condition of the applicant’s bail that he comply with all of the

conditions of the current PSIO. The condition has the capacity to further bring home to the applicant his need to comply with the PSIO and to stay away from the complainant.”

SURETIES

Section 5AAB of the **BA** sets out the following stipulations about **Sureties**:

- (1) If a bail decision maker is considering, in accordance with s.5(2)(c), imposing a condition that requires a deposit of money of a specified amount, the bail decision maker must have regard to the means of the accused in determining-
 - (a) whether to impose the condition; and
 - (b) the amount of money to be deposited.
- (2) If a bail decision maker is satisfied under subsection (1) that the accused does not have sufficient means to satisfy a condition requiring a deposit of money of a specified amount, the bail decision maker must consider whether any other condition would reduce the likelihood that the accused may do a thing mentioned in s.5AAA(1)(a) to (d).
- (3) If a bail decision maker is considering imposing a condition that requires a surety for a specified amount, the bail decision maker must have regard to the means of a proposed surety in determining-
 - (a) whether to impose the condition; and
 - (b) the amount of the surety.
- (4) If a bail decision maker is satisfied under subsection (3) that the accused is unable to provide a surety with sufficient means, the bail decision maker must consider whether any other condition would reduce the likelihood that the accused may do a thing mentioned in s.5AAA(1)(a) to (d).

It follows from s.5AAA(2) that bail conditions must not be imposed to achieve a collateral purpose such as an injunction: see *R v Flynn & Patten* [Supreme Court of Victoria, {MC23/94}, 21/10/1994].

Provisions relating to sureties for bail are contained in s.9 of the **BA**. In *Renate Mokbel v DPP (Vic) and DPP (Cth)* [2006] VSC 487 at [35] Gillard J said:

“The surety undertakes to ensure that the accused will appear at his trial. That is the prime obligation. In *2 Hawkins Pleas of the Crown, Chapter 15, s.3*, the learned author, writing in 1824, stated that the purpose of granting bail was not to set the accused free, but to release him from the custody of the law and to entrust him to the custody of his sureties, who were bound to produce him to answer on his trial at a specified time and place.”

Nowadays, in fact, requiring a child to pay a monetary deposit to secure his/her release on bail is extremely rare. Requiring a child to find one or more sureties to secure his/her release on bail is rare. This is on all fours with ss.5AAB(1) & 5AAB(3) which provide that a bail decision maker must have regard to the means of the proposed money provider in deciding whether to order a deposit or surety in any and what amount.

In *Re Wilkinson* [1983] 2 VR 250 at 254-255 Crockett J discussed the importance of a surety being a “genuine” surety. See also *Re Condon* [1973] VR 427 at 431. Section 31 creates an offence of indemnifying a surety. In *Renate Mokbel v DPP (Vic) and DPP (Cth)* [2006] VSC 487 at [38] Gillard J said:

“The importance of the undertaking given by a surety cannot be overstated. The Court, once it grants bail, is not in a position to supervise obedience to the order and conditions. It relies upon a surety to perform that task. In that sense, the surety acts as both ‘the eyes and ears’ of the Court. The surety undertakes a duty to ensure that the principal, that is, the accused, honours his undertaking to the Court to appear at trial and to attend each day of the trial. The surety must be independent and undertake a real obligation. This means that the surety must put his or her money at risk. Hence, by reason of s 31 of the Bail Act, it is a criminal offence for a person to indemnify a surety, and an agreement by which an accused undertakes to indemnify a surety constitutes a conspiracy to effect a public mischief. See *The King v Porter* [1910] 1 KB 369. It is vital that a surety understands the obligation of his or her undertaking, and the obligation requires the surety to ensure that the accused honours his or her undertaking to attend the trial.

At [43] Gillard J spoke of the amount of the surety exerting a pressure on the accused to honour the undertaking of bail and cited with approval dicta of Lord Widgery CJ in *R v Southhampton Justices; Ex parte Corker* (1976) 120 SJ 214:

“The real pull of bail, the real effective force that it exerts, is that it may cause the offender to attend his trial rather than subject his nearest and dearest who has gone surety for him to undue pain and discomfort.”

Section 9(2A) of the **BA** provides that if objection to a proposed surety is raised, the suitability of the proposed surety is to be determined by a magistrate or judge. Section 9(3) imposes obligations on the person admitting an accused to bail with a surety, including a requirement in s.9(3)(c) that the surety or sureties sign the undertaking of bail.

The prescribed form for a grant of bail is Form 1 (Bail Regulations 1977). The only difference between an adult's and a child's bail undertaking is that the latter contains a paragraph 1A which enables an undertaking to be given by an adult if the child does not have the capacity or understanding to enter the undertaking: see s.16B of the **BA**.

The following standard conditions are included on the Children's Court Courtlink computer but they do not limit in any way the Court's power to impose relevant conditions in any case:

REPORT	Report to a nominated police station on nominated days of the week between nominated hours
RESIDE	Reside at a specified address
NOTIFY CHANGE	Notify the informant of any proposed change of address and/or reporting station
ATTEND PROGRAM	Attend and comply with all requirements of a specified program
OBEY DIRECTIONS	Obeys all lawful directions of a specified person
CURFEW	<ul style="list-style-type: none"> Not leave residence between specified hours except in the company of a specified person Present at front door during curfew hours at request of police
NON-CONTACT	Not contact witnesses for the prosecution other than the informant
NON-ASSOCIATION	Not associate with specified person(s)
INTERVENTION ORDER	Comply with a specified existing intervention order
ALCOHOL/DRUGS	<ul style="list-style-type: none"> Not consume alcohol Not use drugs of dependence
PASSPORT	Surrender valid passport
GEOGRAPHICAL RESTRICTION	<ul style="list-style-type: none"> Not attend points of international departure Not leave Australia/Victoria Not attend licensed premises where alcohol is consumed
MOTOR VEHICLE	Not drive motor vehicle

9.5.4 Extension of bail

A court has a wide power to extend bail: see s.16 of the **BA**.

9.5.5 Reasons and sufficiency thereof

A court which grants bail for a person in circumstances where, under s.4AA, the step 1 – exceptional circumstances test or the step 1 – compelling reason test applies must include in the order granting bail a statement of reasons for making the order: ss.12A(1) & (2) of the **BA**. A failure to include such reasons has been held to render the order a nullity: see *DPP v Parker* [Supreme Court of Victoria, {MC25/94}, 19/08/1994] per Mandie J at p.2; *DPP v Sehevela* [Supreme Court of Victoria, unreported, 12/01/1997] per Beach J; *DPP (Commonwealth) v Stephen Zane Abbott* (1997) 97 A Crim R 19 at 24 {MC2/98} per Gillard J, not following a contrary decision of Hampel J in *DPP v Spiridon* [Supreme Court of Victoria, {MC60/88}, 07/09/1988]. By contrast, in *R v The Director-General of Corrections, ex parte Allen* [Supreme Court of Victoria, {MC1/87}, 11/11/1986] Tadgell J held that a remand warrant was not invalid because it failed to specify a ground for refusal of bail in circumstances where no application for bail had been made.

A similar obligation is imposed on a bail decision maker who is not a court to record and transmit a statement of reasons as required by the regulations: s.12A(3) of the **BA**.

Reasons need not be elaborate. In *Nguyen v Magistrates' Court of Victoria* [Supreme Court of Victoria, {MC31/93}, 13/12/1993] Beach J held that a magistrate who had refused bail to an accused who had 4 priors for failing to answer bail had given sufficient reasons when he stated that the accused was "an unacceptable risk". In *DPP v Harika* [2002] VSC 237 the magistrate had included in the order the following: "Reasons for granting Bail: AGE, SUPPORTS, STRUCTURE, HAS SHOWN CAUSE". Gillard J somewhat reluctantly held that the statement of reasons did comply with the obligation set out in what was then s.4(4) of the Act:

"[30] Taken in isolation, the reasons are difficult to comprehend. Whilst one commends any judicial officer for being brief and to the point, the statement must be comprehensible to the reasonable reader and satisfy the description of "reasons". The object of the requirement is to ensure that judicial officers turn their minds to the issues and determine the matter in accordance with the law. The obligation to state reasons focuses the mind on the issues. In order to determine whether the judicial officer has done so, one turns to the reasons.

[31] ...[T]o state that the applicant 'has shown cause' is a conclusion and is not a statement of reasons.

[32] On their face, the Magistrate has determined that by reason of the respondent's age, the fact that there is a structure in place and that he has the necessary support of others, cause is established as to why his detention in custody is not justified.

[33] The reasons are not to be considered in isolation. By reference to the transcript of the proceedings before the Magistrate and the documentary material adduced in evidence, this Court can determine what the reasons were for concluding that the applicant had shown cause...

[37] What the Magistrate recorded in the order, as a statement of reasons for making the order, was, in my opinion, the barest minimum. Judicial officers should explain in more detail the reasoning which led to the order.

[38] I am satisfied, when the Magistrate's reasons are considered in the light of the transcript of the two hearings before her, that the statement of reasons for making the order does comply with the obligation in s.4(4) of the Act."

Where a person is refused bail by a court, the judicial officer must certify on the remand warrant a statement of the refusal and of the grounds for the refusal: s.12(4)(b) of the **BA**.

9.5.6 Further application for bail – New facts or circumstances

Under s.18(1) of the **BA** an accused who has been refused bail and is in custody pending the hearing or trial of a charge may make a further application for bail.

Under s.18(2) a person whose bail has been revoked under s.18AE or s.24(3) may make a further application for bail. See also s.24(5).

Section 18(3) provides that, subject to s.144(2)(c) of the Criminal Procedure Act 2009, an application under s.18(1) or s.18(2) is to be made-

- (a) in the case of a person charged with treason or murder, to the Supreme Court;
- (b) in any other case, to the court to which the person is remanded to appear.

This provision – which came into operation on 01/01/2011 – nullifies the decision of Cummins J in *Scher & Premru v Popovic, Dever & Wilson* [Supreme Court of Victoria, unreported, 12/01/1990].

However, it is clear from s.18AH(1) that nothing in s.18 – or for that matter in ss.18AA, 18AC or AE – derogates from any other right of application or appeal to the Supreme Court or County Court: cf. the dicta of Gillard J in *Bail Application by Michael Paterson* [2006] VSC 268 at [47]-[49].

Section 18AA(1) of the **BA** provides that a court must not hear an application under s.18 unless-

- (a) the applicant satisfies the court that new facts or circumstances have arisen since the refusal or revocation of bail; or
- (b) the applicant was not represented by a legal practitioner when bail was refused or revoked; or
- (c) the order refusing or revoking bail was made by a bail justice.

Under s.18AB an application under s.18 must be conducted as a fresh hearing and determined in accordance with s.4. Section 18(4) requires a further application for bail to be heard by the same judicial officer if reasonably practical.

Under s.18AK an accused must give notice of a further application for bail under s.18(1) to the informant and to the DPP/prosecutor at least 3 days before the hearing unless the Court is satisfied that the circumstances justify the application being heard sooner or all the parties agree.

9.5.6.1 SOME CASES IN WHICH NEW FACTS OR CIRCUMSTANCES WERE DISCUSSED

Daniel James Keogh

[Supreme Court of Victoria, Lush J, unreported, 07/04/1982]

The applicant was charged with: (1) possession & trafficking of drug and possession of firearm and (2) possession & trafficking of drug and self-administration of amphetamine. Bail had previously been refused. Lush J accepted that "the discovery in more precise terms of the likely effect of the delays [in analysing the substances by FSL] which are referred to in general terms [in the previous application for bail], if significant, should be treated as coming within the expression 'new facts or circumstances have arisen'". His Honour ultimately determined that the delays constituted 'exceptional circumstances' and released the applicant on bail, saying that "the delays [by FSL] should not be the basis for prolonged incarceration of people who have not been tried".

Robin Vincent Holt

[Supreme Court of Victoria, Marks J, unreported, 01/06/1984]

The accused and a co-accused were charged with attempted armed robbery and shooting of 2 brothers. The accused had been refused bail on 3 prior occasions. On each occasion he had been legally represented. At the end of the first day of the committal, the Magistrate held that the evidence of the attempted armed robbery was weak and that the witness' evidence constituted a 'new fact or circumstance'. His Honour allowed the subsequent appeal, holding that it did not and the Magistrate would have had to have heard all of the evidence and submissions prior to determining whether 'new facts or circumstances' had arisen.

Dylan Peter Edwards

(1988) 35 A Crim R 465

After committal, the applicant applied for bail pending trial, having been charged with having in his possession 1.13 tonnes of cannabis resin reasonably suspected of having been imported into Australia contrary to s.233B(ca) of the Customs Act 1901 (Cth). In granting bail, the Court held-

1. The mere fact of a committal having taken place is not of itself sufficient to constitute new facts or circumstances. The question is whether there are new considerations which were not before the court on the occasion of the previous application when bail was refused.
2. The question is whether, now that the extent of the prosecution case is better known, it can be said that there has been a material change in the circumstances or facts which have been discovered which, if discovered in time, would have entitled the applicant to an order in his favour.
3. A persuasive and satisfying case is required, and not one in which the differences disclosed by the additional material go only to matters of mere detail or to considerations which, although not previously raised, would not have been likely to alter the balance to one favouring the granting of bail.
4. There was adequate new material and, weighing the nature and seriousness of the offences with other facts, including the evidence against the accused, his character and antecedents, together with conditions of bail which could be ordered, the risk of his failing to appear at trial was not unacceptable.

Although this is a Queensland case, the legislation, similar to s.18 of the BA , also limits the right of an accused to make successive applications for bail in the absence of new facts or circumstances.
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Antonios Mokbel {See also paragraph 9.4.2 above}

[Supreme Court of Victoria, Kellam J]

[2002] VSC 127 - 26/04/2002

A magistrate had granted bail on being satisfied that exceptional circumstances existed. Cummins J, on DPP & CDPP appeals pursuant to s.18A of the Bail Act 1977, had found that the magistrate had erred and had revoked bail: [2001] VSC 403. In his first bail application before Kellam J the applicant relied, *inter alia*, on delay, deterioration of his financial situation and weakening of Crown case as a consequence of an informer and 2 drug squad officers no longer being Crown witnesses. His Honour was not persuaded that any new facts or circumstances were established as relevant to whether or not the issue of a grant of bail should be revisited. His Honour held at [39]-[40]:

"The applicant must satisfy the Court that new facts or circumstances have arisen since the making of the previous order before the Court may proceed to hear the application. In my view the new facts or circumstances must be of such a nature that they are relevant to bail and justify a conclusion by the Court that reconsideration of the refusal of bail is required. Clearly not every new fact or change of circumstance will fall into this category."

(No.2) [2002] VSC 312 - 09/08/2002

At Mokbel's application for bail decided on 26/04/2002, the prosecution had expressed confidence that the State prosecution would proceed to committal on 15/07/2002. That confidence proved to be

unfounded. It was conceded by the prosecution that new circumstances had arisen since the making of the previous order.

9.5.7 Application to vary bail

Under s.18AC(1) of the **BA** a person who has been granted bail, whether or not the person is in custody, may apply for variation of the amount of bail or the conditions of bail.

Under s.18AC(2) the informant or the DPP may apply for-

- (a) variation of the amount of bail or the conditions of bail; or
- (b) the imposition of conditions in respect of bail which has been granted unconditionally.

Under 18AC(3) an application under s.18AC(1) or s.18AC(2) is to be made-

- (a) in the case of a person charged with treason or murder, to the Supreme Court;
- (b) in any other case, to the court to which the person is remanded to appear.

Under s.18AC(4) a person may apply for variation of the amount of bail or the conditions of bail if-

- (a) the person has been granted bail by a bail justice or the Magistrates' Court; and
- (b) within 24 hours after the grant of bail, the person is unable to meet the conditions of bail.

Such application is to be made to the bail justice who granted the bail or to the Magistrates' Court.

Section 18AD(1) empowers the court or bail justice to vary the amount of bail or the conditions of bail if it appears that it is reasonable to do so, having regard to all the circumstances including, if relevant-

- (a) the nature and seriousness of the offence;
- (b) the character, antecedents, associations, home environment and background of the accused;
- (c) the history of any previous grants of bail;
- (d) the strength of the evidence against the accused;
- (e) the attitude, if known, of the alleged victim to the offence to the proposed variation.

Section 18AI provides that if an accused has been admitted to bail with a surety or sureties applies for a variation of bail, the accused must give written notice of the application to each surety a reasonable time before the hearing of the application. Under s.18AJ(1) a surety is entitled to attend and give evidence at the hearing of an application for variation of bail.

Under s.18AK an accused must give notice of an application to vary conditions of bail under s.18AC to the informant and to the DPP/prosecutor at least 3 days before the hearing unless the Court is satisfied that the circumstances justify the application being heard sooner or all the parties agree.

In refusing an application to vary bail in *Dixon v DPP* [2009] VSC 224 Bongiorno J held at [8] that although the jurisdiction of the Supreme Court is undoubted so far as questions of bail are concerned, it would require a reason of considerable gravity not only to alter bail conditions which have already been endorsed at least once by a State Magistrate but to alter those conditions when an order of a Federal Magistrate having jurisdiction under the Family Law Act governs the applicant's contact with his children anyway.

9.5.8 Application to revoke bail

Under s.18AE(1) of the **BA** the informant or the DPP may apply for revocation of bail granted to a person.

Under s.18AE(2) an application under s.18AE(1) is to be made-

- (a) in the case of a person charged with treason or murder, to the Supreme Court;
- (b) in any other case, to the court to which the person is required to surrender under his or her conditions of bail.

Under s.18AF, on an application under s.18AE, the court may either revoke bail or dismiss the application. It is noteworthy that the court does not have power to vary bail as an alternative.

9.5.9 Appeal to Supreme Court

9.5.9.1 Appeal by DPP

The **BA** sets out three circumstances in which the Director of Public Prosecutions, if satisfied that an appeal should be brought in the public interest, may appeal to the Supreme Court:

- (i) under s.18AG – if a court refuses to revoke bail on an application to revoke brought by the informant or the DPP;
- (ii) under s.24(4) – if a court refuses to revoke bail following an arrest without warrant by any member of the police force under s.24(1) [see 9.5.11 below];
- (iii) under s.18A(1) – if a court grants bail and the DPP is satisfied that the conditions of bail or insufficient or the decision to grant bail contravenes the **BA**.

In this context, the term 'appeal' has been described by the Supreme Court as "anomalous" and "jarring". In *Beljajev & Pinhasovitch v DPP (Vic) & CDPP* [Supreme Court of Victoria-Appeal Division, unreported, 08/08/1991], the Court said:

"[T]he rights of appeal conferred on the Director of Public Prosecutions by sections [18AG] and 18A should be regarded as anomalous. Without those sections, of course, the Director would have had no right to appeal in a bail matter to the Court. But the use of the words 'appeal' is jarring and may be contrasted with the system of review which is available under the New South Wales Bail Act – see Pt. VI of that Act, which not only provides for review by way of rehearing on currently available material, but preserves an accused's right to make fresh application for bail in lieu of seeking review of a decision refusing bail; see also *R. v. Hamill* (1986) 25 A Crim R. 316 and *R. v. Pakis* (1981) 3 A Crim R. 132. Further, the possible lapse of time which section 18A at least contemplates (see sub-section (4)) might well lead to the situation where the appeal would be resolved upon material which was no longer relevant. Were bail revoked on a view of that material, the outcome might be set at naught by a fresh and successful application for bail based on current material, such application being made very soon after the accused was taken back into custody. The mere fact, for example, that an accused person had been at large for a significant period pending the appeal and had not sought to break his bail might of itself be a matter of significance in any fresh bail application. Equally, commencement of the appellate process contemplated by section 18A would not appear to preclude application by the Crown under section 18(6); the application could take account of newly occurring circumstances; the appeal probably could not unless some power could be found to admit fresh evidence. This illustrates, in a different way, the anomaly of appeal in the context of bail."

In *DPP v Fallon* [2001] VSC 136 Beach J applied the above dicta in holding that "it is highly arguable" that the fact that the accused had not committed further offences "during the period of two months or more that he has been free on bail...is irrelevant for the purposes of an appeal pursuant to s.18A of the Bail Act."

Other cases in which the reasoning in *Beljajev & Pinhasovitch* has been applied include:

- *DPP v Morgan* [Supreme Court of Victoria, Beach J, {MC32/94}, 16/06/1994];
- *DPP v Gomez* [Supreme Court of Victoria, Beach J, 07/08/1998];
- *DPP v Ghiller* [2000] VSC 435 per Beach J;
- *DPP v Antonios Mokbel* [2001] VSC 403 {MC10/01} per Cummins J;
- *DPP v Peterson* [2006] VSC 199 per King J.

Section 18A(12) of the **BA** – effective from 01/01/2011 – provides that the respondent or the DPP may appeal to the Court of Appeal from a decision of a single judge of the Supreme Court made under s.18A. This provides a legislative endorsement of the decision of the Court of Appeal – constituted by 5 judges – in *R v Fernandez* (2001) 5 VR 374; [2002] VSCA 115 at [25] which overruled a decision to the contrary in *Beljajev & Pinhasovitch v DPP (Vic) & CDPP* [Supreme Court of Victoria-Appeal Division, unreported, 08/08/1991].

In *DPP v Semaan* [2014] VSC 658 the DPP appealed against a decision by Judge McInerney varying an undertaking of bail by suspending the existing conditions so that Mr Semaan could travel to Lebanon between 19/12/2014 & 09/01/2015 but also ordering there be two sureties – in the amounts of \$15,000 & \$207,000 – when none had previously been required. Croucher J dismissed the appeal on the basis that no error had been demonstrated. There had also been argument as to whether s.18A gave the DPP a right of appeal against an order varying bail as distinct from an order granting bail. His Honour said at [5]: "Since I am not persuaded that the judge's decision was manifestly wrong, and since the appeal must therefore be dismissed in any event, it becomes unnecessary to decide whether the appeal is incompetent. That issue, and the related questions, while important, will have to await another day for their resolution."

In *DPP v Spiteri* [2016] VSC 335 Coghlan JA dismissed a Director's appeal against a grant of bail by a magistrate, holding at [22]: "I probably would not have reached the same conclusion. I do not, however, regard the material as sufficiently clear to vitiate the grant of bail below."

In *Re Brent Reker, Tara Egglestone and Pierce Williams* [2019] VSC 81 and in *Re Martinow* [2019] VSC 118 Beale J allowed a Director's appeal against a grant of bail by a magistrate in circumstances where the magistrate had failed to give adequate reasons. In revoking bail, his Honour held that exceptional circumstances did not exist to warrant the grant of bail and that each of the respondents was an unacceptable risk. At [69] his Honour noted that Ms Egglestone's aboriginality "is an important consideration [b]ut...it does not swamp all other considerations".

In *DPP v Mikael* [2020] VSC 492 Champion J dismissed a Director's appeal against a grant of bail from the County Court on charges of attempted armed robbery, assault with instrument, intentionally damaging property, commit an indictable offence whilst on bail, handling stolen goods and attempted aggravated carjacking, holding that the grant of bail was 'reasonably open' to the Judge.

9.5.9.2 Appeal by remandee

In *Shannon Taylor v DPP* [2020] VSCA 142 the appellant was charged with offences including trafficking in a commercial quantity of a drug of dependence, methylamphetamine; being a prohibited person in possession of a firearm and committing an indictable offence whilst on bail. Although Lasry J was satisfied that "exceptional circumstances have been established, primarily on the basis of the inordinate delay that will occur, along with the impact that COVID-19 is likely to have on the prison population", he nonetheless refused bail because "there is an unacceptable risk that the applicant will continue to offend whilst on bail": see [2020] VSC 146 at [51] & [54]. The remandee's appeal on the unacceptable risk issue was dismissed, Priest, T Forrest & Weinberg JJA stating at [4]-[5]:

"It is clear that the appeal is to be determined according to [the principles in] *House v The Queen* (1936) 55 CLR 499, 505 (Dixon, Evatt and McTiernan JJ): see *Robinson v The Queen* (2015) 47 VR 226. In other words, this Court may only intervene if it appears that the primary judge has mistaken the facts; has acted on an erroneous principle of law; has taken into account irrelevant matters or has failed to take into account relevant matters; or has clearly given insufficient weight, or excessive weight, to some matter taken into account; or unless the decision is unreasonable or plainly unjust. In our view, it is plain that the decision appealed from was correct. The appeal must therefore be dismissed".

9.5.10 No power for surety to apprehend principal – Discharge of surety

Section 21 of the **BA** abolishes the common law right of a surety to apprehend the principal and to bring him or her before a bail justice or a court.

Section 23 empowers a surety to apply to the court to which the accused would be required to surrender himself under the conditions of bail to discharge the applicant from his or her liability with respect to the undertaking of bail.

9.5.11 Arrest of person released on bail

Under s.24(1) of the **BA** any police officer, or any protective services officer on duty at a designated place, may without warrant arrest any person who has been released on bail-

- (a) if the member has reasonable grounds for believing that the person is likely to break the condition for his appearance or any other condition on which he was admitted to bail, or has reasonable cause to suspect that the person is breaking or has broken any such other condition;
- (b) if the member is notified in writing by any surety for the person that the surety believes that the person is likely to break the condition for his appearance and for that reason the surety wishes to be relieved of his obligation as a surety; or
- (c) if the member has reasonable grounds for believing that any surety is dead, or that for any other reason the security is no longer sufficient.

Under s.24(3) of the **BA** a bail justice or court dealing with a person arrested under s.24(1)-

- (a) if of opinion that the person has broken or is likely to break a condition of the undertaking on which he was admitted to bail may-
 - revoke the bail and remand the person in custody with a direction to the officer in charge of the prison-
 - o [if the direction is given by a court] that the person be brought before the court at the time when the person is required by the conditions of bail to attend; or

- o [if the direction is given by a bail justice] that the person be brought before the court to which the person was required to surrender in answer to his or her bail on the next working day or, if the next working day is not practicable, within 2 working days [see s.346(4)(b) of the CYFA]; or
 - release the person on his original undertaking; or
 - release the person on a new undertaking with or without sureties; or
- (b) if not of that opinion-must release the person on his or her original undertaking of bail.

Sections 25 & 26(1) of the **BA** set out circumstances in which a person admitted to bail may be arrested where a bail decision maker is of the opinion that:

- it is necessary or advisable in the interests of justice that the conditions of bail should be amended or supplemented; or
- the person was released with insufficient surety or with surety which has become insufficient.

9.5.12 Breach of bail

Section 30(1) of the **BA** provides that any person released on bail who fails without reasonable cause, the proof of which lies on him or her, to attend in accordance with his or her undertaking of bail is guilty of an offence. The prescribed penalty is Level 7 (2 years) imprisonment.

Section 30A provides that it is an offence for an adult accused to breach, without reasonable excuse, any conduct condition imposed on him or her other than a condition requiring the accused to attend and participate in bail support services. The prescribed penalty is 30 p.u. or 3 months' imprisonment. If an infringement notice is served, the infringement penalty is 1 p.u. It is clear from s.30A(3) that it is no longer an offence for a child to contravene any conduct condition of bail imposed on him or her, regardless of when the contravention is alleged to have been committed.

Section 30B provides that it is an offence for an accused to commit an indictable offence whilst on bail. The prescribed penalty is 30 p.u. or 3 months' imprisonment.

Section 26(2) of the **BA** empowers a court to issue a warrant to apprehend a person who has failed to appear before the court in accordance with his or her undertaking of bail.

Other consequences of an accused's breach of bail both upon the accused and upon a surety are set out in s.32 of the **BA** which:

- (a) empowers a court to declare forfeited a deposit of money or other security made as a condition of bail if the person released fails to appear in accordance with his or her undertaking; but
- (b) gives the person bailed the same right as a surety has under s.6 of the Crown Proceedings Act 1958 to apply for an order varying or rescinding the forfeiture.

In *DPP v Mokbel & Mokbel* [2006] VSC 158 at [17] Gillard J noted that s.6 of the Crown Proceedings Act 1958 (Vic) provides for a two hearing process. The first hearing is pursuant to s.6(1) which provides:

"Where a court is satisfied that a person has failed to observe a condition of bail the court shall declare the bail to be forfeited and shall order that the amount undertaken by the surety or sureties to be paid to Her Majesty in the event of such a breach be paid to the proper officer of the court forthwith or within such time as the court allows and that in default of payment of that amount in accordance with the order that the amount be obtained by seizing and selling the property of the surety or sureties and in default, in whole or in part, that the surety or sureties be imprisoned for the term (not exceeding two years) fixed by the order."

At [18] Gillard J further noted that once the Court is satisfied that an accused person has failed to observe a condition of bail, the Court is bound to declare that the bail be forfeited, and order that the surety pay the amount undertaken. In other words, his Honour said, applying *R v Baker* [1971] VR 717, "the undertakings given by both the accused and the surety are self-executing and the Court is obliged to make the declaration and the orders". However, his Honour emphasized at [31] that "the Crown has to prove that the accused has failed to observe a condition of bail, and that fact has to be proven like any other fact in the proceeding". At [32]-[41] his Honour discussed the case law relating to "failure", noting at [39] that:

"In most cases the mere failure to attend may be sufficient. The surrounding circumstances may very quickly establish that it was a deliberate act."

In *DPP v Mokbel & Mokbel* [2006] VSC 158 at [19] Gillard J said: "The second hearing is found in s.6(4) of the Act." That section gives a possible remedy to a surety against whom an order of forfeiture has been made:

"Where bail is declared to be forfeited under sub-section (1) any surety may at any time within 28 days after the making of the order or, if the order was made in the absence of the surety, within 28 days after the order first comes to his notice apply to the Court that made the order to vary or rescind the order on the ground that it would be unjust to require him to pay the amount undertaken to be paid having regard to all the circumstances of the case and the court may vary or rescind the order..."

The burden is on the surety to satisfy the court as to why the full amount of the surety should not be forfeited: *R v Waltham Forest Justices; Ex parte Parfrey* [1980] Crim LR 571. However, in *Re Wilkinson* [1983] 2 VR 250 Crockett J held at 254-255 that "proof of full and proper performance by a surety of the duties imposed on him by his suretyship will ordinarily entitle the surety to relief under the section. However, that proposition is...true only of a 'genuine' surety."

The principles governing the determination of an application for relief by a surety were summarized by Crockett J in *Re Condon* [1973] VR 427 at 431:

"The surety's obligation was to take all reasonable steps to ensure the attendance of the principal at his trial. The primary question on the present application must therefore remain - did the applicant take such steps? If she has, then no doubt she will have gone a long way, if not the whole way, to earn the total or partial relief sought. If she has not, then before any relief can be granted facts must emerge that establish that notwithstanding such failure, it would be unjust in all the circumstances not to vary or rescind the order."

In *IMO an Application by Melincianu* [2005] VSC 89 a surety of \$100,000 had been forfeited by the Supreme Court. Kaye J allowed an application by the surety to vary the amount he was required to pay to \$70,000. At [14]-[20] Kaye J, adopting the above dicta of Crockett J in *Re Condon* and dicta of Vincent J in *Re Cenzig Arslan* [Supreme Court of Victoria, unreported, 18/03/1986], listed the principles governing such an application:

- (1) The grant of bail and the setting of a surety is not a mere formality. Thus an order, either rescinding or varying an order forfeiting bail, should not be lightly made.
- (2) The role of a surety for the grant of bail is important and is to act as a deterrent to the principal absconding. In particular the surety undertakes the responsibility to take all reasonable steps to ensure the attendance of the principal at the trial.
- (3) The first and primary enquiry to be made on an application by a surety for relief is whether the surety has taken all reasonable steps to ensure the attendance of the principal at trial.
- (4) However, if the surety has not taken such reasonable steps, the court may in an appropriate case permit a reduction in the amount to be paid pursuant to the undertaking of suretyship on grounds of hardship.

In *DPP v Lipp & Anor* [2008] VSC 203 Whelan J had ordered the forfeiture of a surety in the sum of \$300,000 after the accused – the surety's de facto wife's brother – had absconded on the second day of a trial. Applying the principles set out by Kaye J in *Melincianu's Case*, Curtain J allowed an application under s.6(4) of the Crown Proceedings Act 1958 (Vic). Having found the requisite hardship established, her Honour varied the amount of the surety forfeited to \$175,000:

"I fix that amount because it is still a substantial sum of money and, as such, is not likely to give the impression in the minds of right thinking persons that the court, in granting relief from forfeiture, is diminishing the importance of the obligations each surety undertakes and that such a figure may not necessitate the selling of the family home."

See also *Renate Mokbel v DPP (Vic) and DPP (Cth)* [2006] VSC 487 where Gillard J dismissed an application for relief against forfeiture by a so-called surety whom His Honour was "not persuaded" was a "genuine" surety. After setting out the relevant principles, the Court of Appeal dismissed an appeal against this decision of Gillard J: see [2007] VSCA 195. See also *R v Serrano (Ruling No.6)* [2007] VSC 359 at [5] per Kaye J.

9.5.13 No concept of being 'owed bail'

In *the matter of Boris Beljajev* [2006] VSC 259 the applicant had "an extraordinary legal history, of lengthy trials, grants of bail, revoking of bail, and subsequent acquittals" over a ten year period in relation to charges of drug importation. This was described by King J as "possibly the most

complicated history of bail of anyone charged with criminal matters in Victoria's history". At [22]-[24] King J said:

"[O]ne cannot say he is owed bail because he was kept in custody for a lengthy period of time on matters of which he was ultimately acquitted...The fact that someone has been detained in custody on previous charges, of which he is acquitted, does not demonstrate exceptional circumstances. There is no doubt that persons who are remanded in custody for substantial periods of time, and ultimately acquitted of the matters charged, may have a sense of grievance as to the fairness of their detention. There is no system in place for compensation for the time lost, relationships damaged or income foregone...[T]he only relevance of the applicant's legal history over that time is a demonstration of his ability to adhere to the conditions of bail. That by itself would not be an exceptional circumstance."

9.5.14 Bail applications by children compared with adults

In conclusion, apart from the specific differences set out in sections 9.1, 9.2.1, 9.2.2, 9.2.9, 9.4.12 & 9.5.12 above, the **BA** applies equally to an application for bail by a child and by an adult. The cases discussed above, most of which involve adult accused, contain legal principles which by and large are equally applicable to a child accused.

However, factual differences remain, a consequence of the fact that a child generally does not have the maturity, understanding, development or circumstances of an adult. Thus, requiring a child to pay a monetary deposit to secure his/her release on bail is extremely rare. Requiring a child to find one or more sureties to secure his/her release on bail is rare.

And the difference in maturity between a child and an adult, together with the enormous difference between child and adult sentencing philosophies and sentencing orders, often results in the show compelling reason hurdle being lower for a child than for an adult charged with a similar offence. Thus, for instance, a young child who had failed to attend court in answer to his bail because he had forgotten the date and his mum had not reminded him of it might satisfy the court that he was not an unacceptable risk of failing to appear in the future whereas an adult, in similar circumstances, might not. And so on.

Finally, it is noteworthy that in *Re FA* [2018] VSC 372 at [23] Priest JA said: "[I]n my view, the custody or detention of a child should be avoided unless unavoidable." And in *Re JO* [2018] VSC 438 at [14] T Forrest J said: "Children are rightly afforded a special status by the Act and any assessment of 'exceptional circumstances' in the case of a child must be viewed through the prism of s 3B(1)."

9.5.15 Bail applications by persons aged 18 or over in a remand centre

New s.3C of the **BA** provides that if-

- (a) the accused in a criminal proceeding in any court is aged 18 or over and is in a remand centre (within the meaning of the CYFA) pursuant to a remand warrant issued when the accused was aged under 18; and
 - (b) the criminal proceeding relates to one or more offences alleged to have been committed when the accused was aged 18 or over-
- a bail decision maker must take into account (in addition to any other requirements of the **BA**)-
- (c) whether the accused has engaged in conduct that threatens the good order and safe operation of the youth remand centre; and
 - (d) whether the accused can be properly controlled in the youth remand centre.

9.5.16 Power to return accused to youth justice centre

Section 5A of the **BA** applies to an accused in a criminal proceeding in the Supreme Court or the County Court who is undergoing a sentence of detention in a youth justice centre. Where the proceeding is adjourned, the Supreme Court or County Court, instead of remanding the accused in custody, may direct that the accused be returned to the youth justice centre until the end of the sentence of detention or the adjourned date (whichever is the sooner) and either-

- grant bail on condition that bail is not to be entered until the end of the sentence of detention; or
- refuse bail and direct that the accused be brought before the Supreme Court or the County Court at a later date for it to consider the granting of bail.

9.5.17 Limited bail support programs in Children's Court

In section 3 of the **BA** a “bail support service” is defined as a service provided to assist an accused to comply with his or her bail undertaking (whether or not that type of service is also provided to persons other than an accused on bail) including, but not limited to-

- (a) bail support programs;
- (b) medical treatment;
- (c) counselling services or treatment services for substance abuse or other behaviour which may lead to commission of offences;
- (d) counselling, treatment, support or assistance services for one or more of the following-
 - a mental illness;
 - an intellectual disability;
 - an acquired brain injury;
 - autism spectrum disorder;
 - a neurological impairment, including, but not limited to, dementia;
- (e) services to resolve homelessness.

Section 3B(2) of the **BA** provides that in making a determination under the **BA** in relation to a child, a bail decision maker may take into account any recommendation or information contained in a report provided by a bail support service.

However, a significant difference between children and adults is the absence of a comprehensive state-wide bail support program for children along the lines of the Court Integrated Services Program (CISP) available for adults which was central to the granting of bail by Lasry J in *Re Lawson Odlum* [2008] VSC 319 and by Cavanough J in *Kylie Vickers* [2009] VSC 202. Recommendation 130 of the Law Reform Commission Bail Reference (2007) was: “A child-specific bail support program should be established in the Children's Court. It should be developed and administered by CISP, but funded by DHS. Protocols for information sharing should be put in place between DHS and CISP to ensure an integrated service for children. As with the service in the Magistrates' Court, culturally appropriate support should be provided for Indigenous children.” Budget funding bids for a state-wide bail support program have so far been unsuccessful. There are, however, two limited programs currently operating but not in every Children's Court.

(1) Koori Intensive Support Program:

A pilot Koori Youth Bail Support Pilot Program commenced in July 2009. It was originally only available at Melbourne Children's Court to a Koori youth who lived in the NW region of Melbourne and was subject to an opposed bail application.

The Koori Bail Support Program and the Koori Pre and Post Release Program were amalgamated in 2011 to form the Koori Intensive Support Program (KISP). The KISP Bail Support program aims to reduce the number of young Aboriginal offenders who are detained prior to a finding of guilt and/or prior to the completion of the sentencing process. The program provides intensive outreach support to assist young accused to comply with bail conditions or with conditions placed on deferred sentences. This support may address, for example, the issue of unacceptable risk by focussing on such issues as drug and alcohol counselling, mental health services, day programs, recreational programs etc.

KISP practitioners also provide court support for young Aboriginal people, as well as advice to courts. There are five KISP Practitioners, based in five of the DJR's area youth justice teams: Dandenong, Geelong, Shepparton, Morwell and Preston.

(2) Youth Justice Bail Support Service [compiled from a DJR Fact Sheet]:

An Intensive Bail Support pilot program commenced in June 2010 to provide support to young men aged 15-18 who appeared at the Melbourne, Sunshine, Broadmeadows or Heidelberg Children's Courts, who lived in the Department of Health & Human Services' North and West metropolitan region and who were at immediate risk of remand. The objective of the pilot was to divert young people from remand and future involvement in the criminal justice system.

Following on the perceived success of this pilot program Youth Justice now provides two separate bail programs – **Supervised Bail** and **Intensive Bail** – for young persons who can meet their bail requirements with assistance but without assistance might otherwise be remanded in a youth remand centre.

Supervised Bail is the primary program. In the majority of cases where the court sets a bail condition that a young person is to participate in the Youth Justice Bail Support Service, this will be Supervised Bail. This program is targeted at young people who have had no previous contact with Youth Justice and are charged with a serious offence or who have been on supervised bail previously and have responded well. Supervised Bail is also available in the 'dual track' system under the Sentencing Act 1991 for young persons aged 18-21.

Intensive Bail is a separate service that targets young persons who have been charged with serious offending and who have a frequent offending history but show a willingness to engage with intensive bail. This program provides more intensive intervention and more stringent supervision consistent with the identified levels of risk and aimed at young persons who require an intensive level of intervention to ensure they comply with their bail conditions. It also involves a high degree of participation in structured activity including after hours and on weekends. Intensive Bail is not available in the 'dual track' system under the Sentencing Act 1991.

Referral process: The young person's legal representative or the Court may request Youth Justice to assess whether a young person is suitable for the Youth Justice Bail Service. Youth Justice will aim to undertake this assessment on the same day as the request which is usually the day the young person attends his/her bail hearing. Sometimes Youth Justice may request an adjournment for the assessment to be completed.

Assessment process: The Youth Justice Bail Service assesses the young person's risk and protective factors that may impact on his/her ability to meet bail requirements. Information is collected on factors such as personal circumstances, previous offending, risks relating to non-compliance, needs and responsivity issues, risks to community safety, vulnerability on remand and the person's attitude and willingness to engage with Youth Justice.

Assessment outcome and Bail Support Plan: Following assessment Youth Justice will provide a report to the Court which provides the outcome of the assessment including the factors that support bail compliance and factors that create risks for bail compliance. The report will also include recommendations and – where a young person is considered suitable – a Bail Plan outlining the interventions available to mitigate risks to bail compliance as well as a recommendation about whether the young person should participate in the **Supervised Bail** or **Intensive Bail** Service. Youth Justice can also provide advice where a young person has some identified risk factors for bail compliance but these can be mitigated without a bail condition requiring participation in a Youth Justice Bail Service. The Bail Plan for Intensive Bail will contain additional information about strategies to mitigate identified risks, a structured weekly timetable and an agreed course of action if there is non-compliance.

Monitoring, enforcement and breach: Victoria Police is responsible for applications to vary or revoke bail in the event that bail conditions are breached. Youth Justice monitors the young person's compliance and participation with the requirements of the Bail program and notifies police about non-compliance with bail conditions.

9.5.18 Extradition bail

In *Formica & Forni v Victoria Police* [2020] VSC 719 warrants had been issued in Queensland against each of the applicants on charges of conspiracy to import a commercial quantity of a border--controlled drug and other offences under the Criminal Code (Qld). Both applicants were arrested in Victoria and a magistrate ordered that the applicants be taken in custody to Queensland. On an application to review the decision of the magistrate to refuse bail, Hollingworth J held that although some errors were shown, neither applicant had demonstrated exceptional circumstances. The applicants were ordered to be taken in custody to Queensland. In discussing the nature of extradition bail, Hollingworth J said at [83]:

"Queensland's Bail Act will apply when the applicants apply for trial bail in that State. But, given the purpose and limited duration of extradition bail, it makes sense to give primacy to the bail law of the place of arrest, as is required under s.88 of the *Service and Execution of Process Act 1992* (Cth)."

