Bail Act 2013
Case Notes and Links

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The "New Bail Act" 2013 started on 20 June 2014. This note contains short annotations of recent Supreme Court Bail cases. Some are electronically available, some are currently unpublished. We hope more will be available soon.

The aim is early, brisk and relatively simple promulgation of judgments about the New Bail Act. There is no highly clever analysis here. We hope to update this document with new editions as further cases or links come to light. We have noted up what we could get our hands on, where a relevant topic was considered by the Court.

We hope that the paper will ultimately assist practitioners in the early interpretation of the new Act and it's application[2]. These topics have been considered:

1. Aboriginality / Disadvantage
2. Burden and Standard
3. Children
4. Residential Rehabilitation
5. Family and Community Ties / Bail to residence outside NSW
6. Repeated Applications
    - Delay
    - Brief Service
    - Strength of Crown Case
7. Bail prior to Sentence
8. Weight of evidence under the Bail Act / Dismissed Charges

[1] Aboriginal Legal Service Solicitors. The authors want to thank all the other commentators on the new Bail Act; and Belinda Rigg for her analysis and appearance on behalf of Legal Aid and the Aboriginal Legal Service in the early Supreme Court Bail lists.
[2] Supreme Court determinations are binding on lower Courts: see *Flemming v White*, and *Valinetine v Eid*. The Author's have not found an authority that refers directly to the precedential force of ordinary Supreme Court bail determinations.

1. Disadvantage / Aboriginality

R v Morris (SCNSW, Unreported, McCallum J, 20 May 2014)
[no current web link]

This is s a judgment of Justice McCallum and usefully covers the issue of Aboriginal deprivation in a *Bugmy* or *Fernando* way in relation to vulnerability under section 17. On deprivation:

> The applicant is Sandra Lee Morris who is presently aged thirty one. She is an Aboriginal[3]. Ms Morris has been charged with a single charge of larceny allegedly committed on 18 March 2014. She has been in custody since that date, a period of over two months.
>
> The matter is before Tamworth Local Court on 5 June 2014 for hearing. The material before the Court reveals that the Crown case in respect of that charge is strong.
>
> In determining the application, I am required to have regard to the presumption of innocence and the general right to be at liberty: s 3 of the Act. The weight of that consideration is reinforced in the present case by relevant evidence of the applicant's background which, in my assessment, plainly places her in the category of a person with special vulnerability: cf s 17(3)(j) of the Act.
>
> In particular, the applicant has given evidence, which I accept, of a background of appalling deprivation. She grew up in Taree with a father whom she described as "very violent", moving between family and foster parents. She said that she had been "passed around the family". Her evidence included the fact that she has been a victim of sexual abuse for many years; that her mother was murdered when she was fourteen (although she only recently learnt of that); and that she currently suffers from depression together with a series of other physical and mental conditions.

2. Burden and standard

R v Lago [2014] NSWSC 660
http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=171696

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[3] Note the ALS and the Authors don't recommend that advocates use the term "an Aboriginal" used by the learned Bail Judge (or "Aboriginie" as an alternative). The Equality Before the Law Benchbook recommends describing "Aboriginal people". It has not been followed by the Court in this judgment. That benchbook says at 2.3.3.2 [http://www.judcom.nsw.gov.au/publications/benchbks/equality/section02.pdf] :

> Where it *is* necessary to use an ethnic identifier, use the correct and appropriate term. For example:
> – Be as specific as possible — that is, use the term "Aboriginal person" or "Torres Strait Islander person", as opposed to "Indigenous person", wherever possible.
> – Use the word "person" after the ethnic identifier, as opposed to saying "Aborigine" or "Torres Strait Islander" — unless the person uses one of those terms themselves and gives you permission to do the same.

In the decision of *R v Lago*, Hamill J made general comments about the Bail system and determined the issues of "unacceptable risk" and the onus in bails.

> [5] It will be seen that the term "unacceptable risk" is not further defined but that the assessment of whether there is such an unacceptable risk is to be considered by reference to an exhaustive list of factors contained in s 17(3). That section says that those are the only factors to be taken into account in determining the question of whether or not there is an unacceptable risk. The unacceptable risk is directed to the four matters mentioned in s 17(2). Subsection (4) is also important because it provides some of the matters to be considered in determining whether an offence is "a serious offence" for the purpose of s 17(2)(b). The *Act*, as I see it, does not cast an onus on either party to determine whether there is or is not an unacceptable risk.
>
> [6] In helpful written submissions, Ms Rigg submits that there is an onus on the prosecution. I am not sure that that is so but equally I am not sure that it matters. The reason that I say that is because the matter ultimately is to be determined on the balance of probabilities (s32) and, when I come to it, it will be seen that the onus shifts to the prosecution at a more important stage of the reasoning process. If there is no unacceptable risk, bail can be dispensed with or the applicant is to be released without bail or on unconditional bail: s 18. Where there is an unacceptable risk the Court can either refuse bail or grant bail: s 19.
>
> [7] Section 20 is a critical provision and it provides that bail can only be refused where the Court is satisfied that any unacceptable risk "cannot be sufficiently mitigated by the imposition of bail conditions".

It can be seen that section 20 casts the onus on the party who is opposed to the grant of bail. The standard is on the balance of probabilities.

Hamill J doubts that the section 17 onus is on the prosecution – but does not express his opinion in final and determinative form.

This decision on s20 and the onus and standard is confirmed by Hamill J in ***R v Alexandridis*** [2014] NSWSC 662 at [10];
http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=171698

3. Children

R v SK & DK (SCNSW, Unreported, McCallum J, 20 May 2014)
[no current web link]

This case is an early Juvenile Bail decision. It contains some limited commentary in relation to 'vulnerability' under section 17(3)(j) as it relates to youth, and personal circumstances:

> Section 17 of the *Bail Act* makes it plain that Parliament intended that the assessment be very much focused on the individual circumstances of each case coming before the court and, further, that the assessment be informed not only by considerations of the protection of the community but also by considerations relating to the circumstances of the applicant.

> That is made plain by the inclusion of s 17(3)(j), which requires the court in assessing whether there is "unacceptable" risk to have regard to any special vulnerability of the accused person.
>
> The present applicants plainly are boys of acute vulnerability by reason of their youth and the circumstances of their background to which I have referred. Further, the Juvenile Justice report reveals that they have recently suffered the death of their sister, who was also living at Gordon House, apparently due to a drug overdose.
>
> Those considerations lead to competing conclusions. On the one hand, they might be regarded as factors exacerbating the risk of offending; on the other they highlight the acute need for these boys to fall under the care of a considered and carefully planned proposal to meet their future needs which will mitigate against the risk of their reoffending.
>
> Neither the prospect of refusing bail nor the prospect of releasing them from custody is entirely satisfactory or entirely risk-free. The *Bail Act* does not contemplate the absence of any risk if a person is released but the informed balancing of risk.
>
> With some hesitation I have concluded that the applicants should be released on bail on conditions which reflect the careful plan proposed on behalf of each of them with the input of Juvenile Justice and Mr Denton.

The above excerpt clearly highlights the difficulty of an applicant's vulnerability as it relates to an assessment of risk. The same vulnerabilities that might give rise to a need for care and support of an applicant can also give rise to concerns for the safety of the community.

The judgment nevertheless emphasises the need for a full consideration of the personal circumstances of each applicant on a release application, particularly in the case of young persons.

4. Residential rehabilitation

R v Barry (NSWSC, Unreported, Schmidt J, 28 May 2014)
[no current web link]

This case addresses several technical points relating to a bail condition requiring entry into a residential rehabilitation centre.[4] Importantly, Schmidt J notes that such conditions are *not* accommodation requirements under section 28, *nor* do they amount to pre-release requirements under section 29 of the *Bail Act*.

> The parties have addressed me on the operation of the **Bail Act**, because there is no bed available to the applicant today in the rehabilitation program. That is available on 2 June. It is common ground between the parties that, in the circumstances, pursuant to s 12(3) the Court can grant the applicant bail for a specified period, namely, from 2 June until the applicant ceases

[4] These types of release applications are common for ALS and Legal Aid solicitors, and as such this case may be of particular use to them.

> participating in the program, at which point his bail would come to an end. That, it is common ground between the parties, does not amount to the imposition either of an accommodation requirement, which is dealt with in s 28 of the Act, and under s 28(3) is one available only to a child, at present there being no relevant regulations which could apply to these circumstances.
>
> It is also common ground that the proposed bail condition does not impose pre-release requirements, which are dealt with in s 29 of the Act. I agree with the parties' submissions as to the operation of those aspects of the legislation, and I am satisfied that, in accordance with s 12(3), bail for a specified period of the kind proposed can be ordered by the Court in accordance with that provision.

As indicated above, a grant of bail can be authorised under section 12(3) of the *Bail Act*. This is important, because it allows for bail to a rehabilitation centre from a date when a bed is available, without any condition that must be complied with before a person is released (as under section 29).

5. Family and community ties / Bail to a residence outside NSW

R v Justice (NSWSC, Unreported, Schmidt J, 28 May 2014)
[no current link]

Schmidt J determined a narrow point in this case: that the mitigating aspect of community ties as a consideration under s 17(3)(a) may occasionally justify a grant of bail to a different State. Bail was granted where an unacceptable risk of non-appearance had been established under s 17(2)[5], and where the applicant had been extradited from South Australia to face charges in New South Wales.

> Bearing in mind all of those matters relevant under s 17(3), I have come to the conclusion that bail conditions can be crafted which will sufficiently mitigate the risk which the applicant poses. The Crown accepted, in the circumstances, that bail to a residence which has become available in New South Wales will not be appropriate and may, indeed, exacerbate risks which the applicant might pose. It would be preferable that she were bailed to South Australia where her community and family ties lie, albeit the conditions imposed will have to be crafted bearing in mind the need to mitigate the risks which have been identified, including the need to ensure that the applicant will attend when required before the District Court in New South Wales.

6. Repeated Applications – Section 74 (22A Old Bail Act)

This is a topic of some debate in Courts and the subheading below may assist in clarifying the position under the new act.

[5] Conditions additional to a residence condition were imposed to sufficiently mitigate the risk of non-appearance.

Section 74(3) - Delay may be a change in circumstances.

R v Singh (NSWSC, unreported, Hamill J, 21 May 2014).

The Court here considered section 74 repeat applications – the technical application of that provision and the issue of delay. The Court found that given the presumption of innocence a delay to trial of an additional 6 months could amount to a change in circumstances:

> The first obstacle then is the obstacle set up by s 74 of the *Bail Act 2013*, which says that a Court which has refused bail for an offence, in this instance that being this Court, is to refuse to hear another release application unless there are grounds for a further application. Those grounds are defined in s [74]~~17~~ [6](3) as being (a) a person who is not legally represented and is now legally represented, (b) information was not presented last time, and (c) circumstances have changed. (d) concerns a person who is a child. I am paraphrasing in each instance.
>
> Regulation 9 of the Act provides: "An application for grant of bail for an offence that was refused by a Court under the 1978 Act is taken for the purpose of s 74 to have been refused by the Court on a release application under this Act". The legal effect of regulation 9 is that s 74 applies.
>
> Although he has not said it, I am prepared to proceed on the basis that circumstances have changed, and in particular I note that the applicant being in custody for a further six months, as I have said, enjoying the presumption of innocence is a change of circumstances that at least justifies me re-visiting the question of bail.

Section 74(3) - Delay in brief service may be change in circumstances

R v Troy (NSWSC, unreported, Hamill J, 21 may 2014).
[no current web link]

The Court considers the issue of FUTURE applications and a change in circumstances that may yet arise; this is *obiter dicta* but useful commentary. A failure of the prosecution to expeditiously serve a brief may be a change in circumstances:

> I would like to make it clear that if the police do not comply with the orders for service of the brief so that the matter does not proceed expeditiously through the court, it may be that circumstances have changed such that a further application could be entertained in spite of the provisions of the *Bail Act* which generally prohibit to allow a court to decline to deal with such applications.

Section 74(3) – Brief demonstrating a weak case may be a change in circumstances

R v McAffery (NSWSC, Unreported, McCallum J, 20 May 2014)
[No current web link]

[6] 17 transcribed – in unsettled transcript. Obvious reference to section 74.

The Court considers the issue of repeated applications under section 74 and considers the following to be changes in circumstances:

1. Passage of time
2. Brief service demonstrating a weak case

The judgment is in the following terms:

> I note that under s 74 of the new *Bail Act*, after an application has been refused, the Court can hear a further application if there are grounds for a further application. In my view, the passage of time could be grounds in themselves for a further application to be considered.
>
> That addresses one concern raised by Mr Zaki as to the likely length of time before the proceedings come to trial. Secondly, upon receipt of the police brief, it may be clear that the case is not as strong as it appears from the material to which I have referred. That would also be a ground for a further application to be considered.

7. Bail prior to sentence

R v Paul (Unreported, Schmidt J, 28 May 2014)
[No current web link]

The Court clearly establishes in this case that the predictive task required of a judicial officer on a release application should not take into account any impact that a decision in relation to bail would have upon a subsequent sentencing exercise. This case runs counter to any argument that a sentence proceeding may have to be adjourned, or that an applicant will inevitably return to custody, if bailed.[7]

> In this case having in mind all of the matters which I have mentioned as well as the applicant's age and background and personal circumstances and his obvious need to pursue the program into which he has been accepted and the basis on which that program operates, I am satisfied that the risks which the applicant poses can be sufficiently mitigated by the imposition of bail conditions which I propose to impose upon him.
>
> In reaching that conclusion, the question is raised by the Crown as to whether such bail conditions might have an impact on the sentencing exercise to be conducted by the Local Court on 16 June, I have expressed my opinion that given the nature of the provisions of the current legislative scheme and its concern with risk assessment and risk mitigation, which I have discussed, I cannot see how conclusions reached in relation to those statutory concerns can have any impact on the sentencing exercise which will have to be undertaken on 16 June. The sentence will have to be determined on the basis of the relevant evidence led in those proceedings.

[7] Nevertheless, it should remembered that the Court must take into account 'the length of time the accused person is likely to spend in custody if bail is refused' under section 17(3)(g) of the *Bail Act*.

8. Weight of evidence under the Bail Act / Dismissed Charges

R v Campbell (SCNSW, Unreported, 20 May 2014, McCallum J)
[no current web link]

The Court considered the issue of how information tendered about charges which had been dismissed should be dealt with; and that the "rules of evidence" inform the weight to be given to evidence before the Court:

> I had before me in the material provided by the Crown a statement of facts in respect of another series of charges in which it was alleged that the applicant had assaulted and intimidated his mother and his sister.
>
> At the outset of the bail hearing I was informed that those charges had been dismissed on the basis that having been subpoenaed as witnesses neither the mother nor the sister appeared to give evidence against the applicant, having been subpoenaed as witnesses, when the matters were listed for hearing.
>
> **Plainly in those circumstances it would not be appropriate for me to have regard to any of the content of the allegations said to support those charges.** [emphasis added]
>
> However, there is one part of the facts which I do not think I should disregard, since it finds ample support in other material before me. That is that when the police were called in respect of those charges, which I accept have been dismissed, the police recorded in the facts sheet that the accused "has for many years acted in an aggressive and abusive manner, using different types of illicit drugs and alcohol".
>
> A close consideration of the accused's prior criminal history reveals a likelihood that there is at least some force in that statement. I would note in referring to it that a court considering a bail application is not bound by the rules of evidence[8] although plainly those rules inform the weight the court should give to any particular material before it.

The consideration of antecedent comments about a person's general behaviour by police in a fact sheet is considered in this case where consistent with the applicant's record. Arguably, it may be given little or no weight if uncorroborated.

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[8] This is a direct reference to section 31 Bail Act 2013 – which is as follows:

> **31 Rules of evidence do not apply**
> (1) A bail authority may, for the purpose of exercising any of its functions in relation to bail, take into account any evidence or information that the bail authority considers credible or trustworthy in the circumstances and is not bound by the principles or rules of law regarding the admission of evidence.
> (2) This section does not apply:
> (a) to proceedings for an offence in relation to bail, or
> (b) to proceedings under Schedule 2 (Forfeiture of security).