RECENT BAIL DECISIONS IN THE SUPREME COURT, COURT OF APPEAL AND COURT OF CRIMINAL APPEAL

2014 AMENDMENT

The *Bail Act 2013* (the Act) was amended by the *Bail Amendment Bill 2014* which commenced on 28 January 2015. The amendments introduced a new Division 1A whereby a large number of offences required an accused to "show cause" why their detention was not justified. The amendments also varied the unacceptable risk test so that a court was to make an assessment of bail concerns, including a consideration of the proposed conditions, in coming to a decision as to whether the accused constituted an unacceptable risk.

2015 AMENDMENT

The Act was further amended by the *Bail Amendment Bill 2015* which was assented on 5 November 2015 but is yet to be commenced. The amendments were a result of a review by Judge Hatzistergos, the Sentencing Council, and the joint Commonwealth-New South Wales Government Martin Place siege.

A new test was introduced requiring that bail be refused unless it is established that exceptional circumstances exist for applicants charged with:

- an offence under section 310J of the *Crimes Act 1900 (*membership of a terrorist organisation)*;* or
- any other offence for which a custodial sentence may be imposed, if the applicant has previously been charged (pending conclusion or post conviction) with a Commonwealth terrorism offence or an offence under 310J, or is subject to a

control order made under 5.3 of the Commonwealth Criminal Code (terrorism provisions).

The show cause provisions have been extended to persons who commit a serious indictable offence while the subject of a warrant authorising their arrest pursuit to the Act or Part 7 of the *Crimes (Administration of Sentences) Act 1999* (revocation of parole).

The unacceptable risk assessment considerations in section 18 have been amended to add:

- further matters relevant to the applicant's history of compliance or non-compliance, including compliance with intensive correction orders, home detention, community service orders and warnings in relation to bail issued by police officers or bail authorities;
- the likelihood of a custodial penalty if the applicant has been convicted but not yet sentenced;
- whether the applicant has any associations with a terrorist organisation, or has made statements or carried out activities advocating support for terrorist acts or violent extremism, or has any associations or affiliation with any person or groups advocating such support.

SUPREME COURT PRACTICE NOTE

On 4 February 2016, the Chief Justice issued a Practice Note SC CL 11 (PN) which commenced on 7 March 2016. The PN sets out as follows:

- An approved form, completed in its entirety, must be filed;
- Once filed, a hearing date and a call-over date will be allocated;
- The call-over date will be the Monday the week before the hearing date;
- When allocating a hearing date the convenience of counsel will only be taken into consideration in exceptional circumstances;
- Prior to the call-over or at the call-over, the legal representative must file a Notice of Readiness to Proceed that certifies that the matter is ready to proceed on the allocated hearing date, or the hearing date may be vacated;
- If the application is to be withdrawn, a Notice of Withdrawal sent to the Registrar prior to 2pm on the Friday before will obviate the necessity of appearance at the call-over;
- If a Notice of Readiness is filed prior to 2pm on the Friday before, the Registrar will notify the parties by email if an appearance is not required;
- If an adjournment application is to be made, an appearance at the call-over is required;
- If a Notice of Readiness has been filed, and an application for adjournment is sought, an affidavit will be required from the legal representative setting out why the matter is not ready to proceed;
- Any material on which a party intends to rely in an application must be filed with the Registry and served no later than 4pm on the day preceding the hearing;
- Applications for expedition or for drug and alcohol reports will require the filing of a form requesting such, which will be determined by the Registrar in chambers;
- Self-represented persons will not need to comply with the Notice of Readiness requirements, nor will their matters be listed in the call-over;
- The call-over, adjournment and expedition procedures do not apply to juveniles or to detention applications.

DECISIONS OF NOTE SINCE 2014 AMENDMENT

The remainder of this paper considers Supreme Court, Court of Appeal and Court of Criminal Appeal determinations of note in NSW since the commencement of the 2014 Amendment on 28 January 2015.

The Correct Application of the Show Cause Provisions

Following the commencement of the amendments introducing the show cause provisions, there was significant judicial consideration of how those provisions were to interact with the unacceptable risk test. McCallum J in *M v R* [2015] NSWSC 138 found that the show cause assessment was inevitably informed by the unacceptable risk test as both tests led to the consideration of similar and overlapping features. The Court of Appeal in *DPP(NSW) v Tikomaimaleya* [2015] NSWCA 83 stated that the two tests ought not be conflated and that the determination of the show cause assessment did not inevitably inform the unacceptable risk assessment. However the Court of Appeal did note that in many cases the matters relevant to the first test would also be relevant to the second. A more detailed analysis of both cases is set out below.

M v R [2015] NSWSC 138

Onus of proof - show cause - interaction show cause and unacceptable risk - one or two step test - presumption of innocence and right to liberty

Mr M was charged with the murder of his partner's child, as well as a large number of other offences associated with the mistreatment of same child. The murder charge came within the purview of the "show cause" provisions, being an offence that is punishable by imprisonment for life.

There were three grounds relied on to establish "cause": the complexity of the matter and the applicant's need to be free in order to prepare for the trial; the weakness of the Crown case; and the length of time that the applicant would spend in custody.

The Crown identified three bail concerns: that he would fail to appear; endanger the safety of victims, individuals or the community; and interfere with witnesses or evidence.

Justice McCallum stated the following with regard to the amendment removing s.3(2) from the objects of the Act:

> I note that the Amendment Act also removed s 3(2) of the Act, which referred to the presumption of innocence and the right of an accused person to be at liberty. The presumption of innocence is, of course, a fundamental premise of the criminal justice system; the right of a person to be at liberty a fundamental aspect of the common law right of freedom of movement. I do not think their removal from the objects section of the Act derogates from those fundamental common law principles.[4]

Her Honour then noted that the scheme of the Act suggests a two step test in which the applicant must first show cause as to why their detention is "not justified". If that step is overcome, then the court must apply the unacceptable risk test. However, Her Honour stated:

> I have reached the conclusion that the apparent simplicity of a two-stage approach is illusory. The content of the requirement, as already noted, is to show cause why a person's detention is "not justified".
>
> Having regard to the content of that requirement, it is difficult to conceive how an applicant could show cause without addressing any relevant bail concerns. The issue whether an applicant has shown cause in my view must inevitably be informed by the outcome of the risk assessment, since the Act contemplates that the detention of a person who poses an unacceptable risk of the kind identified is justified. Conversely, it is difficult to conceive of a finding that an applicant had failed to show cause in circumstances where there was no unacceptable risk. The absence of any

> unacceptable risk would, I think, inevitably point to the conclusion that the detention was not justified, bearing in mind the common law principles to which I have referred.[7]-[8]

Her Honour found that show cause did not shift the onus to the applicant in any formal sense, nor did the application of the provisions mean that bail would normally or ordinarily be refused:

> The application of the Act cannot and should not be generalised in those terms. While the precise content of the show cause provisions is elusive, it is not in my view to be construed as imposing so fundamental an intrusion on the common law principles to which I have referred. The Court should be careful not to construe the Act in such a way as to put a gloss on the terms of the section, which appears to me to require the Court to approach each case on its merits with no presumption as to the likely or proper outcome of the release application…
>
> Importantly, I would construe s 16A as imposing on an applicant the task of persuading the Court that any such obvious bail concern did not give rise to an unacceptable risk of the kind specified in the Act. In saying so, I do not mean to suggest that the Act imposes any formal onus of proof in the traditional sense.[10] and [15]

Her Honour found that there was nothing in the new Division 1A "show cause" provisions to suggest that if there was no unacceptable risk that the Court could still refuse bail unless the applicant was able to show cause.

Her Honour found that the section 16A has the object of instructing the bail authority in their assessment of any bail concerns and the evaluation of the acceptability of the relevant risk. Her Honour then used the examples of firearms and commercial quantity of drugs offences which both come within the purview of section 16B as offences to which the show cause requirement applies. The provisions guide the court to ensure that regard is had to the "common or notorious" features of such offences. For example the bail concerns of community safety for firearms offences and the bail concern of risk of re-offending in drug related offences.

In the circumstances of M's case, bail was refused, as Her Honour found that there was an unacceptable risk of all three concerns raised by the Crown, and that it followed that the applicant had failed to show cause.

DPP(NSW) v Tikomaimaleya **[2015] NSWCA 83**

Show cause - two step test not one step test - bail after jury conviction - practice of referral from Supreme Court to Court of Appeal not permitted under the *Bail Act 2013*.

Mr Tikomaimaleya was found guilty after trial by jury of one count of sexual intercourse with a person under the age of 10 years: section 66A(1) of the *Crimes Act 1900*. The offence carried a maximum penalty of 25 years and a standard non-parole period of 15 years. The offence was a show cause offence by virtue of section 16B(1)(b)(i) in that it is a serious indictable offence that involves sexual intercourse with a person under the age of 16 years by a person who is of or above the age of 18 years.

Mr Tikomaimaleya had been on bail pending trial and upon conviction his bail was continued pending sentence by His Honour Judge King. The Director of Public Prosecution made a detention application pursuant to section 50 of the *Bail Act 2013* to the Supreme Court. The application came before His Honour Justice Button and at invitation of counsel for the respondent and without opposition by the Crown, the matter was referred to the Court of Appeal.

The Court found that the practice of referring matters from the Supreme Court to the Court of Appeal had no place under the *Bail Act 2013* given the clearly structured scheme for review of bail decisions by the Supreme Court and Court of Criminal Appeal set out in sections 66 and 67.

In relation to show cause, the Court found that there was a two-step process involved which was made clear by sections 16A(2), 17(4), 19(3) and the flow chart. Section 16A(2) provides that if the accused does show cause, the court must then make a decision as to unacceptable risk. Section 17(4) provides that the unacceptable risk test does not apply if bail is refused under the show cause provisions. Section 19(3) provides that the fact that the accused has shown cause why their detention is not justified is not relevant to the determination of whether or not there is an unacceptable risk.

The Court was referred to Justice McCallum's decision in *M v R* and stated as follows:

> We accept that in many cases it may well be that matters that are relevant to the unacceptable risk test will also be relevant to the show cause test and that, if there is nothing else that appears to the bail authority to be relevant to either test, the consideration of the show cause requirement will, if resolved in favour of the accused person, necessarily resolve the unacceptable risk test in his or her favour as well.
>
> It is important, however, that the two tests not be conflated. Determination of the unacceptable risk test is not determinative of the show cause test. The show cause test by its terms requires an accused person to demonstrate why, on the balance of probabilities (s 32), his or her detention is not justified. The justification or otherwise of detention is a matter to be determined by a consideration of all of the evidence or information the bail authority considers credible or trustworthy in the circumstances (s 31(1)) and not just by a consideration of those matters exhaustively listed in s 18 required to be considered for the unacceptable risk assessment.
>
> The present case provides an example of why it is important to bear in mind the two-stage approach Parliament has prescribed in relation to bail applications concerned with offences of the type listed in s 16B in that here there is a matter that is relevant to the show cause test that is not available to be considered in relation to the unacceptable risk test. The jury's verdict of guilty is not within any of the matters listed in s 18; yet it is plainly germane to the question whether cause can be shown that his continuing detention is unjustified, since the presumption of innocence, which operated in his favour before the jury returned its verdict, has

been rebutted by that verdict.[24]-[26]

The respondent in this case sought to show cause on a number of bases: his compliance with strict bail pending the trial and since the conviction; his desire to continue working to support his wife until sentence; a medical appointment regarding his kidneys a week after the bail hearing; and the fact that there was only 2 weeks until the sentence proceedings. The Court was not persuaded that any of these matters were sufficient to show cause in circumstances where he had been convicted of an offence for which he must be sentenced to jail. The court noted that the issues raised were not out of the ordinary for persons post conviction. The Court further noted that there was no evidence regarding the scheduled medical test, nor was there evidence that he could not receive appropriate care in custody from Justice Health.

Other Decisions of Note Since 2014 Amendment

The following decisions have been delivered since the 2014 Amendment. They are of note for a variety of reasons, such as: what constitutes cause, how the provisions regarding special and exceptional circumstances are the be applied, and whether show cause is in effect special and exceptional circumstances. The case summaries are arranged in rough chronological order, commencing with unreported decisions of the Supreme Court (these decisions can be found on the Legal Aid NSW website at the Bail Page), followed by reported decisions of same and dealing finally with Court of Criminal Appeal decisions.

R v Kirby, NSWSC, Garling J, 2 February 2015

Show cause is not special or exceptional circumstances - delay - strong crown case

Mr Kirby was charged with a robbery offence which was not specified in the judgment; nor was the basis upon which the matter came under the purview of the "show cause" provisions.

Justice Garling granted bail, rejecting the Crown submissions that there was a bail concern that the applicant would fail to appear and endanger the victim. His Honour held that the lengthy delay combined with the fact that a sentence at the very lowest end of the range would be likely to be imposed militated for the grant of bail.

In making his decision, Justice Garling stated the following with regard to the "show cause" provisions:

The Act, as amended, does not define what "cause" is.

> One thing is plain: by reference to provisions of s 22(2) of the amended Act, that showing cause does not mean, except for the particular offences there identified, that special or exceptional circumstances must exist. (p.2)

***R v Awad,* NSWSC, Davies J, 3 February 2015**

Show cause - risk of offending high but relatively minor offences can constitute cause

Mr Awad was on bail for driving while disqualified, when he was charged with supplying cocaine, and thereby came under the purview of the "show cause" provisions. He was also at the relevant time on a section 12 suspended sentence.

Without stating explicitly that the applicant had "shown cause" Justice Davies, in granting bail, made the following comments:

> Whilst not seeking to minimise the seriousness of the drug supply offences, the offence charged is a relatively low order supply offence, as is the dealing with the proceeds of crime. Whilst it is a matter of concern that he has two convictions for driving while disqualified, that he has been again charged with that offence, that the present offences were committed at a time he was on bail and that he has breached bail on two previous occasions, I think that those matters are outweighed by the relative seriousness of the offences; that is the offences charged are at a relatively low level of seriousness.(p.2)

***R v McMahon*, NSWSC, Hall J, 9 February 2015**

Show cause - delay awaiting trial can constitute cause even where strong crown case

Mr McMahon was charged with two counts of supply methylamphetamine. The "show cause" provisions applied as he had been on parole for drug supply at the time of the alleged offence.

The Crown submitted that there were bail concerns that the applicant would fail to appear and commit further serious offences.

There was a Drug Analyst Laboratory Certificate before the court which appeared to indicate a low purity level and a low quantity of drugs involved in the offence, although the details were not set out in the judgement.

Justice Hall found that there was a strong Crown case, but granted bail stating:

> Given the nature of the offences and quantity of drugs and suchlike in my view it would be unacceptable for the applicant to be kept in detention for that period of time to face the subject charges (p.2)

***R v Stanley*, SCNSW, Hall J, 11 February 2015**

Show cause - residential rehabilitation can constitute cause

Mr Stanley was charged with a number of offences: aggravated enter dwelling with intent to steal; break, enter and commit serious offence; robbery; assault occasioning actual bodily harm; and goods in custody. The show cause provisions applied as the applicant had been on parole at the time that the offences were committed.

Justice Hall in this case found that Mr Stanley had shown cause why his detention was not justified, as the rehabilitation facilities that he required were not available in custody:

> Where, in a particular case, the evidence points strongly in the direction that the person should be placed in an institution that offers an appropriate rehabilitation program, as in the present case, then I believe it is one to conclude that detention in the correctional institution, which does not provide rehabilitation facilities equivalent to the residential rehabilitation program is not justified. It is not justified in the circumstances of this case where the program has been offered and the conditions under which the program has been offered seem to me to be the one which will include the community's safety. (p.5)

***R v Anderson*, NSWSC, McCallum J, 16 February 2015**

Show cause - short period on remand means smaller risk

Mr Anderson had been on bail for five aggravated break and enter offences committed in company. He was then charged with a further break and enter which brought him under the purview of the show cause provisions.

Justice McCallum, in granting bail, stated:

> On one view with such a short period on remand, it might be thought to be difficult for an applicant to show cause why his detention is not justified. Conversely, however a short period of remand ordinarily carries a smaller risk of the kinds of risks identified in the *Bail Act 2013* (NSW).[3]

***R v Burke*, NSWSC, McCallum J, 16 February 2015**

Show cause - mental illness and brain damage can constitute cause

Mr Burke was charged with a firearms offence (replica pistol only) and therefore had to show cause why his detention was not justified.

Justice McCallum, in granting bail, stated:

> His condition as a person suffering from schizophrenia and being in custody, and further, a reference to his being a person who suffers from slight brain damage, makes me think he is a person whose detention is not justified unless there is any unacceptable risk which cannot be addressed by conditions.[9]

***R v Alchin,* NSWSC, McCallum J, 16 February 2015**

Show cause - Aboriginality – *Bugmy/Fernando* type deprivation - lengthy remand period and separation from 3 month old child perpetuates cycle of disadvantage and can constitute cause

Mr Alchin was charged with a number of offences but had been refused bail in relation to one offence of aggravated enter dwelling knowing there were people present. He had a 3 month old child and was facing a lengthy period in custody awaiting trial.

Justice McCallum stated in granting bail:

> During that period the applicant would in all likelihood see very little of the child if bail is refused. That is a factor which seems to me to be likely to perpetuate the cycle of disadvantage and deprivation notoriously faced in indigenous communities and, as a matter of evidence in the material before me, specifically faced in the family of this applicant. If the Court can reasonably impose

> conditions which are calculated to break that cycle, in my view it should. That is a strong factor in my finding cause shown.[3]

R v Najem, **SCNSW, Wilson J, 18 February 2015**

Show cause - lack of appropriate medical treatment in custody can constitute cause

Mr Najem had been charged with driving whilst suspended, goods in custody and a number of break enter and steal offences. At the time of the alleged commission of these offences he had been on bail and therefore the "show cause" provisions applied.

Mr Najem had been in a car accident in March 2014 and fractured his spine and his ulna. He had metal pins inserted during surgery to address these injuries, but the applicant was in ongoing pain and had received no pain relief in custody, nor items of bedding to alleviate his pain.

Justice Wilson stated:

> Any person in the care of the Corrective Services Department, whether they are a sentenced prisoner or a prisoner held on remand, has to have access to appropriate and proper medical treatment and if that is not occurring then that would appear to be a dereliction of the duty that the Department has to adequately care for inmates.
>
> That would be a matter of concern to the Court. It is certainly a matter which is capable of being relied upon to discharge the onus in relation to showing cause why the applicant's detention is not justified.(p.3)

Nevertheless, Her Honour refused bail on the basis that the applicant posed an unacceptable risk of the commission of further offences.

***R v Benzce; Yates,* NSWSC, McCallum J, 18 February 2015**

Show cause - residential rehabilitation can constitute cause

Mr Yates was charged with a series of domestic violence offences. The applicant was subject to the "show cause" provisions because he was on parole at the time of the alleged serious indictable offences.

The bail proposal was that Mr Yates would undertake a course of full-time residential rehabilitation.

Justice McCallum accepted the Crown contention that the allegations against him gave rise to a bail concern of committing a serious offence and endangering the safety of the victim. Her Honour stated:

> The proposal for rehabilitation, however, indicates two things. First, the assessment permitting his admission to the facility for residential rehabilitation reveals a willingness to engage with the very issue that gives rise to the risk of committing a serious offence and a risk to the safety of the complainant. Secondly, in my view, the circumstances in which he would be residing at the residential rehabilitation programme themselves mitigate those risks.[5]

Her Honour found that the applicant's willingness to engage in rehabilitation adequately addressed the risk of non-appearance that had been raised by the Crown.

Mr Benzce was charged with a series of "relatively serious offences" which were not specified in the judgment. The "show cause" provisions applied as he was alleged to have committed a serious indictable offence whilst on bail.

Her Honour found that the bail concerns identified by the Crown of non-appearance and danger to the community due to drug addiction, were adequately mitigated by the drug rehabilitation proposal.

On the issue of residential rehabilitation and bail generally, Her Honour stated:

> In reaching that conclusion, I do not mean to suggest that the proposal of residential drug rehabilitation will invariably or inevitably address bail concerns of the kind that arose in either of the present cases. However, that is frequently a factor which could readily be regarded as being acutely directed to the issue giving rise to the bail concern, which is also the issue that has triggered the show cause requirement.[10]

***R v Goodwin*, NSWSC, Harrison J, 11 March 2015**

Show cause - being young and in custody for the first time can constitute cause

Mr Goodwin was a 21 year old man charged with supply prohibited firearm to an unauthorised person to which the show cause provisions applied.

Justice Harrison, in granting bail, stated:

> He is a young man and is in gaol for the first time. Those matters appear to me to demonstrate a sufficient indication that he has shown cause why his continued custody is not justified.(p.1)

R v Wright, NSWSC, Rothman J, 7 April 2015

Aboriginality - *Bugmy/Fernando* type deprivation - repeat domestic violence offending - alternative culturally appropriate supervision should be preferred option to remand

Mr Wright was charged with multiple domestic violence offences including common assault, damage property, breach AVO, intimidation and aggravated break enter and commit serious indictable offence. The circumstances did not require that he show cause.

Justice Rothman noted a lengthy criminal record of repeat offending in relation to domestic violence including breach of domestic violence orders, against a background of *Bugmy/Fernando* circumstances. His Honour stated in granting bail:

> The Court of Criminal Appeal in *R v Michael John Brown* [2013] NSWCCA 178 said this:
>
> > "In the cases of Aboriginal accused, particularly where the applicant for bail is young, alternative culturally appropriate supervision, where appropriate, (with an emphasis on cultural awareness and overcoming the renowned antisocial effects of discrimination and/or an abused or disempowered upbringing), should be explored as a preferred option to a remand in gaol.
> >
> > Since the Royal Commission into Aboriginal Deaths in Custody (see particularly Recommendations 89-91 and the National Report at 21.4 and following), the incidence of Aboriginal incarceration has increased dramatically, overwhelmingly as a result of the increase in the numbers on remand. In this case, no such culturally appropriate alternative supervision is proposed or available."
>
> While I still have some concerns as to the risk associated with the liberty of the applicant, I consider that the injunction of the Court of Criminal Appeal in *Brown*, together with the conditions that have been imposed, are such that the liberty on bail is not in the circumstances unacceptable and bail will be granted. (pp.2-3)

***R v Draca* [2015] NSWSC 138**

Show cause - relevance of no unacceptable risks to show cause consideration

Mr Draca was charged with cultivating a large commercial quantity of cannabis and supplying a large commercial quantity of cannabis. The quantity of the drug was such that Mr Draca was subject to the show cause provisions.

It was accepted that Mr Draca would not constitute an unacceptable risk and that his entitlement to bail was subject to whether he was able to show cause why his detention was not justified.

Justice RS Hulme found that cause was established and commented on the relevance of unacceptable risk to the show cause consideration:

> Clearly the factors that argue for the applicant not constituting an unacceptable risk argue in his favour under s 16(1).[12]

***R v Ebrahimi* [2015] NSWSC 335**

Show cause - one step or two step test - qualified application of reasoning in *M v R* but pre-*R v Tikomaimaleya* - electronic monitoring

Mr Ebrahimi was charged with six offences including supply and importation offences, some of which carried life imprisonment, and thereby attracted the show cause provisions. The Crown alleged that he had connections to the Hell's Angels motorcycle club. Mr Ebrahimi had two children under 4 years of age, significant surety of $1.2 million and a proposal that he comply with a system of electronic monitoring at his own expense.

Justice Beech-Jones referred to Justice McCallum's decision in *M v R* (Note: the decision in *R v Tikomaimaleya* had not yet been delivered) that when considering show cause matters a one stage approach ought be applied. His Honour also noted the Victorian provisions having raised similar disagreement as to the application of a one step or two step approach. His Honour applied Justice McCallum's approach but noted that a one stage approach appears to sit uneasily with the structure of Division 3 and the flow chart in section 16. His Honour added that even if a two stage approach was adopted it would not affect the outcome of the application. [7]-[11]

His Honour found the electronic monitoring proposal mitigated the risk of bail, however noted that the legislation did not currently enable such a scheme as the Act does not authorise a court to impose obligations on third parties. [31]-[34]

His Honour refused bail on the basis that Mr Ebrahimi was an unacceptable risk of failing to appear for the following reasons: the prospect of a lengthy jail term, his overseas contacts, access to cash and machinery necessary to generate false identification.

R v Tasker **(No 2) [2015] NSWSC 467**

Show cause - effects of plea of guilty on bail application

Mr Tasker was charged with possession of an air rifle and two counts of cultivation of cannabis (one count being a commercial quantity). He appeared before Justice Button, who indicated an intention to grant bail, despite a strong prosecution case and the application of the show cause provisions.

Subsequent to that indication, the court became aware that the applicant had pleaded guilty to his substantive matters at another court on the same day. His Honour determined that the effect of the entry of the pleas of guilty was that bail ought be refused. His Honour stated as follows:

> First, the applicant is no longer entitled to the presumption of innocence. That principle remains an important matter to be taken into account in any bail application in which a plea of not guilty is extant.
>
> Secondly, any weaknesses or gaps in the Crown case have become irrelevant.
>
> Thirdly, there is no prospect of the applicant being acquitted. Although that was always unlikely, it was possible that he could have, for example, relied upon the "defence" of duress. It was also possible (though admittedly most unlikely) that, by way of some

> negotiations between the parties founded upon favourable conduct of the applicant, the proceedings could have been "no-billed" entirely.
>
> Fourthly, there is no longer, with regard to the most serious offence, any prospect of the applicant being convicted of a less serious alternative offence.
>
> Fifthly, although a substantial period of imprisonment being imposed was always very likely, I consider that it is now inevitable, despite the very favourable subjective features of the matter.[8]-[12]

***JM v R* [2015] NSWSC 978**

Show cause - murder - relevance of police views - Act does not allow refusal of bail due to concern it may fetter decision of sentencing judge - cause established on the basis of youth and delay

JM was charged with murder and was therefore subject to the show cause provisions.

Justice Garling made reference to the decision of *DPP v Campbell* and expressed the view that nothing in the Act warranted a court refusing bail because of a concern that a decision to grant bail may later fetter the decision of a sentencing court. [36]

Nor did the show cause provisions require an applicant to establish special or exceptional circumstances. [39]

In relation to the expression of police views, His Honour stated as follows:

> Section 18 does not permit a court to have regard to the views of investigating police, or any other police officer, about whether bail should, or should not, be granted. The only views to which a court may have regard are those of a victim, or the family member of a victim and then, only to a limited extent: s 18(1)(o) of the Act. A police officer may, and commonly will, put material or relevant facts relating to the matters required by s 18 of the Act, to be considered by a court. But this is, or should be,

> limited to nothing more than a factual account. Statements of police opinion, or views as to the appropriateness of a grant, or refusal, of bail fall outside the terms of s 18 and are thus unable to be considered.[48]

JM was granted bail having established cause on the basis of his youth (21yo) and the length of time he would spend in custody pending trial (15-18 months).

***R v Boyd* [2015] NSWSC 1065**

Show cause - combination of issues can constitute cause - delay

Mr Boyd was charged with a number of violent offences pursuant to sections 33, 35 and 93C of the *Crimes Act 1900*, whilst he was subject to parole, and thereby came under the purview of the show cause provisions.

Justice Hamill found that cause was established on the following bases: the complexity of the trial, the dependence of the Crown case on the evidence of informers, the distance of the jail where Mr Boyd was held from his legal representatives, his family circumstances and community support. His Honour stated the following:

> I accept that a combination of factors may constitute satisfaction of the show cause requirement and I refer to the decision of *R v Young* [2006] NSWSC 1499 where Johnson J held that exceptional circumstances justifying a grant of bail in a murder case could be established or achieved by reference to a combination of factors. There does not have to be just one particular aspect of the case….
>
> The words of Sperling J in *R v Cain* (2001) 121 A Crim R 365 at 367 maintain their resonance under the current bail regime. His Honour said this:

> "As to the interests of the applicant, he has a legitimate claim to be at liberty to go about a lawful life and to be with his family pending trial. He has been in custody for over a year. I am told by the Crown that the present charges might not come to trial for a further year. The prospect that a private citizen who has not been convicted of any offence might be imprisoned for as long as two years pending trial is, absent exceptional circumstances, not consistent with modern concepts of civil rights."[19]&[22]

***R v A2; R v KM; R v Vaziri* (No. 19) [2015] NSWSC 1700**

Bail granted following conviction by jury - likelihood of custodial penalty live issue at sentence - not show cause

A2 and KM had been found guilty of female genital mutilation contrary to section 45 of the Crimes Act 1900. Vaziri had been found guilty of being an accessory after the fact. A2 was the mother of the girls involved in the procedure, KM was the person who carried it out, and Vaziri was involved in steps to divert the subsequent police investigation. All faced a maximum penalty of 7 years imprisonment. After the jury verdicts, the Crown had made a detention application in relation to all three. The show cause provisions did not apply to any of the applicants.

Johnson J indicated that the issue as to whether a custodial sentence would ultimately be imposed was a matter which would be a live question at the sentencing proceedings. The only risk identified by the Crown was the risk of flight in light of the conviction, however Johnson J granted bail on the basis that there had been compliance with bail prior to conviction and that the imposition of more stringent conditions post conviction could ameliorate the risk.

***R v Melmeth* [2015] NSWSC 1762**

Show cause - Inadequate medical treatment can constitute cause - Justice Health failure to provide material regarding adequacy of treatment

Ms Melmeth was charged with wounding with intent to cause grievous bodily harm and detain in company. It was accepted between the parties that she was likely to be in custody for approximately 18 months before her matter would come to trial and that the show cause provisions applied.

There was evidence before Justice Schmidt that the applicant was a type 1 diabetic with poorly controlled insulin dependence who was experiencing symptoms in custody that could precede a diabetic coma. The matter was adjourned so that the Justice Health Service could provide a report. The Service indicated on the next date that the time provided by the court was not adequate and that as a consequence no such report was prepared. The Service also suggested that the ODPP could issue a subpoena for production of medical records. A further short adjournment was granted for this to occur. The court order was not complied with and the applicant's medical records were not produced. Justice Schmidt refused a further adjournment and found cause to be shown on the evidence available. In doing so Her Honour noted the following:

> The resourcing difficulties with which the Department of Corrective Services is currently contending, given record numbers of persons held in custody in NSW, are a matter of common knowledge. Nevertheless, the difficulty with Justice Health's response to an order of the Court made on a bail application such as this, when a Crown application for an adjournment is granted and the order is made at its request, is patent. So is the problem with the response to the subpoena or rather the failure to respond to the subpoena. Both of these difficulties will be dealt with separately, when Justice Health appears before the Court to explain its failures to obey the Court's order and the subpoena. [28]

***Clinton v R* [2015] NSWSC 1953**

Section 22 of the Bail Act does not apply to persons seeking leave to appeal pursuant to 5F

Mr Clinton was charged with a number of dishonesty offences. He had pleaded guilty before Lakatos SC DCJ, but had subsequently made application to withdraw his pleas. This application was refused by Lakatos DCJ and the applicant then sought leave under section 5F of the *Criminal Appeal Act 1912* to appeal against that decision. At the time of the release application, the 5F application had not been determined and the matter was listed for sentence before the District Court two days after the bail hearing.

A question arose as to whether section 22 applied, which would inform whether Mr Clinton faced the requirement that he establish special or exceptional circumstances for his grant of bail, or whether it was only the show cause provisions that applied. Her Honour Justice McCallum J found as follows:

> Owing to the existence of the application for leave to appeal to the Court of Criminal Appeal, an issue arose before either Fagan J or Hamill J as to whether the application falls within s 22 of the *Bail Act 2013* (NSW). On that occasion the parties agreed that, since the application for leave is against an interlocutory ruling rather than being an appeal against conviction, the application does not fall within the terms of that section. I have considered that issue independently and would respectfully agree. However, some of the charges in respect of which the applicant seeks bail are offences alleged to have been committed whilst he was on bail for earlier matters. It follows that the application carries a show cause requirement in accordance with s 16B of the Act. [8]

***R v Tlais* [2016] NSWSC 215**

Domestic violence - complainant retraction - judicial comment on ODPP routine opposition to bail

Mr Tlais was charged with a number of domestic violence offences against his wife: assault occasioning actual bodily harm, grievous bodily harm, aggravated sexual assault and attempted sexual intercourse without consent. He had been granted bail following arrest but had breached both his bail and an apprehended violence order by virtue of being in the company of his wife. He was convicted of the breach AVO and sentenced to one month jail. The Crown made a detention application which resulted in him remaining in jail once the sentence had expired.

Mr Tlais made application for release in the Supreme Court relying on a signed statement from his wife that she had no fears of her husband, would not attend to prosecute the case and would not give evidence against him at trial. Her initial statement to police had contained allegations that Mr Tlais and a number of his family members had threatened her with physical violence and separation from her children if she reported any matters to the police.

Harrison J expressed concern about relying on the retraction statement without hearing evidence from the complainant. Mr Tlais' counsel declined to call the complainant. His Honour refused bail stating that he could not be satisfied that the retraction was genuine and nor could he be satisfied that the unacceptable risk of the commission of further offences or the danger of influence over the complainant could be overcome by the imposition of any bail conditions.

In dealing with the matter, His Honour made the following comments regarding the Crown's approach to bail in the Supreme Court:

> For reasons that I am unable to explain, the Office of the Director of Public Prosecutions appears these days almost always or without exception to oppose bail

> in every case with no obvious attempt to differentiate or discriminate among them, relying instead universally upon fears that the applicant will not appear, will commit further offences, will pose a danger to victims, individuals and the community at large and will interfere with witnesses or evidence. So mechanical and predictable have these expressions of bail concerns become that they potentially but significantly diminish the degree of reliance that can be placed upon submissions said to support them without considerable further examination. This approach also raises the distasteful spectre of the existence of some kind of internal directive that bail is to be opposed as a matter of principle in every case regardless of the merits of the particular applicant concerned. [11]

***R v Viavattene* [2016] NSWSC 299**

Application for expedition of bail hearing - health and difficult personal circumstances of family can form basis for expedition - relevance of Crown opposition to bail

Mr Viavattene appeared for himself having been charged with robbery pursuant to section 94 of the *Crimes Act 1900* which carries a maximum penalty of 14 years. He filed a notion of motion seeking expedition of the hearing of his Supreme Court bail application. Schmidt J granted the application for expedition and listed the bail application for hearing on 6 April 2016. Her Honour indicated that the reason for the grant of expedition was based on his health and the difficult personal circumstances of his family, details of which were not set out in the judgment.

Mr Viavattene then filed an additional notice of motion seeking further expedition. On 18 March 2016 Schmidt J heard the application and stated as follows:

> It seemed to me that if the application was not to be opposed, justice and common sense would dictate that it be dealt with immediately, rather than Mr Viavattene being held longer in custody. The matter was stood down so that instructions could be sought.

The Crown advised that the application would be opposed and the application for further expedition was refused.

***R v BNS* [2016] NSWSC 350**

Show cause - section 74 - multiple release applications - change in identity of surety and the amount offered - change in legal representation - assessment of significance of potential loss of surety

BNS was charged with two offences: supply methylamphetamine (2kg) pursuant to the *Drug Misuse and Trafficking Act* 1985 and participate in a criminal group pursuant to section 93T(1) of the *Crimes Act 1900*. The first offence attracted a maximum penalty of life imprisonment and a standard non-parole period of 15 years. The second attracted a maximum penalty of 10 years. He faced the show cause provisions by virtue of the commercial quantity of the drug the subject of the supply offence.

BNS had previously been refused bail by Fagan J in the Supreme Court on the basis that cause had not been shown. He made a further application to the Supreme Court and sought to establish grounds for further release application as required by section 74. The grounds proffered by senior counsel for BNS were that the surety available had increased from $50,000 to $1 million and that the person offering the surety had also changed. In addition it was argued that senior counsel was making "more thorough" submissions that covered a greater range of relevant matters.

Whilst Garling J found that the change in the identity of a surety and the amount would not always constitute grounds for further application, it did so in this case:

> It is always a matter of degree. A court needs to assess, in the context of the seriousness of the charge and all of the other circumstances relevant to a bail

> application, whether a change in the identity of a surety and the sum being offered are "material". [45]

In relation to the argument that "more thorough" submissions could constitute grounds for further application, His Honour stated as follows:

> In my view, the making of submissions by a legal representative which are different in quality or quantity from those made in an earlier application by another legal representative, does not fall within the terms of s 74. Submissions are not information, nor do they constitute a change of circumstances relevant to the grant of bail. [42]

His Honour found that there was a very strong Crown case and an unacceptable risk of flight. In doing so, His Honour noted the following:

> Whilst on its face the sum appears to be a substantial one, it is not possible to assess with any confidence the relative impact of the loss of that sum to the applicant, his mother or her family, in the event that he does not appear. [60]

***R v NK* [2016] NSWSC 498**

Terrorism offence - exceptional circumstances - youth of applicant and vulnerability to adult influence

NK was a 16 year old girl charged with collecting funds for, or on behalf of, a terrorist organisation pursuant to s.102.6(1) of the *Criminal Code* 1995 (Cth). The offence attracted a maximum penalty of 25 years.

Section 15AA(1) of the *Crimes Act* 1914 (Cth) provides:

> Despite any other law of the Commonwealth, a bail authority must not grant bail to a person … charged with … an offence covered by subsection (2) unless the bail authority is satisfied that exceptional circumstances exist to justify bail.

If NK were to establish exceptional circumstances, the court would then need to consider the unacceptable risk test provided by the *Bail Act* 2013.

NK applied for bail in the Supreme Court and relied on the following to establish exceptional circumstances: a psychological report diagnosing chronic Adjustment Disorder with Mixed Anxiety and Depressed Mood; her youth; $500,000 surety being the equity in her aunt's home; effective house arrest with an ankle bracelet; the expected delay of 18 months to 2 years; and the fact that she had no prior record.

The Crown argued that there was nothing unusual or special about the position of the applicant and that section 15AA required that the prosecution case be shown to be weak.

Hall J extracted the relevant principles as follows:

(1) Section 15AA of the Crimes Act 1914 has been said to enact a rebuttable presumption against bail being granted to a person charged with a terrorism offence: *Hammoud v DPP* [2006] VSC 516 per Bongiorno J at [1].

(2) Section 15AA of the Crimes Act 1914 prevents the court from granting bail unless it is satisfied that exceptional circumstances exist to justify bail. While such a provision requires the applicant to satisfy the court, it does not prohibit bail in all cases. I has been observed that each application for bail, even under these provisions:

> "…must be so dealt with in a way that does more than pay mere lip service to the anxious concern of the law that circumstances do alter cases and that it is rarely, if ever, that a simple, not to say a simplistic one size fits all approach, will be the best way of achieving a just individual result": *Regina v Mirsad Mulahalilovic* 2006/763, 1 August 2006, per Rothman J quoting dicta in *R v Newbury*, Sully J, NSWSC, 27 January 2006, unreported)

(3) In *Hammoud v DPP*, supra, it was observed that as the "presumption" referred to in (1) above is rebutted only if exceptional circumstances exist to justify bail, the onus is upon an applicant to satisfy the Court affirmatively that such circumstances exist: at [2].

(4) Section 15AA sets an extremely high hurdle. The requirement for exceptional circumstances imposes a high test.

(5) The word "exceptional" has received judicial attention in many cases. What must be shown is that there is some situation which is out of the ordinary in some respect which the detainee can point to as justifying the adjective "exceptional": *Hammoud v DPP* at [3].

(6) The concept of exceptional circumstances is necessarily a flexible one. Such circumstances may be constituted by a combination of matters which taken together may render the case exceptional: *Haddara v Commonwealth DPP* [2006] VSC 8 at [5] per Osborn J and *R v Young* [2006] NSWSC 1499 at [19] and [20] per Johnson J (as to s 9C of the Bail Act 1978).

(7) Exceptional circumstances is a threshold issue that requires a case-by-case examination and that there is no definitive definition that would apply to all cases: *R v Maywand Osman* 2015/12786, 12 February 2015 at p 6 per Hall J.

(8) In considering the issue of exceptional circumstances, not only can a combination of matters constitute such features but they can include features that are subjective to the particular applicant, features which bear upon the nature of the alleged offence and features which emphasise, absent the particular test, that the applicant is otherwise a person who will answer bail: *R v Mulvihill* [2013] NSWSC 1190 at [10] and [11] per Price J. [26]

His Honour found that exceptional circumstances may include personal or subjective circumstances and may also include circumstances relating to the strength or weakness of a Crown case. His Honour found that youth was relevant to the determination of exceptional circumstances, as was the fact that there was evidence to suggest that adult males were seeking to engage, utilise or influence the girl in their enterprise:

> in some cases the possible vulnerability of youth to adult persuasion or influence may be a relevant consideration in a determination as to whether exceptional circumstances under s 15AA exist. [41]

His Honour found that the vulnerability arising from the youth of the applicant provided an independent basis for a finding of special circumstances irrespective of the material disclosed in the psychological report. His Honour found that the strict conditions proposed could mitigate the unacceptability of any risk.

R v Kugor **[2015] NSWCCA 14**

Reasonably strong Crown case - serious charges - jail sentence upon conviction inevitable - relatively minor criminal record - delay before trial - on protection - risk of reoffending tempered by experience in custody prior to bail

Mr Kugor was charged with four counts of aggravated sexual assault in company and one count of robbery in company. He had spent 6 months in custody prior to his Supreme Court release application, during which time he was the victim of a serious assault by other inmates.

He was granted bail in the Supreme Court by Justice Davies. The Crown made a detention application pursuant to section 50 to the Court of Criminal Appeal.

The Crown submitted on the application that there were bail concerns that the respondent would fail to appear and commit further serious offences.

Chief Justice at Common Law Hoeben, Justices RA and RS Hulme refused the detention application and found that whilst the case was reasonably strong and that a jail sentence upon conviction was inevitable, the bail concerns could be met by the imposition of strict conditions. The Court found that he was not a flight risk given his strong community ties. In light of his relatively minor record, the concern regarding further offending was a possibility, rather than an unacceptable risk. The Court noted that the risk of reoffending was tempered in circumstances where the respondent had had the sobering experience of being assaulted in jail.

With regard to delay, the Court stated the following:

> A matter of concern to the Court is the delay likely to be experienced by the respondent before these matters are finalised in court. He has already spent 6 1/2 months in custody and if the Crown's application were granted, on the most optimistic estimate he would spend a further 9 months in custody before this matter could come to trial in the Campbelltown District Court. As was fairly conceded by the Crown, the time in pre-trial custody might well be longer. It is a very serious matter to deprive a citizen of liberty for such a long period of time when he has not been convicted of any offence. This is particularly so when such custody will be served under conditions of "protection" which are more onerous than those experienced by the normal prison population.[35]

***El-Hilli and Melville v R* [2015] NSWCCA 146**

Bail pending CCA appeal - special or exceptional circumstances - two step test but similar factors relevant to each step - interaction "unacceptable risk" and "bail concerns" assessment - relevant matters are merit of appeal and proximity of release date - not necessary to establish certain success

Mr El-hilli and Ms Melville were convicted and sentenced after judge alone trial of two offences of dishonestly obtain financial advantage by deception. They had a five year old daughter who was residing in Emu Plains Correctional Centre with Ms Melville. Each filed notices of appeal against conviction. It was common ground that the non-parole period of Ms Melville's sentence would expire before the appeal was likely to be heard. The show cause provisions did not apply to either applicant.

Each made a release application to the Supreme Court which was refused. Each then made a release application to the Court of Criminal Appeal. Section 22 of the *Bail Act 2013* provides that bail only be granted pending appeal to the Court of Criminal Appeal if special or exceptional circumstances are established.

In this case, the court found that neither applicant had established special or exceptional circumstances, but in doing so made a number of useful comments with regard to the operation of the section.

Justice Hamill stated that a two step test applied, and that whilst it was likely that the same factors would apply to both considerations, the two steps ought not be conflated. His Honour observed as follows:

> Given that the "special or exceptional" circumstances requirement in s 22 replaces the show cause requirement (where applicable) and the structure of the *Bail Act*, the same reasoning employed by the Court of Appeal in *DPP v Tikomaimaleya* supports the following propositions. First, where s 22 is engaged, there are two stages. The applicant must demonstrate that "special and exceptional circumstances exist justifying the [decision to grant bail]". Then the Court must apply the "unacceptable risk test" and do so by application of the exhaustive list of matters set out in s 18. The second proposition is that the same factors and evidence may operate at both stages. Where an applicant establishes special and exceptional circumstances, it is likely that the same material will also succeed in satisfying the unacceptable risk test. However, that cannot be stated as a universal proposition and the bail authority must apply each test in accordance with the terms of the Act. A case may arise where a particular matter qualifies as a "special or exceptional circumstance" and yet the application of the unacceptable risk test results in the refusal of bail. Such a case is likely to be rare because the "unacceptable risk" factors are imported in the "special or exceptional circumstances" requirement by s 22(3).[13]

His Honour then set out an extensive history of the application of section 30AA which had previously governed such appeals and was drafted in similar terms [15]-[23]. His Honour concluded that the merit of the appeal and the proximity of the release date were matters relevant to the assessment, however it was not necessary to show that the success of the appeal was inevitable. His Honour stated as follows:

> I should make clear that I do not accept the suggestion that an applicant must establish that their appeal will either “inevitably succeed” or that success is “virtually inevitable”. Neither the statutory language, nor the case law, supports

> such a strict test. It was rejected by the Court (Simpson, Johnson and Rothman JJ) in *R v Antoun*….
>
> In a case where the applicant relies exclusively on the strength of the appeal, the observations of Barr AJ in *Petroulious v R* and Kirby P in *R v Wilson* may apply and it may be necessary to establish that the appeal is "most likely" to succeed. When the merit of the appeal is relevant as part of a combination of factors, the preponderance of authorities suggest that the question is whether the proposed grounds of appeal are arguable or enjoy reasonable prospects of success: see *Peters v The Queen* at 310-311; *Marotta v The Queen* at 266; *R v Velovski* at [24]-[25]…..
>
> It is not possible to determine or predict in advance what those features may be. Two features that frequently arise are (i) the merit of the appeal and (ii) the possibility that the applicant will have served their sentence or non-parole period, or a substantial part of it, before the appeal is determined.[24][26]&[29]

***DPP(NSW) v Campbell* [2015] NSWCCA 173**

Show cause - matter committed for sentence - bail to residential rehabilitation could be perceived as fetter on discretion of sentencing judge

Mr Campbell had pleaded guilty to a number of offences including two counts of armed robbery and an aggravated break and enter offence, and had been committed to the District Court for sentence. He was on parole at the time of the offences and was thereby subject to the show cause provisions.

After the matter was committed for sentence, Mr Campbell was granted bail in the Supreme Court by Garling J on the condition that he enter into and complete the Oolong House residential drug and alcohol rehabilitation program. The Crown made a detention application pursuant to section 50 to the Court of Criminal Appeal.

In refusing bail, Justice RA Hulme stated the following:

> Rehabilitation is an issue of obvious importance but, given the time between now and when he is to appear for sentence it is unlikely that much will be achieved that will assist the sentencing judge to assess his future prospects of successfully eschewing a life of drug and alcohol addiction. There is merit in the Crown's submission that allowing the respondent bail so that he can enter a residential rehabilitation program at this point could be perceived as this Court fettering the sentencing judge's discretion.
>
> I am not persuaded that the respondent has established on the balance of probabilities that his detention at this point is not justified. In fact, it is amply justified. [24]-[25]

DPP(NSW) v Boatswain **[2015] NSWCCA 185**

Show cause - murder - strong case cause shown re: medical situation - unacceptable risk of serious offence and interfering with witnesses

Mr Boatswain was a 64 year old man who came within the purview of the show cause provisions as he was charged with murder.

The following was agreed: the Crown case was a reasonably strong circumstantial case, Mr Boatswain had strong community ties and a minor criminal record.

The Court accepted medical material regarding Mr Boatswain's diagnosis with terminal liver cancer including the fact that he was unlikely to survive more than a couple of years.

The Court found that there was a strong case found for cause being shown based on his grave condition of ill-health and relatively short life expectancy. However, due to the evidence of alleged threats to kill certain persons and to influence the evidence of certain witnesses he was refused bail on the basis that there was an unacceptable risk of the commission of a serious offence and of the interference with witnesses.

The Court noted that if the applicant's health situation deteriorated to the point of incapacitation that the bail concerns may need to be reconsidered, and that the Court's determination should not be considered as precluding such a reconsideration.

Note: Mr Boatswain made a further application for bail some months later when his health deteriorated and bail was granted. He died the day after.

DPP(NSW) v Brooks **[2015] NSWCCA 190**

Show cause - murder - reasonably strong case re: identification - nothing "special or unusual" to amount to showing cause

Mr Brooks was charged with murder and therefore the show cause provisions applied.

Beech-Jones J granted bail in the Supreme Court and the Crown made a subsequent detention application to the Court of Criminal Appeal.

Mr Brooks sought to establish cause by virtue of the following: youth (19yo), no criminal history, strong ties to the community, delay and the inherent unreliability of identification evidence upon which the prosecution case was reliant. The Court, Hoeben CJ, Johnson J and RA Hulme J, found that cause had not been shown and stated as follows:

> there is nothing particularly special or unusual in what the respondent has put before the Court. Age, lack of criminal antecedents, ties to the community and strong family support do not amount to showing cause. This is particularly so when one has regard to the seriousness of the offence with which the respondent has been charged and the apparent strength of the Crown case.[22]

***R v McCormack* [2015] NSWCCA 221**

Show cause - firearms - combination of factors including disposition at Local Court and fact that pre-sentence custody may exceed custodial sentence

Mr McCormack was charged with handling a firearm under the influence of alcohol, possess load firearm and common assault in the context of an ongoing neighbourhood dispute. The firearms offences brought him under the purview of the show cause provisions.

Mr McCormack was granted bail in the Supreme Court by McCallum J and the Crown made a detention application to the Court of Criminal Appeal.

The Court of Criminal Appeal found that cause was shown due to a combination of factors including: the matter was to be finalised at the Local Court, the pre-sentence custody may exceed the custodial sentence, the fact that he was 65 years old and had health issues and that he had no prior history of violent offending.

***DPP(NSW) V Mawad* [2015] NSWCCA 227**

Show cause - show cause is not "special or exceptional circumstances" - police views not evidence

Mr Mawad was charged with a number of offences including two counts of armed robbery and further firearms offences which came under the purview of the show cause provisions. Additionally, Mr Mawad was on bail at the time of the alleged offending.

Mr Mawad was granted bail by Hamill J in the Supreme Court and the Crown made a detention application to the Court of Criminal Appeal.

The Court of Criminal Appeal, Gleeson JA, Adams and Beech-Jones JJ, found that police views as to matters affecting bail such as access to weapons or alleged criminal connections could be admissible, given that provisions dispensing with the rules of evidence are "intended to be facultative, not restrictive". However the bail authority can receive material and give it such weight as it considers appropriate:

> This includes scepticism of conclusions unsupported by any factual detail. In my view, the absence of any detail setting out the basis for what are otherwise potentially damaging assertions warrants this Court not attributing any weight to those assertions. [39]

The Crown referred the Court to *DPP(NSW) v Brooks* and argued that the matters that Mr Mawad relied on to show cause were "common features" and ought not be endorsed as sufficiently special to overcome the show cause requirement on charges of such seriousness. Justice Beech-Jones stated as follows:

> I do not understand *Brooks* to have stated that either "special or unusual" or "particularly special or unusual" circumstances must be demonstrated before cause can be shown. If it did then I disagree. This Court has no authority to add glosses to statutory tests. This is particularly so when s 22(1) of the Act specifically imposes a requirement to establish "special or unusual circumstances" when an appeal is pending in this Court or from this Court to the High Court against a conviction on indictment or a sentence imposed after conviction on indictment. In such case, the establishment of special or unusual circumstances is deemed to satisfy the show cause test where it is otherwise applicable (s 22(2)). These provisions are inconsistent with any suggestion that in all cases where the show cause test applies, special or unusual circumstances must be shown (*JM* at [39] to [41] per Garling J; see also *El-Hilli v Melville v R* [2015] NSWCCA 146 at [11] per Hamill J).

Equally I do not understand *Brooks* to be stating that "age, lack of criminal antecedents, ties to the community and strong family support" could never amount to showing cause, only that they did not amount to cause in that case. Again if *Brooks* did state that then I disagree for the same reason. Each case must turn on its own circumstances. A test posited in terms as to whether detention is "justified" or not necessarily defies any judicial attempt to circumscribe the circumstances in which it can be met.[42]-[44]

Rebekah Rodger

Maurice Byers Chambers

May 2016