2015 Bail Decisions in the Supreme Court, Court of Appeal and Court of Criminal Appeal

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.

This paper considers Supreme Court, Court of Appeal and Court of Criminal Appeal determinations of note in NSW since 28 January that provide guidance as to the application of the amendments.

1. *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.

What then is the point of section 16A? Her Honour found that the section 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.

2. *R 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.

3. *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]…..
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> 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]

4. *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* 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.

5. *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)

6. *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]

7. *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:
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> > "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)

8. *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]

9. *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)

10. *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. It is noted that this decision does not sit well with Justice McCallum's interpretation of the interaction between the "show cause" and the unacceptable risk provisions.

11. *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)

12. *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)

13. *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 5 aggravated break and enters 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]

14. *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]

15. *R v Goodwin*, NSWSC, Hall J, 11 March 2015

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

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

Justice Hall, 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)

16. *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]

17. *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]

Rebekah Rodger

Barrister

Maurice Byers Chambers

June 2015