Bail Act 2013 Decisions in the Supreme Court of NSW

The *Bail Act* 2013 (the Act) commenced on 20 May 2014. It abandoned the presumption based system of the *Bail Act* 1978 and introduced a new risk management approach to the determination of bail.

This paper considers Supreme Court determinations of note since 20 May that provide guidance as to the application of the new Act.

1. ***R v Lago*** [2014] NSWSC 660

   Onus of proof on prosecution s 20 - assessment of unacceptable risk s 17 - grant of bail not risk free - limitations on imposition of security requirements s 26(5) - limitations on police checks on curfew s 81 – presumption of innocence s 3(2) – length of time in custody s 17(3)(g)

   Mr Lago was charged with serious offences relating to firearms and a home invasion.

   Whilst Hamill J stated that he was "*not sure*" that the first step of determining unacceptable risk alone (as required by s 17) placed the onus on the prosecution, he noted in relation to the second step:

   > "Section 20 is a critical provision and it provides that bail can only be refused where the Court is satisfied that any unacceptable risk "cannot be sufficiently mitigated by the imposition of bail conditions". It can be seen that this provision casts the onus on the party who is opposed to the grant of bail. Again the standard is on the balance of probabilities."[7]

   In relation to the assessment of unacceptable risk, His Honour stated:

   > "The concept of assessing risk of this kind has been considered in a number of cases in the context of legislation relating to bail in other states...see for example *Williamson v DPP* (2001) 1 Qd R 99*; Dale v DPP* [2009] VSCA 212*; Woods v DPP* [2014] VSC 1*....*
   >
   > ...The cases on bail recognise that "no grant of bail is risk free": see *Williamson (supra)* at [22]; *Dale (supra)* at [58]. In the *Application of Haidy* [2004] VSC 247, a decision under the Victorian bail legislation, Redlich J said:
   >
   > > "Bail when granted is not risk free. *Williamson v DPP* (QLD). As the offender's liberty is at stake, a tenuous suspicion or fear of the worst possibility if the offender is released will not be sufficient. *Dunstan v DPP; Williamson v DPP* (Qld).""[8]-[9]

   His Honour commented on the interaction between the presumption of innocence and the length of time a person would be required to remain in custody as follows:

   > "The Act does no violence to the presumption of innocence or to the ultimate requirement of proof beyond reasonable doubt before the

State can punish one of its citizens. Further the length of time that a person is required to remain in custody is specifically required to be taken into account in assessing whether there are or are not unacceptable risks: s 17(3)(g). The following words of Sperling J in *Cain (No 1)* (2001) 121 A Crim R 365 at 367 continue to resonate when a bail authority is dealing with a release application where there is expected to be a lengthy delay:

> "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"

.....My assessment is that the applicant will be required, if refused bail, to spend at least one year in custody enjoying, as it were, the presumption of innocence."[13] and [22]

His Honour found that there was an unacceptable risk of the commission of a serious offence and to the safety of the witnesses and the victim on the basis of the serious and violent nature of the alleged offending and the applicant's possession of a gun (it was accepted by the prosecution and the court that this gun was not the one involved in the home invasion).

His Honour found that these risks could be mitigated by a combination of conduct requirements (s 25) and enforcement requirements (s 30). The enforcement condition related to a curfew and was made in terms that required the police to act on the curfew check only where they believed on reasonable grounds that it was necessary to do so, having regard to the rights of the other occupants of the premises to peace and privacy.

In relation to security requirements, His Honour noted the following:

> "I do not impose any security requirements because I am prohibited from doing so under the terms of the legislation, unless I am of the view that he poses an unacceptable risk of non-appearance: s 26(5). I am not of the view that the applicant is an unacceptable risk of non-attendance. I record my opinion that this is something of a problem in the legislation."[28]

What to do if the police aggressively enforce a curfew

It has been reported since the commencement of the new Act that some police have been overzealous in their enforcement of curfew conditions. If this happens to one of your clients, it is suggested that a letter to the Local Area Commander (LAC) may assist by setting out s 81 regarding the giving of directions under enforcement conditions. Section 81 provides that a police officer may give a direction of a kind specified in the enforcement condition either in the circumstances specified by the court in the condition or if the officer has reasonable suspicion that the accused has breached the curfew condition. The letter could also set out your intention to make a variation application to delete the curfew condition, if the persistent and unwarranted

curfew checks continued. In particular, s 30(5) requires a court to consider the unreasonable affect on others when imposing a enforcement condition. A copy of a letter sent to the relevant LAC on behalf of a client is attached as an example at Annexure "A".

2. *R v Alexandridis* [2014] NSWSC 662

Onus of proof on prosecution s 20 - assessment of unacceptable risk s 17 - grant of bail not risk free – evidence must be credible or trustworthy s 31(1)

Mr Alexandridis was charged with threatening a person with intent to influence a witness.

Hamill J made a number of helpful statements with regard to the onus of proof being on the prosecution by virtue of s 20, the determination of unacceptable risk under s 17 and the presumption of innocence as set out in s 3(2). The statements are similar to those set out in *R v Lago* (above at 1) and will not be set out again here.

His Honour made some additional comments with regard to the admissibility of evidence in bail applications that is worth noting. Section 31(1) of the Act provides that the rules of evidence do not apply, but that the court may take into account any evidence that it considers is "credible or trustworthy".

Objection was taken to part of a letter prepared by the Officer in Charge in relation to the application for bail, on the grounds that there was no evidence to support a particular assertion made. Similar material appeared in the police facts sheet. His Honour noted at this stage of the proceedings that the prosecution case appeared "gossamer thin" based on the material in the facts sheet.

After a short adjournment, the prosecution then provided a CD of an ERISP of an alleged associate of the applicant in support of the assertion. A synopsis of this material was prepared by the applicant's solicitor and tendered. His Honour determined the evidence to be "credible or trustworthy" for the purposes of s 31(1). It can be inferred that His Honour would have rejected the admission of the asserted evidence, if the material had not been so provided.

Reference to this case may assist practitioners in any arguments disputing unsubstantiated assertions in police facts sheets and other prosecution material tendered on bail.

3. *R v Morris* (SCNSW, Unreported, McCallum J, 20 May 2014)

Aboriginality – *Bugmy/Fernando* type deprivation - special vulnerability s 17(3)(j) – weight of consideration of presumption of innocence and right to liberty reinforced by virtue of special vulnerability s 3(2) – short period of adjournment mitigates risk of number of offences likely to be committed s 17(4)

Ms Morris was charged with one larceny offence and had been in custody for 2 months at the time of her bail application before the Supreme Court. The matter was listed for defended hearing 2 weeks after the date of the bail application. The facts sheet squarely raised the issue of Ms Morris having acted under duress, but was otherwise a strong prosecution case.

Ms Morris came from a background of severe deprivation including her subjection to violence, sexual abuse and movement between family and foster parents. In addition, her mother was murdered when she was a teenager and she suffered from depression together with a number of physical and mental conditions. Her background clearly placed her within the ambit of the principles set out in the cases of *Bugmy v R* (2013) 302 ALR 192 and *R v Fernando* [2002] NSWCCA 28. McCallum J found that her background was relevant as placing her in the category of a person with special vulnerability under the new Act: s 17(3)(j).

In relation to the interaction between the presumption of innocence and special vulnerability, Her Honour stated as follows:

> "In determining the application, I am required to have regard to the presumption of innocence and the general right to be at liberty: s 3 of the Act. The weight of that consideration is **reinforced** in the present case by relevant evidence of the applicant's background which, in my assessment, plainly places her in the category of a person with special vulnerability: cf s 17(3)(j) of the Act."(p.1: emphasis added)

In relation to the assessment of unacceptable risk of committing a serious offence, Her Honour found, by virtue of her criminal history, that there was a strong likelihood that any offence committed would be a relatively minor offence of shoplifting. Turning to s 17(4) and the requirement to consider the number of offences likely to be committed as a discrete aspect of the seriousness of the offending, Her Honour stated:

> "Whilst a lengthy period of remand might raise a concern in that regard, in the present case the short period of the remand until the hearing at Tamworth Local Court induces me to the conclusion that I could not assess the risk of a substantial number of offences being committed of the kind to which I have referred between now and that time as being an unacceptable risk of serious offending.
>
> In all the circumstances, I am not persuaded on the balance of probability that there is an unacceptable risk of the applicant committing a serious offence in the sense in which that term is defined in the Act between now and the date of the hearing."(p.3)

It can be seen that Her Honour didn't go so far as to say that a risk of committing a number of minor offences like shoplifting would not constitute an unacceptable risk of committing a serious offence as defined under s 17(4). However, if the risk of reoffending is of a relatively minor nature and the remand period is short, then the risk of committing a serious offence is not unacceptable.

This judgment may be of assistance when faced with the argument that bail ought be refused as the substantive matter is listed within a short period. That is, it could be argued that the short adjournment period in fact strengthens the

argument in favour of the grant of bail, as there is a very small period of time in which offences could be committed, thereby mitigating the risk of committing a serious offence in the relevant remand period.

4. *R v SK & DK* (SCNSW, Unreported, McCallum J, 20 May 2014)

Children – special vulnerability s 17(3)(j) – balance of risk between special vulnerability and risk to community as a result of vulnerability – grant of bail not risk free

SK and DK were 15 year old twin brothers from a background of extreme disadvantage. They had been taken into care when they were infants due to domestic violence and substance abuse in the parental home. They had been fostered at various placements until they went to an uncle and aunt where they were further physically and emotionally abused. Prior to arrest they had been residing with their sister at a facility run by the Uniting Church. Whilst they were in custody bail refused their sister had died apparently due to a drug overdose.

McCallum J accepted that there was clearly an unacceptable risk of committing a serious offence, as well as to the safety of the victim or individuals or community. The "more difficult task" in Her Honour's view was whether the risks identified could be sufficiently mitigated by the imposition of conditions. In this consideration, Her Honour noted that:

> "Section 17 of the Bail Act makes it plain that Parliament intended that the assessment be very much focused on the individual circumstances of each case coming before the court and, further, that the assessment be informed not only by considerations of the protection of the community but also by considerations relating to the circumstances of the applicant.
>
> That is made plain by the inclusion of s 17(3)(j), which requires the court in assessing whether there is "unacceptable risk" to have regard to any special vulnerability of the accused person."(p.3)

However, Her Honour noted that the considerations of special vulnerability and protection of the community were sometimes difficult to reconcile in the assessment of unacceptable risk:

> "Those considerations lead to competing conclusions. On the one hand, they might be regarded as factors exacerbating the risk of offending; on the other they highlight the acute needs for these boys to fall under the care of a considered and carefully planned proposal to meet their future needs which will mitigate against the risk of their reoffending."(p.3)

In determining that bail ought be granted, Her Honour stated:

> "Neither the prospect of refusing bail nor the prospect of releasing them from custody is entirely satisfactory or entirely risk-free. The Bail Act does not contemplate the absence of any risk if a person is released but the informed balancing of risk." (p.3-4)

5. *R v Justice* (NSWSC, Unreported, Schmidt J, 28 May 2014)

Community ties s 17(3)(a) – grant of bail to residence outside NSW

Ms Justice had been charged with sexual offences against her 2 children who were 2 and 4 years of age at the relevant time. It was not disputed that she had been extradited from South Australia to New South Wales in order to face the charges. It was disputed as to whether this was an attempt to evade authorities.

Schmidt J, in granting bail, found that there was an unacceptable risk of failing to appear and committing a serious offence but that these risks could be sufficiently mitigated by conditions.

> "Bearing in mind all of those matters relevant under s 17(3), I have come to the conclusion that bail conditions can be crafted which will sufficiently mitigate the risk which the applicant poses. The Crown accepted, in the circumstances, that bail to a residence which has become available in New South Wales will not be appropriate and may, indeed, exacerbate risks which the applicant might pose. It would be preferable that she were bailed to South Australia where her community and family ties lie, albeit the conditions imposed will have to be crafted bearing in mind the need to mitigate the risks which have been identified, including the need to ensure the applicant will attend when required before the District Court in New South Wales." (p.5)

6. *R v Paul* (Unreported, Schmidt J, 28 May 2014)

Bail when sentence imminent - bail granted for lawful purpose rehabilitation s 17(3)(l)

Mr Paul applied for Supreme Court bail to enter a residential rehabilitation centre 2 weeks before he was due to be sentenced on numerous fraud charges and a number of breach AVO charges.

Schmidt J accepted the Crown submission that he posed an unacceptable risk of failing to appear, committing a serious offence and endangering the safety of victims, individuals and the community.

The Crown also submitted that the grant of bail within weeks of the sentence had the potential to interfere with the sentencing exercise. This had been a common submission in the Supreme Court under the *Bail Act* 1978 in relation to bail when the substantive sentence proceedings are imminent and there is a likelihood of a custodial penalty.

In granting bail, Her Honour noted the Crown submission regarding imminent sentence:

> "the question is raised by the Crown as to whether such bail conditions might have an impact on the sentencing exercise to be conducted by the Local Court on 16 June, I have expressed my opinion that given the nature of the provisions of the current legislative scheme and its concern with risk assessment and risk mitigation, which I have discussed, I cannot see how conclusions reached in

relation to those statutory concerns can have any impact on the sentencing exercise which will have to be undertaken on 16 June. The sentence will have to be determined on the basis of the relevant evidence led in those proceedings." (p.3)

7. *R v Barry* (NSWSC, Unreported, Schmidt J, 28 May 2014)

Residential rehabilitation s 17(3)(l) – bail to future date when bed available - grant of bail for specified period s 12(3) - accommodation requirements s 28 - pre-release requirements s 29

Mr Barry was charged with armed robbery (blood filled syringe), resist police and escape police custody. He had been in custody for 7 months at the time of the bail application and his matters were still at the mention stage in the Local Court.

Schmidt J accepted the Crown submission that the applicant posed an unacceptable risk of failing to appear, committing a serious offence and endangering the safety of the victim, individuals and the community. However, given the fact that he had a bed available at a residential rehabilitation facility, Her Honour found that the risks could be sufficiently mitigated by strict conditions.

A technical issue arose as the bed in the rehabilitation centre was not available until 2 June (the application being heard on 28 May). Under the *Bail Act* 1978, the orders in these circumstances would be that bail be granted on 28 May but not entered into until the bed became available on 2 June. This type of order is now prohibited under the Act because pre-release requirements are limited by virtue of s 29 to the following circumstances only: conduct requirement regarding surrender of passport, security requirement, character acknowledgment and accommodation requirement (applying to children only: s 28).

Her Honour in granting bail noted:

> "The parties have addressed me on the operation of the Bail Act, because there is no bed available to the applicant today in the rehabilitation program. That is available on 2 June. It is common ground between the parties that, in the circumstances, pursuant to s 12(3) the Court can grant the applicant bail for a specified period, namely from 2 June until the applicant ceases participating in the program, at which point his bail would come to an end. That, it is common ground between the parties, does not amount to the imposition either of an accommodation requirement, which is dealt with in s 28 of the Act, and under s 28(3) is one available only to a child, at present there being no relevant regulations which could apply to these circumstances.
>
> It is also common ground that the proposed bail condition does not impose pre-release requirements, which are dealt with in s 29 of the Act. I agree with the parties' submissions as to the operation of those aspects of the legislation, and I am satisfied that, in accordance with s 12(3), bail for a specified period of the kind proposed can be ordered by the Court in accordance with that provision." (p.2-3)

8. *R v Pratley* (SCNSW, Unreported, Campbell J, 4 June 2014)

Intellectual disability – special vulnerability s 17(3)(j) - balance of risk between special vulnerability and risk to community as a result of vulnerability

Ms Pratley was an intellectually disabled woman charged with a sexual offence against her infant.

Campbell J found on the balance of probabilities (noting the finding was "marginal") that there was an unacceptable risk of endangering the safety of the community due to her intellectual disability making her susceptible to the influence of others. His Honour therefore found that the applicant's special vulnerability under s 17(3)(j) militated against a grant of bail rather than in favour:

> "The thing that concerns me about this case, however, is that it is quite clear that Ms Pratley has intellectual and perhaps mental and certainly neurological conditions, which make her a very susceptible person. In fact, I doubt very much that she would be facing these charges but for the malevolent influence of another person. To my mind it is that consideration that persuades me that there is an unacceptable, albeit relatively low, risk of Ms Pratley endangering the safety of other persons in the community."(p.1)

This decision reflects the tension of competing conclusions that McCallum J referred to in relation to the special vulnerability of the children and the protection of the community in *R v SK & DK* (above at 3).

His Honour found that conditions could be imposed to sufficiently mitigate the unacceptable risk and bail was granted.

9. R v Ellis (SCNSW, Unreported, Campbell J, 4 June 2014)

Bail granted for lawful purpose rehabilitation s 17(3)(l) – s 11 sentence to rehab already granted on other matters by DCJ

Mr Ellis was charged with armed robbery (long bladed knife). He had been accepted into a residential rehabilitation centre and in fact had been sentenced by the District Court on other matters to a s 11 Griffith Remand to complete the rehabilitation program.

In granting conditional bail, Campbell J stated:

> "But for one thing I would have been of the view that bail should be refused because I would decide in the circumstances of this case that there is an unacceptable risk of this applicant committing a serious offence if released from custody that cannot be sufficiently mitigated by the imposition of bail conditions.....
>
> ....The one consideration which weighs against that matter is that upon sentence for previous offending in the District Court, Flannery SC DCJ thought it appropriate on the evidence before her to exercise the powers available to her under s 11 *Crimes (Sentencing*

Procedure) Act 1999 for a so-called Griffiths remand." (Campbell J, p.1)

10. R v Maddock (SCNSW, Unreported, Campbell J, 4 June 2014)

Strong prosecution case – high likelihood of custodial sentence – grant of bail not risk free - length of time in custody

Mr Maddock was charged with armed robbery, steal motor vehicle and attempt to destroy that vehicle by fire in an alleged attempt to destroy evidence. It was common ground that the prosecution case was strong. However, there were a number of factors in favour of the grant of bail: strong community ties including a new born baby; no serious offences committed whilst on bail in the past; and the likelihood of a lengthy period in custody awaiting trial.

In granting bail, Campbell J stated:

> "There is no doubt, if convicted of this offence, that he will be serving a custodial sentence. However weighing these competing and, perhaps, conflicting factors up, I am of the view that, yes, there may be an unacceptable risk of the commission of other offences and, indeed, perhaps, some risk which may be unacceptable, that he will fail to appear because of the nature of the charges. But considering whether or not conditions can sufficiently mitigate the risk in accordance with s 20, I am not satisfied that there is an unacceptable risk that cannot be sufficiently mitigated by the imposition of bail conditions of the type that Ms Rigg has proposed." (Campbell J, p.3)

Reference to this case may assist practitioners countering submissions that the offence is too serious for a grant of bail or that the inevitability of a jail sentence militates against the grant of bail.

11. R v Thomas (SCNSW, Unreported, Campbell J, 4 June 2014)

Bail pending CCA appeal – special or exceptional circumstances s 22 – custodial portion of sentence likely to be served before appeal determined – relevance of personal circumstances to determination

Mr Thomas had been sentenced by the District Court on 7 April 2014 (supplying methylamphetamine and knowingly dealing with the proceeds of crime) to a total effective sentence of 2 years with a non-parole period of 6 months. He came before the Supreme Court in relation to bail on 4 June 2014 and was eligible for release on parole on 6 October 2014.

The family of the applicant was facing particular hardship in this matter as a result of his incarceration. His fiancée had given birth prematurely to their child who was facing significant medical issues, as was the fiancée due to postal natal complications. Further to this, the family was living in housing for persons of Aboriginal heritage, which the applicant shared but the fiancée did not. As a result, she had been given notice that she would have to leave the premises within a month.

Campbell J was satisfied that the lodgement of a notice of intention to apply for leave to appeal constituted commencement of proceedings and that by virtue of s 5 of the Act there were proceedings for an offence (the appeal against sentence) pending.

His Honour was aware that counsel opinion as to the merits of the appeal had not yet been obtained and that the bail application was not based on the merit of the proposed appeal.

Section 22 of the Act provides that bail not be granted for an offence pending CCA appeal unless special or exceptional circumstances exist (as was the case under s 30AA of the *Bail Act* 1978).

After stating that the considerations under the old Act remain the same under the new, His Honour continued:

> "There are a wide variety of circumstances which may constitute special or exceptional circumstances. *In Re Jackson* [1997] 2 VR 1 Callaway JA at p.2 said the following:
>
> > "The likelihood that an applicant will have served the whole or a very substantial part of the sentence before his application for leave to appeal and appeal, if the application is granted, are heard is often regarded as sufficient to satisfy the requirement of very exceptional circumstances to which I shall refer later in this judgment, always depending on the nature of the offences and the grounds of appeal and the other attendant factors."
>
> At [22] of my decision in *R v Martin* [2012] NSWSC 801 I refer to other authorities on the same point. I also note the following at [24]:
>
> > "There is some debate about whether the focus should be only on the custodial portion of the term of imprisonment or whether one must have regard to the whole sentence. In Re Jackson itself the Court suggested that one should look at the whole term. However, in Chew, Doggett and Re Pennant it is said that the custodial part of the sentence is the relevant consideration.
> >
> > It is not necessary for me to resolve any tension between the different approaches here. As stated at paragraph 8, the primary judge has ordered the applicant's release at the expiration of the non-parole period in compliance with s 50 of the *Crimes (Sentencing Procedure) Act* and there can be no suggestion that the applicant will serve longer."
>
> That it seems is still the case. Here the applicant will have served in my judgment the only custodial portion of the sentence well before his case could be heard in the Court of Criminal Appeal and obviously after it is heard the Judges may take time for consideration." (p.2-3)

His Honour noted that hardship to family is not normally taken into account for any purpose except in exceptional circumstances. In this case, His Honour found that the totality of the circumstances, including those which would not of themselves entitle the applicant to bail, did amount to special and exceptional circumstances and Mr Thomas was granted conditional bail.

12. R v Karaoglu (SCNSW, Unreported, Adamson J, 10 June 2014)

Bail pending District Court Appeal – new test of reasonably arguable prospects of success s 17(3)(i) – time served may satisfy new test

Mr Karaoglu was sentenced to 4 months fixed term for common assault and breach AVO at the Local Court from 19 March 2004 to expire on 18 July 2014. He had lodged an appeal to the District Court which was listed for hearing 10 days after the Supreme Court bail application.

Adamson J refused bail on the basis that there was an unacceptable risk of the commission of further serious offences which could not be mitigated by the imposition of conditions. Her Honour was referred to the decision of *R v Morris* (above at 2) but rejected the application that the short period of adjournment reduced the unacceptability of the risk.

However, Her Honour did accept the submission that an argument on appeal that time served was an appropriate sentence may constitute reasonably arguable prospects of success as required by s 17(3)(i).

13. R v Fesus [2014] NSWSC 770

Multiple release applications s 74 – murder

Mr Fesus was charged with murder and had made 2 prior applications for Supreme Court bail under the *Bail Act* 1978 in which he had not established exceptional circumstances as required by virtue of s 9C. The test under the new Act did not require a finding of special and exceptional circumstances and was to be considered soley by application of the unacceptable risk test set out in ss 17 and 20.

Adams J considered the application of the transitional provisions relating to s 74 governing further applications for bail where prior applications had been refused.

> "Where an application for bail has previously been decided, such as here, the new Act permits a further application to be made in certain circumstances, specified in s 74. If one or more of those circumstances are present, the application may be made and is to be decided by applying the provisions of the new Act. In substance, the present application may be considered if "information relevant to the grant of bail is to be presented...[which] was not presented to the Court in the previous application..."
>
> The threshold is a low one: relevance of the new information is sufficient; it does not have to weigh with any particular level of significance in the consideration of whether bail should be refused or not. Of course, it must be capable of influencing the decision, else it would not be relevant. This is not surprising. It is obvious that the Parliament considers that the present test imposed by the Act for the consideration of all new bail applications is appropriate and (if s 74 is satisfied) to the present application. It is true that the test is different – although the relevant factors remain unchanged – but there is no reason, when the question of bail remains ongoing, arbitrarily to

exclude from current applications, by virtue of some accidental chronology, the application of the present test."[11]-[12]

His Honour then proceeded to consider whether new relevant information was before the court in relation to the application.

> "A number of matters have been put forward as a change of circumstances satisfying the requirements of s 74(3)(b). I do not have to consider them because I am satisfied that one matter does satisfy that requirement. [It concerns not only relevant but significant forensic evidence as to the cause of death which was not available at the previous hearings.]
>
> It follows that the application can be considered and, also, this must be in accordance with the new Act."[13]-[14]

14. R v Daniel (SCNSW, Unreported, Button J, 23 June 2014)

Multiple release applications s 74 – large commercial supply – strong crown case

Mr Daniel was charged with 4 counts of large commercial supply of amphetamines. It was common ground that the crown case was strong. He had previously applied for (and been refused) Supreme Court bail under the *Bail Act* 1978, at a time when his charges attracted a presumption against bail by virtue of s 8A.

Button J refused bail but said the following with regard to the application of s 74:

> "Without delving into the intricacies of s 74 of the new Act, the parties have been content for me to approach it on the basis that "*information before the court*" has changed: in particular, the presumption that existed against the applicant being granted bail, which no longer exists. Secondly, his solicitor Ms Neil has submitted that that effluxion of time since September last year constitutes a "*change in circumstance*". As I say, without engaging in a detailed exercise of statutory interpretation, I am prepared to approach the matter on the basis that a prerequisite in s 74 has been made out."(p.2)

Further cases regarding s 74 have been analysed by Rory Pettit and Jeremy Styles in *Bail Act 2013 Case Notes and Links*, First ONLINE EDITION – 12 June 2014, Hosted by Criminal CLE.com, and are attached at Annexure "B".

Rebekah Rodger
Senior Solicitor
Legal Aid NSW
June 2014

Annexure "B"

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

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

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

> The first obstacle then is the obstacle set up by s 74 of the *Bail Act 2013*, which says that a Court which has refused bail for an offence, in this instance that being this Court, is to refuse to hear another release application unless there are grounds for a further application. Those grounds are defined in s [74]~~17~~ [1](3) as being (a) a person who is not legally represented and is now legally represented, (b) information was not presented last time, and (c) circumstances have changed. (d) concerns a person who is a child. I am paraphrasing in each instance.
>
> Regulation 9 of the Act provides: "An application for grant of bail for an offence that was refused by a Court under the 1978 Act is taken for the purpose of s 74 to have been refused by the Court on a release application under this Act". The legal effect of regulation 9 is that s 74 applies.
>
> Although he has not said it, I am prepared to proceed on the basis that circumstances have changed, and in particular I note that the applicant being in custody for a further six months, as I have said, enjoying the presumption of innocence is a change of circumstances that at least justifies me re-visiting the question of bail.

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

R v Troy (NSWSC, unreported, Hamill J, 21 may 2014).

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

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

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

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

[1] 17 transcribed – in unsettled transcript. Obvious reference to section 74.

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

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

The judgment is in the following terms:

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