SUPREME COURT OF VICTORIA
COURT OF APPEAL

S EAPCR 2020 0180

ANTONIOS SAJIH MOKBEL — Applicant

v

THE KING — Respondent

JUDGES:	EMERTON P, OSBORN JA, JANE DIXON AJA
WHERE HELD:	Melbourne
DATE OF HEARING:	1 April 2025
DATE OF JUDGMENT:	4 April 2025
MEDIUM NEUTRAL CITATION:	[2025] VSCA 62

CRIMINAL LAW – Application for bail pending second conviction appeal – Whether circumstances truly exceptional – Where applicant has several years of non-parole period left to serve – Comprehensive findings of fresh facts in reference determination – Findings of illegal and improper conduct by Nicola Gobbo acting as legal advisor – Issue whether global plea impugned by Crown non-disclosure – Prospects of success in combination with other matters amount to truly exceptional circumstances – Whether applicant an unacceptable risk – Availability of substantial bail guarantee and strict conditions including electronic monitoring – Unacceptable risk not established – Application for bail granted.

Criminal Procedure Act 2009, ss 319A, 326A, 326C(1), 326E(3), 326F.

Mokbel v The King [2024] VSC 725; *Re Zoudi* (2006) 14 VR 580; *Higgs v The Queen* [2021] VSCA 90; *Wilson v The Queen* (2016) 1 NZLR 705.

Counsel

Applicant:	Ms J Condon KC with Ms E Fargher
Respondent:	Mr D Glynn with Mr T Wood

Solicitors

Applicant:	Stephen Andrianakis & Associates
Respondent:	Ms A Hogan, Solicitor for Public Prosecutions

EMERTON P
OSBORN JA
JANE DIXON AJA:

1 The applicant, Antonios Sajih Mokbel, seeks bail pending the determination of an application for leave to bring a second appeal[1] in respect of convictions relating to three drug offences described by the names of relevant police operations known as Quills, Orbital, and Magnum.

2 The convictions followed pleas of guilty to two charges of trafficking not less than a large commercial quantity of MDMA and methylamphetamine[2] (respectively, Quills and Magnum) and a further charge of incitement to import a commercial quantity of MDMA[3] (Orbital). The pleas were entered pursuant to an agreement with the prosecution that in exchange for such pleas, further charges relating to a series of other State drug offences known by police operation names Kayak, Landslip, Matchless, and Spake, were discontinued.

3 The application for leave to appeal is made on the following grounds:

> 1. By reason of the following matters, the integrity of the Applicant's pleas of guilty and convictions in each of Quills, Orbital and Magnum, were so impugned, and the proper administration of justice so compromised, as to occasion, in each case, a substantial miscarriage of justice:
>
> (a) his long-time 'barrister', Nicola Gobbo, was at relevant times a registered informer for Victoria Police, and her conduct as an informer was primarily directed to achieving the conviction and imprisonment of her client, the Applicant;
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> (b) consistently with that design, Ms Gobbo did in fact inform on the Applicant while concurrently communicating with him in respect of, and advising him on, his criminal matters and his extradition;
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> (c) Victoria Police and/or Ms Gobbo improperly and/or unlawfully obtained evidence and/or intelligence against the Applicant, which evidence and/or intelligence was used, and/or was useful, in his criminal matters and his extradition.
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> 2. Each of the Applicant's convictions in the Quills, Orbital and Magnum matters was occasioned by a substantial miscarriage of justice by reason of fundamental breaches of the Prosecution's duty of disclosure.

4 In order to obtain the grant of leave under the relevant provisions of the *Criminal Procedure Act 2009* ('CP Act') an applicant must satisfy the Court that there is fresh and compelling evidence that should, in the interests of justice, be considered on appeal.[4]

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1 Pursuant to s 326A of the *Criminal Procedure Act 2009* ('CP Act').
2 Contrary to s 71 of the *Drugs, Poisons and Controlled Substances Act 1981*.
3 Contrary to s 11.4(1) of the *Criminal Code* (Cth).
4 CP Act, s 326C(1).

5 In the present case, the evidence relied on is constituted by evidence adduced before, and findings made by, Fullerton J upon a reference determination with respect to facts concerning the course of conduct by Nicola Gobbo relating to the applicant which is the subject of the proposed grounds of appeal.[5]

6 On this application the applicant contends in essence:

(a) that the circumstances of his appeal give rise to exceptional circumstances because the circumstances in which he pleaded guilty were vitiated by fundamental misconduct in the manner in which evidence was procured against him coupled with fundamental misconduct by Ms Gobbo when acting as his legal advisor and the failure to disclose such misconduct prior to his pleas;

(b) further matters personal to him support the conclusion that his circumstances are exceptional; and

(c) conditions can be imposed upon the grant of bail which would satisfactorily mitigate the risk of breach of bail.

7 The respondent submits that:

(a) the applicant has not established exceptional circumstances in the requisite sense; and

(b) given the applicant's history there is an unacceptable risk that the applicant will re-offend if granted bail and/or fail to surrender into custody when called upon to do so.

8 For the reasons which follow, we have concluded:

(a) that the applicant's circumstances are truly exceptional; and

(b) that the risk of granting bail can be satisfactorily mitigated by the imposition of conditions.

The sequence of events

9 In order to understand the position of the parties, it is necessary to summarise the history of relevant events:

(1) Following a trial in early 2006, the applicant was found guilty of one charge of being knowingly concerned in the importation into Australia of a prohibited import, namely a traffickable quantity of cocaine. This offence is referred to by the parties as the 'Plutonium' offence.

(2) On 31 March 2006, he was sentenced for the Plutonium offence by Gillard J to 12 years' imprisonment with a non-parole period of nine years. The applicant was sentenced on the basis that he was the principal organiser and financier of

[5] *Mokbel v The King* [2024] VSC 725 (Fullerton J) ('reference determination'). The questions referred for determination were done so pursuant to s 319A of the CP Act.

an arrangement, with four other men, to import just under two kilograms of pure cocaine from Mexico.[6]

(3) The applicant breached his bail prior to the completion of the Plutonium trial and fled the country. The trial concluded, and sentence was delivered, in the applicant's absence. He was arrested in Greece on 5 June 2007 and has been in custody since that time — a period of nearly 18 years.

(4) At the time that he absconded, the applicant had been charged with the Orbital offence but not the Quills offence. Both offences were alleged to have been committed in 2005. The Magnum offence was alleged to have been committed on various dates between 2006 and 2007 after the applicant had absconded and before his arrest in Greece.

(5) Following his arrest in Greece, extradition proceedings were instituted by the Commonwealth Attorney-General.[7] The applicant fought these proceedings in the Greek courts, and also by way of an application to the European Court of Human Rights and by proceedings in the Federal Court of Australia.

(6) The applicant was extradited in May 2008 to face trial on nine matters comprising two charges of murder and seven drug offences being Quills, Orbital, Magnum, Kayak, Landslip, Matchless and Spake, and to serve the Plutonium sentence imposed on him in March 2006.

(7) Following his extradition, the applicant made three unsuccessful stay applications based upon alleged impropriety or illegality in the extradition process.[8]

(8) The two murder prosecutions against the applicant failed. One resulted in an acquittal in September 2009 and the other resulted in a nolle prosequi in April 2009.

(9) A global plea deal was then negotiated with respect to the outstanding drug offences and the applicant pleaded guilty to Quills, Orbital, and Magnum on 18 April 2011.

(10) Thereafter, the applicant sought unsuccessfully to change his pleas on the basis of arguments directed to the validity of search warrants arising out of practices adopted by the police.[9]

(11) The applicant's plea hearing in the Quills, Orbital, and Magnum matters commenced before Whelan J (as his Honour then was) on 24 May 2012 and on

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6 *R v Mokbel* [2006] VSC 119; *R v Mokbel* [2010] VSCA 11.

7 The Quills, Orbital, Magnum, Kayak, Landslip, Matchless and Spake offences, amongst others, were included in the extradition request. See reference determination, [18].

8 *Mokbel v Director of Public Prosecutions (Vic)* (2008) 26 VR 1; *Director of Public Prosecutions v Mokbel (Orbital & Quills - Ruling No 1)* [2010] VSC 331; *R v Mokbel (Magnum - Ruling No 2 - Stay)* [2011] VSC 128.

9 *R v Mokbel* (2012) 35 VR 156; [2012] VSC 86.

the same day a nolle prosequi was entered in respect of the other four drug matters (Kayak, Landslip, Matchless and Spake).

(12) On 3 July 2012, the applicant was sentenced to 30 years' imprisonment with an effective non-parole period of 22 years for the Quills, Orbital and Magnum offences.

(13) The offending for which the applicant fell to be sentenced was very serious. The Quills offending occurred in 2005. At the relevant time the threshold for a large commercial quantity of MDMA (mixed) was one kilogram.[10] The amount produced in the course of the activities forming the subject of the charge was in excess of 30 kilograms. The Quills offending occurred whilst the applicant was on bail for the Plutonium charge and a number of other drug charges.[11]

(14) The Orbital offending also occurred in 2005 and comprised a series of dealings with undercover officers of the Australian Federal Police whom the applicant believed to be potential suppliers of MDMA from international sources. The applicant ordered and sought to import 100 kilograms of MDMA for a price of €800,000. The threshold applicable for a commercial quantity of MDMA at the time was 0.5 kilograms.[12] The Orbital offence was also committed whilst the applicant was on bail for the Plutonium and other drug charges.[13]

(15) The Magnum offending occurred between July 2006 and June 2007 whilst the applicant was on the run, having absconded from the Plutonium trial and fled the country. The offending involved trafficking in excess of 41 kilograms of methylamphetamine. The relevant threshold for a large commercial quantity of methylamphetamine (mixed) at the time was 2.5 kilograms. The offending involved amounts of money, either paid to the applicant or at his direction, in excess of $4 million. The applicant was the principal or head of the enterprise.[14]

(16) On 17 May 2013, this Court refused leave to appeal against the applicant's convictions and sentences on Quills, Orbital and Magnum.[15] On 13 December 2013 the High Court refused an application for special leave.[16]

(17) In February 2016, the Victorian Director of Public Prosecutions informed Victoria Police of his intention to disclose matters relating to the activities of Ms Gobbo as an informer to a number of persons (including the applicant) whose convictions may have been affected by her conduct.[17]

(18) Victoria Police sought to restrain such disclosure. Justice Ginnane dismissed this application.[18] This Court then dismissed appeals by Victoria Police and

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10 *Drugs, Poisons and Controlled Substances Act 1981*, s 70 and sch 11, pt 3, column 1B.
11 *R v Mokbel* [2012] VSC 255, [14]–[21] (Whelan J) ('QOM Sentencing Reasons').
12 *Customs Act 1901* (Cth), s 233B(1).
13 QOM Sentencing Reasons, [22]–[25].
14 QOM Sentencing Reasons, [32]–[43].
15 *Mokbel v The Queen* (2013) 40 VR 625; [2013] VSCA 118.
16 *Mokbel v The Queen* [2013] HCATrans 321.
17 See reference determination, [37].
18 *AB & EF v CD* [2017] VSC 350.

Ms Gobbo against that decision.[19] The High Court subsequently revoked special leave with respect to this Court's decision.[20]

(19) Following the High Court's decision some information was provided to the applicant concerning Ms Gobbo's activities. Further information was subsequently disclosed to him during the course of the Royal Commission into the Management of Police Informants,[21] and as the result of an ongoing course of further disclosure by Victoria Police and the respondent.

(20) The applicant initially commenced proceedings in 2017 relying on the information then disclosed to him and sought to challenge his convictions. Following an amendment to the CP Act in November 2019 which introduced pt 6.4, the applicant filed an application in August 2020 for leave to bring a second appeal with respect to his convictions for the Quills, Orbital, Magnum and Plutonium matters.

(21) On 11 February 2019, the applicant was the victim of a serious assault whilst in custody. He received multiple stab wounds and among other things suffered a serious brain injury resulting in 24 days of post-traumatic amnesia. As a result, he has been left with a permanent neurological deficit.

(22) Further, he has, since his release from hospital following these injuries, been held in substantial isolation within prison, having limited ongoing contact with only one other prisoner, together with family visits.

(23) The Commonwealth Director of Public Prosecutions conceded the appeal in respect of the Plutonium conviction. On 15 December 2020 this Court granted that appeal and quashed the conviction.[22] The Court ordered that the applicant be retried[23] but the Commonwealth Director elected not to proceed.

(24) The applicant then applied to have the sentences varied with respect to the Quills, Orbital, and Magnum offences.[24] On 7 March 2023, the applicant was resentenced to 26 years' imprisonment with a non-parole period of 20 years. The period of the applicant's custody in Greece was counted as part of his pre-sentence detention but the period of five years and 70 days served pursuant to the Plutonium sentence was not and fell to be considered as a basis for the exercise of the *Renzella* discretion.[25]

(25) In varying the Quills, Orbital and Magnum sentences, this Court had regard to 'the serious assault perpetuated upon the [applicant] in 2019 and its consequences; the more restrictive conditions of the [applicant's] incarceration following the assault and the effect of that restrictive regime on his recovery

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19 *AB v CD* [2017] VSCA 338.
20 *AB (a pseudonym) v CD (a pseudonym)* (2018) 93 ALJR 59; [2018] HCA 58.
21 Victoria, Royal Commission into the Management of Police Informants, *Final Report* (2020).
22 *Mokbel v Director of Public Prosecutions (Cth)* [2020] VSCA 325.
23 *Mokbel v Director of Public Prosecutions (Cth)* (2021) 289 A Crim R 1; [2021] VSCA 94.
24 Pursuant to s 326E(3) of the CP Act.
25 *Mokbel v The King* (2023) 375 FLR 290, 307 [64]–[65] (Emerton P, Beach and McLeish JJA); [2023] VSCA 40.

from the assault; and the effects of the COVID-19 pandemic on conditions in custody'.[26]

(26) None of the facts relating to Ms Gobbo's conduct which form the basis of the application for leave to bring a second appeal were the subject of evidence or determination at first instance. On 6 March 2022, the Court of Appeal referred 21 questions to a judge of the Trial Division for determination pursuant to s 319A of the CP Act.[27]

(27) The questions were amended and a further eight questions were cumulatively added by further orders made on 26 May 2023 and 14 December 2023.[28]

(28) Following an extended hearing in which the parties explored the evidence relevant to the questions raised for her determination, Fullerton J published answers to those questions in a detailed and comprehensive document of some 579 pages.[29]

(29) The applicant filed an amended notice of application for leave to bring a second appeal on 28 February 2025 together with a further amended written case. The respondent has not yet formally responded to the amended notice of application and the further amended written case.

Principles

10 The Court's power to grant a prisoner bail pending a second or subsequent appeal is founded in s 326F(2) and (3) of the CP Act, which relevantly provides:

> (2) A prisoner within the meaning of the **Corrections Act 1986** who applies for leave to appeal to the Court of Appeal under this Part may apply to the Court of Appeal to be granted bail.
>
> (3) On an application under subsection (2), the Court of Appeal may grant the prisoner bail pending the appeal.

11 Section 326F does not specify threshold criteria for the exercise of the discretion granted to the Court. Nonetheless, the decision in *Re Zoudi*[30] establishes that the applicant must satisfy the Court that there are circumstances which are truly exceptional.

12 The same authority established that '…the expiry of a prisoner's non-parole period should — unless it appears that the applicant will not be released at or about that time

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26 Ibid [72].

27 *Mokbel v The Queen* [2022] VSCA 83.

28 Orders of Beach and McLeish JJA in *Mokbel v The King* (Court of Appeal, S EAPCR 2020 0180, 23 May 2023); Orders of Beach, McLeish and Kennedy JJA in *Mokbel v The King* (Court of Appeal, S EAPCR 2020 0180, 14 December 2023).

29 Reference determination.

30 (2006) 14 VR 580, 588 [27]–[28] (Maxwell P, Buchanan, Nettle, Neave and Redlich JJA); [2006] VSCA 298.

— be treated as a relevant consideration…' in deciding whether exceptional circumstances exist.[31]

13 The Court further affirmed the following general principles:[32]

> Axiomatically, whether bail will be granted in a particular case will depend on all of the circumstances, of which the expiry of the non-parole period will only be one. There may be countervailing considerations, of the 'unacceptable risk' variety,[33] which mean that bail will be refused despite the fact that the non-parole period (or the suspended portion of a partly-suspended sentence) will have expired before the appeal is heard. The question of whether the applicant can establish that he or she has reasonable prospects of success is another factor that must be considered. That is not to say that an application will fail because of the applicant's inability to demonstrate the existence of such prospects. In some — perhaps many — cases, it will be difficult to make any meaningful assessment of the prospects of success.[34]
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> Otherwise, the principles and practice which apply to an application for bail pending appeal in this State remain as they have been understood since *Jackson*:
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> (1) First, to reiterate the words of Brennan J in *Chamberlain v R (No 1)*,[35] the central feature in the administration of criminal justice is the jury and it is a mistake to regard the effect of its verdict as contingent upon confirmation by an appellate court. In *Markovina v R*,[36] Hayne J doubted that there was any reason to distinguish these remarks in the case of an appeal against sentence. In *Re Pinkstone's Applications*[37] Kirby J stated that in the context of a pending application for special leave, convictions and sentences and other orders are not to be regarded as provisional.[38]
>
> (2) Secondly, although there is a statutory right of appeal, it is a right which is conditioned by the presumption which operates in favour of the validity of the conviction and sentence and it is, therefore, not a right to have the conviction or sentence suspended pending the hearing and determination of an appeal.
>
> (3) Thirdly, as has been confirmed by the High Court in *Cabal*,[39] to allow bail pending the hearing of an appeal, after a person has been convicted and imprisoned:
>
> - makes the conviction appear contingent until confirmed;
> - places the court in the invidious position of having to return to prison a person whose circumstance may have changed

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31 Ibid 581 [4].
32 Ibid 588 [27]–[28] (citations in original).
33 *Bail Act 1977*, s 4(2)(d)(i).
34 *Re Clarkson* [1986] VR 583, 585–6; *Re Jackson* [1997] 2 VR 1, 3.
35 (1983) 153 CLR 514, 519–20.
36 (1998) 72 ALJR 1522, [8].
37 (2003) 77 ALJR 1561, [16].
38 See also *Putland v The Queen* [2003] HCATrans 263 (Kirby J).
39 *United States of Mexico v Cabal* (2002) 209 CLR 165, [39] (Gleeson CJ and McHugh and Gummow JJ).

dramatically during the period of liberty on bail;

- encourages unmeritorious appeals;
- undermines respect for the judicial system in having a 'recently sentenced man walking free'; and
- undermines the public interest in having convicted persons serve their sentences as soon as is practicable.

These considerations have long been recognized as also applicable where the appeal is against sentence.[40]

(4) Fourthly, and consequently, an order granting bail will only be made if there are exceptional circumstances.

(5) Fifthly, 'exceptional circumstances' means circumstances which are truly exceptional.

14 In *Higgs v The Queen*, the Court said:

> There is no hard and fast rule about how much of a term of imprisonment (or, in an appropriate case, a non-parole period) needs to expire before consideration should be given to granting bail pending an appeal. Each case will depend upon its own facts. Moreover, other factors will also likely be relevant — such as the potential strength or merit of an applicant's proposed grounds of appeal. What can be said, however, is the larger the amount of time still to be served, the greater the prospects of success will need to be before it might be said that exceptional circumstances exist justifying a grant of bail.[41]

15 In the present case, the applicant was convicted following guilty pleas after receiving independent legal advice. A threshold issue thus arises as to whether these pleas can be impugned. As the respondent submits, the applicant must demonstrate that something has occurred which affects the integrity of the guilty pleas.[42]

The reference determination

16 We will not purport to summarise in detail the findings of Fullerton J upon the reference determination but we accept the applicant's submission that her Honour's analysis of the evidence upon which he relies places the Court in a strong position to make a preliminary assessment of the merits of the appeal.

17 In the written material filed on his behalf, the applicant emphasises the following particular findings: [43]

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40 *R v Giordano* (1982) 31 SASR 241, 244 (King CJ); *R v Velevksi* (2000) 117 A Crim R 30, [12]; *Ettridge v DPP* [2003] QCA 410, [4]–[7].

41 [2021] VSCA 90, [28] (Beach JA and Emerton JA, as her Honour then was).

42 See generally *Kohari v The Queen* [2017] VSCA 33, [119]–[122]; *Weston (a pseudonym) v The Queen* [2010] 208 ALR 44; *Meissner v The Queen* (1995) 185 CLR 132, 142 (Brennan, Toohey and McHugh JJ).

43 Affidavit in support of an application for appeal bail, affirmed by Sarah Tricarico on 5 February 2025, [17] (in text citations in original and are to the reference determination).

a. ‘Ms Gobbo’s registration as an informer by Victoria Police in September 2005, and her subsequent deployment and use until she was deregistered in January 2009, was pursuant, in large part, to a common purpose Victoria Police shared with her to ensure the applicant was charged with and convicted of serious offences’ — see [852].

b. ‘[H]aving found that Ms Gobbo and Victoria Police shared a common objective that the applicant should be convicted and imprisoned, and that it was agreed she would act as an informer for police to achieve that objective, it follows, almost axiomatically, that conduct, of itself, had a tendency to undermine the appearance of the administration of justice’ — see [890].

c. Ms Gobbo’s breaches of her duties to the Applicant ‘commenced from the date of Ms Gobbo’s registration as an informer on 16 September 2005 and continued for the duration of her registration’ — see [797].

d. ‘Ms Gobbo was also in breach of her duty to act in the best interests of Mr Cooper and Mr Bickley, and the duty of care she owed each of them, by masquerading as an independent legal advisor upon their arrests while was she was, at various times leading up to their arrests and upon their arrests, acting on behalf of Victoria Police as a registered informer’ — see [801].

e. ‘Ms Gobbo’s multiple breaches of her duty of loyalty to the applicant and to those of her clients who gave evidence against him was improper, indeed grossly improper, and … the nature and extent of Victoria Police’s complicity in that course of conduct was also grossly improper. To the extent that those breaches were contrary to law, they were also unlawful’ — see [903].

f. ‘In consequence of that deliberate and persistent course of conduct, I am also satisfied that by that conduct the public’s confidence in the administration of criminal justice in this State was undermined’— see [904].

g. Ms Gobbo, Officer Smith, Officer White, [Police Member 1] and [Police Member 2] engaged in a joint criminal enterprise to attempt to pervert the course of justice in respect of Mr Cooper’s arrest and cooperation on 22 April 2006 — see [1011]–[1018].

h. Had a competent lawyer other than Ms Gobbo been advising Mr Cooper, it is equally (if not more) likely that they would not have advised him to cooperate with police on 22 April 2006 — see [350].

i. Had a competent lawyer other than Ms Gobbo been advising Mr Bickley, it is equally likely that they would not have advised him to cooperate with police in June 2006 — see [392].

j. As of 4 September 2012, while the Applicant’s first appeal proceedings were pending, the then Director of Public Prosecutions breached his duty of disclosure to the Court — see [1380] and [1394]. See also [1384] in respect of the duty to make inquiries.

k. '[T]he applicant was not able to fully assess the strengths and weaknesses of the prosecution cases against him in relation to Operations Quills and Orbital . . . because Ms Gobbo's role and conduct in connection with the way Victoria Police investigated and prosecuted Mr Cooper and Mr Bickley . . . was not disclosed to the applicant' — see [1485].

18 In oral submissions, attention was drawn to a series of further passages amplifying these findings.

19 It is necessary to say something further about the context of the particular findings referred to before turning to the issues which we must resolve.

20 Relevantly, Fullerton J first made detailed findings in the course of answering the questions referred to her, as to the manner in which improper conduct by Ms Gobbo affected the production of evidence against the applicant:

(a) in the prosecution case with respect to Orbital and Quills; and

(b) in the Matchless, Landslip, and Spake prosecutions.

21 The findings with respect to Orbital and Quills included the following finding with respect to Mr Bickley, a client of Ms Gobbo's who 'rolled' pursuant to her advice:

> Because Mr Bickley was an important witness in both of the individual counts on the indictment (although far less so in Orbital), and because of the decision to prosecute the applicant on a single indictment containing both counts, in light of the structure of the prosecution case, as reflected in the filed Operation Quills and Orbital summary of prosecution opening, I am satisfied that the prosecution would have remained 'viable' (in the sense that the applicant would have had a case to answer) had Mr Bickley's evidence been excluded, but it would have been significantly weakened.[44]

22 Secondly, Fullerton J made findings with respect to informing by Ms Gobbo relating to the applicant during the course of the extradition proceedings:

> I have found that whilst the applicant was actively resisting his extradition in the Greek courts, Ms Gobbo was retained by him to provide legal advice, and that she did in fact provide him with legal advice whilst simultaneously informing Victoria Police about her discussions with the applicant and his lawyers, as well as his instructions. I have also found that in that capacity, Ms Gobbo — who was at all times located within and practising as an Australian lawyer subject to Australian law — was acting at least in breach of her fiduciary duty of loyalty (the 'no-conflict rule') and in breach of her contractual duties to exercise reasonable skill and care whilst acting in the applicant's best interests. To the extent that Victoria Police encouraged and facilitated those breaches, it follows that it was complicit in her improper conduct on the same analysis as has been engaged in above.
>
> In that regard, I set out in full the relevant agreed facts:

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44 Reference determination, [1247] (citation omitted).

300. During the extradition proceedings, Ms Gobbo's communication, at least at times, encompassed the provision of legal advice by Ms Gobbo to the applicant.

301. Ms Gobbo represented to the applicant that she was assisting him (including by assisting Dr Bagaric) with the applicant's extradition proceedings.

302. At the same time that Ms Gobbo represented to the applicant she was assisting him, Ms Gobbo was:

a. assisting Victoria Police by providing information to them about the applicant including contact details of his known associates and relatives, information concerning his assets and finances including information as to who appeared to be paying his legal fees;

b. lying to the applicant about what she knew and did not know relevant to the strength of the charges for which extradition was sought (including her role as a human source);

e.(sic) telling Victoria Police she had formed a view that the applicant's Greek solicitor and Dr Bagaric were not doing a good job but told the applicant that Dr Bagaric was.

304. Victoria Police knew of each of the matters set out in [agreed facts] 300 – 302 above.

305. Victoria Police did not disclose any of these matters to the applicant, the Athens Appeal Court or the Supreme Court of Greece. [45]

23 Thirdly, Fullerton J expressly found that non-disclosure of evidentiary matters relating to Orbital, Quills, Matchless, Landslip, and Spake materially affected the applicant's capacity to evaluate the nature and strength of the prosecution case against him at the time he entered into the global plea bargain:

> On the other hand, I am satisfied that plea deal may not have had the same level of attraction were the applicant advised, consistent with the analysis I have applied in answering referral question 14, that the case against him on two of the remaining four charges (namely the Matchless and Landslip offences) would have been significantly weakened were Mr Cooper's evidence excluded, and that it was open to him to contest both sets of charges at trial for that reason.
>
> Additionally, in so far as concerns the case against the applicant on the Spake offences, he may properly have been advised that the prosecution case would also be potentially weakened were the evidence of both Mr Cooper and Mr Bickley excluded in circumstances where their evidence was primarily relied upon by the prosecution as capable of supporting Mr Daniels's evidence,

[45] Ibid [915]–[916] (citations omitted).

> while not corroborating it as a matter of law. Although Mr Daniels's evidence was uncorrupted by any involvement with Ms Gobbo, as he was a person criminally concerned with the applicant, his uncorroborated evidence would most likely have attracted a warning.
>
> In so far as concerns the residual strength of the Quills and Orbital charges, again consistent with the analysis I have applied in answering referral question 14, the applicant may have also been properly advised that there was a legitimate basis to go to trial on those charges, and that an application to stay the further prosecution of the Magnum offence was also open to him. [46]

24 Fourthly, as the last quoted passage indicates, her Honour accepted the respondent's concession that matters which were not disclosed at the time of the plea bargain or at subsequent stages of the proceedings constituted reasonable grounds to apply for a stay of all prosecutions including Magnum. This concession was first recorded at paragraphs [1225]–[1227] of the reference determination. Her Honour went on to state as follows in her conclusions:

> Because the respondent conceded in her answer to referral question 14 that there were reasonable grounds to apply for a stay of all prosecutions (including Magnum), it was not necessary for me to give close consideration in answering that question to the basis upon which that application might have been mounted. Suffice to note for present purposes that the argument that the applicant foreshadowed was that the conduct of Victoria Police and Ms Gobbo in relation to the extradition:
>
> > … constituted an affront to justice, and that accordingly it would undermine public confidence in the system of justice, should the court permit the prosecution before it of an accused brought into its jurisdiction in such circumstances.
>
> Put differently, the argument would be that the conduct of Victoria Police and Ms Gobbo was 'apt to bring the administration of justice into disrepute', or corrosive to the rule of law. In part, that argument would have been based on the fact that Victoria Police and Ms Gobbo's actions, as they related to the extradition, resulted in the 'stultification of basic safeguards' afforded by legal professional privilege and equitable and common law duties owed by Ms Gobbo to the applicant. The argument would also have been based on the ways in which Victoria Police and Ms Gobbo's conduct risked implicating the Australian government in an abuse of the Greek courts' processes, and the erosion of the duties of mutual trust and respect that underpin the international law of extradition.
>
> Whether those arguments (or any of them) would ultimately have held sway is a matter for the Court of Appeal, as to which I venture no opinion.
>
> In all the circumstances, I am unable to reach a positive finding that the applicant's conduct in the context of the plea negotiations in April 2011 can in any sense fairly reflect how he might have approached the pending Magnum trial if he had full disclosure of the circumstances in which he had been investigated and extradited to stand trial for that offence, or the way he would

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46 Ibid [1475]–[1477] (citations omitted).

> have approached the other charges upon which he was extradited and as to which trials were pending in this Court. [47]

25 Fifthly, her Honour expressly concluded that the applicant was obviously in no position to properly assess whether it was in his best interests to agree to the terms of the global plea deal in April 2011. Referral question 20 was in the following terms:

> In the absence of disclosure, was the applicant able to properly assess the strengths and weaknesses of the prosecution cases and/or properly assess whether it was in his best interests to agree to the plea bargain? [48]

26 Fullerton J relevantly answered it as follows:

> I have taken a straightforward approach to answering this question, even if the proposed answers of the parties did not completely align.
>
> Taking the last part of the question first, without disclosure of Ms Gobbo's role as an informer and full disclosure of the manifold ways she assisted Victoria Police to prosecute him that I have already discussed at length, the applicant was obviously in no position to properly assess whether it was in his best interests to agree to the terms of the plea bargain proposed by the prosecution in April 2011. As a matter of procedural fairness, there should be no informational imbalance between the Crown and an accused when they engage in dialogue directed to resolving a charge or charges without the need for a trial. As the authorities explain: 'the inequality of resources as between the Crown and the accused "is ameliorated by the obligation on the part of the prosecution to make available all material which may prove helpful to the defence"'.
>
> As concerns the first part of the question, the respondent accepted that the applicant was not able to fully assess the strengths and weaknesses of the prosecution cases against him in relation to Operations Quills and Orbital (in so far as it was proposed that Operations Orbital and Quills be joined on the one indictment) or in the prosecution cases relating to Operations Landslip, Matchless and Spake**,** because Ms Gobbo's role and conduct in connection with the way Victoria Police investigated and prosecuted Mr Cooper and Mr Bickley (and to a lesser extent Mr Thomas) was not disclosed to the applicant.
>
> By way of contrast, in relation to the charges relating to Operations Kayak and Magnum, the respondent submitted the applicant was able to fully assess the strengths and weaknesses of those prosecution cases, because neither of them was affected by any improper conduct on the part of Ms Gobbo or Victoria Police.
>
> The applicant submitted that although issues of disclosure may not have weighed as significantly on the allegations that formed the basis of the Magnum charges (because, in relative terms, Ms Gobbo had little to do with the investigation and prosecution of him for that offending), her involvement in the extradition process was such that if her role in that process were disclosed, the applicant would have been better positioned to assess the prospects of having the Magnum prosecution stayed. It was submitted that because he was deprived

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47 Ibid [1478]–[1481] (citations omitted).

48 Ibid 487 (citations omitted).

of the opportunity to make a fully informed assessment of those prospects, he was unable to properly assess the strengths and weaknesses of the prosecution case in the Magnum proceeding.

It would seem to me that since I was not invited by the parties to assess the prospects of a stay being granted when answering referral question 14, it is at least open to find that with full disclosure, the applicant may have made a different assessment of the prospects of an application to stay the Magnum prosecution, which would have ultimately informed his decision whether to plead to that offence. [49]

27 In the written case filed on behalf of the applicant, it is submitted:

> 219. The primary way in which the Applicant puts his case on ground 1 is on the basis that the departure from the prescribed processes for trial is so serious — indeed fundamental — as to constitute a substantial miscarriage of justice without calling for inquiry into the inevitability (or otherwise) of conviction. He relies on a combination of the above matters to support that conclusion.
>
> 220. The ground can perhaps be summarised in this way — Victoria Police and Ms Gobbo embarked upon an improper and unlawful design to convict her client, the Applicant, knowing of the risk that it may be unlawful and proceeding anyway. The plan worked. Ms Gobbo's assistance was crucial to securing evidence against the Applicant on the Quills and Orbital joint prosecution (and a number of other matters part of the global plea deal), and putting pressure on him to plead guilty, which he ultimately did.
>
> 221. That she did not assist in securing evidence against the Applicant on Magnum is largely beside the point in circumstances where the objective of Victoria Police and Ms Gobbo was always to secure the Applicant's imprisonment by pressuring him to plead guilty across various matters (reference determination [859]). The reality of any 'global' plea resolution is that the perceived strength of case X will also have a bearing on whether an accused pleads guilty to case Y.
>
> 222. In any event, Ms Gobbo was implicated in Magnum by her involvement in the Applicant's extradition, which involvement would have provided the Applicant with a reasonable argument for a stay of *all* the prosecutions against him. In this respect, it should be emphasised that all the Applicant need show, at most, is a realistic prospect of a stay.
>
> 223. In the alternative to the Applicant's primary position on ground 1, if the Court does not accept that the irregularities in the Applicant's proceedings were so fundamental as to necessarily constitute a substantial miscarriage of justice, it will be necessary for the Court to inquire as to whether the convictions were inevitable. The Applicant's short submission is that the Court cannot conclude that they were.
>
> 224. In this respect, the Applicant relies on Fullerton J's findings that there

[49] Ibid [1483]–[1488] (citations omitted).

were triable issues on Quills and Orbital (reference determination [1477]).

225. Similarly, on Magnum, the Applicant relies on Fullerton J's finding that despite the strength of the evidence in that case there was an available argument that that prosecution should be stayed (reference determination [1477], see also [1227]). It would not be appropriate (nor possible) for this Court to come to a positive view of whether a hypothetical stay application would or would not have succeeded. That is for two reasons. *First*, that would set the bar too high on appeal — essentially requiring the Applicant to prove that he would be acquitted because 'a permanent stay is tantamount to a continuing immunity from prosecution'. *Second*, whether a stay would have succeeded would depend on the precise way in which the Applicant chose to put his stay application, the evidence he sought to call on it, the way in which the Victorian DPP responded to it, and the complex interplay of factors bearing upon the ultimate criterion. In those circumstances, Fullerton J properly expressed her finding in qualified terms that: 'the extradition process would very likely, if not certainly, have "looked different" were Ms Gobbo's role fully disclosed. However, just how different it would have looked remains a matter of some speculation' (reference determination [523]).

…

228. On ground 2, the Applicant again primarily puts his case on the basis that the breaches of the duty of disclosure were so fundamental as to vitiate his convictions. In the language of Gleeson CJ in *Nudd v The Queen*, this is a complaint about process rather than outcome. It engages this Court's observations in *Davies and Cody v The King:*

> From the beginning, [the English Court of Criminal Appeal] has acted upon no narrow view of the cases covered by its duty to quash a conviction when it thinks that on any ground there was a miscarriage of justice, a duty also imposed upon the Supreme Court of Victoria ... It has consistently regarded that duty as covering not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial…

229. Alternatively, the Applicant puts his case on ground 2 on the basis that — in the words of *Baini* — 'the Court of Appeal cannot be satisfied that the [breach of the duty of disclosure] … did not make a difference to the outcome of the trial'. In particular, the Court of Appeal cannot be satisfied — just as Fullerton J clearly was not — that the Applicant would have pleaded guilty to each of Quills, Orbital and Magnum even if he had had full and timely disclosure on all of the matters the subject of the global plea deal.[50]

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[50] Applicant's further amended written case, 28 February 2025, [219]–[225], [228]–[230] (emphasis in original) (citations omitted).

28 The respondent has not yet filed a response to the applicant's written case but has indicated a preliminary position with respect to elements of that case by way of response to this application for bail.

Exceptional circumstances

29 In our view, the applicant has established truly exceptional circumstances as the basis of his application for bail. As Fullerton J found, in the absence of disclosure of Ms Gobbo's conduct bearing on the procurement of evidence adverse to the applicant and the conduct of the extradition proceedings, the applicant was obviously in no position to properly assess whether it was in his best interests to agree to the global plea deal which he entered into.

30 In the circumstances found by Fullerton J, he was deliberately misled and deceived as to the strength and nature of the prosecution cases.

31 It follows that he has a very strong case that the deliberate concealment and non-disclosure of Ms Gobbo's actions should be regarded as vitiating the plea agreement and the pleas of guilty entered pursuant to it. In turn, he has a very strong case that his convictions in the Quills, Orbital and Magnum matters should be quashed.

32 In the event that this occurred, the applicant would be entitled to the presumption of innocence upon any retrial and:

(a) to challenge material evidence relied on by the prosecution in the Quills and Orbital matters; and

(b) to seek a stay of all prosecutions on the basis of abuse of process with respect to the extradition proceedings.

33 The respondent submits that a series of matters stand in the way of a finding of exceptional circumstances.

34 First, the non-parole period of 20 years fixed upon the applicant's resentence will not expire until 23 June 2031. We accept that this is a relevant factor but it does not bear directly upon the essential basis of our findings with respect to exceptional circumstances.

35 Secondly, the respondent submits as a 'fallback' that (accepting that the applicant has a basis for challenges to the evidence in Quills and Orbital) even if regard is had to the Magnum sentence alone, the sentence of 20 years would not be completed until mid-2031 and, assuming a non-parole period of approximately 75 per cent of the head sentence (15 years) the applicant would not be eligible for parole until mid-2026.

36 The difficulty with this hypothesis is that, if the applicant's conviction for Magnum is ultimately upheld but the Quills and Orbital convictions are set aside, he will be entitled to seek resentencing with respect to Magnum.

37 On that resentencing, the applicant would have a strong case for reduction of sentence below 20 years having regard to the following matters:

(a) The applicant would no longer have prior convictions with respect to the Quills and Orbital matters. He would no longer readily justify the characterisation of a repeat offender.

(b) The applicant would no longer fall to be sentenced as a serious drug offender within the terms of the relevant statutory scheme: a change in status which places him in a different class of offender and directly affects the content of the relevant sentencing considerations.

(c) The applicant would fall to be resentenced after at least 18 years' delay in resolving his case by way of a fair trial. The root cause of that delay has been the ongoing delay by Victoria Police in making proper disclosure to the applicant of relevant evidence.

38 In our view, it is overwhelmingly likely that upon resentence for Magnum alone the applicant would receive a sentence of materially less than 20 years. In turn, the time he has served to date should be regarded as substantially reflecting the likely non-parole period in the circumstances hypothesised. Counsel for the respondent accepted that this was so in the course of argument.

39 Thirdly, the respondent submits that each of the appeals has different prospects of success. Insofar as the pleas of guilty were entered into pursuant to a global plea deal, we do not agree. The applicant has a strong case that his capacity to assess the united force of the charges against him was fundamentally compromised by the failure to make proper disclosure to him at the time of the plea agreement.

40 Nonetheless, we accept that success in setting aside the three convictions would not necessarily resolve the proceedings against the applicant. Moreover, the prospects of acquittal may differ in respect of the individual appeals. The respondent has indicated he would currently intend to proceed with the Magnum prosecution if the appeal succeeds but a retrial is open. Assuming no stay were granted of such a prosecution, this gives rise to the resentencing scenario we have set out above. There is no dispute as to the adequacy of the evidence in the Magnum case.

41 Fourthly, the respondent submits that the applicant had independent lawyers acting for him at the time of the plea deal. This is so, but these lawyers were deliberately deceived as to the character and strength of the Crown case.

42 Fifthly, it is submitted the applicant has failed to articulate any error or irregularity affecting his plea with respect to Magnum. The relevant offending occurred while the applicant was in hiding, during a period when he had no contact with Ms Gobbo and she was not retained as his lawyer in any capacity. Fullerton J could not find that any information from Ms Gobbo actually assisted the investigation or prosecution of the applicant in connection with Magnum. The communications relied on by the applicant with respect to Magnum all occurred after the applicant was charged with the offending, and there is no evidence any information connected to those communications was disseminated to the relevant investigating officers or any prosecutor. In relation to the

extradition, Ms Gobbo was retained by the applicant but the scope of that retainer did not include the Magnum offences (she did no more than give limited and specific advice about her views on the strength of the evidence against the applicant).

43 In these circumstances, the respondent does not accept that the applicant has any viable argument for a stay on the Magnum prosecution.

44 There are two fundamental problems with this submission. The first is that the plea with respect to Magnum was entered into as part of a global plea deal reached in circumstances where it appears that the applicant was deceived and misled as to the character and strength of the Crown case with respect to five of the seven drug offence cases in issue. The matters relied on are no answer to the proposition that the non-disclosure which occurred necessarily vitiates the plea agreement as a whole.

45 The second is that upon the hearing before Fullerton J it was expressly conceded by the respondent that there were reasonable grounds to apply for a stay of all prosecutions including Magnum. This concession is unsurprising given that on one view Victoria Police fundamentally subverted the adversary system.

46 Sixthly, the respondent submits that the applicant has failed to identify with any precision what Ms Gobbo or Victoria Police actually did that amounted to an error or irregularity in relation to the Orbital and Quills convictions.

47 In support of this submission, the respondent submits that in assisting to 'roll' the witnesses, Cooper and Bickley, Ms Gobbo did not breach any duty to the applicant as distinct from duties to Cooper and Bickley. With respect, we take a different view of the potential application of s 138 of the *Evidence Act 2008* to the evidence in issue. Evidence which is illegally or improperly obtained, for example by torture, bribery or blackmail of a witness, is potentially susceptible to exclusion pursuant to this statutory provision, whether or not it was the accused who was the subject of the illegal or improper conduct. In the present case, Fullerton J found that evidence was obtained from Cooper by way of a joint criminal enterprise to attempt to pervert the course of justice. Fullerton J further made detailed findings demonstrating that evidence was procured from both Cooper and Bickley by way of blatantly improper conduct.

48 More fundamentally, the respondent has failed to articulate any sensible basis for doubting Fullerton J's conclusion that it is obvious that the applicant could not properly assess the merits of the global plea deal without disclosure of the relevant conduct of Ms Gobbo and Victoria Police. It is not the applicant's case with respect to the granular exclusion of particular pieces of evidence that makes his case exceptional, rather it is his case with respect to the non-disclosure of the conduct in issue as a whole.

49 Seventhly, the respondent has made a series of detailed submissions with respect to the extent and nature of Ms Gobbo's retainers relating to the applicant's extradition and the period following that extradition. None of the submissions advanced meet the fundamental difficulties confronting the respondent that, as at the date of the global plea bargain:

(a) disclosure had not been given of material evidence bearing on the character and strength of the prosecution case in respect of the drug offences as a whole; and

(b) disclosure had not been given with respect to the matters which the respondent conceded before Fullerton J provided a reasonable basis for the stay of all prosecutions (including Magnum).

50 Eighthly, the respondent submits that if the Quills, Orbital, and Magnum convictions are set aside this may enliven the matters which were discontinued pursuant to the global plea deal.[51] Having regard to a number of Fullerton J's findings of fact there are some obvious practical difficulties confronting such a course. We do not accept that this hypothetical possibility overcomes or detracts from the applicant's case with respect to exceptional circumstances.

51 Ninthly, in the course of submissions, counsel for the respondent placed specific reliance upon the principles stated in *Wilson v The Queen*.[52] In that case, the majority (William Young, Arnold, Glazebrook and Blanchard JJ) endorsed the following general statement from *R v Le Page*:[53]

> [I]t is only in exceptional circumstances that an appeal against conviction will be entertained following entry of a plea of guilty. An appellant must show that a miscarriage of justice will result if his conviction is not overturned. Where the appellant fully appreciated the merits of his position, and made an informed decision to plead guilty, the conviction cannot be impugned.[54]

52 Their Honours further held that this statement was incomplete because it did not recognise cases of abuse of process of a type that would justify the granting of a stay in order to preserve the integrity of the justice system:

> In principle, where an abuse of process by the police or prosecuting authorities is sufficiently significant to justify the granting of a stay, the fact that a defendant has entered a guilty plea should not prevent him or her from appealing against conviction in reliance on the abuse of process. The entry of the stay in this type of case indicates that the prosecution should not have gone to trial for reasons based on the public interest. The fact that a conviction results from a guilty plea rather than a trial should not change the position, at least in principle.[55]

53 They further made clear that *Wilson* itself fell within the category of cases in which the appellant was aware of the police misconduct that was said to constitute an abuse of process and accordingly the decision to enter a guilty plea was a fully informed one.[56]

54 In the present case, the applicant was not aware at the time of the plea bargain of the extraordinary facts upon which he now seeks to rely. The matters which were not disclosed affected the rational assessment of the weight of the evidence against him and included circumstances founding a reasonable argument of abuse of process.

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51 See CP Act, s 177(7).
52 (2016) 1 NZLR 705 ('*Wilson*').
53 (2005) 2 NZLR 845 (CA).
54 Ibid 849 [16], cited in *Wilson* (2016) 1 NZLR 705, 739 [96].
55 *Wilson* (2016) 1 NZLR 705, 741 [104].
56 Ibid 741 [105]–[106].

55 In our view, the decision in *Wilson* is not inconsistent with the applicant's case. Further, we note the following observation by Elias CJ in dissent:

> The questions for the court when considering abuse of process are whether the trial can be fair or whether the criminal justice system would be tainted by its proceeding. That is a matter of bottom line judgment.[57]

56 We agree. Ultimately, the question of abuse of process in this case turns upon uniquely troublesome facts which require a case-specific judgment responding to the circumstances as a whole.

57 It follows that we are satisfied that the applicant's case with respect both to the setting aside of his pleas of guilty and his convictions establishes truly exceptional circumstances. In addition, there is one particular aspect of his personal circumstances which fortifies this conclusion.

58 As we have noted, the applicant suffered a serious brain injury as a result of an assault which occurred whilst he was in custody in 2019. He also suffered a fractured skull, stab wounds to his chest and a fractured jaw. The brain injury resulted in post-traumatic amnesia of 24 days. The reports of Dr David Freilich, neurologist, and Dr Nathan Serry, psychiatrist, indicate that the applicant has been left with permanent disabilities as a result of these injuries. Dr Freilich says:

> Mr Antonios (Tony) Mokbel was assaulted in Barwon Prison on 11 February 2019. He sustained multiple injuries as detailed in the report. I will confine my opinion to the neurological aspect of his condition, which is a head injury. I regard the head injury as being severe and resulting in severe traumatic brain injury. As a result of the brain injury Mr Mokbel has cognitive impairment, which was demonstrated by my testing using the MOCA test and by the recent neuropsychological testing referred to above. I also found some dysarthria (slurred speech), which is a result of the brain injury. It is my opinion that his condition has stabilised and that the cognitive impairment is permanent. No further improvement can be expected and there is no treatment to improve the impairment of cognition. [58]

59 A secondary consequence of the assault is that the applicant has been required to serve his imprisonment effectively in isolation since his release from hospital. Dr Serry expresses the opinion that the applicant suffers from a chronic adjustment disorder essentially in consequence of his prolonged incarceration and relative isolation.[59] The reports of a neuropsychologist and forensic psychologist further support the view that the applicant's rehabilitation following the brain injury may have been adversely affected by his continuing incarceration and isolation.[60]

60 It follows that the very protracted proceedings to which the applicant has been exposed as a result of the non-disclosure of relevant evidence by Victoria Police and the Victorian Director have dragged on over a period of significant personal hardship to the

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57 Ibid 744–5 [122].

58 Report of Dr David Freilich, dated 15 August 2023, 4.

59 Report of Dr Nathan Serry, dated 8 August 2023, 16.

60 Report of Dr Peter Ashkar, dated 17 February 2020; Report of Dr Peter Ashkar, dated 28 December 2022; Report of Pamela Matthews, dated 24 February 2020.

applicant. The consequences of the delay in issue may not in themselves constitute exceptional circumstances but they add to the primary matters we rely on in relation to this issue.

Unacceptable risk

61 As the authorities we have cited make clear, even if an applicant establishes exceptional circumstances as a basis for the grant of bail, it will not follow that bail will be granted if there is an unacceptable risk of the applicant re-offending or failing to surrender when required to do so.

62 In the present case, the applicant submits that the risk of breach of bail is reduced by:

- his ties to the jurisdiction, supportive family and stable address;
- the imposition of a condition requiring electronic monitoring by way of a GPS device supplied by the company Allied Universal; and
- the requirement of a bail guarantee in the amount of $850,000 secured against a residential property in Yallambie and a bank cheque.

63 Evidence in support of these submissions was adduced from:

(a) Ms Laura Windsor; and

(b) Ms Gawy Saad.

Ms Laura Windsor

64 Ms Laura Windsor is an Operations Manager with Allied Universal Electronic Monitoring Australia Pty Ltd ('Allied Universal') which is an electronic monitoring ('EM') company.

65 The effect of Ms Windsor's affidavit and oral evidence was as follows:

- Ms Windsor has been employed in the field of EM since 1 February, 2017 and as Operations Manager since October 2022.
- The Allied Universal group has been in the business of EM since 1994 (along with other fields of business) and their products are deployed globally in dozens of countries. EM technology is used to monitor people on bail, parole, home detention, work and weekend release programs, and people subject to extended supervision orders and people on domestic violence orders.
- Their products are used in respect of State and Commonwealth offending as a condition of bail and Allied Universal also supplies EM services to Corrections Departments in Western Australia and South Australia.
- Ms Windsor was aware that it was proposed that the applicant be subject to EM at the Viewbank address. She had checked that address and it is capable of being electronically monitored by Allied Universal.
- Allied Universal maintains a central monitoring system in New Zealand.

- The New Zealand monitoring centre employs 10 monitoring operators with two people per shift and three shifts per day. Allied Universal currently monitor 142 individuals in Australia.
- The device utilises GPS and is installed on the monitored person upon release from prison. The device transmits data about the person's locations and movements to Allied Universal, who in turn provide information to the designated police officer or Officer in Charge ('OIC').
- The cost of the system including installation, commissioning, and 24/7 monitoring for a 12 month period is $18,250.00 exclusive of GST and 6 months is $11,150.00 exclusive of GST and is non-refundable. The applicant would have to pay the amount before the EM device is fitted.
- If bail conditions include an overnight curfew or not approaching within a certain distance of points of international departure, these are inclusions/exclusions that can be specifically monitored.
- The system autonomously sends alerts via SMS and email if the person enters an exclusion zone or if they are in curfew violation or if there is a tampering with the strap, or device. There are operating procedures for handling those events. The OIC is called and failing that the local reporting police station is called.

66 Ms Windsor was questioned about a number of aspects of the technical capabilities of the EM devices deployed by Allied Universal for persons on bail in Australia and as to the oversight that is performed by individuals employed by the monitoring centre, in circumstances where there is a loss of signal, functionality, battery life and the like. In essence, it appears that steps are taken to respond quickly by the monitoring centre making relevant notifications to police or providing a field technician to deal with such circumstances in accordance with the company's operating procedures.

Ms Gawy Saad

67 The effect of Ms Saad's affidavit and oral evidence was as follows:

- Ms Saad is the younger sister of the applicant. She is currently the owner of [redacted] café and lives at the Viewbank residence, the details of which have been supplied to the Court. She confirmed that she had previously provided two affidavits to the Court.
- She has never been in trouble with the police.
- She is aware of the charges and allegations against the applicant, but seeks to provide support by offering her residence to him as a bail address and by offering a bail guarantee.
- Originally, it had been proposed that the applicant would live at a property she and her husband own in Yallambie and that part of the value of that property would be offered as a bail guarantee to the value of $500,000. It was now proposed that the applicant would live at the Viewbank residence with her and her husband whilst on bail. The Viewbank property is the primary residence for herself and her husband. It is a four bedroom home, two bedrooms with ensuites.

- After the Court inquired as to the size of the guarantee offered for the applicant, a further affidavit was prepared by Ms Saad in which she confirmed that she and her husband have clear title over the Yallambie property and that it is valued at $750,000 and the whole of that property could be made available as a bail guarantee along with a bank cheque for $100,000 provided from funds in a joint loan account owned by the couple, the details of which were put forward to the Court. She confirmed she had her husband's authority to offer the money, noting that he was present in court. Ms Saad indicated she was willing to undertake to report any breaches of bail by the applicant to the police.
- When cross-examined about whether she had other assets with a value beyond what had been offered, Ms Saad agreed that she did and that there was at least $1.8 million as a ballpark figure in other assets or equity. Asked why she had not offered a larger sum in the first place, and whether it indicated a lack of confidence in the applicant, she explained that originally she thought $500,000 was fair but if it needed to go up, 'there's money in that ah property'. She agreed she was aware what had happened with her sister's bail surety arrangement back in 2006, stating she was 'truly aware of that', but she expressed confidence it would not happen again.

68 The respondent submits that the grant of bail would result in an unacceptable risk, noting that:

(a) the applicant has previously both breached conditions of his bail and failed to answer bail;

(b) matters which might otherwise be regarded as mitigating the risk of further breaches of bail have previously proved to be no deterrent; and

(c) the efficacy of conditions upon the grant of bail is to be doubted.

69 More particularly, the respondent submits:

(a) The applicant was on bail for the Plutonium and Kayak offences at the time he committed the Spake, Quills and Orbital offences.

(b) The applicant was on bail in 2006 at the time of his trial in the Plutonium matter, when he absconded. His history of failing to answer bail the last time he was admitted to it is a matter of primary relevance. He remained hidden in Victoria before crossing State borders and ultimately fleeing Australia by yacht. When the applicant was arrested in Greece in June 2007 (some 15 months after leaving Australia), he was in possession of a false passport and driver's licence.

(c) After breaching his bail conditions and absconding in 2006, the applicant committed the Magnum offending, which was the most serious of the drug offending to which he pleaded guilty, with quantities, values, and a level of organisation far surpassing that of his other matters.

(d) At the time of absconding in 2006, the applicant had significant ties to the jurisdiction. This included a partner, children, and extended family. The

applicant's children were minors in 2006, not the adults they now are. Despite those ties to the jurisdiction, the applicant fled and breached his bail.

(e) At the time of absconding in 2006, the applicant had a surety of $1,000,000 from a family member. That risk of the applicant's family member losing that surety and facing imprisonment was not sufficient to mediate the risk of the applicant not surrendering into custody.

(f) The adequacy of the EM arrangements proposed by the applicant should not be accepted.

(g) Strict conditions, including a curfew between 10:00 pm and 7:00 am each night, twice-daily reporting, and a prohibition from attending international points of departure, did not prevent the applicant from absconding overseas in 2006.[61]

70 We are not persuaded a grant of bail will give rise to an unacceptable risk for the following reasons:

(a) It is 19 years since the events in 2006 upon which the respondent places primary reliance. The applicant has aged since 2006 and has suffered a traumatic brain injury. The medical reports filed on his behalf show that he is not the man that he once was.

(b) The 2006 breach of bail was, with hindsight, spectacularly expensive and spectacularly unsuccessful. The applicant has since spent some 18 years in custody. Much of this time has been spent in harsh conditions. It may be inferred that this is likely to have had some effect of specific deterrence upon him.

(c) The most concerning aspect of the applicant's history is his breach of bail in 2006 at the time he absconded from the Plutonium trial. It may be observed that at that time his prospects of success in respect of both the Plutonium charge and other matters were plainly poor. The current situation is fundamentally different and offers the applicant significantly more positive prospects. As his counsel submitted, he has a clear incentive to remain in the jurisdiction and to see out the end of the process that began nearly 10 years ago.

(d) The grant of bail can be buttressed by conditions which ameliorate (but cannot completely remove) the risk of future breach of bail.

Conditions

71 There has been some controversy directed specifically to the adequacy of proposed conditions with respect to:

(a) a bail guarantee; and

(b) electronic monitoring.

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61 Respondent's written submissions on bail application, dated 7 March 2025, [39].

72 Having heard the evidence of the applicant's sister, Ms Saad, we are satisfied that a bail guarantee should be required in the sum of $1,000,000.

73 The Court accepts that the deployment of EM is not foolproof and that the applicant could remove or destroy his personal monitoring device. Nevertheless, whilst we do not regard a requirement for EM as essential to our decision, as explained by Dhanji J (with the concurrence of Stern JA and Faulkner J), in *Lee v R*,[62] it can be accepted that such monitoring provides an obstacle to any attempt to escape the Court's jurisdiction.

74 Furthermore, the applicant can be placed under a strict regime including overnight curfew, daily reporting to the police, geographical limits and controls over his use of communication devices.

75 We have considered the parties' further submissions as to the form of conditions which we might impose.

76 Our order will set out in further detail the conditions which taken together we regard as satisfactory in all the circumstances of the case.

Conclusion

77 The applicant should be granted bail pending the hearing of his application for leave to bring a second appeal.

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62 *(Cth)* [2024] NSWCCA, [64].