

**IN THE MAGISTRATE'S COURT OF VICTORIA
AT MELBOURNE**

IN THE MATTER of the *Bail Act 1977*

-and

IN THE MATTER of an application for variation of bail by the informant

-and

IN THE MATTER of an application for variation of bail by Monica SMIT

DEFENCE SUBMISSIONS ON APPLICATIONS TO VARY CONDITIONS

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INTRODUCTION

1. It is common ground between the parties that Conditions 1, 3 and 4 of the Accused's current Bail are redundant. Prosecution seeks to 'vary' conditions 3 and 4 whereas Ms Smit simply seeks their removal.
2. In compliance with Condition 1 Ms Smit did appear at her first return date before this Court and successfully varied the residential address Condition by consent (showing appropriate deference to her operative bail regime). Her next court date is 2 February 2022 for committal mention (three weeks away) and Defence understands that police do not allege an unacceptable risk of failure to appear or flight.

3AAA SURROUNDING CIRCUMSTANCES

3. Pursuant to s 18AD the Court in determining variation applications must consider the ‘surrounding circumstances’ and grant the variation if it is ‘reasonable’ to do so.

Defence submits that it is reasonable to remove conditions 3 and 4 owing to the following circumstances:

- i) Ms Smit has not breached her Bail which is conceded, somewhat begrudgingly, by the Informant in his statement at paragraph 7.
- ii) That is 134 days (or 4 months and 12 days) of no alleged offending since her arrest: s 3AAA(1)(d).
- iii) She has no history of bail breaches, nor any criminal history whatsoever: s 3AAA(1)(c).
- iv) She has already spent 22 days in custody (much of it in solitary quarantine) prior to being released on Bail in the Supreme Court for offences which attract a maximum penalty of fine only.
- v) She became engaged to be married on the day of her release from prison and has stable residential accommodation which is known to police: s 3AAA(1)(g).
- vi) Conditions 3 and 4 are redundant because they are no longer the laws used to ‘police the pandemic’.
- vii) Ms Smit and her organization continues to be actively surveilled by Victoria Police.
- viii) Delay is a significant factor now that Ms Smit has elected trial by jury and the consequent effect this has on prospective timelines for this proceeding.

POLICE SEEK TO AMEND BAIL BECAUSE OF UNCERTAINTY

4. The laws in response to the Pandemic were changed as per the Submissions for the prosecution. One of the reasons why Defence opposed conditions like 3 and 4 to begin with was the fluidity and rapid pace of change in the policy responses by the Victorian Government and the lack of certainty this engenders from day to day as to the current Covid regulatory regime.

5. This lack of certainty is illustrated by speculations in the prosecution Submissions:

“It can reasonably be expected that further pandemic orders will be made to extend past 12 January 2022 in response to the ongoing COVID-19 pandemic.”
(see also paragraph 6 of the Informant’s statement)

6. The specific Pandemic Order or specific risk alleged is not rooted in any current published restriction and seems to be an at large assertion that the accused may breach a future, not yet announced/not yet Gazetted, regulation. As at 13 January 2022 the Informant cannot say what particular Pandemic Order the accused is immediately alleged to be a risk of breaching but rather couches his allegations in more nebulous political/philosophical terms:

“...The zealotry of Ms Smit’s audience..”

“Ms Smit continues to frequently post anti vaccination and emotive posts...”

WHAT IF THE ACCUSED WAS SENTENCED TODAY FOR THE OFFENCES?

7. As Defence have consistently submitted throughout these proceedings if Ms Smit is found guilty of the charged offences and a Court (constituted by a jury) accepts everything alleged by the prosecution she can be dealt with, on sentence, by Fine only.
8. A sentencing Court could not mandate any restrictions/conditions on her liberty whatsoever going forward.
9. The only reason she has spent 22 days in custody and been subject to Conditional bail for nearly four months is because she has plead Not Guilty. If she had been found Guilty already then police could not possibly have the power to restrict where she lives or what she publishes (save for publications that breach the law in their own right).
10. So the ‘cost’ of maintaining her innocence is being subject to a bail regime which is more onerous than the least favorable outcome she could possibly be subjected to even if found guilty. This is a peculiar situation which stands in tension against

guiding principle 1(b) of the Bail Act: “taking account of the presumption of innocence and the right to liberty.”

11. It is arguably a circumvention of the presumption of innocence to subject an accused to very lengthy conditional Bail (considering the current delays in the judicial system) which are more onerous than a Sentencing court could impose (also a relevant surrounding circumstance as at 3AAA(1)(l) of the *Bail Act*).

CONDITIONS 3 AND 4 OF THE BAIL DON'T DO ANY 'WORK' OTHER THAN PLACE MS SMIT IN DANGER OF INCARCERATION

12. Neither of the disputed conditions go any further than the law of Victoria under the *Public Health and Wellbeing Act* (pandemic orders) and the *Crimes Act* (incitement).
13. If the conditions were removed, as submitted is appropriate by the accused, it does not mean she gets a 'free pass' to do what the prosecution allege she is at risk of doing. Any new offences could be prosecuted in the usual way and the Informant's statement illustrates how actively police continue to monitor Ms Smit's activities.
14. By making compliance with Pandemic orders (as yet not even published) a condition of bail the police are able to turn a fine only offence into a jailable one. We have previously referred to this in submissions as a 'jurisdictional bracket creep'.
15. Notwithstanding that the Magistrate's Court and the Supreme Court have both ruled that some conditions of bail are appropriate in the face of this submission, to alleviate an unacceptable risk of reoffending, this submission is made afresh in circumstances where the accused has complied with bail for four months now and will be required to do so until the determination of her proceeding. This is to her credit and is relevant on an assessment as to what is reasonable from this point on.
16. Additionally, the broader community situation is different than when Ms Smit's bail was first considered. There has been an explosion in the number of Covid cases but there are less restrictions and the state has reached some of its 'vaccination milestones'. The Court today is considering bail conditions in a vastly different

broader context than that which faced the Magistrate's Court at first instance and then the Supreme Court (principally, there is no hard restriction on protest gathering which is the main 'issue' that places Ms Smit in the indictable stream to begin with). As an intervening event the MCG was very crowded on Boxing Day and this had nothing to do with Reignite Democracy Australia and was something fully supported by the Government.

17. Protests are not what has led to this latest wave of infections. Defence submits that the prosecution are putting an asserted future risk of endangering the public too high to suggest that Ms Smit's communications are going to exacerbate public health problems. '*Opposing government policy*' is not axiomatic '*with putting other people at risk at risk of harm*' and accepting those two as one and the same has a dangerous tendency to chill public discourse on controversial issues.
18. It is reasonable to cut back on Ms Smit's bail conditions when doing so doesn't actually change the law as it applies to her. It would restore a balance to the presumption of innocence she enjoys under the guiding principles of the *Act* whilst not diminishing community protection and accounts for her otherwise clear history both prior to these alleged offences and on bail since.
19. Bail conditions are required to pass a parsimony test. In *Woods v DPP [2014] VSC 1* Justice Bell issued reasons which included considerations of the intersection between the Bail Act generally, human rights and the imposition of conditions (at 1-84). In relation to conditions Justice Bell said:

“[76] It can be seen that s 5(3) (of the *Bail Act*) requires conditions to be imposed only for the purposes of bail and related purposes. Section 5(4) **requires conditions to be no more onerous than necessary for the achievement of that purpose and reasonable having regard to the nature of the alleged offence and the circumstances of the accused, ie the conditions must pass a parsimony test.** By limiting the authority of the court to the imposition of conditions of that kind, the provisions are intended to operate such that any conditions are compatible with the human rights of the accused. Accordingly, there is no such thing as

standard conditions of bail (other than the one mandatory condition) and **any conditions must be proportionate in the circumstances of the case.**” Emphasis added

20. The circumstances here warrant bail on special Conditions 2 and 5¹ only as they, in combination with the mandatory attendance condition and the other operable laws of the State, are more than restrictive enough given the instant offences charged are not even imprisonable.

M White
Counsel

13 January 2022

¹ The accused has not contested condition 5 regarding prohibition on disclosing police identities. However, as previously stated at earlier hearings she was never going to do that, regardless of whether it was a bail condition. Defence are not even sure what the basis for its inclusion was but in any case Ms Smit does not oppose it if only to offset any inference that may have been reported this was some ‘sticking point’ that does not exist.