SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCR 2020 0249

JASON JOSEPH ROBERTS — Appellant

v

THE QUEEN — Respondent

JUDGES:	MAXWELL P, NIALL and EMERTON JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	22 January 2021
DATE OF JUDGMENT:	26 February 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 28
JUDGMENT APPEALED FROM:	[2020] VSC 793 (Beach JA)

CRIMINAL LAW – Appeal – Bail – Murder – Miscarriage of justice – Retrial ordered after convictions quashed – Application for bail pending retrial – Bail refused – Appeal from refusal of bail – Whether exceptional circumstances exist that justify the grant of bail – Appellant in custody for 20 years before convictions quashed – Whether period of custody constitutes pre-trial delay – Reliance on injustice of corrupted trial and resulting hardship of incarceration – Whether continued incarceration unjust – Whether judge misconstrued applicable provisions – Whether refusal of bail unreasonable – No specific error – Refusal of bail reasonably open – Appeal dismissed – *Bail Act 1977* ss 1B, 3AAA, 4A, 4E.

WORDS AND PHRASES – 'exceptional circumstances exist that justify the grant of bail'.

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr P Matthews and Mr P Smallwood	Stary Norton Halphen
For the Respondent	Mr B Ihle SC with Mr G Hayward	Ms A Hogan, Solicitor for Public Prosecutions

MAXWELL P
NIALL JA
EMERTON JA:

Summary

1 On 15 August 2000, the appellant was arrested and charged with murdering two police officers. On 31 December 2002, he was convicted of both charges of murder. On 24 February 2003, he was sentenced to life imprisonment, with a non-parole period of 35 years. Successive applications for leave to appeal to the Court of Appeal and the High Court failed.

2 In 2019, the appellant commenced fresh proceedings in this Court under pt 6.4 of the *Criminal Procedure Act 2009*, seeking leave to appeal on the ground that his trial had been vitiated by non-disclosure of relevant evidence. On 10 November 2020, the appeal against conviction was allowed. The Court quashed the murder convictions and ordered a retrial on both charges.[1]

3 The appellant then applied for bail pending the retrial. Because the appellant is charged with murder, the judge was obliged to refuse the application unless satisfied that 'exceptional circumstances exist that justify the grant of bail'.[2] The judge was not so satisfied and the application for bail was refused.[3]

4 The appellant now appeals from the decision refusing him bail. The decision to grant or refuse bail being discretionary, the appellant accepts that appellate intervention would only be warranted if he could show that the judge had made a specific error or else that it was not reasonably open to the judge in the circumstances of the case to refuse the application.

5 As to specific error, the appellant submits that the judge misconstrued the applicable provisions and, as a result, gave undue prominence to the seriousness of

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1 *Roberts v The Queen* [2020] VSCA 277 ('*Roberts*').

2 *Bail Act 1977* s 4A(1A) ('*Bail Act*').

3 *Re Roberts* [2020] VSC 793 ('Reasons').

the charges, the strength of the prosecution case and the likely sentence the appellant would face if convicted. By so doing, it was said, the judge effectively made it impossible for the appellant to obtain a grant of bail.

6 As to the complaint of unreasonableness, the appellant submitted that the only conclusion reasonably open was that these were exceptional circumstances which justified a grant of bail. Specific reliance was placed on:

- the 'delay' of more than 20 years between the appellant's arrest and his likely retrial;
- the 'considerable personal hardship' which he has endured while in custody;
- the absence of any factors indicating that the appellant presents an unacceptable risk in any of the ways contemplated by the *Bail Act*;
- the fact that his convictions were quashed because police misconduct had 'so corrupted the fairness of [his] trial as to poison it to its root'; and
- the existence of strong community support for the appellant, and the availability of a substantial surety.

7 For reasons which follow, the appeal must be dismissed. First, there was no specific error. His Honour's construction and application of the relevant provisions was entirely orthodox, and consistent with the applicable authorities. Secondly, as to unreasonableness, the judge took into account all of the matters relied on by the appellant and it was, in our view, well open to his Honour to conclude that there did not exist 'exceptional circumstances that justify the grant of bail'.

8 It is not in doubt that the circumstances giving rise to the quashing of the appellant's convictions last November are quite exceptional. Fortunately, it is an extremely rare occurrence for convictions to be quashed on the ground that police

misconduct denied an accused person 'a fair trial according to law'.[4] The critical question, however, was whether those circumstances, and the fact that the appellant had spent more than 20 years in custody by virtue of those wrongful convictions, *justified* a grant of bail. The judge was not persuaded that they did and, in our respectful view, that conclusion is unimpeachable.

9 A review of bail decisions in 'exceptional circumstances' cases reveals certain types of circumstances which recur as justifications for bail in such cases: unreasonable delay before trial; unacceptable adverse impacts of continued pre-trial incarceration (whether on the accused person or on his/her dependants); and the likelihood that time spent on remand will exceed any term of imprisonment which would be imposed in the event of conviction. What these different kinds of circumstances appear to have in common is that they are capable of rendering continued pre-trial incarceration unjust, notwithstanding the statutory prohibition on bail which otherwise applies.

10 The informing principle seems to be clear: if continued incarceration before trial would be productive of injustice, then a grant of bail may be justified (subject always to the separate question of 'unacceptable risk'). The bail decision maker is thus looking to the future, considering the likely consequences of the continued incarceration of the applicant for bail. Past events may be relevant to that consideration, as in the cases concerning pre-trial delay, but what justifies bail is the need to prevent or mitigate *future* injustice.

11 This analysis highlights the difficulty confronting the appellant, whose core argument rested on past injustice as enlivening his right to liberty. What was said to justify the grant of bail was the injustice constituted by the corruption of his trial, and the personal hardship which he is said to have experienced during the 20 years of custody which followed. According to the submission, the grant of bail should be responsive to and reflective of that past injustice and hardship.

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4 *Roberts* [2020] VSCA 277, [257] (T Forrest and Osborn JJA, Taylor AJA). See *Eastman v DPP* [2014] ACTSCFC 3, [8] (Rares and Wigney JJ, Cowdroy AJ).

12 In our view, it was well open to the judge to reject that submission. Those matters did not, as the appellant submitted, compel the conclusion that bail was justified. Understood by reference to the jurisprudence on 'exceptional circumstances', his Honour was not obliged to view the past events on which the appellant relies as making it unjust for his pre-trial incarceration to continue.

13 We note that the appellant has already pursued appropriate remedies for the injustice and hardship he has suffered. The remedy for the corruption of his trial was the one which he obtained in November 2020: the quashing of his convictions. And the personal hardship on which he relies was expressly accepted, and taken into account, by this Court in considering whether or not to order a retrial.

The applicable provisions

14 The 'exceptional circumstances' test is set out in s 4A of the *Bail Act*, as follows:

> (1) This section applies if, under section 4AA(1) or (2), the step 1 — exceptional circumstances test applies to a decision of whether to grant bail.
>
> (1A) The bail decision maker must refuse bail unless satisfied that exceptional circumstances exist that justify the grant of bail.
>
> (2) The accused bears the burden of satisfying the bail decision maker as to the existence of exceptional circumstances.
>
> (3) In considering whether exceptional circumstances exist, the bail decision maker must take into account the surrounding circumstances.
>
> (4) If the bail decision maker is satisfied that exceptional circumstances exist that justify the grant of bail, the bail decision maker must then move to step 2—unacceptable risk test.

15 The 'unacceptable risk' test is set out in s 4E of the *Bail Act*, as follows:

> (1) A bail decision maker must refuse bail for a person accused of any offence if the bail decision maker is satisfied that—
>
> (a) there is a risk that the accused would, if released on bail—
>
> (i) endanger the safety or welfare of any person; or
>
> (ii) commit an offence while on bail; or

(iii) interfere with a witness or otherwise obstruct the course of justice in any matter; or

(iv) fail to surrender into custody in accordance with the conditions of bail; and

(b) the risk is an unacceptable risk.

(2) The prosecutor bears the burden of satisfying the bail decision maker—

(a) as to the existence of a risk of a kind mentioned in subsection (1)(a); and

(b) that the risk is an unacceptable risk.

(3) In considering whether a risk mentioned in subsection (1)(a) is an unacceptable risk, the bail decision maker must—

(a) take into account the surrounding circumstances; and

(b) consider whether there are any conditions of bail that may be imposed to mitigate the risk so that it is not an unacceptable risk.

16 As s 4A(4) makes clear, if the appellant had satisfied the judge that exceptional circumstances existed justifying a grant of bail, his Honour would then have had to move to consider the question of unacceptable risk. In the event, as his Honour was not so satisfied, the second step in the two-step process was not required.

Ground 1: misconstruing the provisions

17 As noted earlier, the contention advanced under this ground is that the judge erred in law by giving undue prominence to the seriousness of the allegations against the appellant, the strength of the prosecution case and the likely sentence which would be imposed if he were convicted. His Honour's treatment of those matters, it was said, reflected a construction or misapplication of ss 3AAA and 4A of the *Bail Act* in the circumstances of the case.

18 In accordance with s 4A(3), the bail decision maker, in determining whether exceptional circumstances exist, must take into account 'the surrounding circumstances', that is, 'all the circumstances that are relevant to the matter

including, but not limited to' the circumstances set out in s 3AAA(1). Included in the long list of matters which must be taken into account are those specified by sub-paras (1)(a), (b) and (l), namely:

> (a) the nature and seriousness of the alleged offending, including whether it is a serious example of the offence;
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> (b) the strength of the prosecution case;
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> …
>
> (l) the likely sentence to be imposed should the accused be found guilty of the offence with which the accused is charged;

19 The submission for the appellant was that nothing in s 3AAA, or s 4A, required the judge 'to give a particular weighting' to those three matters. So much may be accepted. Although they are all matters which must be considered, what weight is to be attributed to any particular matter is for the decision maker to determine.

20 Counsel for the appellant drew attention to the 'guiding principles' by reference to which the *Bail Act* is to be interpreted. Those principles are set out in s 1B, as follows:

> (1) The Parliament recognises the importance of—
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> (a) maximising the safety of the community and persons affected by crime to the greatest extent possible; and
>
> (b) taking account of the presumption of innocence and the right to liberty; and
>
> (c) promoting fairness, transparency and consistency in bail decision making; and
>
> (d) promoting public understanding of bail practices and procedures.
>
> (2) It is the intention of the Parliament that this Act is to be applied and interpreted having regard to the matters set out in subsection (1).

21 According to the submission, because the prosecution did not suggest that the appellant was an unacceptable risk, the first guiding principle — maximising the safety of the community and persons affected by crime — 'receded in significance'.

As a result, it was said, the second guiding principle — the presumption of innocence and the right to liberty — was necessarily 'prominent in the consideration' of whether exceptional circumstances existed. The error, in short, was to give unwarranted 'prominence' to the three particular matters identified and to fail — to the point of falling into error — to give any sufficient recognition to the presumption of innocence and the right to liberty.

22 In support of the submission, reliance was placed on what was said by Bongiorno J in *Vinayagamoorthy v Director of Public Prosecutions (Cth)*.[5] His Honour was there considering applications for bail by two individuals charged with terrorism offences, and said:

> The offences with which these men are charged are undoubtedly serious and that is why the law requires exceptional circumstances to justify bail, but it must also be kept in mind that they are entitled to the full benefit of the presumption of innocence. If that principle is abandoned, or even modified, for political expediency we risk the legal foundation of our whole criminal justice system. These men are innocent of these crimes unless and until they are proved beyond reasonable doubt to be guilty. The investigation process has taken almost two years to date. Neither of the accused have done anything to hinder that process or that investigation. Indeed, the material before the Court would suggest that they have co-operated.[6]

23 The submission also relied on the decision of this Court in *Dale v Director of Public Prosecutions (Cth)*,[7] where the appellant for bail was charged with being involved (while a serving police officer) in the murder of a police informer and his wife to prevent the informer giving evidence in future proceedings. For reasons discussed below, this Court concluded that exceptional circumstances existed notwithstanding the seriousness of the charge. Reliance was also placed on *Tran v Director of Public Prosecutions*,[8] where Redlich J accepted that the applicant for bail faced a strong prosecution case on the charge of murder, and had poor prospects of acquittal, but was nevertheless satisfied that exceptional circumstances existed.

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5 (2007) 212 FLR 326; [2007] VSC 265.

6 Ibid [19] (Bongiorno J).

7 [2009] VSCA 212 *('Dale')*.

8 [2005] VSC 498.

Consideration

24 It is necessary, first, to examine what the judge said about the three specified matters. As to the seriousness of the charges which the appellant faces, his Honour said:

> While one can always imagine additional aggravating circumstances in relation to any instance of a particularly serious crime, the charges of murder in the present case are, in my view, about as serious as can reasonably be contemplated. The deliberate killing of a police officer, in the course of his or her duties, is an appalling crime deserving of the sternest punishment.[9]

25 Quite properly, counsel for the appellant took no issue with this characterisation of the alleged offending. Nor was there any dispute about what his Honour said about the likely sentence which the appellant would face if convicted, as follows:

> While paragraphs (k) and (l) of s 3AAA(1) of the Act, on their terms, constitute separate surrounding circumstances, in combination they direct attention to the question of whether an accused is likely to spend more time in custody if bail is refused, than the likely sentence to be imposed should he or she be found guilty of the offence with which he or she has been charged. Notwithstanding the lengthy period of time the applicant has been in custody to date, if he is found guilty of the murders of Sergeant Silk and Senior Constable Miller on the retrial, there is no reasonable prospect that he will receive a sentence that is less than the time he will have spent in custody if bail is refused. To the contrary, he will have served a mere fraction of the sentence likely to be imposed.[10]

26 As to the strength of the Crown case against the appellant, his Honour said:

> It is not appropriate to discuss in any detail the strength, or otherwise, of particular aspects of the Crown case. All of that will ultimately be a matter for the jury (assuming a jury trial) uninfluenced by anything said in these reasons. It is sufficient to say that on the material presented on this application, there is no basis for concluding other than that the Crown case as a whole (disregarding entirely the dying declaration evidence) is a powerful one — albeit that, as the Court of Appeal observed, conviction is not inevitable. That assessment, coupled with the fact that the alleged offending in this case is so serious, tells against a grant of bail in this case at this time.[11]

27 According to the written case, his Honour's emphasis on these three matters

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9 Reasons [18].

10 Ibid [23].

11 Ibid [26].

had the effect of creating

> a sliding scale of exceptionalness — the more serious the crime the stronger the case and the more lengthy the potential sentence, the more exceptional the circumstances need to be to justify a grant of bail.

The result for the appellant, it was said, was to erect an insuperable hurdle to the establishment of exceptional circumstances.

28 In oral argument, the point was expressed in a different way. It was submitted that the only real relevance of the seriousness of the charges, the strength of the Crown case and the likely sentence was in relation to the question of unacceptable risk — for example, of the appellant leaving the jurisdiction or interfering with witnesses. Since, as already noted, the prosecution were not suggesting that there would be any unacceptable risk of that kind if the appellant were released, the weight the judge apparently attached to those matters was unjustified.

29 In our view, this ground must be rejected. In short, the judge was doing no more than he was obliged by the applicable provisions to do, that is, taking into account these mandatory relevant considerations. As we have already said — and as is well illustrated by this Court's jurisprudence on sentence appeals — the weight to be given to a relevant factor in the making of a discretionary judgment is a matter for the decision maker. Given that the making of such a judgment does not involve the attribution of particular weight to particular factors, a complaint that insufficient or excessive weight was attributed to a particular factor can only be assessed by looking at the decision ultimately arrived at.[12] Here, neither the reasons, nor the reasoning, reveal error in the construction and application of the *Bail Act*.

30 On appellate review of an exercise of judicial discretion, the question — absent specific error — is whether it was reasonably open to the decision maker to

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12 *DPP v Terrick* (2009) 24 VR 457; [2009] VSCA 220, [5] (Maxwell P, Redlich JA and Robson AJA); *Smith v The Queen* [2020] VSCA 159, [12] (Maxwell P, Kyrou and Weinberg JJA); *DPP v Apostolopoulos* [2016] VSCA 201, [30] (Weinberg, Beach and McLeish JJA); *DPP (Cth) v Estrada* (2015) 45 VR 286; [2015] VSCA 22, [37] (Priest, Beach JJA and King AJA).

arrive at the decision which he or she did if proper weight were given to all relevant factors.[13] It follows that the only way of evaluating the appellant's complaint — that these three matters were given excessive weight — is to examine the discretionary decision itself, in the light of the factors which the *Bail Act* makes relevant. That requires success on ground 2.

Ground 2: unreasonableness

31 As noted earlier, the unreasonableness argument relied on what were described as 'five pillars' supporting the appellant's contention that exceptional circumstances existed which justified the grant of bail. The first of these was what was described as 'the delay from arrest to trial', being the period between the appellant's arrest in 2000 and the retrial, likely to take place later in 2021 or early 2022. The second was 'the considerable personal hardship that the appellant had endured while in custody.'

32 As to the 'delay', the submission in this Court, as it was before the judge, was that the entire period of custody from 2000 onwards should be viewed as a period of pre-trial delay and that it was sufficient, by itself, to establish exceptional circumstances justifying bail. His Honour declined to deal with delay on this basis. His conclusion on this aspect of the case was as follows:

> The delay between now and the commencement of a trial is difficult to assess. If the parties were ready, the Court would very likely be able to accommodate a trial in the second half of 2021, and at the very latest in the first half of 2022. Such a 'delay' is far from exceptional in a matter of this kind. Moreover, in my view, it is not made exceptional by the fact of the applicant's time in custody to date and/or the conditions of that custody, or indeed the existence of any of the other matters relied upon by the applicant, and to which I have referred (notwithstanding what has been described as the reprehensible nature of the police conduct that has led to the quashing of the applicant's convictions and the order for a retrial).[14]

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13 *Clarkson v The Queen*, (2011) 32 VR 361; [2011] VSCA 157, [89] (Maxwell ACJ, Nettle JA, Neave JA, Redlich JA and Harper JA); *DPP v Karazisis* (2010) 31 VR 634; [2010] VSCA 350, [127] (Ashley, Redlich and Weinberg JJA).

14 Reasons [21].

33 His Honour had earlier said:

> [T]he miscarriage of justice found by the Court of Appeal, which resulted in the quashing of his convictions, constitutes a rare and highly unusual circumstance. One may even attach the epithet 'exceptional' to those circumstances.
>
> That said, in my view, the matters relied upon by the applicant in support of his application for bail do not, either individually or collectively, amount to exceptional circumstances 'that justify the grant of bail'.[15] To establish that the circumstances of the applicant's case are, in a general sense, 'exceptional' is not sufficient, there must be exceptional circumstances *that justify* the grant of bail.[16]

34 In our respectful view, his Honour was quite correct to highlight the phrase 'that justify the grant of bail'. It is not enough, as his Honour pointed out, that the circumstances relied on can be said to be 'exceptional'. Meeting that requirement is necessary but not sufficient. As Vincent J said more than 30 years ago:

> What is ultimately of significance is that viewed as a whole, the circumstances can be regarded as exceptional *to the extent that*, taking into account the very serious nature of the charge to which they are applicable, the making of an order admitting the person to bail *would be justified*.[17]

35 The concept of justification is, accordingly, central to the consideration required of the bail decision maker when the 'exceptional circumstances' test is engaged. The language of s 4A(1A) is unambiguous: the bail decision maker is prohibited from granting bail unless the applicant can point to circumstances which are exceptional in character and which justify — that is, provide justification for — releasing the person on bail.

36 A review of the bail decisions of the Trial Division of this Court reveals that certain types of circumstances have consistently been viewed as being capable of providing the necessary justification. The circumstance relied on most frequently is pre-trial delay, that is, the period of time which an accused person will have spent on

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15 Cf s 4A(1A) of the *Bail Act*.

16 Reasons [19]–[20] (emphasis in original).

17 *Re Bail Application by Moloney* (Unreported, Supreme Court of Victoria, 31 October 1990) (emphasis added), cited in *DPP v Cozzi* (2005) 12 VR 211; [2005] VSC 195, [19] (Coldrey J) ('*Cozzi*').

remand by the time the charge comes on for trial. That period will comprise time already spent in custody as at the date of the bail application, and the further time expected to elapse before trial.[18]

37 It is hardly surprising that excessive time on remand has been recognised as constituting 'exceptional circumstances justifying bail'. After all, a person on remand is presumed to be innocent and pre-trial incarceration is fundamentally inconsistent with that presumption. As Kellam J explained in *Mokbel v Director of Public Prosecutions [No 3]*:

> [O]ur society will not, and should not, tolerate what is effectively the indefinite detention awaiting trial of persons such as the applicant whilst an investigation such as that currently underway takes place. … The community will not tolerate the indefinite detention of its citizens with no prospect of charges being tried within a reasonable period.[19]

38 In *R v Cox*,[20] Redlich J cited with approval the following passage from *Outman v The Queen,* in which Hasluck J said:

> Those cases suggest that delay should be measured not against the state of the court list in any particular jurisdiction, but having regard to objective criteria based on the concept that a humanitarian society recognising the presumption of innocence will find abhorrent the idea that people are kept in custody for undue time without trial.[21]

39 His Honour also cited the following statement of Vincent J in *Re Andrea Mantase*:[22]

> Periods of eighteen months or so of detention prior to the conduct of trials is by any form of reckoning extremely long. It is not to the point to say, in effect, that such periods represent the norm and, therefore, cannot constitute part of the matrix of exceptional circumstances as they ultimately can be reasonably agreed to negate the very justification for detention prior to the determination of guilt. *What I mean to convey by this statement is that such detention must be directed to serving the ends of justice and not itself constitute a potential source of injustice.*[23]

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18 *Beljajev v DPP* (1998) 101 A Crim R 362 ('*Beljajev*').

19 [2002] VSC 393, [9], [13] ('*Mokbel*').

20 [2003] VSC 245.

21 *Outman v The Queen* [2000] WASC 303, [28].

22 Unreported, Supreme Court of Victoria, 21 September 2000.

23 Ibid 2–3 (emphasis added).

40 Another recognised 'justifying' circumstance on applications of this kind is unacceptable adverse impact on the accused person of continued incarceration. For example, in *Dale*,[24] it was estimated that the accused person would have been in custody for more than 2 years before the charge of murder came to trial. Expert evidence established that the onerous conditions under which he had been held had caused him to develop a 'moderate to severe' mental illness which, the Court accepted, would continue to be 'moderately to severely debilitating if he were not released on bail'.[25]

41 The Court concluded that exceptional circumstances justifying bail had been established. This conclusion was said to be based on the 'combined effect' of:

- the anticipated delay in the matter coming on for trial,
- the fact that his conditions of incarceration have caused him to suffer moderate to severe depression, which requires treatment; and
- the potential loss of the family business.[26]

42 Similar considerations applied in *Bchinnati v Director of Public Prosecutions [No 2]*,[27] where Croucher J was satisfied that the condition from which the accused suffered was 'sufficiently severe to make his time in custody significantly more burdensome than for other prisoners'.[28] That in turn gave heightened significance to the likely period of time he would spend on remand.[29] His Honour accepted that, in combination with other matters, these circumstances were exceptional and justified a grant of bail.[30]

43 Again, in *Re Gloury-Hyde*,[31] Priest JA regarded the applicant's acquired brain

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24 [2009] VSCA 212.

25 Ibid [40].

26 Ibid [44].

27 [2017] VSC 620 ('*Bchinnati*').

28 Ibid [63].

29 Ibid [67].

30 Ibid [78].

31 [2018] VSC 393.

injury as bringing the case within the 'exceptional circumstances' requirement. His Honour said:

> Any deprivation of a person's liberty is a serious thing. So much is recognised by the Act. Hence, whilst I must construe its provisions taking into account the importance of 'maximising the safety of the community and persons affected by crime to the greatest extent possible', I must also take account of 'the presumption of innocence and the right to liberty'. Moreover, I consider the right to liberty to be of particular importance when the court is faced with a relatively young man such as the applicant, possessing his physical, psychological and cognitive attributes. Indeed, in my opinion, the nature and extent of the applicant's ABI, and its consequences for his functioning, which — when taken with other factors such as the availability of treatment — establish exceptional circumstances justifying a grant of bail. Although it might be observed that there is nothing particularly exceptional about an applicant for bail being an addicted polysubstance abuser afflicted by a range of psychological disturbances, the applicant's traumatic brain injury — for which he bears no responsibility — with its attendant physical and cognitive limitations, makes this an exceptional case.[32]

44 In the same way, exceptional circumstances of hardship to an applicant's dependants may be such as to justify a grant of bail. For example, in *Director of Public Prosecutions (Cth) v Banda*,[33] a finding of exceptional circumstances was upheld after the magistrate had taken into account:

> the family situation and the personal situation of the [accused], including his primary role in caring for his mother, a significant role in caring for a surrogate father with serious health problems, his provision of financial support for a former partner looking after their intellectually handicapped daughter [and] work commitments.[34]

45 In *Re Barnes,*[35] the Court accepted that 'exceptional circumstances' had been made out, in part because 'the continued incarceration of the applicant will … have a deleterious effect on the serious medical condition which his mother suffers, and accordingly his release on bail will to some extent be of assistance in alleviating that situation'.[36] In *R v Curran*,[37] a grant of bail was held to be justified by evidence that

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32 Ibid [35]. See also *Re Ahmad* [2003] VSC 209 (ill-health and reduced life expectancy); *Re Cardona* [2005] VSC 186 (need for surgery); *Re Wells* [2008] VSC 29 ('imperative' need for treatment).

33 [2000] VSC 542.

34 *Cozzi* (2005) 12 VR 211; [2005] VSC 195, [22] (Coldrey J).

35 [2006] VSC 426, [4].

36 Ibid [4] (Bongiorno J).

the life of the applicant's 15 year old son was 'disintegrating, such that he may descend into a life of crime and may be lost forever'.[38]

46 The third type of circumstance often taken into account for this purpose is the likelihood that — unless bail is granted — the time spent on remand will exceed any sentence of imprisonment which might be imposed in the event of a conviction.[39] In such a case, there is an obvious risk that continued incarceration will be productive of injustice.

47 What appears to underpin the judicial recognition of these different types of circumstances as justifying a grant of bail is that they are seen to render continued pre-trial detention unjust, even in relation to very serious offending. That is, it is seen to be unjust for a person to wait an indefinite or unreasonable time in custody before coming to trial; or for a person on remand (or his/her dependants) to suffer serious adverse consequences by virtue of the incarceration; or for an unconvicted person to spend time on remand which will exceed any likely sentence.

48 It is the perceived need to avert or mitigate such injustice which *justifies* the grant of bail — provided always that the circumstances can properly be characterised as exceptional. The point is well illustrated by the recent statement of Coghlan JA in *Re Price*:

> if the delays in this case become even more significant than they exist at the present time, it might be that *the only appropriate and just way* the applicant's position can be dealt with is by the grant of bail, irrespective of what other risks might be observed.[40]

49 We do not wish by this review of the cases to suggest that exceptional circumstances are limited to circumstances of those three types. Nor do we overlook the well-established principle that the test may be satisfied by a combination of

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37 [2010] VSC 622.

38 Ibid [22] (Robson J). See also *MacDonald v DPP* [2004] VSC 431 (five children in care of grandparents with health problems).

39 See, eg, *Re Granata* [2020] VSC 879, [84] (T Forrest JA); *Re Boo* [2020] VSC 882, [71] (Lasry J); *Re Brett* [2021] VSC 10, [40] (Incerti J); *Re GG* [2021] VSC 12, [60] (Incerti J).

40 [2021] VSC 31, [47] (emphasis added).

circumstances. Section 3AAA(1) of the *Bail Act* raises a range of matters for consideration, including those that the appellant complains were given too much weight by the judge below. Those matters — the seriousness of the charges, the strength of the Crown case and the likely sentence — may in some cases assist to establish exceptional circumstances rather than weigh against such a result.[41] Rather, we have sought to examine the circumstances most commonly relied on to make out 'exceptional circumstances' in order to elucidate the notion of 'justification' for a grant of bail.

50 Against that background, we turn to consider what was said on behalf of the appellant to be the justification for the grant of bail. As noted earlier, the principal consideration relied on was the fact of his having spent 20 years in custody. According to the submission, he should be regarded as having spent those years on remand. That characterisation was said to follow necessarily from the quashing of his convictions and the conclusion of the Court that he had not had a lawful trial. As it was put by his counsel:

> The position here is that through the … misconduct of an arm of the State this man has not had a trial according to law for 20 years and counting, so in that sense it is — he remains — has been since arrest and remains, and this is the legal effect of the appeal decision, on pre-trial detention, pre-trial remand.

51 If the appellant's two decades of incarceration were properly to be characterised as time spent on remand, the application for bail would, of course, be irresistible. In *Beljajev*, Kellam J regarded a period of 3 years of pre-trial custody as amounting to 'exceptional circumstances which would, in the absence of other factors, justify the granting of bail based upon the issue of delay'.[42] Doubtless, the same view would be taken today.[43]

52 In our view, however, this is a mischaracterisation of the appellant's time in

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41 See, eg, *Re Lee* [2016] VSC 343, where obvious difficulties with the prosecution case combined with other factors militated in favour of the grant of bail in respect of a murder charge.

42 (1998) 101 A Crim R 362, 370.

43 *Re Raffoul* [2020] VSC 848, [81] (Croucher J); *Re Granata* [2020] VSC 879, [89] (T Forrest JA); *Re Boo* [2020] VSC 882, [71] (Lasry J).

custody. Put simply, he was in prison serving a sentence which was valid until it was set aside. At no point during the period after his conviction was he in custody awaiting trial. In no sense were the prosecuting authorities slow to bring him to trial. The notion — as expressed by Kellam J in *Mokbel* — of 'indefinite detention … with no prospect of charges being tried' has no meaningful application here.[44]

53 It follows, in our view, that in considering delay the judge was correct to focus on the likely period the appellant would spend in custody (if not released on bail) between the time of the quashing of his convictions and the commencement of the retrial. As noted earlier, his Honour was anticipating that the retrial would take place 'at the very latest in the first half of 2022'. As his Honour said, a delay of 12–18 months is 'far from exceptional in a matter of this kind'.

54 As oral argument proceeded, counsel for the appellant clarified that the submission did not depend on the 20 years being treated as 'delay' in the recognised sense. Rather, the focus should be on the 'accumulated personal hardship' suffered by the appellant during that long period. According to the submission:

> [B]ail is about releasing him from that circumstance. It is not about redressing an injustice, it is about understanding the impact of custody upon this individual, which is relevantly indistinguishable, for instance, from the impact of custody upon an 18 year old, the impact of custody upon the intellectually disabled person … .

55 Counsel relied on the 'findings' as to hardship made by this Court in the course of explaining its decision to order a retrial. The Court there said:

> The fact that, as a result of a trial vitiated by a substantial miscarriage of justice, the appellant has suffered considerable personal hardship must be weighed in the balance. In this regard, we accept:
>
> - the appellant has been in custody since 19 August 2000;
> - the appellant was only 19 years of age when imprisoned;
> - the appellant has been imprisoned under onerous conditions in high security; and
> - protracted legal proceedings have and will involve significant stress.[45]

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44 *Mokbel* [2002] VSC 393, [13].

45 *Roberts* [2020] VSCA 277, [280] (T Forrest and Osborn JJA, Taylor AJA).

According to the submission, those findings 'provide the justification for bail'.

56 Counsel was specifically asked whether bail was said to be justified — as in *Dale* — in order to prevent the appellant suffering *future* hardship and mental distress attributable to incarceration. Counsel's response made clear that no such submission was advanced. Instead, it was said, the burden of 20 years' imprisonment should be seen as 'giving particular prominence' to the appellant's right to liberty, as recognised by s 1B(b) of the *Bail Act*:

> It is a proper application of the presumption of innocence and his right to liberty in circumstances where there is not an unacceptable risk and the import of that right to liberty in his case is heightened by the 20 years and counting of history of incarceration, including since early 2013 in particular conditions, et cetera. So there is that aspect of the presumption of innocence and the right to liberty that we emphasise here and how that comes to bear on the 20 years.

57 Asked by the Court to explain how the circumstances of police misconduct had rendered the appellant's time in custody especially burdensome, counsel submitted as follows:

> [T]he position is that he has seen that concerted efforts were made to bring about a result in his trial, efforts that went to criminal offending and were on a significant scale. He must now face a retrial in the same circumstance — of these charges again. He has to prepare for that in custody. He is in very restricted circumstances … . He has been in custody for 20 years. Seen in light of all those accumulated matters he now must prepare for the trial of his life, in quite simple terms, because if he is convicted he faces imprisonment for life. All of those matters together mean this is an extraordinary burden and that is a burden justifying bail.

58 A similar submission was put to the trial judge. What was said to make the circumstances exceptional, so as to justify the grant of bail, was that the appellant had been 'the victim of a substantial miscarriage of justice'. He had 'served 20 years on a deliberately corrupted trial' and had, as a result, suffered 'considerable personal hardship'.

59 In our respectful view, it was well open to his Honour to reject that submission. The circumstances relied on — the injustice constituted by the corrupting of the trial and the hardship which the appellant has suffered during his

time in custody — did not compel the conclusion that a grant of bail was justified. Consistently with the bail jurisprudence to which we have referred, his Honour was not bound to view those circumstances as rendering the appellant's continued incarceration unjust.[46]

60 The argument in favour of bail would, of course, have been much stronger if there had been evidence showing that continued incarceration until the retrial was likely to have a serious adverse effect on the appellant's physical or mental health, or if there were no likelihood of the retrial coming on within a reasonable time. But, as we have said, neither of those circumstances arises.

61 As suggested earlier, the appellant has already pursued the available remedies for the substantial miscarriage of justice at his trial. He succeeded in having his convictions quashed but failed to persuade the Court that, in part by virtue of the hardship he has suffered, there should be verdicts of acquittal rather than an order for a retrial. The hardship argument was, quite properly, put to the Court of Appeal in connection with the retrial question and was appropriately taken into account.

62 In the circumstances, it was of no consequence that the prosecution disavowed any suggestion of unacceptable risk should the appellant be granted bail. Although questions of risk are sometimes taken into account in the 'exceptional circumstances' analysis,[47] an absence of risk cannot — of itself — provide affirmative justification for bail. It simply removes an obstacle to bail.[48]

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46 What were said to be "closely analogous" circumstances in *Eastman v DPP* [2014] ACTSCFC 3, where bail was granted following the quashing of a murder conviction, were materially different in the ways identified by the trial judge: Reasons [27].

47 See, eg, *Bchinnati* [2017] VSC 620, [77] (Croucher J); *Re Sipser* [2019] VSC 362, [45] (Beach JA); *Re Gloury-Hyde* [2018] VSC 393, [30] (Priest JA).

48 *DPP (Cth) v Abbott* (1997) 97 A Crim R 19, 30 (Gillard J).