

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Not Restricted

S ECR 2021 0243

IN THE MATTER of the *Bail Act 1977*

and

IN THE MATTER of an application to vary bail by Monica Marie SMIT

JUDGE: HOLLINGWORTH J
WHERE HELD: Melbourne
DATE OF HEARING: 22 September 2021
DATE OF RULING: 5 October 2021
CASE MAY BE CITED AS: Re application for bail by Smit
MEDIUM NEUTRAL CITATION: [2021] VSC 642

CRIMINAL LAW - Bail - Bail granted in Magistrates' Court on conduct conditions - Applicant rejected conditions and refused to sign bail undertaking - Application to vary conditions - Some existing conditions onerous or unreasonable - Bail conditions varied

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the applicant	Mr P Chadwick QC Mr M White	Legalbit Pty Ltd
For the respondent	Mr A Albore	Victoria Police

HER HONOUR:

Introduction

- 1 The applicant, Monica Smit, is the founder, leader and public face of an activist group called Reignite Democracy Australia (“RDA”). RDA challenges the legitimacy of the Victorian government’s response to the COVID-19 pandemic.
- 2 The legal structure of the government’s response to the COVID-19 pandemic includes the following. At all times relevant to this case, a state of emergency has existed under s 198 of the *Public Health and Wellbeing Act 2008* (“Public Health Act”).¹ That state entitled the Chief Health Officer (“CHO”) to authorise the exercise of various emergency powers to eliminate or reduce a serious risk to public health.² Those emergency powers include the power to restrict the movement of people, and to give any directions that authorised officers consider reasonably necessary to protect public health.³ Over the course of the current pandemic, the CHO has given a number of such directions under ss 199 and 200 of the Public Health Act, covering matters such as wearing face coverings, restrictions on gatherings, and restrictions on movement. Refusal or failure to comply with a CHO direction, without reasonable excuse, is an offence under s 203 of the Public Health Act.
- 3 On 31 October 2020, police saw Ms Smit in the Melbourne CBD without a face-mask; they issued an infringement notice for breach of s 203. Later that same day, they saw her as part of a large group of anti-lockdown protesters in East Melbourne. At that time, she was issued a further infringement notice with a larger fine. She contested both of those infringement notices, as a result of which she was subsequently charged on summonses dated 9 February and 18 June 2021, respectively. Those summonses have been listed for mention in the Magistrates’ Court in November 2021.
- 4 On various dates in August 2021, Ms Smit engaged in further conduct, which resulted in five charges being laid against her on 31 August 2021. Three of the August charges allege that she breached s 203(1) of the Public Health Act, by leaving her home for a

¹ The state of emergency was declared on 16 March 2020. It has been extended regularly ever since then.

² Public Health Act s 199.

³ Public Health Act s 200.

non-prescribed purpose, travelling outside her permitted 5km zone, attending an anti-lockdown protest, and attending another person's home in breach of relevant directions ("the direct charges"). The remaining two charges allege that she incited others to breach s 203(1) of the Public Health Act, by encouraging them to attend anti-lockdown protests that took place in the Melbourne CBD on 11 and 21 August 2021, and attracted 90 and 4,000 attendees, respectively ("the incitement charges").

5 On 1 September 2021, Ms Smit applied for bail in the Magistrates' Court in respect of the August charges. Victoria Police did not oppose bail, but argued that stringent conduct conditions should be imposed, to reduce the risk of Ms Smit offending further, or endangering the safety or welfare of others. After hearing from both sides concerning the proposed bail conditions, the magistrate granted Ms Smit bail on the following special conditions:

- Reside at [a specified address].
- Not to leave the State of Victoria.
- Not leave place of residence between the hours of 7pm and 6am.
- To present at the front door of residence during curfew hours upon request of any member of Victoria Police.
- To abide by any curfew imposed under the current state of emergency restrictions and present at the front door during those curfew hours as requested by police.
- To abide by all Chief Health Officer directions.
- If not wearing a mask due to medical reasons to obtain and produce within 24 hours a medical certificate to police or health official.
- Not to publish on any social media platform or any website or via any electronic communications service any material inciting any person to fail to comply with the Chief Health Officer's directions or allow a medium under her control in full or part to do so.
- Not to incite any person to fail to comply with the Chief Health Officer's directions.
- All business related social media accounts and groups controlled in part or in full by the accused are, within 48 hours, to remove any materials which incite opposition to the Chief Health Officer's directions.
- Not to share copy or distribute in any way any material which incites opposition to the Chief Health Officer's directions either via online social

media or by any other means including but not limited to letter drops or encouraging anyone else to do so.

- Not to attend any protest in any capacity during the state of emergency related to COVID-19.
- Not to disclose or cause to be disclosed to any person the name of the informant or any police officer involved in the investigation on any public forum including but not limited to Reignite Democracy Australia website.

6 Ms Smit objected to the conditions imposed by the magistrate. In that situation, she had two options. The first was to sign the bail conditions under protest, be released on bail, and then apply to have the conditions varied. The second option was to refuse to sign the bail conditions, and remain in custody while she applied to have the conditions varied. Ms Smit chose the second option.

7 Over the following week, Ms Smit's lawyers attempted, unsuccessfully, to renegotiate the bail conditions with Victoria Police. On 14 September 2021, she filed an application in this court, seeking to vary her bail conditions under the court's inherent jurisdiction.

8 After both sides had filed affidavits and written submissions, the variation application came on for hearing before me on 22 September 2021. Once again, Victoria Police did not oppose Ms Smit being released on bail; the only argument concerned the conditions of her bail. At the conclusion of the hearing, I ordered that Ms Smit be bailed on the following special conditions:

2. She must reside at [a specified address], and not change that address without the leave of the court.
3. She must not commit an offence against s 203(1) of the *Public Health and Wellbeing Act 2008* (Vic).
4. She must not incite any other person to pursue a course of conduct that involves the commission of an offence against s 203(1) of the *Public Health and Wellbeing Act 2008* (Vic).
5. She must not disclose or cause to be disclosed the name of the informant or any police officers involved in the investigation of any of the charges against her to any person other than her legal representatives.

9 Later that day, Ms Smit signed her bail undertaking and was released from custody, after spending 22 days on remand.

10 At the conclusion of the hearing, I gave brief oral reasons and indicated that I would provide detailed written reasons in due course; these are those reasons.

The Bail Act 1977

11 Before considering the parties' respective arguments, it is necessary to understand the relevant provisions of the *Bail Act 1977* ("Bail Act"). The nature of the August charges is such that Ms Smit has a *prima facie* entitlement to bail.⁴ However, bail must be refused if the court is satisfied that there is an unacceptable risk that Ms Smit would, if released on bail, "endanger the safety or welfare of any person"⁵ or "commit an offence while on bail."⁶

12 In considering whether such a risk is an unacceptable one, the court must take into account all of the relevant "surrounding circumstances".⁷ The court must also consider whether there are any conditions of bail that may be imposed to mitigate the risk so that it is not an unacceptable one.⁸ Such conditions are called "conduct conditions".

13 The court must impose any conduct condition that, in its opinion, will reduce the likelihood of Ms Smit endangering the safety or welfare of any person, or committing an offence while on bail.⁹ However, there is an important limitation on the court's power to impose conduct conditions:

If a bail decision maker imposes one or more conditions, each condition and the number of conditions –

- (a) must be no more onerous than is required to reduce the likelihood that the accused may [endanger the safety or welfare of any person, or commit an offence while on bail]; and
- (b) must be reasonable, having regard to the nature of the alleged offence and the circumstances of the accused.¹⁰

⁴ Bail Act s 4.

⁵ Bail Act s 4E(1)(a)(i).

⁶ Bail Act s 4E(1)(a)(ii).

⁷ Bail Act s 4E(3)(a).

⁸ Bail Act s 4E(3)(b).

⁹ Bail Act s 5AAA(1).

¹⁰ Bail Act s 5AAA(2).

Whether there should be any conduct conditions at all

- 14 Ms Smit’s primary argument was that she should not be subject to any conduct conditions. She argued that the only bail condition should be the mandatory condition that she undertake to attend court on all necessary future dates.¹¹
- 15 Victoria Police argued that she should be subject to numerous and strict conduct conditions, to reduce the risk of her committing further offences or endangering the safety or welfare of others.
- 16 Ms Smit relied upon the following surrounding circumstances, in support of her argument that no conduct conditions should be imposed.
- 17 Ms Smit is 33 years old, and lives with her parents in a Melbourne suburb. She has a partner. She has no issues with illegal substance abuse. She has no prior convictions. She has never been arrested or on bail before.
- 18 Although Ms Smit describes herself on social media as a “journalist”, that appears to be a label she has given herself to justify her presence at protests. There is no evidence before the court as to her employment status or history, or that she publishes information other than on her website or through social media channels.
- 19 Notwithstanding the lack of evidence regarding employment matters, a stable and law-abiding background such as Ms Smit’s would ordinarily be given considerable weight in assessing the risk of future offending. However, that has to be balanced against the other evidence as to the likelihood of her further offending.
- 20 The evidence against Ms Smit in respect of all of the offending discussed in these reasons is overwhelming. She also does not dispute having engaged in the relevant conduct; on the contrary, she has boasted about much of it on social media. It seems that the only basis on which she will contest the charges is on some, as yet unspecified, legal argument as to the validity of the CHO directions or the Public Health Act.

¹¹ Bail Act s 5(1).

- 21 Ms Smit clearly regards herself as some sort of crusader. It is not the purpose of bail conditions to silence public debate about government policies or actions; Ms Smit is as free to debate such matters as anybody else. But she is not entitled to break the law, or to encourage others to do so, just because she disagrees with it. One of the purposes of bail conditions is to reduce the risk of an accused person engaging in further offending, whilst they are on bail awaiting trial for their original charges. Given her public statements and actions to date, there is clearly a serious risk that Ms Smit will engage in further breaches of s 203, and encourage others to do the same, unless prevented from doing so by appropriate conduct conditions.
- 22 Ms Smit argued that the offences with which she has been charged are not very serious, because they can be dealt with by a penalty infringement notice, and are punishable only by a fine. She argued that Victoria Police has acted unfairly or improperly in charging her with the August offences, and in seeking the imposition of conduct conditions.
- 23 Although the direct charges are summary offences, the incitement charges are more serious and are indictable offences.¹² However, both the direct and incitement charges are punishable only by a fine.¹³
- 24 It is true that police do have a discretion to issue a penalty infringement notice, instead of charging an alleged offender, in the case of a breach of s 203. Indeed, they issued such notices on the first two occasions when they caught Ms Smit apparently breaching CHO directions. However, police are not obliged to issue an infringement notice in the case of more serious breaches, or for repeat offenders. There appears to be nothing improper about Victoria Police having charged Ms Smit in respect of the August offences, rather than simply issuing further infringement notices.
- 25 Ms Smit's counsel described this case as "unique" and "novel", in so far as the incitement charges involve incitement to commit a summary offence, or incitement to

¹² *Crimes Act 1958* ("Crimes Act") s 321G(1).

¹³ The maximum penalty for a natural person is 120 penalty units for each breach of s 203: Public Health Act s 203. The maximum penalty for the incitement offences cannot exceed the maximum penalty for the direct offences: Crimes Act s 321I.

commit an offence punishable by fine only. But there is nothing in the provisions of the Crimes Act that create the offence of incitement, which suggest that the offence is limited to inciting another person to commit an indictable offence, or an offence punishable by imprisonment. The fact that incitement may be most commonly charged in respect of more serious offending does not mean that there is anything improper or unlawful in the current incitement charges.

26 In so far as Ms Smit advanced unfairness arguments, based on a comparison of the time she has spent in custody with the likely sentence she would receive if convicted of the August charges, those arguments were misconceived. Complaints about the fact that it was her first time in custody, and involved hardship spent in remand quarantine, are also misplaced. That Ms Smit spent any time in custody was entirely of her own choosing. The magistrate granted her bail, albeit on conditions that Ms Smit was unhappy with. Ms Smit chose to contest those conditions from custody, rather than from in the community. Those circumstances do not strengthen her argument that there should be no conduct conditions to her bail.

27 Section 30A of the Bail Act makes it an offence to contravene bail conduct conditions, without reasonable excuse. A breach of s 30A is punishable by a maximum penalty of a fine or 3 months' imprisonment. So, if conduct conditions were imposed that prohibited Ms Smit from committing or inciting further breaches of s 203, and she breached those conduct conditions, then she could be punished with up to 3 months' imprisonment for each Bail Act offence.

28 In addition, were she to commit an offence against s 30A of the Bail Act, that could alter her position in relation to any future bail applications. That is because a breach of s 30A would fall within Schedule 2 of that Act. The consequence of falling within Schedule 2 would be that, on a future bail application, she would have to demonstrate "compelling reasons" for the grant of bail, rather than being entitled to a *prima facie* presumption of bail.¹⁴

¹⁴ Bail Act s 4AA(3).

- 29 Ms Smit argued that it would be unfair or unjust to set conduct conditions that would expose her to the risk of imprisonment, or change her bail category, for engaging in conduct that is otherwise only punishable by a fine. She argued that this would amount to some sort of impermissible “sentence creep”.
- 30 Ms Smit was unable to refer to any authorities in support of those arguments. Her arguments are contrary to the scheme of the Bail Act. There is nothing in s 30A (or elsewhere in the Bail Act) to suggest that the section is limited to accused persons who are charged with indictable offences, or facing a possible sentence of imprisonment. On its face, s 30A applies to all conduct conditions that are breached by an accused person whilst they are on bail. The Bail Act also clearly envisages that accused persons who keep offending, in breach of previous bail conditions, may find it more difficult to get bail on future occasions. There is nothing surprising, or inherently unjust, in an accused person facing more serious legal consequences the more they offend.
- 31 That is not to suggest that it will always be appropriate to set bail conduct conditions in respect of an accused person facing less serious charges. The requirement that conduct conditions “must be reasonable having regard to the nature of the alleged offence and the circumstances of the accused”,¹⁵ requires the court to consider, amongst other things, the fact that breach of a bail conduct condition may result in more serious legal consequences for the accused.
- 32 I am satisfied that, without the imposition of appropriate conduct conditions, the risk of Ms Smit committing, and inciting others to commit, further offences against the Public Health Act whilst on bail would be unacceptable. Not only would the risk itself be high, but the potential consequences of such offending could be very serious, given the current rates of COVID-19 in the community, and the highly transmissible nature of the Delta variant of the virus. In addition, for Ms Smit to encourage large groups of unmasked protesters to gather, in defiance of CHO directions, would present an unacceptable risk of her endangering the safety and welfare of others.

¹⁵ Bail Act s 5AAA(2)(b).

33 For those reasons, I rejected Ms Smit’s argument that there should be no conduct conditions imposed on her.

Appropriate conduct conditions

34 In the alternative, Ms Smit argued that if any conduct conditions were to be imposed, they should be limited, in essence, to those set out in paragraphs 2, 4 and 5 of my orders. She argued that the remaining conditions imposed by the magistrate, or sought by the police, were unreasonable and oppressive.

35 Victoria Police conceded that there were problems with the drafting of a few of the magistrate’s orders, but otherwise sought to maintain substantially the same conduct conditions as had been set by the magistrate.

36 I will start by considering the less contentious aspects of the conduct conditions.

37 First, there was no dispute that Ms Smit should be subject to the relatively standard requirement to live at a specified address whilst on bail, and not to change that address without the court’s permission.

38 Secondly, Ms Smit did not object to the condition that the magistrate had imposed, which prevented her from disclosing on a public forum the names of police officers involved in investigating or prosecuting her. That is not a common bail condition. There is no evidence that Ms Smit herself would resort to harassment of, or violence towards, police officers. However, given that she and RDA have tens of thousands of social media followers, and given the zealotry and violence demonstrated recently by some protestors who apparently share Ms Smit’s beliefs, it would be unacceptable for police to be at risk of harassment or violence for simply doing their jobs. As there is no legitimate reason for Ms Smit to be disclosing those police names other than to assist her defence of these charges, I tightened the existing condition so as to prohibit her from disclosing the police names to anybody other than her lawyers.

39 Thirdly, if conduct conditions were to be imposed, Ms Smit did not object to a condition “not to incite any other persons to pursue a course of conduct that involves

the commission of an offence against s 203.” That is the wording which I ultimately adopted in paragraph 4 of my orders.

40 The magistrate’s orders included several conditions that prohibited Ms Smit from inciting “opposition to the CHO directions”. Victoria Police conceded that those particular conditions did not capture the essence of the offence of incitement, and should be varied. Section 321G of the Crimes Act does not make it illegal for people to hold or promote opinions or beliefs that are contrary to those of the government or public servants. Rather, the offence of incitement involves commanding, requesting, proposing, advising, encouraging or authorising¹⁶ any other person to pursue a course of conduct which will involve the commission of an offence. Paragraph 4 of my orders reflects the wording of the actual offence created by s 321G of the Crimes Act.

41 The remaining conduct conditions sought to be retained by the police were problematic for a variety of reasons:

- (a) Some of them were drafted by reference to the specific content of current CHO directions. Such directions may change over time. Ms Smit’s trial may not take place for many months or more. It would be unreasonable and onerous to impose conduct conditions that she must continue to comply with CHO directions that may have been relaxed or abolished whilst she is on bail awaiting trial.
- (b) For so long as the CHO directions include a curfew for Melbourne residents, Ms Smit will be subject to that curfew. But Victoria Police have not provided a legitimate reason to impose an additional curfew on her, which would start two hours earlier, and end one hour later, than the current curfew imposed on all Melbourne residents. Anti-government protests can and do occur throughout the day. Furthermore, Ms Smit can go online at any time of the day or night, and incite others to engage in unlawful activity. The additional three hours of curfew sought by the police is unreasonable, as well as being likely to be

¹⁶ See Crimes Act s 2A for the definition of “incite”.

ineffectual to stop further offending by her.

- (c) In so far as the police sought to retain conditions that Ms Smit remove certain material from social media accounts and groups controlled “in part or in full” by her, those conditions are both vague and unreasonable. If an account or group is only partially controlled by Ms Smit, she may be unable to procure compliance with the bail condition, despite her best endeavours. In such circumstances, she should not be faced with a possible sentence of 3 months’ imprisonment for breaching her bail condition.

42 Apart from those substantive problems, many of the current conditions are ambiguous in their scope, or appear to overlap with other conditions.

43 I understand that what Victoria Police sought, and what the magistrate tried to set, were detailed conduct conditions aimed at preventing Ms Smit from breaching, or inciting others to breach, CHO directions (and thereby breaching s 203 of the Public Health Act), whilst she is on bail. I agree with the magistrate that Ms Smit presents an unacceptable risk of reoffending and/or endangering the safety or welfare of others, unless appropriate conduct conditions are set. However, it is much simpler and clearer to set conduct conditions in the terms that I have used in paragraphs 3 and 4 of my orders.

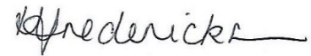
44 If Ms Smit commits or incites others to commit a breach of s 203, without reasonable excuse, whilst on bail, then she will also have committed a breach of s 30A of the Bail Act. In that event, she may be liable to a sentence of imprisonment of up to 3 months for each such breach, and may find it more difficult to get bail on future occasions.

45 The effect of the varied bail conditions is not to prevent Ms Smit from engaging in public debate about government policies. But Ms Smit is not entitled to ignore lawful CHO directions, designed for the protection of the broader community, in order to promote her opinions.

CERTIFICATE

I certify that this and the 11 preceding pages are a true copy of the reasons for ruling of Hollingworth J of the Supreme Court of Victoria delivered on 5 October 2021.

DATED this fifth day of October 2021.



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Associate