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| IN THE SUPREME COURT OF VICTORIA | Not Restricted |

AT MELBOURNE

Criminal Division

S ECR 2022 0331

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| IN THE MATTER OF the *Bail Act 1977* (Vic) |  |
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| and |  |
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| IN THE MATTER of an Application for Bail by BRYCE NEILL |  |

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| JUDGE: | Champion J |
| WHERE HELD: | Melbourne |
| DATE OF HEARING: | 21 December 2022 |
| DATE OF RULING: | 21 December 2022 |
| CASE MAY BE CITED AS: | Re Neill |
| MEDIUM NEUTRAL CITATION: | [2022] VSC 833 |

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CRIMINAL LAW – Application for bail – Charges of home invasion, aggravated burglary, obtaining property by deception, dealing with property suspected of being proceeds of crime, intentionally causing injury, recklessly causing injury, assault and handling stolen goods – Applicant must demonstrate exceptional circumstances justifying grant of bail – Limited prior criminal history as an adult – Prior criminal history as a child for similar offences – Exceptional circumstances satisfied – Unacceptable risk not found – Bail granted on own undertaking with conditions – *Bail Act 1977* (Vic) ss 1B, 3AAA, 3E, 4E.

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| APPEARANCES: | Counsel | Solicitors |
| For the Applicant | Mr R. de Vietri | Matthew Senia, Gallant Law |
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| For the Respondent | Mr D. O’Doherty | OPP |

HIS HONOUR:

Introduction

# By application dated 13 December 2022, Bryce Neill (‘the applicant’) seeks a grant of bail from this court in respect of the following charges:

Senior Constable Kyra McKinnis [‘The McKinnis matters’]

# The McKinnis matters relate to alleged offending which occurred between 20 and 25 April 2022, for which the applicant was charged on 25 April and 12 August 2022. These matters concern allegations of:

## home invasion;

## aggravated burglary;

## obtaining property by deception;

## dealing with property suspected of being proceeds of crime

## intentionally causing injury (two charges);

## recklessly causing injury (two charges);

## assault (common law) (two charges); and

## handling stolen goods.

# These charges appear to represent the most serious allegations before the Court in respect of the applicant at this time.

Senior Constable Jeremy Kelly [‘the Kelly matters’]

# Further charges are brought by Senior Constable Kelly relating to offending between 20 November and 8 December 2022, for which the applicant was charged on 8 December 2022. These matters relate to four charges of contravening conduct conditions of bail.

# At the time of the alleged offending in the informant Kelly matters, the applicant was on summons in the following matters:

Leading Senior Constable Keith Lill [‘the Lill matters’]

# This matter relates to alleged offending on 23 July 2022 for which the applicant was charged on summons on 10 September 2022, in relation to:

## handling stolen goods (two charges); and

## obtaining property by deception. (two charges).

Procedural history

# On 25 April 2022, the applicant was arrested, charged and remanded in custody in the informant McKinnis matters.

# On 27 April 2022, the applicant was granted bail in the Magistrate’s Court in the McKinnis matters.

# On 1 June 2022, the applicant was arrested and remanded in custody for breaching his bail conditions in the informant McKinnis matters. He was granted bail the following day, 2 June 2022, in the Magistrates’ Court.

# On 15 June 2022, the applicant was arrested and charged in unrelated offending, and granted bail the same day in the Magistrates’ Court.

# On 8 August 2022, the applicant was arrested, charged and remanded in custody in an unrelated matter (informant Milijesic).[[1]](#footnote-1)

# On 10 September 2022, the applicant was arrested and charged on summons in the informant Lill matters.

# On 4 November 2022, the applicant pleaded guilty in the Milijesic matter to a number of offences and was sentenced to time served and a community correction order (‘CCO’). The same day, the applicant’s bail in the informant McKinnis matter was varied to increase the applicant’s reporting to daily and for his bail address to be varied for him to live with his mother. The conditions also required him to comply with the directions of Corrections and Australian Community Support Organisation (‘ACSO’).

# On 8 December 2022, the applicant was arrested, charged and remanded in custody in the informant Kelly matters for alleged bail breaches in the McKinnis matters (not presenting during curfew and failing a drug test).

# On 9 December 2022, the applicant was refused bail in the Kelly matter in the Magistrates’ Court on the basis that he posed an unacceptable risk of committing an offence whilst on bail. On the same day, the applicant’s bail was revoked in the McKinnis matters. It follows that the applicant now seeks bail in both matters.

The alleged offending

Informant McKinnis matters

Incident one

# In the early hours of the morning on 20 April 2022, the complainant, Chelsea Jennings, had her car parked in the front yard of her house in Portland when it was broken into and her credit card stolen. The credit card was used over the next four days to make about 40 transactions, worth $1,800.

# CCTV footage depicts a number of transactions taking place in the Hamilton area on the complainant’s credit card, including at a service station where the applicant can be seen with others purchasing a large number of items.

Incident two

# At 4:00am on 21 April 2022, it is alleged that the applicant and Samuel Edwards (‘the co-accused’) attended an address in Casterton where complainants Quinton Slater and David Pullen were staying.

# After arriving at the address, it is alleged that the co-accused kicked the front door in, hitting Mr Slater (who was behind the door) in the chest and forcing him back into the hallway. The co-accused then entered the house and allegedly hit Mr Slater to the face with a baseball bat, causing his nose to bleed, before striking Mr Slater under the chin and to the top of his head with the bat.

# Mr Pullen woke to the commotion and left his bedroom to see intruders in his house. He attempted to remove the co-accused from the house by forcing him out the front door and, in response, the co-accused hit Mr Pullen with the baseball bat. This injured Mr Pullen’s hands as he tried to defend himself.

# A melee ensued, moving from the hallway to Mr Slater’s bedroom. During the fight, the co-accused punched Mr Pullen in the face a number of times, making his eyes and lips swell.

# As this was taking place, the applicant allegedly entered the house and, while inside, recorded some of the incident on his phone. Around this point, a third person who had attended the address with the applicant and the co-accused, Kimeni-Lee Power, left.

# Ultimately, Mr Pullen seized the baseball bat from the co-accused, who then retreated out the front of the property with the applicant. From the front yard, both accused began yelling at the complainants, demanding the CCTV from the house, before then damaging the passenger door of Mr Slater’s car and leaving in an unidentified vehicle.

Arrest and interview

# At 1:00am on 25 April 2022, police went to an address in Hamilton and found the applicant hiding in the cupboard of an upstairs bedroom. He was arrested and transported to the Hamilton Police Station for interview, following which he was remanded in custody. It is unclear whether the applicant provided a commented interview.

Investigation

# On 2 May 2022, the co-accused’s phone was searched and a number of messages were found on it that he had sent to others, including messages stating that he was going to ‘bash’ the complainants and that he ‘fucked them up bad’.

# A voice recording was also found, which captured the co-accused stating that he will ‘just boot the cunt open, I’ll just kick it in and open the door’. Following this, a large bang is reportedly heard in the recording, followed by the complainants being assaulted. In the recording, the complainants identify the applicant and the co-accused by their first names (Sam and Bryce), and towards the final part of the recording, the applicant can reportedly be heard asking ‘who fucked with Sam’s car?’.

# On 3 May 2022, a search warrant was executed on the co-accused’s car, and a baseball bat was found in the rear footwell.

# Finally, Telstra call records of the complainants’ and the co-accused’s mobile phones indicate that they were in Casterton at the time of the alleged offending.

Informant Kelly matters

Background

# On 27 April 2022, the applicant was granted bail in the informant McKinnis matter.

# On 4 November 2022, the applicant’s bail conditions in the informant McKinnis matter were varied with the final conditions requiring the applicant (amongst other things) to reside at his mother’s house in Hamilton, be subject to a curfew between 8:00pm and 7:00am, and not use a drug of dependence.

Incident one

# On 20 November 2022, police went to the applicant’s address between 2:06am and 2:14am to check if the applicant was at home. The applicant was not there.

# On 21 November 2022, the applicant reported to the police station in accordance with his bail conditions. When asked about his absence from his house during curfew hours the day prior, the applicant stated he was on sleeping medication and did not wake up when police knocked.

# Police spoke to the applicant’s mother, Samantha Dance (who the applicant was residing with), on 22 November 2022. The applicant’s mother confirmed the applicant was on new medication, and said that she had not been at the house on 20 November 2022. During this conversation, it was agreed that the applicant would leave his blind up so that police could confirm if he was home during the early hours of the morning.

Incident two

# At 12:32am on 6 December 2022, police went to the applicant’s house to check if the applicant was home. He was not.

# On 7 December 2022, police spoke to Ms Dance once more, who said she was home on 6 December 2022 (during the curfew check), but was sleeping heavily due to medication she was taking. She indicated that, at times, the applicant was not home when she woke up in the morning, and reportedly told police that she suspects he is sneaking out when she is asleep.

Incident three

# On 7 December 2022, police went to the applicant’s house for a curfew check. Another person, Belinda Scott, answered the door and told police that neither the applicant nor Ms Dance were home.

Incident four

# At 6:00pm on 8 December 2022, the applicant went to the Hamilton Police Station and was arrested. He completed a drug test which showed the presence of amphetamine, methylamphetamine and cannabis. It is unclear from the brief of evidence whether the applicant made any comment when interviewed. The applicant was charged and remanded in custody.

Informant Lill Matter (summons)

Transaction one

# Some time between 11:30pm on 22 July 2022 and 5:00am on 23 July 2022, the complainant, Cara Lamanna’s, car was stolen from her driveway. Inside the car was a purse containing her bank cards and passport.

# At around 5:00am 23 July 2022, police were called to an address in Torquay and found the car fully aflame.

# At 7:19am on 23 July 2022, police allege that the applicant purchased a $2.50 air freshener in Norlane, using a card stolen from Ms Lamanna’s car.

# A screenshot of the complainant’s banking application showed the transaction and a person resembling the applicant on CCTV footage making the purchase.

Transaction two

# On 23 July 2022, another complainant, Mason McKiterick, reported his vehicle had been broken into at Swamp Gum Drive in Torquay, about three kilometres from the address of Ms Lamanna. Mr McKiterick stated that his wallet containing his bank cards had been stolen from the car along with other personal items.

# On 23 July 2022 at around 7:34am, Mr McKiterick provided police with details showing a $40.00 purchase using his credit card at a milk bar on Sharland Road.

# CCTV footage from the time shows a person resembling the applicant purchasing a vape pen with Mr McKiterick’s bank card.

Arrest

# Police reviewed the CCTV footage from both transactions, however, could not identify the person depicted.

# On 8 August 2022, the applicant was arrested in relation to the Milijesic matter. The informant recognised the applicant while in custody as the person from the above CCTV and he was interviewed.

# During the course of the interview the applicant identified himself as the individual in the CCTV. He also made admissions to using the cards, but could not remember how he acquired them. The applicant rejected suggestions he was involved in the theft of Ms Lamanna’s car or the theft of Mr McKiterick’s wallet.

# The applicant was charged with

# Handling stolen goods (two charges); and

# Obtaining property by deception (two charges).

# The matter is next listed on 1 March 2023 at the Geelong Magistrates’ Court for mention.

The applicable legislation

# In determining an application for bail, the Court is required to have regard to the guiding principles as set out in s 1B(1) of the *Bail Act 1977* (‘the Act’).[[2]](#footnote-2)

# Because the applicant is accused of a Schedule 2 offence (contravene a condition of bail),[[3]](#footnote-3) which is alleged to have been committed while on bail for a Schedule 2 offence (home invasion),[[4]](#footnote-4) bail must be refused unless the Court is satisfied by the applicant that exceptional circumstances exist that justify the grant of bail.[[5]](#footnote-5) In considering this test, the Court must take into account the surrounding circumstances that are relevant to the matter – including those listed in s 3AAA(1) of the Act.[[6]](#footnote-6)

# If satisfied at step 1 that exceptional circumstances exist, the Court must apply the unacceptable risk test.[[7]](#footnote-7) Bail must be refused if the Court is satisfied by the prosecutor that there is a risk that the applicant would engage in any of the conduct outlined in s 4E(1)(a) of the Act, and that such a risk is an unacceptable one.[[8]](#footnote-8) In applying this test, the Court must again consider the surrounding circumstances, and give thought to whether there are any conditions of bail that may be imposed to mitigate the risk so that it is not unacceptable.[[9]](#footnote-9)

# The applicant identifies as an Aboriginal person.[[10]](#footnote-10) Under s 3A of the Act, in making a determination in relation to an Aboriginal person, the Court must take into account any issues that arise due to the person’s Aboriginality, including the person’s cultural background, such as their ties to extended family or place, as well as any other relevant cultural issue or obligation.

The applicant’s personal circumstances

# The applicant is an 18 year-old Aboriginal male. He had a fraught childhood, where he was exposed to frequent drug use in the family home. He had little connection with his father, who was imprisoned when he was very young. The applicant was raised away from his parents from the age of 14, following intervention from the Department of Families Fairness and Housing (‘DFFH’).

# The applicant reports symptoms of depression and anxiety and a suicide attempt in February of this year. He has also reportedly been diagnosed with attention deficit hyperactive disorder (‘ADHD’), which is untreated. Finally, the applicant appears to have epilepsy based on the medication he is said to be prescribed (Carbamazepine) and the bail order made on 25 November 2022.[[11]](#footnote-11)

Criminal history

# The applicant has a limited criminal history as an adult.[[12]](#footnote-12) His adult convictions are confined to the following dispositions:

## **June 2022:** the applicant was sentenced to a fine of $400 in the Geelong Magistrates’ Court for offences of shop-stealing and committing an indictable offence whilst on bail.

## **November 2022:** the applicant was sentenced in the Geelong Magistrates’ Court to 88 days’ imprisonment (time served) and a 12-month CCO for offences of theft; possessing a drug of dependence (MDMA); committing an indictable offence on bail (two charges); obtaining property by deception and criminal damage.

# The applicant has a relevant prior criminal history as a child, including the following dispositions:

## **April 2019:** the applicant was sentenced in the Hamilton Children’s Court to a without-conviction period of probation for 12 months for offences of attempting to commit an indictable offence; unlawful assault; theft of a motor vehicle; aggravated burglary; burglary; obtaining property by deception, non-prohibited person possessing category A long-arm without license and other offences.

## **December 2021:** the applicant was sentenced in the Hamilton Children’s Court to a Youth Supervision Order for a period of 12 months without conviction for various offences, including burglary (four charges); handling stolen goods, theft; discharging a missile to cause injury and other offences.

## **April 2022:** the applicant was sentenced in the Hamilton Children’s Court to 35 days in a Youth Justice Centre (time served) for theft.

The applicant’s contentions

# The applicant relies on the following matters, in combination, to demonstrate exceptional circumstances that justify the grant of bail.

Strength of the prosecution case

# The applicant submits that there are clear weaknesses in the prosecution case and a number of triable issues. The applicant is charged on a complicity basis, which he submits can be an often challenging evidentiary threshold. It is not alleged that the applicant was the primary offender, nor that he assaulted the complainant – both of which may be relevant in mitigation, especially in comparison to the co-offender.

Criminal history

# The applicant has some history in the Children’s Court, however, submits that this could not be described as ‘extensive’.[[13]](#footnote-13) Although noting that the applicant was sentenced to a term of imprisonment of 88 days whilst on bail for the McKinnis matter, the applicant submits he has no other criminal matters on foot.

Bail compliance history

# The applicant submits that the bail conditions imposed in the McKinnis matter were overly onerous – noting that bail is not punishment and that any conditions imposed should be no more than is necessary to achieve the purposes in s 5AAA of the Act. Nevertheless, the applicant had been reporting to the Hamilton Police Station in accordance with his bail conditions right up until his arrest – demonstrating his capacity to comply with orders of the court. In addition, the applicant submits that a reasonable excuse has been provided for at least some of the alleged bail breaches in the Kelly matter, namely, that he had taken sleeping medication and did not hear police when they came to his house during the night.

Family support and stable accommodation

# The applicant submits he has suitable and stable accommodation at 58 Strachan Street in Hamilton. This is the residence of a family friend, Jessica Patton.[[14]](#footnote-14) Ms Patton is a 35 year old school teacher and single-mother. She lives with her three children, aged: ten, eight and four. The applicant submits that Ms Patton has no criminal history and will support him to comply with any bail conditions imposed, along with any conditions of his CCO.

# Ms Patton gave evidence before the Court at the hearing of the application. She affirmed her qualifications as an early childhood educator, having previously worked as an administration person with a firm of solicitors in the region. She explained to the Court her attitude to drugs, that she has children in the house and that she has a strong attitude towards the abuse of drugs.

# Ms Patton told the Court that she understands that strict conditions could be applied to the applicant should he receive a grant of bail, including a curfew, no use of drugs at the house and the banning of certain associations. She indicated that she was willing to assist the applicant, but also willing to assist the police. She said that if she became aware of the applicant using drugs, she would be prepared to report that matter to the police.

# I found Ms Patton to be a credible witness, who appears to be prepared to support the applicant should he receive a grant of bail.

Employment

# The applicant is engaged with the Wadamba Prison to Work Program, a program designed to reduce the number of Aboriginal people in prison. Wadamba assist Aboriginal men aged 18 – 35 with finding employment through access to services, career guidance and cultural support. Wadamba aims to target early intervention in order to direct young Aboriginal people away from offending. Andrew Vella, the applicant’s caseworker, has indicated that 22 potential employers may be available to the applicant, should he be released on bail. Mr Vella has stated that the applicant has shown commitment to the program, has been attending sessions while incarcerated and that the service will continue to assist him should he be granted bail.

Special vulnerability

# The applicant submits that he has a number of special vulnerabilities. These include, his Aboriginality, his mental health and his physical health.

# The applicant submits that his upbringing was a fractured one. His father was in prison from when he was very young and his mother was not able to provide a proper caring environment. Nevertheless, he was raised by his mother until the age of 14, at which time he and his sister were removed from their mother’s care by DFFH and put into the care of their maternal grandfather. Prior to his removal, the applicant was exposed to an environment where drug use was prevalent, as was the presence of antisocial characters in the house.

# The applicant submits that he was diagnosed with ADHD at a young age and has never been able to successfully manage the condition. This diagnosis has been coupled with a history of reported depression and anxiety which saw the applicant attempt suicide in February 2022, following his mother’s incarceration in late 2021.

# The applicant’s physical health is also poor. In 2021 he was reportedly in a car accident and suffered six fractures to his spine – something which continues to cause him constant and acute pain. There also appear to be allusions in the material that the applicant has epilepsy, however, no further details have been provided by regarding this.

# The applicant is prescribed diazepam and mirtazapine for his mental health, and carbamazepine to control his seizures.

Availability of treatment or bail support services

# The applicant is receiving support through Wadamba, Corrections and the resident of his proposed bail address, Ms Patton.

Delay and likely sentence

# The applicant notes that the committal hearing for the McKinnis matter is listed on 3 March 2023, and that backlogs caused by COVID-19 have created a delay such that the applicant may spend more time in custody than any sentence ultimately imposed. Were it to be the case that this matter went to trial, the applicant submits that this would not be before 2024.

# In these circumstances it is argued delay is a strong factor supporting the grant of bail, especially when viewed in conjunction with the purported weaknesses in the prosecution case and the likely sentence.

# Relatedly, the applicant submits that given his age and the vulnerabilities described above, it is likely that a term of detention at a Youth Justice Centre is open to be imposed rather than a term of imprisonment. Accordingly, it is submitted that any further time on remand may take place when the applicant will not be sentenced to a term of imprisonment.

COVID-19 and onerous conditions in custody

# The applicant describes his experiences in gaol as ‘horrific’.[[15]](#footnote-15) He has had to deal with the ongoing effects of COVID-related restrictions including lockdowns, lack of therapeutic opportunities and quarantine, which have now been in place for an extended period. He also reports being targeted by other prisoners and being constantly harassed and assaulted – often giving up his food to avoid such treatment.

# These things have not helped with the applicant’s mental health or rehabilitation for drug use. Those measures that are available in prison are submitted to be incomparable to the level of treatment available were the applicant to be released on bail. This is submitted to be particularly so given the conditions of the CCO the applicant has in place, which may provide particularly strong support for him in the community. Accordingly, the applicant submits that time in custody is unusually onerous for the applicant.

Unacceptable risk

# It is submitted that any unacceptable risk alleged by the respondent can be moderated to an acceptable level by the imposition of conditions, in conjunction with the support the applicant will receive from Ms Patton, Corrections and Wadamba.

The respondent’s contentions

# The application is opposed by the respondent on the basis that the applicant has not discharged the burden of satisfying the Court as to the existence of exceptional circumstances that justify the grant of bail. Further, even if exceptional circumstances were to be found, the respondent submits that the applicant – if granted bail – poses an unacceptable risk of endangering the safety of any person and committing an offence.

# In response to the applicant’s contentions, and in addressing the surrounding circumstances and unacceptable risk, the respondent relies on the following.

Strength of the prosecution case

# The respondent refutes the applicant’s assessment of the prosecution case, in particular, that the features of the alleged offending will make the charge of home invasion difficult to contest. The parties took a baseball bat to the house, which suggests a degree of premeditation, and both appear to be of one mind regarding the assault of the residents. Indeed, the respondent relies on the fact that the applicant filmed the assault on his phone as evidence of premeditation, and, importantly for the question of complicity, that he was intentionally ‘adopting’ what was taking place in his presence.[[16]](#footnote-16)

# Though the applicant has queried whether he even entered the house, the respondent relies upon his ‘general dishonesty’ and the fact that his detailed account of his movements that evening has been disproven, to suggest that this claim carries little weight.

Bail compliance history

# The respondent submits that, contrary to the submissions of the applicant, the conditions placed on the applicant prior to his remand were ‘fair’ and ‘firm’.[[17]](#footnote-17) Indeed, the respondent notes that the magistrate provided ample warning that any further contraventions of bail would lead to the applicant returning to custody, something the applicant said he understood. The respondent submits that, given the nature of the alleged offending whilst on bail, this demonstrates the applicant’s lack of concern for court orders and places him in a category of offender who is likely to continue offending should he be granted bail.

# The respondent submits that the applicant has been committing further offences whilst on bail and that the charge of breach of a bail condition by drug use is at least indicative of the applicant offending by using a drug of dependence.[[18]](#footnote-18)

# The excuse provided by the applicant for his failure to present at his door during curfew hours (that he was using sleeping medication which meant he did not hear the police) is submitted to be implausible and evidence of dishonesty.

Family support and stable accommodation

# The respondent submits that the proposed address is unsuitable. Ms Patton gave evidence at a revocation application made in the Magistrates’ Court on 9 December 2022 and the magistrate did not find her address to be a suitable one to which the applicant could be bailed. Accordingly, the respondent submits that it is not a suitable address in this application.

# On 9 December 2022, police went to Ms Patton’s address and found it to be in poor condition – observing a car with no number plates parked in the driveway. They spoke to a neighbour who said he did not know Ms Patton well, but that a person by the name of Jindara Austin (who is a known drug user) was often at the address. This, the respondent submits, would be a poor person for the applicant to associate with, given his tendency to offend in the company of others who lead him astray.

# I note that at the hearing of the application, Ms Patton was questioned about the presence of Mr Austin at her house. Her evidence was that he had not been present at the property for some three weeks, and indicated that she would be prepared to effectively ban him from entry if that would assist this application.

# The address also has three young children living at it and this too, it is submitted, makes it inappropriate as a bail address due to the regular nightly checks required by the applicant in order to comply with his bail conditions.

Availability of treatment or bail support services

# The respondent submits that the applicant is currently subject to a Youth Justice Supervised Bail plan until 28 March 2023, which requires weekly appointments. It is submitted that the applicant has not been complying with these requirements. On 8 December 2022, the informant received an email detailing the applicant’s poor attendance and inability to be contacted by phone.[[19]](#footnote-19) The respondent submits that this demonstrates that the applicant refuses to engage properly with those conditions ordered by the court and so is a higher risk of breaching his bail conditions.

Unacceptable risk

Committing an offence whilst on bail

# The respondent submits that the applicant has three prior convictions for committing indictable offences whilst on bail and one prior conviction for contravening a condition of bail. In addition, the applicant also has four further pending charges of contravening conditions of bail (informant Kelly). These charges are aggravated by the fact that they were allegedly committed while the applicant was subject to a CCO made on 4 November 2022. The above offending raises concerns with the respondent that the applicant is simply unable to comply with orders made by the court and that this leaves him at serious risk of re-offending should he be granted bail.

Failing to surrender into custody in accordance with the conditions of bail

# The respondent submits that the applicant is a ‘flight risk’ as he has been known to run from police.

# The respondent also submits that the applicant is at risk of continuing to use drugs of dependence.

Analysis and conclusions

Exceptional circumstances

# It is common ground that the exceptional circumstances test applies to this application. The applicant relies on a combination of factors to demonstrate exceptional circumstances.

# As to the strength of the prosecution case, while the applicant asserts that there are clear weaknesses and triable issues in the prosecution case, I do not regard the case as being inherently weak. In respect of the informant McKinnis matters, being the most serious charges facing the applicant, the prosecution has pointed to some evidence appearing to show a degree of planning and premeditation on the part of the applicant, as well as the applicant’s complicity in the alleged events.

# That said, although these charges are serious, it appears to me that the home invasion, aggravated burglary and related offences (being the most serious charges in this matter) involve matters which focus on the activity of the co-accused rather than the applicant himself. This could ultimately prove to be a mitigating factor in the applicant’s favour.

# The anticipated delay in the resolution of these matters is a strong factor supporting the grant of bail. I consider that is an appreciable risk that the period of remand custody may exceed any sentence ultimately imposed. The delay factor is particularly concerning given the applicant’s young age, and the onerous conditions that he is facing in custody.

# In all the circumstances, I accept that the exceptional circumstance has been satisfied.

Unacceptable risk

# As to the question of risk, it must be acknowledged that applicant’s criminal history, as well as the allegations before the Court, involve a multiple instances of re-offending whilst on bail, as well as breaches of bail conditions and court orders. It is asserted by the prosecution that there is a high risk that the applicant will continue breach bail and engage in re-offending into the future.

# The relevant question for the purposes of this Court is not whether risk can be eliminated, but rather, whether risk can be ameliorated to an acceptable level by the imposition of bail conditions. A number of factors that have been argued, of course, in the exceptional circumstance as part of the argument are relevant to the assessment of risk, and I take those into account.

# In my opinion, the history of the applicant in respect of his previous offending, as well as the allegations the subject of this application, demonstrate the applicant’s lack of respect for court orders and result in a lack of confidence in further bail being granted.

# However, in all of the circumstances, taking into account everything that is put before me, there are two salient factors that alleviate risk back to an acceptable level, whilst acknowledging the failures of the applicant in the period leading up to this point.

# First, I accept the evidence of Ms Patton that she is able to provide assistance to the applicant in the way that she has described. As I have said, I consider that her evidence is credible, and she is a well-meaning person and appears to be sincerely dedicated to providing the applicant with the support and supervision that he requires if released on bail. The second factor which, in my view, is capable of containing risk is the applicant’s engagement with the Wadamba Prison to Work Program.

# In light of those two factors in particular, I consider that a series of bail conditions can be imposed which are capable of mitigating the risk so that it is not unacceptable.

# Accordingly, I will order that the applicant be admitted to bail on his own undertaking, and on the following special conditions:

## He resides at [address] (‘place of residence’) and notify the Informant within 24 hours of any proposed change of address.

## He remain at the place of residence between the hours of 8:00pm and 7:00am each day for the duration of bail unless in the course of employment

## He presents himself at the front door of the place of residence during those curfew hours if and when called upon by a member of Victoria Police to do so.

## He not use alcohol or use a drug of dependence within the meaning of the *Drugs, Poisons and Controlled Substances Act 1981* without lawful authorisation under that Act.

## He provide a sample of his breath, urine or oral fluid for testing if required to do so by any member of Victoria Police.

## To contact Hamilton Corrections within two business days of his release to reengage with the order and comply with all conditions imposed under the community corrections order made on 4 November 2022.

## He report Monday, Wednesday and Friday to the Officer in Charge of the Police Station at Hamilton, or his or her nominee, between the hours 7:00am and 8:00pm.

## He complies with all lawful directions of any officer of Youth Justice and attend all appointments as directed by Youth Justice in accordance with his Youth Justice Plan.

## He comply with directions of Mr Vella of Wadamba in respect of participation in the prison to work program.

## He not contact, directly or indirectly, any witness for the prosecution, except the informant or his or her nominee.

## He not contact, directly or indirectly, any co-accused, including Mr Samuel Edwards, for the duration of the bail period.

## He not contact or communicate with, directly or indirectly, Mr Jindara-Lee Austin.

## He not leave the State of Victoria.

## He reappear before the Court for judicial monitoring (by WebEx or in person) to review his compliance with this order at 9:30am on 17 January 2023, and any further dates this Court appoints during the course of this order.

# **NOTE:**

# On 17 January 2022, the Court granted an application for the above grant of bail to the applicant to be revoked.



1. The charges against the applicant in this matter include: theft; possess drug of dependence (MDMA); commit indictable offence whilst on bail; obtain property by deception and criminal damage. [↑](#footnote-ref-1)
2. *Bail Act 1977* (Vic) s 1B(2). [↑](#footnote-ref-2)
3. Ibid sch 2, item 30. [↑](#footnote-ref-3)
4. Ibid sch 2, item 22(c). [↑](#footnote-ref-4)
5. Ibid s 4AA(2)(c)(i), 4A(1)-(2). [↑](#footnote-ref-5)
6. Ibid s 4A(3). [↑](#footnote-ref-6)
7. Ibid s 4D(1)(a). [↑](#footnote-ref-7)
8. Ibid ss 4E(1)-(2). [↑](#footnote-ref-8)
9. Ibid s 4E(3). [↑](#footnote-ref-9)
10. Affidavit in Support [6]. [↑](#footnote-ref-10)
11. Further information regarding this was requested from the applicant on 14 December 2022, but remains outstanding. See Affidavit in Support, Exhibit MS-4 for an excerpt of the bail orders which states that the applicant is on the epilepsy medication Levi. [↑](#footnote-ref-11)
12. See Affidavit in Support, Exhibit MS-6 for the applicant’s criminal record. [↑](#footnote-ref-12)
13. Affidavit in support, [47]. [↑](#footnote-ref-13)
14. Note Ms Patton’s name has also been spelled Paton in email correspondence 13 December 2022. [↑](#footnote-ref-14)
15. Affidavit in Support, [38]. [↑](#footnote-ref-15)
16. The respondent relies on *Al-Assadi v R* [2011] VSCA 1110 for this proposition. [↑](#footnote-ref-16)
17. Affidavit in response, [21]. [↑](#footnote-ref-17)
18. Though, this is uncharged offending. [↑](#footnote-ref-18)
19. See Affidavit in Response, Exhibit KAW-6 for an email confirming this. [↑](#footnote-ref-19)