



- 3.1. The applicant was convicted after a lengthy joint criminal trial. He was unrepresented.<sup>1</sup> His co-offender, who was represented, is a well known public and political figure. She faced two other more serious charges. He had been on bail for nearly 2 years up to the return of the jury's verdict.
  - 3.2. The specific conduct of which the applicant was convicted - fraudulently seeking to register a political party - has not been the subject of any previous criminal prosecution.
  - 3.3. The fact that this conduct was specifically caught by section 154 of the *Electoral Act* (Qld), but that the DPP elected to not proceed with that charge.
  - 3.4. On the material placed before it, the Court of Appeal found that the basis for the prosecution was *prima facie* flawed, subject to certain assumptions and what the DPP might be able to point to in the evidence led at trial. The appellate process has not yet required the DPP to do so; indeed it has sanctioned her position of not doing so.
  - 3.5. There is a substantial argument (indeed, it is submitted, it is unanswerable) that there is no admissible evidentiary answer to this flaw from any of the material before the trial judge: **Appendix 1**.
  - 3.6. The applicant was sentenced to the same penalty as his co-accused. The sentencing procedure was patently flawed in material respects. First, some important mandatory factors were not taken into account. Second, a proper exercise of comparison with other cases was not undertaken. Third, there was no identification or distinction made of the obvious differences between the applicant and his co-offender.
  - 3.7. In refusing the applicant bail, the courts below have embraced a test for the exercise of discretion which has not been approved of by this or any other court, viz. that he demonstrate that he is "almost certain" to succeed at his ultimate appeal. Secondly, both Courts failed to apply *any* test; for example there is no actual identification of the applicant's prospects of success as being relevantly 'uncertain', if that is in fact to be the test. Thirdly, the weaknesses in the sustainability of the verdict were not weighed in the exercise of discretion in the applicant's case.
  - 3.8. The test for release on bail following a jury verdict is unsettled in the jurisprudence of this Court and most courts in the State judicature. The parameters of the test in this country differ considerably from that of other jurisdictions e.g. Canada, New Zealand and the United States: **Appendix 2**.
  - 3.9. The applicant's case, connected as they are to the fate of his more well known co-offender, has attracted considerable public interest.
4. In determining whether to grant bail following a jury verdict, there is a need to maintain a balance between the competing dictates of enforceability (the due administration of justice)

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<sup>1</sup> Exhibit AB-3 p.2.

and reviewability (the appellate process not being rendered nugatory).<sup>2</sup> The exercise of this discretion is a function ancillary to the appellate jurisdiction of the court. This discretion was not properly exercised by the courts below. The Queensland Court of Appeal sufficiently erred to enliven this Court's own jurisdiction, to preserve the subject matter in the litigation from being rendered nugatory.<sup>3</sup>

5. In this regard, there is nothing inconsistent between the approaches taken by this Court and that which has been arrived at after legislative change, for example in Canada<sup>4</sup>:

*Malvaso v The Queen* (1989) 8 Leg Rep C1 per Deane J:

"This Court's inherent power to preserve from futility the exercise of its jurisdiction to grant special leave to appeal extends to enable it to grant bail in a case such as the present. Were it otherwise, the Court would be powerless to prevent the partial erosion of the subject-matter of the proposed appeal in the period pending the hearing of the application for special leave.

...

...there exists any significant possibility that the applicant might not be required to serve a sentence of imprisonment."

*Doggett v The Queen* (unreported) B54/2000 (2 November 2000) per Callinan J:

"I do not see how you can respect a system that puts incarceration of a person who, ultimately, might turn out to be acquitted as being in the public interest. I just do not understand it. Now, it might well be that he will not be acquitted. It might well be that he will not even get a retrial. It might be that he will get a retrial and he will be found guilty again, but I think, and my inclination is, with respect to that matter, that it does nothing for the system of justice that somebody might be locked up – might turn out to have been locked up."

### Course of proceedings

6. In or about July/August 2001, the Applicant was charged with one count of fraud framed under section 408(1)(f) of the *Criminal Code* (Qld). He was admitted to bail pending trial.<sup>5</sup> On 20 August 2003 the Applicant was convicted of that offence after a jury trial in the District Court at Brisbane<sup>6</sup> and he was sentenced by Wolfe CJDC to 3 years imprisonment.<sup>7</sup>

<sup>2</sup> *Marotta v The Queen* (1999) 160 ALR 525 at [18] (9); cf. *R v O'Connor*, (1997-03-26) BCCA CAV022299, Court of Appeal for British Columbia.

<sup>3</sup> *House v The King* (1936) 55 CLR 499 at 503; Section 35A: *Judiciary Act* (Cth); *Morris v The Queen* (1987) 163 CLR 454 at 475; *Carson v John Fairfax & Sons* (1991) 173 CLR 194 at 218; *United Mexican States v Cabal & Ors* (2001) 209 CLR 165 at 181.

<sup>4</sup> *R v Farinacci* (1992-12-14) ONCA c10797; C13886; C11372 (Court of Appeal for Ontario – Dubin CJO, Catzman, Arbour, Osborne and Doherty JJA):  
The concerns reflecting the public interest, as expressed in the case-law, relate both to the protection and safety of the public and to the need to maintain a balance between the competing dictates of enforceability and reviewability. It is the need to maintain that balance which is expressed by reference to the public image of the criminal law, or the public confidence in the administration of justice."

<sup>5</sup> **Exhibit AB -3**, Court of Appeal Record Book, p. 4.

<sup>6</sup> **Exhibit AB -3** p.17.

<sup>7</sup> **Exhibit AB -3**, pp 9-15: Sentencing remarks.

The prescribed maximum penalty was 5 years imprisonment.<sup>8</sup> On 25 August 2003, the Applicant lodged an appeal against his conviction and an application for leave to appeal the sentence. It is presently listed for oral argument on 5 and 6 November 2003.<sup>9</sup> On 1 September 2003, the Applicant was refused bail by a single justice of Supreme Court of Queensland (Chesterman J).<sup>10</sup> On 15 September 2003 the Queensland Court of Appeal (Jerrard JA, Dutney & Philippides JJ) dismissed the Applicant’s appeal from the decision of Chesterman J and also refused a fresh application before that Court.<sup>11</sup> The Applicant forthwith filed an application for special leave to this Court with a chamber summons applying for bail pending the hearing of his application for special leave to appeal.

### Jurisdiction of this Court

7. This Court has jurisdiction to grant the applicant bail pending the determination of his application for special leave:<sup>12</sup>

“The Court has power, therefore, to stay orders in criminal cases – even orders concerned with sentences of death or imprisonment. When the Court grants bail in a criminal case it does so as an incident in the course of staying the order that is the authority for detaining the prisoner and to make the stay order effective. If there is an application for special leave to appeal or an appeal under s73 of the Constitution against an order of imprisonment, this Court has jurisdiction to stay that order. It also has jurisdiction to grant bail so as to make the stay order effective. Although orders staying proceedings or admitting to bail make the *appellate* jurisdiction of the Court

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<sup>8</sup> Section 408C(2) *Criminal Code* (Qld).

<sup>9</sup> **Exhibits PM-7 and PM-10.**

<sup>10</sup> **Exhibit AB -4:** decision of Chesterman J: *Ettridge v DPP; Hanson v DPP* [2003] QSC 149

<sup>11</sup> **Exhibit AB -1:** decision of Court of Appeal: *Ettridge v DPP* [2003] QCA 410

<sup>12</sup> *Beliajev v The Director of Public Prosecutions* (1991) 173 CLR 28 at 30 per Brennan J “In *Chamberlain v The Queen [No.1]* (1983) 153 CLR 514 at 518, I expressed the opinion that:

“the power of this Court to grant bail rests upon the inherent power to preserve from futility the exercise of the Court’s jurisdiction to grant special leave to appeal and allow an appeal thereafter.”

In *Federal Commissioner of Taxation v Myer Emporium Ltd [No.1]* (1986) 160 CLR 220 at pp.222-223, Dawson J said in reference to an application for stay pending the hearing of an appeal.

“Special circumstances justifying a stay will exist where it is necessary to prevent the appeal, if successful, from being nugatory. Generally, that will occur when, because of the Respondent’s financial state, there is no reasonable prospect of recovering moneys paid pursuant to the judgment at first instance. However, special circumstances are not limited to that situation and will, I think, exist where for whatever reason, there is a real risk that it will not be possible for a successful appellant to be restored substantially to his former position if the judgment against him is executed

*Re Pinkstone’s Applications* [2003] HCA 46 per Kirby J (27 May 2003)

“This Court has the power to grant bail as an incident of its appellate jurisdiction conferred by s73 of the Constitution. Pursuant to the Constitution, the Court has the authority to do all things necessary to make its appellate jurisdiction effective, including the power to stay orders that are, or might be, the subject of its appellate jurisdiction and to grant bail so as to make an appeal effective.”

effective, the orders are made in the *original* jurisdiction of the Court.<sup>13</sup>

### The test to be applied

8. Substantial reliance is placed upon the Applicant's written submissions before the primary judge<sup>14</sup> and the Court of Appeal<sup>15</sup> as to the proper test to be applied in determining an application for bail following a conviction. It has been repeatedly said that "exceptional circumstances" need to be established by an applicant for bail pending an application for special leave before this Court.<sup>16</sup> In *Cabal*, the Court embraced the explanation in *Ex parte: Maher* [1986] 1 Qd R 303:

"In determining whether to stay an order of imprisonment and give bail to the applicant or appellant, the court must consider not only the position of the applicant or appellant but also the position of the Crown. To stay and order of imprisonment before deciding the appeal is a serious interference with the due administration of criminal justice. As Thomas J pointed out in *Ex parte Maher*, to allow bail pending the hearing of an appeal after a person has been convicted and imprisoned:

- ?? Makes the conviction appear contingent until confirmed;
- ?? Places the court in the invidious position of having to return to prison a person whose circumstances may have changed dramatically during the period of liberty on bail;
- ?? Encourages unmeritorious appeals;
- ?? Undermines respect for the judicial system in having a "recently sentence man walking free";
- ?? Undermines the public interest in having convicted persons serve their sentences as soon as is practicable.

Consequently, the doctrine of this Court is that in a criminal case an order granting bail will only be made if there are exceptional circumstances."

9. However, the Courts in *Maher* or *Cabal* did not purport to prescribe all of the features that might amount to "exceptional circumstances" in this context. *Maher* was concerned with the approach to be taken in respect of an application after a person had convicted after a regular trial.<sup>17</sup> It has been demonstrated below that the sentencing procedure in respect of the Applicant was not at all 'regular'.<sup>18</sup> In *Cabal*, which was determining extradition bail,<sup>19</sup> the Court based the following conclusion on a review of the authorities:<sup>20</sup>

<sup>13</sup> *United Mexican States v Cabal & Ors* (2001) 209 CLR 165 at 181 per Gleeson CJ, McHugh and Gummow JJ.

<sup>14</sup> **Exhibit AB -3** p.79-92.

<sup>15</sup> **Exhibit AB -5**, pp. 2-5; paras [6] – [11]

<sup>16</sup> *United Mexican States v Cabal & Ors* (2001) 209 CLR 165 at 181. Also see footnote 51 of the judgment which cites some of the relevant cases.

<sup>17</sup> [1986] 1 Qd R 303 at 307 per Thomas J: "It is necessary for this Court to consider the proper approach towards an application for bail made by an offender who has been regularly convicted." See also at 310. Moynihan J agreed. See also *R v Khan* AR98-30-03621 (11 February 2000) Court of Appeal of Manitoba (Huband, Helper and Kroft JJA) where bail was granted to Mr Khan post-conviction of murder, where the trial was noted as "imperfect".

<sup>18</sup> **Exhibit AB -3** pp.9-15 Sentencing Remarks Wolfe CJDC; Applicant's submissions as to the flaws in it: **Exhibit AB-3**, pp 79-92; paras [13] – [36]

“Consequently, the doctrine of this Court is that in a criminal case an order granting bail will only be made if there are exceptional circumstances.

The history of decisions of this Court shows that ordinarily it will grant bail in criminal cases only if two conditions are satisfied. First, the applicant must demonstrate that there are strong grounds for concluding that the appeal will be allowed. The grant of special leave will often – perhaps usually – indicate that there are strong grounds for so concluding. Secondly, the applicant must show that the sentence, or at all events the custodial part of it, is likely to have been substantially served before the appeal is determined. Thus, in *Marotta v The Queen*, Callinan J granted bail after special leave had been granted. His Honour thought that substantial parts of the custodial sentences were likely to have been served and possibly completed in one case by the time the Court gave its decision on the appeal. Furthermore, the grant of special leave indicated that the application had at least reasonable prospects of succeeding in their appeals.”

10. The term “exceptional circumstances” has only ever been intended as a label and not a description.<sup>21</sup> What might amount to circumstances sufficiently exceptional such as to justify the grant of bail pending appeal cannot be easily or readily distilled from the authorities.<sup>22</sup> A perusal of the authorities cited in *Cabal* and other more recent decisions of this Court reveal several important premises.

11. Firstly in exercising the discretion, a detailed regard as to the factual circumstances of each case is necessary:

*Robinson v The Queen* (1991) 65 ALJR 519 at 519 per Gaudron J:

“Because the jurisdiction which is invoked is that which is inherent and which exists to serve the ends of justice and to perfect the administration of justice, the circumstances which might properly be described as exceptional and sufficiently exceptional as to justify the grant of bail pending appeal must, in my view, relate to the proceedings to be conducted and their relationship with the sentence being served.”

*Velevski v The Queen* (2000) 18 Leg Rep C2 per Gleeson CJ:

“There has been no dispute between counsel as to the principles to be applied in dealing with an application such as this. They are explained in cases such as *Robinson v The Queen* (1991) 65 ALJR 519, *Chew v The Queen [No 2]* (1991) 66 CLJR 221 and *Parsons v The Queen* (1998) 72 ALJR 1325. Of Course, the statements of principle in those cases have to read in the context of the facts and circumstances, and the arguments that were advanced.”

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<sup>19</sup> Section 21 of the *Extradition Act* required that special circumstances need to be established. *Cabal* (supra) at 191: “To constitute “special circumstances”, the matters that relied on “need to be extraordinary and not factors applicable to all defendants facing extradition”: *Matter of Morales* (1995) 906 F Supp 1368 at 1373 (SD Cal).

<sup>20</sup> At 181-182.

<sup>21</sup> **Exhibit AB -2**, Submissions by Mr Walker SC for the Applicant before the Court of Appeal, p. 15-16, but particularly at p.16, after referring to the observations in *Ex parte: Maher*:

“So that, and I don’t mean this disrespectfully, there is a code word, a code expression, exceptional circumstances being used for convenience to describe that as which in the circumstances of the particular case will combine, or will singly appear so extraordinary, or weighty, that they will outweigh those things which were described by his Honour as the, public factors I have mentioned.”

<sup>22</sup> In *Re Kulgari* [1978] V.R. 276 at 277 Young CJ thought it “not possible or desirable to attempt to describe what might be regarded as very exceptional circumstances...”

... [His Honour refers to the passage quoted above from *Robinson v The Queen*.]

“A circumstance which is sometimes relied upon in applications of this nature is that, by the time an appeal is heard and determined, the applicant for bail would have served the whole or the major part of his or her sentence. There is no suggestion that such a circumstance exists in the present case. Equally, however, there can be no suggestion that such a circumstance is a necessary condition for a grant of bail. It is simply a circumstance that is commonly relied upon.”

*Marotta v The Queen* (1999) 73 ALJR 265 at 267: “I also accept that in some cases it has been held that a grant of special leave to appeal and the imminence of the end of a custodial period of sentence have not usually of themselves been regarded as special circumstances. However, the outcome of those cases of no doubt affected by the facts which the justices of this Court had to consider in them.”

*Fulcher v Hilt* (1986) 60 ALJR 278 at 279 per Dawson J:

“No doubt the exercise of such a jurisdiction is discretionary and may be refused in a proper case, even where it is an application for special leave to appeal which is involved. The nature of an application for special leave to appeal is, however, of relevance. Upon such an application various matters fall to be considered, including the question whether there is any substance in the proposed appeal.”

12. Second, the exercise of discretion to grant bail is to ensure that the appellate process is not rendered nugatory or futile:

*Sullivan v DPP* (2000) 17 Leg Rep C13 per Hayne J:

“It is clear that bail, pending the grant of special leave to appeal to this Court, will only be granted in exceptional circumstances. It may be granted if it is necessary to preserve the subject matter of the application for leave, that is, if not to grant bail would render the application for special leave futile.

...

In deciding whether bail should be granted, it is important to consider what prospects the applicant has of obtaining the special leave which he seeks. It is clear that bail should not be granted unless there is a sufficient prospect that leave will be granted.”

*Fulcher v Hilt* (1986) 60 ALJR 278 at 279 per Dawson J:

“Were I to refuse this application no doubt the application for special leave could nevertheless be pursued on behalf of the applicant but the subject-matter of any appeal – the extradition of the applicant to New Zealand – would have been effectively destroyed because the extradition order would have been executed.

It is clear that this Court has power to preserve any subject-matter, human or not, pending a decision and that such a power extends to a decision upon an application for special leave to appeal: see *Tait v The Queen* (1962) 108 CLR 620.”

*Coco v The Queen* (1993) 12 Leg Rep C1 at C2 per Gaudron J:

“It is well settled that the power of this Court to grant bail is a power which comes from the Court’s inherent jurisdiction and is thus necessarily to be exercised on the basis that its exercise is necessary in the interests of justice or is necessary to preserve the subject-matter of the proceedings. It has been said by reference to those considerations that bail will only be granted in exceptional circumstances.”

*Malvaso v The Queen* (1989) 8 Leg Rep C1 per Deane J:

“This Court’s inherent power to preserve from futility the exercise of its jurisdiction to grant special leave to appeal extends to enable it to grant bail in a case such as the present. Were it otherwise, the Court would be powerless to prevent the partial erosion of the subject-matter of the proposed appeal in the period pending the hearing of the application for special leave. That is not, of course, to suggest that bail should be granted in the ordinary case of an application for special leave to appeal from a sentence of imprisonment. To the contrary, it is well settled that the circumstances in which this Court is justified in intervening to grant bail pending the hearing of an application for leave to appeal must necessarily be exceptional. I am, however, persuaded that the circumstances of the present case bring it within that category.”

*Narain v DPP* (1987) 61 ALJR 317 per Brennan J:

“Seemingly, that the limits of the High Court’s inherent jurisdiction are such that there is no jurisdiction to make an order going beyond what is required to save an application for special leave from futility.”

13. Third, the presence or absence of a single factor even, for example the grant of special leave or the certainty that a substantial part of the term of imprisonment will have been served, can be regarded as being of itself necessarily sufficient to justify or refuse the grant of bail.<sup>23</sup> The accumulation of relevant factors may in combination warrant the intervention of the Court in the due administration of criminal justice following a conviction.

*Giordano v R* (1981-1983) 6 A Crim R 397 at 399:

“It is unnecessary, and would be unwise, to attempt to compile a list of circumstances which would be regarded as exceptional. The totality of the circumstances must be looked at. Some relevant factors are indicated by the cases. Reference has been made in the cases to the prospects of the success of the appeal. I do not think, however, that the court which considers the application for bail can be expected to assess the prospects of success of the appeal, unless those prospects are obvious. There are cases, I suppose, in which a perusal of the grounds of appeal and a merely superficial appraisal of the case indicate that the appeal has little prospect of success (*Ryan* [1930] SASR 125). In some cases there is a ground of appeal which has an obvious prospect of success, *McMenamin* [1917] BLR 552. The prospect of undue delay, not caused by the appellant, in the appeal coming on for hearing is undoubtedly a factor (*Carbone* (1976) 14 SASR 176 at p 178). An important factor is the duration of the term of imprisonment which has been imposed, especially if it is so short that the term may expire before the appeal is determined (*Cooper* [1961] ALR 584). No one factor can be regarded as decisive. The court hearing the application must consider all the circumstances in order to determine whether they can be regarded in the aggregate as exceptional.”

*Ex parte Maher* (1986) 1 Qd. R. 303 at p 310:

“Some discretions, of their very nature, will be exercised open-handedly so that they are rarely withheld, whilst others, of their very nature, will be exercised with circumspection so that they are rarely granted. To say that discretions of the latter kind will only be exercised in special circumstances is not to fetter the discretion, but rather to identify it.

(...)

The discretion is one that is not lightly to be exercised, and is one that requires factors of sufficient force to outweigh the public factors I have mentioned. I am content to use the phrase “exceptional circumstances” to describe such factors.”

*Marotta v The Queen; King v The Queen; Bull v The Queen* (1989) 73 ALJR 265 at 267:

“These are the reasons which lead me to the conclusion that bail should be granted in these cases. I emphasise that it is the combination of the matters to which I have referred and the facts of the cases before me that demonstrate sufficiently exceptional circumstances to warrant bail. A grant of special leave alone certainly would not do so.”

*Malvaso v The Queen* (1989) 8 Leg Rep C1 per Deane J:

“In my view, the nature of, and the reasons for, that particular vulnerability of the applicant while in a custodial situation provide special grounds for granting the applicant bail during the period in which there exists any significant possibility that the applicant might not be required to serve a sentence of imprisonment.

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<sup>23</sup> See list set out at pp.191-192 of *Special Leave to Appeal* – O’Brien, David T, Law Book Company 1995.

... With real hesitation, I have come to the view that, in all the circumstances of this particular case, including the fact that the applicant seeks on appeal to re-establish an order made by the learned sentencing judge, I should not conclude that the applicant's chances of such success are so slight that I should decline to make the order sought."

*Cabal* (2001) 209 CLR 165 at 189:

"In *Matter of Extradition of Morales*, [906 F Supp 1368 (SD Cal 1995)] the Court held that a number of matters in combination constituted special circumstances."

*Griffiths v The Queen* (1994) 13 Leg Rep C1 per Deane J:

"The considerations favouring the grant of bail do, in combination, suffice to take this case into the exceptional category."

14. Bail has been granted by the Court before there has been grant of special leave.<sup>24</sup> This has occurred, where like here, there has been no intermediate Court of Appeal ratification of the conviction and sentence imposed at first instance as well as when a Court sees the likelihood of leave being granted as reasonable and the appeal being otherwise rendered futile.<sup>25</sup> See *Griffiths v The Queen* (1994) 13 Leg Rep C1 per Deane J:
 

"Whilst this Court has jurisdiction to make an order that the applicant be released on bail pending the hearing of an application in a criminal matter, it will only make such an order in exceptional circumstances. The reason why that is so is that the grant of an application for special leave does not cancel the significance of the fact that, in an ordinary case, an appeal to this Court in a criminal matter is from a conviction by a jury which has been affirmed by an intermediate appellate court. In that regard, it must be stressed that a grant of special leave to appeal should not be seen as investing a jury's verdict, which has been confirmed by the first appellate court, with a provisional character."
15. The exceptional circumstances in the Applicant's case such as to warrant the grant of bail pending the outcome of his application for special leave are:
  - 15.1. An order refusing bail will render nugatory the applicant's application (and any appeal) to this Court against the Court of Appeal's refusal of bail pending an appeal to it in respect of conviction and sentence.
  - 15.2. Refusing bail will continue the potential erosion of the subject-matter of the appeal to the Court of Appeal.
  - 15.3. There is also an obvious point, even from a summary analysis, that strongly, if not certainly suggests that the conviction will be overturned.<sup>26</sup> There has not been a confirmation of the jury's verdict by an intermediate Court of Appeal.<sup>27</sup> In fact the Court of Appeal has expressed some precise concerns about the absence of any

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<sup>24</sup> *Peters v The Queen* (1996) 71 ALJR 309 where a "reasonable prospect of success" in obtaining leave was seen as sufficient in all of the circumstances of the case.

<sup>25</sup> *Pelechowski v Registrar, Court of Appeal* 72 ALJR 711 at 712, para [6].

<sup>26</sup> **Exhibit CSJN-3; *Hanson v DPP*** [2003 QCA 409 at para [11] to [21]

<sup>27</sup> *Pelechowski v Registrar, Court of Appeal* (1998) 72 ALJR 711 at 712 per Gaudron J, in granting bail: "...There is also the circumstance, which has to be considered in combination with the first, that there has been no intermediate appellate review of the decision. That is a significant matter."

present answer to these flaws.<sup>28</sup>

- 15.4. The sentencing procedure before the trial judge miscarried in obvious respects and any re-sentencing court would properly consider a non-custodial outcome as the appropriate sentence.<sup>29</sup>
- 15.5. There are patent errors in the determinations of both the primary judge and the Court of Appeal to refuse bail.

Firstly, each court misapprehended the test to be applied.<sup>30</sup> It takes the assessment

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<sup>28</sup> **Exhibit CSJN-3** *Hanson v DPP(Qld)* [2003] QCA 409 at p.5, para [11]: “The written submissions filed contain a number of attacks on discretionary rulings by the trial judge and on rulings on admission of evidence and a significant argument that the evidence proved that not offence was committed at all by Ms Hanson.”

At p.6, para [18]: “It is of concern that the Crown case, as expressed when resisting the application for bail, appears to be at odds with the documents in existence at the relevant time...”

At p.7, para [20]: “Assuming in Mr Hampson’s favour that there was a delegation of the power to admit members, the Crown case appears to ignore the contractual obligations and the relationship objectively existing between the appellant and those other persons who paid the relevant fee and received the relevant membership card describing them as a member of One Nation. On the given assumption, Mr Hampson’s submissions that they were members (with admittedly limited) rights appears sound. appears in parts actually conceded in argument by the Crown, and would appear to destroy the basis for Ms Hanson’s conviction on any count.”

And at p.8, para [22]: “Had the Court hearing the bail application heard argument in full from the Crown, including on the point of delegated approval of membership applications, we may have concluded that there were strong grounds for holding that the appeal would be allowed. Absent that argument in full, that conclusion cannot be reached.”

<sup>29</sup> **Exhibit AB -3** pp.82-90, paras [13] – [36] (the Applicant’s submissions before Chesterman J); **Exhibit AB -5** pp.3, 8-13 paras [7] and [20] – [39] (the Applicant’s submissions before the Court of Appeal). It should be observed that a non-custodial sentence such as a suspended sentence could never be regarded as “nominal” as the Court of Appeal seems to have done at **Exhibit AB-1** para [12]. In this context see for example *R v Davey* (1980) 2 A Crim R 254 at 262: “In my view it is erroneous to treat the suspension of a sentence of imprisonment as merely an exercise in leniency. Such an order is made in the community interest and is generally designed to stop re-offending – which a prison sentence, standing alone, seldom does.”

<sup>30</sup> **Exhibit AB -3** p.154 paras [31] – [32] Chesterman J:

“In specific terms that means that it must appear almost certain that the appeals on sentence will succeed and result in terms of imprisonment of about 3 months, or less. Unless that can be demonstrated it cannot be said that there will be injustice in requiring the applicants to remain in prison for the three months that will elapse before the appeals can be heard.

I cannot be satisfied to the requisite standard that the appeals will result in such an outcome.

While it is possible to argue that the sentences imposed were too severe it is not, I think, possible to argue that the applicants were not convicted of a serious offence.”

**Exhibit AB -1**, p.4 para [12] where the Court of Appeal was even more cryptic:

“The maximum term of imprisonment for Mr Ettridge’s offence was five years. Accordingly, a sentence of three years imprisonment may well appear high to the Court deciding Mr Ettridge’s application for leave to appeal against his sentence, but that does not mean that he has established there are strong grounds for concluding that that application will be allowed on the grounds the sentence is manifestly excessive, and that the result will be a decision that he ought either not to have been imprisoned at all, or else to have been imprisoned at most for a period of three weeks, or some other short period. Likewise, if the asserted numerous errors in the sentencing process result in the applicant being re-sentenced, he may persuade the re-sentencing court that only a nominal penalty should be imposed, but that is not the test.”

of prospects to one of “almost certainty” which is not supported by authority.<sup>31</sup> This has now become ‘almost never’. The Court treated the label “exceptional” as a definition of the test rather than seeing whether the points raised were sufficient to “outweigh” any relevant “public factors” requiring hesitation.

Second, in oral argument before the primary judge and the Court of Appeal, the Applicant adopted the arguments advanced by counsel appearing for his co-offender Hanson.<sup>32</sup> The Court of Appeal ignored the prima facie flaws in the prosecution case that it identified in *Hanson v DPP* in determining the Applicant’s application for bail.

Thirdly, the Court of Appeal then did not in fact apply *any* test to the facts placed before it. As to conviction, the Court in *Hanson v DPP* identified fundamental flaws in the prosecution case but then rested with the assurance from counsel for the DPP that there was evidence, but that it need not produce it at a bail application. The Court then ignored the identified flaws in the Applicant’s case in weighing whether in combination with the sentence points, exceptional circumstances were made out. A material relevant factor was ignored. Moreover it was a failure to properly exercise its discretion for the Court of Appeal to not assess the application on the material put before the Court, by both sides.<sup>33</sup> The DPP’s coyness from pointing to the argument or evidentiary basis for its prosecution should not have been tolerated in circumstances where the DPP was asked, after having taking a similar stance before the application before the primary judge to point to such evidence.

Finally, as to sentence, after setting the test at “almost certainty”<sup>34</sup> the Court did not then make the necessary assessment of the Applicant’s prospects.<sup>35</sup>

16. The other possible intervention to the order of imprisonment is a successful appeal to this Court from the Court of Appeal’s refusal to grant bail. It is unlikely that such an appeal, assuming that special leave is granted, will be concluded within the next 12 months or more. There is a strongly arguable case that special leave will be granted.<sup>36</sup> Superior, appellate and

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<sup>31</sup> **Exhibit AB -1**, *Ettridge v DPP* [2003] QCA 410 para. [7]: “...although it is a more absolute test than the authorities justify.”

<sup>32</sup> **Exhibit AB -3**: Transcript before Chesterman J (T.132); **Exhibit AB -2** Transcript before Court of Appeal (T.2)

<sup>33</sup> c.f. *DPP v Corbally* [2000] IESC 38 (15 December 2000) Supreme Court of Ireland: **Appendix 2**.

<sup>34</sup> **Exhibit AB -1**, p.3, para [7]: “Where bail on an appeal against sentence is sought, we see no significant difference in saying Mr Ettridge must establish:

?? Strong grounds for concluding that his application will be allowed; as against

?? A high likelihood that his sentence will be substantially reduced; or

?? It being almost certain that the appeal against sentence would succeed.

Establishing either of the first two propositions would usually be enough, in practical terms, to establish the third; although it is a more absolute test than the authorities justify. It remains the fact that the judge did also put the requirement with more accuracy.”

<sup>35</sup> **Exhibit AB -1**, p.4, para [12] (quoted at footnote [33] above). The Court did so after specific argument to it that Chesterman J had done that very thing, that is, state a test, and then not apply it.

<sup>36</sup> It is far from “remote” as found in *Cabal* at p 199. As noted above, in *Peters v The Queen* (supra) “reasonable prospects” was sufficient.

constitutional Courts of other common law jurisdictions operate in statutory frameworks which are somewhat different and a consideration of them will assist in the development of the appropriate common law position: see summaries and references in **Appendix 2**.

17. The special leave questions are:
  - 17.1. What is the test to be applied by a court determining an application for bail following a conviction and pending appeal?
  - 17.2. Is any distinction warranted between relevant factors to be taken into account when the test is applied by an intermediate Court of Appeal and those to be taken into account in this Court?
  - 17.3. Is any distinction warranted in the approaches to be taken when an application is reliant, on a conviction point only;<sup>37</sup> on a sentence point only; or both?
  
18. There is substance to these questions.<sup>38</sup>
  - 18.1. They concern matters of public importance and affect the due administration of justice. The decisions below have rendered this test opaque if not unclear and unworkable. It is one thing to be in accord as to the label: “exceptional circumstances” however there is significant discord as to what is relevant and how such factors are weighed.<sup>39</sup> The seminal decision of *Ex parte Maher* is now nearly two decades old. The decision in *Cabal* was dealing with extradition bail which has its own special criteria.<sup>40</sup> One of the principal public factors identified in *Maher*, viz., that the release of a person on bail tends to regard a jury’s verdict as provisional, has been doubted by a single justice of this Court.<sup>41</sup>
  - 18.2. There is a need for clarification: *Morris v. The Queen* (1987) 163 CLR 454 per Dawson J at 475: It is for this Court “to develop and clarify the law and to maintain procedural regularity in the courts below.”<sup>42</sup>
  - 18.3. There is no dispute over facts.<sup>43</sup>

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<sup>37</sup> There may also be a need to look at the distinction if any to be made in respect of guilty pleas sought to be withdrawn and jury verdicts sought to be overturned.

<sup>38</sup> *Marotta v The Queen* (1999) 73 ALJR 265 at 266, para [12].

<sup>39</sup> Section 35A *Judiciary Act* 1903; *Morris v The Queen* (1987) 163 CLR 454 at 475.

<sup>40</sup> Because of the heightened flight risk, there is a statutory requirement for “special circumstances.” See p. “To constitute ‘special circumstances’, the matters relied upon must be extraordinary and not factors applicable to all defendants facing extradition: *Matter or Extradition of Morales* 906 F Supp 1368 at 1373 (SD Cal 1995)

<sup>41</sup> See *Doggett v The Queen* B54 of 2000, 2 November 2000 and *Marotta* (1999) 73 ALJR 265 and the general comments in *Cabal*. See also the discussion of this before the Court of Appeal; Exhibit AB-2 at p.14; and Exhibit AB-2, Judgment in the Court of Appeal, para. [4].

<sup>42</sup> This passage was cited with approval in *Carson v. John Fairfax & Sons Pty Ltd* (1991) 173 CLR 194 at 218.

<sup>43</sup> *Morris v. The Queen* (1987) 163 CLR 454 at 456 per Mason CJ: “The first issue for determination is whether the proposed appeal involves no more than a review of a finding of fact. If the answer

- 18.4. The Applicant's facts and circumstances are such that this is a suitable vehicle.
19. The interests of justice in this case, for the reasons expressed above and in the written submissions in each of the Courts below, militate in favour of the grant of bail on appropriate conditions.

These submissions were compiled by Andrew Boe and Paula Morreau (with the assistance of Julian Noud). They were settled by Bret Walker SC (Syd) who also presented oral argument before the High Court of Australia.

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is in the affirmative, the application fails. If the answer is negative, the application will succeed, at least if some point of principle is at stake.”

**Appendix 1 to the Applicant's submissions on Bail  
Conviction point**

1. There were two entities in existence as at October 1997. The Pauline Hanson Support Movement Inc. was an incorporated association. The political party known as Pauline Hanson's One Nation was an unincorporated association.
2. The Crown case was that there were two levels of membership of the support movement and there were no members of the unincorporated association (or political party), save Ms Hanson, Mr Ettridge and Mr Oldfield and/or successful candidates. To establish its case in Count 1 on the indictment, the Crown had to prove beyond reasonable doubt that the list of names submitted to the Electoral Commission (Trial exhibit 17A) was not a list of members of the political party (**Exhibit CJSN-2** T,71-72).
3. The Crown proposition was that Exhibit 17A comprised a list of members of the support group. In proof of this proposition the Crown relied by and large upon statements made by Mr Ettridge to this effect and, further, sought to interpret certain documents as being reflective of this proposition.
4. Whatever may have been said and whatever may be the correct interpretation of the documents, the incontrovertible evidence is that the political party did offer membership to the party to many people and that many thousands accepted the offer and became members of the political party known as Pauline Hanson's One Nation.
5. Ms Claire Wright was called by the Crown and gave evidence as follows:-
  - 5.1. She commenced employment in about May 1997 (**Exhibit PM-4**; T.1349, L.10) with the political party, Pauline Hanson's One Nation. (T.1355, L.20-30)
  - 5.2. Ms Wright was delegated by Mr Ettridge the task of admitting people as members of the political party. (T.1374, L.2 – T1375, L.1)
  - 5.3. Ms Wright admitted as members of the political party everyone who forwarded an application for membership with an appropriate fee. By October 1997 she had admitted thousands of members to the political party. (T.1373, L.450)

- 5.4. Not all of the membership to the political party came through the branch structures. Ms Wright's office received directly requests for forms for membership of the party and people joined the party directly through Ms Wright's office. (T.1360, L.2-10)
- 5.5. Ms Wright had a lot of contact with people who had applied to become members of the party and there was never any indication that anyone thought that they were not members. (T.1364, L.15-20)
- 5.6. In correspondence to the branches, Ms Wright made it very clear that all political party application forms had to come to her office at Manly. Ms Wright's office was the only place where applications for membership of the political party were dealt with. (T.1372, L3-12)
- 5.7. In cross-examination the following evidence was given:-
- “Q.: I think you may have said, but if not I'll ask you again: I take it neither Mr Ettridge – and certainly not Ms Hanson – has ever said to you that the only members of the Pauline Hanson One National Political Party were Ms Hanson, Mr Oldfield and Mr Ettridge?
- A.: No.
- Q.: And the fact is if any of them or anybody else had told you that they were the only members, or that Ms Hanson was the only member, you would have known, wouldn't you – if anybody had said that to you, you would know that to be quite untrue and incorrect in any event, wouldn't you?
- A.: Yes, it was.
- Q.: If Mr Ettridge came to you and said, 'Look, there is only 3 members of the Pauline Hanson One Nation Political Party,' you would say, 'Well, that's just not right'?
- A.: Exactly.
- Q.: 'You are incorrect'? – Mmm. I had over 12,000 records in the database, so yeah.
- Q.: 'Whatever you think, Mr Ettridge, I have set a process in place under your instruction and I have in fact admitted thousands of people as members'?
- A.: Exactly. Yes.
- Q.: 'So whatever you think or intended, I am telling you as a matter of fact there are thousands of members...'?
- A.: Yes, there were.
- Q.: ... 'of the Pauline Hanson One Nation Political Party'?
- A.: Yes.
- Q.: Admitted by you?
- A.: Yes.” (T.1377, L10-L40)
- 5.8. At the request of Mr Ettridge, in October 1997, Ms Wright extracted from the database of members of the political party, over 500 Queensland members of the party. It was this list which was provided to the Electoral Commission for the purpose of registration. (Ex. 17A) (T.1375, L20 –T1377, L9)
6. There is no evidence contradicting Ms Wright that she was delegated to admit people as members of the political party and that she did in fact admit to membership of the party

thousands of people including all of those on the list submitted to the Electoral Commission. Indeed, Ms Wright's evidence is entirely supported by the evidence of Mr Menagh. (**Exhibit PM-5**, T.844)

7. The database kept by Ms Wright is a register of members of the unincorporated association in compliance with s.14 of the association's Constitution (Ex. 17).
  
8. Mr O'Shea, the Electoral Commissioner of Queensland at the relevant time, gave evidence that his Office would have written to 250 of the 500 members listed in Exhibit 17A to ensure that they were members of the political party. (**Exhibit PM-6**, T498, L25-45). All checks confirmed that those contacted were members of the political party. (T514, L20-35).
  
9. The effect of the evidence is and the Crown does not contest:
  - 9.1. Ms Wright was authorised to admit people as members of the political party;
  - 9.2. Ms Wright intended to and believed that she did admit thousands of people as members of the political party, including those listed in Exhibit 17A;
  - 9.3. The persons who applied for membership and who were listed as members of the political party, including those listed in Exhibit 17A, intended to become members of the party and believed that they did become members of the political party.
  
10. The Crown's attempted answer to the evidence referred to in para. 9 above, is as follows:
 

“... In essence, the Crown case was that Menagh and Claire Wright remained process workers. They were people who did an administrative job within an office; they were not part of the controlling mind of any organisation. Persons who applied may well have believed they were becoming members of a party. Wright and Menagh may well have believed that those applications were for members of a party but they simply were not and they were not in a position to know that.” (**Exhibit CSJN-2**, *Hanson v DPP*, Court of Appeal Transcript p.47 l.45).
  
11. The effect of the Crown's argument is that the “controlling mind” intended to deceive Ms Wright and the applicants into believing that membership was to the political party when at all times, it was intended by the “controlling mind” that the membership be to the support group only. The Crown's proposition that there were no members of the political party immediately falls. In light of Ms Wright's authorisation, the “controlling mind's” intention

becomes irrelevant. Ms Wright was not a mere “process worker” but a person invested with authority to admit members to the political party. Ms Wright did not merely open the mail, she, and others in her office, had direct and indirect communication with applicants for membership. The applicants for membership of the party were entitled to assume that Ms Wright had authority to do all things necessary to admit them as members of the party. There was a binding agreement between the party and each applicant. See *Hely-Hutchinson v Brayhead Ltd* [1968] 1 Q.B. 549 at 583:

“Ostensible or apparent authority is the authority of an agent as it *appears* to others. It often coincides with actual authority. Thus, when the Board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the Board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than 500 without the sanction of the Board. In that case his *actual* authority is subject to the 500 limitation, but his *ostensible* authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation...”

12. Statements by Mr Ettridge, or anyone else, disavowing membership of the party were hollow and irrelevant and therefore inadmissible: *Taylor v Johnson* (1982-1983) 151 CLR 429; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1981-1982) 149 CLR 337 at 347-348, 352-354.

These submissions were drawn by Terry Martin S.C. (Bris). Oral submissions were presented by Bret Walker SC (Syd).

22 September 2003

**Appendix 2 to the Applicant's submissions on Bail  
Comparative Jurisdictions**

**AUSTRALIAN JURISDICTIONS**

**Queensland**

**1. Legislation**

No specific legislative provision as to the exercise of the discretion in considering bail pending appeal.

**2. Common Law**

Leading authority is *Ex parte: Maher* [1986] 1 Qd R 303.

**Australian Capital Territory**

**3. Legislation**

Section 9 Bail for persons sentenced to imprisonment

“(1) This section applies if -

(a) a person has been convicted of an offence by a court and sentenced to a period of imprisonment for the offence; and

(b) an appeal is pending in relation to the conviction or sentence (including an appeal against a decision on appeal).

(2) Despite anything else in this Act, a court must not grant bail to the person unless it is satisfied that special or exceptional circumstances exist justifying the grant of bail.”

**New South Wales**

**4. Legislation**

Section 30AA *Bail Act 1978* (NSW)

“Notwithstanding anything in this Act, if:

(a) and appeal is pending in the Court of Criminal Appeal against:

(i) a conviction on indictment, or

(ii) a sentence passed on conviction on indictment, or

(b) an appeal from the Court of Criminal Appeal is pending in the High Court in relation to an appeal referred to in paragraph (a) bail shall not be granted by the Court of Criminal Appeal or any other court unless it is established that special or exceptional circumstances exist justifying the grant of bail.”

**Northern Territory**

**5. Legislation**

Section 23A *Bail Act* (NT)

Limitation on power to grant bail

“Notwithstanding anything in this Act, where an appeal is pending in the Court of Criminal Appeal against -

(a) a conviction on indictment; or

(b) a sentence passed on conviction on indictment, bail shall not be granted by the Court of any other court unless it is established that special or exceptional circumstances exist justifying the grant of bail.”

## South Australia

### 6. Legislation

Section 10(2) *Bail Act 1985* (SA)

“Where the applicant has been convicted of the offence in respect of which he or she has been taken into custody, the bail authority has, subject to this Act, an unfettered discretion as to whether the applicant should be released on bail.”

### 7. Case Law

*R v Kostaras* (unreported) [2002] SASC 231 (18 July 2002) per Bleby J at paras [6] – [8], [16] – [17]: “For this reason it is incorrect to suggest that bail pending appeal will only be granted in exceptional or special circumstances. In that regard I respectfully agree with what was said in *R v Flanigan* (Debelle J, 25 November 1996, Judgment No. S5937, unreported) and by Gray J in *R v Baker* [2000] SASC 281. To hold that exceptional circumstances are required is to fetter, improperly, the discretion conferred by section 10(2).

However, one factor that is present in this case and will always militate against the exercise of the discretion is the fact that the applicant has been found guilty by a jury, has been convicted and sentenced to a significant period of imprisonment, with a substantial period still to be served. Quite clearly, that is not the only governing factor.

Offsetting that in this case, Mr Edwardson argues that the appeal on the particular ground that I have quoted has substantial prospects of success, and that along with other factors ....

...

Not a lot of help can be gained in the exercise of the discretion under s10(2) Bail Act from the particular circumstances of other similar applications where the evidence and the nature of the summing up under appeal is different, and where there are very different circumstances personal to the applicant.

In the circumstances of this case, I am not prepared to say that the factors relied on by the applicant outweigh the significance of the conviction and sentence and other factors relevant to the exercise of the discretion.”

*R v Baker* [2000] SASC 281 (24 July 2000) per Gray J at para [7]:

“The Act confers a judicial discretion,. That discretion is not to be fettered by adjectives such as ‘special’ or ‘exceptional’. It is necessary for the applicant to establish appropriate grounds for the exercise of discretion in his favour. In my view there is no presumption for or against a grant of bail following conviction.”

## Tasmania

### 8. Legislation

Section 415 of the *Criminal Code Act 1924*

415(1) Subject to subsection (1A), an appellant who is in custody shall, pending the determination of his appeal, be treated in the same manner as a person awaiting trial.

(1A) A person who is sentenced to a term of imprisonment by the court of trial and who is required to be treated in the same manner as a person awaiting trial may, except in respect of a period in which he is otherwise liable to undergo imprisonment for a crime or simple offence, elect (subject to an

admission to bail under subsection (2)) between continuing to undergo his sentence or being treated in the same manner as a person awaiting trial.

...

(2) The Court may, if it thinks fit, on the application of the appellant, admit him to bail pending the determination of the appeal.

#### 9. **Case Law**

*Durovic v R* (unreported) CCA 118/1996 per Zeeman J at para [6]:

“It is unusual for a person who has been convicted by verdict of a jury and sentenced to imprisonment to be admitted to bail (*Chamberlain v R [No 1]*). Nevertheless, orders to such effect have been made where there have been exceptional circumstances.”

### **Victoria**

#### 10. **Legislation**

Section 579 *Crimes Act 1958* (Vic)

“579. Admission of appellant to bail and custody when attending Court

(2) The Court of Appeal may if it thinks fit on the application of an appellant admit the appellant to bail pending the determination of his appeal, or where a new trial is directed until the termination of the new trial.”

#### 11. **Case Law**

*R v Phung* (unreported) [2001] VSCA 81 (18 May 2001) per Batt and Chernov JJA at para [8]:

“It is well established that in order to obtain bail pending the hearing of an appeal, an applicant must show very exceptional circumstances...”

### **Western Australia**

#### 12. **Legislation**

Section 4 Schedule 1, Part C *Bail Act 1982* (WA)

“4. When bail to be granted after conviction

In deciding whether or not to grant bail to a defendant who is in custody waiting to be sentenced or otherwise dealt with for an offence of which he has been convicted or awaiting the disposal of appeal proceedings, the judicial officer shall, subject to clauses 5 and 6, consider whether -

(a) in the case of a defendant waiting to be sentenced, there is a strong likelihood that he will impose a non-custodial sentence; or

(b) in either case, there are exceptional reasons why the defendant should not be kept in custody, and shall only grant bail to him if he is satisfied that -

(c) in the case of a defendant waiting to be sentenced, at least one of those reasons exists and, in the case of an appellant, the reason mentioned in paragraph (b) exists; and

(d) he may properly do so having regard to the provisions of clauses 1 and 3 or, in the case of a child, clauses 2 and 3.”

### **OTHER COMMON LAW JURISDICTIONS**

#### **Canada**

### 13. Legislation

Section 679 *Criminal Code*.

679(1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if,

(a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal, or where leave is required, notice of his application for leave to appeal pursuant to section 678;

(b) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal;

(c) in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.

...

(3) In the case of an appeal referred to in paragraph (1)(a) or (c), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal if the appellant establishes that.

(a) the appeal or application for leave to appeal is not frivolous;

(b) he will surrender himself into custody in accordance with the terms of the order; and

(c) his detention is not necessary in the public interest.

### 14. Case Law

*R v Farinacci* (1992-12-14) ONCA c10797; C13886; C11372 (Court of Appeal for Ontario – Dubin CJO, Catzman, Arbour, Osborne and Doherty JJA):

“It is clear to the Committee that bail pending appeal is more liberally granted in some provinces than in others. Fully recognising that some variation in practice in different provinces may be warranted by particular local conditions, at particular times, the adoption of different principles with respect to the granting of bail pending appeal is not desirable. In the opinion of the Committee, the principle that bail will only be granted pending appeal in exceptional circumstances is too restrictive, having regard to the more liberal policy with respect to bail which the Committee has recommended should be adopted prior to the trial of the accused. Moreover, the rule of exceptional circumstances does not provide sufficiently precise guidance for the judge to whom the application is made.

The Committee has taken the view that an accused who is not yet proved guilty should not be kept in custody unless it is necessary for the protection of the public, or to ensure his appearance at his trial. The Committee has taken the position that the onus should rest upon the prosecution to justify pre-trial detention, and not upon the accused to justify his release.

It would seem, however, that after the conviction the onus should rest upon the applicant to justify release on bail pending appeal. Whilst he is no longer entitled to be presumed to be innocent, he may nevertheless not be guilty. If he is denied bail and is acquitted by the court of appeal, an injustice has resulted.

...

The concerns reflecting the public interest, as expressed in the case-law, relate both to the protection and safety of the public and to the need to maintain a balance between the competing dictates of enforceability and reviewability. It is the need to maintain that balance which is expressed by reference to the public image of the criminal law, or the public confidence in the administration of justice.”

The decision in *R v Farinacci* (delivered by Madam Justice Arbour), has been relied upon subsequently, not only in Ontario, but also other Canadian provinces. See *R v O'Connor* (1997-03-26) BCCA CAV022299 (Court of Appeal for British Columbia – Carrothers, Macfarlane, Goldie JJ); *R v Baltovich* (March 31, 2000) (2000-03-31) ONCA C12090 M25498 (Rosenberg J); *R v Khan* (February 11, 2000) AR98-30-03621 (Court of Appeal of Manitoba) and *R v St Pierre* (June 4 1999) (1999-06-04) ONCA C32078 M24375 per

Rosenberg JA:

“In the emphasised portion, Arbour JA has delineated the two extremes on the continuum that a court may face on an application for bail pending appeal. Most applications fall somewhere along this continuum. The stronger the grounds of appeal and the shorter the sentence, the more likely that the release will not be contrary to the public interest because the value of reviewability takes precedence over the interest in immediate enforceability.”

## Ireland

### 15. Legislation

Section 32 *Courts of Justice Act 1924* as amended by section 3(6) *Criminal Procedure Act 1993*:  
 “Leave to appeal shall be granted by the Court of Criminal Appeal in cases where the court is of opinion that a question of law is involved, or where the trial appears to the court to have been unsatisfactory, or there appears to the court to be any other sufficient ground of appeal, and the court shall have power to make all consequential orders it may think fit, including an order admitting the appellant to bail pending the determination of his appeal or application for leave to appeal”.

### 16. Case Law

*DPP v Corbally* [2000] IESC 38 (15<sup>th</sup> December 2000) Supreme Court of Ireland:

“The court’s inability to grant bail pending the hearing of an application for leave caused injustice from time to time. This was particularly so in relation to appeals against sentence where the sentence was relatively short and there was either no transcript yet available or the application could not be given a speedy listing. In such a case it might be impossible for the court to adjudicate on whether it should give leave to appeal without effectively hearing the appeal while on the other hand a delayed hearing might render the appeal useless... But whatever was intended by the subsection, I do not think that it could possibly have been intended by the Oireachtas to introduce a whole new jurisprudence relating to the granting of bail on appeals... The court in *The People (DPP) v Sweetman* [1997] 3 IR 448 applied the correct principles in my view. The relevant passage is contained in the judgment of O’Flaherty J at p.450 of the report. It reads as follows:

*The Court is of the view that the strength of the case as it appears on the materials placed before it on this application is the proper matter to be brought into the reckoning in the first instance, and since the Court has reached a clear conclusion on this it does not need to consider the possibility of whether the accused will abscond so as not to be present for his appeal.”*

It is clear therefore that the court considered the strength of the appeal and not merely whether there might be an arguable point. The last sentence in the judgment is also significant. It appears at p.452: *That means the State case, on the materials presented to us at this stage, and it needs to be emphasised that we act on the materials at present before us, we do not have a full transcript and the matter has not been fully argued, that we consider the State case as such a strong one that in the exercise of our discretion we would not be justified in admitting the applicant to bail at this stage.”*

The *Sweetman* case is a good illustration of the problems confronting a Court of Criminal Appeal on an application for bail. There is an onus on the applicant to satisfy the court that there is some definite and discrete ground of appeal with a strong chance of success. But if the ground of appeal involves a detailed analysis of the evidence before the trial court, it cannot of its nature enable the court to arrive at any preliminary view as to the strength of the appeal.

...

I do not think it desirable that the Court of Criminal Appeal should have to go so far as to make a definite determination as to whether “the appeal is likely to be successful” but I think that there should be enough materials before the court to enable it to hold that there was at least a strong chance of success before it grants bail. I would also agree that the possibility of a sentence of imprisonment expiring before the hearing of an application for leave to appeal or the hearing of an appeal may be a ground for the granting of bail. As far as the certified question is concerned, I think that this court

should simply state that bail should be granted where notwithstanding that the applicant comes before the court as a convicted person, the interests of justice requires it, either because of the apparent strength of the applicant's appeal or the impending expiry of the sentence or some other special circumstance. It must always be borne in mind that the applicant for bail in this situation is a convicted person and the Court of Criminal Appeal should therefore exercise its discretion to grant bail sparingly."

## New Zealand

### 17. Legislation

Section 70 *Bail Act 2000* Granting of bail to appellant and custody pending appeal -

"(1) This section applies if a person is in custody under a conviction and is appealing the conviction or sentence, or both, to the Court of Appeal.

(2) The Court of Appeal or the Judge who presided at the trial in the court below may, if it of the Judge thinks fit, on the application of an appellant and on such terms and subject to such conditions as the court of Judge thinks fit, grant bail to the appellant pending the determination of the appeal, if the appellant is in custody only under the conviction to which the appeal relates."

Section 14 *Bail Act 2000* Exercise of discretion when considering bail pending appeal -

"(1) If a person is in custody under a conviction and is appealing the conviction or sentence, or both, the court must not grant bail unless it is satisfied on the balance of probabilities that it would be in the interests of justice in the particular case to do so.

(2) The onus is on the appellant to show cause why bail should be granted.

(3) When considering the interests of justice under subsection (1) the court may, instead of the considerations in section 8, take into account the following considerations:

- (a) the apparent strength of the grounds of appeal;
- (b) the length of the sentence that has been imposed on the appellant;
- (c) the likely length of time that will pass before the appeal is heard;
- (d) the personal circumstances of the appellant and the appellant's immediate family.
- (e) any other consideration that the court considers relevant."

### 18. Case Law

*Ellis v R* [1998] 3 NZLE 555 at 560 per the Court of Appeal at Wellington:

"The principles are well settled. *Moananui v R* (1984) 1 CRNZ 231 is the leading reported case. Admission to bail pending appeal is unusual and only to be granted in exceptional circumstances. The concern is for the overall interests of justice. The starting point is that the applicant has been found guilty and sentenced. Two further factors for special consideration are the apparent strength of the appeal and the element of delay causing injustice."

## United States

### 19. Legislation

Eighth Amendment "excessive bail shall not be required..."

Sections 1346 and 1348 *Bail Reform Act 1996* "... a person shall be entitled to bail pending appeal, if that appeal is not frivolous or taken for delay, or unless the court of judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community."

### 20. Case Law

*Harris v United States* (1971) 404 US 1232; 92 S Ct 10; 30L Ed 2d 25; 1971 US Lexis 1456 [headnote [3A][3B]:

“Notwithstanding that a Federal District Court and a Court of Appeals had previously denied bail pending appeal from a conviction for a narcotics offence, an individual Justice of the United States Supreme Court, as Circuit Justice, will grant an application for bail pending appeal to the Court of Appeals, pursuant to the standards of the Bail Reform Act of 1966 (18 USC 3141 et seq.) where:

- (1) substantial, nonfrivolous questions were raised as to the sufficiency of the evidence of criminal knowledge, the admission of certain hearsay evidence, and the proper application of the best evidence rule;
- (2) there was not such substantial evidence in the record as to justify denial of bail on the ground that the applicant was a flight risk, it appearing that he was making \$150 per week as a self-employed auto mechanic, that he had lived in the area for the past 8 years, that he had several relatives, including his mother and a sister, living there, that he had never failed to make a required court appearance while on bail, and that he had voluntarily submitted to the authorities upon the expiration of a stay of execution which had been granted by the Court of Appeals after sentencing, and
- (3) the record did not justify denial of bail on the ground of danger to the community [per Douglas J, as Circuit Justice]

*Truong Dinh Hung v United States* (1978) 439 US 1326; 99 S Ct 16; 58 L Ed 2d 33; 1978 US LEXIS 4294:

“It was the risk “[under] the circumstances” upon which the Court of Appeals rested its conclusion that “we find no abuse of the discretion of the district judge in denying the defendant bail pending appeal.” This judgment is entitled to “great deference”: *Harris v United States*, 404 US 1232 (1971) (Douglas J in chambers). Nevertheless, “where the reasons for the action below clearly appear, a Circuit Justice has a non-delegable responsibility to make an independent determination of the merits of the application”: *Reynolds v United States* 80 S Ct 30, 32, 4 L Ed 2d 46, 48 (1959) (Douglas J in chambers). See *Mecom v United States* 434 US 1340, 1341 (1977) (Powell J in chambers). The question for my “independent determination” is thus whether the evidence justified the courts below in reasonably believing that there is a risk of applicant’s flight. In making that determination, I am mindful that [the] command of the Eighth Amendment that ‘[excessive] bail shall not be required ...’ at the very least obligates judges passing upon the right to bail to deny such relief only for the strongest of reasons.”: *Sellers v United States* 89 S Ct 36, 38, 21 L Ed 2d 64, 66 (1968) (Black J in chambers).

These submissions were compiled by Andrew Boe and Paula Morreau (with the assistance of Julian Noud). They were settled by Bret Walker SC (Syd) who also presented oral argument before the High Court of Australia.

22 September 2003