

# The hair dryer and the samurai sword - the impact of COVID-19 on bail determinations

By Chris Taylor

In two recent decisions, the Supreme Court has considered the impact of COVID-19 on bail determinations.

Justice Hamill considered COVID-19 issues in granting bail in the matter of *Rakielbakhour v DPP* [2020] NSWSC 323. In contrast, Wright J considered that COVID-19 considerations were not such as to justify the removal of reporting conditions in the matter of *R v Davis* [2020] NSWSC 472.

## *Rakielbakhour v DPP* [2020] NSWSC 323

In *Rakielbakhour*, the applicant made a release application under the *Bail Act*. The proceedings were conducted by means of a virtual court room. Rakielbakhour was charged with two serious domestic violence offences involving allegations that he repeatedly punched his wife to the face and body before hitting her to the face and head with a hair dryer. The applicant had entered pleas of not guilty and provided '*what might be thought to be an unlikely version of events*' (*Rakielbakhour* at [6]).

However, the prosecution faced a '*significant problem*', in that the alleged victim had indicated that she did not wish to give evidence, indeed she gave a positive account that exculpated her husband, the applicant. Nevertheless, his Honour considered that '*there appears on the evidence to be a case to answer*.' The applicant had a relatively minor criminal history. The applicant tendered a body of evidence concerning the COVID-19 pandemic. That material included information as to the spread of COVID-19 as at 30 March 2020.

Justice Hamill considered that the pandemic may be relevant to following provisions of the *Bail Act*:

- i) Section 18(1)(m) – the need for an accused person to be free for any other lawful reason – in as far as there was a need for the applicant to 'protect themselves from infection and to support their family if there is evidence to support such a finding.' This was relevant to the applicant because of the father's ill-health;



- ii) Section 18 (1) (h) – length of time – in as far as 'many cases have been, and will be, adjourned or delayed;
- iii) Section 18 (1) (l) – need to prepare / obtain legal advice – in that Hamill J considered the audiovisual suites are finite and that the AVL facilities must be under great strain.

In so holding, Hamill J made reference to *Re Broes* [2020] VSC 128, and allowing for the differences in the legislative frameworks, considered the observations of Lasry J in that decision to be relevant to the considerations that arose under similar provisions of the New South Wales *Bail Act*.

His Honour considered all of the relevant matters under s 18, and made an assessment of the risks involved in release. His Honour was satisfied that the bail concerns raised by the prosecution were able to be mitigated by the imposition of strict conditions. Accordingly, his Honour found that the concerns that arose under s 17 of the *Bail Act* were not 'unacceptable risks' for the purpose of s 19.

Bail was accordingly granted, with a series of conditions including the imposition of a 'form of house arrest' requiring the applicant to remain at home with few exceptions including reporting to police (ordered to take place three days a week), to attend medical appointments, to work on specific job sites and in the event of medical emergency. Various further conditions relating to the safety of the alleged victim were also imposed, including that the applicant was not to have any contact with the alleged victim in any way.

## *R v Davis* [2020] NSWSC 472

Justice Wright rejected an application to delete a reporting (to police) condition in the matter of *R v Davis* [2020] NSWSC 472.

The applicant had been charged with murder further to allegedly striking the deceased on the head with a samurai sword. Bail had initially been granted by Rothman J (*R v Davis* [2018] NSWSC 1831). Rothman J had imposed numerous conditions including a condition requiring security of \$493,000, that the applicant undertake and accept electronic monitoring, and that the applicant report to police, daily. That condition came to be varied such that the applicant was required to report on weekdays. The application before Wright J was to remove completely the condition requiring the applicant to report to police.

The applicant submitted that the reporting condition was no longer appropriate on a number of bases. The principal matter relied upon by the applicant was the risk created by COVID-19. His Honour accepted that the applicant's 63 year old mother had emphysema and asthma and an enlargement of the right heart ventricle, including specifically chronic obstructive pulmonary disease. Further, his Honour found that she was particularly vulnerable to adverse consequences if she were to contract COVID-19. The applicant lived with his mother.

One part of the applicant's submission was that, given her special vulnerability, the applicant's mother should not be exposed to the increased risk of contracting COVID-19 by a member of her household being exposed to an uncontrolled environment five times a week, as a result of complying with the reporting condition. The applicant also submitted that, even though he was not especially vulnerable, he should also not be exposed to any unnecessary risk, especially when 'it is the express policy of the government that individuals should practise isolation and social distancing'. It was said that the continued reporting to police places at risk: the applicant's mother; the applicant; the co-accused; and, the general community. The applicant submitted that these considerations together with the other

existing stringent conditions rendered the reporting condition more onerous than necessary and not reasonably necessary to address the bail concerns.

Justice Wright did not accept these submissions. While his Honour accepted that there was some risk in reporting, his Honour held that the risk of infection to the accused, his co-accused and the community was not such as to justify removing the reporting condition (at [35]). In so holding, Wright J noted that the exemptions under the relevant public health order, which included travel for the purpose of fulfilling legal obligations, 'indicates that the governmental authorities do not consider any risk inherent in such compliance is sufficient, at this stage,

to outweigh the benefits and community interest in having such legal obligations properly complied with.'

The risk to the applicant's mother (which his Honour accepted was a serious concern) would not be appropriately managed simply by removing the reporting condition. The co-accused, Ms Quinn, also lived with the applicant. Ms Quinn would be required to continue to report thus, the risk of the applicant's mother contracting COVID-19 because of a member of the household reporting to police would not be effectively reduced or eliminated by removing the applicant's reporting condition.

After considering the evidence Wright J found it unlikely the applicant would be

required to use public transport to report. His Honour also rejected the contention that, if the applicant travelled to the police station by private vehicle, he would be exposing his household to a substantially greater risk in comparison to attending a used car yard, buying essential groceries or similar activities (at [40]).

In refusing the application to vary the bail conditions, Wright J held that the bail reporting conditions were reasonably necessary to address the bail concerns, were reasonable and proportionate to the charge of murder, were appropriate to the bail concerns and were not more onerous than necessary. **BN**

