Chapter 6 (Appeals and Cases Stated)

Part 6.3 – ss 274 to 308.

Part 6.3 – Appeals and case stated from County Court or Trial Division of Supreme Court to Court of Appeal

General

- An application for leave to appeal and the accompanying written case must be filed within 28 days after the day on which the applicant is sentenced (ss275(1), 279(1), 284(1)) unless the time for filing is extended. The Crown does not require leave to appeal (ss 287, 291).

Division 1 – Appeal against conviction

- A person convicted of an offence in the Trial Division of the Supreme Court or the County Court in its original jurisdiction may appeal against conviction to the Court of Appeal if the Court of Appeal gives leave to appeal (s274).
- Hearings for leave to appeal against conviction are hearings on the merits. In determining leave, the Court may hear the appeal *instanter* or adjourn the appeal for hearing before an full bench. Otherwise, the Court will refuse leave to appeal or dismisses the application (*R v GAM (No 2)* (2004) 9 VR 640; [2004] VSCA 117; *Supreme Court (Criminal Procedure) Rules 2008* r2.08).
- A party applies for leave to appeal under s274 by filing a notice of application for leave to appeal and written case within 28 days of the day on which the person is sentenced. The Registrar of Criminal Appeals must then provide a copy of the notice and written case to the respondent within 7 days of filing (s275).

- The Court of Appeal must allow the appeal if the appellant satisfies the court that:

(a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or

(b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or

(c) for any other reason there has been a substantial miscarriage of justice *(*s276(1)).

- The three grounds above are the only bases for allowing an appeal and in all other cases the Court of Appeal must dismiss the appeal (s276).
- Once an application for leave to appeal is heard and determined on the merits and passes into record, the Court cannot hear a second application for leave to appeal. An offender who wishes to show a miscarriage of justice (such as by bringing fresh evidence) must rely on the petition for mercy process (*R v GAM (No 2)* (2004) 9 VR 640; [2004] VSCA 117

S276(1)(a) - Verdict of the jury is unreasonable or cannot be supported having regard to the evidence

- The test is whether it was “open to the jury” to be satisfied of the accused’s guilt beyond reasonable doubt (*M v The Queen* (1994) 181 CLR 487, 493; *R v Haseloff* [1998] 4 VR 359).
- The court must undertake its own independent evaluation of the evidence to decide whether the jury must, as distinct from might, have entertained a doubt about the appellant’s guilt (*Libke v R* (2007) 230 CLR 559, [113]; *Mejia v The Queen* [2016] VSCA 296, [140]; *Inia v The Queen* [2017] VSCA 49, [53]; *Conolly v The Queen* [2019] VSCA 125, [7]).

S276(1)(b) and (c) – substantial miscarriage of justice

- While not purporting to make an exhaustive statement of when there will be a substantial miscarriage of justice, the High Court has identified three situations:
  - Where the jury’s verdict cannot be supported by the evidence;
  - Where an error or irregularity has occurred and the court cannot be satisfied that the matter did not affect the outcome;
  - Where there has been a serious departure from the proper processes of the trial (*Baini v R* (2012) 246 CLR 469; [2012] HCA 59).
- In determining whether there is a substantial miscarriage of justice, the question is not whether the error may have had an effect on the jury. Instead, the court must consider the situation in the trial which would have existed if the error had not occurred. Where the court finds that the conviction was inevitable, in the sense that it was not open to a reasonable jury to acquit, then there may not be a substantial miscarriage of justice (*Baini v R* (2013) 42 VR 608; [2013] VSCA 157).
  - A court may find that there was a substantial miscarriage of justice even if satisfied that each individual ground of appeal did not involve any substantial miscarriage of justice, but that the combined effect of several errors or irregularities may meet the threshold of a "substantial miscarriage of justice" (*R v Kotzmann* [1999] VSCA 27; *R v Schaeffer* [2005] VSCA 306; *R v Gell* [2006] VSCA 255; *R v Ireland* (1970) 126 CLR 321; *R v Glennon (No 3)* [2005] VSCA 262).

Orders on successful appeal

- If the Court of Appeal allows the appeal, it must set aside the conviction and may either:
  - order a new trial for the offence charged or some other offence;
  - enter a judgment of acquittal for the offence charged;
  - enter a judgment of conviction of some other offence the jury (or in the case of a plea, the judge) must have been satisfied that the accused committed; or
  - enter a finding of not guilty because of mental impairment of the offence charged or some other offence and make consequential orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (s277).
- In deciding, the court considers (1) whether the admissible evidence at original trial was sufficiently cogent to justify a conviction (if not, should not give prosecution an opportunity to supplement a defective case) and (2) any circumstances that might render it unjust to the accused to stand trial again (considering the public interest in the proper administration of justice and the individual interests of the accused (*DPP (Nauru) v Fowler* (1984) 154 CLR 627; [1984] HCA 48).

Division 2 - Appeal by offender against sentence

Original jurisdiction

- Offender may seek leave to appeal against sentences imposed in the County Court or the Trial Division of the Supreme Court in its original jurisdiction (s278).
- A party applies for leave to appeal by filing a notice of application for leave to appeal and written case within 28 days of the day on which the person was sentenced. The Registrar of Criminal Appeals must then provide a copy of the notice and written case to the respondent within 7 days of filing (s279, s284).
- The Court of Appeal is usually constituted by a single judge for applications under s278 or s283 for leave to appeal against sentence. The court may refuse leave if:
    - There is no reasonable prospect that the Court of Appeal would impose a less sever sentence than the sentence first imposed; or
    - There is no reasonable prospect that the Court of Appeal would reduce the total effective sentence (s280, 284A).
- As sentencing is discretionary, must show error for review of discretionary decisions as stated in *House v R,* that is that the sentencing judge acted upon a wrong principle, mistook the facts, took into account irrelevant matters or failed to take into account relevant matters or where unclear how an error occurred, the result is unreasonable or plainly unjust (often complaint is manifest excess). It is not enough that the appellate judges would have imposed a different sentence;
- Once a party demonstrates error in the sentencing process, the sentencing discretion is re-opened. In cases of manifest excess, the court must review the circumstances of the case and determine whether the sentence imposed was wholly outside the permissible range of sentences available to the judge (*Dinsdale v R* (2000) 202 CLR 321; [2000] HCA 54 per Gleeson CJ and Hayne J; *R v King* [2007] VSCA 38; *R v ALP* [2002] VSCA 210; *R v Hilton* [2001] VSCA 134). The court must then consider whether it would have imposed a different sentence. The court may only allow the appeal if it is satisfied that the original sentence was affected by error and it believes that a different sentence should be imposed (s281, s285).

- A complaint about the operation of the parity principle is usually assessed in the same manner as a complaint that the sentence is manifestly inadequate or excessive. The question for the appellate court is whether it was reasonably open for the trial judge to differentiate or fail to differentiate in the manner the judge did (*Hilder v The Queen* [2011] VSCA 192, [38]; *Ryan v The Queen* [2016] VSCA 255, [42]).
- A party can appeal against individual sentences, the orders for cumulation and the non-parole period, but not the total effective sentence alone. The court may allow an appeal and impose different sentences on individual counts while still imposing the same non-parole period (*R v Boucher* [1995] 1 VR 110; *R v Bolton& Barker* [1998] 1 VR 692; *R v Lomax* [1998] 1 VR 551).
- Where the court considers an appeal against multiple sentences imposed on an indictment, the sentencing discretion for other offences may be reopened if the appellant demonstrates error in relation to *any* of the sentences imposed. Sentencing can be an integrated process and defects in one sentence may require the court to adjust other sentences (Compare *R v Gill* [2010] VSCA 67; *DHC v R* [2012] VSCA 52 and *Smith, Garcia & Andreevski v R* [2012] VSCA 5).

- If the court refuses leave on the basis that there is not likely to be any change to the total effective sentence, the judge may amend the sentence first imposed by substituting a less severe sentence and make any other orders that should be made (s280(3)).
- If the Court grants leave to appeal, it must allow the appeal if the appellant satisfies the court that:

  (a) there is an error in the sentence first imposed; and

  (b) a different sentence should be imposed (s281(1), s285(1)).

  In any other case, the Court must dismiss the appeal (s281, s285).
- The Court of Appeal may increase the sentence on an appeal by an offender if it is satisfied there is error in the first sentence and a different sentence should be imposed. However, it must warn the appellant, as early as possible during the hearing, that he or she faces the possibility of an increased sentence. This gives the offender the opportunity to seek to abandon the appeal (s281, s285; *Neal v R* (1982) 149 CLR 305).
  - An appellate court must take care to ensure that the warning does not suggest prejudgment of the case and does not appear to be a threat to discourage a person from pursuing a meritorious appeal (*RHMcL v R* (2000) 203 CLR 452; [2000] HCA 46 per Kirby J).
- Once the Court finds that there was error in the sentence first imposed, it must reconsider the sentence afresh on the basis of the material before the original sentencing judge and any additional evidence of the accused's progress to rehabilitation since sentence (including between sentencing and the appeal, such as offender's progress in custody and current mental state). However, any other evidence is subject to the principles which govern "fresh evidence" (*Bass v R* [2014] VSCA 350, [176]; *Kentwell v R* (2014) 252 CLR 601; [2014] HCA 37, [43]; *Betts v R* (2016) 258 CLR 420; [2016] HCA 25 at [11]-[12]).

- When the Court allows an appeal, it must set aside the sentence imposed and either:

  (a) impose the sentence, whether more or less severe, that it considers appropriate; or

  (b) remit the matter to the originating court (s282).

- When the Court imposes its own sentence, it may make any other order that it considers ought to be made (s282, s286).

- If the Court remits the matter, it may give directions concerning the further conduct of the matter, including whether it should be heard by the same or a different judge. The sentencing court must comply with those directions (s282, s286).
  - The Court will only exercise the power to remit a matter sparingly and in exceptional circumstances. It may be appropriate to do so when the sentencing judge's reasons are so brief that the court cannot reliably determine whether a different sentence should have been passed (see *R v McKittrick* [2000] VSCA 131; *R v Roberts* [2000] VSCA 46).

Appeal against sentence of imprisonment imposed by County Court or Supreme Court on appeal from Magistrates' Court

- Person may seek leave to appeal to the Court of Appeal against a **sentence of imprisonment** imposed by the County Court or Supreme Court on an appeal from the Magistrates' Court under s256, s259 or s262, only if the Magistrates' Court did not impose a sentence of imprisonment (s283).
    - For the purpose of s283 **imprisonment** includes detention in a youth justice centre or youth residential centre, but does not include imprisonment in default of payment of a fine (s283); includes a suspended sentence (*R v SA* (2001) 3 VR 109; [2001] VSCA 117).
- Available regardless of whether it was the offender or the Crown that appealed the decision (s283. See also *DPP v Shoan* [2007] VSCA 220).
- Follows similar procedures to an appeal against sentence from the County Court in its original jurisdiction discussed above.
- The court may refuse leave to appeal where:
    - there is no reasonable prospect that the court would impose a less severe sentence than the sentence imposed by the court; or
    - there is no reasonable prospect that the court would reduce the total effective sentence despite there being an error in the sentence imposed by the court (s284A).
- Note the DPP has a limited right of appeal following an offender's appeal from the Magistrates' Court set out in s290A-290D but this not assessable.

Division 3- Crown Appeal against Sentence

- The DPP may appeal as of right against a sentence imposed in the Trial Division of the Supreme Court or the County Court in its original jurisdiction if the DPP:

  (a) considers that there is an error in the sentence imposed and that a different sentence should be imposed; and

  (b) is satisfied that an appeal should be brought in the public interest (s287).

- The situations in which Crown appeals should be brought include:

  (a) where a sentence reveals such manifest inadequacy or inconsistency in sentencing standards as to constitute error in principle;

  (b) where it is necessary for a court of criminal appeal to lay down principles for the governance and guidance of courts having the duty of sentencing convicted persons;

  (c) to enable the courts to establish and maintain adequate standards of punishment for crime;

  (d) to enable idiosyncratic views of individual judges as to particular crimes or types of crimes to be corrected;

  (e) to correct a sentence which is so disproportionate to the seriousness of the crime as to shock the public conscience;

  (f) to ensure, so far as the subject matter permits, that there will be uniformity in sentencing (R v Clark [1996] 2 VR 520 at 522).

- The Crown commences an appeal under s287 by filing a notice of appeal and written case within 28 days after the day on which the sentence was imposed. The DPP must sign the notice of appeal personally (s288). The Crown must serve a copy of the notice of appeal and written case on the respondent personally within 7 days of filing and must also provide a copy to the legal practitioner who previously represented the accused, if that practitioner can reasonably be identified (s288).

- The court must allow the appeal if the DPP satisfies the court that:

  (a) there is an error in the sentence first imposed; and

  (b) a different sentence should be imposed (s289(1)).

  In any other case, the court must dismiss the appeal (s289).

- If the court allows the appeal, it must set aside the sentence imposed and impose the sentence, whether more or less severe, that is considers appropriate. The court may also make any other order it considers ought to be made (s290).
- The court may not take into account any element of double jeopardy (prosecuting/punishing a person twice for the same crime) when determining whether there is error in the sentence first imposed; determining whether to exercise the residual discretion to refuse the appeal despite proof of sentencing error; or determining the appropriate sentence to impose after allowing a Crown appeal (s289, s290; DPP v *Karazisis, Bogtstra & Kontoklotsis* [2010] VSCA 350).
- The prosecution carries the onus of persuading the court to impose a different sentence. This includes the onus of persuading the court not to exercise the residual discretion not to intervene (CMB v AG (NSW) (2015) 256 CLR 346; [2015] HCA 9).
- The Court of Appeal may impose or vary a sentence, even if the offender does not attend the hearing of the appeal or application for leave to appeal (s322).

Division 4 – Interlocutory appeal

- Interlocutory decision defined in s 3 as: a decision made by a judge in a proceeding referred to in section 295(1), whether before or during the trial, including a decision to grant or refuse to grant a permanent stay of proceeding [NB. not a decision to uphold a no case to answer submission - *DPP v Singh* [2012] VSCA 167].
- If the trial has already commenced when the Court of Appeal grants leave, the trial judge must adjourn the trial without discharging the jury if that is reasonably practical, until the appeal has been determined (s299).
- **Certification by trial judge:**

  A party can only seek leave to appeal if the judge who made the interlocutory decision certifies:

  - Either:
    - If the decision concerns the admissibility of evidence, that the evidence, if ruled inadmissible, would eliminate or substantially weaken the prosecution case; or
      - This is a stringent test. The prosecution's case will only be "substantially weakened" if the exclusion of the evidence would cause the prosecution to seriously reconsider whether the case should proceed (*CGL v DPP* (No 2) (2010) 24 VR 482; [2010] VSCA 24) or if the prosecution case "depends entirely" on the challenged evidence (*THD v R* [2010] VSCA 115), or if the exclusion of the evidence "could realistically be expected to affect the outcome" (*DPP v Paulino* [2017] VSCA 38, [9]-[10])
    - If the decision does not concern the admissibility of evidence, that the decision is sufficiently important to the trial to justify it being determined on an interlocutory appeal; and
      - Judge must consider the purpose of an interlocutory appeal. The process exists in part to reduce the number of retrials by allowing the Court of Appeal to correct erroneous decisions before the commencement or conclusion of a trial. A judge must consider to extent to which court time and resources would be wasted if the decision is found to be erroneous and is not immediately appealed (*Stannard v DPP* [2010] VSCA 165; *UR v R* [2011] VSCA 152).
  - If the decision was made after the trial commenced, either:
    - That the issue in question could not reasonably be identified before the trial; or
    - The party was not at fault in failing to identify the issue in question (s295(3)).
  - Even if the relevant limbs of s295(3) are met, judge must also consider whether the interlocutory decision is attended by sufficient doubt to warrant an appeal. A judge should refuse to certify any decision where the appeal would be hopeless or the decision is not attended by sufficient doubt (*MA v R* (2011) 31 VR 203; [2011] VSCA 13; McDonald v DPP (2010) 26 VR 242; [2010] VSCA 45; Wells v R (No 2) [2010] VSCA 294; R v Bufton (Ruling No 2) [2019] VSC 264).
  - The judge who made the interlocutory decision must determine an application for certification as soon as practicable after the request is made (s295).

- The Court of Appeal may only grant leave to bring an interlocutory appeal if it is satisfied that it is in the interests of justice to do so. When determining whether to grant leave, the court must consider:

  (a) the extent of any disruption or delay to the trial process that may arise if leave is given; and

  (b) whether the determination of the appeal against the interlocutory decision may-

  (i) render the trial unnecessary; or

  (ii) substantially reduce the time required for the trial; or

  (iii) resolve an issue of law, evidence or procedure that is necessary for the proper conduct of the trial; or

  (iv) reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial; and

  (c) any other matter that the court considers relevant (s297(1)).

- In addition, the court may only grant leave to appeal after the trial has commenced if it is satisfied that the reasons for granting leave clearly outweigh the disruption to the trial (s297(2)).
  - Where application is brought while jury is considering its verdict, it will be rare that the reasons for granting leave would outweigh the inevitable disruption that would be caused to the trial (see *ML v R* [2011] VSCA 193).

Application to Review Refusal to Certify

- If the trial judge refuses to certify a matter under s295(3), the party that requested certification may apply to the Court of Appeal in accordance with the rules for a review of the trial judge's refusal (s296).
- The applicant must serve a copy of the notice on the other party. Filing and service must take place:
  - If the trial has not commenced and is not due to commence for at least 10 days, within 10 days after the day on which the judge refuses to certify, or in any extension of that period;
  - If the trial commences within 10 days of when the judge refuses to certify, within 2 days after the day on which the trial commences, or in any extension of that period; and
  - If the trial has commenced when the judge refuses to certify, within 2 days after the day on which the judge refuses to certify, or in any extension of that period (s296).
- On an application to review a judge's refusal to certify under s296(1), the Court of Appeal

  (a) must consider the matters referred to in section 295(3); and

  (b) if satisfied as required by section 297, may give the applicant leave to appeal against the interlocutory decision (s296(4)).

- Applications to review certification are also applications for leave to appeal. The court may determine both questions in the one hearing.
- A challenge to the failure to certify is determined in accordance with *House v The King* (1936) 55 CLR 499; [1936] HCA 40 principles. The applicant must show that the trial judge acted on a wrong principle, took into account an irrelevant consideration, mistook the facts, failed to take into account a relevant consideration or reached a plain unreasonable result such that error may be inferred (*DPP v Wise* [2016] VSCA 173 at [12]; *Tuite v R (No 2)* [2015] VSCA 180 at [33];]; *Frazier v R* [2017] VSCA 370 at [7]-[8]).

Determination of interlocutory appeal

- An appeal against an interlocutory decision is to be determined on the evidence, if any, given in the proceeding to which the appeal relates, unless the Court of Appeal gives leave to adduce additional evidence (s300).
- The Court of Appeal –

  (a) may affirm or set aside the interlocutory decision; and

  (b) if it sets aside the interlocutory decision –

  (i) may make any other decision that the Court of Appeal considers ought to have been made; or

  (ii) remit the matter to the court which made the interlocutory decision for determination (s300(2)).
- If the Court of Appeal remits a matter under subsection (2)(b)(ii)-

  (a) it may give directions concerning the basis on which the matter is to be determined; and

  (b) the court to which the matter is remitted must hear and determine the matter in accordance with the directions, if any (s300(3)).
- After the Court of Appeal decides the case, the Registrar of Criminal Appeals must transmit the decision to the trial court. The trial court must enter the decision on the court record (s301).

Division 5 – Cases Stated for Court of Appeal

- Allows a court to reserve a question of law that arises before or during a trial in the County Court or Supreme Court or on an appeal from the Magistrates' Court for the Court of Appeal (s302, s302A).
- The court may reserve a question of law if it is satisfied that it is in the interests of justice to do so. The court must consider:
  - the extent of any disruption or delay to the trial process that may arise if the question of law is reserved;
  - whether the determination of the question of law may-
    - render the trial or hearing unnecessary;
    - substantially reduce the time required for the trial or hearing;
    - resolve a novel question of law that is necessary for the proper conduct of the trial or hearing; or
    - in the case of questions reserved in relation to a trial, reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial (s302(2), 302A).
- The court may exercise this power on the application of a party or on the judge's own motion (see s337).
- If the court reserves a question of law, it must state a case for the Court of Appeal, setting out the question of law and the circumstances in which that question has arisen. It must also sign the case stated and transmit it to the Court of Appeal. The Court of Appeal may also return a case stated for amendment, and the originating court must amend the case stated as required (s305).

- Alternatively, if the court refuses to reserve a question of law, a party may apply to the Court of Appeal for an order calling on the originating court and the respondent to show cause why the question of law should not be reserved. On this application, the Court of Appeal may order the trial court to reserve the question of law or may refuse the application with or without costs. The trial court must comply with an order to reserve a question of law and must follow the process described above as if it had granted the original application to reserve a question of law (s304).
- Once the case is stated, the Court of Appeal may hear and determine the question of law in the stated case and may remit the question and determination back to the originating court (s306).
- The trial court may not reserve a question of law once the trial has commenced unless the reasons for doing so clearly outweigh any disruption to the trial (s302). If the court does reserve a question of law after the trial commences, it must adjourn the trial without discharging the jury until the question of law has been determined, if that is reasonably practical. In addition, where a court reserves a question of law arising on an appeal to the County Court, the court must adjourn the hearing if reasonably practicable until the question has been determined (s303).
- The Court of Appeal may refuse to answer questions in a case stated if it does not have jurisdiction to answer the question or if it is otherwise inappropriate to answer one or more of the questions (see *R v Garlick* [2006] VSCA 127; *Furze v Nixon* [2000] VSCA 149; *R v Assange DPP (Cth) v JM* [2012] VSCA 21).
- After the Court of Appeal decides the case, the Registrar of Criminal Appeals must transmit the decision to the court which reserved the question. The court must then enter the judgment and order on the court record (s307).

DPP Referral of Question of Law

- This process allows the DPP to seek clarification of a point of law that has caused confusion or possible injustice in the past.
- The DPP may refer a question of law arising in a proceeding **if a person is acquitted of any or all charges** in:
  - a trial on indictment in the Supreme Court or the County Court; or
  - on an appeal against conviction or sentence from the Magistrates' Court (s308(1)
- The Court of Appeal must consider the point of law and give its opinion (s308(2)).
  - The opinion of the Court of Appeal on the reference only affects future cases and does not affect the respondent's acquittal (s308; *Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410). The court should endeavour to conceal the identity of the respondent, who should not suffer public opprobrium if the court rules that he or she was wrongly acquitted (*Attorney-General's Reference (No 1 of 1983)* [1983] 2 VR 410; *DPP Reference No 2 of 1996* [1998] 3 VR 241).
- This procedure is only available on a question of law that arose in the proceeding. It does not "enable the director to set in train a roving judicial commission on a particular branch of the law" (*Attorney-General's Reference (No. 3 of 1994)* [1998] AC 245). However, a question may arise in a proceeding even if it was not in controversy between the Crown and the accused. It is only necessary that the judge decided the question in the proceeding (*DPP Reference No 2 of 1996* [1998] 3 VR 241).
- The acquitted person who appears in person or by a legal practitioner as contradictor is entitled to reasonable costs as settled by the Costs Court (s308).
- The power of the DPP to refer a point of law is not limited to matters *arising in the trial*. Under s308, the DPP may refer any point of law that arose *in the proceeding* (s308).
- The order of the court on a DPP referral may be appealed to the High Court (*Mellifont v Attorney-General* (1991) 173 CLR 289; [1991] HCA 53).

Bail

- Where to start: understanding the way that the Bail Act 1977 (Vic) is structured

- Where to end: working out a narrative structure for answering questions relating to bail and bail hearings

The Bail Act 1977 (Vic)

- Special personal circumstances
- “Vulnerable adult” – s 3AAAA: a person is a vulnerable adult if the person is 18 years of age or more and has a cognitive, physical or mental health impairment that causes the person to have difficulty in (a) understanding their rights, or (b) making a decision, or (c) communicating a decision.
- Nb: Section 3A sets out matters to be taken into account by a bail decision maker in making a determination in relation to an Aboriginal person; section 3B sets out matters to be taken into account by a bail decision maker in making a determination in relation to a child.

“Surrounding circumstances”: s 3AAA

- If this Act provides, in relation to a matter, that a bail decision maker must take into account the surrounding circumstances, the bail decision maker must take into account all the circumstances that are relevant to the matter including, but not limited to, the following:
- Some of these circumstances relate to the alleged offending, such as, the nature and seriousness of the alleged offending, including whether it is a serious example of the offence, the strength of the prosecution case, any known view or likely view of an alleged victim of the offending on the grant of bail, the amount of bail or the conditions of bail, the length of time the accused is likely to spend in custody if bail is refused, and the likely sentence to be imposed should the accused be found guilty of the offence with which the accused is charged

- Some of these circumstances relate to the circumstances of the accused, such as the accused's criminal history, the extent to which the accused has complied with the conditions of any earlier grant of bail, whether the accused was at the time of the alleged offending, on bail for another offence, on summons, on parole, or on a community corrections order, whether there is a family violence intervention order or family violence safety notice against the accused;
- And also the accused's personal circumstances, associations, home environment and background; any special vulnerability of the accused, including being a child or an Aboriginal person, being in ill health or having a cognitive impairment, an intellectual disability or a mental illness, and the availability of treatment or bail support services

The test for the bail decision maker, relevant to the circumstances of the particular case

- There is a prima facie entitlement to bail under s 4, unless another test applies
- See s 3D of the Bail Act and the key features of the decision making process
- Flow chart 1 – which test applies
- If exceptional circumstances – move to flow chart 2
- If compelling reasons – move to flow chart 3
- If unacceptable risk only – move to flow chart 4

Examples where the exceptional circumstances test will apply

- S 4AA(1): Schedule 1 offences: Murder, aggravated home invasion, aggravated carjacking, trafficking, cultivation in a large commercial quantity or commercial quantity
- S 4AA(2): The exceptional circumstances test also applies where a sch 2 offence said to have been committed where the person has a terrorism record or there is risk of a terrorism offence, or the offence is alleged to have been committed whilst the accused is on bail or summons or is awaiting trial for a Sch 1 or Sch 2 offence, or during a sentence, parole order, or community corrections order for a Sch 1 or Sch 2 offence

Re Gloury-Hyde [2018] VSC 393

- The concept of ‘exceptional circumstances’ is elusive, but in an appropriate case it may be a combination of the strength of the prosecution’s case, an applicant’s personal circumstances, and an absence of factors showing that the applicant poses an ‘unacceptable risk.’ [30]
- The right to liberty is particularly important when the applicant is young and has physical, psychological and cognitive problems. The nature and extent of those problems and their impact on the applicant’s functioning, when considered with other factors – such as the availability of treatment – may ‘establish exceptional circumstances justifying a grant of bail.’ [35]

Re CT [2018] VSC 559

- Having to show ‘exceptional circumstances’ takes a case out of the normal and is a high hurdle for a bail applicant; however, it is not an impossible standard. [64]
- ‘Exceptional circumstances’ may be established by a combination of factors involving the nature of the Crown’s case – including its strength, undue delay in bringing the matter to trial, or unusual features of the offending or investigation – and the applicant’s personal circumstances. [65]

If the exceptional circumstances test applies

- The accused bears the onus of demonstrating exceptional circumstances (s 4A(2)), having regard to the surrounding circumstances (s 4A(3))
- Even if those exceptional circumstances are made out, the prosecution may then allege there is an unacceptable risk (referred to as a two stage test under the Act)
- if so the prosecution bears the onus of demonstrating that the risk is unacceptable in the surrounding circumstances, including having regard to the extent to which any risk may be mitigated by suitable conditions of bail
- Consider delay as well as those other relevant surrounding circumstances

Examples where the compelling reasons test will apply

- S 4AA(3): Examples of schedule 2 offences:
  - An indictable offence alleged to have been committed whilst the accused is on bail or summons or awaiting trial for another indictable offence, or during a community corrections order or parole order
  - Manslaughter, child homicide, homicide by firearm
  - ICSI, RCSI in circumstances of gross violence
  - Rape, sexual penetration of a child and other sexual offences
  - Contravening a family violence intervention order in some circumstances
  - Etc

If the compelling reasons test applies

- The accused bears the onus of demonstrating a compelling reason (s 4C(2)), having regard to the surrounding circumstances (s 4C(3))
- Even if those exceptional circumstances are made out, the prosecution may then allege there is an unacceptable risk (referred to as a two stage test under the Act)
- if so the prosecution bears the onus of demonstrating that the risk is unacceptable in the surrounding circumstances, including having regard to the extent to which any risk may be mitigated by suitable conditions of bail
- Consider delay as well as those other relevant surrounding circumstances

Re Ceylan [2018] VSC 361 and compelling reasons

- In applying its terms, the Act requires a court to consider two considerations that may factor against each other when it comes to determining if bail should be granted. They are the safety of the community as well as the presumption of innocence and right to liberty.
- The ‘exceptional circumstances’ test in the Act is plainly intended to be more difficult to satisfy than the ‘compelling reason’ test. [45]2 • Whether an accused shows a ‘compelling reason’ involves considering all relevant circumstances including the strength of the prosecution case, the accused’s personal circumstances, and criminal history. A synthesis of all the factors must compel the conclusion that detention is not justified. [46]. • This will likely be shown if there is a ‘forceful, and therefore convincing, reason showing, that in all the circumstances, the continued detention of the applicant was not justified.’ [47]

If the unacceptable risk test applies

- This can therefore be the second stage of a two stage test, if exceptional circumstances or compelling reasons applies, or it could arise separately
- The prosecutor bears the onus of demonstrating an unacceptable risk (s 4D(2)), having regard to the surrounding circumstances (s 4D(3)) and the extent to which any risk may be mitigated by suitable conditions of bail