Re Mongan [2018] VSC 638 (24 October 2018) – Victorian Supreme Court

'Bail' – 'Breach' – 'Children' – 'Factors affecting risk' – 'People with children' – 'Physical violence and harm' – 'Protection order' – 'Unacceptable risk and best interests'

Charges: Charges including false imprisonment, recklessly causing injury, unlawful assault, aggravated burglary, theft and threat to kill.

Proceeding type: Bail application.

Facts: The applicant and complainant were married for 13 years and have three children. The complainant claimed that the marriage ended because of the applicant's controlling and intimidating behaviour. From the time of the separation, a series of interim and final Family Violence Intervention Orders (FVIOs) were in place restraining the applicant from contacting the complainant. The applicant breached many of the FVIOs. It was alleged that the applicant, armed with items intended to incapacitate the complainant, unlawfully entered her premises, interfered with a CCTV camera which might have recorded his subsequent conduct, and then waited for her. He grabbed her from behind, forced her to the ground, sought to bind her wrists and gag her, pushed her into her own home, and again forced her to the ground, binding her ankles. He threatened her in a graphically and frightening manner whilst she was bound and helpless. The children returned home from school and heard the complainant screaming. The complainant eventually escaped ([46]). The applicant submitted that a combination of a number of matters demonstrated a compelling reason that justified a grant of bail (see [34]).

Issues: Whether bail should be granted; Whether there was a compelling reason why the applicant's detention in custody was not justified; Whether the applicant presented an unacceptable risk of committing further offences, endangering the safety or welfare of the complainant and interfering with witnesses.

Decision and reasoning: Section 4AA of the *Bail Act 1977* (Vic) sets out circumstances in which a two-step test applies to the consideration of a grant of bail. Step 1 requires the existence of exceptional circumstances and compelling reasons. Step 2 mandates that the Court must apply the unacceptance risk test. In considering whether or not the applicant established compelling reasons that justified the grant of bail, the Court must take into account the surrounding circumstances (see s 4C and s 3AAA of the Act). The Court was required to assess 'the nature and seriousness of the alleged offending, including whether it is a serious example of the offence' (see s 3AAA(1)(a)).

There was no question that the offending alleged was serious. It was pre-meditated and involved the use of equipment to incapacitate the complainant. Only the escape of the complainant prevented a continuation of the offending. The Court found that the applicant's lawyer's reliance of an 'arguable defence' was 'somewhat optimistic' ([48]). The Court also considered the applicant's criminal history and the extent of compliance with conditions of earlier grants of bail. Although his criminal history was limited and there was nothing to indicate previous breaches of bail, the Court noted two factors, namely, that the applicant failed to accept the breakdown of his marriage, and that he refused to respect the orders of the Magistrate Court in relation to the complainant. A significant matter was the fact that, at the time of the alleged offending, the applicant was approximately six weeks into a six month adjourned bond which he received for his multiple breaches of the FVIOs. Matters pursuant to s 3AAA(1)(g), (j), (k), (l) were also considered.

At [57], his Honour noted that the risk of further violence or intimidation by the applicant towards the complainant was significant and entirely unacceptable (see s 4E of the Act). The application for bail was therefore refused as the applicant failed to establish a compelling reason that would justify the grant of bail. The circumstances suggested that the applicant should be held in custody pending trial.