BAIL FOLLOWING CONVICTION AND BEFORE SENTENCING
SECTION 22B OF THE *BAIL ACT 2013*
"NINE MONTHS LATER"

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Note: This paper has been produced as a further addendum to the paper produced at the passing of this legislation on 27 June 2022 and the addendum produced 11 July 2022.

This further addendum can be used as a "ready reckoner" without reference to the previous paper.

THE LEGISLATION

1. On 23 June 2022, the Bail Amendment Bill was passed by Parliament. It was assented to on 27 June 2022.

2. In short, it applies where
    a. an accused person has either:
        i. been found guilty, or
        ii. has entered a plea of guilty; and
    b. the accused person will be sentenced to imprisonment to be served by way of full-time imprisonment.

3. When the section applies, the accused needs to demonstrate special or exceptional circumstances in order for bail to be granted or dispensed with, or for a detention application to be refused.

HOW DOES THE COURT DETERMINE WHETHER SOMEONE "WILL BE SENTENCED TO IMPRISONMENT TO BE SERVED BY FULL-TIME DETENTION"?

4. Since our original paper, the Court of Criminal Appeal has had cause to consider what is meant by this term.

5. In *DPP v Van Gestel* [2022] NSWCCA 171 (***Van Gestel***), the Court said:

    a. Whether someone "will be sentenced to imprisonment to be served by full-time detention" is an "evaluative judgment as to a future matter" (at [16]);
    b. Proof on the balance of probabilities is <u>not</u> the relevant standard (at [17]);
    c. Section 22B sets a "high bar for the degree of satisfaction to be reached by the Court to engage the power to make a bail decision under s22B" (at [42]);
    d. However, that an alternative sentence to full time imprisonment is lawfully, and therefore theoretically, available does not mean that the Court could not reach the opinion or state of satisfaction that the convicted person will be sentenced to full time imprisonment (at [46]).

6. The Court said that "will" suggests what is "realistically inevitable" as distinct from what may happen or is likely to happen, but does not mean a state of "absolute certainty" ([44]). The Court held that the requirement of the condition in s 22B(1) that the Court be satisfied that the convicted person "will" be sentenced to full time imprisonment, involves a state of satisfaction, as opposed to the *fact*. This is an evaluative judgment of a future matter and not a fact to be proved (see *Director of Public Prosecutions (NSW) v Day* [2022] NSWCCA 173 at [21]) . In *Van Gestel* at [47], it was considered that this state of satisfaction could be reached if the materials and submissions placed before the Court

demonstrate that no other sentence than full time imprisonment could realistically be imposed by the sentencing court with respect to the convicted person in all the circumstances of the case.

7. In engaging in the "evaluative judgment", the Court might look to (at [45]):

    a. The offences for which the person has been convicted, bearing in mind the principles of sentencing, sentencing laws and available alternatives;
    b. The materials and submissions before the Court relevant to the future disposition of the sentence; and
    c. The "abbreviated nature" of the bail application, especially that it is not a "pseudo" or "abridged" sentencing hearing.

SPECIAL OR EXCEPTIONAL CIRCUMSTANCES

8. The Court in *Van Gestel* confirmed that whether "special or exceptional circumstances" exist is a question of fact, determined on the balance of probabilities, with the onus being upon the convicted person (at [20]).

9. The Court also confirmed that whether "special or exceptional circumstances" exist is a matter to be determined case-by-case (at [51]-[52]).

10. In *R v Isaac* [2023] NSWSC 22, Yehia J observed that the requirement to establish "special or exceptional circumstances" is at least as onerous as the show cause requirement (at [7]). Her Honour also stated (at [9]):

> The authorities also show that the concept of exceptional circumstances is a flexible one which requires a case-by-case examination. Such circumstances may be constituted by a combination of matters together, features that are subjective to an applicant, features which bear upon the nature of the alleged offence(s), and features which emphasise that the applicant is otherwise a person who will answer bail: see *R v Khayat* (No 11) [2019] NSWSC 1320 at [14].

DOES SECTION 22B APPLY TO JUVENILES?

11. In *R v LM* [2022] NSWSC 987, Dhanji J, sitting as a single judge of the Supreme Court, said that where a juvenile is being dealt with to finality in the Children's Court, there can be "no question" as to the application for the provision, because there is no sentence of imprisonment available in the Children's Court (at [15]).

12. Where the matter may not be finalised in the Children's Court, his Honour said (at [18]):

> Even if the prosecution satisfies the Children's Court magistrate that the matters should not be dealt with summarily, there is a further question as to what would occur when they are ultimately dealt with, in this case, in the District Court. That is, in any sentencing proceedings in the District Court there would, in turn, need to be a determination as to whether the matters would be dealt with according to law or under the *Children (Criminal Proceedings) Act*: see s 18. If the latter, it again follows that there would be no question as to the imposition of a sentence of imprisonment.

DOES SECTION 22B APPLY IN THE CONTEXT OF A SPECIAL HEARING?

13. In *R v Boujandy* [2022] NSWDC 517, a detention application was brought after the defendant was found that, on the limited evidence available, he committed the offences charged. The Crown brought a detention application. Montgomery DCJ found that s 22B did not apply as the findings were not "determinations of conviction" (at [13]).

WHAT TO DO IF A PERSON IS CONVICTED IN THEIR ABSENCE?

14. Where a person is convicted in their absence and a detention application is brought prior to sentencing proceedings, or, a s 25(2) warrant is issued, then the person is likely in the "period following conviction and before sentencing".

15. In some cases, it may be prudent to ask that an annulment application be heard prior to the hearing of a release or detention application.

WHAT ABOUT THE NOTICE PROVISIONS?

16. Where a detention application is brought upon a plea of guilty, without notice, it may be appropriate to rely upon s 50(5) of the *Bail Act 2013* which requires "reasonable notice". There is no definition of what constitutes "reasonable notice". Reliance upon this provision may provide a basis for an adjournment of the hearing of the detention application.

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