

IN THE MAGISTRATES COURT OF VICTORIA
AT MELBOURNE

CRIMINAL DIVISION

Case No.s X02285456
Y01046940

IN THE MATTER of the Bail Act 1977 (Vic)

and

IN THE MATTER of Applications for Bail by

Applicant

PASQUALE BARBARO

MAGISTRATE: S GARNETT
WHERE HELD: MELBOURNE
DATE OF HEARING: 8 & 9 July 2010
DATE OF DECISION: 2 August 2010

REASONS FOR DECISION

Catchwords: Bail Act 1977 – Commonwealth Offences: S 18 (4):New Facts and Circumstances – S 4 (2) “exceptional circumstances” – State Offences: Prima facie entitlement to bail - Risks: failing to answer bail – interfering with witnesses & obstructing the course of justice – Factors to consider: strength of prosecution cases – nature & seriousness of offences – background issues - conditions in custody - \$3.45m surety – financial impact on family if fail to appear – parity - significant delay before trial.

APPEARANCES: Counsel

For the Applicant	Mr Heliotis Q.C Mr Boyce & Ms Kapitaniak
For the Respondents	Ms Abraham Q.C & Mr B Young for the CDPP Mr Hughen for OPP

HIS HONOUR:

- 1 On 7 April 2010, Mr Barbaro lodged a further application for bail in relation to Commonwealth offences involving drug importation, trafficking and dealing with proceeds of crime for which he was charged on 8 August 2008.
- 2 On 28 June 2010, Mr Barbaro lodged an application for bail in relation to two State offences involving conspiracy to murder for which he was charged on 16 April 2009.
- 3 Before detailing the evidence and the submissions presented to the court, it is necessary to set out some detail surrounding the background which has given rise to a further bail application being made by him in relation to the Commonwealth offences and an initial bail application being made by him in relation to the State offences.

Background

- 4 On 19 September 2008, I refused an application for bail in relation to the Commonwealth offences because, even though I found “exceptional circumstances” existed due to the anticipated delay before trial, I determined that Mr Barbaro was an “unacceptable risk” of failing to answer bail or obstructing the course of justice. A further application for bail was made by him and on 18 December 2008, I granted bail after finding that new facts and circumstances existed on the basis of an increased surety to \$2m and the provision of an electronic monitoring bracelet. I formed the view that with the imposition of stringent bail conditions the risks of flight and obstructing the course of justice were now acceptable to the Court.
- 5 The Commonwealth DPP appealed this decision pursuant to S 18A of the Bail Act 1977 and on 6 February 2009, Mr Justice Forrest found that I had made a manifest error in granting bail and that Mr Barbaro was an unacceptable risk

of flight if granted bail. Accordingly, Mr Barbaro's bail was revoked.¹

6 Mr Barbaro appealed this decision pursuant to S 17 (2) of the Supreme Court Act 1986 to the Court of Appeal.² Before the Court of Appeal, the Crown conceded that "exceptional circumstances" existed on the basis that there would be an anticipated delay before trial of approximately 2 years. The Crown contended that Mr Barbaro was an unacceptable risk of failing to answer bail, obstructing the course of justice and committing further offences if released on bail. In essence, the Crown contended that he had the incentive, capacity and disposition to take flight. Importantly, counsel for Mr Barbaro did not withdraw the initial concession made before me on 19 September 2008 that the Crown case against him was strong and that the evidence indicated that he was the principal organiser of the alleged drug syndicate. The Court of Appeal agreed with Mr Justice Forrest that Mr Barbaro was an "unacceptable risk" of flight based on; the strength of the prosecution case; the seriousness of the alleged offending; the penalty if found guilty; and, importantly, that Mr Barbaro had the incentive, capacity and disposition to take flight.

7 The Court concluded that despite the increased surety and monitoring bracelet, the risk of flight remained an "unacceptable risk". The Court did however, refer to the issue of delay and noted, after referring to Kellam J in Mokbel v DPP (No 3)³ that; "there will be circumstances where the actual or anticipated delay is of such a magnitude that risks which would, in other circumstances, be regarded as unacceptable may properly be viewed as acceptable. As Kellam J said, the community will not tolerate the indefinite detention of persons awaiting trial. Whether, and when, the delays in a particular case can be so characterised will depend on the circumstances.

¹ CDPP v Barbaro [2009] VSC 27

² Barbaro v CWDPP [2009] VSCA 26

³ (2002) 133 A Crim R 141.

Suffice to say that, as things stand at present, this is not such a case”.⁴

Developments since Court of Appeal Decision

- 8 In my opinion, two significant events have occurred since the Court of Appeal delivered its decision on 3 March 2009. Firstly, Mr Barbaro was charged on 16 April 2009, under State law with Conspiracy to Murder Fedele D’Amico between 1 January 2008 and 8 August 2008 and Conspiracy to Murder Michael Barbaro between 18 June 2008 and 26 July 2008. Mr Madafferi is a co-accused in the Commonwealth matter and is also a co-accused in relation to the Conspiracy to Murder Michael Barbaro. He was charged on 25 March 2009 and bailed on the conspiracy charge on 24 April 2009. Mr Potter, who is also a co-accused in the Commonwealth matter is a co-accused for both Conspiracy to Murder charges. He was charged for these matters on 28 May 2009 and granted bail by me on that date. He has subsequently failed to answer bail in both the Commonwealth and State matters and I have issued a warrant for his arrest.
- 9 The second significant issue to have occurred since the Court of Appeal decision has been the increased delay in the anticipated scheduling of a committal hearing, and if committed, a trial for the Commonwealth offences. When I dealt with the bail applications by Mr Barbaro in September and December 2008, and when the appeals were considered by Mr Justice Forrest on 6 February and the Court of Appeal on 3 March 2009, it was anticipated that a trial would not occur until the end of 2010. On that basis, it was assumed Mr Barbaro would be remanded for a period of approximately 24-30 months before trial.
- 10 The Commonwealth charges against Mr Barbaro and 30 co-accused were initially listed for a tentative committal hearing to commence on 2 February 2010. This date was vacated and the hearing re-scheduled to 31 August 2010

⁴ Para 41.

and then to 25 October 2010 and is now listed to commence (relating to Mr Barbaro and 6 co-accused) on 1 March 2011. The principal reason for the delay is due to the failure of the prosecution to comply with orders made by the court as early as 25 March 2009, in relation to the form and content of the hand up brief.⁵ In fact, the particulars as ordered by the court in relation to the 2008 trafficking charges were not served on all relevant defendants until 31 May 2010. The sheer volume and complexity of material to be relied on made it difficult for the prosecution to comply with orders made⁶. On that basis, the scheduled dates for service of full particulars relating to all charges, the completed hand up brief and committal hearing date were re-scheduled on a number of occasions and the matter was not ultimately set down for a committal hearing on 1 March 2011 until 18 June 2010.

Current Bail Applications

- 11 As indicated Mr Barbaro made a further application for bail in relation to the Commonwealth charges on 7 April 2010. The hearing of this application was adjourned on a number of occasions for various reasons including a submission by the Commonwealth that this court did not have jurisdiction to determine the application. On 11 June, I determined the court did have jurisdiction⁷ and my decision was affirmed by Mr Justice Pagone on 22 June 2010.⁸ The Commonwealth then lodged an appeal to the Court of Appeal which was abandoned by them on 5 July. The bail application in relation to the State charges was filed on 28 June but consideration of it was delayed pending the jurisdictional issues relating to the Commonwealth charges.

- 12 Prior to and during the hearing of the bail applications on 8 and 9 July, the parties provided the Court with numerous documents. **The Commonwealth provided;**

⁵ See written reasons dated 18 November 2009 and 11 December 2009.

⁶ The paper hand up brief now consists of 260 lever arch volumes.

⁷ See written reasons dated 11 June 2010.

⁸ [2010] VSC 297.

- Sworn Affidavits of Mr Money, Corrections Victoria, dated 12 May 2010, 9 June 2010 and 18 June 2010 relating to custodial issues including computer training given to Mr Barbaro and the restrictions on his access to the paper hand up brief;
- Written submissions from Mr Maidment S.C in response to a sworn Affidavit of Mr Condello dated 11 June 2010;
- A sworn Affidavit of Federal Agent Bates dated 6 July 2010 exhibiting an enhanced recording of a conversation of Mr Barbaro dated 15 May 2008 relating to his views concerning the arrest of Mr Mokbel and his extradition to Australia.

The State provided;

- A sworn Affidavit of Detective Senior Sergeant Kelly dated 8 June 2010 and Executive Summary of the Conspiracy to Murder charges.

Mr Barbaro provided;

- A sworn Affidavit of Mr Condello dated 11 June 2010 with exhibits including medical reports from Dr Walton, Psychiatrist, dated 14 April 2010 and 13 May 2010 and various correspondence between Acquarro & Co and the CWDPP office;
- Sworn Affidavits of three persons dated 1 June 2010 who are prepared to provide sureties totalling \$3.45m;
- A sworn Affidavit of Mr Paul Keen from Elmotech P/L dated 7 July 2010 relating to the provision of an electronic monitoring bracelet;
- A sworn Affidavit of Amanda McLeod, Accountant, dated 7 July 2010 relating to the financial situation of the "Barbaro Group" and the financial impact on members of the Barbaro family should he abscond;

- A medical report from Dr Walton dated 5 July 2010;
- A sworn Affidavit of Mr Condello dated 8 July 2010; and,
- Written submissions in support of the application for bail prepared by counsel for Mr Barbaro.

“New Facts and Circumstances” & “Exceptional Circumstances” – Commonwealth Offences

- 13 In order to proceed with a further bail application in relation to the Commonwealth offences, Mr Barbaro must satisfy the court that new facts or circumstances have arisen since the making of the previous order in accordance with S 18 (4) of the Bail Act. Mr Barbaro relies on the increase in the sureties offered and the further delay before the matter is likely to proceed to trial. The Commonwealth concede that the increased delay does constitute a new fact and circumstance. The Commonwealth also concedes that the anticipated delay before trial amounts to “exceptional circumstances” pursuant to S 4 (2) of the Bail Act. The issue of where and when a trial will be conducted remains in dispute. The Commonwealth indicated to the court that it is their intention for the Commonwealth offences to be heard in the Supreme Court. The court was told that as a result of preliminary discussions with the Supreme Court, the Court has expressed an “interest” in listing the Commonwealth offences which now involves 28 co-accused. The Commonwealth contend, that if committed to trial, a trial date is likely to be conducted in early 2012.
- 14 Mr Heliotis contended that this matter is more likely to be heard in the County Court as the Supreme Court may not wish to deal with it. On this basis, he submitted that if Mr Barbaro is committed to stand trial it is unlikely to occur until the end of 2012 or early 2013 based on the current delays being experienced in the County Court.

- 15 I do not propose to set out the history of the Commonwealth offences or the background or personal circumstances of Mr Barbaro, as they have been fully canvassed by Mr Justice Forrest and the Court of Appeal.

State Offences – Prima Facie Entitlement to Bail

- 16 Mr Barbaro has a prima facie entitlement to bail in relation to the State offences. The prosecution contend that if released on bail he would be an unacceptable risk of failing to answer bail, endangering the safety and welfare of members of the public and interfering with witnesses or otherwise obstructing the course of justice. The burden of establishing unacceptable risk is on the prosecution and in order to find that he would be an unacceptable risk, something beyond mere speculation or suspicion must be established. In support of his opposition to bail, the Informant, Sgt Baulch gave evidence, and as indicated, an Executive Summary of the Conspiracy to Murder charges authored by him was tendered to the court.
- 17 Sgt Baulch gave evidence that as a result of information given to the Victoria Police by the Australian Federal Police who were involved in the drug charges investigation, a view was formed that Mr Barbaro and others had conspired to murder Fedele D'Amico and Michael Barbaro. Sgt Baulch told the court that the prosecution will rely on physical surveillance, telephone intercept material, optical and listening device material, photographs, witness statements, forensic material and physical exhibits to support the charges against Mr Barbaro. He confirmed that a significant amount of the evidence will rely on interpretation of conversations recorded and inferences to be drawn from that material. Sgt Baulch referred to numerous passages in the extracts of transcribed intercepts tendered to the court to support the inferences that have been drawn. In general, it is alleged that Mr Barbaro and his overseas criminal contacts blamed Mr D'Amico for the failed 2007 drug importation and wanted him killed and that he had a long standing vendetta against Michael Barbaro and that is the reason he wanted him killed. It will be alleged that Mr

Barbaro enlisted Mr Potter to murder Mr D'Amico between January 2008 and August 2008. It is contended that intercept material will demonstrate a number of discussions involving Mr Barbaro and others in the plan to murder Mr D'Amico. It will also be alleged that a note written by Mr Barbaro listing possible addresses where Mr D'Amico may be located was found at the Carlton premises where Mr Barbaro was staying and where firearms were located.

18 It is also alleged that Mr Barbaro, Mr Madafferi and Mr Potter conspired to murder Michael Barbaro between June and July 2008. The prosecution intend to rely on intercept material, physical surveillance and the evidence of "Witness A" who will allegedly give evidence that Mr Barbaro asked him in June 2008 whether he had killed someone before and if he was interested in doing so for \$100,000. Sgt Baulch told the court that surveillance material will reveal a plan by Mr Barbaro and others to attend the Reggio Calabria Club on 24 July 2008 to murder Michael Barbaro. The prosecution will allege that arrangements were made to obtain a "clean car" and to lure Michael Barbaro to an appropriate location. It will also be alleged that on 24 July 2008, firearms and ammunition subsequently seized from the residence where Mr Barbaro was staying in Carlton were given by Mr Barbaro to Mr Potter to use in the murder of Michael Barbaro. It is alleged that the plan failed when the "clean car" they had obtained broke down on the way to the club and Michael Barbaro left before Mr Potter, Mr Barbaro and "Witness A" arrived. Sgt Baulch told the court that forensic evidence will reveal the presence of gunshot residue in the "clean car".

19 Sgt Baulch told the court that in his view Mr Barbaro, if released on bail, would be a risk of; failing to answer bail, endangering the safety and welfare of others and interfering with witnesses. In addition to the matters referred to, he also told the court that on 2 and 3 February 2010, whilst remanded, Mr Barbaro made threats to a prosecution witness who was also in custody in

relation to another unrelated matter. It is alleged that Mr Barbaro told this person words to the effect; “ you're a dog, you know what happens to a dog in a place like this”. In cross examination, Sgt Baulch was unable to dispute that this conversation may have arisen in circumstances where Mr Barbaro was the elected prisoner representative and was suggesting to the other person that he should seek to be moved to another place for his own safety. In relation to the safety of “Witness A”, Sgt Baulch told the court that information in his possession suggested that an associate of Mr Barbaro has tried to contact this witnesses. He agreed that Mr Madafferi had been granted bail and that the Magistrate who granted bail noted one of the reasons being the lack of strength of the prosecution case. He also agreed that there is no reference in the recorded conversations to the word “kill” apart from the evidence of “Witness A”.

20 It became apparent during detailed cross-examination by Mr Heliotis that the transcript of intercepted conversations contained in the materials tendered to the court had deficiencies in that they were a “cut and paste” of all intercepted conversations and the material provided to the defence is not the “final version” as conceded by Sgt Baulch. On this basis, it was alleged by Mr Heliotis that the summary provided to the court is not a fair and balanced summary of the material in the hand up brief. Notwithstanding these issues, the prosecution contend that when looking at all of the evidence it is clear that Mr Barbaro and others discussed plans to murder both Mr D’Amico and Michael Barbaro.

21 The conspiracy to murder charges are listed for a committal hearing on 6 June 2011. This date was scheduled on the basis of representations by the defence that it is both logical and practical for the hearing of these charges to follow the hearing of the Commonwealth charges. The prosecution contend that if committed to trial in the Supreme Court in relation to the conspiracy charges a trial date will occur within six to nine months which would be in early 2012.

The prosecution contends that there is no valid reason to delay a trial in relation to the State charges until final determination of the Commonwealth charges as they are not dependent on the outcome of the Commonwealth prosecution.

22 **Submissions on behalf of Mr Barbaro**

i. Strength of Prosecution Case – State Offences

Mr Heliotis submitted that the Commonwealth had the opportunity in past bail applications to rely on the evidence that resulted in these charges being laid but neglected to do so. He contends that it is open to doubt the concern that this evidence raises in the minds of the prosecution in relation to Mr Barbaro being an “unacceptable risk”. Furthermore, he submitted that it is patently unfair that the Commonwealth now seek to rely on this evidence when it had this evidence at its disposal in August 2008 prior to the first bail application. He argued that the strength or otherwise of the prosecution case cannot be properly assessed at this stage as it is almost entirely reliant on interpretations placed on conversations by a large number of people over a significant period of time and inferences that it is said can be drawn from those conversations and conduct of the alleged participants. He also noted that “Witness A” has a criminal history and therefore his evidence may not be accepted as truthful.

ii. Conditions in Custody

It is not in dispute that since the last application for bail a considerable amount of evidentiary material in relation to the Commonwealth charges has been served on Mr Barbaro by way of a paper hand up brief consisting of approximately 260 lever arch volumes of material and an electronic hand up brief contained in a GEMS software program. Although Mr Barbaro has been provided with a laptop computer and received computer training in accordance with an order made by the court, he remains for all intents and purposes computer illiterate and has restrictions placed on him in his custodial

environment in accessing the paper version of the hand up brief. I accept the submission made on his behalf that this is causing difficulty for him in providing meaningful instructions to his legal advisers. I also accept the opinion of Dr Walton, Consultant Psychiatrist, that the sheer volume of material and the difficulties he is experiencing in providing instructions to his legal advisers has exacerbated his anxiety and depressive disorder. I have also noted that his recent move at the Metropolitan Remand Centre from the onerous environment in the Exford Unit to the Cambridge Unit has led to some improvement in his condition.

iii. Financial Consequences if fails to answer bail

It is submitted on behalf of Mr Barbaro that the increased surety from \$2m to \$3.45m is the highest amount ever offered in Victoria, if not in Australia. Additionally, Ms McLeod, the Barbaro family accountant, deposed in her affidavit that as a result of restraining orders made over the Barbaro family properties, the family members would suffer dire financial consequences should Mr Barbaro abscond. Mr Heliotis contended that these factors, in addition to the factors raised before Mr Justice Forrest and the Court of Appeal, should satisfy the court that Mr Barbaro will not abscond.

iv. Parity

Mr Heliotis referred to the fact that Mr Madafferri has been granted bail for both the Commonwealth and State offences as has Mr Potter. He noted that the Magistrate who granted bail to Mr Madafferri in relation to the State offences listed as one of the reasons the lack of strength of the prosecution case against him.

v. Delay

As previously indicated, is contended that if bail is refused Mr Barbaro will be remanded in custody or period of approximately four to four and a half years

before trial. It is submitted, that such a delay is unconscionable and intolerable in the sense contemplated by Mr Justice Kellam in Mokbel v DPP (No 3)⁹ and referred to by the Court of Appeal. Mr Heliotis also compared Mr Barbaro's situation to that of Mr Beljajev who had been remanded in custody for a period of approximately four and a half years or five years (which was due in part to re-trials) and was eventually acquitted.¹⁰ He also submitted that the delay in relation to the State offences will be longer as the committal and trial for these offences will occur after the Commonwealth offences.

Submissions on behalf of the Commonwealth

23 Ms Abraham contended that nothing has changed to alleviate the unacceptable risk of flight which was found to exist by Mr Justice Forrest or the Court of Appeal in March 2009. She reminded the court that three of the Commonwealth offences attract a penalty of life imprisonment and two of the offences attract a penalty of 25 years. She noted that the State offences attract a penalty of life imprisonment. In her submission, she stated that Mr Barbaro has even more reason to abscond now than he did before. She referred the court to various paragraphs set out in the decisions of Mr Justice Forrest and the Court of Appeal. She referred to paragraph 62 of Mr Justice Forrest's decision noting the conversations of Mr Barbaro which related to obtaining passports, facial recognition systems, techniques used to obtain false identification and the manner in which you can leave Australia without alerting the authorities. She noted that this issue was commented on by the Court of Appeal where it held that Mr Barbaro was "a person with a disposition to flight, with clear views about how it could be successfully achieved and with knowledge of persons abroad whose flight had evidently been successful".¹¹ Ms Abraham also referred the court to the enhanced transcript of Mr Barbaro's comments on the 15 May 2008 concerning Mr Mokbel's arrest and

⁹ (2002) 133 A Crim R 141 at 142-3.

¹⁰ *Beljajev v DPP* (1998) 101 A Crim R 362 and also *The Queen v Beljajev & Lambert* 8 February 1999 Judge Higgins.

¹¹ Paragraph 30

return to Australia and where Mr Barbaro believed he went wrong and what he should have done.

24 Ms Abraham submitted that when considering what appears to be significant evidence against Mr Barbaro in relation to the State offences which involved the use of weapons, the risk of flight is even greater than what existed in March 2009. In relation to the issue of delay, she submitted that it is more likely than not that a trial will commence in the Supreme Court in early 2012 therefore constituting a delay from charge to trial of approximately 3 1/2 years. She referred the court to the decision of Judge Higgins in Beljajev where although His Honour noted that there would be a delay between charge and trial of four and a half or five years, he was not prepared to grant bail on the basis that he found Mr Beljajev to be an unacceptable risk of failing to surrender himself into custody and committing further offences whilst on bail. Ms Abraham also took issue with the submission made on behalf of Mr Barbaro that there would be automatic forfeiture of the family property if he absconded whilst on bail. She contended that the submission is wrong in law and the matters deposed by Ms McLeod should be disregarded as they are based on an incorrect understanding of the provisions of the Commonwealth Proceeds of Crime Act 2002.

Submissions by the State

25 Mr Hughen submitted that Mr Barbaro is an unacceptable risk of flight, endangering the health and safety of members of the public and interfering with witnesses if released on bail. He contended that the State case against Mr Barbaro is strong, particularly having regards to the evidence of "Witness A" and that if committed for trial at the completion of the committal hearing in June 2011, there is no reason why a Supreme Court trial could not commence for the State charges in late 2011 or early 2012. He also submitted there is no valid reason to delay the trial on the State charges until the Commonwealth charges have been determined. Accordingly, he submitted that there is no

issue of inordinate delay and that stringent bail conditions cannot make the risks alleged acceptable.

Conclusion

26 It appears to me that the fundamental issue for this court to determine is whether the factors that have arisen since the decisions of Mr Justice Forrest and the Court of Appeal now make the identified unacceptable risks acceptable to the community therefore justifying a grant of bail.

27 In my opinion, it is significant that Mr Barbaro has now been charged with two counts of conspiracy to murder since his previous bail applications were considered by the courts. As is common in bail applications, it is sometimes difficult for the court to assess the strength or otherwise of the prosecution case, particularly when significant reliance is to be placed on intercept material and where the court is presented with limited material with which to assess the prosecution case. Obviously, the intercept material will be heavily reliant on interpretation and inferences which it is alleged can be drawn from those conversations. However, the involvement of "Witness A" and the evidence he will apparently give together with the physical surveillance material leads me to conclude that the prosecution case could not be described as being weak. Whilst it is true that the Commonwealth had this material in its possession at the time of the previous bail applications, I do not accept that its failure to refer to it is patently unfair to Mr Barbaro. The Commonwealth took the view that it had enough material without it, to support a refusal of bail. Mr Justice Forrest and the Court of Appeal agreed. If reference to this material had been made at that time, without charges being laid, the alleged strength of the evidence against him would have been vigorously attacked by Mr Barbaro on the basis that charges had not been laid.

28 I do not consider the issue of parity to be a significant matter in this

application. Every bail application involving co-accused must be determined on their own particular facts and circumstances. In this case, there is a fundamental difference between Mr Barbaro and Mr Madafferri in relation to both the Commonwealth and State matters. In relation to the Commonwealth offences, there is considerable support for the contention that Mr Barbaro was the head of the drug syndicate. In relation to the State offences, Mr Barbaro has been charged with two counts of conspiracy to murder and appears to be the driving force behind each of them. Furthermore, I am unaware of what evidentiary material in relation to Mr Madafferri was placed before the Magistrate when he decided to grant bail to him in relation to the State offences. It is also of some note that I granted bail to Mr Potter in relation to both the Commonwealth and State offences and he has failed to answer bail and a warrant for his arrest has been issued.

29 It is of concern that the conditions of confinement is causing Mr Barbaro to experience difficulties in accessing the paper version of the hand up brief considering that he is ill equipped to master the electronic version of the hand up brief. I note that this has caused difficulties for his legal representatives to obtain adequate instructions from him. However, I accept as valid the submission of Ms Abraham that the very size and scale of the alleged drug offending which allegedly occurred over an 18 month period and the extent to which those involved engaged in activities to avoid detection is the very reason for the voluminous material and the difficulties Mr Barbaro is experiencing on remand should not be a reason to justify bail.

30 The other significant issue to consider is the increased delay that is likely to occur before trial on both matters. I have had particular regard to the comments of Mr Justice Kellam in Mokbel and the Court of Appeal on 3 March 2009. Clearly, the delay involved in this case is very substantial. It is for this reason that I granted bail with strict conditions in December 2008. At that time the anticipated delay was approximately two and a half years. It is now

between three and a half years and four and a half years. The central issue therefore, is whether this delay before trial, is of such magnitude, that the risk of flight, which as at March 2009 was unacceptable, is now acceptable to the community with the imposition of appropriate bail conditions. The increased surety and the possible financial consequences on the Barbaro family should he abscond is a matter of significance.

- 31 However, after considering the decisions of Mr Justice Forrest and the Court of Appeal and what appears to be a reasonably strong case in relation to the conspiracy to murder charges, it does appear to me that there is now even greater incentive for Mr Barbaro to take flight notwithstanding the possible financial consequences for his family and to those who are prepared to provide the increased surety. In all the circumstances, the risk of flight remains unacceptable despite the magnitude of the delay. I am no longer satisfied that the imposition of stringent bail conditions that I considered appropriate in December 2008 can make this risk acceptable to the community. Accordingly, I refuse his applications for bail.