



District Court
New South Wales

Case Name: R v Colquhoun

Medium Neutral Citation: [2026] NSWDC 300

Hearing Date(s): 12 August 2026

Date of Orders: 14 August 2026

Decision Date: 14 August 2026

Jurisdiction: Criminal

Before: Abadee DCJ

Decision: See: [82]-[83]

Catchwords: CRIMINAL LAW — Bail — release application pending determination of appeals against conviction and sentence — whether special or exceptional circumstances established — consideration of merit of proposed grounds for severity appeal — whether unacceptable risks — consideration of prospect whether substantial part of non-parole period will be served prior to determination of appeals — consideration of bail conditions

Legislation Cited: Bail Act 2013 (NSW), ss 17, 22, 62
Bail Act 1978 (NSW), s 30AA
Crimes (Sentencing Procedure) Act 1999 (NSW), ss 3A, 5, 66
Crimes Act 1900 (NSW), s 192E(1)(a)

Cases Cited: Director of Public Prosecutions (Cth) v Cassaniti [2006] NSWSC 1103
El Khouli v R [2019] NSWCCA 146
El-Hilli and Melville v R [2015] NSWCCA 146
Ex parte Maher [1986] 1 Qd R 303
Narayan v R [2026] NSWCCA 94
Obeid v R (2017) 96 NSWLR 155

Obeid v R (No 2) [2016] NSWCCA 321
Potier v R [2014] NSWCCA 177
R v Colquhoun; R v Colquhoun [2026] NSWDC 284
R v Colquhoun; R v Colquhoun; R v Colquhoun [2026]
NSWDC 198
R v Khayat (No 11) [2019] NSWSC 1320
R v Khoo (2013) 97 ACSR 1; [2013] NSWSC 1518
R v Richard [2011] NSWSC 866
Stanley v DPP (2023) 278 CLR 1
United Mexican States v Cabal (2001) 209 CLR 165
WR v Director of Public Prosecutions (NSW) [2023]
NSWCCA 38

Category: Consequential orders

Parties: Margaret Colquhoun (Applicant)
Rex (Crown) (Respondent)

Representation: Counsel:
C Parkin / B Gooch (Applicant)
S Healy (Respondent)

Solicitors:
Greg Walsh & Co (Applicant)
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(Respondent)

File Number(s): 2023/00227396

REASONS FOR JUDGMENT

(This is a revised version of reasons given orally on 14 August 2026).

Background

- 1 On 3 August 2026, I sentenced Margaret Colquhoun (the ‘applicant’) to a term of imprisonment of 2 years and 4 months, with a non-parole period of 1 year and 2 months, following her conviction by the Court (on 12 June 2026) on a charge of fraud, contrary to s 192E(1)(a) of the *Crimes Act 1900* (NSW).
- 2 On 5 August 2026, the applicant’s solicitor, Mr Gregory Walsh, caused a notice of intention to appeal to be filed in the Court of Criminal Appeal. The applicant’s expressed intention is to appeal both her conviction and her sentence.

- 3 By a notice of motion filed 7 August 2026, the applicant brings a conditional release application. Her application was supported by: (a) an unsealed affidavit of Mr Walsh sworn on 7 August 2026, a corrected version of which was sworn on 11 August 2026 (Exhibit A); and (b) a further affidavit of Mr Walsh sworn on 12 August 2026. However, none of that evidence, which generally concerned the applicant's difficulties in adjusting to the custodial setting, was referred to in her Counsel's written or oral submissions in argument on the application.
- 4 In addition to the affidavit evidence of Mr Walsh, the applicant relied upon a document containing 'Proposed Grounds of Appeal' for a severity appeal (Exhibit C) and two alternative sets of proposed bail conditions (Exhibits D and E).
- 5 The Crown tendered a bundle of documents (Exhibit 1) comprising the indictment, a bail report, custodial history, sentencing assessment report, and the bail conditions that subsisted following the applicant's arrest until her entry into custody. Parts of the sentencing assessment report, together with the applicant's absence of any prior criminal history, were referred to in the sentencing remarks. None of this material was referred to, however, in the Crown's argument on the application.

Power to order release and relevant principles

- 6 No point was taken by the Crown as to whether, as the trial judge and sentencing judge, I lacked power to grant the applicant's release pending an appeal against conviction or sentence. The Court's power to order the applicant's release is in s 62 of the *Bail Act 2013* (NSW) ('the Act'), which carries the (conjunctive) requirements that: the applicant has been convicted of an offence; proceedings on an appeal (against sentence or conviction) are pending in another court;¹ and the applicant has not yet made her first appearance before the Court in the appeal proceedings. The Crown accepts that those conditions for the exercise of this power were satisfied.
- 7 The question then becomes whether the power should be exercised under s 22 of the Act.

¹ The filing of a notice of intention to appeal is taken to constitute an appeal pending in the Court of Criminal Appeal: *Obeid v R* (No 2) [2016] NSWCCA 321 ('Obeid') at [4].

8 Section 22 of the Act provides:

(1) Despite anything to the contrary in this Act, a court is not to grant bail or dispense with bail for any of the following offences, unless it is established that special or exceptional circumstances exist that justify that bail decision—

(a) an offence for which an appeal is pending in the Court of Criminal Appeal against—

(i) a conviction on indictment, or

(ii) a sentence imposed on conviction on indictment,

(b) an offence for which an appeal from the Court of Criminal Appeal is pending in the High Court in relation to an appeal referred to in paragraph (a).

(2) If the offence is a show cause offence, the requirement that the accused person establish that special or exceptional circumstances exist that justify a decision to grant bail or dispense with bail applies instead of the requirement that the accused person show cause why his or her detention is not justified.

(3) Subject to subsection (1), Division 2 (Unacceptable risk test—all offences) applies to a bail decision made by a court under this section.

9 The test engaged by s 22 was stated in *El-Hilli and Melville v R* [2015] NSWCCA 146 (*'El-Hilli'*) per Hamill J (Simpson J and Davies J agreeing) at [13].² The test imports two requirements. The first is that there must be 'special or exceptional' circumstances justifying release. The second (assuming the first requirement is satisfied) is that consideration must be given to whether there is an unacceptable risk that the applicant, if released, would engage in any of the conduct referred to in s 19(2)(a)-(d) (incl.) of the Act, by reference to the non-exhaustive list of matters in s 18 of the Act. The same factors and evidence may operate at both stages. Indeed, it is likely that where an applicant establishes special or exceptional circumstances, the same material is likely to sustain the conclusion that the applicant has also satisfied the unacceptable risk test.

10 There is no express definition of the expression 'special or exceptional circumstances'. However, it is not a new concept, and its rationale has been explained in older authority concerning the expression as it was contained in the *Bail Act 1978*, and especially s 30AA. Authorities concerning that earlier enactment remain current under s 22 of the Act: *Potier v R* [2014] NSWCCA 177 at [14]-[16].

² Applied, for example, in *Obeid* at [10]-[11].

- 11 In opposition to the application, the Crown referred the Court to the decision in *Director of Public Prosecutions (Cth) v Cassaniti* [2006] NSWSC 1103 ('*Cassaniti*'). *Cassaniti* was also a case where an applicant sought bail following conviction and sentence. Basten JA observed that the bail authority must consider not only the position of the applicant, but must also consider the position of the Crown. It must bear in mind that any stay of an order of imprisonment and grant of release on bail is a serious interference with the administration of criminal justice.
- 12 In *Cassaniti*, Basten JA reflected (at [25]) on earlier authorities indicating that there are multiple concerns that follow from a grant of bail pending the hearing of an appeal after sentencing, including that the release:
- may operate to make the sentence appear contingent until confirmed;
 - places the Court of Criminal Appeal in the invidious position of potentially having to return to prison a person whose circumstances may have changed during the period of release;
 - undermines respect for the judicial system in having a 'recently sentenced (person) walk free'; and
 - undermines the public interest in having convicted persons serve their sentence as soon as practicable.³
- 13 The applicant referred to the line of authority positing that the combination of matters that may amount to special or exceptional circumstances may encompass matters personal to the applicant, features bearing upon the nature of the offence, and features emphasising that the applicant is someone who can answer bail.⁴ I note, however, that in *Cassaniti*, Basten JA said (at [19]) that the circumstance that an applicant is highly likely to answer bail has regularly been assumed.
- 14 In *El-Hilli* at [29], Hamill J also observed that 'special or exceptional circumstances' may exist in the combination of factors or in the co-incidence of a number of features. What those features may be cannot be predicted, however, two features that frequently arise include: (i) the merit of the appeal; and (ii) the possibility that the applicant will have served their sentence of

³ Ex parte Maher [1986] 1 Qd R 303 at 310, approved in *United Mexican States v Cabal* (2001) 209 CLR 165.

⁴ R v Khayat (No 11) [2019] NSWSC 1320 at [14], where Adamson J (as her Honour then was) noted that the application before her Honour was based on s 15AA(1) of the Act.

imprisonment (or the non-parole period), or a substantial part of it, before the appeal is determined. The applicant argued, by analogy, that the latter consideration is also applicable where there is a question whether any term of imprisonment should be served by full-time custody at all.

- 15 The applicant referred to observations in *El Khouli v R* [2019] NSWCCA 146 at [27]-[28], where the Court of Criminal Appeal determined that where a ground of appeal is put forward *in combination with* other factors, the relevant criteria in assessing the merits of the appeal would be whether the posited ground is reasonably arguable or enjoys reasonable prospects of success.
- 16 To the extent that an appeal relates to sentencing only, it is also relevant to the assessment to acknowledge that the Court of Criminal Appeal is a court of error. Even if error is found, the applicant would still face the additional hurdle that it would remain open to that Court to determine that no lesser sentence than that which was imposed by the sentencing court was warranted in law.⁵

Submissions

The applicant's submissions

- 17 The written submissions of Mr Parkin, with whom Ms Gooch appeared for the applicant, are MFI 1.
- 18 The applicant relies upon a combination of factors to support her contention that 'special or exceptional circumstances' exist.
- 19 These were:
 - (1) A reasonably arguable appeal;
 - (2) The absence of 'unacceptable risk'; and
 - (3) The nature of the severity appeal calls into question both whether any sentence of imprisonment should have been imposed at all or, alternatively, whether it could justifiably have exceeded two years. (On the last ground, it was argued that if any term of imprisonment did not exceed two years, it was virtually inevitable that an intensive correction order would have been made). Collectively, this factor might appropriately be characterised as concerning the consequences of a successful appeal, and I will refer to that factor in those terms.

⁵ R v Khoo (2013) 97 ACSR 1; [2013] NSWSC 1518 at [21].

Strength of the severity appeal

- 20 Although she has expressed her intention to appeal her conviction (reasons for which were delivered by me, sitting as Judge alone, on 12 June 2026)⁶, the applicant confined her submissions to the strength of her appeal on the severity of the sentence, with the sentencing remarks delivered on 3 August 2026.⁷
- 21 A proposed grounds of sentencing appeal document was supplied (Exhibit C).
- 22 The applicant's principal ground (proposed ground 1) is that the sentence imposed was manifestly excessive. Her first point was to refer to some of her personal circumstances: her age, her lack of antecedents, and the non-violent nature of her offending, with the offence occurring over 10 years ago (proposed ground 1(a)). The point was developed further in oral argument, where Counsel for the applicant referred to certain matters which, it was insinuated, reduced the seriousness of the offending. These included that it was impossible to precisely value the Property that was obtained, that her offending did not involve a breach of trust, and that no finding was made that the offending had led to irretrievable loss.
- 23 It was argued that it was not reasonably open to find that the s 5(1) threshold in the *Crimes (Sentencing Procedure) Act 1999* (NSW) (the 'CSP Act') was crossed. Reference was made to sentencing statistics on the Judicial Information Research System (JIRS). But even if the threshold was crossed, it was argued that it was not open to impose a term of imprisonment exceeding two years. One statistic that was emphasised was that in 72% of cases where a term of imprisonment was imposed for offences contrary to s 192E(1)(a), it was of a duration of two years or less. If that last submission regarding the length of the term were to be accepted, it was said that it was inevitable that an intensive correction order (ICO) would have been made.
- 24 Her second point purported to identify error that inferentially (so it was put) contributed to a manifestly excessive sentence (proposed ground 1(b)(i)). This asserted error was the treatment of specific deterrence as being 'of

⁶ R v Colquhoun; R v Colquhoun; R v Colquhoun [2026] NSWDC 198.

⁷ R v Colquhoun; R v Colquhoun [2026] NSWDC 284.

significance', given the applicant's lack of antecedents, the unique nature of the offending, and the lack of subsequent offending. In oral argument, Counsel for the applicant initially argued that, in light of the finding that the applicant had in her favour that she was unlikely to reoffend, specific deterrence was 'completely insignificant'. However, it appeared to the Court that Counsel somewhat retreated from that position, before eventually submitting that specific deterrence should not have carried the weight that the sentencing remarks, viewed as a whole, conveyed that it did.

- 25 It was further argued that it was erroneous to find that her good character 'enabled' the offending (proposed ground 1(b)(ii)). This submission centred upon a sentence within paragraph [147] of the sentencing remarks. To place that paragraph in context, paragraph [146] contained a finding of prior good character. The entirety of paragraph [147] in the sentencing remarks was as follows:

"Unfortunately for her, whilst good character is mitigating, especially in the sense of both offenders being 'first-time offenders', the weight to be given to that matter is reduced on account of certain considerations. First, it is often the case in fraud offences, and it was the case here, that the actuality and perception of an offender's good character (and, for reasons explained, the good character of PC who created and sent the documents containing the deceptive representations) enables fraud to occur. Whether the system is one of self-reporting for income tax assessment, social security or other government benefits or, as in this case, applications to the Registrar-General, the system depends for its efficacy upon the apparent trustworthiness and honesty of those who engage with it. Fraud perpetrated by persons of prior good character can be difficult to detect. Secondly, and particularly in the case of MC, her good character did not prevent her offending on three different occasions over a not insubstantial period of time. Given the course of conduct offence for which she has been convicted, the offending cannot accurately be minimised as an 'aberration', even if there was a substantial similarity in the deceptions."

- 26 The applicant then argued that any sentence involving the imposition of a term of imprisonment was outside the range of sentences that could lawfully be imposed or, alternatively, that any sentence exceeding a term of imprisonment of two years also fell outside that range (proposed ground 1(c)).
- 27 In her Counsel's written submissions (MFI 1), some other aspects of the sentencing remarks were said to be erroneous. It was submitted that it was wrong for the sentencing court to:

- (1) treat the count as a 'rolled up' charge (proposed ground 2);
- (2) rely on the circumstance that PC had drafted documents as heightening the extent of planning (proposed ground 3); and
- (3) find that it would not be double counting to treat a motive of financial gain as an aggravating factor (proposed ground 4).

28 Proposed ground 2 was developed in oral argument. Relevant to this argument are paragraphs [76]-[78] (incl.) of the sentencing remarks. This part of the remarks is reproduced as follows:

"Period of time

[76] Both offenders were found guilty, jointly, of a single charge. In *R v Richard* [2011] NSWSC 866, Garling J observed that there can be a considerable advantage to an offender in a "rolled up" charge, in that it restricts the maximum penalty to that for one offence, instead of what, in reality, could have been charged as a number of discrete offences. This is particularly so in the case of MC.

[77] In both offenders' cases, the Crown nominated a period of 18 months in which the offending was pursued up until the point when the offending was committed. MC's acts of deception that caused the obtaining of the Property occurred in three instances, being in documents created in November 2013, March 2014 and January 2015 (noting that her additional deceptions in March 2015 did not cause or contribute to the obtaining). In AC's case, his acts of deception occurred twice, in documents created in November 2013 and March 2014 (i.e. four months apart).

[78] However, I agree with the Crown that this is the appropriate period for MC and AC since the period encompasses the acts of deception, but also a period in which the offenders could have withdrawn their application before the offence was completed. This is a substantial period of time."

29 Counsel for the applicant argued that it was erroneous to refer to any 'rolled up charge'. It was said that this was a *House v The King* error. There was only one charge. Counsel noted that, in *R v Richard* [2011] NSWSC 866, Garling J had observed at [104], preceding the passage that I had referred to in the sentencing remarks, that rolled up charges could be brought by the Crown only where there was agreement with the offender and when there was a plea of guilty. If either (or both) of these elements were missing, the charge would be bad for duplicity and would be liable to be struck down. Counsel submitted that the only charge in the present case was completed in May 2015. There had been no agreement and, of course, the applicant had not pleaded guilty.

30 In oral argument, and for the purposes of the release application, Counsel for the applicant abandoned the reliance that he placed on proposed grounds 3 and 4 referred to in Exhibit C.

Absence of ‘unacceptable risk’

31 The applicant submitted that she has at all times complied with her bail since 8 August 2023. She does not present as any kind of unacceptable risk. Specifically, there is no reason to think that she would offend whilst on bail. She obtained a finding at the sentencing hearing that she was unlikely to re-offend. She has never presented as a danger to the community. The offending occurred a long time ago, meaning she is no longer in a position to interfere with the evidence (which was mainly documentary) or with any witness. With her passport being surrendered when she was arrested in 2023, she does not present as a flight risk.

Consequences of a successful appeal

32 In written and oral submissions, Counsel for the applicant submitted that, on a release application, it is unnecessary for the bail authority to do anything more than reach a broad overall view of the applicant’s apparent prospects of success.⁸ Nevertheless, he submitted that it stood to reason that his client would be in a stronger position if he was able to establish multiple arguable grounds rather than a single arguable ground.

33 As indicated, he submitted that it was erroneous to determine that the s 5(1) threshold was crossed.

34 Counsel for the applicant’s alternative point, however, was that, because the term of imprisonment imposed was 2 years and 4 months, if error were established it would not take much on the re-exercise of the discretion for the applicant to persuade the Court of Criminal Appeal to reduce the length of the sentence to two years or less, thereby qualifying the applicant for an ICO.

35 It was important, in this last respect, that at the sentencing hearing the Crown conceded that a sentence to be served by ICO was a course ‘open’ to the sentencing court. The Crown had not resiled from that expression of its position

⁸ WR v Director of Public Prosecutions (NSW) [2023] NSWCCA 38 at [9].

on this application and, so it was argued, it would be unlikely to resile from it on the sentencing appeal if the issue emerged.

The Crown's submissions

The release application was premature

- 36 The Crown's position was that the application was premature. It was already apparent on the day of the hearing for this application that the applicant's proposed grounds of appeal were fluid, as her Counsel did not press two of the proposed grounds of appeal he had identified in writing. I understood Mr Crown to submit that it would be incongruous if I, acting as bail authority, granted bail having regard to proposed grounds of appeal put before me, only for the applicant to potentially run different grounds of appeal in her Notice of Appeal.
- 37 The proper course was for the applicant first to settle on her grounds of appeal in a Notice of Appeal and then approach the Registrar to obtain the earliest hearing date for the appeal, having regard to the circumstance that her non-parole period would expire in early October 2027.
- 38 In his submissions in reply, Counsel for the applicant rejected the Crown's prematurity point. He observed that s 62 of the Act expressly contemplates release applications of the kind that his client had brought and, further, the legislation implicitly countenances the possibility that proposed grounds of appeal on a release application may or may not ultimately feature in a Notice of Appeal. That there might be some other route to obtaining a grant of release was, he argued, irrelevant. But even if it were not irrelevant, he submitted that, if the Crown were correct, the Court of Criminal Appeal would likely be inundated with bail applications.
- 39 Counsel for the applicant did, however, accept that this Court's refusal of his client's release application would not preclude a fresh application to the Supreme Court (to be heard *de novo*) or, if that be unsuccessful, to the Court of Criminal Appeal itself.

Merit of the proposed grounds of appeal

- 40 The Crown submitted that, where the release application is based, in substance, on an appeal against sentence, the bar for establishing 'special or

exceptional circumstances' should be higher, even if it is unnecessary for the applicant to establish that her appeal is certain to succeed.

- 41 Mr Crown observed that at the sentencing hearing, Senior Counsel for the applicant had not argued that the s 5(1) threshold was *not* crossed when he had the opportunity to do so.
- 42 In written submissions for the applicant in the sentencing hearing, Senior Counsel for the applicant wrote:

"72. In light of these matters and the other features of this case, it is submitted that in order to adequately punish the offender for the offence and, to the more limited extent required in the circumstances, denounce her conduct and make her accountable for her actions, while promoting her rehabilitation, a conditional release order or community correction order would be within range (and would be available, including to perform community service work for up to 22.5 hours per month, as indicated in the SAR), and would achieve those purposes of sentencing. *While it is accepted that such a means of disposition would be exceptional in respect of an offence of obtaining of real property by fraudulent means*, it is submitted that it would be an appropriate and proportionate punishment given that the circumstances of this case are also exceptional.

73. Accordingly, based on a consideration of those possible alternatives, it is submitted that the Court would not be satisfied that no penalty other than imprisonment is appropriate, and would impose a non-custodial sentence.

If found no penalty other than imprisonment is appropriate

Intensive Correction Order

74. If the Court does however find that a sentence of imprisonment is the only available sentencing option, it is submitted that *it would be open and appropriate to impose a sentence of two years in length or less*, and to order that it be served by means of an intensive correction order...

Special circumstances

75. Finally, *should the Court impose a sentence of full time imprisonment on the offender, it is submitted that it would be open and appropriate to find special circumstances*, based on, individually or cumulatively, the offender's prior good character...the fact that such a sentence would be her first time in custody...her advanced age...and the hardship which will be experienced by PC during any incarceration of the offender." (emphasis added)

- 43 In a submission in reply, Counsel for the applicant submitted that legal representatives for offenders at sentencing hearings for serious indictable offences do not routinely submit that the s 5(1) threshold is not crossed. I would also add, in fairness to Mr Parkin's predecessor, that he *did* urge that any sentence of imprisonment be served by ICO.

- 44 On proposed ground 2, the Crown agreed that it was not correct to characterise the applicant as having been subject to a rolled up charge in the sense considered in *R v Richard*. But Mr Crown argued that, when considering the content of paragraphs [77]-[78] of the remarks, what was said about the nature of the charge was an immaterial misdescription and that the balance of the paragraphs was correct. What will be important, when the Court of Criminal Appeal comes to consider whether the sentencing discretion was vitiated, is whether an error of principle can be established. This particular proposed ground of appeal did not do so.

Unacceptable risk

- 45 Responding to the applicant's arguments that she had demonstrated 'longstanding' compliance with earlier bail conditions and that there was generally an absence of any unacceptable risk, the Crown submitted that these were not truly special or exceptional circumstances. On the factor concerning 'unacceptable risk', the Crown did not contest the applicant's submissions in accordance with their terms. But it was first necessary for the applicant to establish special or exceptional circumstances.

Consequences of successful appeal

- 46 The Crown submitted that the applicant's point that she should not have received a sentence of full-time custody should not be viewed separately to her point about the strength of her appeal.
- 47 I understood the Crown to have submitted that the Court of Criminal Appeal is alive to the difference between the Crown submitting at a sentencing hearing that there would be no error in imposing an ICO, *if the Court considered that appropriate*, and the Crown, on a severity appeal, seeking to maintain a sentence of full-time custody as falling within the range of rational and lawful outcomes.
- 48 Further, the Crown submitted that it was not axiomatic that even if a sentence of two years or less had been imposed, the applicant would have received an ICO, notwithstanding the emphasis that the High Court placed in *Stanley v DPP* (2023) 278 CLR 1 upon the sentencing court's assessment of community safety as the paramount consideration, viewed prospectively with reference to

the offender's risk of re-offending. As was indicated in oral argument, the Court is also obliged (under s 66(3) of the CSP Act) to consider all the sentencing principles in s 3A and under general law (and other relevant matters) when deciding whether to make an ICO.

- 49 No information was before the Court to indicate when a combined appeal against conviction and sentence would likely be heard by the Court of Criminal Appeal. The Crown submitted that it was far from inevitable that the applicant would have served her non-parole period before the Court of Criminal Appeal heard her appeal. Mr Crown relied upon that circumstance as one reason the Court should decline the application.

Consideration

General observations

- 50 I first take into account the rationale for the test of special or exceptional circumstances identified in *Cassaniti*. Some people in the community might find it curious that less than two weeks after being sentenced to a term of imprisonment, where that sentence had taken into account (amongst other things) positive subjective features also relied upon in this release application (such as findings about the applicant's prior good character and unlikelihood of re-offending), and subject to her compliance with certain conditions, the applicant should be released pending determination of her appeal. This perception largely explains why the test is designed to be somewhat stringent.
- 51 I accept that this is not a case where the applicant *exclusively* relies upon the strength of her severity appeal. Other matters are relied upon, including, but not limited to, the consequences for her if she succeeds in establishing sentencing error.
- 52 Contrary to what the Crown appeared to submit, I also accept the applicant's submission that the admitted circumstance that she does *not* present as an unacceptable risk is itself a factor that is relevant to my consideration of whether she has established 'special or exceptional circumstances'.
- 53 Further, when evaluating the broad question of whether special or exceptional circumstances exist, commonly recurring considerations include not only the merit of the appeal but also the possibility that the applicant will have served

their sentence, the non-parole period, or a substantial part of either before their appeal is determined.

Assessment of apparent merit of appeal

- 54 The consequence of the applicant's reliance upon a combination of factors is that, relevantly, when considering the merit of her proposed appeal, the bail authority is to determine whether the proposed grounds of appeal are arguable or enjoy reasonable prospects of success.
- 55 In what follows, the nature of the exercise is somewhat artificial. It is enough for the bail authority to form a broad view on prospects. Nevertheless, the practice on such applications is for the bail authority to express preliminary views on each proposed ground that has been identified.
- 56 I would be inclined to consider that the proposed ground (1)(a) of manifest excess is arguable within the constraints that the Court of Criminal Appeal identified in *Obeid v R* (2017) 96 NSWLR 155 at [443]. The matters that the applicant points to in Exhibit C (proposed ground 1(a)) were essentially matters in her subjective case. Even then, however, they omitted reference to the findings made at the sentencing hearing that the applicant exhibited no remorse, demonstrated no insight, and instead demonstrated a sense of entitlement ([148]-[156] and [159] of the remarks).
- 57 However, it is also fair to acknowledge that the applicant's *oral* argument concerning the ground of manifest excess generally extended beyond reference to the subjective features of her case (addressed in proposed ground 1(a)) to include some other objective matters which had also been advanced on the applicant's behalf at the sentencing hearing. Specifically, there were other objective features which arguably augment the applicant's reliance on her subjective case, including the absence of actual quantification of value of the Property; even though it was found that this was 'substantial' (the Court having accepted the applicant's submission that the value of the Property was somewhere between \$250,000 and \$3.67 million as the outer limits of the range: see [72] of the remarks). The applicant raised no ground about the *correctness* of findings relating to the objective seriousness of the offending.

Nor was it demonstrated how or why an appellate court would diminish those findings.

- 58 As to proposed ground 1(b)(i), in the way that Counsel for the applicant refined this submission in oral argument to the effect that specific deterrence should be given diminished significance (rather than, as was put in writing, *no* significance), in my view, this proposed ground is not arguable, having regard to the finding at [239] of the remarks.
- 59 As to proposed ground 1(b)(ii), the remark was made in the context of an assessment of the weight to be given to the applicant's good character. It may be thought to be axiomatic that good character has generally been treated as having less weight for offences that are easy to commit but difficult to detect. However, there is a reasonable prospect that the remark at [147] may be construed as going further and ascribing causal significance to good character to the offending in a way that is erroneous.
- 60 Far from being 'instructive', as the applicant suggests, the JIRS statistics provide little assistance in illuminating the force of the applicant's argument about manifest excess in terms of the length of the term of imprisonment. The limited utility of JIRS statistics generally was recently referred to in *Narayan v R* [2026] NSWCCA 94 at [67]-[68]. Drilling down further, for example, into Schedule A to Counsel's written submissions, in every instance concerning the imposition of sentences of imprisonment and ICOs, there were *guilty* pleas. The applicant was in a different (and worse) position than those offenders in that respect, whatever the level of discount each offender received. More pertinently, perhaps, the same statistics do not indicate the *nature of the property* obtained. In this regard, Senior Counsel who appeared for the applicant at the sentencing hearing submitted in writing that "no usefully comparable cases" were "able to be offered up for the assistance of the Court" (paragraph 69). The usually limited utility of JIRS statistics would appear to be even more confined in the circumstances of this case, which might explain why the parties did not refer to them at the sentencing hearing. I place little weight on them in considering this application, and do not regard it as even arguable

that they provide patent indications of error in the imposition of a sentence of imprisonment or the length of that term.

- 61 I do not consider that by his written submissions (or oral argument) at the sentencing hearing, the then Senior Counsel for the applicant forwent the opportunity to say that it would have been erroneous for the Court to determine that the s 5(1) threshold was crossed, such that *that* circumstance should be held against the applicant on this release application. The written (and oral) submissions plainly indicate that Senior Counsel was trying to cover all bases at the sentencing hearing. He did not concede that the s 5(1) threshold was crossed. Rather, he made contingent submissions as to what should occur in that event, namely that it was appropriate that any term of imprisonment be served by ICO or, alternatively, that a finding of special circumstances should be made.
- 62 As to proposed ground (1)(c)(ii), I do not place material weight upon the Crown's observation at the sentencing hearing that an ICO might be 'open'. Consistently with his obligations as a prosecutor, having primarily submitted that the s 5(1) threshold was crossed, Mr Crown made no submissions as to the *length* of any term of imprisonment, but rather left the determination of that question for the Court. When Mr Crown observed that it was open to the Court to impose an ICO, he was impliedly submitting that, on the assumption that the Court determined that the applicant qualified for such an order (being that the term of imprisonment imposed was two years or less), a matter about which he was agnostic and in respect of which he was not in a position to advocate for or against, it would be open to the Court to determine that the sentence should be served by ICO. Mr Crown was responding to the submission of the applicant's Senior Counsel which, as I have said, sought to cover all bases. The applicant's Senior Counsel also did not nominate any range for the length of any term of imprisonment, but also submitted that, if the sentencing option of imprisonment was imposed, there should be a finding of special circumstances. Viewed in context, both the applicant's Senior Counsel and Mr Crown made submissions about a finding of special circumstances in the event that the Court determined, as it did, to impose a full-time custodial penalty whose length was two years or more.

- 63 As to proposed grounds 1(a), 1(b) and 1(c) generally, when determining whether the s 5(1) threshold was crossed, and the length of any sentence of imprisonment (and indeed the ratio of the non-parole period), the Court was obliged to take into account all of the sentencing principles in s 3A of the CSP Act. The applicant's written and oral submissions made no reference to the principles of general deterrence, retribution, denunciation and equality before the law that underpinned the Court's conclusions that the threshold was crossed in the circumstances ([236]-[242] of the remarks) and that the applicant did not qualify for an ICO ([244]).
- 64 A stronger point for the applicant is that the Crown did not dispute that if material error (or errors) was or were demonstrated, the applicant had a not insubstantial prospect of the term being reduced to two years and, on that contingency, would have good prospects of obtaining an ICO.
- 65 In circumstances where the applicant's argument did not grapple with the other sentencing principles and barely submitted anything about the seriousness of the offending, but instead essentially relied upon her subjective case, which had already been considered by the sentencing court, it is difficult to make any sensible prediction about the prospects of the Court of Criminal Appeal determining that it was plainly unjust to impose a sentence of imprisonment or that the length of the sentence that was imposed fell outside of the permissible range.
- 66 I accept that proposed ground (2) has reasonable prospects of success.
- 67 In summary, the Court accepts that at least in relation to proposed grounds (1)(b)(ii) and 2 that the applicant advanced, she enjoys reasonable prospects of success. As to the remaining grounds (with the exception of proposed ground 1(b)(i)), I find that those grounds are arguable.
- 68 It would also be speculative to consider the prospects of the Court of Criminal Appeal determining to substitute a different sentence on the assumption that error was established, or whether the Court of Criminal Appeal might find that no lesser sentence was warranted in law.

Unacceptable risk

- 69 How much additional weight the absence of unacceptable risk provides in the Court's assessment of 'special or exceptional circumstances' is in question. To paraphrase what Basten JA observed in *Cassaniti*, where there is doubt as to whether an applicant for bail will answer bail, the applicant might find it difficult to establish the requirement of special or exceptional circumstances.
- 70 But the applicant has a conspicuously good record. She has previously complied with bail conditions (including, notably, after the conviction but before sentencing), was otherwise of good character, and had obtained a finding in her favour that she was unlikely to reoffend (where the offending was not violent in nature). These are matters that, in combination, weigh in her favour in the assessment, although viewed in isolation they may not be particularly special or exceptional.

Consequences of successful appeal

- 71 The applicant has only just begun to serve her non-parole period. That period expires in early October 2027.
- 72 I agree with Counsel for the applicant that the Act countenances the making of a release application in the present context on the basis of uncertain or incomplete information. Far from there being any necessity to settle on grounds of appeal by the filing of a Notice of Appeal, judicial construction of s 62(b) of the Act indicates that bail applications can be brought on the basis of a filing of a Notice of Intention to Appeal. The applicant cannot be criticised for bringing an application relatively expeditiously on the basis of proposed appeal grounds that may or may not be augmented or departed from in the appeal proper. Indeed, some applications of the present kind are made almost immediately after the sentence is passed.
- 73 That being so, the suggestion that the applicant should wait until she and her legal team are in a position to finalise the documents to institute appeal processes, and then seek to ascertain an indication from the Registrar as to what dates might be available in the Court of Criminal Appeal, appears cumbersome.

- 74 Although it would have been desirable for this Court, as bail authority, to have an indication as to when an appeal could be heard, the Crown did not doubt the sincerity of the applicant's intention, expressed through her Counsel, that she proposes to appeal the conviction as well as sentence. Although it might be expected that her legal team may have already developed an appreciation of what they might wish to say about the conviction, given that reasons were published over two months ago, it cannot be doubted that the reasons for conviction and sentencing remarks are lengthy and perhaps complex in certain respects.
- 75 This Court can infer that the scope of the appeal might commensurately be significant in terms of time or subject matter. Moreover, no assumption can be made about the speed with which judgment on appeal might be delivered.
- 76 It follows that, given the scope of the appeals, the conventional period of delay through the Supreme Court's summer vacation, and time required for an appellate Court's consideration, the Court is in a position to predict, albeit in a less than fully informed way, that a substantial part of the applicant's non-parole period will likely be served before the Court of Criminal Appeal has determined the appeals. This is a matter of significant weight in favour of the application.

Unacceptable risk (again)

- 77 I have touched upon this matter as a consideration relevant to the question of 'special or exceptional circumstances'. In addition, and for the purposes of ss 17 and 22(3) of the Act, I accept the applicant's submissions that she is unlikely to commit any further offending. There is a concern that she might present as a flight risk, given that she may return to custody at the conclusion of the appeal process, and also that she has a son (James) who permanently resides in England; although that is mitigated by the surrender of her passport and the inherent unlikelihood that for someone in her circumstances (including her age) she would try to put herself beyond the jurisdiction; particularly given the predicament of her husband and the presence of other family within the jurisdiction. In this regard, I take into account her earlier compliance with bail conditions prior to the trial and after her conviction. I agree that she presents

no risk of interfering with evidence (which at the trial was substantially documentary in nature) or witnesses. I take into account the circumstance that she is a person of prior good character and has no prior criminal history. She presents no danger to the safety of anyone.

- 78 I have also taken into account the two sets of proposed bail conditions. Possibly anticipating the Court's concern that she may present as a flight risk, the applicant's latter proposed bail conditions (Exhibit E) place further restraints upon her physical capacity to abscond in comparison with the former version.
- 79 They would be acceptable subject to one additional condition. Given the policy underpinning the requirement of special or exceptional circumstances referred to in *Cassaniti*, and particularly the interference with the administration of justice and other concerns reflected at paragraph [12] above, it is important that the appellate processes be completed as soon as possible.
- 80 This was raised with the parties in correspondence after the hearing of the release application concluded (MFI 2). Neither party objected to the inclusion of such an additional condition, although they differed as to its suggested form. On this point, the Court prefers the Crown's suggested form, which not only has the advantage of greater simplicity, but is also consistent with past case law authority.
- 81 In summary, the cumulative force of the factors relied upon by the applicant is such that the Court is persuaded that the two requirements under s 22 of the Act are satisfied.

Order

- 82 The applicant is to be released, subject to her compliance with the conditions referred to in Exhibit E on the application, with the additional inclusion of the condition that she prosecute her appeal with expedition.
- 83 The Court also notes that condition 7 (in Exhibit E) is an enforcement condition within the meaning of s 30(3)(b) of the *Bail Act 2013* (NSW).

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