

IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Suitable for publishing

Case No. L10984035

IN THE MATTER OF the *Bail Act 1977*

AARON PRICE (VPOL)
and
RICHARD PUSEY

IN THE MATTER of an Application for Bail by

RICHARD PUSEY

MAGISTRATE: HER HONOUR MAGISTRATE METCALF
WHERE HELD: Melbourne
DATE OF HEARING: 11 May 2020
DATE OF RULING: 14 May 2020
CASE MAY BE CITED AS: Victoria Police v Pusey

RULING

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Applicant	Mr Peters	Mr McLennan
For the Respondent		Mr Harper

HER HONOUR:

- 1 Mr Pusey applies for bail, having been remanded in custody on 23 April 2020.
- 2 He is charged with 12 offences alleged to have occurred on 22 April 2020, namely:
 - Reckless conduct (driving 149kmph in a 100kmph zone) endangering serious injury;
 - Driving at a dangerous speed;
 - Refusing to remain at the scene after providing an oral fluid test;
 - Failing to render assistance at the scene of a collision knowing that a person had been killed;
 - Destruction of evidence (relating to material on an iPhone);
 - Possessing a drug of dependence (methamphetamine);
 - 3 charges of Committing an indictable offence on bail;
 - 2 charges of Attempting to pervert the course of justice (by knowingly removing items from the scene of a collision and by providing misleading information to police); and
 - Driving a motor vehicle with more than the prescribed concentration of drugs in his system
- 3 The application for bail is opposed.
- 4 Section 4 of the *Bail Act* 1977 (the Act) provides that a person accused of an offence and remanded is entitled to be granted bail *unless* the bail decision maker is required to refuse bail by the Act.
- 5 The accused in this application falls into the “show compelling reason” test for bail because:
 - he was on bail for an indictable offence (being an alleged theft of car keys in October 2018) at the time he is alleged to have committed the current indictable offences.¹

¹ Bail Act section 4AA(3) and Schedule 2 clause 1(a)

- he was subject to summons for indictable offences, being 4 charges of Using a carriage service to menace (alleged to have occurred on 27 August 2019) and Criminal damage (alleged to have occurred on 26 March 2019)²

6 The court must therefore refuse bail unless satisfied that a compelling reason (in the sense of being a convincing or forceful reason) exists that justifies the grant of bail. The accused bears the burden of satisfying the court that a compelling reason exists.³

7 In considering whether a compelling reason exists, the Court must take into account all of the “surrounding circumstances” – a concept which is defined in s3AAA of the Act.

8 A combination of circumstances can establish the “compelling reason” threshold.

9 If I am satisfied that a compelling reason exists, I must then consider whether (again having regard to the surrounding circumstances) the prosecution has established that there is an unacceptable risk that, if released on bail the accused would:

- Endanger the safety and welfare of any person;
- Commit an offence while on bail;
- Interfere with a witness or otherwise obstruct the course of justice in any matter;
- Fail to surrender into custody in accordance with the conditions of bail.

10 The informant DSC Aaron Price alleges all of the above unacceptable risks are present in this case.

11 I must also consider whether there are any conditions of bail available that would reduce risks to an acceptable level.

12 Finally, the overarching guiding principles set out in Section 1B (1) of the Act

² Bail Act s4AA(3) and Schedule 2 clause 1(b)

³ Bail Act section 4C(1A)

must be kept in mind. When deciding whether to grant bail or not, the court is bound to consider the following matters:

- Maximising the safety of the community and persons affected by crime to the greatest extent possible;
- Taking account of the presumption of innocence and the right to liberty;
- Promoting fairness, transparency and consistency in bail decision making; and
- Promoting public understanding of bail practices and procedures.

The surrounding circumstances

- 13 At about 4:50 pm on 22 April 2020, police intercepted a vehicle being driven by Mr Pusey for speeding.
- 14 Police were in the process of testing Mr Pusey for the presence of illicit drugs in his system when suddenly a prime mover truck veered into the emergency lane, striking the attending police members LSC Lynette Taylor, SC Kevin King, Con Joshua Prestney and Con Glen Humphris, and the three vehicles. Tragically, all four police members died at the scene of the collision.
- 15 Mr Pusey was standing a short distance away at the time of the collision and escaped being struck or injured.
- 16 He is not charged with any offences relating to the deaths of the police officers, nor does the informant allege that Mr Pusey is in any way responsible for or connected to the actions of the vehicle or its driver.
- 17 Nevertheless, the charges before the court are serious.
- 18 He is charged with endangering members of the public by driving at speed (149kph in a 100kph zone) and with drugs in his system. Analysis of activity on Mr Pusey's phone indicates that he was likely awake for 22 of the preceding 24 hours, raising the prospect of fatigue as an additional risk factor in his driving.

19 Shortly after the collision, Mr Pusey retrieved 2 iPhones and a metro branded satchel bag from his car. This conduct is the subject of one of the charges of Attempting to pervert the course of justice.

20 While members of the public (including two medical doctors) stopped to render assistance, Mr Pusey did nothing to assist LSC Lynette Taylor, who was still alive at this point. There is evidence that he took photographs and filmed what was occurring for approximately three minutes. The informant described the commentary on the recording as “derogatory and extremely offensive”.

21 Mr Pusey is not charged with any offences for filming the scene. While his actions in seeking to record the aftermath of the collision were highly intrusive and morally repugnant, the filming was not illegal.

22 The charge he does face is an allegation that he Failed to render assistance at the scene knowing that the accident had resulted in a person’s death.

23 Mr Pusey left the scene about 15 minutes after the collision, asking for a lift home from one of the civilians who had stopped at the scene. This was after paramedics and an ambulance had arrived, and as investigating police were arriving. The informant does not allege that Mr Pusey was deliberately trying to avoid investigators.

24 However, Mr Pusey is charged with Refusing to remain at the scene until the samples he provided were tested, or for a period of 3 hours, as required by section 55E(2) of the *Road Safety Act 1986*.

25 Over the course of the next few hours, Mr Pusey told various people what happened, sent stills of the scene to his wife and a friend, and stills plus a link to the footage to an AFP officer known to him.

26 It is not alleged that he was responsible for uploading any imagery to social media and he faces no charges in this regard.

- 27 At 9:44pm he emailed a Victoria Police member known to him with the subject line “4 dead officers on freeway” and telling her that he had been there, describing what he had seen, and expressing that he felt very unwell and needed to go to bed.
- 28 At 11:15pm Mr Pusey called the Fitzroy Police Station and spoke at length with officers there, providing a version of events to them. However, he declined their request to attend the station that night, telling them he didn’t feel up to it.
- 29 The following day Mr Pusey’s lawyers agreed with police that he would come into the station to make a statement. Before this could occur, however, he was arrested in premises in Fitzroy after a member of the public called 000, and escorted to Melbourne West Police station.
- 30 At 9.40am, in the company of his legal representative, he provided a video recorded statement about the previous day’s events. At one point during this statement, he told police he was not proud of what he had said during the videos from the scene.
- 31 He also produced an iPhone to police that he told them was the device he had used to film the scene. However, police allege that Mr Pusey deliberately gave them the incorrect phone. The phone he produced to them contained no footage, had been restored to factory settings, and only contained some messages from that morning.
- 32 It is alleged that Mr Pusey intentionally swapped his sim card between different phones during the early hours of 23 April 2020 (consistent with call charge records) to deceive police as to which phone had been in use at the scene.
- 33 When asked, he gave police an explanation as to why he had given them the wrong phone, concerning not wanting to lose business information if the phone was confiscated.
- 34 At 2:50pm that day Mr Pusey was arrested for indictable traffic offences and

shortly afterwards, police executed a search warrant at his home address.

35 There, police seized three iPhones. Digital analysis of one of the phones recovered two videos taken at the scene (referred to above) that had been deleted from the device. This conduct is the subject of the charge of destruction of evidence.

36 The other two phones are yet to be analysed.

37 A sample of blood taken from Mr Pusey that day is awaiting analysis.

38 Police also recovered the metro branded lunch bag which they allege Mr Pusey removed from his car at the scene of the collision. This was found to contain two ziplock bags each containing a small quantity of “rocks” (under 3g), yet to be analysed, but which police believe to be methyamphetamine. No cannabis or other drug paraphernalia, such as ICE pipes, were located at the house.

Strength of the prosecution case

39 It is difficult to make definitive assessments at this early stage about the strength of the prosecution case. There is overwhelming evidence of Mr Pusey’s presence and behaviour at the scene of the collision, including from LSC Taylor’s body worn camera, and of his actions afterwards. There is evidence of his speed at intercept and of the preliminary breath test and oral fluid test process and results. He answered police questions in a recorded statement, later adopted as a formal record of interview.

40 It is clear, however, that there are arguable issues in relation to many of the charges.

41 Mr Peters’ questions to the informant highlighted gaps in the evidence and took issue with the police interpretation of the evidence of Mr Pusey’s conduct, particularly in relation to the Refusal to remain at the scene and the Failure to

- render assistance charges.
- 42 There are potential legal issues in relation to the charge of Failing to render assistance, around Mr Pusey's control of the vehicle at the time of the collision, given that he was not driving it at the time, nor was his vehicle responsible for the collision.
- 43 There is no evidence of Mr Pusey's observed driving behaviour (other than as to his speed) before he was intercepted. There is presently no expert evidence concerning the amount of MDMA detected in Mr Pusey's system, or about the effect that the combination of drugs and the 0.042g of alcohol also detected might have had upon his driving. These matters are of particular relevance to the strength of the Reckless conduct charge.
- 44 The suspected drugs found in the lunch bag have not yet been analysed.
- 45 The charges of Attempting to pervert the course of justice require inferences to be drawn about Mr Pusey's intention from the available evidence.
- 46 In my view a better assessment of the overall strength of the case against Mr Pusey will be possible once the hand-up brief has been compiled, which the informant anticipates will be ready by the due date.
- 47 It seems clear that the current charges are unlikely to resolve without evidence at a committal hearing, and possibly a jury trial.

Criminal history & pending matters

- 48 Mr Pusey has a prior criminal history as an adult dating back to 2008 from multiple court appearances. The most recent matter is a conviction and fine in QLD on 18/09/2019 for Offensive and disorderly behaviour and Committing a public nuisance in relation to abusive behaviour that occurred on an airplane while he was intoxicated, and which saw him removed from the vessel, arrested and charged.

49 The Victorian prior history does him no credit. It includes offences of violence,
property damage, threatening and harassing behaviour, and reckless conduct
endangering serious injury.

50 He has received several lower-end without conviction dispositions of fines and
an adjourned undertaking. He received a without conviction Community
Correction Order (CCO) in November 2016.

51 However, Mr Pusey has also been sentenced to two terms of imprisonment,
firstly in 2008, when he was convicted of Intentionally causing injury and
Intentionally damaging property and sentenced to a 9 month wholly suspended
prison sentence. More recently in April 2018 he was sentenced to 3 months'
time served for Reckless conduct endangering serious injury and other offences
relating to a dispute at a bar.

52 He successfully completed the CCO, the suspended sentence and most
recently an adjourned undertaking imposed for Stalking. This demonstrates he
has some ability to abide by court orders.

53 On the other hand, the prior history also includes breaches of Personal Safety
intervention orders from two court appearances, and offences against the *Bail
Act 1977* from two appearances.

54 He has a relevant driving history, including for speeding offences, a Traffic
Infringement Notice for low level drink driving in 2016 and a finding of guilt for
Driving Suspended from November 2017. His Infringements history shows 11
speeding fines dating back to 2000, with the most recent occurring in October
2019.

55 The court was told about pending matters with alleged offence dates of 20
October 2018 (Unlawful assault and Theft); 26 March 2019 (Criminal damage)
and 27 August 2019 (four charges of Using a carriage service to menace).

56 Mr Pusey contests these three matters and is entitled to the presumption of

innocence for them. He has not been found guilty of any of these offences. The pending matters are relevant, but only in a general sense to the overall risk assessment task.

57 There are no Family Violence intervention orders in operation against the accused.

Submissions regarding compelling reason and unacceptable risk

58 Mr Peters relies on a combination of circumstances to establish a compelling reason to justify a grant of bail, being delay due to COVID 19, the issues with the prosecution case on some of the charges, and that the likely sentence Mr Pusey would receive if convicted would be less than the time he would spend on remand if denied bail.

59 Mr Peters also points to Mr Pusey's pre-existing mental health issues, which he says are likely to have been exacerbated by having witnessed, and narrowly escaped, a horrific incident. He submits that Mr Pusey needs to continue the treatment he has been undergoing, and which is unlikely to be available to him in prison.

60 Two reports were tendered from Mr Pusey's treating psychologist, who first saw Mr Pusey in July 2016 and assessed him as presenting with "likely ADHD with comorbid antisocial/narcissistic PD and polysubstance abuse". The 2016 report provides background information about Mr Pusey and notes that Mr Pusey finds sessions with [his forensic psychologist] helpful. This report recommended a trial of particular medication, continued psychotherapy with his current forensic psychologist "while adherent with abstinence of substance misuse".

61 The second report, which is undated but apparently written in May 2020, confirms that the psychiatrist has seen Mr Pusey on six occasions since April 2018 (when he was released from his last prison sentence). The author's last contact with Mr Pusey was by phone on 16/3/20, before the current offences

occurred. He has prescribed repeat prescriptions of Ritalin to assist with concentration, and a low dose anti-psychotic to assist Mr Pusey with irritability, anger, paranoid ideation and anxiety symptoms. He notes that Mr Pusey's adherence to his follow-up and treatment has been variable, and usually undertaken in the context of court related stressors.

62 The author says that since engaging in treatment with [the author and the forensic psychologist] in 2016, Mr Pusey "continues to struggle with anger management and narcissistic rage towards multiple parties" and had reported "daily fear of being arrested, being watched by police, constant abusive calls received, and at times fantasizing about killing people". The report is not clear about the context or timing of these reports by Mr Pusey, whether they are historic or continuing.

63 On a positive note, the author states that "when adherent to [his anti-psychotic medication] and avoiding substance misuse, Richard presents as calmer and more rational..."

64 The author concludes that "After discussion with [Mr Pusey's forensic psychologist], it is our shared view that Mr Pusey remains at high risk of further acting out behaviours, self-medicating with alcohol and recreational substances, and variable adherence with private mental health practitioner follow-up."

65 He concludes that "a forensic psychiatry service is now warranted to provide assertive psychiatric treatment, including psychiatrist, psychologist and case manager involvement, with close follow up to include weekly urine drug testing, with positive results leading to consideration of bail being revoked..."

66 Finally, as part of the combination of factors, Mr Peters relies on Mr Pusey having stable accommodation, a supportive partner, employment in the form of several building projects that are in various stages of completion and need attending to.

67 He submits that conditions are available to attach to a grant of bail to render any risks acceptable, including prohibiting Mr Pusey from driving and from having contact with prosecution witnesses, requiring him to surrender his passport and not attend international points of departure.

68 In relation to mental health concerns and drug use, Mr Peters points out that Mr Pusey had voluntarily sought out and engaged in mental health counselling before these events and remains willing to engage. He suggests that Mr Pusey could obtain a mental health care plan from his GP and the court could mandate regular drug screens as a condition of bail.

69 Ms Harper argues that a compelling reason for the grant of bail has not been established. While conceding the inevitability of delay in the current pandemic, she points to the seriousness of the charges, the strength of the evidence available (while conceding that some of the charges may be arguable) and asserts that Mr Pusey could expect to be sentenced to a substantial gaol term if convicted of these offences, given the circumstances and his prior history.

70 In relation to Mr Pusey's mental health, Ms Harper argues that the matters raised in the reports tendered by the defence are of concern and go to the risk Mr Pusey poses should bail be granted.

71 Ms Harper submits that there is an unacceptable risk of Mr Pusey committing further offences, particularly driving offences, given the high speed alleged in the current matters, the messaging found on Mr Pusey's phone expressing desires about driving at high speeds, the references to speed avoidance measures in his car, and that Mr Pusey has another vehicle at his disposal.

72 She also pointed to a risk of illicit drug use, given that drugs were found in Mr Pusey's system and at the scene, and in light of the report tendered on Mr Pusey's behalf.

73 Ms Harper argues that Mr Pusey's prior history shows a disregard for court

orders and for the obligations of bail. In particular, the prior matters show a demonstrated tendency to harass people by phone, leading to the informant's concern that Mr Pusey could harrass or interfere with the civilian witnesses in particular who were at the scene of the collision.

74 The informant's concerns about an unacceptable risk of failing to answer bail are based on Mr Pusey's financial means, the prospect of gaol for these offences and his history of failing to comply with court orders.

75 Ms Harper submits that there are no conditions that could be imposed in the circumstances to render Mr Pusey's risks acceptable.

Has a compelling reason been established?

76 Having considered all of the surrounding circumstances, I am satisfied that the accused has demonstrated a compelling reason based on a combination of factors, chief of which is the likely delay in these charges being determined due to the ongoing pandemic. A contested committal hearing will not occur until 2021, and any trial would likely not occur until late 2021 - early 2022, and possibly well into 2022.

77 This is a significant delay in the circumstances, particularly when there is the prospect that Mr Pusey may ultimately be acquitted of the more serious charges, given the issues that have been identified.

78 Further, in my view Mr Pusey could well spend a longer period on remand than any gaol sentence that he might receive.

79 The issues around his mental health and likely unavailability of appropriate treatment whilst in custody are also relevant to demonstrate a compelling reason.

80 Finally, Mr Pusey's personal circumstances, including the availability of a stable address, family ties and ongoing employment, form part of the combination of

circumstances establishing a compelling reason.

Are there unacceptable risks with a grant of bail?

81 In determining whether the unacceptable risks alleged by the prosecution are made out, I must consider the same surrounding circumstances including the nature and seriousness of the alleged offending, the nature and seriousness of Mr Pusey's prior criminal history, his previous compliance with court orders and previous grants of bail, whether he was on bail or summons at the time of this alleged offending, his background and personal circumstances, the availability of treatment or bail support services and any other relevant matters.

82 Mr Pusey has a stable address, a supportive wife and employment. He has no history for failing to answer bail. While the informant referred to the significant financial resources available to Mr Pusey, there was no further detail about this before the court. In my view there is no unacceptable risk of Mr Pusey failing to surrender into custody given his significant ties to the jurisdiction and the availability of conditions to require him to remain in the jurisdiction and mitigate any risk.

83 I am not persuaded that there is an unacceptable risk that Mr Pusey will interfere with witnesses, being the civilians who attended the collision scene, or otherwise obstruct justice. It is unclear how relevant the evidence of these witnesses would be to the matters in dispute. While there was evidence before the court of harassing behaviour by Mr Pusey in other contexts, in my view a condition prohibiting him from contacting prosecution witnesses is sufficient to render any risk of this nature acceptable.

84 I do however hold concerns about Mr Pusey's risk of committing offences on bail and of endangering the safety and welfare of members of the public.

85 Mr Pusey has a poor driving record, prior findings of guilt for committing an indictable offence on bail, and the present charges are alleged to have occurred

while he was on a grant of bail. He has breached court ordered intervention orders on 2 occasions.

86 The current matters involve allegations of driving at a high speed with MDMA, cannabis and alcohol (albeit in a small amount) in his system, and suspected illicit drugs were found in the bag he removed from his car. Messages and a photograph were found on Mr Pusey's phone from the evening before the collision that are consistent with him using cannabis at that time.

87 The evidence of illicit drug use in the current offending must be viewed in the context of a documented history of recreational drug misuse, as outlined in the report of his treating psychiatrist and tendered by the defence. Mr Pusey's prior criminal history also has instances of some concerning offending committed whilst intoxicated, most recently in the incident on board an aircraft.

88 I do accept that Mr Pusey has no prior criminal history for drug offences, and that no drug-related paraphernalia was found at his home address.

89 There is additional material suggestive of risk-taking attitudes and driving behaviour before the court. While some of the messages found on Mr Pusey's phone about speeding and fitting "blinders" onto his car to avoid police detection could be no more than empty bragging, the informant also referred to dashcam footage showing Mr Pusey's car travelling at high speed along the Eastern Freeway on 21 March 2020, plus a video recovered from his phone showing a person (believed to be Mr Pusey) driving a Porsche at speeds up to 247kph on the Monash Freeway, including doing 160kph through signed roadworks.

90 This type of driving behaviour puts community safety at risk.

91 As well, I am concerned about the prospect of ongoing drug and alcohol misuse and the risks that poses, including the potential undermining of the effectiveness of treatment to improve and stabilise Mr Pusey's mental health. His history reflects concerning behaviour and volatility when these risks are not

being addressed.

92 The report from Mr Pusey's own treating psychiatrist clearly refers to a high risk of "acting out behaviours, self-medicating with alcohol and recreational substances and variable engagement with mental-health practitioner follow-up." The report recommends intensive support to address these issues.

93 I note that the author of the report has not assessed Mr Pusey's current mental state, including the assessing the impact if any of witnessing the collision, as the most recent contact was on 16 March 2020.

94 The bail application did not address in detail what treatment or support would be put in place for Mr Pusey to address these risks, other than proposing a mental health care plan for counselling and the ability to order drug screens.

95 Considering the whole of the evidence before the court in this application, my view is that Mr Pusey poses an unacceptable risk of committing offences on bail and of endangering the safety and welfare of members of the public. The conditions that are available to the court on the evidence before me would not mitigate these risks to an acceptable level.

96 Bail is therefore refused.