

LAW REFORM

OUT ON BAIL — THE REPORT OF THE CRIMINAL LAW REFORM COMMITTEE ON BAIL

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1.

INTRODUCTION

In December 1982 the Criminal Law Reform Committee presented to the Minister of Justice a comprehensive report on bail and made many recommendations for changes in the current law and practice in this area.

The primary recommendation of the Committee is that in a majority of circumstances there should be a statutory presumption in favour of bail. The circumstances in which this presumption will operate and the factors to be taken into account in a decision as to whether it is rebutted will be discussed in detail later.

Among the lesser recommendations made are a number aimed at making the law on bail more consistent and accessible. The Report envisages that any statutory reform should be in the form of a comprehensive Bail Act (as is the position in many overseas jurisdictions) and that such a statute should cover the vast majority of instances where bail decisions have to be made. It is not envisaged that the proposed Act would cover young persons (those under 17) where frequently a remand in custody may be made for the benefit of the individual in question and not as a necessary part of criminal proceedings; nor is it envisaged that immigration cases (involving as they do the possibility of deportation, which is a remarkable incentive not to attend trial) should be covered by the new statute. However, all other bail decisions would be covered by the Act, though on pragmatic grounds the Report envisages that there may still be jurisdictional limitations on the power of the District Courts in cases under the Misuse of Drugs Act. The new Act would however, cover both court and police bail, and would also fill in the current lacunae which appear to make bail unavailable where an appeal to the Privy Council is pending. The Report also expresses the view that in any new statute simpler and less technical terms should be used so that the procedure may be more readily comprehended by the layman: this bail bonds would be forfeited not estreated. Such a change is perhaps long overdue.

2.

THE CLASSIFICATION

The proposed reforms would not necessarily leave the classifications of bailable offences in a much simpler form than they are at present. The system envisaged by the Report would retain police bail as a separate type of bail subject to rather different criteria from court bail, and would retain the distinction between offences bailable as of right and those where the individual is bailable only at the discretion of the court, although there would be changes in detail in each type of bail covered.

The Report envisages that the category of offences bailable as of right should be rather broadened, so that s.319(3) of the Crimes Act would be repealed and its curious mixture of offences where bail is available of right would disappear. In its place there would be a simpler set of rules. Bail would be available as of right where the offence charged is one which does not carry a sentence of imprisonment as a possible penalty. It would also be available as of right to any first offender except where the charge is one carrying more than three years imprisonment as a possible penalty (other than charges under s.194 of the Crimes Act — assault by a male on a female or assault on a child). However, as is the current position, where the accused is charged with an imprisonable offence and had a prior conviction for an imprisonable offence bail would not be as of right. This alone would mean that there has been no significant broadening of the availability of bail. It may well be that other recommendations in this area would have the effect of reducing the application of bail as of right as a factor in some cases. The Report recommends that even where bail is available as of right, the court should have the power to attach “such reasonable conditions as the court considers necessary to secure that the offenders surrenders to custody, does not offend, and does not obstruct the course of justice” (para. 138). At present where the offence is bailable as of right, there is no power to attach conditions. It is envisaged that where there is a breach of a condition of bail, the defendant be arrested and brought before the court and then, even if the offence originally charged was one where bail was available as of right, the decision to continue bail would be at the discretion of the court *without* any presumption in favour of bail. This may well mean that where there is a substantial interval between bail and trial, even those for whom bail was as of right may find their liberty jeopardised where it could not now be.

Where bail is not available as of right, the court will have a discretion to grant bail. At all stages prior to conviction, there would be a presumption in favour of bail, but this presumption would not apply where either the offender has been convicted and seeks bail pending sentence or an appeal, or the offender has breached a condition of his bail.

Police bail is relatively unaffected. The Report envisages that the current law allowing release on either a personal bond or without bond but on a police summons to attend be retained, and that the police have the power to release in all cases other than those of indictable offences not triable summarily. The Report also recommends the abolition of the right of the police to demand a cash deposit, but would allow the retention of sureties in police bail (though their total liability should not exceed \$500). One innovation would be that the police would be entitled to a reporting condition where the accused is unlikely to appear in court for some days. The presumption in favour of bail which is to apply in the courts is not specifically carried into police bail, but there is a change (which may in practice be only semantic) in that release on bail or summons should be made “unless it is imprudent” rather than the current formula of release if it is “deemed prudent”. Interestingly, the Report envisages the consistency in the bail decision as best being achieved by internal police training and regulation and thus rejects a right of review by the courts of the police bail decision or a need for the police to furnish reasons for not granting bail. A

minority of the committee expressed a view that this may place too much confidence on the fairness of the police, and certainly it is hoped that there will be monitoring of the police decisions to ensure this confidence is not misplaced.

3. THE BAIL HEARING, REVIEW AND APPEALS

The Report recommends that the courts be specifically empowered to prohibit publication of the evidence considered on any bail hearing, and only the applicant's name (where not otherwise suppressed), the charges, the decision whether or not to grant bail and any conditions attached to bail should be publishable unless in special circumstances the court allows further publication. Obviously this is necessary as evidence which is inadmissible at the trial may be relevant to a bail decision, and it would be prejudicial if such matters could be reported. The Report also envisages that there be an express provision that the court, in making any bail decision be empowered to receive as evidence any relevant information whether or not it would normally be admissible. The Report envisages that in some circumstances the court may require the evidence to be on oath, and where the defendant elects to give evidence this should later be admissible against him only on charges of perjury or where he later gives later testimony inconsistent with that given at the bail hearing.

It is envisaged by the Report that at the bail hearing the Judge shall decide the issue on the balance of probabilities, but must give his reasons if bail is refused. If bail is granted, the prosecution is entitled to ask for a statement of the Judge's reasons. Where conditions are imposed (or are varied at a later hearing) reasons need only be furnished if either party asks for a statement of them. The furnishing of, or availability of, reasons will be a necessary element of the review procedure foreseen as applying to bail decisions. The Report envisages that where bail has been refused, there shall be a right of the defendant to seek bail again at each remand, and the question of bail is then to be determined *de novo* on each occasion. Where it is refused, or is granted subject to conditions, the defendant shall have a right to appeal to the High Court by way of original application in what is effectively an informal hearing of the case. The prosecution would also be able to appeal to the High Court against the granting of bail or to seek a variation in the bail conditions. There would be no appeal from the High Court decision. Where the defendant has unsuccessfully applied to the High Court, and then reappears on remand in the District Court, he shall only be able to seek bail where he can point to circumstances not before the court on the earlier occasion. Where bail is only available in the High Court, either party shall have a right of appeal to the Court of Appeal against the decision made. Unlike appeals to the High Court, however, these appeals would not be hearings *de novo*, but would be limited to the question of whether the High Court Judge wrongly exercised his discretion. Certainly this system should allow for a more rational and speedy method of dealing with reviews of bail decision, but there are two matters which may be of concern. Since the Report envisages there being a list of matters which may rebut the presumption in favour of bail, there may be a danger that Judges in refusing bail will steer by the list of criteria in

giving their reasons. This may make it difficult for a High Court Judge or the Court of Appeal to really review the decision. This may be obviated in practice by a convention that such "reasons" are inadequate. There may also be problems in establishing what will be sufficient new circumstances to justify a fresh approach to the court after bail has been denied by the High Court in its appellate jurisdiction. If the aim is to prevent unnecessary applications but to allow reasonable ones to go forward, any limiting provision will require extremely careful drafting.

4.

ENFORCEMENT

Inevitably a system of bail must include some sanctions to deal with those who do not fulfil their bail obligations. The Report makes several recommendations concerning enforcement of bail obligations; alas not entirely consistent. In the first place, the Report recommends the widening of the power of the police to arrest persons who are in breach of bail conditions or are about to abscond. Any police officer would be entitled to arrest without warrant any person on bail who absconds or is about to abscond or breaches the condition of his bail. A majority recommend that the police should also be given powers to arrest those who are reasonably believed to be about to breach the conditions of their bail. The question left unresolved is what is to happen to the persons arrested under this last heading. The Report would provide a new sanction for those who actually fail to attend their trial, by creating a new summary offence of failing to attend trial without reasonable cause. Those who breach bail conditions are to be brought before the court and their bail position reconsidered. There does not, however, appear to be any consistency in the thinking of the Committee in regard to anticipated breaches of conditions. While the actual breach of a condition will not be an offence (para. 140), it does displace the presumption in favour of bail. Anticipated breaches apparently do not have this effect. The position is then that a person is liable to arrest, and may well be kept in custody for some time before reappearing, only to have the presumption in favour of his release on bail reapplied and possibly to be set at liberty again. It is submitted that unless the reasonable grounds for anticipating a breach of a bail condition are themselves grounds which would rebut or be relevant to rebutting the presumption in favour of release, there should be no power to arrest a bailed person merely for anticipated breach of a condition. Unless there is such a safeguard, a risk of a trivial breach of a condition may deprive a person of his liberty. Such a result should not be contemplated.

A second method of enforcement is a sanction directed at the offender personally. At present there is no power in the courts to demand a cash deposit, but the Committee, by a majority, recommend that such deposits should be a possibility where there is a serious risk of the defendant absconding overseas. In other cases, the sanction directed at the offender will be a separate offence of failing to appear for trial, with a punishment of half the maximum sentence applicable for the offence for which bail was granted. A related offence would be created of failing to answer to police bail or a police summons. To facilitate the implementation of such an offence, it is recommended that a more adequate bail notice be given to

the defendant outlining his position. It is submitted that the Committee is correct in recommending against the creation of new offences of failing to comply with bail conditions, since any serious breach of a condition relating to the prevention of interference with the accused's trial or of other offending will, in itself, be an offence under existing law.

The third method of enforcement of bail is the surety system. It is envisaged that sureties may be required for both police and court bail, with the police approving sureties for police bail, and a Judge, Justice of the Peace, Registrar or Deputy Registrar approving court sureties. Where a defendant is ordered to find sureties as a condition of bail but cannot do so within 24 hours, the court is to be obliged to reconsider the condition. Although there would not normally be a requirement that a surety post a cash bond, the Report recommends that this power be available in exceptional cases (e.g. where the surety is normally resident overseas). The duty of the surety would be to take all reasonable steps to ensure that the defendant attends his trial, and only where this is not done would the surety be liable to forfeiture of all or some of his bond. It is suggested that the procedure used in the District Courts under s.57 and s.58 of the Summary Proceedings Act is the appropriate system for use in all courts. The Report specifically notes (para.173) that it would be unduly onerous on the surety to ensure compliance with bail conditions other than attendance at trial. This may be doubted — there may well be some occasions on which it is not particularly onerous, and if the aim of the bail system is to allow liberty of the defendant while facing a criminal charge, the interests of the state should also be served by preserving the obligations of sureties at as high a level as is feasible. If the test of the surety's duty is to take all reasonable steps to prevent a breach of bail conditions, the court is or should be able to decide whether the surety has taken reasonable steps in regard to any particular condition. The more onerous it was for him to supervise that condition, the less the standard of care required. If the condition was easily supervised, the surety can reasonably be expected to supervise it. Perhaps this point may be reconsidered when the proposed Act is drafted.

5. THE BAIL DECISION — PRESUMPTION AND DISCRETION

The greatest departure from the existing law envisaged by the Report is the recommendation that there be a presumption in favour of bail in almost all cases. As noted earlier, the presumption would not apply where the defendant had been brought before the court after a breach of existing bail conditions, and it would also cease to operate where the defendant has been convicted and seeks to remain at liberty pending sentence or appeal. In these cases bail would be at the discretion of the court. Apart from these instances, and those where bail is available as of right, the presumption would operate regardless of the nature of the offence. Even where the presumption in favour of release on bail is rebutted, the court will have a residual discretion to grant bail.

The Report postulates rebuttal of the presumption where there are reasonable grounds to believe that the offender may not appear for trial, may commit further offences while on bail, or may interfere with the course of justice. In deciding this, the court should have regard to a number

of factors including the nature and seriousness of the offence charged, the penalty likely to be imposed on the charge, the defendant's prior criminal history (if any), the defendant's record in respect of prior grants of bail — including, as a separate ground, the fact that the offence in question was allegedly committed while on bail, the strength of the evidence against the defendant and the accused's family circumstances and other relevant personal circumstances such as his employment position.

If the court is satisfied that the presumption is rebutted, then it is to consider whether the discretion it has should be exercised in favour of the defendant nevertheless. The Report (para. 79) envisages as relevant at this later stage such matters as the potential delay in the matter of coming to trial, the health of the accused, the preparation of his defence and the effects that custody may have on his employment or his family. Whether such factors will in practice serve to outweigh judicial caution may be doubted. It certainly is not unlikely that in the majority of cases, the fact that the presumption is held to have been rebutted will lead to the conclusion that the risk of placing the defendant at liberty is unjustified.

On a more general view, it appears that the logical basis of the suggestion for a rebuttable presumption and the factors which can rebut the presumption is not as sound as it should be. It is a notable feature of the Report that there is little if any consideration of the philosophical basis for bail. In essence the Report takes the view that the existing considerations in a bail decision must be continued, without discussing their bases. If, as the Report postulates, there are four circumstances which justify pre-trial detention, with its attendant infringement of personal liberty, in the interests of society, one would expect those circumstances to be critically evaluated to see whether there is in fact such a justification. These four circumstances are that bail may be refused where the defendant is mentally disturbed and detention is required for his or society's protection or for evaluation of his mental state where this cannot be done while he is at liberty; where the defendant is unlikely to appear for trial; where the defendant may interfere with the course of his trial by tampering with evidence, witnesses or the jury; and where there is a risk of further offending while the defendant is awaiting trial. These circumstances are not necessarily linked logically. The detention of the mentally disturbed is a relatively rare case, and can be justified both as protecting society and in terms of the "paternal" power of the state. It is clearly tenable as a ground. The second and third circumstances are linked in that they concern the overall interests of justice — the opportunity of the state to have a chance to prove properly the guilt of the accused. In such circumstances, pre-trial detention may be justified. However, the fourth circumstance, the risk of future offending is not so easily justifiable. In substance it is a form of preventive detention. Surely more is needed to justify the denial of liberty of an individual who may or may not commit offences than the statement that "Respect for the law suffers where offences are committed by persons on bail" (Report, para. 10). No one has (yet) suggested doing away with parole because some parolees commit offences while on parole. If a bailed defendant commits further offences, he should be punished for those after due trial. The cases where preventive detention might be justified can be subsumed under other

justifiable heads. If it is feared the original alleged victim will be in jeopardy, there is a threat to a witness — and this comes under the protection of the due course of justice. If there is a risk of indiscriminate violent offending, there may be a case for a more general ground of protecting society, but such a ground needs careful definition. It is certainly not sufficient to leave a general risk of further offending as a ground for restricting individual liberty. The Report does foresee difficulties for the courts in deciding whether there is a sufficient risk of serious offending as a matter relevant to the exercise of their discretion. But this may be too late in the process. The risk of serious harm to some person, particularly to the original victim, may be a ground for rebutting the presumption in favour of liberty, but a general risk of offending should not be. There is a similarity with the limitation of bail as of right to first offenders — where bail is not as of right where offences under s.194 of the Crimes Act are charged because of the domestic nature of many such incidents and the fear of repetition. The fear of repetition to the same victims is clearly the basis of such a provision. A similar distinction ought to be drawn in the wider field where bail is only available as of right.

Criticism can also be made of the same matters relevant to deciding whether the presumption is rebutted. The seven factors specified to be relevant are not all justifiable. The nature of the offence, the probable penalty in the event of conviction and the strength of the case against him are clearly relevant to deciding whether it is likely the defendant might abscond rather than face trial, conviction or sentence. The defendant's prior history, if any, in respect of grants of bail may also indicate whether he is likely to surrender to his bail, and his family ties etc. are clearly matters to be taken into account in assessing the degree of risk attributed to the earlier factors. But there must be doubt as to the remaining two specified considerations. The stipulation that it is relevant that the defendant is charged with an offence allegedly committed while already on bail ought only to be relevant where firstly the court can justifiably override the presumption of innocence on a criminal charge (in that otherwise there is effectively detention because of the repetition of allegations of offending, without conviction on any charge) and the offence is one where the state has a right to intervene either to protect the interests of justice or of threatened parties such as the victim of the alleged first offence. A general rule that the charge is one of an offence committed while on bail seems unduly wide. Criticism can also be directed at the requirement that the courts take into account the prior criminal history of the defendant. Although such prior history is usually relevant to sentencing, it ought only to be relevant to the decision relating to bail where the prior history is such that it shows a serious likelihood of absconding (e.g. where the defendant will be likely to receive a lengthy term of imprisonment because of his prior history) or where it indicates a risk of interfering with the course of justice. This may be the intention of the Report, but it is to be hoped that any statute will make it clear that prior criminal history is only of this limited relevance. It may also be doubted whether the addition of a catch-all provision of "any other relevant factors" increases the clarity of the proposed tests.

6.

SUMMARY

Although this writer has been critical of some of the detail of the proposed reform, and the implementation of it may require attention to be given to certain matters, it is undoubtedly capable of giving rise to a far more coherent and balanced law of bail than we currently have. The inclusion of the presumption in favour of bail, if it is preserved and observed, indicates a desirable shift in favour of preserving the rights of the accused person who has not yet been convicted. If nothing more comes from the Report than a recognition that these rights are not properly protected at present, the Report will have been a most valuable document. The scheme for the review of bail decisions may also, if adequate reasons are insisted on, allow for a relatively equitable and speedy procedure. It is to be hoped that the Government will see fit to include bail reform in its legislative programme in the near future; and that the strong points in the Report are not reduced or removed to demonstrate the Government's apparent wish to be seen as "getting tough" with those involved in the criminal justice system.