**Bail - Some People Don't Get It**

**Justice Stephen Estcourt**

Any person accused of committing a crime is presumed innocent until proven guilty in a court of law. It follows that a person charged with a crime should not be denied freedom without conviction unless there is a good reason.

A word search in a random transcript of the opening and closing addresses of counsel, and the trial judge's summing-up in a criminal trial, will generally disclose at least nine, sometimes a dozen references to the presumption of innocence, yet the allied presumption of freedom until conviction does not appear to be universally appreciated.

The essential question to be determined on any application for bail is whether or not the applicant will appear to answer bail if it is granted; *R v Fisher* (1964) 14 Tas R 12 at 13, per Crawford J (Snr).

The nature of the offence charged, the severity of the possible sentence, and the strength of the State's case are said to be additional considerations, but, properly regarded, they are really only matters that are relevant to the central question of whether the applicant will answer bail.

Prima facie every accused person is entitled to their freedom until trial. No one should be punished by imprisonment before conviction, and to place too much reliance on the strength of the State's case is to prejudge the matter.

The safety and security of members of the public are matters to be taken into account, and special considerations apply to persons who have allegedly committed offences while on bail.

Murder is a special case. The common law rules provide that bail will only be granted on a charge of murder if the applicant shows exceptional circumstances.

A moment's reflection however, will reveal that the reason for murder amounting to a special case is that there is a far greater likelihood that the accused would abscond than in the case of an accused who faces a less serious charge. That was particularly so when a sentence of death or life imprisonment was an inevitable consequence of conviction. The arguments against granting bail in a case of murder are no longer as strong.

The risk of flight in all bail applications is the key issue. However, it needs to be appreciated that people with prior convictions for failing to appear are often little more than forgetful or disrespectful nuisances. Prior convictions for breaches of bail conditions may be a more serious consideration, but the central question is still whether the individual will answer his or her bail if it is granted. It is not a case of punishing someone by refusing them bail because they have failed to appear or have breached bail conditions in the past.

There are numerous ways in which bail hearings come before a Supreme Court judge. Some of them are:

* Bail application: the *Criminal Code*, s 304.
* Bail appeal: *Justices Act* 1959, s 125C.
* Appearance following arrest for breach of bail condition: *Bail Act* 1994, ss 10(2) and 11.
* Appearance following arrest on warrant: *Bail Act*, s 12.
* Oral applications for bail: *Bail Act*, s 22.
* Applications for variation of bail: *Bail Act*, s 23, to be made "as prescribed".
* Applications for revocation of bail: *Bail Act*, s 24, to be made "as prescribed".
* Revocation of bail by judicial officer: *Bail Act*, s 24.

Some of these applications are to a judge in chambers and some to the Court or a judge. Some are to be heard in court as in chambers and some in court. It is very confusing and it has been my view that all applications should be adjourned into court and heard with the judge and counsel robed and wearing wigs. The judges of this Court have now agreed, and a Practice Direction has recently been promulgated to that effect.

The only remaining justification for wearing robes and wigs in criminal matters is anonymity as I apprehend it, and in my experience bail applications can see emotions run sufficiently high to warrant the same court conditions as in any criminal matter.

Speaking extra-judicially, and of course only for myself, I tend to think that there are sometimes bail applications or appeals that are brought which are unmeritorious, and equally some are opposed without sufficient justification.

I am, of course, well aware of the pool of public sentiment stemming from cases concerning serious offences committed by individuals who were, at the time, on bail for other serious offences. That is why the public interest is a consideration with which I will deal shortly. However, the rule of law is threatened by any unjustified weakening of the presumption of innocence and the presumption of an accused's prima facie entitlement to bail pending trial. Utilitarian considerations must not be allowed to dilute basic freedoms.

For those readers not fortunate enough to have a copy of the annotated *Justices Act* 1959, prepared originally by the late and highly respected Justice Bill Zeeman (during a brief year in the 1980s when he was a magistrate sitting in Launceston), a copy of which he kindly gave me all those years ago, I will set out his passage under s 35 as follows:

"The fundamental question to be determined upon an application for bail is whether or not it is probable that the defendant will appear to answer the complaint if bail is granted (*Forrest v Huffa* [1968] SASR 341; *Burton v R* [1974] 3 ACTR 77; *R v Mahone v Smith* [1967] 2 NSWR 154). Although the nature of the offence charged, the severity of punishment and the probability of a conviction have been said to be additional questions (*R v Vos* (1894) 7 QLJ (NC) 74) they are in fact but matters which are relevant to the probability of a defendant answering to his bail (*R v Lythgoe* [1950] QSR 5; *R v Fisher* [1964] 14 Tas R 12). Where the complaint is one alleging a summary offence a defendant ought normally to be granted bail. In summary cases bail 'should only be refused if there is real and substantial reason to fear that the defendant will not appear on his trial, or that he would be likely to commit offences during the period of bail' (per Bray CJ in *Forrest v Huffa* [1968] SASR 341 at 344).

Other matters to be taken into account and not directly relevant to the question of the likelihood of the defendant appearing to answer the complaint have been said to be as follows (*R v Light* [1954] VLR 152 followed by Crawford J in *R v Fisher* [1964] Tas R 12):

(a) the defendant's state of health;

(b) any possibility that the defendant might tamper with prosecution witnesses;

(c) the attitude of the prosecution to the application;

(d) any prejudice that the defendant might suffer in the preparation of his defence;

(e) the safety and security of members of the public; and

(f) the delay (if any) before the determination of the proceedings.

The matters there considered relevant to the question of the likelihood of the defendant answering to his bail, and which are directly relevant to the degree of inducement he has not to answer bail, are as follows:-

(a) the nature of the case;

(b) the degree of probability of conviction;

(c) the severity of punishment that might be expected in the event of conviction;

(d) any property which the defendant might have and to which he might be required to give attention;

(e) the state of the defendant's family;

(f) the character and antecedents of the defendant; and

(g) the state of the defendant's business (if any).

All of these matters go to the exercise of the discretion, which should be exercised having regard to them and any other factors which might be said to be relevant in a particular case. In the exercise of its discretion the court must reconcile as best as it is able a number of conflicting principles. No person ought to be punished by imprisonment before he has been convicted of the relevant offence and of which he may well not be convicted at all, but an offender once apprehended should not be able to avoid conviction by absconding from bail. Given that in a particular case punishment is likely to include an element of protection of the public, the public ought to be protected no less because the offender, although apprehended, has not yet been convicted. In no way ought a refusal of bail to be treated as some form of retribution for any guilt which might be supposed from the circumstances by which the defendant comes to be before the court (*R v Mahoney-Smith* [1967] 2 NSWR 154).

Questions as to the onus of proof and procedure generally can arise. Many of the cases suggest that the onus is upon the applicant to establish that he is entitled to bail. That was the view taken by Manning J in *R v Pascoe* (1960) 78 WN (NSW) 59 at 61, but in *R v Fisher* [1964] Tas R 12 *R v Light* [1954] VLR 152 and *Burton v R* [1974] 3 ACTR 77, it was held that prima facie every accused is entitled to his freedom until he stands trial. It is suggested that that is now the correct view and that the onus is therefore upon the prosecution to make a clear case for the refusal of bail (*Burton v R* [1974] 3 ACTR 77).

Special considerations may be said to apply to persons who are charged with serious offences allegedly committed whilst on bail in respect of other serious matters. The principles were expressed by Isaacs J in *R v* *Appleby and McMahon* [1966] 1 NSWR 35 at 36 as follows: 'Save in very special circumstances persons committed for trial who during such committals commit serious offences against the community cannot hope to be liberated on bail once these later offences have been prima facie established and there has been a committal in respect of them. Magistrates are only doing their duty towards the community in stamping out crime and the opportunities for further crime by refusing bail in those circumstances. That is a protection which the public is entitled to ensure from the courts and is a course which may in its turn lead to the suppression of this current spate of these kinds of crimes which daily terrorise the public.'

The same principles apply in cases where there is a substantial prospect that a defendant might, whilst on bail, commit other offences which would result in very serious consequences to the public (*Burton v The Queen* [1974] 3 ACTR 77).

The practice in courts of petty sessions is for the facts in support of and in opposition to an application for bail to be stated from the bar table. It follows that in the event of the parties being in dispute upon any material fact it must be the subject of sworn evidence. However, the facts to be established may be quite different from those which might be required to be proved upon the trial of the defendant. For example, if as part of an alleged strength on the part of the prosecution case, a written confession is alleged, it is no part of the function of the court hearing the bail application to determine the question as to whether the defendant made the confession. Rather it must determine whether there is confessional evidence available to the prosecution, and taking its nature and quality into account, consider what effect that has upon the total strength of the prosecution case."

Prosecution and defence counsel should be guided in all cases by these well-established principles and endeavour to fit the case they have within the framework of these considerations before taking the decision to give advice to either bring or oppose an application.

Clearly, for example, there would be little point in prosecuting counsel recommending opposition to bail in a case where relatively minor summary offences only are involved, even where the applicant has relevant prior convictions, and even convictions for failing to appear, unless there is a past history of the applicant offending while on bail for like offences, or the applicant has in the past absconded, perhaps interstate, requiring extradition. It is not the law that petty thieves and recidivist disqualified drivers can be kept in custody because of their records, even where they may have a suspended sentence hanging over them.

Utilitarian custodial remands pending trial, or even sentence, in such cases cannot displace the notion of freedom from imprisonment without conviction. Practical forensic manoeuvring even less so. For example, where an applicant has not entered pleas to summary charges and could expect to receive an immediate custodial sentence if pleas of guilty were entered.

And counting up the number of prior convictions for failing to appear may demonstrate an egregious disrespect for the law and authority, but the punishment for those breaches is by way of the sentence imposed on conviction for those breaches, and not by way of refusal of bail when the person is not really likely to flee the jurisdiction.

Serious offences, as can be seen above, put the case into a different category where they have been committed whilst on bail for similar offences, or there is a substantial prospect that an accused might, whilst on bail, commit other serious offences.

The seriousness of a single offence, or a series of related serious offences, does not of itself militate altogether against bail, even where there is a strong prima facie case against the person, unless public interest can be legitimately invoked on a basis other than just the crime charged. The central question remains whether the accused will answer bail. If it were not so, persons charged with serious offences of violence including grievous bodily harm, rape and attempted murder would never qualify for bail.

On the other side of the coin, defence counsel waste their own time and that of the Court when they advise an appeal against a refusal of bail by an experienced magistrate on no better ground than having a second "go". Experienced magistrates make mistakes. I know I did. Magistrates work at the coal face every day in very busy courts and time frequently does not permit the luxury of lengthy consideration of an application for bail such as judges enjoy. But far more often than not, in my experience, refusal of bail in the Magistrate's Court is justified. Applicants should be disabused of the idea that they only need to appeal to be granted bail by a judge for the variety of personal and convenience reasons that they might genuinely feel should justify bail.

Particularly, I think, defence counsel need to advise their clients of the very real difficulties they face in being admitted to bail in cases where s 12 of the *Family Violence Act* 2004 is engaged.

I will turn to the observations of the Full Court in the decision of *DPP v JCN* [2015] TASFC 13 in a moment, but, as is well known, Parliament has decreed that a judge is *not permitted* to grant bail unless he or she is satisfied that the release of the applicant would not be likely to adversely affect, not only the *safety* of the affected person (and/or any affected child), but also his/her/their "wellbeing and interests".

Applicants for bail need to be aware of this as they will waste their own and others' time in making applications to this Court without compelling circumstances or a carefully structured plan to secure the safety, wellbeing and interests of the affected person/s.

Clients with a history of family violence offences, in particular breaches of family violence orders, need much more to satisfy the preconditions to bail under s 12 than to have their counsel assure the Court that the relationship is over, that they will henceforth abide by the conditions of an extant order, and are willing to accept a condition of bail that they will not enter the neighbouring suburb to their bail address, in which neighbouring suburb the affected person and children reside.

In *DPP v JCN* (heard 7 October 2015) Pearce J, with whom the other members of the Full Court agreed, said at [16]:

"Absent statutory intervention, a person accused of an offence or crime is generally entitled to his or her freedom until they stand trial. In some cases it is proper to refuse bail if there is an unreasonable risk that, even with appropriate conditions, an accused person will fail to appear in court to answer the charge. A court may also consider whether an accused person poses such a risk that, notwithstanding the presumption of innocence, the protection of the community requires his or her detention until trial. It is unlikely that a trial of the indictable charge faced by the respondent can be ready to proceed until at least February 2016, and possibly later. The remaining summary charges may take longer to be dealt with. There is potential for injustice if he is acquitted of all or, even if found guilty of some of the charges, sentenced to imprisonment for a period less that the period of his remand. Although it will be for another court to consider, I consider there to be little risk of injustice if he is convicted of the most serious charges he now faces. He owns a house at Sorell. His mother lives in Hobart. I do not see that there is a significant risk that he would abscond to avoid appearing in court to face trial. Any such risk may be adequately controlled by bail conditions. In my view, there is a risk that, if granted bail, he will continue to offend. That issue is largely subsumed however by a consideration of the operation of the Family Violence Act, s 12, to which I now turn."

His Honour then set out s 12 and continued at [18]:

"Thus, because the respondent is charged with family violence offences, he is not to be granted bail unless he satisfies this Court that his release on bail would not be likely to adversely affect the safety, wellbeing and interests of the complainant and her children. The Act thereby creates a presumption against bail: Re S (2005) 157 A Crim R 451. The onus is on the respondent to displace the presumption: *Olsen v State of Tasm*ania [2005] TASSC 40. In the affidavit sworn by the respondent in support of his application for bail he advances a number of contentions in support of his application. He denies his guilt of the most serious charge of violence against the complainant. He does not deny approaching the complainant in April 2015 but contends that the approaches were 'instigated' by her. He says his health is affected by a back injury suffered at work for which he requires medication. His father is elderly and in failing health. His mother is prepared to offer a surety of $4,000 to secure his attendance in court and compliance with bail conditions. She is also in poor health. She requires dialysis and the respondent, if released, wishes to care for her. The respondent says he will comply with bail conditions, including curfew and reporting conditions and a geographical condition preventing him from going near the complainant's home." (Emphasis added.)

The Full Court revoked the respondent's bail and remanded him in custody. Of note in considering the matters required by s 12(2) of the *Family Violence Act* to be assessed on an application for bail to which s 12 applies, Pearce J noted that the respondent's own home was quite close to the complainant's residence, and that, if he lived at that address, monitoring his movements and conduct would be very difficult and that it would achieve little to reduce the risk.

The respondent's mother was put forward as offering a surety in the sum of S4,000, and the respondent was ready to live at his mother's home in Hobart. Pearce J noted that would increase the physical separation from the complainant, but observed that his presence at that home had not, in the past, prevented breach of the order.

In my view a consideration of the reasons of Pearce J in that case, notwithstanding the respondent had a bad prior record for family violence, should give pause for thought to defence counsel advising a bail application or appeal, unless the applicant can demonstrate some concrete proposals to secure the well-being and interests of the complainant.

I will conclude with a word about murder. As I have already noted, murder is a special case. However, when the facts of the cited cases and the outcomes in them are examined, there does not seem to be any relevant distinction between the expressions used as qualifying a case for bail. The terms variously used are "special or unusual circumstances"; "exceptional circumstances"; "extremely exceptional circumstances", or a "rare case that is sufficiently exceptional". See *Re a Bail Application* [1966] VR 506; *R v Hughes* [1983] Qd R 92 at 94; *Lim v Gregson* [1989] WAR 1 at 13 and 32; *Mercanti v WA* [2005] WASCA 254 at [17], [44] and [45]; *Milenkovski v WA* [2011] WASCA 99 at [21], [28], [35], [50] and [51]; *Re an Application for bail by Costa* [2013] ACTSC 15 at [2]-[4].

While it can no longer be said that a grant of bail on a charge of murder is very unusual, stringent conditions are often applied as for example in *R v Hallas* (2001) 81 SASR 1, where electronic monitoring was a condition of bail. In one Tasmanian Supreme Court unreported decision some years ago two cash sureties, each of $40,000 were required, one from a family member and one from a non-family member. In a more recent case in this Court, again unreported, bail of $100,000 was required from a non-family member, with $20,000 deposited with the Court in cash.

And, one last word. As to surety, the Court can have no regard to the character or antecedents of the proposed surety. In *R v Barrett* (1985) 16 A Crim R 123 at 125, O'Loughlin J said as follows:

"In *Badger* (1843) 4 QB 468, 114 ER 975, Lord Denman CJ made it quite clear that the Court was not entitled to enter into:

'An investigation as to the character or opinions of such bail, provided (the Court) is satisfied of their sufficiency to answer for the appearance of the party in the amount reasonably required for that purpose.'

Although *Badger's* case can not now be considered the law in the United Kingdom (by virtue of the introduction of the *Bail Act* in 1976), it must nevertheless, in my opinion, be regarded as the law in South Australia. Hence, whilst I acknowledge the common sense force of Mr Millsteed's argument, I must, so far as they relate to the character of the intended surety, reject them."

S P Estcourt

16 August 2016