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THE QUEST FOR BALANCE IN BAIL: THE NEW SOUTH WALES EXPERIENCE

R. P. Roulston*

*"Bail is a security in the form of a bond required in respect of the release of an accused person, and conditioned for his appearance at a specified time and place to answer the charge. If the terms of a bail require a surety or sureties, the defendant is placed in custody of such sureties, who, at common law, could re-seize him."*¹

The right to bail is as old as the law of England itself and it is, as Lord Devlin has remarked,² "indeed curious that fundamental questions concerning it have never been settled. The system so far has worked satisfactorily without providing any occasion for their resolution."

This rather complacent view as to the satisfactory operation of the procedure is not today reflected among those involved in the administration of the bail system. The principles upon which bail should be granted or refused have been re-examined by the courts and the relative importance of traditional criteria have been questioned. There is also evidence of practical concern for the effect upon an accused of a refusal to grant bail as well as for the possibly harmful effects of the injudicious granting of bail.

In the United States the Vera Foundation's participation in the Manhattan Bail Project in the courts of New York City pioneered a new approach to the problem of bail. This paved the way for remedial action against bail abuses elsewhere and similar bail projects have been started in other communities throughout the United States.³

In England initial examination of the question was undertaken by the Home Office Research Unit's study in 1960.⁴ Further steps have been taken by "Justice," the British Section of the International Com-

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¹ ARCHBOLD, ¶ 201, at 76 (24th ed. 1961).

² DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 71 (24th ed. 1961).

³ See NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE; *PROCEEDINGS AND INTERIM REPORT*, Washington, D. C. (1965).

⁴ See HOME OFFICE RESEARCH STUDY, *TIME SPENT AWAITING TRIAL* (1960).

mission of Jurists, by arranging a conference on "Bail and Remands in Custody" in November 1965, and by setting up a working party.⁵

In New South Wales there has been recurring criticism of the operation of the bail system. It was asserted on the one hand that there were a significant number of cases in which accused citizens were being unnecessarily deprived of their liberty before being convicted of an offense, and in some instances, without ultimately being convicted of an offense, either because bail was refused or set at too high an amount. On the other hand, it was claimed that the bail system was being abused by professional criminals in order to prolong their criminal activities or to evade punishment altogether.

As a result of this disquiet and various other subsidiary, but related, considerations the Institute of Criminology of the University of Sydney Law School held an important seminar on the bail system in November 1969, in the hope and expectation that it would encourage the search for ways to diminish unnecessary remands in custody without impairing the effectiveness of state law enforcement efforts. This article is based on a paper presented to this seminar by the author which has been expanded to incorporate ideas and materials raised by other participants in formal papers and informal discussion.⁶

I. THE DEVELOPMENT OF BAIL

Bail originated in medieval England as an alternative to holding untried prisoners in custody. Inadequate and disease-ridden jails and lock-ups and inordinate delays in trials by travelling justices made the development of some workable alternative to holding accused persons in pre-trial custody a necessity. There are at least two other principal theories attributing the origin of present bail procedures to the early days of the common law. One is the ancient Anglo-Saxon practice of hostageship whereby one person was held hostage until a promise was fulfilled by another. The other traces bail to the ancient practice of "Weregeld"—an assurance to the creditor by a third party that the debt would be paid.

The system that developed invested the sheriffs with a wide and ill-defined discretion to release a prisoner on his own promise, or that of an

⁵ See *NEW LAW JOURNAL* 195 (December 9th, 1965); *NEW LAW JOURNAL* 954 (June 16, 1966).

⁶ See *PROCEEDINGS OF THE INSTITUTE OF CRIMINOLOGY* (N.S.W. Government Printing Office 1969).

acceptable third person, that he would appear for trial. The third party surety was personally responsible for the appearance of the accused. If the accused escaped, the third party surety was originally required to surrender himself; thus in effect bail was the bailment or delivery of the accused to jailers of his own choosing who had custodial power over him. Later the sureties were permitted to forfeit promised sums of money instead of themselves if the accused failed to appear.

The first statutory regulation of the granting of bail in England was by the Statute of Westminster in 1275.⁷ This legislation was designed to remedy the irresponsible abuse which the sheriffs had made of their discretion to grant bail. The Statute regulated the discretionary bail power of sheriffs by specifying which offenses were bailable and which were not. It listed a series of thirteen types of cases in which persons should not be bailed and a shorter list of specific situations and offenses in which bail should not be refused.

These two lists were clearly based on three considerations: (1) the seriousness of the offenses (*e.g.*, homicide, arson, treason), (2) the likelihood of the accused's guilt (*e.g.*, "furtum manifestum," thieves "openly defamed and known"), and (3) the "outlawed" status of the offender (*e.g.*, banished, excommunicated or escapees).

Almost certainly these three factors are ultimately derived from the single consideration of the accused's likelihood of appearing for his trial. Nevertheless, the first statutory regulation of bail procedures did not specifically proceed on the basis of one single principle upon which all decisions about bail should be based. In the centuries that followed this enactment, emphasis in the reported cases continually fluctuated from one principle to the other.

For over the next five centuries the Statute of Westminster determined what offenses should be bailable. Until 1826 no basic changes were made in the principles upon which bail should be granted or withheld. The intervening statutes, in the main, made changes in the procedure whereby bail was granted in efforts to eliminate administrative abuses.

The next important enactment was the Statute of 1826,⁸ which placed emphasis on the principle that bail should rarely be granted in cases where there was a strong likelihood of conviction; and that bail should be granted where the prospect of conviction was small.

⁷ 3 Edw. 1 ch. 15.

⁸ 7 Geo. IV ch. 64; adopted by N.S.W. in 9 Geo. IV, No. 1.

By amendment some nine years later,⁹ all previous criteria were subordinated to the single criterion of the risk that the accused will not appear to take his trial. This statute appears not to have been adopted in New South Wales, perhaps not surprisingly if one reflects on the conditions of the colony of New South Wales in 1835.

The modern origin of the present magisterial discretion in granting bail rests on the Indictable Offences Act of 1848,¹⁰ which in effect provided that the committing magistrate may in his discretion admit to bail a person charged with any felony, or with any of a dozen assorted misdemeanors. In other crimes bail could not be refused. The cardinal principle upon which this discretion should be exercised was specified:

Such justice of the peace may, in his discretion, admit such person to bail upon his procuring and producing such surety or sureties as, in the opinion of such justice, will be sufficient to ensure the appearance of such accused person at the time and place when and where he is to be tried for such offence.

In New South Wales, this statute is substantially reproduced in sections 34 and 45 of the Justices Act of 1902. It is more surprising that the Bail Act of 1898,¹¹ which modified the absolute requirement as to sureties and gave the magistrates unfettered discretion to admit to bail, even on his own recognizance, any person whom they have reason to believe will submit to trial, was not adopted in New South Wales. It would be of considerable advantage to magistrates in this State if legislation of similar effect, even at this late stage, were enacted.

II. STAGES OF THE CRIMINAL PROCESS

In New South Wales applications for bail may arise at several different levels and stages in the criminal process. There are three main divisions of criminal courts, namely Courts of Petty Sessions, Courts of Quarter Sessions and the Supreme Court, each of which has important powers of granting bail. There is also statutory power given to police officers to grant bail in certain circumstances.¹² This power

⁹ 5 & 6 Will. IV ch. 33.

¹⁰ 11 & 12 Vict. ch. 42s. Chapter 23 was adopted in N.S.W. by 14 Vic., No. 43.

¹¹ 61 & 62 Vict. ch. 7.

¹² Justices Act 1902-68 § 153(1) (N.S.W.):

Any officer of police of or above the rank of inspector, and any officer of police of or above the rank of firstclass constable in charge of a police station, and any gaoler shall have the same powers of discharging any person who is in custody . . . as a Justice has under the provisions of this Act. When any such

is usually only exercised in minor offenses and when bail is refused in such circumstances the accused is speedily brought before a court for determination of bail.

A. Applications for Bail in Courts of Petty Sessions

Courts of Petty Sessions in New South Wales are statutory courts with purely statutory powers. They exist in prescribed city, urban and rural areas throughout the State and are presided over by permanent, appointed, legally qualified persons (known as Stipendiary Magistrates) who exercise the power vested in "Justices" under the Justices Act of 1902-68.

The problems involved in the granting or refusing of bail arise primarily in these Courts of Petty Sessions and are a matter of daily occurrence in almost all such courts. It is in these courts that persons charged with offenses usually appear initially. The courts hear charges of indictable offenses and determine in the first instance whether or not the accused should be committed to stand trial before a jury. These courts also deal with a large number of offenses triable summarily and a number of indictable offenses which may be tried summarily only in certain circumstances (*e.g.*, with the accused's consent).

In the Courts of Petty Sessions three different situations commonly arise and different considerations may be of varying importance in each situation. Firstly, the accused may be committed to stand his trial before a superior court and the question of whether or not to grant bail pending trial arises, or he may have pleaded guilty and been committed for sentence, thereby raising a similar, but not identical question.¹³ Secondly, a person may be charged with an indictable offense, and the question arises as to how he is to be dealt with pending and during the preliminary inquiry and examination of witnesses. Thirdly, a person may be charged with a summary offense, or an indictable offense triable summarily, and the question arises as to how he is to be dealt with until the hearings, which may be lengthy and protracted, are completed.

With regard to the first situation it is provided that when a person is committed for trial the committing Justice (*i.e.*, Stipendiary Magis-

officer or gaoler refuses to discharge any such person . . . the person shall, if he so demands be brought before a Justice as soon as practicable, and the Justice shall thereupon hear and determine the matter.

¹³ Justices Act 1902-68, § 51A (N.S.W.).

trate) shall either commit him to prison or admit him to jail.¹⁴ A discretion is conferred on the committing Justice whether or not he shall grant bail in cases of felony, assaults with intent to commit a felony, attempted felony and certain disparate indictable misdemeanors (e.g., riot, concealment of the birth of a child). In the case of all other misdemeanors he *shall* grant bail.¹⁵ It is to be noted that in both cases the accused must find a surety or sureties.¹⁶ This, it is suggested, is an unnecessarily inflexible requirement and should be repealed. It is not required in the two other situations previously mentioned.

The second situation entails a less rigid and more satisfactory procedure. Provision is made for adjournments of the hearing, but in the interests of the accused, the length of the adjournment shall not exceed eight days without the accused's consent.¹⁷ During the adjournment the accused may, in the court's discretion, be kept in custody or released on bail with or without sureties.¹⁸

In the third situation power is conferred on the court to adjourn without limitation as to time,¹⁹ and the magistrate may commit the defendant to custody, release him on bail or suffer him to go at large.²⁰ The words "with or without sureties" do not appear in the Act, thus the defendant is frequently discharged on his own recognizance and not uncommonly, without formal order, suffered to go at large. Rarely is the defendant committed to custody and then it is usually done in his own interest (e.g., alcoholism, psychiatric disorder).

B. *Applications for Bail in Courts of Quarter Session*

Courts of Quarter Sessions sit regularly in prescribed cities and towns throughout New South Wales. They are presided over by a judge of the district court permanently appointed from members of the practising Bar. The judge, in exercising criminal jurisdiction, sits as a Chairman of Quarter Sessions. These courts have wide criminal jurisdiction covering all indictable offenses other than those which, immediately prior to the abolition of the death penalty in 1955, were

¹⁴ Justices Act 1902-68, § 42 (N.S.W.).

¹⁵ Justices Act 1902-68, § 45 (N.S.W.).

¹⁶ *Id.*

¹⁷ Justices Act 1902-68, § 33 (N.S.W.).

¹⁸ Justices Act 1902-68, § 34 (N.S.W.).

¹⁹ Justices Act 1902-68, § 68 (N.S.W.).

²⁰ Justices Act 1902-68, § 69 (N.S.W.).

punishable by death.²¹ These latter offenses include murder, rape and seriously aggravated assaults which are triable in the Supreme Court sitting in its criminal jurisdiction.

Persons committed to trial at Quarter Sessions by a Court of Petty Sessions are directed to a named court for a specified session or sitting of the court. The committing magistrate retains the power of admitting to bail any person committed for trial who has been committed to prison; such power may be exercised at any time before the first sitting of the court at which the accused is to be tried or before the day to which such sitting is adjourned.²² If bail has been refused by the magistrate, an application may be made to a judge of the Supreme Court who may admit the applicant to bail.²³

The Courts of Quarter Sessions, in respect to the offenses within their jurisdiction, exercise concurrently with the Supreme Court the power to admit to bail persons who have been committed to, and are awaiting trial at, Quarter Sessions. This exercise of power is based predominantly on long accepted practice and as a necessary incident to the constitution of the court of trial rather than any explicit authority.²⁴

Courts of Quarter Sessions frequently entertain applications for bail by persons awaiting trial before them. In some cases bail has been refused by the committing magistrate or the applicant has failed to seek bail from the magistrate. In others, the application is in the form of a request to reduce the amount of bail fixed by the magistrate or to dispense with sureties. These applications are conveniently and characteristically described as applications to reduce bail but are in the nature of an application *de novo* to admit the accused to bail.²⁵ There is very little formality about such applications. They are frequently made before a date for trial is fixed but may be made at any time prior to trial. In exceptional cases bail may be granted over-night during the

²¹ Crimes Act 1900-69, § 568 (N.S.W.).

²² Justices Act 1902-68, § 46 (N.S.W.). Magistrates other than the committing magistrate have a more limited power under the same section.

²³ The judge of the Supreme Court who hears the application does so in the exercise of the inherent jurisdiction received from the courts of Kings Bench in England. See *R. v. Pascoe*, 78 W.N. 59 (N.S.W. 1960); *R. v. Ladd & Murphy*, 75 W.N. 431 (N.S.W. 1958).

²⁴ *But See R. v. Wakefield*, 89 W.N. 325 (N.S.W. Pt. 1 1969); ARCHBOLD, ¶ 213 (36th ed. 1961).

²⁵ *R. v. Wakefield*, 89 W.N. 325 (N.S.W. Pt. 1 1969); *R. v. Barrett*, [1959] V.L.R. 458.

trial when, for example, it is necessary to permit the accused to confer with his counsel regarding complex evidence.

C. Applications for Bail in the Supreme Court

The Supreme Court, as the highest court in the State of New South Wales, has a discretionary power inherent in it to grant bail at any time up to conviction even if it has been refused by a Magistrate, a Chairman of Quarter Sessions or even another Supreme Court Judge.²⁶ The most common stages of the criminal process at which application for bail is likely to be made to the Supreme Court are as follows: (1) After remand by a magistrate and before committal for trial. The power to grant bail in remand cases should be carefully and sparingly exercised. At this stage there is little evidence of the probability of conviction or the likely grounds of defense. If, however, there is to be a lengthy delay, especially if unreasonable, this may be sufficient grounds for granting bail.²⁷ (2) After committal but before commencement of the trial. This is the most common situation in which bail is requested. Again the powers of the Supreme Court are in addition to those given to the committing magistrate, which have already been discussed. The application is in no sense an appeal from the committing magistrate, but a separate and independent request to exercise an inherent power. As a matter of law and practice it is exercised without reference to material other than that before the judge. At this stage the strength of the prosecution's case is known, the probability of conviction can be assessed, and the date of trial (always a relevant consideration) can be ascertained.²⁸ (3) During the adjournment of a trial. Although the court of trial has power to release an accused person during an adjournment of the trial, there is a further inherent power of bail in the Supreme Court if the trial judge has refused it.²⁹ (4) Pending an appeal against conviction. There is statutory power for a judge of the Supreme Court to admit to bail a person who, hav-

²⁶ "The power of the superior courts to bail in all cases whatever, even high treason, has no history. I do not know, indeed, that it has ever been disputed or modified." 1 STEPHEN, HISTORY OF THE CRIMINAL LAW 243 (1955). But if refused by one judge the applicant can go from judge to judge in the hope of a more favorable reception. *R. v. Pascoe*, 78 W.N. 59 (N.S.W. 1960).

²⁷ *R. v. Ladd & Murphy*, 75 W.N. 431 (N.S.W. 1955); *R. v. Cable*, 63 W.N. 267 (N.S.W. 1946).

²⁸ *R. v. Watson*, 64 W.N. 100 (N.S.W. 1947).

²⁹ *R. v. Greenham*, [1940] V.L.R. 236.

ing been convicted, has appealed to the Court of Criminal Appeal.³⁰ The pertinent section of the Criminal Appeal Act does not mention "exceptional circumstances," but it has been held that bail will, in this situation, only be granted in exceptional circumstances because "the guilt of the accused has been established by the verdict of a jury in what must be taken, until the contrary be shown to be a trial properly conducted without error of law."³¹

Having considered the various stages of the criminal process at which the question of granting or refusing bail may have to be considered by the courts, we now turn to the various criteria that govern the answer to this question. The importance and relative weight to give to each of the following criteria will, of course, differ at various times of the judicial process as will the nature and effect of the material before the court.

III. THE CRITERIA FOR GRANTING BAIL

A. Non-Appearance at Trial

An examination of the authorities and the statutes show that the most consistently followed and enunciated consideration when dealing with the question of whether bail should be refused is that the object of bail is to secure by a pecuniary penalty the appearance of the prisoner at his trial. This consideration has been frequently and emphatically restated over at least the last one hundred years. In *R. v. Scaife*³² Mr. Justice Coleridge remarked:

I conceive that the principle on which persons are committed to prison by magistrates, previous to trial, is for the purpose of ensuring the certainty of their appearing to take trial. It seems to me that the same principle is to be acted on in an application for bailing a person committed to take his trial, and it is not a question of the guilt or innocence of the prisoner. It is on that count alone that it becomes important to see whether the offence is serious, whether the evidence is strong, and whether the punishment for the offence is heavy.³³

³⁰ CRIMINAL APPEAL ACT §§ 18(2), 22 (N.S.W. 1912).

³¹ *R. v. Southgate*, 78 W.N. 44 (N.S.W. 1961).

³² 10 L.J.M.C. 144 (1841).

³³ See also *R. v. Robinson* 23 L.J.Q.B. 286 (1854); *R. v. Barronet & Allain* [1852] Dears. C.C. 51.

In *R. v. Rose*³⁴ Lord Russell expressed a similar view:

It cannot be too strongly impressed upon the magistracy of the country that bail is not to be withheld as a punishment, but that the requirements as to bail are merely to secure the attendance of the prisoner at trial.

Recently, in two New South Wales decisions, similar opinions were expressed. In one decision the Court noted:

The object of bail is to ensure and secure the attendance of the accused at his trial and it recognises that the liberty of the subject should only be restricted in such ways as will achieve this result.³⁵

In another decision the Court stated:

But it is, I think, important to keep in mind that the grant or refusal of bail is determined fundamentally on the probability or otherwise of the applicant appearing at Court as and when required and not on his supposed guilt or innocence.³⁶

Although the sentiment in this passage has been echoed in countless other decisions, the courts, over the years, have found it necessary to articulate and elaborate a number of other factors which should be taken into consideration. What has been described as "the prima facie right to bail" may be displaced by a variety of other considerations.

B. *Seriousness of the Offense*

The seriousness of the offense has been established as an important matter to be taken into consideration when assessing the likelihood that an accused will appear at his trial.

In charges of murder the relationship between the seriousness of the offense and the granting of bail comes into the sharpest focus. It is abundantly clear that it would be most unusual to grant bail to a person against whom there exists a prima facie case of murder. For example, in *R. v. Barronet & Allain*,³⁷ Mr. Justice Erle giving the decision of the court said:

Thus then it appears that the crime charged is of the highest magni-

³⁴ 18 Cox C.C. 717 (1898).

³⁵ *R. v. Appleby*, 83 W.N. 300, 301 (N.S.W. Pt. 1 1966).

³⁶ *R. v. Mahoney-Smith*, 2 N.S.W.R. 154 (1967).

³⁷ [1852] Dears C.C. 51.

tude, the punishment of it assigned by law of the extreme severity and the evidence of guilt a confession; under such circumstances the court is bound to presume that no amount of bail would secure the presence of the accused at the trial should they be liberated.

It is questionable, however, in cases of murder, whether an accused should be admitted to bail or even in such cases where the seriousness of the offense should stand as an absolute principle in its own right. In *R. v. Cable*,³⁸ Mr. Justice Herron granted bail to a person charged with murder who had been remanded in custody until the coronial inquiry which was to take place a month after the alleged offense. His Honor stated:

In this case, however, there is nothing before me except the bare fact that the accused is charged with murder, and it seems to me that, unless I have some evidence before me to show that he is likely to abscond or fail to answer his bail by the time the coronial enquiry comes on, it is wrong in principle that he should be held for such a length of time. I cannot be taken as saying for one moment that an application for bail on a charge of murder must be granted upon being made. Far from it.

C. Probability of Conviction

The strength of the Crown's case and the apparent probability of conviction is a matter—particularly if allied with other matters—which will make the granting of bail more difficult than in a case where the evidence appears weak and conviction appears improbable.³⁹

The presumption of innocence or the principle that a man is presumed to be innocent until he is proven guilty would seem to operate rather weakly where the court, on a bail application, is making an assessment of the probability of conviction. This may be inevitable as the court is entitled to consider the nature of the evidence which the Crown proposes to present in order to rebut the presumption of innocence and may be faced with real difficulty in adequately assessing the strength of the defense, which, at this stage, may not have been revealed at all. In *R. v. Ladd*,⁴⁰ the court regretted that in the circumstances of that case

³⁸ 63 W.N. 267 (N.S.W. 1946).

³⁹ *R. v. Montgomery*, 75 W.N. 233 (N.S.W. 1958); *R. v. Clancy*, 75 W.N. 142 (N.S.W. 1958).

⁴⁰ 75 W.N. 431, 433 (N.S.W. 1958).

The court is not able at this stage of the matter to assess on examination of the depositions before the magistrate what are the probabilities as to conviction of the crimes charged or what defences the accused persons may have and what are the probabilities of their success on those defences.

D. *Severity of Punishment*

The severity of the punishment is inextricably interrelated to the seriousness of the offense as well as to the accused's previous criminal record.

If it appears that the offense charged is one of some gravity, the evidence against the accused looks overwhelming, and he has an extensive criminal record, there are obviously strong inducements for him to flee if granted bail. It then becomes increasingly unlikely that, if granted bail, he will appear to stand his trial. In these cases the refusal to grant bail would usually be justified on what, as previously submitted, is the basic reason for refusing bail. The materiality of this consideration, along with others, has frequently been adverted to. In *R. v. Montgomery*,⁴¹ the court remarked:

The subject charges are very serious involving heavy penalties. The evidence, apart from the alleged admissions of guilt, is very strong against him—in fact, he was caught red-handed. He has every reason to fear a conviction and, if convicted, a long sentence. In the circumstances it seems to me that the applicant has every incentive to abscond if granted bail.

In *R. v. Clancy*⁴² it was stated:

The offence with which he is charged is a very serious one and it carries a maximum penalty of ten years' penal servitude. The evidence against the applicant also is very strong and in my opinion it is very likely that he will be convicted of it. In view of these facts and the fact that there are other serious charges pending against him, it seems to me that the applicant has every reason to abscond should he be given the opportunity.

E. *Previous Record and Likelihood of Committing Further Offenses*

In contemporary times it would appear that the most important factor

⁴¹ 75 W.N. 233, 234 (N.S.W. 1958).

⁴² 75 W.N. 142, 143 (N.S.W. 1958).

justifying the refusal of bail is a combination of a previous criminal record and the consequent likelihood that the accused will commit further offenses if released on bail. This consideration seems to have become deeply entrenched in the practice of granting bail in both England and New South Wales although its standing in other jurisdictions is less certain.⁴³

It is generally recognized that a sizable minority of crimes—particularly those involving dishonesty—are committed by persons who are currently on bail. It is also recognized that persons with a long criminal history of these crimes involving dishonesty will very probably commit further crimes if they are released on bail. This fact was recognized in *R. v. Phillips*,⁴⁴ where the court noted:

Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail; but some are, and housebreaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record of housebreaking such as the applicant has.

In *R. v. Armstrong*⁴⁵ it was stated:

It is clear that it is the duty of the justices to inquire into the antecedents of the man who is applying to them for bail, and if they find he has a bad record—particularly, a record which suggests that he is likely to commit similar offences while on bail—that is a matter which they must consider before granting bail.

The remarks of Mr. Chief Justice Goddard in *H.M. Postmaster-General v. Whitehouse*⁴⁶ have frequently been cited with approval in New South Wales. In *R. v. Pascoe*,⁴⁷ *R. v. Prentice*,⁴⁸ and *R. v. Clancy*,⁴⁹ the court reiterated:

As we have pointed out in cases in the Court of Criminal Appeal, bail ought to be sparingly granted in cases where prisoners have long records of conviction, since it very often results when such a person obtains bail, he commits offences while on bail, sometimes telling the court afterwards that he committed them so as to get money to

⁴³ See, e.g., *R. v. Alexander* [1956] V.L.R. 451; *R. v. Harrison* [1950] V.L.R. 20.

⁴⁴ 32 Crim. App. 47-48 (1947).

⁴⁵ 2 All E.R. 219 (1951).

⁴⁶ 35 Crim. App. 8, 11 (1952).

⁴⁷ 78 W.N. 59 (N.S.W. 1961).

⁴⁸ 74 W.N. 440 (N.S.W. 1957).

⁴⁹ 75 W.N. 142 (N.S.W. 1958).

enable him to be represented at quarter sessions, in other cases saying that he had to make some provision for his wife and children while he was in prison.⁵⁰

Similar sentiments were expressed colorfully and forcefully by Mr. Justice Isaacs in two recent cases, *R. v. Appleby & Anor*,⁵¹ and *R. v. Young*.⁵² In the former he said:

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 latter 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.

And in the latter case he remarked:

But it is timely to sound a note of warning. I have already dealt with bail applications by persons who between committal by magistrates and the hearing at Quarter Sessions commit like offences . . . Let it not be thought that people can at early stages, that is, in between remands before magistrates, commit like offences with impunity, that is, safe and secure in the knowledge that they can nevertheless get bail on such new charges and still retain their bail on the pending charges.

Let it be clearly understood that the honeymoon is on the way out and their conduct is likely to be viewed as a calculated risk and such conduct is likely to imperil their liberty, and may well lead to refusal and revocation of bail.

Judge Cross in *R. v. Wakefield*⁵³ considered this matter of granting bail to prisoners with previous criminal convictions "of very great importance" and said:

Accused persons have in fact claimed at Quarter Sessions that they committed these crimes to raise money for legal representation. Others were no doubt influenced by the "rule" in *R. v. Lovell*⁵⁴ which was said to prohibit more than one accumulative sentence. As a result, crimes were frequently committed by persons on bail without fear of any proportionate penalty. But, whatever the causes,

⁵⁰ See note 46 *supra*.

⁵¹ 83 W.N. 300, 302 (N.S.W. 1966).

⁵² 83 W.N. 391, 395 (N.S.W. 1966).

⁵³ 86 W.N. 325, 332 (N.S.W. 1969).

⁵⁴ 56 W.N. 75 (N.S.W. 1939).

judges of the Court are confronted time and again with the situation where offences—often a multiplicity of them—are committed by persons at a time when they were currently on bail.

Without minimizing the seriousness of the incidence of crimes committed by persons on bail the recognition of the principle that it is entirely proper and defensible to refuse bail, and remand a person in custody on the basis that he may commit further offenses if he be released on bail, raises important questions of both practical implementation and principle.

Two practical considerations that need to be carefully considered are (1) the available criminal statistics provide no adequate or safe guide to the number of persons who do commit crimes while on bail or the number and types of crimes they commit, and (2) there has not yet been developed any reasonably satisfactory predictive method for determining which prisoners are, in fact, certainly or very likely, going to commit further offenses. It is doubtful that the criteria upon which the police make their assessments, are the same as those which guide the court.

The court, no doubt, would know, in general terms, that a person who has been shown to have patent criminal tendencies will be more likely to commit further crimes. The evidence as to recidivism indicates that the probability of reconviction becomes steadily greater with each new conviction. The court, in light of this, is likely to be guided by the length of the record and the seriousness of the offense.

The police, on the other hand, may place greater emphasis on information in their possession not then available to the court, and the desirability of having the defendant out of the way, but nevertheless readily available while they complete their inquiries without the risk of interferences with witnesses and obstruction of their investigation. They are also likely to be more acutely conscious of the fact that if further offenses are committed the onerous burdens of investigation and apprehension will fall squarely on their shoulders.

There is also a serious objection in principle to remanding a person in custody on the ground that he may commit other offenses if released on bail. The right of a person, not yet convicted, to his liberty is a most important consideration. What Lord Atkin in *Liversidge v. Anderson*⁵⁵ described as "one of the pillars of liberty" was that "in English

⁵⁵ 3 All E.R. 338 (1941).

law every imprisonment is prima facie unlawful and that it is for the person directing imprisonment to justify his act." The objection was expressed in *Everett v. Ribbands*⁵⁶ as being

[C]ontrary to all principle for a man to be punished not for what he has already done but for what he may thereafter do.

This view is accepted in the United States where judges are not authorized to refuse pre-trial bail as a device for the protection of society from possible new crimes by the accused. Mr. Justice Jackson justified this attitude in *Williamson v. United States*⁵⁷ in these terms:

Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted.

While recognizing that the possibility of the commission of further offenses, interfering with witnesses, and other matters which hamper police investigation are the most difficult factors to deal with that arise on the question of bail, it is manifestly undesirable that the principle of *salus populi suprema lex* be too readily invoked or allowed to obscure the fundamental principle that the object of bail is to secure attendance of the accused at his trial. The very existence of the device of bail recognizes that the liberty of the subject should only be restricted in such a way as will achieve this result.

F. *The Public Interest in the Right of the Accused to Be Free to Prepare His Defense*

One of the most interesting recent developments in the principles and practices relating to bail has been the assertion that the most important consideration in bail applications is that in the public interest, it is most desirable that the accused be allowed his freedom so that his case may be prepared in the best possible circumstances.

This view has been most fully developed by Judge Cross sitting as Chairman of Quarter Sessions in *R. v. Wakefield*,⁵⁸ and because of its relative novelty warrants thorough analysis:

⁵⁶ 1 All E.R. 823 (1952).

⁵⁷ 184 F.2d 280, 282 (2d Cir. 1950).

⁵⁸ 86 W.N. 325, 326 (N.S.W. 1969).

In considering whether bail should be granted it seems to me that the most important consideration is the public interest in the right of any person to have his case presented in the fairest possible circumstances. In criminal cases the accused is entitled to equal—no less and no more—consideration to that given to the Crown. The Crown law officers with the sizable, if not unlimited resources, of the Attorney-General's Department, are able to prepare the prosecution with thoroughness and at leisure, and generally, without finding themselves under great difficulties in the interviewing of witnesses, the obtaining of further evidence or the like.

Prima facie it is desirable that the preparation of the defence be allowed to take place in circumstances of approximate parity with those in which the prosecution is prepared. There are obvious forensic advantages in the accused's legal adviser interviewing the accused. And because it is desirable that the legal adviser have as many interviews with the accused as he considers beneficial to the conduct of the accused's case, it is desirable that the legal adviser have ready access to the accused, i.e. that the accused be readily available for such interviews. It can be seen therefore, that the proper conduct of the accused's case involves the proper presentation of it, which in turn involves the ready accessibility of the accused to his legal adviser which can best be achieved if the accused is at liberty and cannot be best achieved if the accused is confined at the State Penitentiary. . . .

This statement of principle merits close consideration not only because of its refreshing novelty or because it has been a previously neglected factor, but also because of the explicit and tacit assumptions underlying it. To say that it is novel is perhaps to overstate the position. It is a factor that has from time to time been mentioned in cases usually in the context of whether the defense to be raised is simple or complex. Preparation of a complicated defense, even with the aid of experienced solicitors, may be very difficult if the accused man can be seen only in prison.

In the past, little consideration was given to cases with apparently straightforward defenses or ones in which the accused intended to plead guilty. In the leading case of *R. v. Watson*,⁵⁹ the court, after considering the three main tests as to the probability of the accused appearing at his trial, i.e. the nature of the crime charged, the prob-

⁵⁹ 64 W.N. 100 (N.S.W. 1947).

ability of conviction, and the severity of punishment, went on to list eight other circumstances that may be relevant in appropriate cases, but were not matters to outweigh the general rules enunciated. The last of these considerations was the following:

[T]he fact that the accused might be prejudiced in the preparation of the defence might also have some weight, but the case would need to be an exceptional one.

It remains to be seen to what extent these propositions will find general acceptance. They are supported to some extent by the opinion expressed by Mr. Justice Sholl in *R. v. Light*⁶⁰ that he was not prepared to subscribe to the view expressed in *R. v. Watson* as to the relative unimportance of the accused's liberty to prepare his defense. In Tasmania, *Light* has been preferred to *Watson*.⁶¹

It is beyond question that the accused should, as a matter of policy, be placed as nearly as possible in a position of parity with the prosecution in the preparation of his defense. It must also be recognized that many accused persons have, in fact, no legal representation at any stage of the proceedings. If the public interest demands that it is the right of every person to have his case presented in the fairest possible circumstances, much remains to be done to make this right a reality. To even move effectively in this direction there would need to be a major expansion of legal aid at both trial and pre-trial levels. Until the resources available to the accused in all cases approximate those of the Attorney General's Department, the argument that the liberty of the accused to prepare his defense is the primary consideration in bail applications becomes unsatisfactory in the many cases of unrepresented defendants.

Judge Cross was clearly correct when he observed in *Wakefield* that the same principles apply both to a person who has been committed for sentence only and to a person who has been committed for trial. Although bail will only be granted in exceptional cases where a person has pleaded guilty before a court of competent jurisdiction and been remanded before it for sentence, the position under Section 51A of the Justices Act of 1902-68 is in no way comparable. That section was designed to expedite the hearing of pleas and ease an administrative burden and in such cases:

⁶⁰ [1954] V.L.R. 152.

⁶¹ *R. v. Fisher*, [1964] Tasm. Rep. 7.

The same principles should be followed as apply where an enquiry has been held, a *prima facie* case has been made out, and the accused has been committed for trial. The section was not intended to affect the position of an accused person in any manner prejudicial to him.⁶²

G. Delay in Court Hearing

The question as to how long the accused may be kept in custody awaiting trial is another factor which must be considered. This is largely dependent on the degree of hardship in each case. If the period is substantial, the grounds for refusing bail must be strong:

If it is a long period, particularly if it appears to be an unreasonably long period, that might furnish a very good ground for the granting of bail.⁶³

Here the accused's previous record may also be of some relevance in considering the hardship that custody may inflict. Confinement in prison may impose lesser hardship upon a person who has suffered previous periods of imprisonment than on a man who has not.

It is relevant to determine whether delay has been occasioned by the accused or his legal advisers, or whether through no fault of the accused or his legal advisers the refusal of bail will result in the lengthy detention of the accused.⁶⁴

Other and more difficult considerations may arise in cases before magistrates where they may have to decide questions of bail before a *prima facie* case is developed. Although the period that is allowed for remands for the purpose of further presentation of evidence is subject to statutory control, the question remains: How long should a person be kept in custody without even a *prima facie* case existing against him?

Lord Devlin made this interesting observation on the question:

. . . [U]ntil a *prima facie* case is made out against the accused to the satisfaction of the magistrate, he is being detained simply because the police believe him to be guilty; a magistrate who remands after formal evidence of arrest is holding him in custody simply because the police say he is guilty and for no better reason. To the extent to which this is done, and it is quite frequently done, can it not be said

⁶² R. v. Pallister, (unreported) (N.S.W. Sup. Ct. 1959).

⁶³ R. v. Pett, noted in 75 W.N. 434 (N.S.W. 1957). See also R. v. Ladd, 75 W.N. 431 (N.S.W. 1958); R. v. Cable, 63 W.N. 267 (N.S.W. 1946).

⁶⁴ See R. v. Wakefield, 86 W.N. 325, 331 (N.S.W. 1969).

that people in England are detained merely on police suspicion. That could be said if there were any substantial number of cases in which the police subsequently failed to obtain a committal. But there is not. No doubt if there were magistrates would be more cautious about exercising their power of remand on formal evidence, and the defence would object to such adjournments much more frequently than it does. . . .⁶⁵

H. Other Relevant Factors

Although the above matters appear to be the major considerations involved in determining whether or not bail should be granted they are by no means exhaustive. Other factors that are generally considered, depending on the nature of the case, include the accused's economic position, his employment record, if employed, how long in his present employment and if unemployed, how long unemployed and why; his marital status and the state of his family; his local reputation; his state of health; and the fact that the prosecution has, or has not, opposed the application.

IV. CONCLUSION

It is axiomatic from the above discussion that the quest for balance in the granting of bail is a complex task. There is uncertainty as to the relative importance of the various relevant criteria. There is doubt as to what weight is to be given to each of them at different stages of the pre-trial process. There are differences of opinion as to which of these criteria can properly be regarded as principles in their own right justifying the refusal of bail. It is important that these considerations be clarified and made more explicit so as to minimize doubts as to the validity of the basis upon which any particular bail application is refused.

⁶⁵ DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 78 (1960).