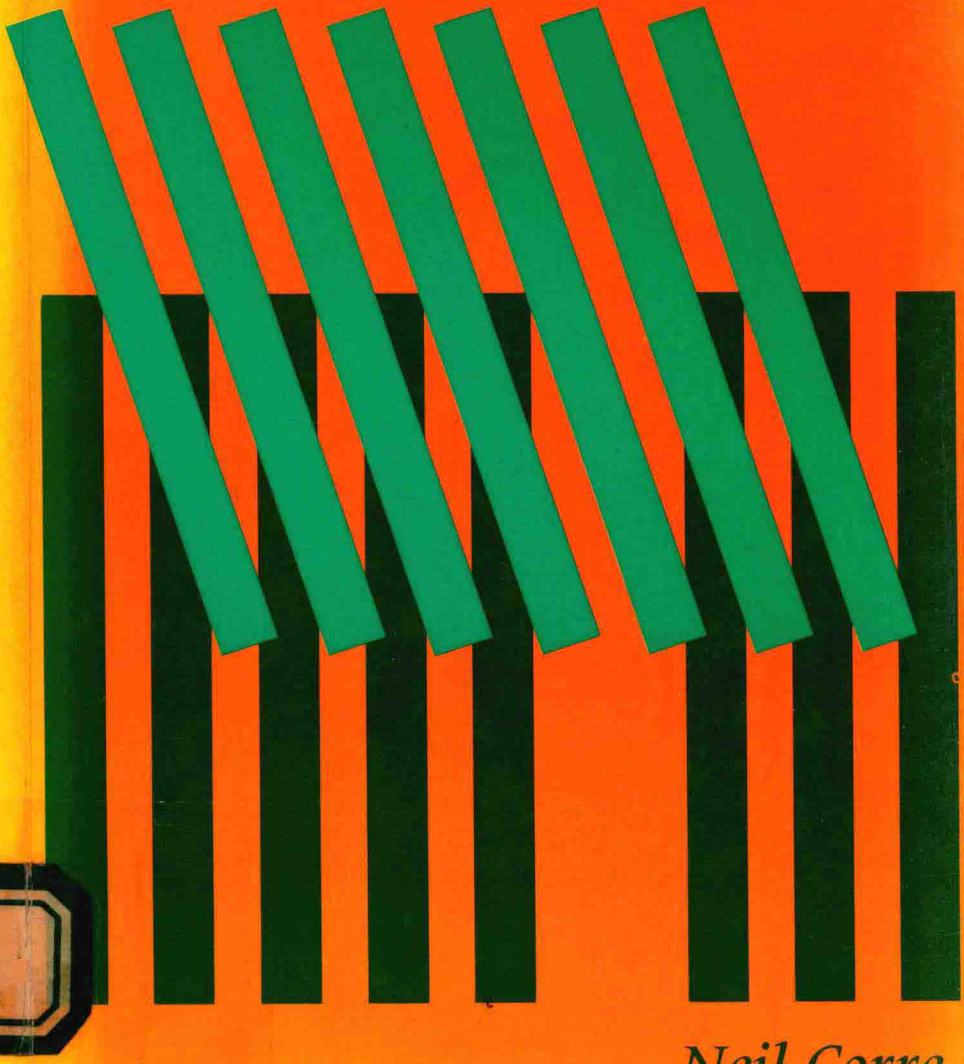
Bail in Criminal Proceedings



Neil Corre

Bail in Criminal Proceedings

by
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For Corinne, Stefan and Adam

Foreword

The publication of Neil Corre's new book is singularly opportune.

If the concept of freedom is one of the fundamental criteria by which a socety is judged, and the "refusal of bail represents one of the rare examples in peace-time where a man can be kept in confinement without a proper sentence following conviction after a proper trial", as a former Lord Chancellor had occasion to say in 1971, then so comprehensive a work on the subject of bail would be of value at any time.

The present decade, however, brings a new urgency to thought on the nature and length of custody. Its use, once the source merely of private and professional submissions, is now the subject of welcome public debate and constitutional discussion. The meaning, purpose and indeed quality of detention is kept continually under public scrutiny. Nor is interest confined to custody. The extent to which those not physically detained are made subect to conditions which effectively limit their freedom and provide control within the community, whether before or after conviction, is a topic likely to remain in the public domain for some years to come.

Recognising the minefield that lies to either side of any attempt to deal with bail in its social context, the author deftly avoids any incursion into this quasi-political territory. At the same time he meets head-on and with imagination, in his final chapter, the challenge to the future in a world where the criminal justice system may now be seen as one and where its many facets exercised through, for example, the Crown Prosecution Service in its codes of practice, or the probation service in its bail information schemes, will all contribute to the

just bail decision. Starkly, the wrong answer arguably leads either to an increase in crime or to unfair and unacceptable delay which reverberates throughout the judicial system. Succinct, yet persuasive, advocacy dedicated to assisting a tribunal to reach the right conclusion benefits not only the parties to the case, but everyone upon whom the timetables of court hearings impinge.

The pleasure to be found in the author's work here is to be derived in part from discovering what this book is *not* about. It is not an academic treatise and, whilst itself published at the height of the custody debate, does not yield to any of its pretensions. It offers two essentials: a rounded, reliable view of bail in all its aspects, beautifully tailored for the busy practitioner, and at the same time an ideal introduction for students on vocational courses to learn how best to forge an essential tool of their trade.

Those familiar with the author's style in shorter publications on the subject will be delighted to find that witty illustrations and examples, well chosen from more than one century, have not been allowed to disappear: they remain to leave the text crisp, memorable and most easy to read. It is plain that sound practical experience underwrites his judgement at every stage in the selection of material and the presentation of argument. He leaves the reader in no doubt that those responsible for reaching decisions upon bail do so not merely as trustees for the public but as guardians of one of our most precious freedoms.

Jeremy Connor
Metropolitan Stipendiary Magistrate
October 1990

Introduction

The gaoler's office of a London magistrates' court used to display a notice that read "Please do not ask for bail as a refusal often offends". At the same court, the writer once heard a police officer complete his recital of the brief facts by saying, "He was arrested and cautioned to which he replied, 'Will I get bail?'".

Practitioners will know of clients who will accept with resignation a custodial sentence but campaign with all their energy for the grant of bail. It seems that the adage "if you can't do the time, don't do the crime" does not apply to remands in custody.

Since the implementation of statutory duty solicitor schemes, most people in custody have had the opportunity to be represented. The benefit of legal representation in bail applications has been shown in several studies. The Cobden Trust Study, *The Effect of a Duty Solicitor Scheme* (1976) compared Hendon Magistrates' Court which had a duty solicitor scheme, with Harrow Magistrates' Court which did not. At the time of the research, the two courts fell within the same petty sessional area. During the first sixteen months of the scheme at Hendon, the proportion of defendants granted bail on their first appearance rose by four per cent whilst at Harrow the proportion fell by 1.5 per cent. By way of contrast, another study (M Zander, *The Operation of the Bail Act in London Magistrates' Courts*, New Law Journal, 1 February 1979) found that whilst eighty per cent of represented

defendants were granted bail, the figure for unrepresented defendants was eighty-six per cent.

The cardinal rule of advocacy – know your tribunal – applies as much to the bail decision as it does to trials and pleas in mitigation. Courts are reputed to be either "hard" or "soft" on bail. The anecdotal evidence of practitioners is supported by empirical evidence which shows that a defendant is ten times more likely to be refused bail at some magistrates' courts than at others (M Winfield, *Lacking Conviction: the remand system in England and Wales* (1984)). The Home Office has recognised the disparate nature of bail decisions and has urged magistrates' courts to be more consistent (Home Office Circular 25/1988).

A solution may be found in the proposal contained in the Bail (Amendment) Bill 1989 for "structured decision-making", and it is encouraging that the Magistrates' Association is in favour of such an approach. However, it is not yet clear how this would differ from the existing procedures set out in the Bail Act 1976.

Writing before the introduction of the Crown Prosecution Service, James Morton reported:

> "One of the greatest difficulties in applying for bail is that rules may vary from town to town and even from courtroom to courtroom. Some magistrates accept a statement by the prosecution or even the Court Inspector by way of objections to bail. Some agree that the officer in the case should give evidence and submit to cross-examination. Some will not allow it ... Some courts will even make the defendant apply for bail without hearing the prosecution evidence or even the grounds for their objections" (*Why the Bail Lottery Needs Reform*, The Guardian, 10 November 1980).

It is now unusual for police officers to attend magistrates' courts on remand hearings and the objections or observations on bail are in most cases given by the crown prosecutor. This is sometimes expressed in a bland or even dull manner, and means that the defence has no scope for cross-examination. Before the introduction of the Crown Prosecution Service, it was not unusual for the police officer in the case to address the

defending lawyer out of court in the following terms: "Your client's good as gold and I don't really want him in custody. The problem is, with his record, the court will think I've been bribed if I don't object to bail. So it's up to you to ask the right questions". The officer would then object to bail at the hearing and cross-examination would follow along these lines:

> *Lawyer*: Would your objection that he will fail to surrender be met by the imposition of a surety?
> *Police Officer*: Yes, Sir.
> *Lawyer*: Do you accept that his conviction for breach of bail occurred after he went abroad for a funeral?
> *Police Officer*: Certainly, Sir.
> *Lawyer*: Will you take it from me that he has a job starting on Monday as a painter and decorator and that his common law wife is pregnant?
> *Police Officer*: Most definitely, Sir.

There was nothing improper in this (so long as the lawyer was acting in accordance with his instructions) and a stipendiary magistrate or experienced justices would read between the lines and be grateful that the proceedings had been enlivened.

Bail is not only a subject of importance to defendants and practitioners but it is also a subject of constitutional importance. Lord Hailsham described the refusal of bail as "the only example in peace-time where a man can be kept in confinement without a proper sentence following conviction after a proper trial. It is therefore the solitary exception to the Magna Carta" (address to the Gloucester branch of the Magistrates' Association, 11 September 1971).

The attempt of the judiciary to check the monarch's power of arbitrary arrest and detention without trial formed an important aspect of the constitutional conflicts of the seventeenth century. The decision in *Darnel's Case* or *The Five Knights' Case* (1627) 3 St Tr. 1, that there was no right to a writ of *habeas corpus* where the prisoner was detained *per speciale mandatum regis* (by special order of the King) and the general issue of the powers of the royal prerogative were not finally resolved until the passing of the Bill of Rights 1688, and the nascency of the

modern system of constitutional monarchy.

The right to *habeas corpus* continued to be suspended during times of political unrest. An example is Act 34 Geo III c.54, which prohibited any person imprisoned under a warrant signed by a Secretary of State on a charge of high treason from insisting upon being discharged or put on trial.

Until recent times, the only ground for refusing bail was that the defendant will fail to surrender to custody. In an 1854 case, *In Re Robinson* 23 LJQB 286, Coleridge J directed magistrates to concentrate solely on this point. In *R* v *Rose* (1898) 78 LT 119, Lord Russell said: "It cannot be too strongly impressed on the magistracy 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 his trial".

A further ground for remand in custody, that the defendant will commit an offence whilst on bail, was propounded by the Court of Appeal in a series of cases in the 1950s: *R* v *Pegg* [1955] Crim LR 308; *R* v *Wharton* [1955] Crim LR 565 and *R* v *Gentry* [1956] Crim LR 120. The point was forcefully put by Atkinson J in *R* v *Philips* [1974] 111 JP 333, who held that offences of burglary are likely to be repeated, especially if the defendant has a record for such offences. With regard to a defendant who committed nine offences whilst on bail, he declared that:

> "to turn such a man loose on society until he has received his punishment for an offence which is not in dispute is, in the view of the Court, a very undesirable step to take. The Court wishes justices who release on bail young housebreakers such as this to know that in nineteen cases out of twenty, it is a very wrong step to take".

The Criminal Justice Act 1967 prohibited the refusal of bail to defendants charged with offences punishable with not more than six months' imprisonment, subject to certain exceptions. The exceptions included cases where the defendant was likely to commit an offence while on bail, and also cases where the offence charged was alleged to have been committed while on bail. Under the Bail Act 1976, one of the exceptions to the right to bail in the case of imprisonable offences is where there are

substantial grounds for believing he will commit an offence while on bail.

It is interesting to compare the grounds for the refusal of bail in England and Wales with the grounds for refusal in another common law jurisdiction, that of Canada. Securing the attendance of the accused is there preserved as the primary ground; the commission of offences and interference with the administration of justice are secondary grounds:

> "For the purposes of this section, the detention of an accused in custody is justified only on either of the following grounds, namely:
>
> (a) on the primary ground that his detention is necessary to ensure his attendance in court in order to be dealt with according to law; and
>
> (b) on the secondary ground (the applicability of which shall be determined only in the event that and after it is determined that his detention is not justified on the primary ground referred to in paragraph (a)) that his detention is necessary in the public interest or for the protection and safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or an interference with the administration of justice." (Bail Reform Act 1970-71-72 (Can. (c.37)).)

Another important development in recent years has been the increased use of conditional bail. When conditions were first introduced by the Criminal Justice Act 1967, the Under Secretary of State told the House of Commons:

> "It is hoped that the court will keep in mind that the purpose of the provision is to save some people being kept in prison and not to burden those who will in any event be given bail by the adding of conditions. There should be no question of imposing special conditions [as they were then called] as a matter of course".

It is arguable that this exhortation has not been heeded, and that many conditions or grants of conditional bail do not fulfil the statutory criterion of being "necessary". It certainly appears that conditions are becoming ever more elaborate. The chief

clerk of a London magistrates' court has reported that a defendant applied for a variation so that he could "attend his hairdresser by prior appointment on seven days' prior notice to the CPS and the police" ((1990) 154 JP 107).

The law on bail has developed considerably in recent years. Apart from the Bail Act itself, statutory provisions have dealt with:

(a) the length of remand (Criminal Justice Act 1982 Sch 9 and Criminal Justice Act 1988 s 155);
(b) remand for medical reports (Magistrates' Courts Act 1980 s 30 and Mental Health (Amendment) Act 1982 s 34);
(c) the power of the Crown Court to grant bail pending appeal to the Court of Appeal (Criminal Justice Act 1982 s 29 (1));
(d) police detention (Police and Criminal Evidence Act 1984 Part 1V);
(e) serious charges (Criminal Justice Act 1988 s 153);
(f) further applications (Criminal Justice Act 1988 s 154).

Important judgments have dealt with:

(a) the forfeiture of recognizances (*R* v *Southampton Justices ex parte Green* [1976] QB 11);
(b) further applications (*R* v *Nottingham Justices ex parte Davies* [1980] 2 All ER 775);
(c) conditional bail (*R* v *Mansfield Justices ex parte Sharkey and others* [1985] Crim LR 148 and *R* v *Bournemouth Magistrates' Court, ex parte Cross and Others* [1989] Crim LR 207);
(d) the offence of failing to surrender *(Schiavo* v *Anderton* [1986] 3 WLR 176, the Practice Direction *Bail: Failure to Surrender,* 19 December 1986 [1987] 1 WLR 79, and *Murphy* v *Director of Public Prosecutions* [1990] 2 All ER 477).

This book is intended for the practitioner, but it is not a prescriptive work and there are no check-lists or *aides-mémoire.* My aim has been to provide a practical guide to the law and procedure but I have added critical comment where I considered it appropriate.

I am grateful to my former university tutor, Mr Colin Low, who passed on to me his enthusiasm for the subject of criminal law, and to Mr Peter Hughman, who provided much of the source material.

I must also thank the tea producers of Darjeeling, without whose product this book could not have been written!

Table of cases