The New Law of Bail

By BRIAN HARRIS LL.B

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Reasons

3:01 But an over-emphasis on community ties would have been as wrong as to have ignored them altogether. Perhaps the most important contribution of the working party was in making clear the distinction between the *reasons* for a refusal of bail and the *evidence* in support of those reasons. In the past a police inspector would rise to his feet to object to bail on the ground that the defendant had no fixed abode and a criminal record. Logically, this is nonsense because if the absence of a fixed address and the possession of a criminal record were reasons for locking anyone up the prisons would be full many times over. What the Home Office working party did so successfully was to identify the main *reasons* for refusing bail as being the likelihood of the defendant absconding and the likelihood of further offences being committed. Looked at in this light it is easy to see that the absence of a fixed address might be *evidence* in support of the view that the defendant would not appear at the adjourned hearing and a record of previous convictions could be *evidence* for thinking that, if released, he might commit further offences while on bail. These grounds are not mutually exclusive; for example, the absence of a fixed address might mean that the defendant lives the life of a vagabond and, if released, would be likely to break into beach huts or steal food as a means of subsistence. Similarly, the fact that the defendant has a long record of previous convictions might suggest that, if released on bail, he would be disinclined to attend because he feared a lengthy prison sentence at the end of the proceedings.

3:02 Let us take two contrasting examples. In the first, a professional burglar has been caught at the scene after a chase and is brought before the local magistrates the following morning. His companion got away with a substantial part of the loot and has not yet been apprehended. The police inspector objects to bail because of the defendant's previous convictions and the gravity of the offence. The defendant's solicitor points out that his client has a fixed address and has never broken bail in his life. The magistrates fix bail with two sureties and the defendant is released to give aid and comfort to his friend in disposing of the stolen property and to attempt to commit as many further offences of burglary as he can to set up his "common law" wife in funds while he serves the long prison sentence which he knows is to await him. In fact the question of attendance at court was never really in issue and the sureties were an irrelevance. Had the inspector concentrated on the fear of further offences a great deal of police time and householders' distress could have been saved. By contrast, consider the inadequate middle aged recidivist charged with a minor

offence of dishonesty committed because he has nowhere to live. Throughout his long criminal career he had never committed an offence of violence or indeed any offence worse than petty dishonesty. The court inspector rightly draws the magistrates' attention to his "bad" record and to the absence of a fixed address and the magistrates have no hesitation in remanding in custody. Had they put the case back until later in the morning list for inquiries by the probation officer a bail hostel or alternative accommodation might have been found, the public spared the cost of keeping the defendant in prison, he himself might have been spurred to get a job which in turn could have influenced the final sentence. In both cases, it is submitted, had the parties and the magistrates been compelled (as they now are under the Act) to address their minds clearly to the substantive reasons for refusing bail and to distinguish them firmly from the evidence in support of those reasons, different decisions could well have resulted.

3:03 The working party identified three basic reasons for the refusal of bail, fear of the defendant's absconding, fear of further offences being committed by him if granted bail and possible interference with witnesses. All three appear in the Act of 1976 but along with a number of others which it proved necessary to insert once the government had rejected the working party's view that there would be no advantage in attempting to lay down in precise terms the circumstances in which bail might be refused. The result is a complex measure which has had to be supplemented by regulations.

3:04 It is a curious feature of modern legislation that, despite the simplifying and codifying ideal to which we all subscribe, every new Act seems to add more material to the statute book than it takes away. Certainly, this may be the first reaction of any practitioner reading through the Bail Act. But that the Act was necessary and necessary broadly on the lines upon which it has been enacted few would challenge. Aside from its procedural reforms the Act's main achievements are, first, the creation of the general right to bail in criminal proceedings which, although largely a formality, cannot be gainsaid and, secondly, and more important, the laying down of clear reasons for the refusal of bail and the differentiation between those reasons and the evidence which may support them. The new Act will not make it easy to make decisions about bail, but it should make it less difficult.

Motives

4:01 Inevitably, the motives of those supporting the Bill were mixed.

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On the one hand, there was the suspicion in libertarian circles that magistrates, particularly lay justices, are over-ready to accept police objections to bail, while on the other there was the understandable view of Ministers that, with prisons overcrowded and no money available to build any more, almost any measures likely to reduce the prison population were to be welcomed. It is interesting to note that this was not the approach of the Home Office working party which wrote:

> "It seems to us unprofitable to discuss in general terms whether more or fewer persons should be granted bail. Each case has to be considered individually. What is important is to provide procedures which will ensure that it is considered fully, in accordance with appropriate criteria and in the light of all the relevant information."

4:02 This, surely, must be right. While the penal system is no more immune than any other public sector from the cold winds of economy, it would be a sorry day when the criminal courts, which exist to protect society from its unsociable members, were required to take decisions concerning the liberty of the individual, not on a balance between his interests and those of the state, but rather on the need to reduce Government spending on capital works. Lord Harris of Greenwich, moving the second reading of the Bail Bill, sailed close to the winds of candour when he said that it emphasized the Government's concern over the size of the prison population and their desire to see that bail was given in all cases where that was reasonable. More acceptable was the statement of Mr. Brynmor John, performing the same function in the Commons, when he said that the Bill's purpose was to improve the quality of bail decisions by setting out more clearly than hitherto the questions to which the courts should address their minds, and by improving the procedure to ensure that those matters were considered at the right time.

4:03 Let us now examine how the Act sets out to achieve these ends.

A GUIDE TO THE ACT

5:01 The Bail Act 1976 changed the law in criminal proceedings by:

(1) creating a general right to bail (para 6:01);

(2) specifying exceptions to that right (para 7:01);

(3) abolishing the defendant's own recognisance and replacing it by a duty to attend (para 22:01);

(4) creating an offence of failing to answer bail (para 31:01);

(5) altering in a variety of ways the incidents of bail (paras 23:01 - 26:01);
(6) providing a power to vary the conditions of bail (para 27:01);
(7) requiring the giving of reasons for the refusal of bail or the imposition of conditions of bail (para 28:01);
(8) extending the legal aid provisions by making its grant mandatory (subject to means) on certain occasions related to bail and by allowing legal aid limited to the bail application (para 29:01); and
(9) creating an offence of agreeing to indemnify sureties (para 23:04).

5:02 It is important at the outset to remember that most of the provisions of the Bail Act 1976 are confined to bail in criminal proceedings (a term which is defined in s.1). The general right to bail, the principles upon which bail may be refused and the abolition of the defendant's own recognisance therefore, have no application in the case of bail granted in civil proceedings, where the old law still applies.

The General Right to Bail

6:01 The general right to bail provides that anyone accused of an offence who appears or is brought before a magistrates' court or the Crown Court in the course of or in connexion with proceedings for an offence or who applies to a court for bail in connexion with the offence must be granted bail unless his case falls within one of the exemptions in the first schedule to the Act: s.4(1).

6:02 Following changes made to the bill in Parliament the general right to bail applies both before and after conviction, although not where the offender is committed to the Crown Court for sentence or to be dealt with. From a drafting point of view this is effected somewhat clumsily in s.4(2) by first excluding from the general right to bail proceedings after conviction (a term widely defined in s.2(1)) and then going on in subs.(4), to extend the right to adjournments after conviction for the purpose of enabling inquiries to be made to assist the court in dealing with the offender for the offence as well as to breach of probation and community service (subs.(3), *ibid*). It may be noted here that this provision does not apply to an offender upon whom sentence is deferred under the provisions of the Powers of Criminal Courts Act 1973, s.1. This is because the Criminal Law Act 1977, has done away with the power to remand on a deferment of sentence.

6:03 In summary therefore, the general right to bail does *not* apply

in civil proceedings or in the following circumstances in criminal proceedings:

– committals to the Crown Court for sentence. Lord Parker C.J. has said that "the cases must be rare when justices can properly commit (for sentence) on bail because the whole purpose of the committal is to have the accused sent to prison for a longer period than the justices could impose". (*R. v. Coe* [1969] 1 All E.R. 65; 133 J.P. 103).

– [It applies to committals to the Crown Court for breach of requirement of probation or community service but not to] other committals to be dealt with, e.g. for the commission of a further offence during the operational period of a suspended sentence.

– appeals to the Crown Court and the High Court, where magistrates have an unfettered discretion to grant or refuse bail pending the determination of the higher court. (Magistrates' Courts Act 1952, s.89).

– proceedings against a fugitive offender for the offence.

6:04 Bail may not be granted by a magistrate in a case of treason: Magistrates' Courts Act 1952, s.8, as reaffirmed by the Bail Act 1976, s.4(7).

Exceptions to the General Right to Bail

7:01 What, then, are the circumstances in which a court may refuse bail to a person enjoying the general right to bail? Basically, there are three exceptions which apply in all cases, a further exception which applies only in the case of non-imprisonable offences and five more exceptions which apply only in the case of imprisonable offences. The three exceptions which apply in the case of *all offences* are where the court is satisfied that:

1) the defendant has been arrested for absconding or breaching bail conditions in the present proceedings (para.2 of part I and para.5 of part III of sch.1.)

2) it is for the defendant's own protection or, if a juvenile, for his welfare (para.3 of part I and para.3 of part II of sch.1.)

3) the defendant is in custody in pursuance of a sentence of a court or under the Services Acts (para.4 of part I and para.4 of part II of sch.1.). Needless to say, a remand in custody in respect of another offence does not constitute a sentence of a court for the purpose of refusing bail, any more than does a commitment in default of paying a fine, etc. The term "the Services Acts" is defined in para.4 of part III of the schedule.

7:02 In the case of *non-imprisonable offences* there is one further ground for refusing bail and that is:

4) it appears to the court that the defendant has previously failed to answer bail (seemingly either in those proceedings or others) *and* the court believes that, if released, he would fail to surrender to custody (para.2 of part II of sch.1.)

The likelihood of further offences being committed or witnesses being interfered with or, indeed, any other reason may not justify a refusal of bail in the case of offences not punishable by imprisonment.

7:03 Where the offence in question is *punishable with imprisonment*, however, the court may, in addition to the first three exceptions also refuse bail if there are "substantial grounds" for believing that any one of the three basic reasons referred to in the Home Office working party report applies, namely that if released on bail the accused would

5) fail to surrender to custody;

6) commit an offence or

7) interfere with witnesses or otherwise obstruct the course of justice (para.2 of part I of sch.1).

7:04 There are two further exceptions which may justify a refusal of bail in the case of an *imprisonable offence*, namely where the court is satisfied.

8) That it has not been practicable since the proceedings were instituted to obtain sufficient information to take the bail decision (para.5 of part I of sch.1);

9) That the defendant has been convicted and it is impracticable to complete any necessary inquiries or report on bail (para.7 of part I of sch.1).

7:05 The fact that exception 9 is the only one which refers specifically to remands after conviction does not restrict the refusal of bail on other remands after conviction so long as it can be justified by any one or more of the other exceptions.

7:06 Of all these exceptions 5 and 6 are by far the commonest encountered in practice, namely absconding and re-offending.

Fear of Absconding

8:01 Since the trial of a serious offence cannot normally proceed in the absence of the defendant any remand arrangements which fail to assure his attendance will be unsatisfactory. "The requirements as to bail", said Lord Russell, C.J., in *R. v. Rose* (1885-99) All E.R. Rep. at p.851, "are merely to secure the attendance of the prisoner at the trial". On the other hand, where the only objection to bail is fear of absconding there should be few cases indeed where the court cannot by calling for adequate and sufficient sureties and by imposing suitable requirements ensure the attendance of the accused. If he fails to find the sureties

he will of course remain in custody, but courts should never refuse bail with sureties simply because they believe the accused would be unable to obtain them.

8:02 It should be remembered that the fear of defendant's absconding is an exception to the general right to bail only where the offence of which he is accused is one punishable with imprisonment. In the case of all other offences it must be accompanied by a previous failure to answer bail. (Para 7:02)

Further Offences

9:01 But no matter how many sureties are tendered they will be insufficient to meet the case if the true ground for objection is that the defendant will commit an offence or offences while on bail.

9:02 The working party's report quoted the Court of Appeal decision in *Philips* (1974) 111 J.P. 333, in which Atkinson, J., said that 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. It is an offence which can be committed, he added, with a considerable measure of safety. Referring to a defendant who had committed nine offences while on bail, he said: "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 inadvisable step to take. The Court wish justices who release on bail young housebreakers such as this to know that in 19 cases out of 20 it is a very wrong step to take". It has been said that this applies *a fortiori* in the case of offenders with bad records: *R. v. Gentry; R. v. Wharton* (1955) Crim. L.R. 565; *R. v. Pegg* (1955) Crim. L.R.308. The Home Office working party agreed with this view and added that there were indications that there is a significantly greater risk of offences being committed on bail by persons charged with robbery or burglary than by those charged with other offences. At the other extreme, they commented, if a person is charged with a comparatively minor offence a greater risk of similar offences being committed if bail is granted can reasonably be accepted (para. 67 and 68 of the report).

9:03 No matter how serious the offence which is feared bail may only be refused on this ground if the offence of which the defendant is accused is punishable with imprisonment.

Interference With Witnesses

10:01 The fear of police that the defendant will, if released on bail,

interfere with witnesses or otherwise obstruct the course of justice is probably the most difficult consideration for a court to evaluate. Such an objection can easily be made without foundation. On the other hand, fears of this sort may well be felt strongly by experienced police officers and yet be incapable of proof. The Home Office working party commented:

> "The possibility of the defendant interfering with the witnesses . . . will usually be relevant only where the alleged offence is comparatively serious and there is some other indication, such as a past record of violence or threatening behaviour of the defendant. Where there is a substantial ground for fearing such interference, this seems to us to be a very strong reason for refusing bail" (para.69).

10:02 Once again the fear of interference with witnesses etc is an exception to the general right to bail only where the offence of which the defendant is accused is punishable by imprisonment.

Factors to be Considered

11:01 As was said in the case of *Phillips, supra,* the court must weigh the gravity of the charge and all the other facts of the case against the likelihood of the defendant absconding. Parliament has given this warning statutory form by enacting that where exceptions 5, 6 or 7 are being considered (and that, it will be remembered, can only arise in the case of an imprisonable offence) the court must consider *any* factor which appears relevant. (Para.9 of part I of the first schedule). Nevertheless the Act singles out for special mention the following factors:

The Nature and Seriousness of the Offence

12:01 This has long been a factor at common law: see for example *R. v. Barronet and Allain* (1852) 17 J.P. 245. The Home Office working party on bail commented:

> "The more serious the offence charged, the stronger the temptation to abscond is likely to be, since a defendant who is liable, if convicted, to receive a long sentence of imprisonment has more incentive to abscond than one facing a less serious charge. Moreover, the more serious the offence, the smaller is the risk that can justifiably be taken either of the defendant's absconding or of his committing offences similar to that with which he is charged. At the other extreme, the comparative triviality of the offence may of itself indicate that a remand in custody is not justified, whatever the other considerations. While the seriousness of the class of offence is an important factor, it is not necessarily conclusive. The nature of the particular offence may also be relevant. The circumstances of a domestic murder, for example, may of

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