

Bail or Remand-The Civil Libertarian Perspective

Russell Jamison
Barrister and Solicitor
President South Australian Council
for Civil Liberties

This presentation will describe the procedures that follow arrest in South Australia, to point out certain aspects of this procedure which violate fundamental civil liberties, and to recommend changes that the South Australian Council for Civil Liberties believe are needed.

Arrest And Detention

In South Australia a person is not entitled to apply for bail immediately upon arrest. Arrested persons may be detained pursuant to s.78(2) (b) of the *Summary Offences Act 1953* or if not detained may be held in a police lockup before being transferred to a watch-house. Once in the watch-house a prisoner is entitled to apply in writing to the officer in charge or a police officer of the rank of sergeant or above, but once refused the prisoner may be held in the watch-house up until noon of the next working day before he has to be brought before a justice when he may apply for bail. If this is also impossible a procedure for an appeal by telephone to a magistrate is provided for. Is Even once bail has been granted the police can defer releasing the person for up to 72 hours by stating to the bail authority that a review will be applied for.

- We believe that this procedure takes far too long and that two justices or one magistrate should be 'on call' at all times to adjudicate bail applications independently, and that a prisoner should be entitled to so apply at any time following arrest.
- We believe that detention is a fundamental breach of civil liberty.

Eligibility For Bail

There is no law guaranteeing citizens the right to be at liberty - it is the custom, but there is no law or Constitutional guarantee, only a rebuttable presumption in favour of bail being granted after liberty is lost. Section 10 of the *Bail Act 1985* states 'the bail authority should, subject to this Act, release the applicant on bail unless, having regard to (any relevant matter) the bail authority considers that the applicant should not be released'.

- We believe that liberty should be the right of every person.
- We believe that no bail authority should deny that right except in specified circumstances proved on the balance of probabilities.

Reasons For Refusal

Section 10 of the Bail Act sets out a selection of reasons for refusing bail to which the bail authority can have regard: namely, the gravity of the offence, the likelihood of absconding, reoffending or interfering with evidence, witnesses or police enquiries, protection of the victim, need to protect the applicant, medical requirements of the applicant, prior contravention of terms or conditions of bail and 'any other relevant matter'.

The Third Report of the Criminal Law and Penal Methods Reform Committee of South Australia (Mitchell Committee) in 1975 adds to the list of other relevant matters the probability of conviction, the likelihood of the liability to severe punishment, the character and behaviour of the accused and the nature of his abode and ties in the state.

- The Mitchell Committee recommended that a court not refuse bail in order to facilitate police enquiries (instead it recommended detention provisions). The legislation includes both the detention laws and bail refusal on the grounds that the accused might hinder police enquiries. We believe that continuing enquiries should not be a factor in determining bail.
- We believe that the gravity of the alleged offence, per se, is no measure of whether a person will appear for trial and should not be a consideration in determining bail.
- In our experience the 'likelihood of absconding' has been held to mean 'likely to leave the state' and this should not be a determining factor. Instead the automatic provision in every bail agreement not to leave the state (s.11(6)) should be abolished, the fact that a person has no fixed address, residence, or family ties in South Australia should not determine whether a person is granted bail. Surrender of passports should be sufficient reply to evidence of intention to leave the country.
- We believe that the need which the applicant may have for physical protection or medical or other care should not be grounds for refusing bail but may be the subject of special conditions on bail.
- We believe that the failure to comply with terms or conditions of bail on any previous occasion should not be a factor unless the breach is substantial and fundamental and that a similarity of circumstances exists that makes it probable that such a breach is likely to reoccur.
- We believe that bail should never be refused in offences where prison is not a prescribed penalty or is unlikely to be applied or would be likely if applied not to exceed the time for which the prisoner is likely to be held until trial.

Conditional Bail

The bail authority can impose one or more conditions upon granting bail. These are that the applicant agree to reside at a specified address, not to approach victims or witnesses, to be under the direction and supervision of the Department of Correctional Services, to report to police at a specified time and place, to surrender his passport and to any other conditions as to conduct.

Further, the bail authority may require the applicant to give written assurances from a number of acceptable persons that he or she will comply, as well as requiring the applicant and guarantors to be liable to pay a specified sum upon breach to pay such sum into court as a precondition to being released.

- We believe that requiring that a fixed sum be paid either as a precondition or promise whether by an applicant or a surety as a condition of bail should be abolished. No person should be denied release once bail has been granted because of his inability to meet pecuniary conditions. The penalty for breach of bail should be determined by reference to the seriousness of the breach and the effect, including the cost to the public of such breach. The penalty should be determined at the time of sentencing or discharge.

The Bail Act and more recent home detention provisions deny the bail authority power to impose conditions of supervision, including home detention, except upon the Crown's application or consent. In practice the justice indicates his willingness to release the applicant on supervision or home detention. The prosecutor, who has already opposed bail, is then asked if that is all right with him. The answer is predictable

- We believe that the prosecutor should not have the power to deny supervision or home detention.

Further Considerations

Availability of Facilities

Currently the Remand Centre is full and all persons denied bail in South Australia can expect to spend on average 3 to 7 days in a police lockup or watch-house before being removed to gaol. The lockups are generally exposed to the weather. Most remandees will spend their initial time in the Angas Street Watch-house where there are minimal facilities.

- We believe that no prisoner should be remanded in custody unless the bail authority is assured that basic human requirements will be met. Police lockups and the Angas Street Watch-house do not meet these requirements at the present time.

Court and Prosecution Delays

Before a committal proceeding can commence the prosecution must produce statements of witnesses. Inordinate delays have been evident in cases where bail has been refused.

- We believe that in cases where bail is refused witness statements must be served on the accused or his representative not more than 14 days from the date of arrest.

Waiting times for trial vary from court to court. An accused who can have his charges disposed of summarily can usually get a trial within two to five months depending on which Magistrate's Court he or she is charged in. The waiting time for a trial in the District Criminal Court and the Supreme Court of South Australia can exceed 12 months from the date of arrest.

- We believe that an early trial date should be the right of every remandee and that except in exceptional circumstances persons should be entitled to bail if a trial cannot be commenced within six months of arrest.

Reference

Criminal Law and Penal Methods Reform Committee of South Australia 1975, *Court procedures and evidence, Third Report*, (Chair, Justice Dame Roma Mitchell), Government Printer, Adelaide.