

The Police (Prosecutors') Perspectives on Bail

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This paper is presented from the perspective of a police prosecutor of 18 years' experience. From that position, far from seeing that too many persons are remanded in custody, it seems custodial remands are invoked too infrequently. Unfortunately though there is a lack of reliable statistics upon which any conclusions can be based. The Correctional Services Department can provide figures for persons placed into custody, but these include defendants granted bail but unable, at that time, to meet the requirements.

It is necessary also to have available total numbers of persons appearing before courts in the various jurisdictions charged with criminal offences; statistics available from both the Courts Services Department and the Police Department. To arrive at any firm conclusion, it is necessary to go further and examine the reasons for refusal of bail on each occasion.

Procedures

The very first task of the police prosecutor each morning is to collect the briefs for the 'overnight arrests', process them, determine the appropriate charge(s), if any, and lay the complaint/information before a justice. Part of the process involves ascertaining the situation regarding bail and, where it has not been granted, determining the prosecution attitude should bail be applied for at court.

The *Bail Act 1985* (SA) provides a comprehensive code for the grant and refusal of bail. It also provides for the first time in this state a statutory right to bail.

It creates a member of the police force as a bail authority with the same responsibilities and authority in a determination of bail as a justice or a court (except to take evidence on oath). Previously, a police officer's duty was to grant or refuse 'police bail' to ensure the apprehended persons appearance before court; thereafter the question of bail was the responsibility of the court.

The procedures under the *Summary Offences Act 1953* (since repealed) placed no statutory fetters upon the exercise of that discretion to grant or refuse bail. Accordingly, it is understandable (and acknowledged) that in doubtful cases the tendency was to 'err on the side of caution' and leave it for the court to decide.

Such a situation is no longer possible; if a member of the police force determines not to grant bail, that decision must be justified in writing and is subject to the apprehended person's right to apply to a justice for bail or to seek a review of the decision to refuse bail

by a magistrate (by telephone if the person will not appear before court on the day following arrest).

The Act also gives the prosecuting authority the right for the first time to seek a review of a decision to grant bail.

Where a defendant is in custody (either because bail has not been applied for or has been refused) the prosecutor must be prepared for an application for bail to be made to the court, and must assume that it may be granted. As well as determining whether the application is to be opposed, the prosecution attitude if bail is granted must be established as the Act requires an 'immediate indication' if a review is to be sought.

At the direction of the Attorney-General and as a means of formalising and standardising procedures in respect of bail reviews, very stringent guidelines, agreed to by the Deputy Commissioner of Police and the Crown Solicitor's Office, have been adopted as Prosecution Services Policy no. 36.

In all other cases, where full and proper objections to bail have been made but nevertheless the court grants bail, a bail review will not be sought.

The Practical Reality

At least 90 per cent of persons arrested, are released on bail by a member of the police force acting as a bail authority. In those cases, the duty of the prosecutor is to determine whether the conditions imposed (if any) are adequate. It is extremely rare for a prosecutor, where a defendant appears on bail, to ask for a remand in custody.

Of the 10 per cent who are placed in police cells, more than 50 per cent are there for no other reason than the existence of a warrant of apprehension (in addition to any charges for which the person was arrested) which precludes any release upon bail until appearance before court.

At least 50 per cent of defendants before court on a warrant of apprehension (with or without additional charges) are released upon a fresh bail agreement with more stringent conditions; generally with a requirement to provide one or more guarantors.

Of defendants in custody in respect of any charge(s) for offence(s) without warrant, about 50 per cent are bailed by the court. A large percentage of persons remanded into custody are itinerants, resident in another state and often only passing through this state. Experience has shown that this class of person is an extremely poor bail risk, with invariably no social support system to obtain guarantors.

Reasons for opposition to bail are generally based upon:

- the seriousness of the offence, coupled with fears for the safety or intimidation of witnesses;
- other offenders are at large and there is a real possibility of hindrance to police investigations and/or the destruction of evidence;
- the commission of (a number of) other offences whilst released on bail;
- an indication, on the basis of past experience, that (he/she is unlikely to appear as required by a bail agreement, or to comply with any conditions imposed. (This is relevant in situations with or without a warrant of apprehension.)

The above figures show that the percentage of defendants remanded into custody is small, and that most of them have histories of prior non-appearance on bail or breach of conditions. It is appropriate at this stage to make the following observations:

- It is normal practice, where a justice issues a warrant of apprehension following failure to comply with a summons, to endorse the warrant directing the release of the defendant upon bail when arrested.
- A significant proportion of defendants granted bail with guarantor(s) are conveyed to a correctional institution if the guarantor(s) are not available, but are released within a short time upon the attendance of the guarantor(s).
- Occasionally a defendant granted bail with guarantor(s) remains in custody if he is unable to secure any person(s) to provide the guarantee(s). In such cases the matter must be brought back before the bail authority within the prescribed time for a review of the condition (see section 11(9)). Normally, the prosecutor's attitude is: if not one person known/related to the defendant trusts him/her sufficiently to guarantee compliance with the bail agreement, the person is obviously a poor bail risk.
- The option of home detention on bail (section 11(2)(ia)) which has been an alternative since 4 October 1987 has not so far been imposed in a summary court.
- The conditions of supervision or home detention require an adjournment for at least 24 hours for reports to be obtained by the Correctional Services Department, but delay is invariably opposed by the defence who want the issue determined on the spot, claiming the prosecution objections are nothing more than unsubstantiated allegations.
- No procedural guidelines for home detention with respect to children have been provided by the Department for Community Welfare.
- Protracted bail applications disrupt the listings in summary courts as, with the exception of the Adelaide Magistrate's Court, no court has the luxury of a court available to spend the time required on fresh matters. Adelaide No. 1 Court is kept free as a remand court each morning.
- Police records systems are currently inadequate to detect persons committing offences on bail, a defect that will be cured by introduction of the Justice Information System next year. This will become known in due course but by then there is often a number of pending offences before various courts which result in a custodial remand for all matters to be brought together.

When the Bail Act first came into operation, there were numerous anomalies contained in the legislation but these were cured by the substantial amendments operative from 4 October 1987. There are still, however, some deficiencies in procedures as follows:

- A condition requiring forfeiture of a monetary amount is still widely regarded as a 'financial condition' which is not to be imposed unless necessary to ensure compliance (see section 11(5)). Such is not the case: a 'financial condition' is defined in section 3 to be lodgement of cash, a requirement for one or more guarantees, or lodgement of cash by any guarantor(s).
- Written assurances as mentioned in section 11(2)(b) are never invoked as no procedures are available in the event of non-compliance.
- It is not currently the practice to charge defendants/guarantors for offences under section 17/17a in addition to applying for estreatment pursuant to section 19.

- There is no right of appeal (or review) of an order rescinding or revoking a bail agreement or guarantee (or refusal to do so). On far too many occasions the liability is either substantially reduce, or revoked, providing a further disincentive to comply with conditions of bail.
- There is currently a defect in the format of the prescribed Form 5 relating to guarantors. This form (which replaced the earlier form on 30 July 1987) must again be redesigned and reprinted.
- There is a need for a pamphlet to be produced to inform guarantors of their obligations.
- If a condition is imposed requiring an eligible person to reside at a particular address as a condition of bail, it should necessitate enquiries to be made with the occupants to ensure that he or she can stay there.
- The issue of after-hours bail applications to a justice pursuant to section 13(2) has not been resolved. How far do police have to go to obtain a justice so an apprehended person may exercise this right? It is contended that the Act does not envisage after-hours applications as, if the person will not appear before court on the following day they are entitled to a telephone review to a magistrate. If they are to appear, there is no entitlement to a telephone review in the case of a refusal by a police officer bail authority, but if a justice refuses bail, there is an entitlement. A magistrate would justifiably be annoyed to receive a telephone call in the early hours of the same morning that a defendant was to appear before the court.
- A witness arrested on a warrant is not an eligible person to apply for bail pursuant to section 4, and the machinery enabling release on bail previously contained in the *Justices Act 1921* has been repealed.

In conclusion, it is submitted that the vast majority of persons remanded in custody are there not because they are perceived to be a poor bail risk, but rather because they have demonstrated by their past behaviour that they will not comply with bail conditions imposed or will continue to commit further offences. In conclusion, it is the police prosecutors' perspective that it is not the case that too many persons are remanded in custody, rather too many poor prospects are granted bail.