Chapter 2: Bail Law and Procedure

In the Solomon Islands there is no legislation specifically dealing with the bail process. Practitioners therefore find the law of bail in the *Constitution*, the *Criminal Procedure Code* and relevant case law. It is important for practitioners to be aware of the matters that a court should take into account when considering whether bail is to be granted.

Overlaying the criminal justice system and highly relevant to a preliminary stage in the administration of justice, consideration of bail is the right to personal liberty referred to by Mason and Brennan JJ in *Williams v The Queen*:

> The right to personal liberty is, as Fullagar J described it, 'the most elementary and important of all common law rights' (*Trobridge v Hardy* (1955) 94 CLR 147 at p 152). Personal liberty was held by Blackstone to be an absolute right vested in the individual by the immutable laws of nature and had never been abridged by the laws of England 'without sufficient cause': *Commentaries of the Laws of England* (Oxford, 1765) Bk 1 pp 120–121, 130–131. He warned:
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> Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper … there would soon be an end of all other rights and immunities.[1]

That warning has been recently echoed. In *Cleland v The Queen* Deane J said:

> It is of critical importance to the existence and protection of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed.[2]

The Solomon Islands *Constitution* emphasises bail and the right to personal liberty. Chapter II section 5 of the *Constitution* states:

> **Protection of right to personal liberty**
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> **5.** (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say –
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> …
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> (3) Any person who is arrested or detained –
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> (a) for the purpose of bringing him before a court in execution of the order of a court;

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1 (1986) 161 CLR 278, 292; [1986] HCA 88 at [9].
2 (1982) 151 CLR 1, 26; [1982] HCA 67 at [16].

> (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Solomon Islands,
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> and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

Kirby P in *DPP v Serratore* provides a description of how bail applies in an international context.[3] He stated:

> Bail is a particular feature of the systems of law which derive their origins from the common law of England. It is not a feature usual to other legal systems, such as those of civil law countries, although in recent times the influence of the privilege to seek bail has come to be felt in the municipal systems of non-common law States and in the international statements of basic civil rights. The *International Covenant on Civil and Political Rights*, art 9, for example, provides:
>
> 9.1 Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
> …
>
> (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of judgement.[4]

Presumption in Favour of Bail

Section 5(3)(b) of the *Constitution* establishes a presumption in favour of bail. This presumption means that the prosecution must tender evidence proving a lawful reason for a bail application to be refused. The presumption in favour of bail has been endorsed in a number of Solomon Islands cases. In *R v Perfili* Muria ACJ held:

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3 (1995) 38 NSWLR 137, 142–3.

4 Ibid.

> The common law presumption of innocence is embedded under the Constitution of Solomon Islands and it is so done not without qualification. … Thus prima facie, an accused person is entitled to bail.[5]

In *Jino v Regina* Palmer J held:

> Bail is a right protected by law (section 106 of the *Criminal Procedure Code*). The granting of bail by the court however is discretionary. That means it is not to be unreasonably withheld.[6]

In *R v Wells Street Magistrates' Court; Ex parte Albanese* Gibson J, delivering the judgment of the court, commented:

> [T]he public duty of the Court is to grant bail unless, inter alia, it considers that there are substantial grounds for believing that the defendant would fail to surrender to custody.[7]

The presumption in favour of bail meshes well with the common law presumption of innocence that is enshrined in section 10(2)(a) of the *Constitution* which states:

> Provisions to secure protection of law
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> **10.** (2) Every person who is charged with a criminal offence –
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> shall be presumed to be innocent until he is proved or has pleaded guilty[.]

Criteria to be Considered in Bail Applications

The following are some standard criteria for consideration when bail is being sought.

The probability the accused will appear in court

In *R v Mahoney-Smith* emphasis was placed on the probability of the applicant appearing to answer bail when determining whether it should be granted:

> [I]t 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 where required and not on his supposed guilt or innocence.[8]

This criterion has been accepted in the Solomon Islands, for example, in *R v Khong Ming Khoo* when Ward CJ held that "[t]he principal consideration in all bail applications is whether the accused will attend his trial".[9]

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5 [1992] SBHC 10, 3.
6 [1999] SBHC 51.
7 [1981] 3 All ER 769, 776.
8 (1967) 2 NSWLR 158.
9 [1991] SBHC 24.

When considering this point the following factors may be of assistance:

- The person's background and community ties.
- The person's prior criminal record.
- Any previous failure to appear in court.
- The circumstances of the offence (including its nature and seriousness).
- The strength of the evidence against the person and the severity of the penalty or probable penalty.
- Any specific evidence indicating whether or not it is probable that the person will appear in court.

The period that the person may be obliged to spend in custody if bail is refused.
In *R v Perfili* Muria ACJ held:

> The question of delay in bringing an accused person to trial is a relevant factor to be taken into account in considering [a] bail application. I feel it is particularly important that the liberty of an accused person must be borne in mind in order to minimise any delay in bringing an accused person to trial.[10]

This criterion was given less emphasis in *Regina v Tahea* when the trial date had been fixed and it was one month before the trial. Palmer J stated:

> The accused has spent a better part of his time in custody and now that a trial date has been fixed not more than a month away, it needs to be shown that further remand in custody until that time taking all relevant matters into account would be prejudicial to this accused's interests.[11]

The needs of the person to be free to prepare for the person's appearance in court or to obtain legal advice or both.

The needs of the person to be free for any lawful purpose.

The protection of any person against whom it is alleged that the offence concerned was committed, and the close relatives of any such person.

The likelihood of the person interfering with evidence or witnesses.
In *Perfili v R* Palmer PJ stated:

> Although I am satisfied that if the applicant is released on bail he will not abscond there are other factors that this Court is entitled to consider.
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> One of these and the main one raised by Prosecution is the possibility of tampering with evidence and interference with prosecution witnesses and investigation.
> …

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10 [1992] SBHC 10.
11 [1996] SBHC 3.

> It is obviously in the interests of justice that police are allowed the opportunity to investigate all avenues and sources, links and persons properly and that no possibility of interference is permitted. [12]

Whether or not it is likely that the person will commit any serious offence while at liberty on bail.

The strength of the prosecution case.
This factor increases in relevance where the prosecution case is exceptionally weak, or where the charge is murder.

In *Seko v R* Palmer CJ applied the factors specified in the Amnesty International Fair Trials Manual,[13] which are relevant to an assessment of whether a period of pretrial detention is reasonable. He stated:

> The Manual then sets out a number of factors which the Human Rights Committee and regional bodies consider to be relevant matters in examining or assessing the reasonableness of a period of pre-trial detention:
>
> (i) the seriousness of the offence alleged to have been committed;
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> (ii) the nature and severity of the possible penalties;
>
> (iii) the danger that the accused will abscond if released;
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> (iv) whether the national authorities have displayed "special diligence" in the conduct of the proceedings, considering the complexity and special characteristics of the investigation;
>
> (v) whether continued delays are due to the conduct of the accused (such as refusing to cooperate with the authorities) or the prosecution.[14]

Power to Grant Bail
The *Criminal Procedure Code* governs the processes for arrest, detention and bail. Section 23 of the *Criminal Procedure Code* requires an arrested person to be brought before a magistrate within 24 hours. If that is not practicable, subject to the seriousness of the charge the police should release the person with or without sureties.

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12 [1992] SBHC 35; see also: *R v Kong Ming Khoo* [1991] SBHC 24; *R v Tahea* [1996] SBHC 3; *R v Maeni* [1999] SBHC 46; *The State v Tohian* [1990] PNGLR 173 at 177–8.

13 [2005] SBHC 100; Amnesty International, *Fair Trials Manual* (1998) Amnesty International Publications, London, Chapter 7; available online at http://www.amnesty.org/en/library/info/POL30/002/1998 (retrieved 10 July 2011).

14 [2005] SBHC 100.

Section 23 is in the following terms:

> **Detention of person arrested without warrant**
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> **23.** When any person has been taken into custody without a warrant for an offence other than murder or treason, the officer in charge of a police station to whom such person shall have been brought may in any case and shall, if it does not appear practicable to bring such person before an appropriate Magistrate's Court within twenty-four hours after he has been so taken into custody, inquire into the case, and unless the offence appears to the officer to be of a serious nature, release the person on his entering into a recognisance with or without sureties, for a reasonable amount to appear before a Magistrate's Court at a time and place to be named in the recognisance, but where any person is retained in custody he shall be brought before a Magistrate's Court as soon as practicable:
>
> Provided that an officer of or above the rank of sergeant may release a person arrested on suspicion on a charge of committing any offence, when, after due inquiry, insufficient evidence, is in his opinion, disclosed on which to proceed with the charge.

It is well established at common law an accused person must be released or brought before a magistrate as soon as possible. This requirement takes into account the right to liberty and the presumption of innocence. It also reduces the chance that police will behave inappropriately towards an accused.

A failure by police to bring a person to court was described succinctly by Lawton LJ in *R v Mackintosh*, when he said:

> It is important that the police should bear in mind that it is stupid as well as unlawful to keep someone in custody for a minute longer than they should.[15]

Section 106 of the *Criminal Procedure Code* gives the courts power to release a person on bail with or without surety. Section 106(1) restricts the granting of bail in murder and treason cases; however under section 106(3) the High Court may grant bail to a person charged with murder or treason notwithstanding section 106(1).

Section 106(2) forbids a court from setting an amount for bail which is excessive. Section 106(3) provides the High Court with power to grant bail in all cases and also to vary bail conditions required by a magistrate or police officer.

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[15] (1983) 76 Cr App R 177, 182.

Section 106 provides:

> **Bail in certain cases**
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> **106** (1) Subject to the provisions of section 23 where any person, other than a person accused of murder or treason, is arrested or detained without warrant by a police officer or appears or is brought before a court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person may in the discretion of the officer or court be admitted to bail with or without a surety or sureties.
>
> (2) The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.
>
> (3) Notwithstanding anything contained in subsection (1), the High Court may in any case direct that any person be admitted to bail or that the bail required by a Magistrate's Court or police officer be reduced.

Although excessive bail amounts are prohibited, nothing in section 106 proscribes the usual practices of the courts when considering whether to grant or vary bail.

Some points of relevance

The court with carriage of a case has the power to grant, vary or refuse bail. For example, if the matter is to be heard in the Magistrates' Court the power to grant, vary or refuse bail lies with the magistrate hearing the trial. The same is the case with the High Court and Court of Appeal.

If an accused has been refused bail by police then the first court to consider a bail application will be the Magistrates' Court, except where the accused is charged with murder or treason.[16]

If a court is asked to vary bail conditions previously imposed it will normally look for changed circumstances before it will vary conditions. Changed circumstances could be:

- the prosecution case has significantly weakened;
- delays are becoming excessive;
- additional surety can be provided;
- the accused has been following the conditions imposed for some time and restrictive conditions can be reduced because flight risk is considered to have lessened;
- family difficulties warrant a lessening of restrictive conditions;
- perceived possible interference with witnesses is no longer considered a factor; or

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[16] See Criminal Procedure Code s 106(1).

- the charges against the accused have changed and reduced in seriousness.

These are just some possibilities.

The magistrate or judge can always indicate that they will entertain a fresh bail application if circumstances change.

There is some case law to support the proposition that if a bail application has been refused, a court will only entertain another bail application on the basis of new considerations or changed circumstances: *R v Nottingham Justices, Ex parte Davies*.[17] The main reason for such case law is to stop pointless applications that waste the time of courts.

In *Philip Suiga Kwaimani* Goldsborough J refers to the right to liberty, changed circumstances and delay as matters of relevance when considering a fresh bail application.[18] Discussing the relevant provisions set out in Part II of the *Constitution*, Goldsborough J states:

> Taken together these provisions mean that when a person has been remanded in custody for good reason, if the trial … is not to take place within a reasonable time, then, even so, the arrested person must be released.
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> It is difficult to imagine how the legislature could have impressed the importance of the right to liberty with any greater clarity. …
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> It also demonstrates, as has been demonstrated elsewhere, that the effluxion of time in itself can amount to a change in circumstances. This is relevant if it is determined that a repeated bail application should only be considered by the same court when there are fresh matters to be put before the court. This procedure was adopted in England and Wales in time past not through legislation but through case law. It came about through *R v Nottingham JJs Ex Parte Davies* (1981) QB 38. Nottingham magistrates decided that they would not hear the repeat of a bail application made the previous week, after the first and second weekly appearance, if there was nothing new to be said. This was a substantial departure from the norm, and quickly found its way to the High Court on review. In the High Court it was said that this practice was perfectly proper.
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> In that case the High Court reminded the magistrates' court that repeatedly inquiring into the same subject matter without any fresh circumstances was to be reviewing, almost allowing an appeal against, a matter already decided. That, the High Court said, was wrong as a matter of principle. It was not a question of interpreting the provisions of the legislation then in force, it was an old common law principle that was being abused.
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> That principle is equally applicable here. A magistrates' court should not hear a repetition of the same material it has previously heard in

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17 [1980] 2 All ER 775; [1981] QB 38; (1980) 71 Cr App R 178; [1980] 3 WLR 15.
18 [2005] SBHC 11, 4–6.

> circumstances where nothing has changed. The *Nottingham case* referred to that in different ways. 'A change in circumstances', 'fresh circumstances', 'matters not previously put before the court', 'new considerations' were phrases variously used by counsel in the proceedings and by the court. What the court said was that no court should … hear arguments as to fact or law which it has previously heard unless there has been such a change of circumstances as might have affected the earlier decision; to do otherwise would be to act in an appellate capacity. As can be said from that dictum, it applies to the same court, not to courts of different levels. Thus it would be not appropriate to apply it as between the High Court and the magistrates' court; it applies only to that court of first instance.
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> The bar referred to above might serve to limit the number of bail applications made in the magistrates' court over a period of time, but it does not serve to remove the jurisdiction of the High Court as outlined above.
> …
>
> Having determined that the magistrates' court should follow the principle set out in *Nottingham*, it should not be necessary to point out that the High Court will apply the same principle in dealing with bail applications in its jurisdiction.[19]

There is a right to seek bail in the High Court where it has been refused in the Magistrates' Court.

Bail Conditions

The *Criminal Procedure Code* governs the conditions that can be imposed by a court if bail is granted.

In *R v Perfili* Muria ACJ held:

> The common law presumption of innocence is embedded under the Constitution of Solomon Islands and it is done without qualification … Thus prima facie, an accused person is entitled to bail. However, the law also allows conditions to be put on the bail in order to secure the attendance of the accused at his trial. Once conditions are imposed on a bail granted, it is for the accused to show that those conditions do not apply to him and that he will attend at his trial.
> …
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> The object of imposing conditions on a bail is to secure the attendance of the accused at the trial. The onus is on the Accused to satisfy the Court that he will attend at the trial.[20]

Bail conditions that are commonly imposed by courts include:

- The requirement that the accused reside at a particular address;

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19 [2005] SBHC 11, 4–6.
20 [1992] SBHC 10, 3–4.

- Imposition of sureties;
- Imposition of cash bail;
- Surrender of a passport;
- Reporting condition to a police station;
- No contact with the complainant and/or other witnesses to be called by the prosecution; and
- No interference with the on-going police investigation.

In *R v Perfili*, commenting on the requirement for surrender of a passport, Muria CJ stated:

> It is not unusual that a foreigner charged with a criminal offence in a foreign country may very well find his passport or other travelling documents withheld to prevent him escaping criminal prosecution.
> …
>
> Apart from the other considerations raised by Counsel for the Court to take into account in exercising its discretion, the paramount consideration in such a case as the present where an accused is from a different country, is the question of securing the attendance of the accused at the trial. If the Court is not satisfied that the Accused will attend at the trial, then even if the other considerations are satisfied, the Court will not grant unconditional bail.
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> Sections 107 to 114 of the *Criminal Procedure Code* deal with conditions and sureties. When making a bail application it is important to determine whether sureties can be found. If sureties are available it is appropriate to advise the surety of the consequences they may confront if the accused does not adhere to the bail conditions. The usual approach in the High Court is to have an affidavit from any surety available when the application is made. It is also advisable to have any surety present in court so they can sign any recognisance and give evidence in court if required.[21]

The relevant provisions of the *Criminal Procedure Code*, sections 107 to 114, are extracted below.

> **Recognisance of bail**
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> **107.** Before any person is released on bail, the court or a police officer, as the case may be, shall take the recognisance of such person and of his surety or sureties, where such is or are required, conditioned for the appearance of such person at the time and place mentioned in the recognisance and such person shall continue so to attend until otherwise directed by the court or police officer as the case may be.
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> **Discharge from custody**
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> **108.** (1) As soon as the recognisance with or without sureties, as the case may be, has been entered into the person admitted to bail shall be released and when he is in prison the court admitting him to

[21] Ibid 2, 4.

bail shall issue an order of release to the officer in charge of the prison and such officer on receive [sic] of the order shall release him.

(2) Nothing in this section shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the recognisance was entered into.

Deposit instead of recognizance

109. When any person is required by any court or police officer to enter into a recognisance, with or without sureties, such court or police officer may, except in the case of a recognisance for good behaviour, permit him to deposit a sum of money to such amount as the court or police officer may fix in lieu of executing such a recognisance.

Power to order sufficient bail when that first taken is insufficient

110. If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the court may issue a warrant of arrest directing that person released on bail be brought before it and may order him to find sufficient sureties, and on his failing so to do may commit him to prison.

Discharge of sureties

111. (1) All or any of the sureties for the appearance and attendance of a person released on bail may at any time apply to a Magistrate to discharge the recognisance either wholly or so far as it relates to the applicant or applicants:

(2) On such application being made the Magistrate shall issue his warrant of arrest directing that the person so released on bail be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the recognisance to be discharged either wholly or so far as it relates to the applicant or applicants, and shall call upon such person to find other sufficient sureties, and if he fails to do so may commit him to prison.

Death of surety

112. Where a surety to a recognisance dies before the recognisance is forfeited, his estate shall be discharged from all liability in respect of the recognisance, but the party who gave the recognisance may be required to find a new surety.

Persons bound by recognisance absconding may be committed

113. If it is made to appear to any court, by information on oath, that any person bound by recognisance is about to leave Solomon Islands, the court may cause him to be arrested and may commit him to prison

until the trial, unless the court shall see fit to admit him to bail upon further recognisance.

Forfeiture of recognizance

114. (1) Whenever it is proved to the satisfaction of a court by which a recognisance under this Code has been taken, or when the recognisance is for appearance before a court to the satisfaction of such court, that such recognisance has been forfeited, the court shall record the grounds of such proof, and may call upon, any person bound by such recognisance to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the court may proceed to recover the same by issuing a warrant for the attachment and sale of the movable property belonging to such person, or his estate if he is dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the court which issued it; and it shall authorise the attachment and sale of the movable property belonging to such person without such limits, when endorsed by any Magistrate within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the court which issued the warrant, to imprisonment for a term not exceeding six months.

(5) The court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(6) When any person who has furnished security is convicted of an offence the commission of which constitutes a breach of the conditions of his recognisance, a certified copy of the judgment of the court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the court shall presume that such offence was committed by him unless the contrary is proved.

(7) Where a sum of money has been deposited in lieu of executing a bond conditioned for the appearance of a person before a court, such court, if such sum of money appears to the court to be forfeited, may make an order accordingly:

Provided that the court, upon application made within a period of fourteen days from the making of such order by or on behalf of the person who has deposited such sum of money, may in its discretion cancel or mitigate the forfeiture.

Appeal from and revision of orders

115. All orders passed under section 114 by any Magistrate shall be appealable to and may be revised by the High Court.

Power to direct levy of amount due on certain recognisance

116. The High Court may direct any Magistrate to levy the amount due on a recognisance to appear and attend at the High Court.

It is for the police officer or court granting bail to determine whether a surety is sufficient. Before accepting the obligations of providing a surety, it is usual practice for the police officer or court officer to ensure that the person acting as surety:

- Is advised about the exact nature of his or her obligations;
- Understands such obligations;
- Understands what action can be taken if such obligations are not met; and
- Is still prepared to undertake such obligations.

In the event that an accused does not appear in court, the difficulties that may be confronted by a person providing a surety are canvassed in *R v Inner London Crown Court; Ex parte Springall* by Pain J when he states:

> *Southampton Justices; Ex parte Green* [1976] QB 11 … is the authority showing that in considering whether there should be some mitigation of the recognizances which are to be estreated, the court may look at the conduct of the surety concerned, and we were referred to the passage at p.19F in the report when Lord Denning said this:
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> By what principles are the justices to be guided? They ought, I think, to consider to what extent the surety was at fault. If he or she connived at the disappearance of the accused man, or aided it or abetted it, it would be proper to forfeit the whole of the sum. If he or she was wanting in due diligence to secure his appearance, it might be proper to forfeit the whole or a substantial part of it, depending on the degree of fault. If he or she was guilty of no want of diligence and used every effort to secure the appearance of the accused man, it might be proper to remit it entirely.
> …
>
> The width of what Lord Denning said has perhaps been curtailed a little by what was said by the Master of the Rolls and Donaldson LJ in a case which is not reported, but is referred to in the judgment of McCullough J in *Uxbridge Justices; Ex parte Heward-Mills* [1983] 1 All ER 530, a judgment which contains a valuable collection of various authorities on the subject. At p 533E he refers to the judgment of Donaldson LJ in *Walthman Forest Justices; Ex parte Parfrey* noted in [1980] Crim LR 571, although Mc Cullough J was obviously quoting from a transcript of the judgment. The Master of the Rolls said this:

> The obligation entered into by someone who enters into a recognizance as a surety is a very serious obligation indeed. I hope that nothing I say today will suggest to the contrary. There is an obligation on a surety to be fully satisfied that he or she can meet the liability which will arise if the accused person does not surrender to his bail. This failure to surrender is not a theoretical possibility, though a surety may think it is. The unhappy event of arrested persons not surrendering happens frequently. There is a real risk. Indeed it is difficult to conceive of a set of circumstances in which a surety can be absolutely sure that the accused will surrender to his bail. So let no one think that this is an obligation which can be entered into lightly. Furthermore, the burden of satisfying a court that the full sum should not be forfeit is a very heavy one, so again let no one think that they can simply appear before the magistrates and tell some hard luck story, whereupon the magistrates will say, 'Well, be more careful in future'. We are not dealing with that character of obligation at all.[22]

> Then in reference to what Lord Denning said in *Ex parte Green*, Donaldson LJ said this:

> Lest this passage be misunderstood by justices, as I think it might well be misunderstood, let me stress the fact that Lord Denning said that, if there was no want of due diligence and every effort had been made to secure the appearance of the accused man, it might (not that it would necessarily, but it might) be proper to remit it entirely. For my part, I think that Lord Denning was contemplating a wholly extreme and exceptional case when he said that. I do not, for my part, believe that he ever intended to suggest that the mere fact that every effort to secure the appearance of the accused man had been made and that there was no want of due diligence involved the proposition that the amount of the obligation should be remitted entirely.[23]

Rules of Evidence and Procedure

Section 4 of the *Evidence Act* states that the *Act* applies to bail applications. Section 4 is in the following terms:

> **4.** (1) This Act applies to all proceedings in all courts, including proceedings that –
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> (a) relate to bail; or
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> (b) relate to any interlocutory proceedings or proceedings of a similar kind; or
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> (c) are heard in chambers.

In such proceedings the standard of proof is on the balance of probabilities, as indicated by section 12 of the *Evidence Act*. That section states:

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22 (1987) 85 Cr App R 214, 218, 219.

23 Ibid; see also: *R v Tottenham Magistrates' Court, Ex parte Riccardi* (1978) 66 Cr App R 150; *R v Wells Street Magistrates' Courts; Ex parte Albanese* [1981] 3 All ER 769; [1981] 3 WLR 694; (1982) 74 Cr App R 180; [1981] Crim LR 771.

> **12.** (1) In a criminal proceeding the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.
>
> (2) In a criminal proceeding where the onus of proof is on the accused, the court is to find the case of an accused proved if it is satisfied that the case has been proved on the balance of probabilities.
>
> (3) Subsection (1) does not apply to proceedings relating to sentencing, bail, amnesty or where the standard of proof is set out in any other written law.

The onus is on the prosecution to satisfy the court on the 'balance of probabilities' that a defendant should not be granted bail.

In many common law jurisdictions the rules of evidence do not apply to bail applications. The *Evidence Act* introduces a degree of formality that did not previously exist. The *Evidence Act* applies to Magistrates' Court proceedings in the same ways that it applies to High Court proceedings. With this in mind, the defence can require the prosecution to bring evidence to court for testing in the usual adversarial manner to assist a magistrate or judge to determine bail. While it has always been open for a judge or magistrate to seek further and better evidence from the prosecution or defence, there is now legislation to assist the parties in making such procedural applications.

Alternatively, if the procedures are becoming overly formal and therefore oppressive, section 9 of the *Evidence Act* may provide relief by allowing the court, with the consent of the parties, to waive the rules of evidence. Section 9 states:

> **9.** A court may, at any stage of proceedings, if it is in the interest of justice to do so or with the consent of the parties, by order dispense with the application of any one or more of the provisions of this Act in relation to particular evidence or generally.

It is sometimes suggested that because bail applications 'are often made immediately after a person has been arrested and before there has been any time for prosecuting authorities to prepare a full brief of evidence or for defence counsel to marshal evidence in reply', decisions must be made 'on the basis of hearsay accounts of perhaps dubious reliability'.[24]

This justification has some merit but it should be remembered that police, prosecutors, and judicial officers are ultimately responsible for gathering and providing reliable evidence. Despite this responsibility, as a

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[24] ACT Law Reform Commission, Report on the Laws Relating to Bail,Report No 19, Canberra, July 2001, [10]; available online at http://www.austlii.edu.au/au/other/actlrc/reports/19.html (retrieved 12 July 2011).

consequence of insufficient time prior to bail hearing, police 'facts' often comprise the only evidence before the court.

One argument that often arises is that an accused needs to be kept in custody because the police have not completed their investigations. This is not a justifiable reason for refusing bail, as Ward CJ noted in *Hou v Attorney-General*.[25] In that case, Ward CJ stated:

> The grounds given were that the police still needed to interview witnesses and that the property had not been recovered. The first ground means nothing. Why should the fact they still have to interview witnesses require a suspect being kept in custody? If it is claimed he may interfere with those witnesses, that would be a different matter but, in such a case, the magistrate should seek details of the basis of such belief.[26]

In cases where the presumption is against bail (as is sometimes claimed by the prosecution in the case of murder), the excuse that there has been insufficient time to prepare a brief of evidence should be given little weight. This is because the arrest and detention should have been based upon evidence already gathered. In many cases an alleged offender is arrested after the collection and recording of substantial, if not all, prosecution evidence.

Conference with Accused for the Purpose of Obtaining Bail
The following information should, as a minimum requirement, be obtained from the client.

1. Name and address.
2. Place of residence upon being granted bail. This may be a matter of concern where the alleged offence was, for example, committed against a family member and it is considered inappropriate to return to the residence.
3. Employment status. If the accused is employed and would not be prejudiced by revealing to the employer that he or she has been arrested the employer could be of considerable assistance by supplying a reference, attending court or both.
4. Family situation.
5. Community ties – for example, any positions of responsibility held, any services rendered on an ongoing basis to the community outside of employment obligations.
6. Prior criminal record. The obligation is on the prosecution to supply this record. When supplied it should be check for accuracy with the accused.
7. Any previous failure to appear in court pursuant to bail undertakings.
8. Details of any person(s) who may be able to provide a surety.
9. Details of any person(s) who may be able to provide character reference(s).

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25 [1990] SILR 88; [1990] SBHC 77.
26 [1990] SILR 88; [1990] SBHC 77.

10. Willingness to comply with reporting conditions. This often involves reporting to the police station nearest to the place of residence more than once a week. Care should be taken, as far as possible; to arrange such reporting conditions to fit in with other obligations such as employment.

It may be advisable to adjourn a bail application, even if it is before a magistrate, if the practitioner is unable to obtain sufficient detail to present a cogent application.

The suggested areas of questioning at interview with the client are not designed to be definitive. They provide a reasonable guide, but each case is different and may require additional questions.

Making an Application for Bail
If the application for bail is being made in the Magistrates' Court there are no initiating forms or affidavits that need to be filed, unless specifically requested by the presiding magistrate. If the application is being made in the High Court then there is a standard initiating application.

The usual practice is for the accused to file an affidavit with the application listing personal details and any cogent reasons why bail should be granted. Affidavits also form part of standard High Court initiating applications. The affidavits of applicants and sureties can be filed in court, although it is preferable to file and serve such documents before the hearing. Character references can also be useful. If an affidavit has not been filed, the evidence can still be taken by the court in the usual way. Apart from relevant affidavits it is the practice in the Solomon Islands to prepare written submissions outlining the reasons why bail should be granted, or in the case of the prosecution if bail is opposed, refused.

Children and Bail
Special circumstances surround the grant of bail to children. Where the accused is a child, the relevant provisions of the *Juvenile Offenders Act* [Cap 14] must be considered. These provisions are discussed in more detail below.

Section 5 states:

> **5.** Where a person apparently under the age of eighteen years is apprehended, with or without warrant, and cannot be brought forthwith before a juvenile court, a police officer of or above the rank of Inspector, or the officer in charge of a police station to which such person is brought, shall forthwith enquire into the case, and –
>
> (a) unless the case concerns a grave crime; or
>
> (b) unless it is necessary in the interests of such person to remove him from association with any undesirable person; or

> (c) unless the officer has reason to believe that the release of such person would defeat the ends of justice,
>
> shall release such person on a recognisance, with or without sureties, for such amount as will, in the opinion of the officer, secure the attendance of such person upon the hearing of the charge, such recognisance being entered into by him or by his parent or guardian or other responsible person.

This section requires that the police release a juvenile unless it is alleged that a grave crime has been committed, release would not be in the best interests of the juvenile, or release would defeat the ends of justice.

The term 'Grave Crime' is defined in section 2 of the *Juvenile Offenders Act* as 'any crime specified in the Schedule, and the Minister may from time to time by order amend the Schedule'.

As outlined in the Schedule, the following are 'Grave Crimes' for the purpose of the *Juvenile Offenders Act*:

- Murder;
- Attempted Murder;
- Manslaughter;
- Unlawful Wounding;
- Unlawful Poisoning; and
- Causing Grievous Harm.

Section 6 states:

> **6.** Where a person apparently under the age of eighteen years having been apprehended is not released as aforesaid, the officer in charge of the police station to which such person is brought shall cause him to be detained in a place of detention until he can be brought before a juvenile court unless the officer certifies –
>
> (a) that it is not practicable to do so; or
>
> (b) that he is of so unruly or depraved a character that he cannot be safely so detained;
>
> (c) that by reason of his state of health or his mental or bodily condition it is inadvisable so to detain him,
>
> and the certificate shall be produced to the court before which the person is brought.

A 'place of detention' is defined in section 2 of the *Juvenile Offenders Act* as 'a place of detention provided for or appointed by the Minister under section 17'.

At the time of writing, no such place has been appointed by the Minister. People apparently under the age of eighteen years should therefore be held in custody in a watch house and segregated from adult offenders. In all circumstances the juvenile's parent or guardian should be advised.

The *Juvenile Offenders Act* contains additional requirements where the accused is a 'child' or a 'young person'. Section 7 states:

> **7.** It shall be the duty of the Commissioner of Police or other person having custody of a child or young person being detained to make arrangements for preventing so far as practicable such child or young person while being detained, from associating with any other person not being a child or young person, other than a relative or guardian, charged with an offence.

Section 8 states:

> **8.** (1) A court on remanding or committing for trial a child or young person who is not released on bail shall, instead of committing him to prison, commit him to custody in a place of detention, or to the care or custody of any person, named in the commitment, to be detained or cared for, as the case may be, for the period during which he is remanded or until he is thence delivered in due course of law:
>
> Provided that in the case of a young person it shall not be obligatory on the court so to commit him if the court certifies that he is of so unruly a character that he cannot be safely so committed, or that he is of so depraved a character that he is not a fit person to be so detained or cared for.
>
> (2) A commitment under this section may be varied, or, in the case of a young person who proves to be of so unruly a character that he cannot be safely detained in such custody, or cared for, as the case may be, or to be so depraved a character that he is not a fit person to be so detained, or cared for, revoked by any court, and if it is revoked the young person may be committed to prison.'

Under section 2 of that *Juvenile Offenders Act*, the term: 'child' is defined as 'a person who is, in the opinion of the court having cognisance of any case in relation to such person, under the age of fourteen years'. A 'young person' is defined as 'a person who is, in the opinion of the court having cognisance of any case in relation to such person, fourteen years of age or upwards and under the age of eighteen years'.

Under section 4(4) of the *Juvenile Offenders Act*, all juvenile court hearings, including bail applications, are to be held in a closed court.

Murder and Treason

Section 23 of the *Criminal Procedure Code* governs bail where charges of murder and treason are involved.

If a charge of murder or treason is laid, bail may only be granted by the High Court: section 106(1) and (3). However, those charged with murder or treason must also be brought before a Magistrates' Court as soon as practicable, as Daly CJ noted in *R v Baefaka*.[27]

In *Taisia v Director of Public Prosecutions*, Kabui J emphasised that the court has a discretion to grant or refuse bail. Kabui J stated that:

> The Court has a discretion to grant bail or not to grant bail. This means that granting bail is not automatic on its own. The exercise of the discretion of the Court therefore depends upon the facts of each case before the Court in view of the principles governing bail applications in murder cases such as this case. In the first place, a person who is detained by Police in connection with the offence of treason or murder cannot be released by the Police but must be brought to the Magistrate Court as soon as is reasonably possible. This is done under section 23 of the *Criminal Procedure Code Act*. The reason for non-release of a person held by the Police in connection with treason or murder is that such offences are serious offences. In such cases, bail can only be granted by the High Court. The test to be applied is whether or not it is probable that the accused will appear in Court at the trial date.[28]

In *R v Khong Ming Khoo*, Ward CJ found that bail would only be granted for an accused charged with murder or treason in exceptional cases, stating:

> … section 106 makes it clear, when the charge is murder or treason, it is only exceptionally that bail is granted. Mr Young seeks to distinguish between good reason, special circumstances and exceptional circumstances. I am afraid I do not feel such distinctions apply in this case. The effect of Section 106 is that bail in murder cases will only be granted in exceptional circumstances. However, whilst that places a heavier burden on the defence, the same considerations apply as in any bail application. The court must consider them all but bear in mind that the effect of section 106 in a case involving a charge of murder or treason means it is only in rare cases that bail will be granted.[29]

In *R v Dickson Maeni* Palmer J stated:

> It is correct that bail applications in murder charges are rarely given by this Court. It is because the nature of the charge and the severity of the punishment are very serious. But that does not mean that bail will not be considered or given.[30]

In New South Wales, 'exceptional circumstances' must also be made out for a court to grant bail in cases involving murder or repeated serious violent offences. When New South Wales introduced a section to the *Bail*

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27 [1983] SILR 26, 29; [1983] SBHC 9.
28 [2001] SBHC 73.
29 [1991] SBHC 24.
30 [1999] SBHC 46.

Act 1978 (NSW) that addressed exceptional circumstances, the Minister for Justice stated in the Second Reading Speech of the amendments:

> Exceptional circumstances will be left to the court to decide on an individual case-by-case basis. However, as a general guide it might include cases including a battered wife, or a strong self-defence case or a weak prosecution case. It might also include a case in which the defendant is in urgent need of medical attention or who has an intellectual disability, or a case in which the court is satisfied that the offender poses no threat to the victim or the community.[31]

Apart from this general comment, the question of what is exceptional remains to be determined by the judicial officer considering the individual case.

In *Kwaiga v Reginam* Palmer CJ acknowledged the cases of *Khoo* and *Maeni* but placed greater emphasis on liberty, the presumption of innocence and risk assessment when determining bail in murder cases.[32] Chief Justice Palmer stated:

> In murder cases while bail may only be granted by the High Court it is important to bear in mind this presumption of innocence and presumption of liberty reflected in a prima facie right of an accused to bail; this must always be the starting point in any bail applications. The burden of proof however still lies with the Prosecution to show that on the balance of probabilities an accused should not be granted bail. Notwithstanding what was said by this court in *Regina v Kong Ming Khoo* and *Regina v Dickson Maeni* that bail will only be granted in exceptional circumstances or rarely given, the court is obliged to carefully consider each application for bail on its merits. It is important to appreciate that simply because an accused has been charged with the offence of murder it does not necessarily follow that he should be denied bail. The presumption of innocence and liberty do not permit such presumption to be made.
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> In considering bail, the court is involved in a risk assessment. This entails assessing how much risk society should bear on one hand by granting bail and how much the accused should bear on the other by being remanded in custody or on conditional bail. If the risks are high such that society should not be exposed to that risk, then bail normally would be refused and the accused made to bear that risk by having his presumption of innocence and liberty curtailed even in the absence of a lawful conviction in a court of law.
>
> This risk assessment however is not as easy as it sounds because it entails a prediction of future behaviour, requiring the balancing of and measurement of what the defendant is likely to do in the future; which cannot be 100% accurate. Further much of that prediction is measured by what had happened in the past, which can be quite unreliable and

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31 Second Reading Speech, Bail Amendment Bill 2003 (NSW), Legislative Council, 24 June 2003 (John Hatzistergos, Minister for Justice); available online at the website of the New South Wales Parliament (retrieved 19 July 2011).

32 [2004] SBHC 93.

> prejudicial against the accused. In many instances as well, much of what is relied on by the prosecution is based on his interpretation of what the police had said had happened. It is important therefore that the courts do not lose sight of the purpose and requirements of bail and what it entails. It is not what the police say which dictates whether bail should or should not be granted. It is the balancing of the risk assessment by the Court after hearing both sides which determines at the end of the day which way the discretion of the court will fall. (References omitted.)

Bail after Conviction

Section 290 of the *Criminal Procedure Code* gives authority to the High Court, or the court that convicted the appellant, to grant bail pending an appeal. Section 290 states:

> **Admission to bail or suspension of sentence pending appeal**
>
> **290.** (1) Where a convited person presents or declares his intention of presenting a petition of appeal, the High Court or the court which convicted such person may, if the circumstances of the case it thinks fit, order that he be released on bail, with or without sureties, or if such person is not released on bail shall, at the request of such person, order that the execution of the sentence or order against which the appeal is pending be suspended pending the determination of the appeal. If such order be made before the petition of appeal is presented and no petition is presented within the time allowed the order for bail or suspension shall forthwith be cancelled.
>
> (2) Where the appellant is released on bail or the sentence is suspended, the time during which he is at large after being so released or during which the sentence has been suspended shall he [sic] excluded in computing the term of any sentence to which he is for the time being subject.
>
> (3) An appellant whose sentence is suspended but who is not admitted to bail shall during the period of such suspension be treated in like manner as a prisoner awaiting trial.

Bail pending appeal from a conviction or sentence in the Magistrates' Court should be regarded as a rule rather than an exception. This is because there is usually a long delay before the appeal is heard in the High Court, and a sentence may have been served before the appeal is heard.

Some of the principles that underlie the general refusal of bail following a conviction in the High Court are set out in *Tamana v Regina* by Muria CJ. He states:

> It must be pointed out … that the principles to be considered in an application for bail after conviction cannot be treated as the same as those in an application for bail before conviction. The presumption of innocence which is a guiding legal principle in criminal cases no longer exist after a person has been found guilty by a competent court. By the same note, the right of appeal does not revive that pre-conviction presumption of

> innocence. It will therefore be a case of exceptional circumstances which will justify the court in granting bail to a person who has been found guilty and convicted.[33]

The principle that a grant of bail following a conviction is the exception rather than the rule was followed by Palmer CJ in *Ha'arai v Regina*,[34] when he stated:

> It is very rare for bail to be granted pending hearing of an appeal especially where a conviction has been entered after a guilty plea. I made this very clear at the bail hearing itself. Unless it can be shown there is a manifest error on the face of the record which would have warranted the intervention of this court or that sentence is manifestly excessive on its face, no reasonable tribunal would allow bail more so where the substantive appeal is already listed for hearing in a couple of weeks time and it hasn't been shown that no real prejudice will occur in so far as the rights of this Applicant are concerned.[35]

Applying for Bail Pending an Appeal to the Court of Appeal

When applying for bail pending an appeal to the Court of Appeal, the procedures differ from other types of bail applications. The procedure is governed by the *Court of Appeal Rules* and the attached forms.

In summary, the following steps must be completed:

1. The appeal needs to be lodged within 30 days of the date of the judgment being appealed.
2. Pursuant to rule 32, 'Form 1' needs to be completed and filed with the Registrar of the High Court.
3. The decision on whether bail is granted will then be decided by a single judge 'on the papers'.
4. If the decision is to refuse bail the Registrar needs to write to the applicant notifying the refusal and also send with such notification 'Form G'.
5. The applicant then needs to file 'Form G' within 14 days of receiving the refusal notification.
6. The filing of Form G by the applicant is effectively a renewal of application for bail.
7. The renewal application is heard by the full court of the Court of Appeal.

Rule 32 contains much of what is in summary form above. It states:

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33 [1995] SBHC 41.

34 [2005] SBHC 32.

35 See also *R v Garnham* (1910) 4 Cr App R 150; *R v Wise* (1922) 16 Cr App R 17; *R v Fitzgerald* (1923) 17 Cr App R 147.

Application in ancillary matters

32. (1) An applicant –

(a) for extension of time in which to appeal or apply for leave;

(b) for assignment of legal aid;

(c) to allow to be present at proceedings where leave of such is required;

(d) for admission to bail pending appeal,

shall apply in Form 1 filed with the Registrar.

(2) An application made under this rule shall be forwarded by the Registrar to a single judge and the application shall be determined by him on the papers and he shall inform the Registrar of his decision who shall notify the application in writing and with a notification of refusal the Registrar shall forward to the applicant form G.

(3) If the single judge refuses the applicant may renew his application to the full court by filing notice in Form G within 14 days of the receipt by him of the notification under paragraph (2) and thereupon the application shall be listed for such determination.

Rule 33 requires an appellant granted bail to attend every hearing day. If the appellant does not attend, the appeal can be dismissed and a warrant of arrest issued, or the appeal can be heard in the absence of the appellant. Rule 33 states:

Presence of appellant granted bail

33. (1) An appellant who is granted bail shall be present in Court at each and every hearing of his appeal and upon the final determination thereof.

(2) Where an appellant who is granted bail does not comply with paragraph (1), the Court may decline to consider the appeal and may proceed summarily to dismiss the same and may issue a warrant for the arrest of the appellant:

Provided that the court may consider the appeal in his absence and make such order as they think right.

The fundamental principles concerning liberty and the presumption of innocence apply up to the time of conviction. Practitioners should remain alert to the changed circumstances of an accused and be aware that bail can be applied for throughout the trial process.