

THE LEGAL BASIS OF THE RIGHT TO BAIL

The right to bail is an important factor in the study of the complicated process beginning with the etymology and ending with the treatment of the offender. It is not only at times crucial in allowing an accused to prepare a better defence, but it also affects his whole attitude to society and its approach to criminal justice as well as his approach to those who enforce it, for long stretches of time spent in needless incarceration can lead to contempt of the criminal law, as well as contact with those in whom the criminal pattern of behaviour is well entrenched. To quote the Report of the Canadian Committee on Corrections¹ at page 101:

"Many of the institutions used to house those awaiting trial are old and poorly equipped. Sanitation and living conditions are primitive. Segregation is difficult, and security provisions designed to meet the requirements of the most difficult inmates must apply to all. This means that security in these institutions often exceeds that in institutions housing the convicted. Little is available in the way of program. Problems of segregation and classification make even work or recreational programs difficult to organize. Incarceration under such conditions can lead to confusion and resentment on the part of the accused. . . . Because segregation is difficult, the young and susceptible inmate is thrown into contact with sophisticated and hardened criminals. The period immediately following his first arrest is a crucial one for the first offender. If he is unwisely dealt with, he may come to see society as an enemy and to assume that his future lies with the criminal element. If he is released while awaiting trial he may continue his positive family and social relationships; if he is held in jail he will more readily identify himself with the criminal element. This negative self-identification is fostered if the jail is old and dilapidated and he is thrown into contact with confirmed criminals, but it can occur even in the most modern building . . .

Incarceration prior to trial may cause the accused to lose his job and thus make it impossible for him to fulfill his family and other obligations. Even if he does not lose his job, the loss of income during the period in jail may have similar effects. This in turn may weaken his family and social relationships. Also, the period in jail may leave a stigma even if he is eventually found innocent. This kind of social dislocation may strengthen his belief that there is no place for him in the normal community."

The Report continues at page 102:

"There is some statistical evidence in support of the conclusion that the fact that the defendant has been held in custody pending trial militates against his chances of acquittal. The release of the accused on bail may enable him to render assistance in locating witnesses and permit greater consultation with his counsel."

The right to bail achieved recognition by the common law of England as early as the thirteenth century. Indeed it soon came to be that bail was allowed in almost all cases except homicide, escape from prison, and in the case of "open and notorious thieves".²

It should not be assumed, however, that this right arose from the innate sense of justice involved in granting bail to those not yet convicted. This factor was to develop with time, at least theoretically. In the early

1. Ottawa, Queen's Printer, 1969.

2. P. K. McWilliams, "The Law of Bail"; (1966-67) 9 G. L.Q. 21, 22.

period of the common law, however, more practical considerations determined the birth of the system of bail, for the inadequate jails and the inability of the state through the local sheriff to feed the prisoners, and the considerable delays involved in bringing prisoners to trial meant that many of them died before their trials.³ In 1848 the Indictable Offences Act⁴ was passed which laid down the law of bail in a comprehensive fashion. It substantially represents the law in Canada and Great Britain today.

It cannot be said with precision when bail as a feature of the criminal process became a "right". It is certain that this transition from necessity and mere pragmatism came to pass by the nineteenth century at least. Quoting Lord Russell, C.J., in *Regina v. Spilsbury*:⁵

"This inherent power to admit to bail is historical and has long been exercised by the Court, and if the Legislature had meant to curtail . . . this well-known power, their intention would have been carried out by express enactment."

The Chief Justice then referred to *Short and Mellor's Crown Office Practice*, page 374:

"(it was) the assumption, based probably on Magna Charta, and enacted in the Habeas Corpus Act (31 Car. 2, c.2) that persons charged with any crime, unless treason or felony, are entitled to bail as a matter of right on finding sufficient sureties."

Later cases reasserted the proposition that in the case of misdemeanours, bail was a matter of right while with respect to felonies it was discretionary. The dichotomy prevailed in Canada until 1869, when the granting of bail was made discretionary with respect to misdemeanours as well.⁶ The universality of discretion in bail has been maintained by the Criminal Code, which, in sections 451, 463, 465, and 710 (2) has used the word "may" to indicate that bail is discretionary in regard to both indictable and summary conviction offences.

The situation in Canada today, therefore, with respect to the "right" to bail, is that the cases clearly recognize the desirability of easily obtaining bail while the Criminal Code lays down the conditions under which it is obtainable. It is, therefore, only a "near-right" or "quasi-right" in that it is subject to the discretion of the magistrate, justice or judge, and to the restrictions imposed by the Code.

Assuming that the recent, and as yet unreported, *Drybones Case* does indeed serve to prevent further Federal legislation from infringing upon the tenets of the Bill of Rights, it is also submitted that Section 2(f)

3. R. Salhany, *Canadian Criminal Procedure* (Toronto: Canada Law Book Company, 1968), 46.

4. 11 and 12 Vict., c. 42.

5. [1898] 2 Q.B. 615 at 622.

6. 32-3 Vict., c. 42.

of the Canadian Bill of Rights does not change the position of bail as a "near right" only. This Section states that:

"2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge, or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to:

(f) deprive a person charged with a criminal offence . . . of the right to reasonable bail without just cause."

Nothing in this section militates against the judge's clear discretion to refuse bail where he thinks it advisable to do so, and "the Bill of Rights will not likely affect this since there is the 'just cause' qualification to the right to reasonable bail".⁷

This position is very different from that prevailing in the United States where the federal law and most of the laws of the States have clearly provided that a person arrested for a non-capital offence shall be admitted to bail. The only method of denying bail in the United States, therefore, would appear to be to set it too high for the particular accused to possibly meet it. At this point, however, the right to bail then receives the support of the Eighth Amendment to the Constitution which states that excessive bail shall not be required. It should be mentioned, though, that in view of the very high rate of crimes committed while the accused was released on bail, it is likely that the near future will see a change in the American position in this area.

What is the present state of the law in Canada with respect to bail? Its basic delineation is provided by the Criminal Code, wherein certain sections regulate bail with respect to indictable offences, while others regulate bail for summary conviction offences. In regards to indictable offences, Section 451 and 465 govern bail before committal for trial by a preliminary inquiry.

Section 451 (a) states *inter alia* that:

"A justice acting under this Part (Preliminary Inquiry) may:

(a) order that an accused, at any time before he has been committed for trial, be admitted to bail

(i) upon the accused entering into a recognizance in Form 28 before him or any other justice, with sufficient sureties in such amount as he or that justice directs, or

(ii) upon the accused entering into a recognizance in Form 28 before him or any other justice and depositing an amount that he or that justice directs, or

(iii) upon the accused entering into his own recognizance in Form 28 before him or any other justice in such amount as he or that justice directs without any deposit;"

Section 463 regulates bail for indictable offences after committal for trial. It states:

"(1) The following provisions with respect to bail apply where an accused has been committed for trial, namely,

(a) where an accused is charged with an offence other than an offence punishable by death, an offence under sections 50 to 53, or non-capital murder, he may apply to a judge of a county or district court, or a magistrate as defined in Section 466, who has jurisdiction in the territorial division in which the accused was committed for trial or is confined; and

(b) where an accused is charged with any offence, or where bail has been refused by a judge of a county or district court, or by a magistrate, he may apply to a judge of, or a judge presiding in, a superior court of criminal jurisdiction for the province.

(2) Where an accused makes an application under sub-section (1) he shall give notice thereof to the prosecutor.

(3) The judge or magistrate may, upon production of any material that he considers necessary upon the application, order that the accused be admitted to bail . . .".

In addition to the above Sections, there are two sections which apply both *before* and *after* the accused has been committed for trial. Section 464 states that:

"Notwithstanding anything in this Act, no court, judge, justice or magistrate, other than a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which an accused is charged with an offence punishable by death, an offence under Sections 50 to 53 or non-capital murder may admit that accused to bail before or after committal for trial."

Section 465 enunciates as follows:

"(1) A judge of, or a judge presiding in, a superior court of criminal jurisdiction may, upon application,

(a) before an accused is committed for trial,

(i) admit the accused to bail if a justice has no power to grant bail or if bail has been refused by a justice, or

(ii) vary the amount of bail fixed by a justice, or

(b) where an accused is committed for trial, vary an order for bail fixed under subsection (3) of section 463 by a judge of a county or district court or a magistrate.

(2) No application shall be made by way of habeas corpus for the purpose of fixing, reviewing or varying bail."

Section 710 (2) regulates bail in regards to summary conviction offences. It states, *inter alia*:

(2) Where the summary conviction court adjourns a trial it may

(c) discharge the defendant upon his own recognizance in Form 28,

(i) with or without sureties, or

(ii) upon depositing such sum of money as the court directs, conditioned for his appearance at the time and place fixed for resumption of the trial."

It is obvious from the above sections that a justice of the peace or a

magistrate has the absolute discretion to admit to bail any accused charged with an offence other than one punishable by death, an offence under sections 50 to 53, or non-capital murder. Moreover, a judge of a superior court of criminal jurisdiction has a similar discretion in addition to the absolute power to grant bail in those circumstances which preclude a justice of the peace or a magistrate from granting bail. In addition, the latter has the discretion to vary the amount of bail fixed by a justice before committal, or by a judge of a county or district court or a magistrate after committal for trial.

We must now seek to define the limits and the basis of this discretion. What are the guiding principles? To begin with, judicial discretion is never unfettered. Rather, it is, as Lord Blackburn stated:

“. . . not to be exercised according to the fancy of whoever is to exercise the jurisdiction . . . , but is a discretion to be exercised according to the rules which have been established by a long series of decisions.”⁸

A similar attitude was evidenced by Lord Mansfield in *R. v. Wilkes*,⁹ wherein he stated that “discretion, when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, but legal and regular”.

It is authorities such as these which substantiate the contention that though bail is not a matter of absolute right, it can at least claim the qualities of a qualified or near-right.

What are the factors which have regulated the use of this discretion? The question which all judges must ask themselves in deciding whether to grant bail or not is whether the accused will appear at his trial. This is now firmly established in Canada. Authority for this proposition is provided by *Rodway and Okipnik v. The Queen*¹⁰ wherein Monnin, J., of the Manitoba Queen’s Bench stated:

“The basic test in an application for bail before conviction is whether or not the accused will appear for trial. . .”

There is the further case of *Regina v. Wing*¹¹ wherein Sargent, Co. Ct. J., stated:

“The granting of bail is discretionary and fundamentally is based upon the likelihood of the prisoner appearing for trial. . .”

The factors to be taken into account in determining whether the accused will appear at his trial have also been the subject of judicial consideration. Perhaps the leading case in this area, and certainly the most oft-quoted

8. *Doherty v. Allman* (1878) 3 A.C. 709 at 728.

9. (1770) 4 Burr. 2527 at 2539.

10. (1965) 44 C.R. 327 at 328.

11. [1964] 3 C.C.C. 102 at 103.

one is that of *Re: John's Bail Application*.¹² In this decision of the Saskatchewan Queen's Bench, McKerchen, J., quoted with approval G. Armour:

" . . . The proper test of whether bail should be granted or refused is whether it is probable that the accused will appear to take his trial. The test should be applied to the facts of each case by reference to the following considerations: — The nature of the accusation; the nature of the evidence in support of the charge, that is, whether the evidence for the Crown is slight or conclusive; the severity of the punishment which will follow upon conviction; whether the sureties are independent or indemnified; the speed or otherwise with which the prosecution is being conducted; the character of the accused; and the ties which are likely to bind him to remain in the county and stand his trial."

Monnin, J., in *Rodway and Okipnik v. The Queen, supra*, also provided a succinct guide for determining whether the accused will appear for his trial:

"The matter is entirely discretionary and the following points may be scrutinized:

1. The nature of the charge.
2. When depositions at the preliminary hearing are available, the nature of the evidence in support of the charge.
3. The severity of the offence.
4. The severity of punishment which can follow conviction.
5. The adequacy of the proposed sureties.
6. The character of the accused and his position or status in the community.
7. The accused's previous criminal record, if any.
2. Whether the alleged offence was committed while the accused was already on bail."

Both of these cases have been followed throughout Canada, and can, it is submitted, with but one reservation, be taken to be an authentic statement of the law in Canada. This reservation centres around the fact that no mention is made of the role of the public interest in granting or refusing bail.

It has been held that where the accused is afflicted with venereal disease, bail should be refused in the public interest.¹³ It has also been held that a very high probability of interference with witnesses is a ground for refusing bail in the public interest. This was the case of *Regina v. Black*,¹⁴ a decision of the British Columbia Supreme Court. In that case bail was refused because it was felt that there was a real risk that the accused would interfere with the holding of his trial by intimidating, either himself, or in association with others, witnesses whom the Crown intended to call. Macdonald, J., stated that the protection of the public calls for a proper trial in which

12. (1958) 122 C.C.C. 144.

13. *Regina v. N.* (1945) 87 C.C.C. 377.

14. [1969] 1 C.C.C. 82.

the witnesses whom the Crown intends to call will come forward and freely give their evidence. He further stated at page 84 of the decision:

"But the factor of the probability of the accused attending for trial is not the only one that may be considered. I respectfully adopt the words of my brother Seaton in *R. v. Binns* (1968) 2 C.C.C. 323 at pp. 326-327,:

'*Re Johnson's Bail Application* (1958) 122 C.C.C. 144, may suggest that the endangering of the public peace is not a factor to be taken into account. This has not been the attitude of the later Saskatchewan cases and in view of the observations of our Court of Appeal in *R. v. Wing* (unreported), I would decline to follow that reasoning. *R. v. Henderson* (1963) 45 W.W.R. 55, seems to suggest that once the Court is satisfied that the accused will probably appear for trial, bail should be granted without considering whether or not the public is thereby endangered. I cannot concur with that reasoning.'

Moreover, we have the general proposition enunciated in *Rodway and Okipnik v. The Queen*, *supra*, wherein Monnin, J., of the Manitoba Queen's Bench stated at page 329:

"Bail is not punitive but to secure the attendance of the accused at trial. Yet courts must be concerned with the protection of the general public as well as the rights of the individual."

With these statements, no one can quarrel. The real issue, however, centres around the more common situation of the lengthy record of a type which indicates a likelihood of further offences. Can this likelihood be said to be against the public interest and hence a test to be applied in deciding whether to grant bail or not? It is clearly so in England.¹⁵ One of the prices of a federal system, however, is the inconsistency of decisions which can result on the part of the various provincial courts. Such is the case here. Courts in British Columbia, Saskatchewan and Quebec have ascribed to the principle that the likelihood of commission of further offences is a valid reason for denying bail. This test, which may be called prevention, is then placed alongside with securing attendance at trial as the criteria for granting bail. To quote Ouimet, J., of the Quebec Queen's Bench (Crown Side) in *Regina v. Travers and McGuire*:¹⁶

"The principles established by the courts as to the granting of bail rest principally on . . . : (inter alia)

(d) The fact that it is probable that the accused, if set at liberty, will continue to lead a criminal life or commit further crimes:

(e) The criminal record of the accused . . . :".

The case most often quoted in support of this contention is that of *Regina v. McKinney*,¹⁷ a decision of the Saskatchewan Queen's Bench. In that case, Disbery, J., stated:

"It is reasonable to assume that, as a general rule, only hardened criminals would be sufficiently defiant of the law to dare to commit further offences while at liberty on bail awaiting their trial for other offences. Such persons,

15. *R. v. Phillips* (1947) 32 Cr. App. R. 47.

16. (1964) 42 C.R. 32 at 38.

17. (1963) 40 C.R. 137 at 139.

particularly if they reasonably anticipated being convicted, might well come to the conclusion that if they carried out further burglaries while on bail, not only might they possibly escape detection but even if detected and convicted they might receive sentences to be served concurrently, with the result that they might well suffer little, if any, additional punishment for such further offences."

The principle has been rejected in Newfoundland and Alberta. In *Regina v. Henderson*,¹⁸ Primrose, J., of the Alberta Supreme Court rejected the *McKinney case*, *supra*, and refused to deny bail on the principle of prevention:

"Although there is always a possibility that a further offence will be committed by a person admitted to bail awaiting trial, this is not the *ratio decidendi*. Except in unusual circumstances and capital cases in this province bail is generally, and, in my view, should be granted. The proper test on which judicial discretion is based in such a case is whether the person charged will probably appear for his trial, and if the answer is in the affirmative bail should be granted."

The Newfoundland Supreme Court, in the person of Winter, J., rejected the principle using similar language. This involved the case of *Regina v. Samuelson*,¹⁹ where the above judge stated that:

"If, however, the probability that another similar crime may be committed if bail is allowed is taken into account, not only is the test completely altered but a new power is given into certain hands which can easily, perhaps unwittingly, be abused."

The author submits that the better view of the law is that there are certain cases wherein the public interest is sufficiently threatened to warrant a denial of bail. This would serve to place prevention on the list of the principles of bail. This statement cannot be allowed to stand unqualified, however, for the court would have no justification whatever for denying bail unless it was overwhelmingly convinced of the accused's guilt. The presumption of innocence is not a sham, and, with respect to bail, constitutes the basis of the individual's rights. The court must seek to balance the public interest and the rights of the individual. It is justified in tipping the balance in favour of the public only where it is reasonably clear that the presumption of innocence will be easily displaced.

A second qualification is that there must be cogent evidence of the likelihood of further offences. The mere fact of a lengthy record does not constitute a danger to the public interest. The best evidence of further offences would be something in the nature of an express declaration by the accused of his intent, or else a record of prior offences while on bail previously. Finally, the words of Winter, J., in regards to the potential of abuse in this area must be taken to heart. It is this caution which is the most cogent argument against the "prevention" argument. Judges must be specific in citing their arguments when bail is refused in the public interest in order to allow for appeals when abuses have taken place.

18. (1963-64) 45 W.W.R. p. 55 at 57.

19. (1953) 109 C.C.C. 253, at 257.

The rules for bail regarding an accused charged with an offence punishable by death, an offence under Sections 50 to 53 of The Criminal Code or with non-capital murder are different from those outlined above. To begin with, Section 464 states that an application for bail in such a matter can only be made to a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is charged. Moreover, various cases have held that the principles for granting bail are different than for other offences. Salhany, in his book, *Canadian Criminal Procedure*, has stated the rule as follows:

"Where the accused is committed for trial for murder he will, as a general rule, be refused bail unless the circumstances afford a strong assurance that he will appear for his trial. This rule is based upon the assumption that the temptation to escape from trial is too great to leave any hope that any amount of bail would ensure the appearance of the accused."²⁰

It should be pointed out, however, that he further stated that, "in view of the present division of murder into capital and non-capital, it would appear that the court has relaxed this policy with regard to the latter offence and will now more frequently grant bail"²¹ The Report of the Canadian Committee on Corrections has also noted this trend.²²

The basic authority for this proposition is that of *Regina v. Dubois*,²³ a decision of the Quebec Queen's Bench (Crown Side). In that decision, W. B. Scott, Associate C.J. stated that:

"The general rule is that a person committed for trial on a charge of murder will not be granted bail . . . There are certain cases however, where a person committed for trial on a charge of murder has been granted bail where the judge considers the circumstances are such that it is reasonably certain that the accused person will duly surrender himself for trial."

The learned judge continued at page 366 of the judgment:

"It is sufficient for me to say that after carefully considering all the evidence taken on the preliminary hearing and at the voluntary statement I have not such strong assurance that the accused . . . would appear for trial if admitted to bail as in my opinion would justify a departure from the general rule of refusing bail in the case of a person committed for trial on a charge of murder."

The above statement has gained widespread acceptance. The rationale of the rule is provided by the case of *Rex v. Rae* wherein Meredith, C.J.C.P. of the Supreme Court of Ontario stated that:

". . . the temptation to escape from a trial in such a case being too great to leave much, if any, great hope that bail to any amount would overcome it. But there may well be some exceptions to that rule . . ."²⁴

There have been a number of cases which have stated that the facts

20. R. Salhany; *supra*, 48.

21. *Ibid*, 49.

22. *Supra*, note 1, 104.

23. (1959) 124 C.C.C. 364 at 365.

24. (1914) 23 C.C.C. 266 at 268.

justified a departure from the general rule, in that it was felt that the accused would duly surrender himself for trial. One of these was *Regina v. Cymbalisky*²⁵ wherein Williams, C.J.Q.B. of the Manitoba Queen's Bench granted bail because the accused had never been in any sort of trouble before, and because, unless the accused was able to look after his farm, the inheritance of his children and their opportunities for education would be placed in jeopardy, In *Rex v. Fournier*²⁶ the judge granted bail because there was evidence of bad character apart from the offence charged, because the accused had a record of industry, and because his confinement prevented him from giving to his children the care and attention that he should give them instead of entrusting them to strangers.

The Criminal Code, also, provides for the capacity to vary bail or to grant it if it has been refused. Before the accused is committed for trial Section 465 (1) (a) allows a judge of a Superior Court of criminal jurisdiction to grant bail if a justice had no power to grant bail or if the latter refused to grant bail. Moreover a judge may vary the amount fixed by a justice. Once the accused has been committed for trial, Section 463(1) (b) allows a judge of a Superior Court of criminal jurisdiction to grant bail where it has been refused by a judge of a county or district court or by a magistrate. In addition, Section 465(1) (b) allows this same judge to vary an order for bail by any of the above. The principles which fetter a judge's discretion in this area are the same as those which guide a justice or magistrate in the first instance. Finally, the capacity to vary bail, as delineated in Section 465, is wide enough to allow a judge of a Superior Court to cancel bail which has already been granted.

Section 587 of the Criminal Code provides for bail in the case of an appeal:

"The chief justice or the acting chief justice of the court of appeal or a judge of that court to be designated by the chief justice or acting chief justice may admit an appellant to bail pending the determination of his appeal".

This section applies, not only in the case of appeals to the Court of Appeal of the province concerned, but also in the case of appeals to the Supreme Court of Canada. Moreover, bail may only be granted where the appeal is pending. Thus, where leave to appeal is required before the appeal may be heard, "there is no appeal pending until the court grants leave and, accordingly, the court has no jurisdiction to entertain an application for bail."²⁸

In deciding whether to grant bail pending the determination of the

25. M. L. Friedland; *Detention Before Trial* (Toronto: University of Toronto Press, 1965), 137.

26. (1961) 36 C.R. 333.

27. (1960) 33 C.R. 247.

28. R. Salhany, *supra*, 51.

appeal, an entirely different set of factors must be taken into account. The accused can no longer fall back on the presumption of innocence and the judge hearing the application has no choice but to regard the accused as guilty. In *R. v. Goverluck*, O'Halloran, J.A. of the British Columbia Court of Appeal stated that:

“. . . bail after conviction is quite a different thing to bail before conviction, and is governed by entirely different principles. Until a man is convicted, he is presumed to be innocent. But naturally there can be no such presumption after he has been found guilty by a competent court. There is no basis whatever in our law for treating his guilt as if it were in a state of suspension until his conviction has been confirmed by a Court of Appeal.”²⁹

The definition of this “entirely different set of principles” has been the subject of much judicial consideration. Perhaps the most illuminating authority in regards to this matter is that of *Rex v. Henry*, a decision of the Nova Scotia Supreme Court. In that decision, Chisholm, C.J. stated that:

“It is the rule of court, frequently laid down by eminent judges that bail will not be granted after conviction unless there exist some exceptional and unusual circumstances to warrant an order for bail . . . The circumstances are many and varied and cannot be set forth with completeness. Circumstances which have been considered in several cases are: the nature and seriousness of the crime; the quality of the evidence supporting the conviction; and the previous character and standing of the prisoner. A judge has to consider whether the offence for which the prisoner has been convicted is serious or trivial, whether the evidence in the case is properly admissible and substantial, whether the appeal is not a frivolous one and there is a fair chance of success in the appeal, and whether the prisoner has been a man of good standing and has borne a good character and has family ties and obligations. If it appears that there is not sufficient evidence to support a verdict of guilty, that the verdict is perverse, it will be an injustice to keep an innocent man in custody pending the determination of his appeal.”³⁰

This statement was followed in *Rex v. Goverluck*, *supra*, at page 379:

“In deciding if exceptional circumstances exist, the known previous character of the applicant is one of the essentials for consideration. . . That is not to say, however, that a man of previous bad character ought not to be granted bail if it appears he was denied a fair hearing below or that he was convicted without jurisdiction. For in such circumstances he has not legally been tried at all. Such unusual or exceptional circumstances would naturally override any consideration of character. But that is not the case where the ground of appeal, as here, is based on an alleged error in the application of the law during a trial held by a court with jurisdiction which has exercised its jurisdiction competently. That an appellant may possibly succeed on his appeal is not sufficient in itself to constitute a special circumstance justifying grant of bail . . .”

Relying on the proposition contained in the cases above it has been held that neither a delay in obtaining a hearing of the appeal³¹ nor the fact that the accused may serve the whole of his sentence before the appeal is determined³² constitute exceptional or unusual circumstances justifying bail after conviction.

29. (1945) 83 C.C.C. 377 at 378.

30. (1940) 73 C.C.C. 347 at 348.

31. *R. v. Henry* (1940) 73 C.C.C. 347.

32. *R. v. Kissick* (1951) 101 C.C.C. 217.

It was stated above that the mere possibility of succeeding on appeal does not constitute an unusual circumstance. In *Beechin v. Regina*, McNair, C.J.N.B. agreed with this proposition but went on to say:

"The only other ground upon which, on the facts before me, I could justify the granting of bail has relation to the appellant's guilt or innocence of the crime for which he has been convicted. It seems to me that before granting bail I must be convinced that *the Appeal is likely to succeed.*"³³

This statement therefore distinguishes between mere possibility and substantial likelihood of success on appeal. In the latter situation bail is justified.

It has, also, been held that in the matter of an appeal to the Supreme Court, a dissenting judgment in the Court of Appeal was not a special circumstance justifying the granting of bail. Hence, when this factor was combined with an appeal based entirely on technical grounds, bail was denied.³⁴

It can be seen from the foregoing, therefore, that the "right" to bail has some legal basis. Nevertheless, a consideration of the principles applicable in granting bail must be accompanied by a consideration of the amount of bail, for exaltation of the inalienable right to bail is meaningless if the judge can merely pay lip service to the right to bail and then simply set the amount so high that the accused cannot possibly meet it. There is a possibility of this happening because Section 465 (1) of The Criminal Code gives the justice, magistrate, or judge before whom the application is brought the same absolute discretion in setting the amount of as in granting bail. This same section, however, allows for a review of the decision by a judge of a Superior Court of criminal jurisdiction.

The principles which fetter a judge's discretion in setting the amount of bail are similar to those in granting or refusing bail. The chief one is that the amount must be sufficient to secure the attendance of the accused for his trial.³⁵ In determining this question, regard must be had to the circumstances outlined in *Re: Johnson's Bail Application* and in *Rodway and Okipnik v. The Queen*, *supra*. In addition, there is the added factor of the wealth of the accused. The factor of wealth is important because it is a principle of law that bail must not be so excessive as to prevent the accused from obtaining it. Excessive bail is punitive rather than a useful safeguard of the interests of both the accused and society. The leading authority on this point is that of *R. v. Rose*³⁶ wherein Lord Russell of Killowen C.J. stated that:

33. (1959) 31 C.R. 239, at 242. Italics are those of the author.

34. *R. v. Gray* (1959) 30 C.R. 250.

35. *Supra*, note 12.

36. (1898) 67 L.J.Q.B. 289 at 292.

"It cannot be too strongly impressed upon the magistrates that bail is not intended to be punitive, but merely to secure the attendance of the prisoner at the trial or to come for judgment."

The key, therefore, is to assess each case on its particular factual situation and determine how much cash or how much and what type of surety will ensure that the accused will appear to stand trial. Under this system, the amount of bail for similar offences but different offenders will vary considerably, and so it should be. The rather common occurrence of the rich being admitted to bail while the poor remain incarcerated for similar or even the same offence is totally unjustifiable. Hence, the arbitrary practice of fixing a standard amount of bail for each offence must not be allowed to continue in those jurisdictions where it is prevalent.

There is one further factor which may serve to obviate the quasi-right to bail. This concerns the common Canadian practice of requiring security in advance, that is, a deposit of cash or the pledging of property by depositing the deed with the court's officers. This is in contrast to the traditional practice of simply having the accused undertake to pay a designated sum upon failure to appear or having a *surety do this for the accused*. It has been statistically proven that the latter method allows for greater numbers of accused eliminating needless incarceration³⁷ and the author wholeheartedly supports its implementation, especially since Section 451 (a) (ii) of the Code allows for it. Moreover, these same studies reveal that the security in advance system even reveals a higher proportion of bail skipping.

Friedland, in his book "Detention Before Trial",³⁸ has addressed himself to the issue in a most lucid fashion:

"... The major solution to the defects in bail setting practices is to eliminate the practice of requiring security in advance a practice which, *inter alia*, has the effect of keeping many persons in custody unnecessarily while not acting as a substantial deterrent against absconding: knowledge by the accused of virtual certainty of recapture followed by a prosecution for skipping bail would certainly be more effective and would by itself be sufficient."

In short terms, therefore, there is presently a "right" to bail in Canada only if it appears that the accused will definitely appear at his trial. It is the determination of this question and the high degree of discretion appurtenant to it that results in this "right" falling far short of being a true one. In contrast to the American position, therefore, and despite the wording of the Bill of Rights, it cannot be said that there is a right to bail in Canada. Two matters further impinge on the quality of this near-right. One involves the imposition of the test of public interest in several provinces as a further factor in deciding whether to grant bail. Indeed, Bill C-220 seeks to establish this as a test for bail throughout Canada. It is also to be noted

37. M. L. Friedland, *supra*, 137.

38. *Ibid.*, 177.

with some degree of apprehension that the term "public interest" as used in Section 445A subsection 7 of the Bill, is supported by no measure of definition and hence, with the generality of the term, further increases the discretion afforded to those who grant bail, and may readily serve as a statutory impingement of the "right" to bail. The other factor is the security in advance system. This system has made bail far less accessible in Canada than in the United Kingdom. Thankfully Bill C-220 seeks to abolish this requirement.

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