

BAIL : RIGHT OR DISCRETION

By

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"Imprisonment is the restraint of a man's liberty whether it be in the open field, or in the stocks or cage in the street, or in a man's own house, as well as in the common goal. And in all these places the party so restrained is said to be a prisoner, so long as he hath not his liberty freely to go at all times to all places whither he will, without bail or mainprize."

Winfield (Law of Torts)

PREFACE

In Malaysia, there are indeed an excessive number of remand prisoners who are swelling the country's prison as well as police lock-ups as opposed to being released on bail while awaiting trial. These pre-trial detainees were remanded despite the fact that the law presumed them to be innocent until proven guilty.

The high rate of pre-trial detention certainly seemed to warrant an investigation to determine both the causes and consequences of pre-trial detention. Thus, it significant that due to the unsatisfactory conditions of pre-trial detention, has urged the courts to increase the use of bail as much as possible or at least reduce the period of custody before trial.

The granting or denial of bail in Malaysia has in effect remained a dicretionary function of the judiciary. This discretion vested to the authorities concerned must be exercised judicially and not arbitrary although the granting or rejecting of bail is the prerogative of the courts. If the courts become too strict, perhaps thousands of innocent people will find themselves detained in custody for an excessive period. That would make useless of the presumption of innocence. On the other hand, if the Magistrates and Judges are too lenient, there is a grave danger that serious whereby public interest will be interfered with the continuance of criminal acts done by the people who have been released on bail.

We may wonder why such a right is preserved in our administration of justice, namely, in respect of criminal procedure. As a democratic country, the Malaysian Constitution has made various important provisions relating to fundamental liberties. These rights are conferred upon every citizen of the country. The position is quite similar in respect of an accused person. Indeed, an accused person is presumed by law to be innocent until proven guilty, and, as a result he should be entitled to his freedom before trial. This presumption will be given its utmost affect if all accused person are set at liberty pending their trails although it may sound impossible in the age of public interest. If bail is refused, it may result in more than a temporary deprivation of liberty.

The institution of bail has always been hailed as a device which has the primary object of providing freedom to an accused person. In other words, bail should be the rule and its refusal the exception. It, therefore, complies with the rules of natural justice which denotes that justice is not only has to be done, but also must seen to be done.

Scope of study

A substantial portion of this brief study has been devoted to the determination, analysis and the evaluation of the various factors that govern the exercise of the discretion in allowing or refusing bail by judicial and police officers in Malaysia.

The writer will begin by briefly discussing the nature of bail as well as its purpose and the historical background up to the institution of bail system in Chapter I. The rationale behind the creation of 'bailable' and 'non-bailable' offences which is a matter of absolute right in the former as opposed to a discretionary privilege in the latter is also examined in Chapter II. Chapter III will cover the principles and factors which serves as a guideline to the court in the application of bail. A study of bail on other specific statutes is also examined in Chapter IV, namely, bail in relation to drug cases, essential security and firearm offences. In Chapter V, a study of bail in respect of juvenile cases will also be made. An emphasis will also be put upon to the application of bail pending appeal in chapter VI. It has also been the intention of the writer to provide solutions to the problems incidental to the administration of bail, hoping that it will help in the formulation or reform or changes in the bail system which will be dealt in Chapter VII.

Limitations and problems encountered

There are indeed available material though not enough in the course of this study. The available material, though helpful, is often out of date because there have been some drastic changes to our bail system.