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BAIL

1 Introduction

The *Bail Act 2002* sets out the law relating to bail.

This chapter focuses on the Court's role and all statutory references are to the *Bail Act 2002*, unless stated otherwise.

2 Jurisdiction

A Court may determine an application for bail by an accused person: *s13(1)*.

A Magistrate when not sitting as a Court may at any time grant bail to:

- a person brought or appearing before him or her, who is accused of an offence; and
- a person who is an appellant under *Part X CPC: s12*.

An “accused person” and “person accused of an offence” is “a person who has been arrested for, or charged with, an offence and:

- (a) who is awaiting summary trial;
- (b) who has been committed for trial on indictment;
- (c) whose trial has been adjourned;
- (d) who has been convicted and –
 - (i) who has been committed for sentence;
 - (ii) whose case has been adjourned for sentence;
 - (iii) who is appealing against conviction or sentence; or
 - (iv) whose conviction is stayed;
- (e) who is under arrest for a breach of bail; or
- (f) who has applied for a writ of habeas corpus”.

A Magistrate now has full powers to grant bail, including bail for murder and treason.

The Court may dispense with the requirements for bail: *s6(1)*.

If no specific order or direction is made in respect of bail during the appearance of an accused person, the Court is deemed to have dispensed with any requirement for bail: *s6(2)*.

3 Applications for Bail

An accused person may make any number of applications to Court for bail: *s14(1)*.

An application to a Court for bail must be dealt with as soon as reasonably practicable after it is made: *s14(2)*.

The Act states that a Court may refuse to entertain an application for bail if it is satisfied that the application is frivolous or vexatious: *s14(3)*.

An accused person is entitled to have legal aid for an application for bail, or for review of bail, subject to the provisions of the *Legal Aid Act 1996*. You should explain this to an unrepresented accused person.

4 Considering Bail Applications

4.1 Presumption in Favour of Bail

The *Bail Act 2002* makes it clear that there is a **strong presumption in favour of granting bail**.

Every accused person has a right to be released on bail unless it is not in the interests of justice that bail should be granted: *s3(1)*. The “interests of justice” will vary from case to case.

There is a presumption in favour of granting bail: *s3(3)*. However:

- a person who opposes the granting of bail may seek to rebut the presumption: *s3(3)*; and
- the presumption in favour of the granting of bail is displaced where the accused person:
 - has previously breached a bail undertaking or bail condition; or
 - has been convicted and has appealed against the conviction: *s3(4)*.

4.2 Case Against the Presumption of Bail

A person making submissions against the presumption in favour of bail must deal with:

- the likelihood of the accused person surrendering to custody and appearing in Court;
- the interests of the accused person; and
- the public interest and the protection of the community.

4.3 Primary Consideration

The **primary consideration** in deciding whether to grant bail to a defendant is the likelihood of the defendant appearing in Court to answer the charges laid against him or her: *s17(2)*.

4.4 Other Statutory Considerations

The Court must take into account the time the accused person may have to spend in custody before trial if bail is not granted: *s17(1)*.

An accused person must be granted bail unless in the opinion of the Court:

- the accused person is unlikely to surrender to custody and appear in Court to answer the charges laid;
- the interests of the accused person will not be served through the granting of bail; or
- granting bail would endanger the public interest or make the protection of the community more difficult: *s19(1)*.

You must have regard to all the relevant circumstances. The following particular factors are listed in *s19(2)*:

Likelihood of surrender to custody

- The accused's person's background and community ties (including residence, employment, family situation and previous criminal history).
- Any previous failure by the person to surrender to custody or to observe bail conditions.
- The circumstances, nature and seriousness of the offence.
- The strength of the prosecution case.
- The severity of the likely penalty if the person is found guilty.
- Any specific indications (such as that the person voluntarily surrendered to the Police at the time of arrest or, on the contrary, was arrested trying to flee the country).

The interests of the accused person

- The length of time the accused person is likely to have to remain in custody before the case is heard.
- The conditions of that custody.
- The need for the accused person to obtain legal advice and to prepare a defence.
- The need for the accused person to be at liberty for other lawful purposes (such as employment, education, care for dependants).

- Whether the accused person is under the age of 18 years (see s3(5)).
- Whether the accused person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection.

The public interest and the protection of the community

- Any previous failure by the accused person to surrender to custody or to observe bail conditions.
- The likelihood of the accused person interfering with evidence, witnesses or assessors or any specially affected person.
- The likelihood of the accused person committing an arrestable offence while on bail.

4.5 Right to Bail for Certain Offences

An accused person has the right to be released on bail, with or without conditions, for the following offences:

- any offence not punishable by a sentence of imprisonment;
- any offence under the *Minor Offences Act Cap 18*; and
- any offence punishable summarily that is of a class or description prescribed by the regulations for the purposes of this section: ss5(1), 5(2)(b) *Electable Offences Decree*.

However, this entitlement to bail is lost if:

- he or she has previously breached bail;
- he or she is incapacitated by intoxication, injury or use of a drug, or is otherwise in need of physical protection;
- he or she stands convicted of the offence; or
- the requirement for bail is dispensed with under s6: s5(2).

An accused person is not entitled to bail if he or she is in custody serving a sentence of imprisonment in connection with some other offence: s5(3).

4.6 Young Accused Persons

Bail must be granted to an accused person **under the age of 18 years** unless:

- he or she has a previous conviction;
- he or she has previously breached bail; or
- the offence in question is a serious offence.

A “serious offence” is any offence for which the maximum penalty includes imprisonment for 5 years or more: *s2*.

4.7 Offender Appealing Against Conviction or Sentence

Where the Court is considering granting bail to a person who has appealed against conviction or sentence, the Court must take into account:

- the likelihood of success in the appeal;
- the likely time before the appeal hearing;
- the proportion of the sentence which will have been served, when the appeal is heard: *s17(3)*.

4.8 Accused Person in Custody for 2 Years or More

If an accused person has been custody for 2 years or more and his or her trial has not begun, the Court must release him or her on bail: *s13(4)*.

Note that this is not the case where:

- the trial has begun and the Court has refused bail;
- the accused person is serving a sentence for another offence: *s13(5)*.

The period of 2 years does not include any period of delay caused by the fault of the accused person: *s13(6)*: *Albertimo Shankar* HAM 014/3.

“Trial” means the trial proper of the accused person in respect of the offence which he or she has been charged with and does not include:

- committal proceedings; or
- the determination of any preliminary or interlocutory application: *s13(7)*.

4.9 Case Law

See *Tak Sang Hao v State* Misc. Action No. HAM 003 of 2001S. The Court stated 10 factors to be considered:

- the presumption of innocence under *s28(1)(a)* of the *Constitution*;
- whether the accused person will appear to stand trial;
- whether bail has previously been refused;
- the seriousness of the charge;

- the accused person's character;
- the accused person's right to prepare his or her defence;
- the likelihood of the accused person re-offending while on bail;
- any likelihood of the accused person interfering with witnesses;
- the likelihood of further charges;
- the prosecution's opposition to bail.

See *Bail Act* cases: *Sanjana Devi v State* Misc Action HAM 011 of 2003S; *State v Albertino Slainkar* Cr Action HAM 014.03.

5 Granting Bail

5.1 General

Bail may be granted unconditionally or subject to written conditions: *s22*.

When granting bail, you **must**:

- set bail for a determinate period, ending no later than 60 days after the day on which bail was granted, or on the date of hearing, whichever comes first: *s15(2)*;
- state a time, date and place that the accused person must surrender to the custody of the Court;
- advise the accused person, in a language that he or she understands, of his or her obligation to surrender to the custody of the Court at the time, date and place designated: *s15(6)*;
- explain the procedures for complying with the obligation, that is, that he or she must surrender to the bail officer.

If the hearing date has not been fixed within 60 days, the accused person must be brought before the Court for a continuation of bail, or its reconsideration: *s15(3)*.

What the accused person must do in all cases

The accused person must give a written undertaking, on Form 1B, to appear before the Court on the day and place specified: *ss21(1)(b), 21(2)*.

On the granting of bail, the accused person must:

- provide the Court with details of his or her residential address; and
- reside at that address until the case is heard: *s16*.

If the accused person wishes to reside elsewhere, he or she must notify the bail officer in writing, who will either make a decision or put it before the Court to make a decision whether the bail undertaking should be varied accordingly: *s16(4)*.

5.2 Conditions

Bail must be granted unconditionally unless you consider that conditions should be imposed for the purpose of:

- ensuring the accused person's surrender into custody and appearance in Court;
- protecting the welfare of the community; or
- protecting the welfare of any specially affected person: *s23(1)*.

Conditions must only be imposed if required by the circumstances of the accused person:

- to protect the welfare of the community;
- to protect the welfare of any specially affected person; or
- in the interests of the accused person: *s23(2)*.

Conditions that may be imposed

If conditions are attached, they may only be one or more of the following:

- that the accused person enters into an agreement to observe specified requirements as to his or her conduct while on bail;
- that one or more sureties acknowledges that he or she is acquainted with the accused person and regards the accused person as a responsible person who is likely to comply with a bail undertaking;
- that the accused person enters into an agreement, without security, to forfeit a specified amount of money if the accused person fails to comply with his or her bail undertaking;
- that one or more sureties enters into an agreement, without security, to forfeit a specified amount of money if the accused person fails to comply with his or her bail undertaking;
- that the accused person enters into an agreement, and deposits acceptable security, to forfeit a specified amount of money if the accused person fails to comply with his or her bail undertaking;

- that one or more sureties enters into an agreement, and deposits acceptable security, to forfeit a specified amount of money if the accused person fails to comply with his or her bail undertaking;
- that the accused person deposits with an authorised officer of the Court a specified amount of money in cash and enters into an agreement to forfeit the amount deposited if the accused person fails to comply with his or her bail undertaking;
- that one or more sureties deposits with an authorised officer of the Court a specified amount of money in cash and enters into an agreement to forfeit the amount deposited if the accused person fails to comply with his or her bail undertaking.

Security

If security by an accused person or surety is considered to be a necessary condition of bail, you must:

- ascertain, under oath if necessary, the ability of the accused person or surety to provide the security: *s22(3)*; and
- set the amount with reference to the capacity of the accused person or surety to meet the obligation: *ss22(3) and (4)*.

You must not impose a requirement for security if it amounts to an unreasonable impediment to the granting of bail: *s22(5)*.

An accused person and any person offering himself or herself as a surety may appeal to the High Court if you refuse to accept him or her as surety or any proposed security: *s22(8)*.

5.3 Continuation of Bail

If a bail undertaking includes an undertaking to appear at any time and place at which proceedings in respect of the offence are continued, whether upon adjournment, committal or otherwise:

- a Court may continue bail already granted in respect of the offence: *s29(1)*;
- the bail undertaking and conditions, including any sureties and any security, continue to apply unless the Court orders otherwise: *s29(2)*;
- if the accused person appears in accordance with the bail undertaking and no specific direction is made by the Court in respect of bail upon adjournment or committal, the Court is taken to have continued bail on the same conditions: *s29(3)*.

If a bail undertaking does not include such an undertaking, and the case is adjourned or the accused person is committed for trial or sentence, the Court must make a fresh bail determination if bail is applied for: *s29(4)*.

6 Refusal of Bail

If bail is refused:

- the hearing of the case must not be adjourned for more than 14 days, except with the accused person's consent; and
- any further adjournment must be for no more than 48 hours and must be to a Court available to deal with the case: *s13(2)*.

However, *s13(2)* does not apply where the accused person is in custody in connection with another offence or if the Court is satisfied that there are reasonable grounds for a longer period of adjournment and that bail should continue to be refused: *s13(3)*.

If bail is refused, you must:

- give a written ruling, with reasons, dealing with the submissions made on:
 - the likelihood of the accused person surrendering to custody and appearing in Court;
 - the interests of the accused person; and
 - the public interest and the protection of the community: *ss18(2) and 20*;
- remand the defendant in custody to re-appear for trial or review of bail within 14 days: *s18(2)*;
- immediately inform the accused person of the procedure for review as set out in *s30: s20(3)*.

As soon as practicable, and within 24 hours after the refusal to grant bail, the written reasons must be conveyed to the accused person in a language he or she understands: *s20(2)*.

7 Review

A Magistrate may review any decision in relation to bail made by a Police officer or made by another Magistrate, including a reviewing Magistrate: *ss30 (1) and (2)*.

The power to review a decision may be exercised only at the request of:

- the accused person;
- the Police officer who instituted the proceedings for the offence;
- the Attorney General;
- the DPP; or
- a victim of the offence: *s30(8)*.

If you are not satisfied that there are special facts or circumstances that justify a review or the making of a fresh application, you may refuse to hear it: *s30(7)*.

The review must be by way of a re-hearing: *s30(10)*.

You may confirm, reverse or vary the decision: *s30(9)*.

8 Appeals

The accused person or DPP may appeal to the High Court all:

- grants and refusals of bail; and
- orders, conditions or limitations made or imposed under the Act: *s31*.

9 Breaches and Penalties

You may issue a warrant of arrest if an accused person who has been released on bail:

- fails to surrender to custody or otherwise breaches a condition of bail;
- absents himself or herself from the Court without your leave at any time after he or she has surrendered to custody; or
- is found to have given a false residential address: *s25(1)*.

A defendant who has been released on bail and who fails without reasonable cause to surrender to custody commits an offence and is liable on conviction to a fine of \$2000 and 12 months imprisonment: *s26(1)*. The burden is on the accused person to prove that he or she had reasonable cause for failing to surrender to custody: *s26(2)*.

Where the defendant has been released on bail subject to the provision of security fails without reasonable cause to surrender to custody, you may order forfeiture of the whole or any part of the security to the State: *s27(2)*.