BAIL PENDING APPEAL

Ralph v. *Public Prosecutor*

[1972] 1 M.L.J. 242

In Singapore, the matter of bail pending appeal has rarely gone on appeal because the appellate courts have very rarely and reluctantly intervened and disturbed an exercise of discretion on the part of the trial court. So, the High Court has had little or no opportunity to pronounce its decision on the matter and hence there is very little by way of authoritative statement of the law on the subject. The predicament is also shared in other jurisdictions. In *Krishnamorthy* v. *State*,[1] an Indian case, Ramaswami J. lamented that,

> The principles governing enlargement on bail by appellate courts of convicted persons who have preferred appeals are unfortunately the subject-matter of sparse law. The result is that sentences are being suspended or not suspended and convicted persons are being enlarged or not enlarged on bail on distractingly discordant principles or to be more accurate, no principles.

The recent decision of Winslow J. in *Ralph* v. *P.P.*[2] is a welcome pronouncement on the subject of bail pending appeal although it provides no more than a judicial review of the criteria and considerations regarded as applicable to the granting of post-trial bail.

Ralph had been convicted on four charges of corruption and one charge of criminal breach of trust in respect of $102,784, for which he was sentenced to two years' imprisonment in all. He had appealed against his conviction and had also applied to the District Court for bail pending appeal. This application was "brushed aside" by the learned district judge who remarked that he never granted bail unless there were very special reasons. Ralph then applied under section 351 of the Criminal Procedure Code[3] (hereafter referred to as the Code) to be admitted to bail pending his appeal. The relevant considerations for the grant of bail were advanced in the affidavit filed in support of the application. After a consideration of these, Winslow J. dismissed the application.

The law relating to bail generally is contained in Chapter XXXV of the Code, and the provisions relating to bail pending appeal and

1. (1957) M.W.N. 608, at 609.
2. [1972] 1 M.L.J. 242.
3. Singapore Statutes, Rev. Ed. 1970, Cap. 113. S. 351 of the Code reads: "The High Court may, in any case whether there is an appeal on conviction or not direct that any person shall be admitted to bail or that the bail required by the police officer or District or Magistrate's Court be reduced or increased."

stay of executions are contained in sections 238[4] and 241[5] respectively of the Code. The Code gives an accused person the right to appeal to the High Court against any judgement, sentence or order pronounced by any District Court or Magistrate's Court, but it does not give the accused a corresponding right to bail pending appeal against conviction and sentence. The granting of bail pending appeal is a discretionary matter. Section 238 expressly empowers the subordinate courts to grant post-trial bail and section 241 confers powers on the High Court to admit any person to bail "in any case whether there is an appeal on conviction or not". Section 2,[6] the interpretation section, distinguishes bailable offences, where bail can be asked for as of right, from non-bailable offences, where bail only lies at the discretion of the court. The distinction is however inapplicable to post-trial bail which is always at the discretion of the court.

Ralph's application to the High Court proceeded on the ground that the district judge had exercised an arbitrary discretion in the matter, or to be more precise, that "he failed or refused to exercise his discretion in the matter".[7] Upon an examination of the considerations advanced by the applicant, Winslow J. decided not to exercise his discretion in favour of the applicant; his Lordship also held that the district judge had not exercised an arbitrary discretion in the matter.

However, a comparison of the two modes of the exercise of discretion, as respectively followed by Winslow J. and the district judge, would rather show that the summary refusal of the bail application by the latter was a superficial, mechanical and perfunctory act which can only be termed an abuse of discretion. Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the purposes for which it exists. The most important purpose of bail is the right of the appellant to remain at liberty. A determination of the discretionary question without reference to the purposes of bail and the valuable right of the appellant to remain at liberty is inconsistent with our fundamental principles of justice. The learned district judge should have applied his mind to the considerations for the grant of bail as set out in the application and then decided whether or not the appellant should be given his freedom.

4. S. 238 reads: "A District Court or Magistrate's Court may grant bail to any person who has filed a notice of appeal against his conviction in accordance with S. 237". S. 237 lays down the procedure for appeal to the High Court.

5. S. 241 reads: "No appeal shall operate as a stay of execution but the courts below and the High Court may stay execution on any judgement, order, conviction or sentence pending appeal on such terms as to security for the payment of any money or the performance or non-performance of any act or the suffering of any punishment ordered by or in the judgement, order, conviction or sentence as to court seem reasonable."

6. S. 2 defines "bailable offence" as "an offence shown as bailable in Schedule A to this Code or which is made bailable by any other law for the time being in force" and "non-bailable offence" as "any other offence." The five charges against Ralph were for non-bailable offences.

7. [1972] 1 M.L.J. 242, at 242.

Winslow J., in his judgment, also undertook to consider "the trend of judicial opinion relating to the relevant factors to be weighed in the balance before the discretion to grant bail is exercised".[8]

Johore v. *R.*,[9] the first reported decision on the subject of post-trial bail under our law, and *R.* v. *Lim Soh Chwee & Anor.*[10], another early case, both decided by Fisher J., were initially considered by Winslow J. Without reference to the judgment in these cases, his Lordship adopted the view expressed by Whyatt C.J. in *Goh Beow Yam* v. *R.*[11] that "Fisher J. took the somewhat extreme view that bail should be granted in almost every case unless there was strong reason to suppose the appellant would abscond".[12] This, it is submitted, was a misunderstanding of Fisher J.'s judgment. On the facts before him Fisher J. was expressing concerns over the miscarriage of justice that would have resulted if the appellants had been left languishing in jail pending the determination of their appeal. His observations were rather as to the mode of exercising the discretion in the matter of bail pending appeal. In fact, Fisher J. was of the view that "if an appeal was manifestly frivolous or if reasonable security could not be given to ensure that the accused will not run away, bail may rightly be refused".[13] In the latter case of *Lim Soh Chwee*, Fisher J. went further and held that, as there was a right of appeal by law, bail ought not to be refused in any "ordinary case of appeal" unless there were strong reasons to suppose that the granting of bail was likely to enable the convicted person to abscond. Apart from employing the same criterion of probability of absconding to determine both pre-trial and post-trial liberty, Fisher J. was suggesting that bail even for a person convicted of an offence was the rule and refusal of bail the exception, at least in "ordinary cases". In *R.* v. *Tan Tee*,[14] Sir Murray Aynsley C.J., in a short judgment that implicitly espoused the reasoning of Fisher J. in the earlier cases, allowed bail pending appeal observing that it was the practice to allow bail to a convicted person unless there were reasons for not allowing it. These decisions seem to suggest that applications for bail pending appeal should generally be allowed and that there must be grounds for refusing bail.

To this policy and practice of the courts in the early days, two later cases, *Re Kwan Wah Yip*[15] and *Goh Beow Yam* v. *R.*,[16] stand in direct contrast. In the former case, Spenser Wilkinson J. cited with approval the observations of Wilson J. in *Doraisamy* v. *P.P.*[17] that a stay of execution should not be granted unless there were special reasons

8. *Ibid.*, at 242.
9. (1907) 11 S.S.L.R. 36.
10. Cr. App. (Singapore) No. 8 of 1911 (reported in R. Braddell, *Common Gaming Houses*, Appendix C, at p. 178.).
11. (1956) 22 M.L.J. 251.
12. [1972] 1 M.L.J. 242, at 243.
13. (1907) 11 S.S.L.R. 36, at 36-37.
14. (1948) 14 M.L.J. 153.
15. (1954) 20 M.L.J. 146.
16. (1956) 22 M.L.J. 251.
17. K.L. Criminal Application, No. 2 of 1954 (unreported).

for doing so, and that the mere fact that a notice of appeal has been given or that the accused believes he has good grounds for appeal, does not constitute sufficient grounds for releasing an applicant on bail pending appeal. Being substantially in agreement with the views of Wilson J., Spenser Wilkinson J. further went on to outline some considerations which subordinate courts should follow in granting or refusing bail. In *Goh Beow Yam's* case, Whyatt C.J. approved and followed "the lucid and persuasive judgment of Mr. Justice Spenser Wilkinson",[18] but added that the considerations set out by the latter should not be regarded as an exhaustive list. In the instant case, Winslow J. agreed with and followed these views on bail pending appeal. He has thus added support to the policy of not granting bail in post-trial cases unless there are "special reasons" for allowing bail — a policy which is in conflict with the earlier policy that bail was not to be refused in "ordinary cases" unless there were strong reasons for such refusal.

The locus classicus on the subject of post-trial bail in our law are the pronouncements of Spenser Wilkinson J. in *Re Kwan Wah Yip.*[19] The facts of the case bear some similarity to the facts of the instant case. Kwan Wah Yip had been convicted on two charges and sentenced to twelve months imprisonment on the first charge of dishonestly receiving stolen goods unler section 411 of the Penal Code[20] and to a month's imprisonment on the second charge under the Minor Offences Act.[21] On an application to the High Court for bail pending appeal, Spenser Wilkinson J. refused bail because of the insufficient grounds advanced for it. The only grounds put forward were that the applicant was about to file notice of appeal and that he had been advised by his solicitor that it would be sometime before the appeal could be heard. Spenser Wilkinson J. dismissed these grounds by saying that as the records of proceedings of the case were not lengthy, the appeal would be heard within a few weeks' time. In the course of his judgment he expressed, as has been noted earlier, his disagreement with Fisher J.'s views, stated that the grant or refusal of bail was a discretionary matter, and went on to state the grounds on which the discretion was to be exercised. He interpreted "special reasons", with regard to the application before him, to mean no more than that there must be reasons beyond the mere intention to appeal or advice and belief that there were grounds of appeal. He also expressed his fears that "special reasons" might be interpreted as placing a greater restriction upon the discretion of the lower courts than would be justified by the words of the authorising provision similar to the present section 241 of the Code.[22] His main concern seems to have been to restrict the privilege of bail only to bona fide appellants who actually intended to appeal. Such a requirement is now provided for by section 238 which was, subsequent to the case, added to the Singapore Criminal Procedure Code in 1955,[23] making

18. (1956) 22 M.L.J. 251, at 252.

19. (1954) 20 M.L.J. 146.

20. Singapore Statutes, 1970 Rev. Ed., Cap. 103.

21. *Ibid.*, Cap. 102.

22. See fn. 5, above.

23. See fn. 3, above.

a notice of appeal an essential prerequisite to an application for bail. Therefore it seems clear that Spenser Wilkinson J. did not intend to make a radical departure from the earlier policy and practice with regard to post-trial bail. While the earlier view, as expressed by Fisher J., was that bail pending appeal should generally be allowed and that there must be grounds for refusing bail, Spenser Wilkinson J. merely qualified this rather broad principle by saying that there must be grounds to justify the grant of post-trial bail. Spenser Wilkinson J. stressed that post-trial bail is discretionary and not automatic as well as even a superficial reading of Fisher J.'s views would have led one to conclude. But later Judges, among them Winslow J. in the instant case, have interpreted his observations to mean that bail should always be refused unless there were "special reasons" for granting it. This misunderstanding has led to a departure in the policy and practice with regard to post-trial bail and hence the conflict of authority between the earlier and later cases.

The training and experience of our Judges in the law and practice of English courts has once again consciously or unconsciously led them into accepting and adopting the prevalent practice in England. In England, bail applications to the Court of Criminal Appeal are granted only in "exceptional circumstances".[24] There, it means that the higher the tribunal the accused approaches for bail pending appeal, the lower the chances of obtaining bail.[25] The considerations applicable to the grant of bail pending appeal under the structure and arrangements of the Code are different, and the "exceptional circumstances" test propounded in English decisions has been held inapplicable in the local context. Murray Aynsley C.J. in *R.* v. *Ton Tee*[26] refused to follow the English authorities on the matter and observed that the appeal was against the decision of a Magistrate and that the bail application was made to the High Court and not to the Court of Criminal Appeal. A similar view was taken by Spenser Wilkinson J. in *Re Kwan Wah Yip.*[27] Despite his attempts to clarify and circumscribe the interpretation of "special reasons" applicable to bail pending appeal, the "exceptional circumstances" test applied in English cases has crept into our law and has resulted in the practice of not granting bail unless there are "special reasons" for granting it.

An appellant does not enjoy the presumption of innocence as does an accused awaiting trial. Entirely different considerations arise as regards his application for post-trial liberty. The presumption of innocence and all attendant and kindred considerations are no longer applicable. But then, the great fear by both the police and prosecution that an accused would tamper with witnesses or hamper investigations is also no longer present. Whether pre-trial or post-trial, the main consideration in the refusal of bail continues to be the risk of flight

24. *Halsbury's Laws of England*, 3rd. Ed., Vol. 10, at p. 526.

25. See Chandra Mohan, *Bail in Singapore* (unpublished LL.M. thesis, University of Singapore), at p. 412.

26. (1948) 14 M.L.J. 153.

27. (1954) 20 M.L.J. 146.

by the accused or appellant. Conviction and the probability of pending punishment may increase the probability of absconding. But as an American Court has said,

> The theory of purpose of bail pending appeal is not different than that given before conviction, it is to insure the presence of the accused when wanted to answer the charge and to make amends to society by the service of the sentence imposed. It, of course, insures the innocent against the injustice of any imprisonment in the event of an acquittal of the charge.[28]

Though the presumption of innocence is no longer present, it is a fundamental rule of our system of justice that until the conviction is confirmed by the appellate court, a convicted person who has appealed should be regarded as innocent. Though an appellant has no absolute right to be free pending appeal, he does have a right to have his conviction reviewed under the Code. Until finally adjudged guilty by the court of last resort there must be a natural reluctance to compel anyone to undergo punishment, and the imposition of actual punishment should be avoided pending disposal of the appeal. But the administration of criminal justice requires that the duly convicted guilty be promptly punished and public policy requires that society is entitled to protection from convicted criminals. In consonance with our notions of justice, in all the circumstances of the particular case, the desire not to imprison a man until finally found guilty nonetheless outweighs the disadvantages of allowing him to be at large. Thence, the considerations regulating bail pending appeal should aim at achieving a resolution of these conflicting goals.

Winslow J. in the instant case discussed the various considerations regulating post-trial bail.[29] As he adopted and applied with approval the six considerations listed by Spenser Wilkinson J. in *Re Kwan Wah Yip*[30] as the main criteria for the grant or refusal of bail, his observations and discussions can best be reviewed under those six headings. The oft cited six factors are:

(i) *The gravity or otherwise of the offence*

The gravity of the offence and severity of the sentence indicate probabilities of flight. But in the absence of cogent reasons indicating the likelihood of the convicted person absconding if released on bail, the mere seriousness of the offence with which he is charged will not afford the court a justification for withholding bail.[30]

(ii) *The length of the term of imprisonment in comparison with the length of time which it is likely to take for the appeal to be heard*

If a convicted man is likely to be imprisoned awaiting appeal almost as long as his sentence would run if finally affirmed, bail should be granted except in unusual circumstances. Even in England where the

28. (1923 CA 2 NY) 292 F 591, at 593 *Garvey* v. *U.S.*, (cited in *Orfield's Criminal Procedure under the Federal Rules*, Vol. 6).

29. [1972] 1 M.L.J. 242, at 243.

30. (1954) 20 M.L.J. 146, at 147.

30. *R.* v. *Gull*, 109 I.C. 118 (cited in *Mallal's Criminal Procedure* at p. 461).

practice is not to grant bail pending appeal except in exceptional and unusual circumstances, the Court of Criminal Appeal granted bail pending appeal in *R.* v. *Tarran*[31] in view of the fact that owing to the length of the transcript of the shorthand notes of the trial, the appeal would probably not be heard until the end or possibly after the expiration of the sentence of nine months' imprisonment imposed in the case. Again, in a recent case, *R. v. Neville & Ors.*,[32] despite the severity of the sentence bail was granted with conditions because the transcripts might not be available in time for an early appeal.

In *R.* v. *Ooi Ah Kow*,[33] a case of pre-trial bail for a serious non-bailable offence, the court observed that inordinate delays in the police investigation of the case might be an exceptional or special reasons for granting bail.

In the instant case, the transcripts of the grounds of appeal were already available at the time of the bail application to the High Court and Winslow J. was of the opinion that the appeal would be heard within three or four months. Apparently, he did not regard the period as a substantial part of the sentence or think that if the appeal was allowed there would have been a miscarriage of justice. Furthermore, the appellant apparently had another appropriate remedy i.e. an expedited hearing of his appeal, for appeals from a person, who has been refused bail in the lower court and also has failed in his application for bail to the appellate court, are given priority by the Registrar of the Supreme Court when he fixes dates for the hearing of appeals.[34]

(iii) *When there are difficult points of law involved*

The existence of difficult points of law enhances the probability of the accused succeeding in his appeal and it would be unjust to compel him to serve sentence under such circumstances for if the appeal is allowed the appellant would have been unnecessarily punished as he would have suffered the indignities of a prison regime.

Both in India and the United States, the prospects of success on appeal and the legal merits of the question presented are the primary considerations in determining whether bail pending appeal ought to be granted.[35] In the United States, the Criminal Appeals Rules of the Supreme Court require that the existence of a "substantial question"[36] is the main criterion in the grant of bail pending appeal. In *Krishnamoorthy* v. *State*,[37] the court decided that the main question to be consi-

31. (1947) Times, Dec. 16 (cited in *Mallal's Criminal Procedure* at p. 461).
32. (1971) Cr. L. R. 589.
33. (1952) 18 M.L.J. 95, at 97.
34. See Chandra Mohan, *op. cit.*, at p. 296.
35. See generally, *Banerjee's Criminal Appeals & Revisions*, 3rd. Ed., p. 176 and *Orfield's Criminal Procedure under the Federal Rules*, Vol. 6.
36. Rule VI of the Rules reads: "Bail shall not be allowed pending appeal unless it appears that the appeal involves a substantial question which should be determined by the appellate court."
37. (1957) M.W.N. 608.

dered in bail pending appeal was whether upon the perusal of the record a prima facie ground is disclosed for substantial doubt regarding the conviction and sentence.

On the particular facts of the instant case, Winslow J.'s decision can rightly be justified on the ground now under consideration. His Lordship observed that "no ground had been advanced in the affidavit that serious defects or demerits in the judgement to show his chances of success were good".[38] In view of the fact that the transcripts of the judgement were already ready and available before the bail application was made, the failure of the applicant to indicate the substantial grounds of appeal and that his prospects of success were good was fatal to the application for grant of bail pending appeal. The proper and speedy administration of criminal justice requires that men convicted of serious crimes by a competent court ought not to be free for long periods of time immediately after their sentencing in the absence of substantial grounds that would indicate the prospects of their success on appeal or inordinate delays in the determination of the appeal, or unless there is an error of law or a serious mistake of fact on the face of the record. Therefore, it is submitted that this is an important consideration in the grant of bail pending appeal and one that can lead to a satisfactory compromise between the two often conflicting principles of the freedom of the individual and the safety of the public.

However, the trial court is certainly not the best tribunal to decide that its conviction was based on insufficient evidence or on wrong grounds or that an appeal preferred against its decision is frivolous. These are considerations for the High Court to consider on appeal or in an application for bail made to the High Court where the lower court has refused bail. The very nature of the question raised and the decision to be made indicate that the lower court is not the proper tribunal to exercise a discretion where an application for post-trial bail based on the legal merits of its decision is made. "That the trial court thinks that the appeal is frivolous is no reason at all for the refusal of bail, it amounts only to an emphatic expression of its opinion that the conviction is right".[39] On the other hand it must be borne in mind that the trial judge has had the opportunity to observe the accused during the trial and is familiar with the background and circumstances of the case and the nature and character of all the evidence adduced against the accused. He would thus appear to be better qualified than the distant appellate court to determine the trustworthiness of the accused to be present to undergo his punishment if the conviction is affirmed.

Though an indiscriminate overruling of the trial court's discretion, where there is little possibility of reversal of the conviction, is bad, the High Court must exercise its own independent judgement on bail

38. [1972] 1 M.L.J. 242, at p. 242.

39. Per Fisher J. in *R.* v. *Lim Soh Chwee & Anor. op. cit.* (fn. 10), at 189.

applications even in the absence of abuse of discretion by the trial court. Previous refusal by the trial court should not make the High Court hesitate to act. Winslow J. in the instant case set out to "deal with the matter in the light of the relevant considerations advanced in the affidavit filed in support of the [bail] application with a view to deciding whether [he] should exercise [his] discretion in [the applicant's] favour",[40] but ultimately dismissed the application because it had not been shown that the learned district judge had exercised an arbitrary discretion in the matter. It would therefore appear that his Lordship mainly decided the matter in an appellate capacity and did not apply his mind to the facts of the case with a view to exercising an independent judgement.

In view of the fact that the courts will consider the legal merits and prospects of success on appeal in the light of information about the proceedings from which the appeal lies, the transcript and other documents relating to the proceedings are very important and must be submitted for the perusal of the court along with the application for bail. This does not necessarily mean that the appellate court should scrutinize the evidence in great detail, otherwise the appellate court will have to go through the evidence twice, once at the stage of the application for bail and once again at the stage of the hearing of the appeal. As was indicated by the learned judge in *Krishnmoorthy v. State*,[41] the appellate court upon perusal of the record must consider whether a *prima facie ground* is disclosed for *substantial* doubt regarding the conviction or sentence. Ralph's experience in the preparation of his application should guide future applicants for bail pending appeal to be wary and diligent in the preparation of the main considerations in support of the post-trial bail application.

(iv) *When the accused is a first offender.*

(v) *The possibility of his becoming again involved in similar or other offences whilst at liberty.*

A previous good character might favour the applicant. Bad character is a guide to the appellant's criminal propensities pending appeal but by itself it is not so relevant in an applicant for bail pending appeal against conviction as in an appeal against sentence where the good or bad character of the accused is very relevant. However, if the appellant is a persistent offender with a criminal record,[42] then the threat of injury to the community is great and must weigh heavily with the court in the exercise of its discretion on an application for bail pending appeal.

40. [1972] 1 M.L.J. 242, at p. 242.

41. (1957) M.W.N. 608, at 610.

42. See *R.* v. *Phillips* (1947), 32 Cr. App. R. 47.

(vi) *Whether the security imposed will ensure attendance before the appellate court.*

Historically and throughout the evolution of the bail system to the present day, it has been settled in principle and in practice that whether the accused will abscond or not and whether he will appear before the courts for the purposes of justice, is the question of cardinal importance in any bail decision. Conviction and knowledge of pending punishment, especially, the severity of punishment, increase the probability of flight. At present, the bail system hinges on the threat of a financial forfeiture as a means of deterring flight. The efficacy and effectiveness of this pecuniary forfeiture method have been questioned and criticized by writers and research scholars and suggestions have been made for the reform of the system and for the introduction of non-monetary conditions for the release on bail.[43]

In practice, bail is made up of a substantial amount to effectively deter the accused from absconding before the disposal of the appeal, and together with this money bond it is usual for bail to be granted subject to conditions. For example, the surrender of a passport to the police is a condition that would always be imposed if the prosecution wanted it. The grant of bail subject to such conditions and other stipulations is necessary in the interests of justice and for the prevention of flight. The imposition of conditions and stipulations indicates the right kind of flexible approach to bail problems for deciding between the release of an accused on bail and incarceration.

Notions about the risk of flight upon release on bail tend to be exaggerated and have not been borne out by statistical study.[44] Such risk of flight can be met by securing reasonably high bail (which must not be excessive) "fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested".[45] But bail must not be fixed high or withheld as a punishment. As Lord Russell of Killowen emphasised in *R.* v. *Rose*, "It cannot be too strongly impressed upon magistrates that bail is not intended to be punitive, but merely to secure the attendance of the prisoners at the trial or to come for judgement".[46]

On the financial forfeiture, a Committee that studied the practice in Washington, D.C. pertinently observed:

> The Committee doubts that fear of incurring a forfeiture of a bond is in many cases the principal reason which impels an accused to appear in

43. See generally R. Goldfarb, Ransom: *A Critique of the American Bail System*, New York, 1965.

44. C. Foote, "Forward: Comment on the New York Bail Study," 106 U. Pa. L. Rev. 685.

45. See s. 350 of the Code.

46. (1898) 67 L.J.Q.B. 289, at 292.

> Court... stronger incentives for appearance would seem to be the fear of being caught and charged with a violation of the terms of release and the defendants unwillingness to sever ties with the community where he lives such as employment, family, and other social relationships.[47]

The risk of flight is inherent in the bail system. "No precaution will prevent an accused on bail from absconding if he is really determined to do so; that is an inherent risk and the chief deterrent must be the efficiency of the police in capturing these who abscond".[48] In the instant case, Winslow J. would appear not to have directed his mind anywhere in his judgement to this cardinal question. Having firmly decided against granting bail, His Lordship probably felt it unnecessary to weigh these considerations.

After an review of these criteria and considerations discussed by the learned judge, we are left wondering if the judges have not been confused by the very criteria which they have formulated to determine the grant of post-trial bail. The weight to be attached to, the significance and order or priority of each of the factors are not clear. The question how special must the "special reasons" be remains unanswered. It is probably because "the jurisdiction in granting bail pending appeal, even in respect of bailable offences,[49] is completely discretionary and it would be wrong to attempt to lay down an exhaustive definition of the considerations which a magistrate (or judge) must have when exercising it".[50]

Admittedly, the granting of post-trial bail is a discretionary matter. In determining whether or not bail should be allowed the court must exercise a judicial discretion, and it must so act in accordance with established legal principles. Under our law, an accused has a right of appeal and until final determination of the appeal, he must be regarded as innocent. Therefore, the discretion to refuse bail must not be exercised inconsistently with such a fundamental principle of law. In view of this, it is submitted that the courts should revert to the enlightened policy and practice of the courts in the earlier part of the century to allow bail to convicted persons who have appealed against their conviction unless there are reasons for not allowing it.

Despite the various factors and criteria that have been evolved for the guidance of the courts in the exercise of their discretion, it is submitted that the courts should have three primary considerations when deciding upon a post-trial bail application.

Firstly, whether the grant of bail, the security, and the conditions imposed thereon, will insure the appellant to be present to abide his punishment if his conviction is affirmed.

47. *Bail Reform in the Nation's Capital* (Final Report by R.R. Molleur, Director and staff of the D.C. Bail Project), Washington D.C., 1966, at p. A-8.

48. Devlin, *The Criminal Prosecution in England*, London, 1960, at p. 75.

49. See fn. 6, above.

50. Per Whyatt C.J. in *Goh Beow Yam* v. *R.* (1956) 22 M.L.J. 251, at 252.

Secondly, the prospects of success and a reversal of conviction on appeal to be assessed after a perusal of the convicting court's judgement to see whether the bail application discloses a prima facie ground for substantial doubt regarding the conviction.

And thirdly, the existence of particular and exceptional circumstances that may result in inordinate and unusual delay in the determination of the appeal with the result that the appellant, while awaiting for his appeal to be heard, would be required to remain in jail almost as long as the sentence imposed.

Where no compelling reasons exist for the fear that the appellant would abscond if released on bail, the degree of legal merit should be the sole criterion, and upon this important criterion his Lordship was right in the conclusion that he finally arrived at.

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