

INTRODUCTION

This paper focuses on one of the most important areas of our criminal justice system, i.e. the interval between arrest and the final disposition of the case. It is at this stage in the criminal process that the pre-trial status of a person accused of committing a crime (but not yet proved to be guilty) is determined. It is a question of whether he will be released on bail pending trial and conviction (and pending sentence in cases where the defendant had pleaded guilty at the first court appearance) or whether he should spend this time in custody because the court has decided that if released, he will not appear at the trial or that he will interfere with the course of justice. The notion that the institution of bail is the best device for the control of defendants prior to trial has been so ingrained in our criminal justice system that for a long time it was not even seen worthy of study.

However the cruciality of a no bail determination to the defendant cannot be over-emphasised for the reverberations of such a decision affects the defendant not only at his trial but it also touches his domestic life.

preparation of his defence, if he is fortunate enough not to encounter difficulties in retaining counsel as a result of his pre-trial confinement. Prior consultation with counsel can prove to be difficult within the confines of a prison especially if such facilities are lacking. He may also have difficulty tracing witnesses who can be of assistance to his case.

The cumulative effect of these handicaps is that for a remanded defendant, the pre-trial period can be said to be fraught with danger. Judicial pronouncement to this effect has been made by the United States Supreme Court:

"Indeed, the pre-trial period is so full of hazards for the accused that, if unaided by competent legal advice, he may lose any legitimate defence he may have long before he is arraigned and put on trial."²

In short, whilst he is disadvantaged by a pre-trial remand, the State is able to prepare its case with thoroughness. It must be stressed here that it is in the

¹"A remand is an order for the defendant to appear on a later occasion at the same Court (or occasionally at another Court). A committal is an order made when the Court has completed a case eg. committal for trial, a committal for sentence or a committal to prison." See, Anthony & Berryman's Magistrates' Court Guide, 1970 Butterworths, p.388.

²Escobedo v State (1964) 378 U.S. 478

interest of the public that the defendant^{should} be able to do the same.

Disruption is also caused to the defendant, his family and his work. His incarceration may result in the loss of a source of income to his family. In the interim, if he is employed, he may be dismissed in absentia by his employer. And even if he is subsequently acquitted and discharged, the stigma of being detained may remain.

A way of escape from these handicaps and possible injustice has however been made available by the Legislature via provisions in the law governing the specific circumstances in which bail shall be granted and those cases where bail may be granted³.

It is pointed out by Friedland⁴ that there is "a disturbing relationship between custody pending trial and the outcome of the case, with respect to both the determination of guilt or innocence and the type of sentence imposed." One other discovery made by Friedland⁵ is that the accused person may, whilst in custody, be subject to direct or indirect pressures to plead guilty for reasons unconnected with guilt.

³See ss. 387-8 of the Criminal Procedure Code
F.M.S. Cap. 6

⁴Friedland: Detention Before Trial, 1965 Cap. 6,
p. 110
A Study of Criminal Cases Tried in
The Toronto Magistrates' Courts.

⁵ibid- Cap. 3, p. 60

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In the United States, similar findings were recorded by the Vera Foundation⁶ as a result of its study of the bail system in Manhattan Courts. It was found that two and a half times as many people released on their own recognizance were later acquitted or discharged as *those who* had been held in custody throughout. They suggest that an accused at liberty has the better opportunity of successfully defending the charges against him⁷.

It is quite evident from these studies that initial custody may mean more than a temporary deprivation of liberty. It at once becomes clear that if the aim of the bail system is simply to compel appearance at trial, present arrest and bail procedures are based on ill-conceived and non-scientific criteria resulting in unnecessary harm to those who are *in* remand. However that may be, it is felt that a thorough itemization of the adverse effects of the loss of liberty pending trial would be inappropriate at this juncture⁸.

⁶Ares, Rankin & Sturz: The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole, 1963 N.Y.U. Law Rev. p. 87.

⁷Substantial statistical analysis supporting this view are contained in the article by Patricia Wald: "Pre-Trial Detention and Ultimate Freedom. A statistical Study," N.Y.U. Law Rev., 39, 1964, pp. 631 - 640.

⁸The negative effects of a remand in custody would be unfolded in subsequent chapters.

For the time being, suffice it to say that: "It obviously makes a good deal of difference to an accused person whether he is held in custody or is released on bail pending his trial⁹.

AIM OF THE STUDY

It is the intention of the writer to show that there is an urgent need for an enquiry into the utility and effectiveness of our bail system as administered in the Subordinate Courts.

Much ground has been gained in attempts to inject fairness into the bail systems in both the United Kingdom and the United States as a result of adequate and reliable information supplied by studies pioneered by the Vera Foundation and the Home Office Research Unit¹⁰ and Justice¹¹, British Section of the International Commission of Jurists in the United States and the United Kingdom respectively. These studies have paved the way for a fresh approach to the problem of bail. With their accumulation of accurate

⁹Jackson: Enforcing The Law, 1971 (Penguin), p.142

¹⁰Home Office Research Unit Report, "Time Spent Awaiting Trial (London), 1960

¹¹New Law Journal, June 16, 1966, p.954

and reliable criminal statistics, they have to a certain extent succeeded in setting in motion the forces tending towards reform.

Apart from the thesis written by Chandra Mohan¹², there is a dearth of legal materials on our bail system. Corollary to that, the present study has therefore been undertaken with the hope that attention may be focussed on this decisive stage in the criminal process.

One reason for our apparent neglect of this step in the criminal process could be, perhaps, we share the complacency of Lord Devlin¹³, which was expressed in these terms:

"The right to bail is as old as the law of England. It is indeed curious that fundamental questions concerning it have never been settled. The system so far has worked satisfactorily without providing any occasion for their resolution."

The same, if said of our existing bail system, would at best be mere speculation. There cannot be an objective appraisal of our pre-trial and pre-sentence release procedures without research and adequate and reliable criminal statistics.

¹²Chandra Mohan, "Bail in Singapore"
L.L.M. thesis, University of Singapore.

¹³Devlin, The Criminal Process in England
(London, 24 ed., 1961) p. 71.

The situation is further confounded by the fact that the criminal business of the Subordinate Courts often go unpublicised.

SCOPE OF STUDY

This paper is limited to a study of the bail system as provided for by Chapter 38 of the Criminal Procedure Code¹⁴ entitled, "Of Bail".

An attempt is made to document statistically bail setting practices in the Subordinate Courts and the ability of defendants to provide sureties of the amounts required as a pre-condition of release.

Also recorded are statistics illustrating the nature, extent and ramifications of detention before trial and custody pending sentence in the Magistrates and Sessions Courts at Jalan Duta, Kuala Lumpur.

Preliminary Enquiries conducted in the Subordinate Courts were excluded from the ambit of this paper. Individually they may be of equal importance with the cases studied here; but quantitatively, they represent only a very small percentage of the total number of criminal cases tried and completed in the Subordinate Courts.

¹⁴Criminal Procedure Code, F.M.S. Cap. 6.

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Some of the specific areas that were enquired into are: the extent to which suspects are detained rather than summoned, the frequency with which suspected persons are detained under S.117 of the Criminal Procedure Code, the extent and consequences of detention before and after the first Court appearance, the effects of detention pending trial or pending sentence where the defendant had pleaded guilty at the first Court appearance and more specifically, the relationship between initial custody and the type of sentence awarded, the exercise of discretion by the Subordinate Courts in setting the amounts of bail, the ability of defendants to find sureties of different amounts as a qualification for release and the practice of applications to the High Court, under the second limb of S.389 of the Criminal Procedure Code, where bail has been refused in the Subordinate Courts at the first instance.

METHODOLOGY

Much of the fieldwork for this paper were carried out during a one month period from 24/5/76 to 25/6/76 in the Subordinate Courts at Jalan Duta. In all, the records of 2433 defendants were examined. Only records of criminal cases tried and concluded at the date of investigation were examined. The study comprises of offences under the Penal Code¹⁵, the Dangerous Drugs Ordinance and the Dangerous

¹⁵Penal Code, F.M.S. Cap. 45

Drugs Regulations 1952¹⁶, the Prevention of Corruption Act¹⁷, Corrosive and Explosive Substances and Offensive Weapons Ordinance¹⁸, Customs Act¹⁹, Excise Act²⁰, Sales Tax Act²¹ and the Excise (Control of Toddy and Toddy Shops) Regulations 1970.

It was the intention of the writer to make a study of cases over a three year period, between 1973 - 1975 inclusive²² as it was felt that such a period was sufficient to yield a large but manageable number of cases.

The files containing the charge sheets and the particulars²³ incorporated therein served as the chief source of information. In addition, records of summons issued by the police for the years 1973 - 1975 inclusive (excluding summons for offences under the Road Transport Ordinance²⁴) were examined.

¹⁶Dangerous Drugs Ord., F.M. Ord. No.3 of 1952

¹⁷Prevention of Corruption Act, Act of Parliament No.57/61 (Revised 1971)

¹⁸F.M. Ord. No.43 of 1958 (Reprinted 1965)

¹⁹Customs Act - Act of Parliament No.62/67

²⁰Excise Act - F.M. Act No.34/61

²¹Sales Tax Act, Act 64

²²However in Sessions Court 1, only cases completed in 1975 and those where proceedings had terminated on 26/4/76 were available for examination. As for Special Sessions Court 2, only 1973 and 1974 files were available. In Special Sessions Court 1, the 1975 files were missing.

²³See S.176 (ii) Criminal Procedure Code

²⁴Road Traffic Ordinance No.49/58 (Reprint No.5/1970)

Applications by Way of Notice of Motion to the High Court, pursuant to S.389²⁵ of the Criminal Procedure Code were also examined. In all, 30 such applications made between 22/1/74 to 23/5/76 were studied.

In compiling the data at the Subordinate Courts, the following information was gathered: 1) the charge 2) the age of the defendant 3) the date of arrest 4) the date of first court appearance 5) the plea of the accused 6) the bail history of the defendant 7) the number of court appearances before final disposition of the case 8) number of previous convictions, if any 9) the sentence 10) if fined, the ability to pay 11) retention of counsel 12) the date of termination of proceedings.

Although there are at present five Magistrates Court at Jalan Duta, only records of particulars kept at the first Magistrates Court were examined. This was so because until recently, most of the criminal work in the Subordinate Courts were dealt with by this Court. Apart from these records, the records kept at the two Sessions Courts and the two Special Sessions Courts were also considered.

The Subordinate Courts were selected for study because the overwhelming majority of bail/custody decisions are first made in the Subordinate Courts. Another reason is

²⁵S.389, "..... and a Judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or court be reduced or increased."

that with the enlargement of the jurisdiction of the Sessions and Magistrates Courts vide amendments in 1969²⁶ to the Courts Ordinance 1948²⁷, the volume of criminal cases tried summarily in these courts have increased tremendously.

With the availability of the above mentioned information, a retrospective study of the cases became feasible. A prospective study of the cases was not undertaken for the reason that within the time set for the completion of this paper, a prospective study would not have resulted in a sufficiently large number of cases. A further reason is the inherent difficulties that would be encountered in respect of cases not yet completed at the date of writing of this paper.

From the data thus collected, attempts are made throughout this study to prove or disprove statistically the existence of causal relationships. To ascertain the presence or absence of such relationships, simple correlation analysis by the use of percentage is made. Comparisons where appropriate are made with the findings recorded by studies conducted in foreign countries.

The data is presented where relevant, in the form of tables. The phrase pre-trial bail is used in this paper

²⁶Published in the Gazette on 18th Dec.1969 as P.U. (A) 521 and P.U. (A) 522

²⁷This ordinance is now called the Subordinate Courts Act, 1948, Act of Parliament No.92 (Revised 1972)

in contradistinction to post-trial bail which is more commonly referred to as bail pending appeal.

PREVIEW OF THE PAPER

Chapter I of this paper opens with a discussion of the Origin & Theory of Bail. A consideration of the significance of the presumption of innocence in bail/custody decisions is also undertaken here.

In Chapter II, the law relating to arrest as contained in the Criminal Procedure Code is set out. The use of the summons as an alternative to arrest is also explored. The various types of offences for which the summons were used will be set out.

In Chapter III, an attempt is made to elucidate on the legal principles as stated in Chapter 38 of the Criminal Procedure Code. Before discussing the law of bail, mention would be made of the jurisdiction of the Subordinate Courts. This Chapter is intended to provide a framework for the more detailed discussions that follow it.

Bail setting and the ability of defendants to find sureties of the various amounts is the core of Chapter IV. Here, an examination is made of the factors affecting the bail amounts. Certain hypotheses relating to the ability of defendants to find sureties will be tested. Also

considered is the type and source of information concerning the defendants that Magistrates and Presidents have before them when exercising their discretion in bail/custody decisions. In this chapter, tables regarding bail amounts by charge and the percentage of defendants providing sureties is also set out. The hypothesis that bail amounts are standardised for certain offences is also tested. A striking finding in this chapter is that bail amounts are set on the basis of the gravity of the offence charged, regardless of the ability of the accused to produce a surety of that amount.

The Fifth Chapter deals with the questions of the extent, nature and consequences of custody between arrest and the termination of proceedings. Here, an attempt is made to document statistically the relationship between custody and the outcome of the trial. The extend^d of detention prior to the first court appearance under S.117 of the Criminal Procedure Code is also examined. The time spent in custody between steps in the criminal process is another topic covered in this chapter.

As is customary, the paper ends with a summary of the main findings recorded in this study. Some suggestions as to the manner in which our bail system may be ameliorated are also made.