CHAPTER I

ORIGIN AND THEORY OF BAIL

Bail, as a device for the pre-trial release and control of defendants, had its origins in Medieval England. Its emergence as "the door between confinement and freedom"[28] at the preliminary stages of criminal proceedings was not in response to any articulated libertarian sentiments. In tracing the origins of the English bail system, it would be quite correct to say that it comes very close to the saying that necessity is the mother of invention.

Disease ridden jails and delays caused by travelling justices necessitated an alternative to keeping untried prisoners in jail pending the disposal of the question of guilt. Such therefore were the conditions that brought about the system of bail in England.

It is commonground that court calenders being what they are, the same pressing needs are also present today, so that it can be said with some confidence that delay is the byword of the justice system. Part of that delay is inherent in the system as a consequence of its myriad stages.

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[28]Goldfarb: Ransom, N.York, Harper & Row 1965, p. 9.

Starting with the observation that court calenders are crowded, Qasem[29] in a very persuasive article has put forward the view that bail as a scheme for the release of untried and unsentenced defendants might well be resorted to even without the necessary presence of any doctrine of personal liberty.

Regardless of the utility of bail as a system of pre-trial release, there are certain points that has to be borne in mind. Amongst other things, it is questionable whether the available predictive mechanism can ensure accuracy in the Court's prediction of the likelihood of flight or of future criminal conduct. Prediction as a tool in the criminal process is at best a chancy method.

It is submitted that the broad objective of the bail system should be to keep the number of defendants held in custody before trial to the minimum compatible with the interests of justice.

The best things in life goes the saying are free. But the rest must be paid for. It is axiomatic that in our world everything costs something and the law of bails is no exception. Like all else, it comes at a price. This price involves as it does the denial of liberty to a person who may not subsequently be convicted of any offence.

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[29]Qasem: "Bail and Personal Liberty"
30 Can. Bar Rev. p. 379

However, not all errors which occur consist of unnecessary committals to custody, the decision to release defendants on bail can sometimes work against the public interest both by wasting police time in apprehending those who jump bail and more importantly, in the commission of further offences.

In this connection, it is pertinent to consider whether flight is a police problem to be brought into play after the fact or whether it should be treated as a judicial problem of insurance before the fact. To invoke the latter alternative as a rationale for the bail system would be to do injustice to this passage by Devlin:

> "....., no precautions will prevent an accused on bail from absconding if he is really determind to do so, that is an inherent risk and the chief deterrent must be the efficiency of the police in capturing those who abscond."[30]

This statement seems to capture the very liberal view of criminal procedure and thus leads nicely into a consideration of the possibility of the bail system achieving an equilibrium between two conflicting and opposing values.

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[30]Devlin, loc cit

The Individual's Interest v Society's Needs

When a bail application comes before the Courts, they are faced with the dilemma of striking a balance between the individual's interest in remaining free until his guilt has been determined against a society's just demands for varying degrees of restraint.

A Court faced with such a problem has therefore to endeavour to reconcile the applicant's interest in pre-trial liberty with the need for an assurance that he will appear at his trial.

Everyone accused of committing a crime has the benefit of the presumption of innocence. This presumption cannot be impinged by a detention for whatever reason prior to a finding of guilt. A person cannot be kept in jail merely upon an accusation until it is found convenient to give him a trial.

Thus, stated simply the difference in opinion swirls around the question whether confinement prior to a judicial determination of guilt and the consequent necessity to furnish bail as a condition for freedom negates the presumption of innocence.

Proponents of the view that such detention is an infringement of the cardinal jurisprudential rule explain that this presumption serves to permit the unhampered preparation of a defence and that no inference can be drawn from the mere fact of arrest. Without this privilege,

it is pointed out that even those wrongly accused are punished by a period of imprisonment while awaiting trial. It is therefore said that pre-trial detention is equivalent to punishment before conviction.

This view is best expressed by Denning L.J. (as he then was) when his Lordship said:

> "It would be contrary to all principles for a man to be punished not for what he has already done but for what he may hereafter do."[31]

Viewed at from another angle, it can be said that detention prior to trial is not anathema to the presumption of innocence. T.B. Smith[32] provides this other aspect of the controversy. On this point, he is contend to take the view that the presumption of innocence is an evidentiary rule intended to secure a fair trial. Inherent in this presumption is that the guilt of an accused must be proved at his trial beyond a reasonable doubt. It is his argument that it does not mean that those who discharge executive or administrative functions prior to the trial stage should be bound to act as though the suspect had behaved and would pending trial behave as a law-abiding citizen. It is

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[31]Everett v Ribbands (1952) 1 All E.R. 823 at p. 826

[32]T.B. Smith: Bail Before Trial "Reflections of a Scottish Lawyer" 1960 108 U. of Pen. L. Rev. p. 109

argued therefore that since bail proceedings take place before trial, the presumption cannot be of application at this stage of the criminal process.

For an elaboration on this point, that the presumption of innocence is not really the focal point when deciding whether an individual has a right to bail, reference may be made to the article by Bogomolny and Sonnenreich[33].

To conclude on this point, it is germane to quote the views of the International Congress of Jurists:

> "Prolonged detention before trial even when justified on the grounds of "police enquiries" or "preparation of the Prosecution's case" may constitute a serious denial of justice. This is even more true if the alleged reason for the delay is the pressure of criminal business in the Courts."[34]

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[33]Bogomolny & Sonnenreich: Bail Reform Act of 1966 (1969) 11 Arizona L.R. p.201

[34]Report of I.C.J., New Delhi 1959 "The Rule of Law in a Free Society" p. 250