CHAPTER III

LAW OF BAIL

Criminal Jurisdiction and Powers of The Subordinate Courts

By section 6 of the Criminal Procedure Code, "the courts for the administration of criminal justice in the Federation shall be those constituted pursuant to the Constitution, or the Courts of Judicature Act, 1964, or by the Courts Ordinance, 1948, or by any other law for the time being in force." The Courts Ordinance, 1948 was revised in 1972 and is now known as the Subordinate Courts Act, 1948.

Since this study centres around the bail-setting practices of the Subordinate Courts, it would not be inappropriate to consider both the criminal jurisdiction and powers of these Courts. By Subordinate Courts are meant Sessions Courts and Magistrates Courts.

The criminal jurisdiction and powers of the Subordinate Courts are set out in the Subordinate Courts Act, 1948[46] (hereinafter referred to as the Act).

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[46]Subordinate Courts Act, 1948 Act 92 (Revised 1972)

A Magistrate's Court is presided over either by a First Class Magistrate or a Second Class Magistrate or by a President of the Sessions Court[47] having the powers of a First Class Magistrate.

Under Section 88 and 89 of the Act, a Second Class Magistrate is empowered to try criminal offences where the maximum punishment imposed by law is not more than 12 months imprisonment. When he tries such an offence, he may impose a sentence not exceeding three months imprisonment or a fine not exceeding $250 or both. In addition, he may also impose a sentence combining either of the sentences just mentioned.

A First Class Magistrate possesses more extensive powers and jurisdiction. Under s.85 of the Act, he has power to try any offence for which the maximum term of imprisonment does not exceed five years, or which are punishable with a fine only. In addition, a First Class Magistrate is also given power to try certain other offences under the Penal Code which carry a maximum sentence of more than five years or which are punishable with whipping as well. In such cases he may pass any sentence which does not exceed two years imprisonment or a fine of five thousand dollars.

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[47]It would be instructive to refer to the following cases on the powers of a Sessions Court President sitting as a First Class Magistrate: (a) Hitam v Public Prosecutor (1963) M.L.J. 224
(b) Public Prosecutor v Thui Kuan Wing (1963) M.L.J. 368

If whipping is ordered, it can be for up to six strokes. A sentence combining any of the above is also within the powers of a First Class Magistrate[48].

The proviso to s.87 of the said Act provides that where by any law for the time being in force, jurisdiction is given to the Court of any Magistrate to award punishment for any offence in excess of the powers prescribed by s.87, a First Class Magistrate may award the full punishment authorized by that law notwithstanding that it may be beyond the competence of the Magistrate. In addition, a First Class Magsstrate is also given power to award the full punishment authorized by law if it appears that by reason of the accused's previous conviction or of his antecedents he deserves it[49]. In such a case, he must record his reasons and if the accused does not appeal against the sentence, the Magistrate must transmit the record to the High Court so that the High Court may satisfy itself as to the correctness, legality or propriety of the sentence[50].

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[48] ibid, s.87 (1)

[49] ibid, s.87 (2)

[50] s.37 Courts of Judicature Act 1964. Act 97 (Revised 1972)

Under s.63 (1) of the Act, the criminal jurisdiction of a President of the Sessions Court extends to offences with a maximum punishment of ten years or a fine only[51]. In addition, certain other offences under the Penal Code with punishments in excess of those mentioned above are also triable by a President. Under s.63 (2) of the Act, other offences may be included if the Public Prosecutor applies to the Court to try the offence and the accused consent, provided the offence in question is not punishable with death or life imprisonment[52]. Sentence imposed on convicted offenders should not exceed five years imprisonment or a fine of $10,000 or whipping up to 12 strokes or a combination of any of the above[53]. Also, like First Class Magistrates, a President can award the full punishment authorized by law if he thinks that by reason of the accused's previous conviction or of his antecedents, he deserves it[54].

Sessions Court Presidents conferred with special powers[55] under s.63 (3) of the Act may try offences for which the maximum term of imprisonment does not exceed

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[51]For the ruling that a President can try a case which carries a sentence of both a fine and a term of imprisonment, see Periannan & Ors v P.P. (1954) M.L.J. 236

[52]as to the procedufe to be adopted in such a case, see the judgment of Mathew CJ in Chew Yoke Keng v P.P. (1954) M.L.J. 158

[53]ibid, s.64 (1)

[54]ibid, s.64 (2)

[55]At present, there are two Special Presidents in Kuala Lumpur

14 years and offences under ss.326, 329, 376 and 377 of the Penal Code and s.30 of the Arms Act 1960. By Act A315, offences under s.39 (B) of the Dangerous Drugs Ordinance[56] and s.4 and s.5 of the Firearms (Increased Penalties) Act[57] have also been included. Special Presidents have authority to sentence to a maximum of seven years imprisonment or a maximum fine of $20,000.

Section 173 of the Criminal Procedure Code sets out the procedure to be adopted by a Magistrate in a summary trial. Briefly, the procedure is as follows: The charge containing particulars of the offence of which he is accused is read over and explained to the accused person at his first court appearance. If he is fit to plead, the accused would then be asked whether he pleads guilty to the offence charged or whether he intends to claim trial. If the accused pleads guilty, the Magistrate can then proceed to record the plea and convict the accused. However before recording a plea of guilty, a Magistrate is required to ascertain that the accused understands the nature and consequences of the plea and that he intends to admit, without qualification, the offence alleged against him. Questions of the grant of bail and its amount are dealt with only after the plea of the accused person has been taken.

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[56] Dangerous Drugs Ord. No.30 of 1952

[57] Firearms (Increased Penalties) Act 75

From the study conducted by the writer at the Subordinate Courts in Kuala Lumpur, an indication of the type of criminal cases tried and disposed of by these courts are set out in Appendix C.

The Law of Bail

This paper deals only with the subject of bail as contemplated by Chapter 38 of the Code. It is important to note this because provisions as to bail can be found in the various chapters of the Code. They however have their relevance only with regard to the peculiar circumstances envisaged therein.

No definition of bail is provided for by the Code. For purposes of this study, it is sufficient to define bail by reference to the function that it performs in the criminal process. Bail is a device for setting free an unconvicted or unsentenced accused. Such freedom is however conditioned upon the ability of the accused to provide adequate assuarance of his presence at the trial. This assuarance usually takes the form of a requirement for a surety.

There are four discernible stages in criminal proceedings at which the question of release on bail can arise. It arises; a) at the police station when a suspect is arrested and accused of an offence b) at the first court appearance when the accused is charged c) when an accused is committed for trial in the High Court after a Preliminary

Enquiry by a Magistrate d) bail pending appeal. In this chapter, we are only concerned with bail granted at stage (b).

Under the Code, offences are classified inter alia as bailable or non-bailable. A bailable offence is defined in the Code as an offence shown as bailable in the 5th Column of The First Schedule to the Code[58]. A non-bailable offence means any other offences.

With regard to offences other than those falling under the Penal Code, the 1st Schedule of the Code enacts a general rule that if the offence is punishable with death or imprisonmentfor seven years or upwards, it is not bailable. An offence punishable with imprisonment for 3 years is also made non-bailable. If however the offence is punishable with imprisonment for less than 3 years or if it is punishable with a fine only, then it is a bailable offence.

Bail is a matter of procedural privilege at the most and it is not an accrued right, at least until it is granted[59]. It is therefore clear that bail being a part of procedural law, its grant or refusal must be regulated by the law under which a particular trial is held. The

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[58] s.2

[59] per Digby J in Sitao Jholia v Emperor A.I.R. (1943) Nag.36

question on bail would have to be decided according to Chapter 38 of the Criminal Procedure Code where the offences alleged is one under the Penal Code. For offences under any other law, the question of bail would also have to be determined according to the Code, unless a contrary intention appears[60].

In the case of Salig Ram v Emperor[61], the Court stated that:

> "The commission of an offence does not ipso facto carry with it a right of bail. Such a right is dependent on the provisions contained in the Statute under which the trial is held and to that Statute alone can the Court look for any right which the offender claims."

Bailable Offences

Section 387 of the Code must now be set out. Its setting is Chapter 38 of the Criminal Procedure Code, a chapter which has as its heading, "Of Bail" and runs from s.387 to s.394 inclusive. Provisions relating to bailable offences are contained in s.387 while that governing non-bailable offences are laid down in s.388 (i) to (v). Section 389 is applicable to both classes of cases and sections 390 - 394 are subsidiary or ancillary to the main provisions. Other sections in the Code that contain provisions that are ancillary to the

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[60]see s.3 of the Criminal Procedure Code

[61]Salig Ram v Emperor, A.I.R. (1943) Allah. 26

question of bail are sections 403 and 436. Section 403 permits the deposit of a sum of money in lieu of executing a bond. Under s.436, a person released on bail must provide an address for service of notice or process.

The substantive part of s.387 imposes a statutory duty upon the Court and "any police officer in charge of a police station" or "any police officer not under the rank of corporal" to release on bail a person who is involved in a bailable offence, when he is arrested, detained, appears or is brought before the Court.

The right to bail under s.387 is however dependent upon whether or not the accused is prepared and able to give bail. It follows that the accused person contemplated under s.387 cannot be kept in custody unless he is unable or unwilling to offer bail or execute a personal bond[62].

In Reg. v Lim Kwang Seng[63] Whitton J was of the view that under s.406 of the Criminal Procedure Code (which corresponds to s.387 of our Code) any person accused of a bailable offence who is prepared to give bail must be released by the police or the Court, as the case may be. His Lordship further stated that although the section is silent, it presupposes the bail contemplated will be of an

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[62]The Crown v Makhan Lal, 48 Cr. L.J. 656

[63]Reg. v Lim Kwang Seng (1956) M.L.J. 178

amount which may reasonably be considered adequate to secure the accused person's attendance at the proceedings. In that case, certain persons were charged with the offence under s.147 of the Penal Code. Under the then Criminal Procedure Code, (i.e. C.P.C. cap.132) an offence under s.147 was bailable. However upon an application being made by the Prosectuion, the Magistrate remanded the accused persons to custody for 4 days. On revision, his Lordship stated that the special procedural provosions laid down in s.7 of the Criminal Justice Ordinance 1954[64] could not have been intended to abrogate the substantive right of bail conferred by s.406. The Magistrate should therefore have granted bail before deciding to grant a postponement.

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[64] s.7 reads as follows:

> "Where any application made to any criminal court by or on behalf of any person charged with a scheduled offence in respect of the release on bail of such person is opposed by the Public Prosecutor or a Deputy Public Prosecutor. The Court to which such an application is made shall, unless it is the High Court, refer such application for the decision of the High Court or a Judge and, until such decision has been obtained, shall remand such person in custody."

Since the provisions of s.387 are imperative, a Magistrate or President has no discretion in the matter of granting bail[65]. It stands to reason that apart from fixing the bail amount, they are likewise precluded from imposing any other conditions except the requirement of security with sureties[66]. In Malaysia as in India, the decision to grant or refuse bail is a judicial function so that a mistake in the fulfillment of that function, without malice, will not afford grounds for a civil action.

Non-Bailable Offences

The provisions relating to the grant or refusal of bail and its cancellation in respect of non-bailable offences are contained in s.388 (i) to (v). There are two limbs to s.388 (i). The first limb allows a discretion to the police officer or Court to release "any person accused of any non-bailable offence," when such a person is arrested or detained without a warrant or appears or is brought before the Court.

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65 From the writer's examination of 2124 cases, 340 persons were charged with bailable offences. Of these, 15 were refused bail (11 of those who were remanded were charged with the offence s.224 of the Penal Code).

66 Rex v Ganda Singh & Ors. 1950 Allah. 525

The exercise of the discretion given by the first limb of s.388 (i) is however limited by the second part of s.388 (1). The second limb of s.388 (i) suggests an enquiry into the existence of reasonable grounds to believe that the person involved was guilty of an offence punishable with death or imprisonmentfor life. In such cases, the police officer or President or Magistrate, as the case may be, has no powers to set free on bail. In Malaysia, this has been established by a long line of cases[67]. It is also equally well-established that the words "punishable with death or imprisonment for life" as it appears in s.388 (i) should be read disjunctively as if it meant "with death or with imprisonment for life[68]." In the case of Re K.S. Menon[69], Bostock-Hill, President, took the view that "to interpret it otherwise would lead to an absurdity - a man charged with an offence punishable with death only will be in a better position as regards obtaining bail than if he were charged with an offence punishable with death or life imprisonment."

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[67]see Re K.S. Menon (1946) 12 M.L.J. 49; R v Ooi Ah Kow (1952) 18 M.L.J. 95; R v Chan Choon Weng & Ors (1956) 22 M.L.J. 81; Shanmugam v P.P. (1971) 1 M.L.J.283

[68]King-Emperor v Nga San Htwa I.L.R. 5 Rang. 276
Re K.S. Menon (1946) 12 M.L.J.49

[69]ibid, n. 67 & 68

Further, it might be pointed that under the second limb of s.388(1), the powers of a police officer is much narrower than that of the Magistrate or President. The said police officers are prohibited absolutely from granting bail to a person accused of a non-bailable offence if there appears reasonable grounds to believe that he is guilty of an offence punishable with death or life imprisonment. But under the proviso to sub-section (i) of s.388, a Magistrate or President has the discretion to admit to bail in cases where the person involved is "under the age of 16 years, or any woman or any sick or infirm person."

Reasonable Grounds To Believe

The question to be discussed here is what constitutes reasonable grounds to believe that a person involved in a non-bailable offence is guilty of an offence punishable with death or imprisonment for life within the meaning of s.388 (i).

In the case of Jamini Mullick v Emperor[70], the Court thought that the phrase meant "such grounds upon which a conviction could be based if not rebutted." On this view, it is arguable that if the allegation against such an accused person was based merely on suspicion and the offence

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[70]Jamini Mullick v Emperor 36 Cal. 74

for which he is arrested is punishable with death or life imprisonment, then both the police and the Subordinate Courts can allow bail, irrespective of whether the accused comes within the exceptions in the proviso to s.388(i).

In Malaysia, there seems to be a conflict of views among the Courts as to what facts constitute "reasonable grounds". The cases seem to show that the Courts have oscillated from one view to another, namely, whether the mere charging of a person with an offence punishable with death or life imprisonment is sufficient to take the question of bail out of the powers of the Subordinate Courts.

It is clear from Re K.S. Menon (supra) that there should be some facts upon which a Court could determine the absence or otherwise of reasonable grounds. However in the case of R v Ooi Ah Kow[71] Spenser-Wilkinson J took the view that where a person is charged with an offence punishable with death or life imprisonment, that by itself is sufficient to provide the reasonable grounds to believe in the accused person's guilt for the purposes of s.388 (i).

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[71] ibid, n. 67

This point was made clear when his Lordship stated:

> "Under s.416(1) (which corresponds to s.388(i)), the Magistrate had no power to release the accused on bail, because unless there had been at least reasonable grounds of suspicion that the accused had been guilty of such offences, he presumably would not have been remanded in custody on the previous occasions." (emphasis added)

Then, in deciding the case of Reg v Chan Choon Weng & Ors[72] his Lordship went further by equating the charging of a person with an offence punishable with death or life imprisonment with the existence of reasonable grounds to believe in his guilt thereof. His Lordship said:

> "There is no doubt in law that where an accused is charged with an offence punishable with life imprisonment a Magistrate has no power under s.416(1) to grant bail whether or not that offence is also punishable with death." (emphasis added)

Neal J in the later case of Adat b.Taib v PP[73] took a different view of the matter. His Lordship stressed the obviously "wide distinction" between the charging of an offence and of there being reasonable grounds for

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[72] ibid, n. 67 p.82

[73] Adat b. Taib v PP (1959) 25 M.L.J. 245

believing guilt. The Court stated that:

> "It may well be that in the initial stages of a criminal prosecution the fact that the Public Prosecutor has elected to charge a man with an offence coming within s.388 (1) of the Criminal Procedure Code may provide prima facie evidence of such reasonable grounds but the law still remains that there must be reasonable grounds for believing guilt."

It would therefore seem that mere prima facie evidence and reasonable grounds are not one and the same. The refusal of bail under s.388 (1) can only be made after a determination of the existence of "reasonable grounds."

However, in the case of PP v Latchemy[74], the views of Spenser-Wilkinson J were restored when Pawan Ahmad J held that:

> "The general rule under s.388(1) of the Criminal Procedure Code is that the Court should not grant bail to a person charged with an offence punishable with death."
> (emphasis added)

In PP v Shanmugam[75] Azmi J decided that it is only when there are reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life that a President or Magistrate is without power to grant bail in the case of a non-bailable offence. Presumably this meant that there has to be grounds for such belief and that the mere charging of an offence

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[74]P.P. v Latchemy 1967 2 M.L.J. 79

[75]ibid, n. 67

punishable with death or imprisonment for life was not sufficient to constitute such a belief of guilt[76].

Whatever the position may be, it is desirable that this question be settled by a Federal Court decision. In the absence of such an authoritative decision from the Federal Court, it is erroneous to equate the mere charging of an offence with reasonable grounds of belief. Such an interpretation would make it too easy for the Prosecution to charge a person with an offence punishable with death or life imprisonment where it is thought "desirable" that such a person should be kept in custody.

Sub-Sections(ii) and (iv) of Section 388

Under section 388 (ii) a police officer or a Court shall release on bail if it appears as a result of investigations, inquiry or trial that there does not exist any reasonable grounds for believing that the accused has committed a non-bailable offence but that there are grounds for further enquiry. In R v Ooi Ah Kow (supra), the Court doubted the applicability of this sub-section when the trial had not

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[76]From the writer's examination of the cases tried summarily in the Special Sessions' Court, it was found that the Prosecuting Officer very often objected to bail where the charge was one under s.326 or s.376 of the Penal Code. These objections were often based on the grounds that the Court had no power to grant bail. But at that stage of the proceedings (i.e. when the accused is charged) there would hardly be any evidence before the President for him to form a reasonable belief of his guilt.

commenced. The Court held that the words "if it appears at any stage of the enquiry" suggested that the sub-section only came into effect when the enquiry had started and some evidence had been taken from which it "appeared" that the accused might not have committed a non-bailable offence.

Under s.388(iv), a Court but not a police officer shall release on bail if after the conclusion of the trial but before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of such offence. It can be seen that in respect of sub-section (ii), the police and the Court is enjoined to release an accused person if there are not reasonable grounds for believing that the accused has committed a non-bailable offence. The most obvious case is when after a remand, evidence incriminating the accused in the non-bailable offence is not adduced or if the Prosecution has already been given sufficient time to adduce such evidence. Sub-section (iv) on the other hand applies only after the conclusion of the trial and on the evidence the Court is able to decide on the guilt or innocence of the accused.

To summarise, it can be said that under sub-sections (ii) and (iv) of S.388, bail must be granted where no non-bailable offence appears to have been committed or that the accused is not guilty. In such a case, an accused

person shall be released on his own personal bond without sureties. Conversely, if any such offence was manifested, then bail should not be given. In other words, from the commencement of the investigation, inquiry or trial till after its conclusion, the accused was to be secured and could be released on bail only when no non-bailable offence was evident.

Cancellation of Bail

As bail in a non-bailable offence is a concession granted by the Court to the accused, it pre-supposes that this privilege will not be abused. When such an abuse occurs, the Court is empowered under sub-section (v) to arrest that person and commit him to custody. Although the word used is "arrest" there is no reason not to believe that this sub-section confers upon the court the power to cancel bail in appropriate cases.

s.388 (v) reads:

> "Any Court may at any subsequent stage of any proceeding under this Code cause any person who has been released under this section to be arrested and may commit him to custody."
> (Emphasis added)

It is clear from this sub-section that the power to cancel bail can only be exercised in relation to bail granted in cases involving a non-bailable offence. There is therefore a lacuna in the law in that while the Court is empowered to cause the arrest of a person who has been

released on bail in a non-bailable offence, the Code makes no provision for the cancellation of bail in respect of bailable offence[77].

The Court in K. Bomanji Wookerji v State of Mysore[78] attempts to explain this hiatus on the grounds that in a bailable offence the grant of bail is a right and the question of cancellation does not arise since the Courts cannot deny to the accused what the law gives him.

The Court in a bailable offence can however enhance the amount of bail[79].

In India, this point has been settled in the case of Talab Haji Hussain v Madhukar Purshottar[80] where the Supreme Court of India affirmed the view that the High Court has inherent powers under s.561A of the Indian Criminal Procedure Code to cancel bail in bailable cases. On behalf of the appellant it was urged that where a specific provision in a statute enjoins the Court to do something or not to do something, it is well settled that the Court cannot act contrary to the intentions of the Legislature. The Supreme Court accepted this view but rejected the contention that the lacuna was deliberate. Section 561A reads:

> "Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders

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77But where a person accused of a bailable offence absents himself from Court on the specified day, a warrant for his arrest can be issued in accordance with s.50 of the Criminal Procedure Code.

78K. Bomanji Wookerji v State of Mysore 1955 Cr.L.J.973

79Bashiruddin v Emperor A.I.R. (1932) Allah. 327

80Talab Haji Hussain v Madhukar Purshottar AIR(1958)

> as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

The provision closest to S.561A of the Indian Criminal Procedure Code is s.4 of the Malaysian Criminal Procedure Code. Section 4 says:

> "Nothing in this Code shall be construed as derogating from the powers or jurisdiction of the High Court."

The question whether a Malaysian High Court will invoke S.4[81] to cancel bail in a bailable offence is open to speculation. However it is a fair view that if an accused person by his conduct, puts a fair trial into jeopardy, it would be the primary duty of the High Courts to ensure that the risk to the fair trial is removed and this would be equally true in cases of both bailable and non-bailable offences.

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[81] S.389 does not give the High Court power to cancel bail where it has been granted.
S.392 applies only in certain specific circumstances eg. where bail had been granted through fraud, mistake or where insufficient sureties have been accepted or if the sureties become insufficient afterwards.

Section 389

There are two limbs to s.389. The second limb of s.389 reads as follows:

> "..... 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."

Under this part of s.389, a High Court is given absolute discretionary powers to vary the bail amount from the time of arrest right up to the time of conviction. It may grant bail when bail has been refused. It may reduce the amount of bail if the amount is excessive and it may also increase the amount of bail if the amount is insufficient[82].

In King-Emperor v Joglekar[83] this section was interpreted to mean that it gave the High Court absolute discretion to grant bail, free from the limitations of the discretion prescribed in s.388 (i).

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[82] Sulaiman b. Kadir v P.P. (unreported) Criminal Application No.25/75

[83] King-Emperor v Joglekar I.L.R. 54 Allah. 715

But in Nga San Htwa's[84] case, Rutledge CJ said:

> "Though the discretion is absolute, the Court must exercise it judicially ..... and it might not grant bail in such cases (those punishable with death or imprisonment for life) except for exceptional and very special reasons."

This view was subsequently followed by the Court in Re K.S. Menon and R v Ooi Ah Kow. It becomes evident therefore that before a High Court can exercise its discretion in favour of a person accused of an offence punishable with death or imprisonment for life, exceptional and very special reasons will have to be proved.

Exceptional And Very Special Reasons

In Shanmugan v PP, Azmi J[85] held that what constitutes exceptional and special reasons must necessarily depend on the facts of each case. If by reason of delay in the investigation of a case by the police, inordinate delay is caused, this might constitute exceptional and very special reasons for release under s.389[86]. Further it has been stated, albeit in a negative form, that where the refusal to grant bail prejudices an accused in the preparation of his defence, this might be a reason to grant bail[87]. But in P.P. v Latchemy[88] Pawan Ahmad J thought that the reasons that the applicant was a mother

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84ibid, n. 67

85op cit n. 68

86R v Ooi Ah Kow (1952) 18 MLJ 95
87P.P. v Wee Swee Siang (1948) 14 MLJ 114
88P.P. v Latchemy 1967 2MLJ 79

of ten children, the youngest of whom was still under breast feed and that there was no one else to look after them if the applicant was not given bail fell far short of being exceptional and very special.

In the case of Sulaiman b. Kadir v P.P.[89] Harun J had occasion to pronounce on what his Lordship thought constituted exceptional and very special reasons. The accused in that case had been charged with rape under s.376 of the Penal Code. The learned President, Special Sessions Court before whom he had been charged, had disallowed his application for bail. The accused therefore asked the High Court to exercise its discretion under s.389 of the Code to grant bail on exceptional and very special reasons. His Lordship took the view that the anomalous position created by the conferment of special jurisdiction on Session Court Presidents without a corresponding discretionary power to grant bail in respect of offences triable by it, amounted to exceptional and very special reasons. The applicant was before the Subordinate Courts for summary trial. Whilst the Courts (amendment) Act 1971 had granted special jurisdiction to the Sessions Court to try rape offences, consequential changes to the Criminal Procedure Code in respect of s.388 (1) had not been made. By s.64 (1) of the Subordinate Courts Act 1948,

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[89]ibid, n. 82

the maximum sentence which a Special President may pass is 7 years. In rape cases no power had been given to the Sessions Court to impose the maximum sentence of life imprisonment by the proviso to s.64 (1) nor is such a power given by s.64 (2) which is restricted to the exercise of powers under s.63 (1) but not under s.63 (3) of the said Act. The applicant was therefore no longer charged with an offence punishable with life imprisonment. In the event his Lordship granted bail in the sum of $1,000 in one surety.

However the anomalous position referred to by Harun J would cease to exist when the Penal Code (amendment and Extension) Act 1976 Act A327 comes into force. Under this Act, offences against s.326, 329, 376 and 377 of the Penal Code are no longer punishable with life imprisonment so that a Special President with powers to deal with these offences can grant bail in appropriate cases thereof.

Procedure To Be Followed When Applications Under s.389 are Made

This point was also considered by Harun Hashim J in the case mentioned above. It was contended on behalf of the D.P.P. that the application was in effect an appeal from the refusal of the President to grant bail and that therefore the proceedings should be brought by notice of appeal under s.394 of the Code. The applicant had brought the application by Notice of Motion under s.389 of the Code. The Court held that though there was no authority

on the point, the procedure under s.389 of the Code was the correct procedure for such applications. His Lordship stated:

> "In my view, if a person should not be kept in custody for a moment longer than is necessary, then the speedy procedure of s.389 is obviously indicated."

If it is an appeal under s.394 of the Code, it will take a longer time to be heard because there has to be a Notice of Appeal and the Subordinate Court will have to state its reasons for refusal before the petition can be filed and eventually heard. The court held that if it is an application by Notice of Motion, supported by affidavit, it can be made immediately after refusal without notice to the Subordinate Court (but with notice to the Public Prosecutor) and the application can even be heard by the High Court on the same day or very soon thereafter, speed being the essence of such an application.

Grounds For The Refusal Or Grant Of Bail

While the Code provides that in non-bailable offences, a Subordinate Court or a police officer, as the case may be, has a discretion to grant bail, except where the offence is punishable with death or imprisonment for life, it does not specify the grounds for the refusal or grant of bail. In short, the Code does not specify clear guidelines for the solution of this question. There is

therefore some uncertainty as to the factors which should properly be taken into account in dealing with bail applications. To fill this gap, both Malaysian and English[90] cases will have to be referred to.

The basic question involved when an application for bail is made is whether the accused will appear to stand his trial if bail is granted[91].

English Law

Atkinson J in R v Phillips[92] stated that the matters which ought to be taken into consideration include the nature of the accusation, the nature of the evidence in support of the accusation and the severity of the punishment which conviction will entail. These criteria derive almost exclusively from Re Robinson[93].

The rationale of the above stated test is clear. It is that the more serious the charge and the more severe the likely sentence upon conviction, the more likely it is that the accused will abscond[94].

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90 s.5 of the Code permits this.

91 Judicial confirmation of this view can be had from R v Tan Tee (1948) MLJ 153
Re Robinson (1854) 23 LJQB 286

92 R v Phillips (1947) 32 Cr. App. R. 41

93 ibid, n. 91

94 Of the 1250 persons who were able to find sureties of the amounts required, only 11 absconded. Seven were charged with the offence of theft under ss.379 & 380 of the Penal Code, 2 under s.454, 1 each under ss.419 and 143.

Another factor that is often emphasised in English cases is the applicant's record. This point was repeated by Lord Goddard in several cases[95]. His Lordship stated:

> "As this Court has pointed out over and over again, it is most dangerous to grant bail to a man with a long record of convictions unless the Magistrates think that there is a real doubt as to his guilt, because he is sure, if he is admitted to bail to commit offences while he is on bail."

Lord Atkinson J[96], speaking of a housebreaker alleged to have been arrested in the act who had previous convictions said that it is "a very inadvisable step" to free on bail such a person. In commenting on accused persons with previous convictions, Lord Goddard expressed the opinion that in such cases the accused might take the attitude that there is nothing to lose by committing further offences, for there is no point in "hanging for a lamb". The accused in such circumstances might try by criminal means to get money to provide for his family for the period he is serving his impending sentence.

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[95] R v Wharton (1953) L.R. 565
R v Gentry (1955) 39 Cr. App. R 195
R v Pegg (1955) Crim. L.R. 308

[96] ibid, n. 91

An accused person's bad record is a relevant factor to consider as it is an indication of the probability of the accused committing further offences while on bail. It does not bear on the probability of the accused person's appearance for his trial. As regards both the relevancy of an accused person's bad conduct and its justification for the denial of bail to such persons, Courts in the United States have differed in opinion with the English Courts.

In the United States, it has been held that the antecedents of an accused has a bearing upon his good faith in appearing for trial[97], and in Williamson v United States[98] Justice Jackson expressly repudiated an accused person's bad record as a justification for denying him bail:

> "Imprisonment to protect society from predicted but unconsummated offences is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loathe to resort to it, even as a discretionary judicial technique to supplement conviction of such offences as those of which defendants stand convicted."

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[97] Rubinstein v Mulcahy 155 F.2d. 1002

[98] Williamson v United States 184 F. 2d. 280

In A.G. v Ball[99] the Court pointed out that bail must be refused if the course of justice might be impaired by interference with any witness or potential witnesses or in any other way tampering with evidence.

Malaysian Cases and Cases From Singapore

In P.P. v Wee Swee Siang Callow J considered the nine points set out at p.551 of Mallal's Criminal Procedure Code[100], which a Court may take into consideration when granting or refusing bail. They are as follows:

1) Whether there was or was not reasonable grounds for believing the accused guilty of the offence.
2) The nature and gravity of the offence charged.
3) The severity and degree of punishment that might follow.
4) The danger of the accused absconding if released on bail.
5) His character, means and standing.
6) The danger of the offence being continued or repeated.
7) The danger of the witnesses being tampered with.
8) Opportunity to the accused to prepare his case.
9) The long period of detention of the accused and the probability of further period of delay.

On a closer examination of these 9 points, it becomes apparent that in truth there are three main grounds on which bail may be refused. These are 1) the probability of the accused person's appearance at his trial 2) the likelihood of a repetition of the offence 3) whether if

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[99] A.G. v Ball (1958) 1 R. 280

[100] Mallal's Criminal Procedure Code 4th Edn. 1957

released he will obstruct the course of justice[101].

The nine points listed by Mallal should not be referred to as reasons, for they are really matters of evidence which may or may not support any of the three grounds listed above. Looked at this way, it may be appreciated that the absence of any one or more of these factors is not itself a reason for refusing bail except in so far as it supports any of the grounds. In short, the points listed by Mallal confuse possible grounds with evidence upon which the Court should act in deciding whether such grounds exist. An example of this confusion can be seen when a comparison is made between points (4) and points (1, 2 and 3).

In P.P. v Mat Zain[102], on a charge of robbery, the Court decided that regard must be had to the gravity of the crime and therefore bail was to be refused. This is surely an example of the confusion resulting from treating the gravity of the crime as an independent factor when in fact it only provides evidence of the probability of the accused person's presence at the trial.

In P.P. v Wee Swee Siang, (supra) the Court further decided that in exercising its discretion to grant or refuse bail, it cannot go into the alleged facts to consider whether the accused should be properly charged under one section or another.

101see Shanmugan v P.P. op cit.

102P.P. v Mat Zain (1948) MLJ Supp. 142

Bearing in mind the practice of the Subordinate Courts, it is quite unlikely for the President or Magistrate to be in possession of information relating to the previous convictions of a defendant when a bail decision is made. In most cases where the accused had pleaded guilty it takes between one to three weeks for the Prosecuting Officer to make available to the Court the list of previous convictions of an accused, so that in practice it is difficult to envisage that bail decisions in the Subordinate Courts take into account the consideration whether if released on bail, the accused would commit further offences.

The points listed out by Mallal are however not exhaustive. One important point to bear in mind is that bail applications depend so much on their own particular facts. Any one or more of a number of factors may assume a greater or lesser importance in any particular case or a particular factor may have been considered by the Court without regard for the other factors. The tests suggested above are therefore not necessarily exclusive of each other, and have to be weighed one with the other .

Who Can Apply For Bail

Sections 387 (i) and 388 (i) speaks of the grant of bail to a person who is arrested or detained or appears or is brought before the Court. The question is whether a person who has not been arrested or detained or produced or brought before the Court is entitled to apply for bail.

There is much controversy on this point among the different High Courts in India. There is one view which says that when a person appears before the Court against whom a First Information Report has been lodged, he may be enlarged on bail. It is said that the mere recording of a First Information Report makes the person against whom it is given an accused so that the institution of a First Information Report as a prelude to prosecution entitles the accused if not under arrest to bail[103].

It is also argued that the word "appears" is not qualified to convey that such an appearance has to be under some form of judicial process or restraint. It is not necessary therefore that the accused should be detained or arrested or brought before the Court when only the question of bail can be considered[104].

On the other hand, it has been held by the Court in Muzafaruddin v State of Hyderabad[105] that:

> "..... none of the provisions in Chapter 39 of the Criminal Procedure Code (which corresponds mutatis mutandis to Chapter 38) envisage a grant of bail to a person not arrested or detained or put under some kind of restraint."

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[103] M.P. Sharma and Ors v State 1954 S.C. 300

[104] State v Nathnal 1952 Raj. 156

[105] Muzafaruddin v State of Hyderabad A.I.R. 1953 Hyd. 219

The two conflicting views centre upon the question whether there should be some kind of restraint before bail may be granted or whether bail in anticipation of such restraint is permissible.

A close reading of ss.387 and 388 reveals that throughout the chapter on the law of bail, the accused person is depicted as being "released on bail" so that it pre-supposes some form of prior restraint from which bail releases him from.

The very notion of bail itself pre-supposes some form of prior restraint so that bail cannot be granted to a person who has not been arrested or for whose arrest no warrants have been issued. In fact the grant of bail to a person who is not at all under any restraint may result in the imposition of restrictions in his movements[106].

In the Privy Council decision of Jairain Das v Emperor[107], it was held that the granting of bail referred to in chapter 39 of the Indian Criminal Procedure Code (which corresponds to chapter 38 of our Code) is the granting of bail to accused persons. It decided that there was no reference therein to the granting of bail to persons who have been tried and convicted. The Council thus remarked:

> "The only bonds "executed under this Chapter" are executed by persons who are accused (not convicted) person..."

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[106] Zahural Haque v State 1950 Madh. B. p. 17

[107] Jairain Das v Emperor 46 Cr. L.J. 662

Agreements to Indemnify a Surety

It is quite common for the Courts to require a surety in addition to the bond executed by the accused. The personal element is therefore emphasised when a surety is required for the appearance of the accused to answer a criminal charge.

The problem considered in this part is whether an agreement by the accused or a third party to indemnify the surety is enforceable.

English law on this point can be found in Halsbury's Law of England where it is stated:

> "Where the defendant in a criminal case has been ordered to find bail, a promise given either by him or by a third party to indemnify his surety against liability on his recognizance is illegal because it deprives the public of the protection which the law affords for securing the appearance or good behavior of the accused."[108]

In the case of Consolidated Exploration and Finance v Musgrave[109] it was held that any indemnity given to bail whether by the person bailed or another is illegal. Also, in the case of Jones v Orchard[110] it was held that a contract by an accused to indemnify his bailor against the consequences of his own default to appear and take his trial is unenforceable as being opposed to public policy.

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[108] Halsbury's Law of England Vol. VII Art. 826 at p. 398

[109] Consolidated Exploration and Finance v Musgrave (1900) 1 Ch. D. 37

[110] Jones v Orchard 15 QBD 561

At one time it was thought that bail is a mere contract of suretyship but this notion was dispelled by Lord Alverstone when it was held that such an agreement to indemnify the surety was illegal. His Lordship stated:

> "..... if that were so, indemnity to bail would make a surety utterly careless with regard to seeing that the accused was forthcoming on his trial and it is obvious that criminals of means would frequently abscond from justice."[111]

The only English case which decided otherwise is R v Broome & Ors[112] where Martin B said obiter that there was no objection to a bailor being indemnified, otherwise an innocent man would for months remain in prison because he had no friends to stand bail nor was permitted to induce them to do so by holding them free from responsibility.

In India, the Courts have similarly frowned upon such contracts. A contract to indemnify a surety against loss in the event of the surety bond being forfeited is illegal and cannot be enforced[113]. Even when the promise of indemnity comes from a third party, that agreement is illegal and cannot be enforced[114].

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111 R v Porter (1908 -10) All. E.R. Rep. 78

112 R v Broome & Ors. 18 LT (1851) p. 19

113 Bhupati Chandra Nandi v Golam Ehihar Choudhury of Salka A.I.R. (1920) Cal. 498

114 Prosanna Kumar Chakeravaty v Prokash Chandra Dutt 28 1. C. 560

It is quite clear from a survey of the above cases that the forfeiture of the amount of surety in cases of non appearance was only a secondary consideration, the primary aim being the personal element of the surety whose duty it was to take steps to have the accused arrested in cases of attempts to abscond.

An agreement to indemnify a surety is therefore opposed to public policy and would therefore be a void contract under s.24 (2) of the Contracts Act[115].

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115 Contracts Act; Act 136 (Revised 1974)