Law Reform Commission

Report

Bail and Other Related Issues

[August 2009]

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(b) a representative of the Judiciary appointed by the Chief Justice;
(c) the Solicitor-General or his representative;
(d) the Director of Public Prosecutions or his representative;
(e) a barrister, appointed by the Attorney-General after consultation with the Mauritius Bar Council;
(f) an attorney, appointed by the Attorney-General after consultation with the Mauritius Law Society;
(f) a notary, appointed by the Attorney-General after consultation with the Chambre des Notaires;
(g) a full-time member of the Department of Law of the University of Mauritius, appointed by the Attorney-General after consultation with the Vice-Chancellor of the University of Mauritius; and
(h) two members of the civil society, appointed by the Attorney-General.

The Chief Executive Officer has responsibility for all research to be done by the Commission in the discharge of its functions, for the drafting of all reports to be made by the Commission and, generally, for the day-to-day supervision of the staff and work of the Commission.

The Secretary to the Commission is responsible, under the supervision of the Chief Executive Officer, for the administration of the Commission and taking the minutes of all the proceedings of the Commission.
Executive Summary of Report

In April 2008, the Commission released a Discussion Paper on the “Law and Practice relating to Criminal Investigation, Arrest and Bail”. Since then consultations have been held with stakeholders and specific issues calling for law reform have been further analyzed.

In this Report, concerns about the law on bail are examined. This is followed by a discussion of the Issues Calling for Legislative Reform and our Proposals for Reform of the Law (which are contained in the Bill attached to the Report as an Annex).

The Commission recommends that:

(a) Grounds for refusing bail be clearly distinguished from factors/considerations to be taken into account when determining whether or not a defendant or detainee is to be released;

(b) It be laid down in greater detail the factors to be taken into account by a Court when assessing the risks involved in deciding whether or not to release a defendant or detainee (as these would assist bail decision-makers);

(c) It be laid down in what circumstances bail would exceptionally be granted;

(d) Some of the conditions, including curfew and electronic monitoring mechanism, that should or could be imposed by a Court for release on bail be expressly laid down;

(e) That a person released on bail is liable to be arrested for breach, or anticipated breach, of a bail condition;

(f) Harsher penalty be imposed for breach of conditions of bail; and

(g) The time spent in custody prior to sentence, by a person to whom bail has been refused, be fully taken into account when assessing the length of the sentence that is to be served from the date of sentencing.

The recommendations flow from the need to strike a proper balance, in accordance with human rights principles, between the right to liberty of the individual and the protection of society
# Table of Contents of Report

(A) Introductory Note .............................................................. 1

(B) Concerns about the Law on Bail ............................................. 3

(C) Issues calling for Legislative Reform ...................................... 8
   (a) The Principles relating to Bail .......................................... 8
   (b) Conditions imposed for Bail ........................................... 18
   (c) Other Issues ................................................................... 20

(D) Our Proposals for Reform of the Law .................................... 24

(E) Concluding Observations .................................................... 25

Annex: The Bail (Amendment) Bill ........................................... 26
(A) Introductory Note

1. In April 2008, the Commission released a Discussion Paper on the ‘Law and Practice relating to Criminal Investigation, Arrest and Bail’ in which we examined the constitutional right to liberty of a person arrested or detained and the provisions of the Bail Act.

The Commission has since consulted the public and stakeholders on the issues relating to bail. We have taken note of the various concerns regarding the law on bail and

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1 The right to personal liberty is guaranteed by section 5(3) of the Constitution, which provides, inter alia, that any person who is arrested or detained –
   (a) for the purpose of bringing him before a court in execution of the order of a court;
   (b) upon reasonable suspicion of his having committed, or being about to commit a criminal offence; or
   (c) upon reasonable suspicion of his being likely to commit breaches of the peace,
   and who is not released, shall … be brought without undue delay before a court; and if any person arrested or detained as mentioned in paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including, in particular, such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial; and if any person arrested or detained as mentioned in paragraph (c) is not brought before a court within a reasonable time in order that the court may decide whether to order him to give security for his good behaviour, then, without prejudice to any further proceedings that may be brought against him, he shall be released unconditionally.

2 Press notices were issued in Le Matinal Weekly, le Défi Plus and Le Mauricien on 26th April 2008, and in Weekend on 27th April 2008, inviting members of the public, stakeholders and interested parties to submit written comments or views on the issues raised by LRC in its Discussion Paper on ‘Law and Practice relating to Criminal Investigation, Arrest and Bail’. A Brain Storming session was held on 7th May 2008 at the then Human Rights Centre with representatives of registered political parties and civil society.
A meeting was held early this year with a team of officers of the Mauritius Police Force, designated by the Commissioner of Police, to discuss, inter alia, issues relating to bail.
We invited views/comments on the following issues:
   (a) Whether, in order to fight crime and protect society, the State can derogate from fundamental rights by prescribing that a class of suspected persons [persons suspected of committing offences related to terrorism or a drug offence] would be denied the right to bail?
   (b) Is the legislative framework, for determining whether or not a defendant or detainee or a convicted person appealing against his conviction could be released on bail, satisfactory? Should changes be made in the legislation in order to better assist bail decision-makers? What else can be done to assist bail decision-makers?
   (c) Are the conditions laid down in the Bail Act for release on bail satisfactory? Are they not too financial in nature? Should legislation be introduced with a view to modernizing the monitoring mechanism for bail administration?
   (d) Is the current framework for release of suspects during week-end satisfactory?
   (e) Are the sanctions for breaches of conditions of bail adequate?
have paid particular attention to what members of the legal profession and the Judiciary have had to say on the law. The law and practice in other jurisdictions and the reflections of other law reform agencies on reform of this aspect of the law have also been examined.

The Commission is of the opinion that there are aspects of our law which are in need of reform and we are reporting thereon. We wish, however, to emphasize that the issue in respect of bail is also one of capacity-building and legal awareness: adequate resources and further training for those involved in bail-making decisions; education of the general public as to the principles governing bail, the more so as decisions to release or not to release often give rise to emotion.

(f) Does our legal system provide sufficient safeguards against unduly prolonged pre-trial detention? Does the legal system sufficiently safeguard the rights of persons who are detained pending final judgment?

(g) Should the law determine in what circumstances a person charged should be released unconditionally?


4 At the Judicial Conference held on 27-29 June 2008 about ‘Human Rights and the Conduct of a Fair Trial’ at La Plantation Hotel, Balaclava, Justice Balancy addressed the audience on “Bail: The Hurdles and Difficulties” [available at http://supremecourt.intnet.mu/cjei/index.html].


One Member of our Commission, Mr. R. Daureeawo, had the opportunity recently, whilst attending a conference in London, to discuss some of the issues related to bail with Professor Jeremy Horder and Ms. J. Dawson of the Criminal Law Team of the Law Commission of England.

7 According to Justice Balancy, in his address on “Bail: The Hurdles and Difficulties”, op. cit. note 4, at p. 2:

“Public opinion is characterised by (1) excessive emotional reaction to crimes arousing the moral indignation of the community, resulting in a complete disregard of the possibility that the suspect may not be the author of that monstrous crime; and (2) an accompanying erroneous assumption that the person arrested as a suspect by the police must be the author of that hideous crime … That public opinion is often supported in Parliament by elected representatives of that public.”
(B) Concerns about the Law on Bail

2. In the National Assembly, questions addressed to Dr. the Hon. Prime Minister have highlighted some of the public concerns about the law on bail: whether certain categories of offenders should be refused bail;\(^8\) whether the Bail Act needs to be amended to provide stringent conditions for the release of accused persons on bail;\(^9\) whether it is envisaged to bring the concept of provisional information within the ambit of the law;\(^10\) whether police is objecting to release on bail in drug-related offences;\(^11\) whether police is not objecting to release on bail on humanitarian

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\(^8\) In reply to PQ B/378, on 6 May 2008, Dr. the Hon Prime Minister said:
   “There are at present constitutional constraints on the power of the executive to itself provide for bail to be refused in prescribed circumstances”

During the PNQ addressed to Dr. the Hon. Prime Minister by the Hon. Leader of the Opposition on 14 July 2009 regarding the Caterino case – a French steward convicted of importing drugs and who escaped whilst on bail pending determination of his appeal - the view was expressed that there is a need to ensure that bail be refused to suspects in serious cases and that on the day there is consensus in the House on this issue, it may have to make appropriate changes to the Constitution to address this issue more effectively.

\(^9\) In response to PQ B/791 on 8 July 2008 about the desirability of amending the Bail Act to provide stringent conditions for the release of accused persons on bail, this is what Dr. the Hon Prime Minister stated:
   “The question of amending the law relating to bail has come up time and again mainly because of the concerns expressed against either the release on bail of persons charged with serious offences or the unduly long pre-trial detention of suspects.”

\(^10\) In response to PQ B/300 [29 April 2008] as to whether consideration is being given for the review of the current police practice of lodging a provisional information against a suspect prior to the completion of an inquiry, Dr. the Hon. Prime Minister considered it is up for the Law Reform Commission, which is looking at the implications of arrest and bail, to recommend whether or not the concept of provisional information should be brought within the ambit of the law.

\(^11\) In reply to PQ B/378, on 6 May 2008, as to the number of cases in which police has not objected to the granting of bail to suspects against whom provisional charges had been lodged, Dr, the Hon. Prime Minister had this to say:
   “I am informed by the Ag. Commissioner of Police that, as a matter of policy, it is only in relation to minor offences under section 34 of the Dangerous Drugs Act, namely, where a person is arrested for use of drugs for his personal consumption that the police does not normally object for release on bail, unless that person had previously been convicted for similar offences or has no fixed place of abode. In cases of importation and trafficking of drugs, which are very serious offences carrying long terms of imprisonment, the police almost systematically objects to the release of a suspect on bail although it is ultimately for the Court to decide whether or not to grant bail in the light of the grounds of objection to bail and supporting evidence placed before the Court by the police ... It is the prerogative of the Court to decide whether a suspect should be denied his liberty pending his trial or whilst an investigation is ongoing. Each bail application is dealt with by the Court on its particular facts and its own merits...”
grounds;\textsuperscript{12} whether detainees released on bail remain in jail as they are unable to furnish sureties;\textsuperscript{13} whether serious offences are committed by persons who are already on bail in respect of two or more offences committed previously;\textsuperscript{14} whether the monitoring of compliance with conditions imposed for bail is satisfactory.\textsuperscript{15}

3. The participants at the Brain Storming session held on 7\textsuperscript{th} May 2008 at the then Human Rights Centre, which we helped organize, voiced the following concerns:

(a) Bail should be as of right, but that the rights of victims and society should also be taken into consideration;

(b) Some serious criminal offenders (in particular drug dealers, serial killers and rapists) who constitute a real threat to society should not to be released on bail;

(c) It is unacceptable that poor people remain in jail just because they do not have the means to pay the “caution”;

(d) There should be a greater awareness of the arrangements made regarding release of persons arrested or detained during week-ends or public holidays [namely Magistrate on call during week-ends];

\textsuperscript{12} During the last five years, Police did not resist bail in only four cases on account of the defendant’s or detainee’s physical conditions: these cases concern one detainee for breast feeding her newly born child, two for being physically handicapped and one for medical complications [reply to PQ B/478, on 26 May 2009].

\textsuperscript{13} During the period July 2005 to April 2008, 497 detainees were on remand as they were unable to furnish the required sureties for their release though they were granted bail by Courts [reply to PQ B /314 on 29 April 2008].

\textsuperscript{14} During the period July 2005 to mid July 2008, there were 54 cases of drug offences, larceny with violence and rape that had been committed by suspects who were already on bail in respect of two or more offences committed previously [reply to PQ B/846 on 15 July 2008].

\textsuperscript{15} Vide, for instance, PNQ addressed to Dr. the Hon. Prime Minister by the Hon. Leader of the Opposition on 14 July 2009 regarding the Caterino case.
(e) It is unacceptable that some people, who later on are acquitted or informed the 
Director of Public Prosecutions is discontinuing proceedings against them, remain in 
jail for a relatively long time; there has to be time limits for entering a prosecution 
after a person has been arrested so that pre-trial detention is not unduly prolonged and 
the accused is tried within a reasonable time (similarly that the appeal of a convicted 
person be heard within a reasonable time and the hearing of his appeal not be unduly 
prolonged when he is remanded to jail).

4. During the Symposium held by the Mauritius Bar Association on the Bail Act in April 
2008, some of the areas of the law in need of reform were addressed. Reference was 
made to three case scenarios.\(^{16}\)

First, the situation a defendant finds himself when he is refused bail pending trial after 
which he is either acquitted or the Director of Public Prosecutions discontinues 
proceedings against him. It was felt there should be a provision in our law to ensure 
trial takes place, when an accused is on remand, within a reasonable time with least 
possible delay. The view was also taken that the law should provide for some 
compensation for deprivation of liberty as the defendant, in such a case, would suffer 
prejudice to himself, his livelihood, his family and his reputation.

Secondly, the situation of a defendant who having spent several years in jail on 
remand is found guilty by a court of law: the view was taken there should be a 
 provision in the law for the time spent on detention to be deducted when passing 
sentence so as not to punish the accused more than he deserves.

Thirdly, the situation where a defendant appeals against judgment and is remanded in 
custody pending appeal: sentence will run from the date of the judgment of the 
appellate court; there exists no provision in our law for the time served by a prisoner 
between conviction and appeal to count as his sentence.

5. At the Judicial Conference held on 27 June 2008 about ‘Human Rights and the Conduct of a Fair Trial’ at La Plantation Hotel, Balaclava, Justice Balancy considered there are four major problems/obstacles in upholding the right to liberty through the law on bail:

(a) The practice of the police in Mauritius to arrest as a matter of course when there is a power to arrest, in lieu of exercising their discretion to arrest in a reasonable manner [as highlighted in Dahoo v State (2007) MR 55] which results in the further infringement of a person’s constitutional right to liberty when he is released on bail after having been unlawfully arrested: the fact that conditions – including, probably financial ones – are being imposed for releasing him constitutes a further infringement of this right;

(b) The inability of certain detainees to provide bail [according to him, Magistrates at the Bail and Remand Court know from experience that when the detainee is being kept on remand for a rather long time, the amount of security for release on bail is often reduced by the court but even drastic reduction of that amount is often insufficient to enable the detainee to be released as he is still unable to deposit that reduced amount, not having the financial means nor the necessary sureties]; hence the need for financial security to be closely linked to the real means of the detainee, and the need, in that connection, for an effective investigation into the means of the detainee;

(c) The inability of the relevant authorities to avoid long delays in lodging the cases [owing to understaffing, red tape procedures and lack of training at different levels, ineffective case-management];

(d) “Uninformed public opinion” and its influence upon the police, the State Law Office and the judiciary, which may explain why part of our judiciary, both at higher and lower level, was clinging to the irrational treatment of the seriousness of the offence as a ground in itself for the refusal of bail.
6. Justice Balancy was of the opinion there were problems/difficulties in applying the principles relating to bail and in the imposition of conditions. Regarding the application of the principles relating to bail, Justice Balancy was of the view there is a difficulty on the part of prosecutors in adducing adequate relevant evidence, evidence which would be relevant to a risk, to assist the court in arriving at its decision in a bail application. There is also a difficulty, according to him, on their part, in understanding that the nature of the evidence as a relevant consideration (that is the type of evidence and surrounding circumstances) is distinct from the actual details of the evidence. He was further of the view that the exercise involved in determining a bail application is a risk assessment exercise with which Magistrates are not familiar and in which they have had no training: specific training is called for in the context of a judicial education project.

Regarding problems/difficulties with the imposition of conditions, this is what Justice Balancy had to say:

“There is a tendency unfortunately to impose only a limited range of conditions - those traditionally resorted to - whereas a more rational but at the same time imaginative approach would lead to more appropriate conditions being devised, especially conditions not involving financial constraints such that lack of financial means would not result in suspects remaining on remand due to inability to provide financial security. There are also practical difficulties in imposing the amount of security: there is a tendency to adopt, within a particular district court, a tariff figure for a particular type of offence. The inadequacy of this approach lies in the fact that an amount of security which may be sufficient to deter a pauper from a certain course of

17 This is a matter which the authorities are fully aware of as can be gathered from the reply given to PQ B/791 on 8 July 2008:

“[There is a need] to focus on the type of evidence which can be gathered and put before the Court in support of objection to bail in case where it is genuinely felt that bail should be refused to a suspect. Legally, there are strict grounds for objection to bail and these risks are assessed by the Courts … It will be for the Police and the Prosecution to bring before the Courts the necessary evidence and the arguments that can persuade the Courts that, for example, the release on bail is likely to lead the suspect to tamper with evidence or abscond and it will be for the Court then to determine and decide whether such risks could be attenuated by the imposition of such conditions as the Court may deem fit and proper in the circumstances."

Vide also reply given on 15 May 2007 to PQ B/349.
conduct may not be sufficient to deter a rich man from such conduct. Accordingly, security in the form of deposits of sums of money must fully take into account the financial circumstances of the suspect and other effective conditions may have to be devised in the case of suspects with meagre financial resources or those who are unable to find sureties. Finally there is the difficulty in supervising compliance with conditions: In *Islam v Senior District Magistrate, Grand-Port* (2006) SCJ 282, the Court (Domah and Caunhye JJ) has made comments as to how the monitoring mechanism has remained old-fashioned in Mauritius as compared with other countries.”

(C) Issues calling for Legislative Reform

(a) The Principles relating to Bail

Judge discretion to release on bail

7. The Bail Act is meant to uphold the right to liberty guaranteed by sections 1, 3 and 5 of the Constitution, which precludes any automatic denial of bail even in the most serious or heinous offences and crimes. As stated in *Labonne v DPP* (2005) SCJ 38, the function of the law of bail is:

“On the one hand the need to safeguard the necessary respect for the liberty of the citizen viewed in the context of the presumption of innocence and, on the other hand, the need to ensure that society and the administration of justice are reasonably protected against serious risks which might materialise in the event that the detainee is really the criminal which he is suspected to be.”

8. Legislative attempts to refuse bail in prescribed circumstances have not stood the test of constitutionality.
In *Noordally v Attorney-General & anor* (1986) MR 204, section 46(2) of the Dangerous Drugs Act 1986 which purported to deny bail to a class of persons was held to violate sections 3 and 5 of the Constitution. The Supreme Court held that section 5 of the Constitution indicates that the suspect remaining at large is the rule; his detention on ground of suspicion is the exception, and he must be tried within a reasonable time or released.

In *Police v Khoyratty*, the view has been taken both by the Judicial Committee of the Privy Council and by the Supreme Court that section 32 of the Dangerous Drugs Act 2000 and section 5(3A) of the Constitution, in so far as regards drug offences, are void since they infringe sections 1 and 47(3) of the Constitution. It is a fundamental principle of our Constitution, which establishes a democratic State, that Parliament cannot by legislation refuse bail to a defendant and thereby deprive the judiciary of its power to determine whether a person arrested may be released. Our case-law on this aligns itself with what obtains in developed jurisdictions in the matter: more specifically, the Strasbourg jurisprudence on the European Convention, the text of which is very much similar to Chapter 2 of our Constitution.

9. A statutory prohibition which would deny bail to a class of persons would infringe section 1 and 5 of the Constitution. But that does not mean that the legislature may not provide for a presumption that a defendant falling within a particular category represents a significant risk of re-offending so that bail is granted only in exceptional circumstances, when the Court believes that the defendant would not pose a real risk to the public if released, as is the case under section 25 of UK Criminal Justice and

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19 Section 5(3A) of the Constitution provides that, notwithstanding subsection (3), where a person is arrested or detained for an offence related to terrorism or a drug offence, he shall not, in relation to such offences related to terrorism, or drug offences, as may be prescribed by an Act of Parliament, be admitted to bail until the final determination of the proceedings brought against him, where (i) he has already been convicted of a drug offence; or (ii) he is arrested or detained for a drug offence during the period that he has been released on bail after he has been charged with having committed a drug offence. Parliament has in this connection enacted section 32 of the Dangerous Drugs Act No. 41 of 2000, and section 3 of the Prevention of Terrorism (Denial of Bail) Act of 2002.
Public Order Act 1994 as amended in 1998). Such a presumption would impose an onus on an applicant for bail (only an evidential burden) to show that there are “exceptional circumstances” justifying his release. It meets Parliament’s purpose of ensuring that decision-makers, when making bail decisions about defendants to whom such a provision would apply, focus on the risk the defendant may pose to the public by re-offending. Such a provision is not constitutionally objectionable.

The South African Constitutional Court in *Dlamini & ors v State*\(^{21}\) considered the constitutionality of Section 60(11)(a) of the Criminal Procedure Act.\(^{22}\), which imposes an onus on an accused on a schedule 6 charge to adduce evidence to satisfy a court that “exceptional circumstances” exist which permit his or her release. Kriegler J took the view that although the inclusion of the requirement of “exceptional circumstances” in s 60(11)(a) limits the right to liberty, it is a limitation which is

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\(^{20}\) Section 25 of the UK Criminal Justice and Public Order Act 1994, as originally enacted, prevented bail being granted *at all* in cases where the defendant who was charged with the offence of murder, attempted murder, manslaughter, rape or attempted rape, had already been convicted of one of these offences. The statutory prohibition on the grant of bail in a limited class of very serious cases was conceded by the United Kingdom in *Caballero v United Kingdom* (2000) 30 EHRR 643, para 20, to violate the Convention, a concession which the Court accepted in that case (para 21) and held in *SBC v United Kingdom* (2001) 34 EHRR 619, paras 22-24, to have been rightly made. The section did not allow for the examination of all the relevant facts; it caused bail to be denied to certain offenders simply because they fell within a particular category, irrespective of whether a deprivation of liberty was necessary in the individual circumstances and without any room for judicial discretion. The section was amended in 1998 (by the Crime and Disorder Act 1998, section 56) and now provides that bail may be granted in such cases only if the court or police is satisfied that there are “exceptional circumstances” justifying it. The Law Commission considered [in its 2001 Report on “Bail and the Human Rights Act 1998” at para 8.45-8.47] that the amended section is compatible with the European Convention: section 25 should be construed as meaning that where the defendant would not, if released on bail, pose a real risk of committing a serious offence, this constitutes an “exceptional circumstance” so that bail may be granted. The compatibility with the Convention of section 25 of the UK Criminal Justice and Public Order Act 1994 was discussed by the Queen’s Bench Divisional Court in *R(O) v Crown Court at Harrow* [2003] 1 WLR 2756. Hooper J considered that section 25 should be construed as imposing an evidential burden on the defendant to point to or produce material which supports the existence of exceptional circumstances. A defendant who falls within section 25 is very unlikely to be granted bail and, unless he can point to exceptional circumstances, will almost certainly not be granted bail. None the less, the burden remains upon the prosecution to satisfy the court that bail should not be granted.

\(^{21}\) 1999 (2) SACR 51 (CC).

\(^{22}\) Section 60(11)(a) of the South African Criminal Procedure Act provides that where an accused is charged with an offence referred to in Schedule 6 – which includes murder, rape, indecent assault on a child less than 16 involving the infliction of grievous bodily harm, robbery involving the use of a firearm or the infliction of grievous bodily harm - the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.
reasonable and justifiable. He stressed that what is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted.

We have formed the opinion that in order to better protect society and reduce the incidence of offending by people on bail such a statutory presumption can be introduced in our Bail Act.

_Bail as a Risk Assessment Exercise: Grounds for Refusing Bail and Relevant Considerations_

10. The rationale for bail was considered in _Maloupe v. District Magistrate of Grand Port_ (2000) MR 264. The view was taken that release on bail at pre-trial stage is the release upon conditions designed to ensure that the suspect:

   (1) appears for trial, if he is eventually prosecuted;

   (2) in case he happens to be the author of the offence of which he is suspected, does no further harm to society whilst being at large; and

   (3) does not interfere with the course of justice, should he be so minded.

   The rationale of the law of bail at pre-trial stage is, accordingly, that a person should normally be released on bail if the imposition of the conditions reduces the risks referred to above - that is risk of absconding, risk to the administration of justice, risk to society - to such an extent that they become negligible having regard to the weight which the presumption of innocence should carry in the balance. When the imposition of the above conditions is considered to be unlikely to make any of the above risks negligible, then bail is to be refused.

11. In _Labonne v DPP_ (2005) SCJ 38, the Court pointed out that the seriousness of the offence or the likelihood of the suspect being charged with a serious offence is not a ground by itself, just a consideration, for refusing bail.  

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23 This is what the Court had to say in _Labonne:_

“The seriousness of the offence or the likelihood of the suspect being charged with a serious offence is obviously just a consideration to be weighed in the balance and not by itself a ground for refusing bail
12. In *Deelchand v DPP* (2005) SCJ 215, Justice Balancy has this to say about the risks of not granting bail:

“In carrying the balance of risks, the Court must bear in mind the risk of prejudice to the accused and his next of kin if he is not granted bail, namely the risk, in the event he is acquitted, that an innocent person would have been unjustly detained and suffered prejudice along with his next of kin. That risk is greater and not worth taking when the quality of the evidence is particularly poor whilst it can be more readily taken when the evidence is particularly strong in view of its nature.”

13. *Labonne* and *Deelchand* also clarified the relationship between release on bail and the failure of the authorities to try the suspect within a reasonable time. Section 5(3) of our Constitution provides that a suspect kept in detention and not tried within a reasonable time shall be released either unconditionally or upon reasonable conditions. And detention initially justified by risks which cannot be made negligible can cease to be based on relevant and sufficient grounds when the risk of a breach of sect. 5(3) has to be weighed in the balance.

14. In *Hurnam v State of Mauritius* (2005) [Appeal No. 53 of 2004], the Judicial Committee of the Privy Council approved the reasoning adopted in *Maloupe, Labonne* and *Deelchand*. The view was taken that the Bail Act of 1989 was constitutionally defective because it did not reflect the principle that the grant of bail should be the rule as opposed to the exception. It also stated that the 1999 Bail Act cured the defect by restating that bail should be the rule. It also highlighted that the 1999 Act was by and large in line with the English Law as set out in the UK Bail Act of 1976 and also consonant with the European Convention on Human Rights from which our Chapter II on fundamental rights has been borrowed.

… Clearly our law was never intended to mean that once a person is charged with a serious offence as defined in section 2 of the Act, he should be refused bail. Common sense is sufficient authority to hold that the seriousness of the offence charged or likely to be charged is only a consideration relevant to one of the risks, and not a ground by itself.”
This is what the Judicial Committee had to say regarding grounds for refusing bail and the seriousness of the offence as a relevant factor/consideration which can be taken into account:

“Sections 5(1) and (3) and section 10(2)(a) of the Constitution bear a very close resemblance to articles 5(1) and (3) and 6(2) of the European Convention on Human Rights …

The jurisprudence on the European Convention, which recognises that the right to personal liberty, although not absolute (X v United Kingdom (Application No 8097/77, unreported, E Comm HR)), is nonetheless a right that is at the heart of all political systems that purport to abide by the rule of law and protects the individual against arbitrary detention (Winterwerp v Netherlands (1979) 2 EHRR 387, para 37; Engel v Netherlands (No 1) (1976) 1 EHRR 647, para 58; Bozano v France (1986) 9 EHRR 297, para 54). The European Court has clearly recognised five grounds for refusing bail (the risk of the defendant absconding; preventing crime; preserving public order; and the necessity of detention to protect the defendant): see Clayton and Tomlinson, The Law of Human Rights (2000), p 501, para 10.138; Law Commission of England and Wales, Report on Bail and the Human Rights Act 1998 (Law Com No 269, 2001), para 2.29. But it has insisted that a person must be released unless the state can show that there are “relevant and sufficient reasons” to justify his continued detention: Wemhoff v Federal Republic of Germany (1968) 1 EHRR 55. As put by the Law Commission in its Report just cited, para 2.28, “Detention will be found to be justified only if it was necessary in pursuit of a legitimate purpose (or ground)”.


26 Vide, for instance, Matznetter v Austria A 10 (1969), 1 EHRR 198, para 9; Clooth v Belgium A 225 (1991), 14 EHRR 717, paras 38–40; Muller v France (No 1) 1997-II, para 44.


The European Court has, realistically, recognised that the severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending (see, for example, *Iljikov v Bulgaria* (Application no 33977/96, 26 July 2001, unreported)), para 80, but has consistently insisted that the seriousness of the crime alleged and the severity of the sentence faced are not, without more, compelling grounds for inferring a risk of flight: *Neumeister v Austria (No. 1)* (1968) 1 EHRR 91, para 10; *Yagci and Sargin v Turkey Series A No 319* (1995) 20 EHRR 505, para 52; *Muller v France* Reports of Judgments and Decisions 1997 – II, 374, para 43; *IA v France* Reports of Judgments and Decisions 1998 – VII, 2951, paras 105, 107. In *Iljikov v Bulgaria*, above, para 81, the Court repeated

‘that the gravity of the charges cannot by itself serve to justify long periods of detention on remand.’

It went on, para 84, to reiterate

‘that continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. Any system of mandatory detention on remand is *per se* incompatible with article 5(3) of the Convention’ …’

15. Section 4(1) of the Bail Act contains both grounds for refusing bail [failing to surrender to custody or to appear before a Court as and when required; committing an offence, other than an offence punishable only by a fine not exceeding 1,000 rupees; interfering with witnesses, tampering with evidence or otherwise obstructing the course of justice, in relation to him or to any other person; for his own protection or, in the case of a minor, his own welfare]29 as well as relevant factors/considerations which can be taken into account when assessing risks involved in releasing/refusing to release in bail [breach of a bail condition; seriousness of the offence charged; giving false or misleading information regarding his names or address; no fixed place of abode].30

It is apposite to note the Law Commission of England considered that the fact that the defendant was on bail at the time of the alleged offence should not be regarded as an independent ground for the refusal of bail. It is just one of the considerations which

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29 Section 4(1)(a)-(b) Bail Act.

30 Section 4(1) (c)-(f) Bail Act.
the court should take into account when considering withholding bail, such as a real risk that, if granted bail, the defendant would commit an offence.\textsuperscript{31}

16. We have formed the opinion there is a need conceptually to clearly distinguish between grounds and considerations. This is the more so as there has been erroneous interpretation in past judgments of what are the grounds for refusing bail, mere considerations being treated as grounds.\textsuperscript{32}

17. There is also the need, according to us, to spell out in greater detail [than what is done in section 4(1) (c)-(f) and 4(2) of the Bail Act\textsuperscript{33}] the relevant factors/considerations which can be taken into account when Courts are called upon to carry out the balancing exercise in respect of risk-assessment.

18. In \textit{Deelchand v DPP} (2005) SCJ 215, Justice Balancy examined, in the light of the jurisprudence of the European Court of Human Rights, the factors/considerations which can be taken into account when assessing the risk of absconding, the risk of interference with witnesses and the risk of offending.

The risk of absconding has to be assessed with regard to several relevant factors. Considerations relevant to the risk of absconding will include the strength, weakness


\textsuperscript{32} This is what Justice Balancy in “Bail: The Hurdles and Difficulties” [Judicial Seminar on Human Rights and the Conduct of a Fair Trial [La Plantation Hotel, Balaclava, 27 June 2008], had to say at p. 2:

“When in 2005 the Supreme Court in \textit{Labonne} (Balancy and Peeroo JJ) and \textit{Deelchand} (Balancy J) made it clear that the seriousness of the offence could not by itself be a ground for refusing bail, and that the proper approach was that laid down in 2000 in \textit{Maloupe} (Matadeen and Balancy JJ) a full bench presided by the then Chief Justice sought in \textit{Rangasamy v D.P.P.} (2005) MR 140 to overrule those two pronouncements. Luckily, however, the Judicial Committee held, at the end of that same year, in \textit{Hurnam}, that the full bench had fallen into error and failed to give due consideration to the right to liberty and presumption of innocence enshrined in our Constitution and the European Convention of Human Rights which it substantially follows.”

\textsuperscript{33} Section 4(2) of the Bail Act provides that in making a determination under subsection (1), the Judge or Magistrate shall have regard to such considerations as appear to the Judge or Magistrate to be relevant, including –

(a) the nature of the offence and the penalty applicable thereto;
(b) the character and antecedents of the defendant or detainee;
(c) the nature of the evidence available with regard to the offence.
or absence of family, community, professional or occupational ties and financial commitments as such ties, if strong, might be strong incentives not to abscond and, if weak might increase the risk of absconding. The strength of the evidence may also be relevant because if it is likely that the charge will not be proved, the defendant may be less likely to abscond. The seriousness of the offence may, by itself or in conjunction with some other factor such as the defendant’s criminal record, give a basis for believing that the defendant will fail to surrender through fear of a custodial sentence, this factor must be viewed in conjunction with other factors which may well indicate that the defendant is unlikely to abscond. As pointed out by Justice Balancy

“...The court must ask itself: what would be likely to motivate the applicant to abscond and what would be likely to make him refrain from absconding? Is the risk too great to be taken or is the level of risk acceptable, such that it can be taken having regard to the presumption of innocence? Can the risk at least be reduced to an acceptable level by the imposition of conditions?”

Several factors may be relevant in the assessment of the seriousness of the risk of offending or re-offending, and the propriety of detention to avert the danger: the character and antecedents of the applicant, including a clean or criminal record; the nature of the offence or offences which the applicant is suspected to have committed; the sentence expected in case of conviction because of the greater risk that the

34 In Neumeister v Austria (1968) 1 ECHR 91 (27 June 1968) at para 10, the European Court of Human Rights ruled that the severity of the sentence which the defendant would be likely to incur, if convicted, does not in itself justify the inference that he or she would attempt to evade trial if released from detention:

“...The danger of flight cannot … be evaluated solely on the basis of such consideration. Other factors, especially those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted may either confirm the existence of a danger of flight or make it appear so small that it cannot justify detention pending trial.”

In Wemhoff v Germany [1968] ECHR 2 at para. 15, the European Court of Human Rights emphasised that –

“...When the only (...) reason for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance.”

35 As between the offence charged and the offence feared, there is no reason why they should necessarily be similar so long as there is an appropriate connection between them.

36 Some offences are more likely to be repeated than others there may be ground for fearing, for example, that one or more murders or rapes with which the applicant stands charged, are part of serial killing or serial raping by a psychopath. On the other hand a “crime de passion” may be unlikely to be repeated.
offender may think he has nothing to lose by offending whilst on bail; the extent to which the offences which the applicant is suspected to have committed are lucrative as the temptation, in case the applicant is guilty, that he may wish to make as much money as possible whilst on bail, is likely to be greater; the nature of the evidence against him.\footnote{37}

Regarding factors to be taken into account when assessing the risk of interference with witnesses, Justice Balancy had this to say:

“It would be preposterous to hold the view that in each and every application for bail, it would suffice that an enquiring officer should express his fear that the applicant would interfere with one or more witnesses for the accused to be denied bail on that ground. To satisfy the court that there is a serious risk of interference with a witness, satisfactory reasons, and appropriate evidence in connection thereof where appropriate, should be given to establish the probability of interference with that witness by the applicant. In his book “Bail in Criminal Proceedings” (1990), Neil Corre, writing from sound practical experience, points out that the risk that the applicant may “interfere with witnesses or otherwise obstruct the course of justice” is “an important exception to the right to bail because any system of justice must depend upon witnesses being free of fear of intimidation or bribery and upon evidence being properly obtained”. He then goes on to point out:

‘The exception’s most common manifestations are in cases where:
(a) the defendant has allegedly threatened witnesses;
(b) the defendant has allegedly made admissions that he intends to do so;
(c) the witnesses have a close relationship with the defendant, for example in cases of domestic violence or incest;
(d) the witnesses are especially vulnerable, for example where they live near the defendant or are children or elderly people;
(e) it is believed that the defendant knows the location of inculpatory documentary evidence which he may destroy, or has hidden stolen property or the proceeds of crime;
(f) it is believed the defendant will intimidate or bribe jurors;
(g) other suspects are still at large and may be warned by the defendant
The exception does not apply simply because there are further police enquiries or merely because there are suspects who have yet to be apprehended’.”

\footnote{37 If he happens to be a criminal, then if the evidence against him appears strong, he is more likely to think he has nothing to lose by re-offending; if the evidence appears weak to him, he will be less likely to take the risk of detection upon re-offending.}
(b) Conditions imposed for Bail

19. A general criticism addressed at our law on bail is that the condition imposed for bail is too often financial in nature, such that in practice the paupers are being discriminated against.\(^{38}\)

We wish to point out that the current law - which requires the provision of sureties when the accused is charged with a serious offence - does not sufficiently give effect to the recommendation of the 1998 Report of the “Presidential Commission set-up to examine and report upon the structure and operation of the judicial system and legal profession of Mauritius” [known as MacKay Report] on Bail. This is what the Presidential Commission had to say:

“At present bail requires generally the lodging of money or security and there are obviously substantial costs to accused persons of limited means occasioned by this system. The number of occasions on which people can effectively avoid required appearance in Court in Mauritius is very small and therefore we recommend that in future on the grant of bail, conditions should be imposed to secure the attendance of the accused where necessary before the Court and to require that the accused do not interfere with any of the witnesses and that the court may impose any other particular requirements that the Court should judge appropriate to the circumstances of the case but it should be only in extremely exceptional circumstances that any deposit of money or other security is required. As we said, the opportunities for fleeing from justice in Mauritius for many of those accused of crime is minimal …

The type of exceptional case which we envisage in connection with requiring money or other security in relation to bail is where organized crime or very high stakes are involved for the individual concerned in which it is possible to envisage that he or she might make elaborate arrangements to flee from justice and in which case substantial money or other security would be a reasonable way of counteracting that possibility.”\(^{39}\)


The reply given by Dr. the Honourable Prime Minister to PQ B/314 on 29.04.08 is self-explanatory: since July 2005 until April 2008, 497 detainees, granted bail by the courts, had been kept on remand as they were unable to furnish the required sureties for their release.

\(^{39}\) At paragraphs 7.1 and 7.2.
In our opinion, it must be expressly laid down that where a Magistrate or Judge is satisfied that a defendant or detainee is unable to provide surety, he shall impose other conditions of a non-financial nature.

20. Section 7 of the Bail Act provides that a Judge or a Magistrate may impose such other conditions of a general or specific nature as he thinks fit for the release on bail of a defendant or detainee, requiring him to do or not to do any act, and any recognisance shall apply to any such condition.

In a number of jurisdictions, the law enumerates some of the conditions which may be imposed on a defendant or detainee for his release: residence at a specified address and the need to inform the court of any change in address, reporting to the police at a specified place and at specified times, surrendering passport, avoiding contact with specific persons, avoiding specified place, to be subject to curfew and tagging/electronic monitoring, to be under the supervision of a community corrections officer, to undergo medical examination.\(^\text{40}\)

We consider the Act must expressly provide for a ‘fixed place of abode’ as a requirement for bail. It must also be provided in the Act, as is the case under section 3(6) of the UK Bail Act 1976, that the other conditions imposed are meant to secure the defendant or detainee surrenders to custody or attends court as and when required, that he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person, that he does not commit an offence while on bail, and that he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence.

We further consider it can laid down in the Bail Act that a defendant or detainee may be required to comply with requirements imposed for the purpose of securing the

\(^{40}\) Vide, for instance, section 31 of the New Zealand Bail Act 2000, section 11 of the South Australia Bail Act 1985, and section 3 UK Bail Act 1976.
electronic monitoring of his compliance with any other requirement imposed on him as a condition of bail and that a Court shall impose on a child such a requirement only in prescribed circumstances [under section 25(1) of the Bail Act, the Chief Justice may, for the purposes of this Act, make such rules as he thinks fit].

21. We also take the view that, should the need arise, it should be possible for any Court before which a charge is pending in respect of which bail has been granted, at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, to vary or add any further condition of bail.

(c) Other Issues

22. Our legal system does not sufficiently sanction the breaking of conditions of bail. The penalty currently provided for the offences of absconding or breaking conditions of bail must be made harsher.

23. The Court who released a person on bail must, in our view, be empowered to issue a warrant for the arrest of that person should he fail to attend court at the appointed time or absconds during proceedings. The person should also be liable to be arrested by a police officer, without warrant, for breach or anticipated breach, of a bail condition. In the event such a person is arrested, it would be for the court to decide whether to grant or withhold bail.

24. Concerns have been expressed about the unduly long pre-trial detention of suspects who are denied bail. It is a constitutional requirement that the person detained be tried within a reasonable time. A court can decide that unreasonable delay constitutes an
abuse of its process. The provisional charge against an accused who is detained would as a matter of practice be struck out within a reasonable time of the arrest of the person charged and a formal charge, if any, lodged before the appropriate court.

41 In Mohur v. R (1990) MR 138, it was said that the four factors which, in Lord Templeman’s view in Bell v. D.P.P. (1985) A.C. 937, a Court should consider to assess in determining whether a particular defendant has been deprived of his right to a speedy trial, are namely:
(i) the length of delay;
(ii) the reasons given by the prosecution to justify the delay;
(iii) the responsibility of the accused for asserting his rights and
(iv) prejudice to the accused.

The Court in Mohur went on to say that it is now settled that in U.K., a judge of a superior court has an inherent power to decline to allow a prosecution to proceed if he is satisfied that it is oppressive and vexatious and an abuse of the process of the Court. The Court added that, by virtue of section 17 of the Courts Act the Judges of the Supreme Court have the same inherent powers as the Judges of the High Court in England and that by section 72(3) of the Constitution, conferring power to the Director of Public Prosecutions to institute and undertake criminal proceedings before any court of law where he considers it desirable so to do, cannot in any way divest this Court of its inherent power to decline to allow a prosecution to proceed where it is satisfied that it is oppressive and vexatious and amounts to an abuse of its process.

Reference was made to D.P.P. v. Humphreys (1976) 2 ALL.E.R. 497, where at page 535 Lord Edmund Davies had the following to say –

“While Judges should pause long before staying proceedings which on their face are perfectly regular, it would indeed be bad for justice if in such fortunately rare cases as R. v. Riebold their hands were tied and they were obliged to allow the further trial to proceed. In my judgment Connelly established that they are vested with the power to do what the justice of the case clearly demands, and in R. v. Thomson Holidays Ltd. (1974) I ALL.E.R 823 the Court of Appeal proceeded on that basis...”

42 As stated in Gordon Gentil v State (1995) MR 38, a provisional information is a mechanism whereby a court is informed of the reason for the arrest of an individual. The police may well inform the Magistrate verbally but the use of a provisional information is now a well established practice. Only an offence known to the law and not any act not sanctioned as an offence should give birth to the provisional information. When a person is arrested, he must be taken before the Magistrate who is informed by the prosecutor of the reason for the arrest. This is but a prolongation of the initial process of arrest. Whereas at the initial stage the person arrested should be told the reason for his arrest, the next important step is to inform the court why the person is detained and taken before the court. This is not merely a formality. The court acts as arbiter between the executive and the citizen and, in such cases, may control the regularity of an arrest if the need for it arises.

In DPP v. Indian Ocean International Bank (1989) MR 11O, the court made the following observations on the nature of a provisional information at p. 112:

"As everybody knows, a provisional information is entered when a suspect is arrested or is brought into custody. Its purpose is to bring the detention of the individual under judicial supervision and control so as to prevent an administrative detention and to enable a judicial authority to decide whether the detainee should be released on bail or not and, if not, for how long he should be detained. No detainee pleads to a provisional information and no trial takes place."

Vide also Shaik v. State (1994) MR 149
25. In *Callachand & anor v The State* (2008) PRV 44, the Judicial Committee of the Privy Council considered the approach to be adopted by sentencing courts in Mauritius to time spent in custody prior to sentence. It held that, save in exceptional cases and where otherwise justified by specific local conditions of detention on remand and whilst serving sentence, respectively, in Mauritius, the proper approach, having regard to the value ascribed to the right to liberty is as follows:

“...principle it seems to be clear that where a person is suspected of having committed an offence is taken into custody and is subsequently convicted, the sentence imposed should be the sentence which is appropriate for the offence. It seems to be clear too that any time spent in custody prior to sentencing should be fully taken into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing. We find it difficult to believe that the conditions which apply to prisoners held on remand in Mauritius are so much less onerous than those which apply to those who have been sentenced that the time spent in custody prior to sentence should not be taken fully into account. But if that is thought to be the position there should be clear guidance as to the extent to which time spent in custody prior to sentence should not be taken fully into account because of the difference between the prison conditions which apply before and after the sentence.”

In *State v Mootien & Ors* (2009) SCJ 28, Justice Balancy had this to say regarding the approach indicated in *Callachand* case:

“I hold the view that a Judge in Mauritius cannot take judicial notice of the extent to which there are, or are not, significant differences between the conditions of prisoners held on remand and those serving sentences. It would be highly desirable, in my view, that this aspect of sentencing policy be the subject of a study and recommendations by the Law Reform Commission, leading to introduction of legislation in connection with that important aspect of sentencing affecting the right to liberty.....”

The Commission has reflected on the matter, as requested by Justice Balancy. On the basis of the sworn evidence of the Commissioner of Prisons in *Callachand & anor v State* (2009) SCJ 59 [SC Record Nos. 6990 & 6994] to the effect that the conditions which apply to prisoners held on remand are not significantly less

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43 Privy Council Petition No. 44 of 2008; reasons for decision taken on 26 September 2008 [at Court House, Port Louis, when sitting in Mauritius] given in London on 4 November 2008.
onerous than those which apply to those who have been sentenced, we take the view that the time spent on remand should be taken into account - as indicated by their Lordships of the Judicial Committee - when assessing the length of the sentence that is to be served from the date of sentencing.

We propose that legislation be introduced in the National Assembly in connection with this important aspect of sentencing. Section 135 of the Criminal Procedure Act already provides that where an accused has been in custody or has been imprisoned under a warrant or process before his trial for an offence of which he has been convicted, although the minimum of the term of imprisonment to which he is liable on conviction is limited, the Court or Judge in passing sentence, may sentence the accused to a term less than the minimum by a term not exceeding the aggregate of the term of imprisonment already served. We consider section 16(3) of the criminal Appeal Act\(^\text{44}\) needs to be amended, as well as section 94 of the District and Intermediate Courts (Criminal Jurisdiction) Act.

26. In most jurisdictions police can admit defendants or detainees on bail. We are not convinced there is a need, for the time being, to re-introduce in our law grant of bail by police.

27. Our attention has also been drawn to the concept of “anticipatory bail”, as it obtains under section 438 of the Indian Code of Criminal Procedure whereby a person who has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, may apply to the High Court or the Court of Session for

\(^\text{44}\) Section 16(3) of the Criminal Appeal Act provides that the time during which an appellant, pending the determination of his appeal, is admitted to bail, and subject to any directions which the Court may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated under this section, shall not count as part of any term of imprisonment or penal servitude under his sentence, and, in the case of an appeal under this Act, any imprisonment or penal servitude under the sentence of the appellant, whether it is the sentence passed by the Court of trial or the sentence passed by the Court shall, subject to any directions which may be given by the Court, be deemed to be resumed, or to begin to run, as the case requires, if the appellant is in custody, from the day on which the appeal is determined, and, if he is not in custody, from the day on which he is received into prison under the sentence.
direction that in the event of such arrest, he shall be released on bail. We do not consider there is a need, for the time being, to have such a provision in our law to uphold the constitutional right to liberty of the individual.

(D) Our Proposals for Reform of the Law

28. Our proposals for reform of the Bail Act are contained in the draft Bill attached to this Report. The provisions contained in the Bill fulfill the following objectives:

(a) To clearly distinguish grounds for refusing bail from factors/considerations to be taken into account when determining whether or not a defendant or detainee is to be released;

(b) To lay down in greater detail the factors to be taken into account by a Court when assessing the risks involved in deciding whether or not to release a defendant or detainee (as these would assist bail decision-makers);

(c) To provide the circumstances when bail would exceptionally be granted;

(d) Some of the conditions, including curfew and electronic monitoring mechanism, that should or could be imposed by a Court for release on bail must be expressly laid down;

(e) That a person released on bail is liable to be arrested for breach, or anticipated breach, of a bail condition; and
(f) Harsher penalty for breach of conditions of bail.

29. We also recommend consequential amendments to the Criminal Appeal Act and the District and Intermediate Courts (Criminal Jurisdiction) Act so that the time spent in custody prior to sentence, by a person to whom bail has been refused, be fully taken into account when assessing the length of the sentence that is to be served from the date of sentencing.

(E) Concluding Observations

30. We are confident the recommendations contained in this Report would alleviate the concerns expressed by different quarters as to the law on bail; we have done our utmost to strike a proper balance, in accordance with human rights principles, between the right to liberty of the individual and the protection of society.

31. We recommend that no effort be spared in capacity-building (adequate resources and further training be given to those involved in bail-making decisions) and in legal awareness of the general public (as to the principles governing bail) so that the public can have trust in the criminal justice system, a sine qua non condition for peace, democracy and sustainable development.
ANNEX

THE BAIL (AMENDMENT) BILL

(No of 2009)

Explanatory Memorandum

The object of this Bill is to amend the Bail Act to make further provision as to–

(a) Grounds for refusing bail;

(b) Factors to be taken into account by a Court when assessing the risks involved in deciding whether or not to release a defendant or detainee on bail;

(c) The circumstances when bail would exceptionally be granted;

(d) Conditions, including curfew and electronic monitoring mechanism, imposed by a Court for release on bail;

(e) Liability of a person released on bail to be arrested for breach, or anticipated breach, of a bail condition;

(f) Penalty for breach of conditions of bail; and

(g) Other related matters.

2009

Attorney-General
THE BAIL (AMENDMENT) BILL

(No. of 2009)

ARRANGEMENT OF CLAUSES

Clause

1. Short title
2. Interpretation
3. Section 4 of principal Act amended
4. Section 5 of principal Act amended
5. Section 7 of principal Act repealed and replaced
6. Section 22 of principal Act amended
7. New section 23 added to principal Act
8. Consequential Amendments
9. Commencement
A BILL

To amend the Bail Act to make further provision as to the principles applicable to bail and other related matters.

ENACTED by the Parliament of Mauritius, as follows –

1. **Short title**

   This Act may be cited as the Bail (Amendment) Act 2009.

2. **Interpretation**

   In this Act –

   “principal Act” means the Bail Act.

3. **Section 4 of principal Act amended**

   Section 4 of the principal Act is amended-

   *(a)* By repealing subsections(1) and (2) and replacing them by the following new subsections-

   (1) A Judge or a Magistrate may refuse to release a defendant or a detainee on bail on one or more of the following grounds:

   *(a)* Where there is the likelihood that the defendant or detainee, if released on bail, will fail to surrender to custody or to appear before a Court as and when required;
(b) Where there is the likelihood that the defendant or detainee, if released on bail, will endanger the safety of the public or any particular person or will commit an offence, other than an offence punishable only by a fine;

(c) Where there is the likelihood that the defendant or detainee, if released on bail, will interfere with witnesses, tamper with evidence or otherwise obstruct the course of justice, in relation to him or to any other person;

(d) Where there is the likelihood that the defendant or detainee, if released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system;

(e) Where in exceptional circumstances there is the likelihood that the release of the defendant or detainee will disturb the public order or undermine the public peace or security;

(f) Where he is satisfied that the defendant or detainee should be kept in custody –

(i) for his own protection; or

(ii) in the case of a minor, for his own welfare.

(2) In considering whether the ground in subsection (1) (a) has been established, the Court may, where applicable, take into account the following factors, namely-

(a) the emotional, family, community or occupational ties of the defendant or detainee and whether he has a fixed place of abode;

(b) it is reasonably believed that the defendant or detainee has given false or misleading information regarding his names or address;

(c) the assets held by the defendant or detainee and where such assets are situated;

(d) the means, and travel documents held by the defendant or detainee, which may enable him to leave the country;

(e) the extent, if any, to which the defendant or detainee can afford to forfeit the amount of bail which may be set;
(f) the question whether the extradition of the defendant or detainee could readily be effected should he flee across the borders of the Republic in an attempt to evade his or her trial;

(g) the defendant is charged with or likely to be charged with a serious offence;

(h) the nature and the gravity of the charge on which the defendant is to be tried;

(i) the nature of the evidence available with regard to the offence, the strength of the case against the defendant and the incentive that he may in consequence have to attempt to evade his trial;

(j) the nature and gravity of the punishment which is likely to be imposed should the defendant be convicted of the charges against him;

(k) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or

(l) any other factor which in the opinion of the court should be taken into account.

(2A) In considering whether the ground in subsection (1) (b) has been established, the Court may, where applicable, take into account the following factors, namely-

(a) the degree of violence towards others implicit in the charge against the defendant;

(b) any threat of violence which the defendant or detainee may have made to any person;

(c) any resentment the defendant or detainee is alleged to harbour against any person;

(d) any disposition to violence on the part of the defendant or detainee, as is evident from his past conduct;
(e) the character and antecedents of the defendant or detainee, including any disposition of the defendant or detainee to commit serious offences as is evident from his past conduct;

(f) the prevalence of a particular type of offence;

(g) any evidence that the defendant or detainee previously committed an offence, punishable otherwise than by a fine not exceeding 10,000 rupees, while released on bail; or

(h) any other factor which in the opinion of the Court should be taken into account.

(2B) In considering whether the ground in subsection (1) (c) has been established, the Court may, where applicable, take into account the following factors, namely-

(a) the fact that the defendant or detainee is familiar with the identity of witnesses and with the evidence which they may bring against him;

(b) whether the witnesses have already made statements and agreed to testify;

(c) whether the investigation against the defendant has already been completed;

(d) the relationship of the defendant or detainee with the various witnesses and the extent to which they could be influenced or intimidated;

(e) how effective and enforceable bail conditions prohibiting communication between the defendant or detainee and witnesses are likely to be;

(f) whether the defendant or detainee has access to evidentiary material which is to be presented at his trial;

(g) the ease with which evidentiary material could be concealed or destroyed; or

(h) any other factor which in the opinion of the Court should be taken into account.
(2C) In considering whether the ground in subsection (1) (d) has been established, the Court may, where applicable, take into account the following factors, namely-

(a) the fact that the defendant or detainee, knowing it to be false, supplied false information at the time of his arrest or during the bail proceedings;

(b) whether the defendant or detainee is in custody on another charge;

(c) the defendant or detainee, having been released on bail, breached any condition imposed on him for his release or failed to comply with section 12(2);

(d) any indication that the defendant or detainee will not comply with any bail conditions; or

(e) any other factor which in the opinion of the court should be taken into account.

(2D) In considering whether the ground in subsection (1) (e) has been established, the Court may, where applicable, take into account the following factors, namely-

(a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;

(b) whether the shock or outrage of the community might lead to public disorder if the defendant or detainee is released;

(c) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the defendant or detainee;

(d) whether the release of the defendant or detainee will undermine or jeopardize the public confidence in the criminal justice system; or

(e) any other factor which in the opinion of the Court should be taken into account.
(2E) In considering whether the ground in subsection (1) (f) has been established, the Court may, where applicable, take into account the following factors, namely-

(a) whether the defendant or detainee if released might suffer harm by others;

(b) the mental health of the defendant or detainee and whether he may suffer self-harm if released;

(c) any other factor which in the opinion of the Court should be taken into account.

(2F) In considering whether or not to refuse bail on any ground mentioned in subsection (1), the Court shall decide the matter by weighing the interests of society against the right of the defendant or detainee to his liberty and in particular the prejudice he is likely to suffer if he were to be detained in custody, taking into account, where applicable, the following factors, namely-

(a) the period for which the defendant or detainee has already been in custody since his arrest;

(b) the probable period of detention until the disposal or conclusion of the trial if the defendant is not released on bail;

(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the defendant with regard to such delay;

(d) any financial loss which the defendant or detainee may suffer owing to his detention;

(e) any impediment to the preparation of the defendant’s defence or any delay in obtaining legal representation which may be brought about by the detention;

(f) the state of health of the defendant or detainee; or

(g) any other factor which in the opinion of the court should be taken into account.
(2G) A defendant shall be granted bail by the Court only if it is satisfied that there are exceptional circumstances which justify it when-

(a) in those proceedings the charge against him relates to murder, manslaughter, rape, indecent assault on a child less than sixteen, a drug offence other than an offence under section 34 of the Dangerous Drugs Act, a terrorism offence, or larceny involving the use of a firearm or the infliction of grievous bodily harm; and

(b) he has in any proceedings been charged with or convicted of a very serious offence as indicated in paragraph (a).

(b) By inserting after subsection (3) the following new subsection (3A)-

(3A) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the Court shall have the duty, contemplated in subsection (2F), to weigh up the personal interests of the defendant or detainee against the interests of society and justice.

4. **Section 5 of principal Act amended**

Section 5 of the principal Act is amended by inserting immediately after subsection (2) the following new subsection-

(2A) Where a Magistrate or Judge is satisfied that a defendant or detainee is unable to provide surety, he shall impose other conditions of a non-financial nature.
5. **Section 7 of principal Act repealed and replaced**

Section 7 of the principal Act is repealed and replaced by the following section-

### 7 Other conditions for release on bail

(1) A Magistrate or Judge shall impose as a condition of release on bail that the defendant or detainee resides at a specified address and that he notifies the court immediately of any change of address and any recognisance shall apply to any such condition.

(2) A Judge or a Magistrate may impose such other conditions of a general or specific nature as he thinks fit for the release on bail of a defendant or detainee, requiring him to do or not to do any act, to secure that-

(a) he surrenders to custody or appears before a Court as and when required,

(b) he does not commit an offence while on bail,

(c) he does not interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person,

(d) he makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence, and any recognisance shall apply to any such condition.

(3) Subject to subsection (4), a defendant or detainee may be required to comply with requirements imposed for the purpose of securing the electronic monitoring of his compliance with any other requirement, such a curfew, imposed on him as a condition of bail.

(4) A Court shall not impose on a child an electronic monitoring requirement, save in prescribed circumstances.
(5) Any Court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, vary or add any further condition of bail-

(a) with regard to the reporting in person by the defendant or detainee at any specified time and place to any specified person or authority;
(b) with regard to any place to which the defendant or detainee is forbidden to go;
(c) with regard to the prohibition of or control over communication by the defendant or detainee with witnesses for the prosecution;
(d) with regard to his place of abode;
(e) with regard to his supervision by a probation officer; or
(f) which, in the opinion of the Court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the defendant or detainee.

6. **Section 22 of principal Act amended**

Section 22 of the principal Act is amended-

(a) by deleting in paragraph (a)(iii) the words “not exceeding 1,000 rupees”;

(b) by deleting in the penultimate phrase the words “5,000 rupees and to imprisonment for a term not exceeding 2 years” and replacing them by the words “50,000 rupees and to imprisonment for a term not exceeding 5 years”.

7. **New section 23 added to principal Act**

The principal Act is amended by inserting immediately after section 22 the following new section—

23 **Liability to arrest for absconding or breaking conditions of bail**

(1) If a person who has been released on bail in criminal proceedings and is under a duty to surrender into the custody of a court fails to surrender to custody at the time appointed for him to do so the court may issue a warrant for his arrest.

(2) If a person who has been released on bail in criminal proceedings absents himself from the court at any time after he has surrendered into the custody of the court and before the court is ready to begin or to resume the hearing of the proceedings, the court may issue a warrant for his arrest; but no warrant shall be issued under this subsection where that person is absent in accordance with leave given to him by or on behalf of the court.

(3) A person who has been released on bail in criminal proceedings and is under a duty to surrender into the custody of a court may be arrested without warrant by a police officer—

(a) if the police officer has reasonable grounds for believing that that person is not likely to surrender to custody;

(b) if the police officer has reasonable grounds for believing that that person is likely to break any of the conditions of his bail or has reasonable grounds for suspecting that that person has broken any of those conditions; or

(c) in a case where that person was released on bail with one or more surety or sureties, if a surety notifies the police in writing that that person is unlikely to surrender to custody and that for that reason the surety wishes to be relieved of his obligations as a surety.
(4) A person arrested in pursuance of subsection (3) above shall be brought as soon as reasonably practicable before the court which released him on bail.

(5) When a person is arrested pursuant to the provisions of this section, the court shall determine whether to grant him bail subject to the same or different conditions as originally imposed to remand him in custody.

8. Consequential Amendments

(1) Section 16(3) of the Criminal Appeal Act is repealed and replaced with the following subsection:

(3) The time during which an appellant, pending the determination of his appeal, is admitted to bail, and subject to any directions which the Court may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated under this section, shall not count as part of any term of imprisonment or penal servitude under his sentence, and, in the case of an appeal under this Act, any imprisonment or penal servitude under the sentence of the appellant, whether it is the sentence passed by the Court of trial or the sentence passed by the Court shall, subject to any directions which may be given by the Court, be deemed to run, if the appellant is in custody, from the day on which he was on remand for that offence and, if he is not in custody, from the day on which he is received into prison under the sentence; the time spent in custody prior to sentence, by a person to whom bail has been refused, shall be fully taken into
account when assessing the length of the sentence that is to be served from the date of sentencing.

(2) The District and Intermediate Courts (Criminal Jurisdiction) Act is amended in section 94 by inserting after subsection (5) the following new subsection-

(6) The time during which an appellant, pending the determination of his appeal, is admitted to bail, and subject to any directions which the Supreme Court may give to the contrary on any appeal, shall not count as part of any term of imprisonment or penal servitude under his sentence, and, in the case of an appeal under this Act, any imprisonment or penal servitude under the sentence of the appellant, whether it is the sentence passed by the Court of trial or the sentence passed by the Supreme Court shall, subject to any directions which may be given by the Supreme Court, be deemed to run, if the appellant is in custody, from the day on which he was on remand for that offence and, if he is not in custody, from the day on which he is received into prison under the sentence; the time spent in custody prior to sentence, by a person to whom bail has been refused, shall be fully taken into account when assessing the length of the sentence that is to be served from the date of sentencing.
9. **Commencement**

(1) Subject to subsection (2), this Act shall come into operation on a date to be fixed by proclamation.

(2) Different dates may be fixed for the coming into operation of different sections of this Act.