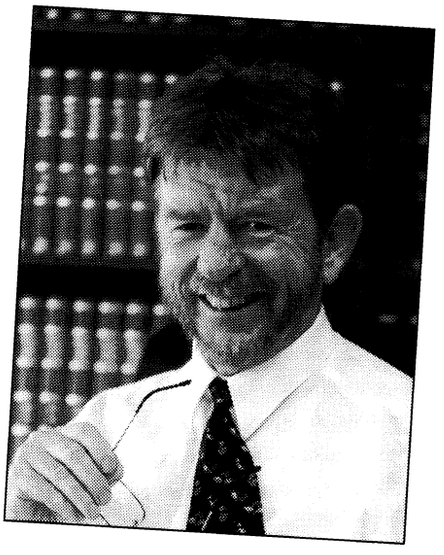
The Application for Bail



Hon Justice Riley

It sometimes appears that the application for bail is something of an afterthought on the part of counsel. That should never be the case. The importance of the application to your client is obvious. An unsuccessful application means further time in custody and that is likely to be an unhappy experience for your client and provide a poor start to your professional relationship. It follows that careful thought must be given to the question of bail prior to the first appearance before the court.

Of course in many cases the position regarding bail will be clear. The obtaining of a grant of bail, in some cases, will be little more than a formality. However in such cases you should prepare on the basis that the court will need to be convinced that a grant of bail is appropriate. In other cases it will be clear that a grant of bail is not an option. In many cases a thoroughly prepared application is likely to be required.

As with most appearances before a court appropriate preparation is vital to the presentation of an application for bail. It is necessary that a case strategy appropriate to the circumstances be developed and followed.

The starting point for your preparation will be obtaining a thorough knowledge of the workings of the *Bail Act*. That Act provides for "the granting of bail to accused persons in or in connection with criminal proceedings." I do not propose to review the Act in detail. It provides for circumstances where there is a presumption in favour of bail, a presumption against bail and where there is no presumption either way ie the situation is neutral.

You will need to bear in mind where the onus lays as a consequence of those provisions. Of particular relevance to your preparation for the application will be the operation of s 24 of the Act which identifies the criteria that a court must take into consideration in reaching its decision on a bail application.

The level of your preparation will obviously depend upon the time available to you. In many cases that time will be limited and you will have to do your best in the circumstances.

Where you have adequate time for preparation of the bail application there are many things to consider. Some of those are spelled out in s 24 of the Act and you will give consideration to each matter there identified.

What is important for the application will vary according to the nature of the offence and the nature of the offender. The fact that the offender has a criminal history does not necessarily mean that bail will not be granted. Such a history may indicate that the client has previously honoured undertakings made to the court and can call upon his or her history as support for the making of a grant of bail on this occasion. The fact that the offence is serious does not necessarily mean that bail will not be granted. Bail is regularly granted in matters as serious as murder.

It will be necessary to obtain clear and detailed instructions from your client on the issues likely to arise.

In many cases these will include an effort to identify an acceptable surety and the development of a plan for what will occur in the event that your client is released. For example you will need to know where he or she intends to live and work and what assurances can be provided to the court as to the attendance by your client at the hearing and that there will be no interference with witnesses.

The prospect that your client may reoffend whilst on bail is another issue to be addressed. If bail is likely to be granted subject to conditions then it will be necessary for you to explain to the client the impact of those conditions and ensure that the client fully understands that a breach of such a condition is likely to result in further time in custody.

When obtaining instructions from your client as to conditions that may be imposed it is necessary to ensure that he or she appreciates the importance of the undertaking to be given.

If the client is unlikely to be able to comply with a condition (eg a reporting condition, residential condition or curfew) you should be in a position to inform the judicial authority of that problem.

Agreeing to conditions which a client is unable or unlikely to meet is to set the client up for failure leading to arrest and a period in custody whilst the matter is revisited.

If acceptable sureties are identified you will need to speak with those persons to confirm their willingness and ability to accept the responsibility. The surety needs to be made aware of the likely consequences for the surety if the bail conditions are breached.

It is prudent to have frank discussions with the prosecutor before the application proceeds. It may be possible to negotiate an agreed basis for the grant of bail which can then be put to the court as, effectively, a joint submission.

Alternatively it may be possible to reduce the area of conflict between prosecution and defence so only the matters that are in dispute need be addressed.

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Additionally, I should express my appreciation to those organisations that also asked that I represent their interests in Malaysia and that also provided financial assistance.

These included Tony Abbott, President of the Law Council of Australia; Ruth McColl SC, Past-President Australian Bar Association (and her successor David Curtain QC) and Richard Bayley, President of the Criminal Lawyers Association of Western Australia. All of whom, together with LAWASIA, I was proud to represent.

There were also many persons who helped me on the ground in Kuala Lumpur. Special mention should be made of Dato' Param Cumaraswamy, *United Nations Special Rapporteur on the Independence of Judges and Lawyers,* Mah Weng Kwai, President of the Malaysian Bar Council, and his Vice President Roy Rajasingham.

Finally, I should also make mention of the assistance of the Federal Minister for Justice and Customs, Senator Christopher Ellison for providing me with diplomatic support in Malaysia and to the staff of the Australian High Commission, including Damien Miller (Third Secretary Political) who assisted with valuable information and advice.

This report should not end without at least some mention of the person at the centre of this drama. Karpal Singh is a larger than life character. He is part rascal, part fearless advocate.

For decades he has been a thorn in the side of the Malaysian Government. He has been an outspoken advocate of human rights and for over 28 years was an opposition member of parliament highly critical of the ruling party. Sometimes, the lawyer and the politician merge. In most other legal systems that would not be appropriate, but in Malaysia it is unavoidable. The political and legal systems constantly collide in Malaysia.

Some persons were critical of Karpal Singh for making what they believe was a political statement in court, even though he was appearing as an advocate. Obviously, he stretched the limits of political tolerance in Malaysia with his comments, but there was every basis to complain and it would have been wrong not to do so. However, in the context of that trial, once having made the remark about "people in high places" he immediately became a political target.

The advisability of making those comments may be debated endlessly, however, we should rather focus on the nature of the response. Some Malaysian lawyers have in the past been charged with sedition, but not for things said in court. As far as is known, the charging of Karpal Singh is the first instance anywhere in the world where a lawyer has been accused of sedition for words spoken in the defence of his client.

It has always been accepted that in various circumstances advocates may be dealt with for acts of contempt or professional misconduct, which have occurred in court.

However, as I said in my earlier Report, to bring a criminal charge against an advocate for words spoken in the course of legal proceedings is an act capable of destroying the immunity of counsel, which public policy has determined should exist to ensure fairness within a justice system.

As I also mentioned in my first report, the provisions of the *Sedition Act 1948* have been used in the past by the Government not only to restrict freedom of speech within the Malaysian community, but also at times parliamentary privilege. In this case, it was used to restrict the freedom of a lawyer to speak openly in court on behalf of his client.

For these (and other reasons) the trial of Karpal Singh had significant legal importance.

Karpal Singh remains an important member of that small band of Malaysian lawyers that is prepared to assert the principle of the rule of law and take on the executive and the judiciary to defend it.

That does not mean as lawyers they always get it right or that their conduct is always appropriate in the traditional sense. It does mean that more often that not, they find themselves in conflict with a system that often fails the essential tests of independence and impartiality expected within a democratic nation.

1 Refer to my first Report of 6 December 2001 for details of the adjourned proceedings.
2 The Star, *Wednesday, January 16, 2002*
3 Public Prosecutor v Param Cumaraswamy *[1986] 1 MLJ 512*
4 Distinguished Malaysain lawyer, Dato' Param Cumaraswamy has for some years now been the United Nations Special Rapporteur on Independence of Lawyers and Judges.
5 "Justice in Jeopardy: Malaysia 2000", *Report of the International Bar Association Joint Mission to Malaysia (in conjunction with the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists (CIJL), the Commonwealth Lawyers' Association (CLA) and the Union of Internationale de Advocats (UIA), Journal of the Malasian Bar, page 6*
6 "Justice in Jeopardy: Malaysia 2000" Report

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In your discussions with the prosecutor you should obtain information as to your client's criminal history, the history of compliance with bail undertakings, the submissions to be made by the prosecutor in relation to the strength of the Crown case and the general attitude of the Crown to the whole of the application.

Wherever possible, before making an application for bail, you should give the prosecution notice of your intention so that there is no application from the prosecutor for an adjournment to obtain instructions or to prepare to meet the application.

A matter of interest to the court will be the length of time your client is likely to remain in custody prior to trial in the event that bail is not granted. You should therefore make enquiry of the Court Registry as to when the matter is likely to be able to be given a hearing date and you will be able to provide that information to the court.

Any court appearance that involves the liberty of your client is clearly a serious occasion. You should ensure that your preparation permits you to effectively present the strongest case for the relief your client seeks.