RECENT CASES

Criminal procedure—bail

R. v. CUTLER[1]

C was standing trial on an indictment containing two counts, one charging him with the commission of a crime and the other with the commission of a misdemeanour. During the period between his committal and the beginning of the trial C was admitted to bail. The question arose whether the trial judge had jurisdiction to admit to bail during trial persons charged and in the hands of the jury on an indictment alleging the commission by him of a crime.

Burt J. observed that it might be thought to be an odd thing that there should be such an absence of authority on a question such as this, arising as it did under the Criminal Code which had been in operation in both Queensland and Western Australia for 70 years or thereabouts. He could find no reported decision on the point in Western Australia and only two in Queensland.[2] Burt J. understood that neither decision was regarded as having established the law for that State and made reference to an unreported decision of Mansfield J. which denied bail and led to the amendment of s. 555 of the Queensland Criminal Code in 1964 giving express power to the court to admit any person to bail after the trial had commenced, notwithstanding that such person had been given in charge to the jury. Section 573 of the Criminal Code of Western Australia had not, however, been amended and reads—

> The Supreme Court or a judge thereof may admit to bail any person who has been committed for trial or for sentence or is in custody upon a charge of an indictable offence whether bail has been refused or not or may reduce the bail of any such person to whom bail has been granted.

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1 Unreported, in Supreme Court of Western Australia, May 1972, before Burt J.

2 R. v. Kennedy [1941] Q.W.N. 49—bail refused when the accused's health was not so bad that he could not safely be trusted to the care of the gaol authorities. E. A. Douglas J. observed that an application could not be made in the absence of the jury, but it is not clear from the report of the case at what stage the application was made.

Burt J. held that s. 573 had no bearing on the problem. It dealt with the position *prior* to trial, not with the admission of an accused to bail *during* the hearing.

He did, however, consider that the power to admit to bail can be extracted from s. 611 when read with s. 610 (adjournments). Section 611 of the Code provides—

> When the trial of a person charged with an offence on indictment is adjourned, the Court may direct the trial to be held either at a later sitting of the same Court, or before some other Court of competent jurisdiction, and may remand the accused person accordingly, and may, in a proper case, admit him to bail, or enlarge his bail if he has already been admitted to bail, and may enlarge the recognisances of the witnesses.

When the Court grants an adjournment the Court has power to admit an accused to bail. In reaching this conclusion Burt J. said that he was

> very much influenced by the knowledge that the jurisdiction to admit to bail during trial has been exercised by judges of this Court on a number of occasions and I think I should follow the precedent so set as it proceeds from a construction of the section which I think is plainly open.

He went on to distinguish between two kinds of adjournment—an adjournment in the course of the trial as distinct from an adjournment of the complete trial. In this instance he was concerned in the admission to bail during an adjournment such as an adjournment overnight.

In exercising his discretion on the particular facts he made a number of pertinent observations on a number of matters.[3]

(i) *Likelihood of conviction*—

> . . . the consideration . . . as to whether there is a likelihood of the accused being convicted is—must be a criterion which is irrelevant to the exercise of my discretion at this point of time. I say that because to decide otherwise would be to draw me as the presiding judge into a consideration of that matter, which indeed would be unfortunate, and worse still, it would involve me in making some judicial pronouncement upon it which of course would be quite improper.

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[3] Referring in particular to those listed in Brown, *Bail—An Examination* (1971) 45 A.L.J. 193.

(ii) *Presumption against admitting to bail during trial—*

> The new thing which is not involved in the discretion when it is exercised either prior to trial or after conviction is the integrity of the trial process, and it is that factor, I believe, which has led all judges so far as they have been reported, who have dealt with an application of this type, to emphasise that the circumstances which would justify the granting of bail during a trial must in the true sense be quite exceptional; that the normal rule is that bail would not be granted.

(iii) *Exceptional circumstances—*

Thus to grant bail during the trial there must be some good reason to do so—

> . . . an accused person once in charge of the jury should, in the absence of circumstances which are exceptional, and generally circumstances which are personal to him, be kept in custody until the verdict is returned.

In this instance no exceptional circumstances could be established. It was submitted that because it was a long case this fact justified admission to bail. Burt J. rejected this as an exceptional circumstance.

(iv) *Facilitating the defence—*

He did however accept that the nature of the case and complicated nature of the facts and in consequence the necessity for counsel to have frequent, uninterrupted, uninhibited conferences with C justified some form of bail. He accepted that bail would in this instance facilitate the conduct of the defence. He concluded his judgment by saying—

> Now, for that reason I do propose in this case to accede to the application to grant bail, but not exactly in the same terms as counsel has submitted. The object of the bail as I see it is the object that I have indicated—to enable the accused to be quite free in his relationship to his solicitors and to counsel, and to enable him to be in no way handicapped in the conduct of the defence; and the bail that I am thinking of (and I will discuss this with counsel) is that whenever counsel tells me that an occasion has arisen upon which he would like to confer with the lay client—and in a case like this it may be every day that that will arise—whenever he indicates to me that that is the position then I would have thought that if the accused were then released on bail, on the same bond, as to amount, and the same surety as existed prior to the trial commencing and

> with the time of the bail to commence, let us say 40 minutes or half an hour after the court has risen, and to continue thereafter for a period of time that might be indicated to me by counsel, and at the end of that period the condition of the bond being that he will then report back to East Perth, if that be the place where he is presently held in custody—that is broadly the sort of bail that I think would meet the circumstances of this case.
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> It goes without saying of course that if counsel says that an occasion has arisen when he would like to have a conference, there is no question, so far as I am concerned, of that ever being questioned. I would simply accept it to be the case and bail would be granted to enable that to be done.

At the risk of splitting hairs and perhaps being unduly critical there are nevertheless some aspects of the judgment which are unsatisfactory.

First, it is impossible to follow the reasoning as to why an accused person should have to argue about his admission to bail on two occasions—at the time he is committed for trial and at the time of the commencement of the trial proceedings. The factors to be taken into account would surely be the same. The phrase 'integrity of the trial process' which Burt J. used does not seem an adequate explanation as to why the accused should establish exceptional circumstances to justify the award of bail. What does the expression mean? The whole process from the time the charge is laid until the prisoner is acquitted or sentenced demands integrity.

Secondly, it is time consuming that the trial court should have to deliberate yet again as to whether the accused should be admitted to bail. For convenience it should be a matter of practice that a presumption prevails that the accused should be on bail throughout the trial if he has previously been admitted to bail. The onus should lie with the prosecution to establish a good reason as to why the accused should not be permitted to continue bail during the trial.

Thirdly, it is hard to follow the argument that because the accused has been put in the care of the jury he should only be released on bail in exceptional circumstances. The function of the jury is to establish guilt or innocence. It is no part of their function to decide how the accused should be treated during the trial. It is the judge who conducts the trial and the expression 'in charge of the jury' is surely irrelevant in respect of bail.

Fourthly, many would argue—and here one is on weaker ground —that a trial is better served by the accused being on remand. The whole appearance of a man being escorted by the police in and out

of the court may suggest to an uninitiated jury that he is half-way to being guilty. It starts the trial off on the wrong foot. Here is a man who has obviously been denied bail and this obvious fact puts the jury in the wrong frame of mind. It would seem that there are perhaps more compelling reasons for the accused to be on bail during the trial than in some instances prior to the trial. Admittedly this view is partly taken because of one's distaste for the whole method of trial by jury, but it is nevertheless submitted that it is not wholly without validity.

On the other hand there are certain bonus points which emerge from the judgment.

First, it is clear that despite the necessity which Queensland felt in making an amendment to s. 555 of their Criminal Code classifying the jurisdiction of the trial judge to award bail during the trial, clearly the case shows that there is power to award bail during the trial in a 'proper case' under s. 611.

Secondly, there is a clear rejection of any suggestion that some sort of assessment should be made of any 'likelihood of a conviction'. Here, one can only welcome this positive assertion.

Thirdly, the outcome was in the end partly satisfactory—a limited form of bail was granted.[4]

In the meantime the Law Society of Western Australia has made representations to the Attorney-General that the onus should rest on the prosecution to show cause why bail should not be granted during the course of a trial, rather than on the accused to show cause why bail should be granted.[5] This would indeed be a radical change in the law, but there is a lack of statistical evidence to show whether such a change in the law is justified.

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4 The case aroused widespread national and international interest. Cutler was charged with committing offences in March 1971 whilst a director of Leopold Minerals N.L. in saying that an assay report gave an average of 5.33% nickel of the core from 665 feet to 690 feet. The trial, one of the longest in Western Australia, lasted 26 sitting days. The trial was conducted with 11 jurors because one of the jurors needed an urgent operation and had to leave. 68 witnesses were called for the Crown and 8 for the defence. The jury of seven men and four women deliberated about 7½ hours before finding Cutler guilty. Burt J. sentenced Cutler to 3½ years' imprisonment and set a 2-year minimum before being eligible for parole.

5 45th Annual Report of the Law Society of Western Australia, 1971-72, p. 10.