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Common Law

IN THE SUPREME COURT OF TONGA

PRACTICE DIRECTION NO.2 of 2015: BAIL

1. Introduction:

The law of bail is contained in the Bail Act 1990 as amended by the Bail Act (Amendment) Act 1991 and in common law.

All Magistrates should make sure that they are thoroughly familiar with these statutes.

It has been observed that the law of bail is not always being correctly applied. This Practice Direction is only intended to explain the existing law by drawing attention to some areas of uncertainty with the object of achieving a consistent approach.

2. General entitlement to bail

The Bail Act embodies the principle, recognised in Clause 9 of the Constitution, that persons must not be deprived of their liberty except by due operation of law. It may be said that there is a presumption in favour of bail.

3. Bail after arrest and charge

Persons who have been arrested or charged with an offence *punishable by imprisonment* "shall be granted bail" unless one or more of the conditions set out in Section 4 (1)(i) to (v) has been satisfied. In deciding whether any of these conditions applies the court *must* take into account "all the relevant circumstances" and in particular those set out in Section 4(2)(a) to (d).

4. Conditions of bail - Bail Act, Section 5

(a) Return date

All bail is granted subject to conditions. These conditions must be clearly set out in the grant. The first condition is that the person granted bail "shall surrender to custody". It has been the practice to grant or extend bail without specifying the date on which this surrender to custody is to take place. That practice is erroneous and must cease. Bail must *always* specify a date on which surrender must take place. Where the court granting bail is not certain of the date when, for example, an accused committed for trial in the Supreme Court should surrender, the accused should be bailed for an interim period, usually 28 days, back to the bailing court, to allow inquiries to be made with the Supreme Court and the appropriate date determined.

(b) Residence reporting and travel

A Court granting bail must consider whether to require the accused to reside at a particular address and whether to require him to report at a specified police station at regular intervals e.g. every Monday morning. Where a reporting condition is included the officer in charge of the police station should be advised that a reporting order has been made and that the Court should be notified of default.

Now that the use of mobile phones is so widespread, all bailed accused should be required to provide a telephone number, either their own or that of a close relative or friend with whom they are in regular contact.

Section 5 (iv) allows a Court to forbid overseas travel pending trial. A similar order can be made restricting travel within Tonga.

5. Security

When granting bail, the Court must consider whether the accused person should be required to "give security for himself and, secondly, whether he should be required to provide a surety or sureties".

The term "security" includes cash (which must not be excessive and will be refunded in due course to an accused who has complied with the conditions of his bail) or some other form of security.

It has been the practice to accept the accused's "own recognizance" as a form of security and this practice is acceptable providing it is clearly explained to the accused that if he fails to surrender to custody on the specified return date then, absent exceptional circumstances, the security will be lost. In other words, the accused will then be in the situation that he owes the amount of recognizance accepted by the court. If that amount is not paid then a term of imprisonment in default is likely to be imposed. An accused's "own recognizance" in a specified amount, say \$500, binds the accused to pay that amount if he fails to surrender to custody on the date specified in the grant of bail. This must be clearly explained.

Any amount of recognizance forfeited by the court will be additional to the accused's liability to be fined or imprisoned for failing to surrender, that being a distinct offence created by Section 8 of the Act.

6. Sureties

The law applicable to sureties is found in Section 10 of the Act. Where sureties are required, the sureties who bind themselves to pay the specified sum in the event of the accused's failure to surrender to custody *must* have the

consequences of their recognizance explained to them. They *must* in addition, satisfy the court that they are in fact able to pay the court the amount specified in the event of default by the accused. A person who has no, or very little money, and no access to the sum specified *must not* be accepted as a surety. It must clearly be explained to the sureties that in the event of default by the accused and failure on their part to satisfy the debt they are liable to find themselves imprisoned (see Section 10 (B)).

It has been the practice of some courts to fix bail security and sureties without adequately inquiring to establish that the accused and the sureties understand what they are signing and the consequences of breach. If there is a magistrate present then it is that magistrate who should conduct this enquiry – it should not be left to the clerk. If the order granting bail is to be made dependent on sureties who are not present then the making of the order should await the arrival of the sureties, even if the accused has meanwhile to remain in custody. If, by the time the sureties have arrived the magistrate has left, then one of the other persons named in section 10 (iv) may accept the proposed sureties subject to the provisions of section 10 (ii) being satisfied.

7. Bail pending appeal

Unfortunately, Section 3(1) of the Act is not very well drafted and is not consistent with Section 4B(1). Until the position is clarified by amendment, Section 3(1)(iii)(a) should be read subject to Section 4 B(1).

In outline, the position is that a person who has been convicted and sentenced to an *immediate* term of imprisonment (i.e. not a suspended term) should not be granted bail pending appeal unless conditions (a) or (b) and (c) of Section 4 (1) are satisfied (but see Section 4B(2)).

Persons who have *not* been sentenced to an immediate term of imprisonment but who wish to appeal against their sentence or conviction are free to pursue their appeal without further remand. There is no requirement that they surrender to custody again. These appellants should not be bailed pending the hearing of their appeal.

8. Return of passports

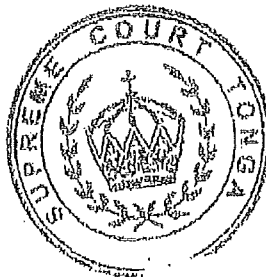
Where an accused's passport has been surrendered pursuant to Section 5 (iv) of the Act it should be returned immediately after an acquittal. Where an accused is convicted the passport should be available for return. Where an immediate term of imprisonment is imposed it will usually be sensible to retain the passport until the prisoner's release from prison.

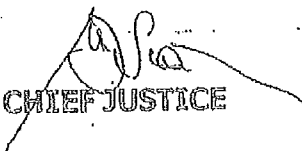
Section 17B of the Court of Appeal Act grants the Crown the right to apply for leave to appeal against a sentence imposed by the Supreme Court. There do not appear to be any statutory provisions preventing the return of passports previously taken from respondents to such appeals, however, there seems no reason in principle why a writ *Ne Exeat Regno* (do not leave the Kingdom) might not be available to the Crown in those circumstances (see *Felton v Callis* [1968] 3 All ER 673).

Bench book

Magistrates are kindly requested to place a copy of this Practice Direction in their Benchbook.

Dated: 14 June, 2013.




CHIEF JUSTICE