Drugs and Bail—The Queensland Experience

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The Bail Act 1980 (Qld) commenced operation in Queensland on 1 July, 1980, and replaced the previous common law situation with a codification of the entire law with respect to bail. The Act introduced a general principle that courts should grant bail, subject to the various specific provisions of the Bail Act.

The Bail Act, in setting out a positive duty to grant bail, specifically empowers a watch-house keeper to investigate whether or not bail should be granted and to grant such bail if it is not practicable to bring the person charged before a court within 24 hours of being taken into custody (section 7).

However, section 13 of the Bail Act, as originally introduced provided that bail for the crimes of treason, murder, piracy and offences defined in sections 130(2) and (2A) of the Health Act could only be granted by the Supreme Court. The Bail Act went on to provide that, where the offence was a drug offence under the Health Act section 130(2) or (2A), if the prosecutor indicated to the court that the charge was to proceed summarily, then bail could be granted by the Magistrates Court (which was where the defendant would finally be dealt with).

The drug offences contained in sections 130(2) or (2A) (for which watch-house bail was not available under the Bail Act as it was originally introduced), included the more serious drug offences such as producing dangerous drugs, cultivating prohibited plants, selling or supplying dangerous drugs or prohibited plants, permitting premises to be used for any such serious offence concerning dangerous drugs or prohibited plants, or having in one's possession money or property obtained from any such serious offence. Those offences (relatively minor) for which watch-house bail was available were the offences of possession of dangerous drugs or prohibited plants, or possession of utensils (for example, pipe, needle, syringe).

After some years of discussion, the Queensland Government introduced the Drugs Misuse Bill on 10 December 1983. This Bill, which was the first attempt to introduce new legislation covering drugs, was withdrawn in the face of severe criticism from many sections of the community, including the Queensland Law Society, the Bar Association and the Queensland Council for Civil Liberties.

1. The opinions expressed in this paper are the personal views of the author, and do not necessarily reflect the views of the Legal Aid Office (Queensland).
The Queensland Government's second attempt at legislation in this area, again called the Drugs Misuse Bill, was introduced on 5th August, 1986 (Parliamentary Debates (Qld) 19 August 1986, pp. 353-4) and was finally approved on 19 August 1986.

At no time in either the second reading speech of the Minister for Police, the Minister responsible for introducing the bill, the Hon. W. Gunn (Parliamentary Debates (Qld) 5 August 1986, pp. 277-80), nor in any of the speeches of the Government or Opposition members debating the bill was there any discussion about the effect of the new legislation on the question of bail for drug offences (Parliamentary Debates (Qld) 19 August 1986, pp. 351-460.

In fact, as both the legal profession and the community in general discovered immediately after the Act commenced pursuant to proclamation on 27 October, 1986, bail was no longer available from a watch-house keeper for any drug offence whatsoever.

With the introduction of the Drugs Misuse Act 1986, bail on any drug offence was to be available only from a Magistrates Court (in certain circumstances) or the Supreme Court.

The Magistrate's Court has the power to grant bail with respect to a particular drug offence only if the prosecutor is able to elect summary jurisdiction and, in fact, does so (Drugs Misuse Act ss 13(1) and (2); Bail Act s 13(2). The only offences for which the prosecutor can elect summary jurisdiction are those offences for which the maximum penalty is 15 years. In addition, the 'possession of a utensil' charge can only be dealt with by the Magistrates Court and bail is therefore available from that court.

The Drugs Misuse Act provides penalties for various serious indictable drug offences ranging from 15 years to life and in some circumstances, mandatory life (see Dearden 1988, p. 149). It is only those offences providing for a maximum 15 year imprisonment in which a prosecutor can elect, in certain circumstances, to proceed summarily, subject to the right of the Magistrate to over-ride that election (Drugs Misuse Act, s 45(4).

Where there is no summary election, either because the prosecutor has elected not to proceed summarily, or because such an election is not available, bail is only available from the Supreme Court. It is interesting to note that there are no guidelines in the Drugs Misuse Act for the exercise of the prosecutor's election and a prosecutor can elect to have the possession of even the smallest quantity of marijuana proceed in the Supreme Court. In practice, of course, such a course of action is most unlikely, but would be entirely legitimate within the scheme of the Act.

When the Drugs Misuse Act was first introduced in 1986, it provided that the offence of receiving or possessing property obtained from trafficking or supplying a dangerous drug could only be dealt with on indictment (i.e. in the Supreme Court). This meant that, no matter how small the amount of money or property obtained from the supplying or trafficking, bail was only available from the Supreme Court.

One example of the injustice involved in this provision which came to the writer's attention was a young woman who appeared in a suburban Magistrates Court on a number of charges relating to the possession and supply of a dangerous drug (cannabis) and also the alleged possession of the sum of $20.00 from the sale of a small quantity of cannabis. In the circumstances, although all parties concerned including the Duty Solicitor, the Police Prosecutor and the Magistrate were anxious for her to be granted bail, there was no power in the court to grant bail on the 'possession of money' charge (although she was granted bail on the charges of supply and possession). She therefore languished in the watch-house and then in prison until such times as she was able to apply for Public Defence to conduct a Supreme Court bail application. In these circumstances, it should be noted that it was extremely unlikely that the woman was going to receive a custodial sentence when finally dealt with, but she could not avoid spending time in custody before bail was granted.

This particular injustice was obviously recognised by the Government, and in 1987, the Drugs Misuse Act Amendment Act made provision for a maximum penalty of 15 years in certain circumstances for offences of receiving or possessing property obtained from trafficking or supplying dangerous drugs, therefore leaving open the possibility that in certain circumstances charges under this section could be dealt with summarily.
The provisions of the Bail Act and the Drugs Misuse Act apply not only to adults but to children charged with offences under the Drugs Misuse Act. Children charged under the Act can be granted bail only by a Children's Court, and consequently, until they appear before a court to be granted bail, will be locked up either in secure youth detention centres, or if outside the Brisbane metropolitan area, then in all likelihood in local watch-houses. This is, of course, a most undesirable situation but one which the Government has shown no signs of dealing with, despite calls for them to do so (Courier Mail, 10 November 1986, p. 9).

In certain circumstances, co-operative police officers have been prepared to side-step the provisions of the Bail Act either by proceeding by summons, with the result that the person concerned does not have to be arrested and processed through the watch-house (and find themselves in the situation of being unable to be granted bail until brought before the court), or by arresting by arrangement shortly before the commencement of court on the first available court date after the commission of the alleged offence. Such an 'arrest by arrangement' means that the person arrested is still processed through the watch-house, but is then immediately brought before the court and can apply for bail without spending time in custody.

The inability of the watch-house keeper to grant bail means that a person arrested from around mid-day Saturday onwards (or even from Friday afternoon onwards in towns where there is no Saturday session of the Magistrates Court) will be held in custody until Monday morning, being the first available session of the Magistrates Court. This applies regardless of how minor the drug offence may be, and is, in effect, a form of mandatory pre-conviction punishment which takes no account either of guilt or innocence of the person charged, nor of the likely eventual outcome of the case. Even a person eventually discharged without conviction may well have spent two nights in the watch-house before being initially granted bail.

What then is the reason for treating bail for drug offenders any differently to bail for any other offence. A recent New South Wales study suggests that 'the present results [of this study] suggest in fact that the current emphasis upon the nature of the charge in considering bail for alleged drug offenders is misplaced. No reliable evidence of a relationship between the type of drugs charge and the likelihood of absconding was found. Nor was any evidence obtained suggesting that those allegedly found in possession of large quantities of drugs were more likely to abscond.' (Weatherburn et al. 1987). The New South Wales legislation, although providing different provisions for bail with respect to the possession or supply of commercial quantities of a prohibited drug, still allows 'police bail' for a variety of drug offences, unlike Queensland.

It is possible to understand the rationale for restricting bail on what were previously 'capital' offences (murder, treason and piracy) to the Supreme Court, but it is difficult to understand why even the most minor of drug offences should be subject to the grant of bail only from a Magistrates Court or a Supreme Court, depending on the circumstances.

It is curious also to note that, although watch-house bail is not available even for the most minor of drug charges, there is no similar prohibition on watch-house bail for federal drug offences under the Customs Act. Bail on such offences is available in the normal way from a watch-house keeper and can either be granted or refused in accordance with the principles set out in sections 7 and 11 of the Bail Act.

The provisions of the Drugs Misuse Act, with its extensive series of offences providing penalties of either life imprisonment or mandatory life imprisonment, together with the instances of prosecutors electing to proceed on indictment on offences with maximum 15 year penalties, means that there is an ongoing and increasing pressure on the Supreme Court to consider bail applications from drug offences. The practical procedures involved in a Supreme Court Bail Application, requiring an application to the Supreme Court in Chambers on an Originating Summons supported by affidavits and three days notice to the Crown, mean that almost inevitably persons seeking bail from the Supreme Court will spend some period in custody either in the watch-house or in jail before being granted bail. This is occurring at a time when the Queensland Government openly acknowledges that the jail
system is bursting at the seams (three new jails are currently in the process of construction) and as a consequence, watch-houses are full to overflowing.

The Government, when it introduced the Drugs Misuse Act, made no attempt to support the concept of unavailability of watch-house bail. However, it appears prepared, despite the effects on an overcrowded penal system and an over-loaded judicial system, to continue a situation where bail is not available at the watch-house for any drug offences, and in many cases is available only from the Supreme Court.

The Queensland Government should immediately move to reform the law in this area by allowing watch-house keepers to grant bail to drug offenders in any circumstances where summary jurisdiction can be elected by a prosecutor. Such summary elections by prosecutors are generally made on the advice of the arresting officer, and there is no practical reason why a watch-house keeper should not obtain such advice from the arresting officer before considering the question of bail. To refuse to consider reform in this area will mean the perpetuation of a situation where an offender charged with the possession of even the most minute quantity or marijuana is unable to be granted watch-house bail, whereas a person who, for example, beats up little old ladies in the park, can be released by the watch-house keeper. It is a situation that calls for rational and logical reform, not continued emotional over-reaction to the ongoing problem of drugs in our community.

References


Parliamentary Debates (Qld) 1986, 5 August, pp. 277-280; 19 August 351-460.