Peter Ward, 'Ensuring optimal chances of success in applications for bail', paper given at the Lexis Nexis Criminal Conference on 2 September 2005.

The most critical decisions that one has to make when an Advocate is faced with a Bail Application is the grave decision as to the timing of the Application. Usually a phone call is made on the evening of an arrest or in some circumstances a few hours prior to the first listing of a matter before a Magistrates' Court. The difficulty that one encounters is that nearly every accused person is anxious to be released and usually the accused exerts pressure on the Advocate to make a Bail Application quickly. There are a number of considerations to be taken into account in making the decision to apply for bail. Unfortunately an Advocate is bound by his instructions however every effort should be made to rationally explain to the Defendant the consequences of an untimely or ill prepared Bail Application. This strategy is derived from the Bail Act itself when one considers Section 18 Sub-section 4 of the Act if bail has been refused and the person has been legally represented on the previous occasion Court will not proceed to hear the Bail Application unless new facts and circumstances have arisen since the making of the previous Order of Refusal. New facts and circumstances are in many cases very difficult to find as it may well be the case that the previous application was made only a week or two earlier to the subsequent application. This provision therefore makes it abundantly necessary to have the Bail Application thoroughly prepared.

In significantly opposed applications it is often practical to defer the Bail Application for example to:-

(a) acquire appropriate medical/drug reports;
(b) secure witnesses re: availability of employment and stability;
(c) acquire a significant understanding of the strength of the Crown Case.

The first practical suggestion that can be offered is after one has received a copy of the Charge Sheets and has inspected summary of the remand application then it is imperative that one has a significant discussion with the Police Prosecutor or Solicitor for the Office of Public Prosecutions involved in handling the case for the Crown. It is exceptionally important to be proactive and to suggest conditions to your opponent which may on the face of it be significantly severe i.e. reporting daily, significant surety. One must remember that once a person is released on bail then there is always the opportunity to make applications for variations. For example although it may appear on the surface somewhat onerous daily reporting conditions that may be reduced to one or three days a week down the track by an appropriate application thus discussion, consultation and commonsense in dealing with your opponent could be the best initial approach to handle a Bail Application. It is worth remembering that although it is the decision of the Magistrate to grant or refuse bail you are in a far better position if you can acquire agreement and the application succeeds without opposition.

Even if your opponent is steadfastly opposing your application it is important to elicit from your opponent or make appropriate inquiry as to some of the following principles:-

(a) The category of charge;
(b) Previous criminal history. If there is a criminal history then it is important to elicit the previous bail history of the Defendant;
(c) Are there co-offenders. Have they made Bail Applications. Were those Bail Applications successful;
(d) Evaluate the strength of the Crown Case and indeed ascertain the stage of the investigation. Will there be a significant delay i.e. drug analysis, forensic material to be ascertained, telephone intercept to be transcribed. It is also important to try and establish the timing of any committal proceeding and the length of a likely Committal Hearing.
(e) The identity of the Magistrate who will hear the Bail Application;
(f) An Advocate must be fully prepared by having at his disposal any necessary medical, psychiatric, drug reports to substantiate a Bail Application. Consultation with the Credit Program, and the Bail Advocate in reference to accommodation employment.

In essence a Bail Application must be fully prepared to enable an Advocate to have the best chance of successfully having his or her client admitted to bail.

It is now important to make general observations in relation to the Bail Act. It is a fundamental principle that Practitioners should have a thorough working knowledge of the Bail Act. The Principle Section of the Bail Act is Section 4. It is a general principle pursuant to Section 4/1 of the Bail Act that a person accused of an offence is entitled to bail. There are exceptions to this principle but that principle is based on the premise that the law presumes a person innocent until proven otherwise and generally there is an entitlement for bail.

I would now like to analyse the other provisions of Section 4 which is contrary to that general provision of entitlement to bail. Section 4 Sub-section 2 of the Act states the following:-

> Notwithstanding the generality of the provisions of sub-section 1 a Court shall refuse bail:-
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> (a) In the case of a person charged with treason or murder except in accordance with Section 13 of the Act. Section 13 Sub-section 2 indicates that only the Supreme Court can release a person on bail charged with murder or treason. Exceptional circumstances must exist before a Judge can release a person on bail. A Magistrate who commits a person to trial on a charge of murder can according to the provisions of Section 13 2D Sub-section 3. A Magistrate at the completion of a committal can release a person on bail if exceptional circumstances exist justifying the making of such an Order.

Section 2 then lists a variety of offences the Court can only release upon bail unless the Court is satisfied that exceptional circumstances exist. These offences and I will not transcribe the full transcript of the Act but these offences relate to trafficking of a commercial quantity of trafficking in relation to State and Commonwealth legislation. The offences are clearly set out in Section 4 Sub-section 2. I wont take you through

all the provisions of Section 2 but I refer you to Section 14 of the Bail Act where a Court may refuse bail when a person's life is in a state of uncertainty the Court may refuse bail if it is uncertain whether the person injured will die or recover. It is important in this instance to make appropriate inquiries and test any evidence related to the condition of the victim.

It is important to be familiar with the provisions of 2A of the Act where a person undergoing sentence for another offence may be granted bail but will not be released until the person's sentence has expired. Other Section in Section 4 that must be discussed is Section 4 Sub-section 2D and that Section reads:-

> If a Court is satisfied:-
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> 1. That there is an unacceptable risk that the person if released on bail would:-
>   a. Fail to surrender himself into custody in answer to his bail;
>   b. Commit an offence whist one bail;
>   c. Endanger the safety or welfare of a member of the public; or
>   d. Interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person.
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> The Court shall refuse bail in those circumstances.

In relation to Section 4 Sub-section 3 the Court has to have regard to the following matters in assessing whether an unacceptable risk is present. Those matters contained in Section 4 Sub-section 3 are:-

(a) the nature and seriousness of the offence;
(b) the character, antecedents, associations, home environment and the background of the accused person;
(c) the history of any previous grants of bail to the accused person;
(d) the strength of the evidence against the accused person;
(e) the attitude if expressed to the Court of the alleged victim of the offence in their grant of bail.

Before continuing with other matters related to Section 4 it is important to reflect on what constitutes exceptional circumstances. It is interesting to note that exceptional circumstances is not defined in the Act. This may be somewhat controversial but it is my view that the terms despite the existence of authority is interpreted differently by different Magistrates and indeed Supreme Court Judges. In reality it is an interpretation of the fact there are countless factors that are taken into account in establishing exceptional circumstances. In Tang & Ors (1995 83 A Crim R 593) His Honour Justice Briggs made the following definition. He indicated that the accused bears an onus of establishing that there is some unusual or uncommon circumstance surrounding his case before a Court is justified in releasing him on bail. There have been a number of papers and a number of unreported decisions often those cases contradict each other. It is my view that it is important to establish unusual circumstances. There is no doubt that in practice and in reviewing a number of unreported decisions that the element of delay between arrest and committal and subsequent trial is a significant factor in determining exceptional circumstances in

favour of the accused. There are decisions that indicate delay in itself is not enough but tactically and strategically delay is in many instances the primary reason that bail is granted. There are issues that can assist in establishing exceptional circumstances are personal family circumstances i.e. affect on small children, the existence of a significant medical condition and the assertion supported on material that the case against the accused is very weak. There are two principles that are important in any Tribunal's decision in granting bail and they are:-

a. The assurance that a person will not abscond;
b. That witnesses will not be interfered with.

In a recent case bail was granted where not only was there the normal existence of delay but there were over two hundred hours of telephone intercepts in a foreign language and in that circumstance delay was sufficient. It ought be born in mind that if there is material suggesting that the accused is not likely to attend Court or there is sufficient material to exhibit that the accused will interfere with witnesses and will be a public risk or that there is a significant propensity that the accused will continue to commit offences then those factors will override the significance of delay.

I now return to an evaluation of Section 4 and I refer directly to Section 4 Sub-section 4 (of the Bail Act). This Section lists a number of charges where an accused will be refused bail unless the accused shows cause why his or her detention in custody is not justified thus the onus is significantly reduced than in the exceptional circumstance category. I will briefly list examples of that category:-

(a) indictable offences committed whilst an accused is at large awaiting trial on another indictable offence;
(b) an offence against Section 21A1 of the Crimes Act relating to stalking where that person in the previous ten years has been convicted or found guilty of an offence against stalking;
(c) Breach of Intervention Order with an associated offence of violence and the accused person has within ten years breached an Intervention Order in relation to that person or on a separate case and has threatened or used violence against the victim;
(d) An offence of Aggravated Burglary
the accused has used or threatened to use a firearm;
with offence of arson causing death under Section 197A of the Crimes Act;
Trafficking a drug of dependence;
Conspiracy to traffick a drug of dependence;
Commonwealth offence under the Customs Act relating to trafficking a drug of narcotics and an offence against the Act

In respect to Section 4(4 of the Bail Act) there is no attempt to define in terms of a different definition in this circumstance the applicant must show cause to the satisfaction of the Court. It would seem to me from an examination of material on the subject that the overriding principle of bail is relevant:

(a) appearance of accused at trial;
(b) lack of interference with witnesses;

(c) public safety.

The standard in rebutting a prima facey case is significantly lower than in exceptional circumstances and it in my view relates to a combination of factors. The factors are not exclusively summarised below but the following considerations are relevant:-

(a) antecedents of accused;
(b) personal family circumstances;
(c) health of accused;
(d) strength of Crown Case;
(e) delay in matter being determined;
(f) the likely penalty to be imposed on conviction.

Now it is not suggested that these are the only factors but it is in reality a combination of factors that will persuade a Magistrate or a Judge of the Supreme Court to allow a person to be released on bail. It is important to note that bail is not in any circumstances meant to be a punishment it is an exercise in basically an assurance that a person will attend trial.

I would now like to go on to consider various other Sections of the Bail Act that are significant. An Advocate when appearing for a Defendant at a Bail Application ought be aware generally of the provisions of the Act but in particular Section 8 Sub-section D is a significant Section. It states that the accused person shall not be examined or cross-examined by the Court or any other as to the offence with which he is charged and no inquiry shall be made of him as to that offence. This is a significant Section as an Advocate can call his client to verify issues as to residence, marital status, employment and generally factors that will attempt to persuade a Court that the person has stable ties in the community. With the imposition of this Section it clearly protects the Defendant from giving evidence about material issues pertaining to the offence in organising sureties for a Bail Application in practical terms a surety may lodge cash, a bank book or a Title as surety for the Defendant. Documents pertaining to Title has to be exhibited to the Registrar of the Court for which the Bail Application is being made. It is important to remember that a Bail Justice who is not a Magistrate and is called upon to attend a Police Station has powers to grant or refuse bail. It is important to understand that one must be very cautious in representing a Defendant at a Police Station before a Bail Justice because he or she has the same powers of a Magistrate. The situation may arise that a represented Bail Application bailed before a Bail Justice will be used in front of a Magistrate pursuant to Section 18 Sub-section 4 of the Act which was referred to earlier in the paper.

In conclusion it is significant to say that preparation, collation of material, potential witnesses in support of the application and a knowledge of the Bail Act combined with an appreciation of the strength of the case against the accused are the important criteria that one has to have in his or her possession before a Bail Application is mounted.