arbitration. In any event there is nothing on record to show that the defendant was asked to appoint solicitors to accept service, or even that they were threatened with a writ. These two factors go no way to rebutting the uncontradicted affidavit made by Mr. Neish that the defendant was ready and willing to submit to arbitration. There was in my view no justification for the rejection of that affidavit, which the learned judge should have accepted.

20 **SPRY, P.** concurred with both judgments.

Appeal allowed.

[1980–87 Gib LR 456]

GUERRA v. ULLGER

SUPREME COURT (Alcantara, A.J.): March 6th, 1987

Criminal Procedure—bail—bail conditions—bail conditions not to be phrased in alternative—surety to be required first and if none available, deposit required instead—if accused unable to raise deposit specified, court may reduce under Criminal Procedure Ordinance, s.7—counsel to help by suggesting possible range affordable by accused

The applicant was charged in the magistrates' court with theft.

The applicant was caught attempting to steal a bicycle and admitted to having stolen several others. He appeared in the magistrates' court and was granted bail on the following conditions: "£100 on his own recognizance together with either a surety of £300 provided by a resident of Gibraltar or a deposit of £300 to secure his appearance before the magistrates' court on March 16th, 1987."

The applicant was unable to comply with the conditions of bail as he was unemployed, had no connection whatsoever with Gibraltar and was therefore unable either to find a surety or raise £300 and consequently remained in custody.

In the Supreme Court, he sought to vary the terms of bail specified by the Stipendiary Magistrate. He submitted that (a) the Stipendiary Magistrate had not appreciated that he would be unable to comply with the conditions; and (b) the only way to alter them was by application to the Supreme Court.

The respondent submitted that an application to reduce the amount of the deposit should have been made at first instance in the lower court before the present hearing.

Held, allowing the application:

(1) The court would exercise its discretion under the Criminal Procedure Ordinance, s.57 to reduce the deposit to £150. The deposit would be reduced as, although the Stipendiary Magistrate had already exercised his discretion under the Criminal Procedure Ordinance, s.55 to allow a deposit to be made if no suitable surety was available, the applicant was unable to pay the requested deposit and requiring him to do so, without taking account of his personal circumstances, would be tantamount to not granting bail at all (paras. 12–13).

(2) Although the Stipendiary Magistrate had not erred in granting bail in the alternative, *i.e.* requiring the applicant either to find a suitable surety or pay a deposit, in future, payment of a deposit should only be accepted if the applicant first satisfied the court that no suitable surety was available. If the applicant were then unable to pay the requested deposit, his counsel should assist the court to exercise its discretion, under s.57 of the Ordinance, by offering a range of amounts which he might be able to meet. If, however, it appeared that he could offer no deposit whatsoever, the best course of action would be for the court not to exercise its discretion under s.57 at all (paras. 9–10).

Case cited:

(1) *Mauro* v. *R.*, Supreme Ct., October 29th, 1986, unreported, referred to.

Legislation construed:

Criminal Procedure Ordinance (1984 Edition), s.55(1): The relevant terms of this sub-section are set out at para. 1.

s.57: "Where a person is remanded on bail the recognizance may be conditioned for his appearance at every time and place to which during the course of the proceedings the hearing may be from time to time adjourned, without prejudice, however, to the power of the court to vary the order at any subsequent hearing."

s.59: The relevant terms of this section are set out at para. 8.

F. Vasquez for the applicant;
J. Nuñez, Crown Counsel, for the respondent.

1 **ALCANTARA, A.J.:** This application is made under s.55(1) of the Criminal Procedure Ordinance, which reads:

> "Where in connection with any criminal proceedings an inferior court has power to admit any person to bail, but either refuses to do so, or does so or offers to do so on terms unacceptable to him, the Supreme Court may admit him or direct his admission to bail or,

where he has been admitted to bail, may vary any conditions on which he was so admitted or reduce the amount in which he or any surety is bound or discharge any of the sureties."

2 The applicant, Jose Guerra, seeks to vary the terms of bail granted by the Stipendiary Magistrate on February 19th, 1987. The bail granted was as follows:

"£100 on his own recognizance together with either a surety of £300 provided by a resident of Gibraltar or a deposit of £300 to secure his appearance before the magistrates' court on March 16th, 1987."

3 The applicant was caught, on February 4th, 1987, whilst stealing a bicycle. During the course of police investigation, it is alleged that he admitted to the theft of other bicycles at different places and on different dates, making a total of eight bicycles the value of which amounts to £1,000.

4 He first appeared before the magistrates' court on February 5th, 1987 and was remanded in custody for a week. On February 12th, 1987, he was further remanded for another week and granted legal aid. When he came before the court again, his counsel asked for bail. This was opposed by the police prosecutor but granted by the Stipendiary Magistrate on the terms stated above. Since that date he has been unable to comply with the conditions of bail and is still in custody.

5 The applicant is an unemployed Spanish national resident in La Linea with no connection to Gibraltar apart from the fact that his mother comes regularly to do some work as a charwoman. Neither he nor his mother can raise the £300 deposit nor do they know anyone who would be willing to stand surety.

6 I am told by counsel for the applicant that, on March 16th, the applicant will be pleading guilty to the theft of one bicycle (the one he was caught with), but not guilty to the other charges and might even consider asking for a trial by jury. The reason for this, according to counsel, is that the applicant, who is 30 years old, has the mental age of a 13 year old child, suffers from mental illness and has been in a mental asylum and that, consequently, his admissions to the police were involuntary.

7 The submission by counsel for the applicant is that, although the Stipendiary Magistrate was prepared to grant bail, in fixing the conditions as he did, he did not appreciate that the applicant would be unable to attain them. I do not think that this is a fair comment. The conditions of bail were eminently fair, taking into account the factors which were spelled out in the case of *Mauro* v. *R.* (1). There is no evidence before me that the Stipendiary Magistrate was made aware at the time of fixing the conditions of bail that no surety would be forthcoming or that a deposit of £300 was an impossibility.

8 In fixing the amount of the deposit, the inferior court made use of the powers conferred by the Criminal Procedure Ordinance, s.59 which states:

> "Where a court is disposed to admit a person to bail with sureties but no suitable surety is available, the court may, in its discretion, allow a deposit of money in court by way of security for his due appearance, and any such sum shall be forfeited in default of appearance unless the court otherwise orders."

9 The correct interpretation of that section is that security, in the form of a deposit, is not just an alternative to the requirement of sureties but in substitution for it. In other words, a deposit should only be allowed when the court is satisfied that no surety or suitable surety is available. The practice in the magistrates' court, even during my tenure, has been that in some cases bail has been conditioned in the alternative, surety or deposit. I do not commend such a practice for the future. A two-stage process is the better practice, even if done in the same sitting.

10 The co-operation of the applicant is needed in informing the inferior court not only that he is not in a position to procure a surety, but that he can make a deposit. Once the court decides that a deposit is in order, the means of the applicant come into play. If he has little or no means, requiring him to pay a high deposit which he cannot meet might be equivalent to not granting him bail at all. I think that the legal adviser to enable the court to exercise its jurisdiction under s.57, should help the court by offering a range of the sort of deposits that his client might be able to meet. If an applicant is not in a position to offer any deposit whatsoever, the best course of action for the court is not to exercise its jurisdiction under s.57.

11 Counsel for the Crown, Mr. Nuñez, commented that an application to reduce the amount should have been made in the first instance to the lower court before this hearing. Mr. Vasquez, for the applicant, was of the opinion that, once the lower court fixes the conditions of bail, the only way to alter them is by an application to the Supreme Court.

12 There was no argument on this point, but my view is that every time a prisoner appears before an inferior court on remand, he can apply for bail or for a variation of the conditions of bail. What he cannot do is to insist on a full hearing on the merits if those have been dealt with on a previous occasion. If he is able, however, to bring new factors before the court, a hearing will be accorded. Applying this to the present case, it would have been in order to inform the inferior court about the difficulties of meeting the requirements of bail and apply for a variation.

13 I now come to my own conclusions. I am satisfied that there is no possibility of the applicant procuring a surety. The Stipendiary Magistrate has already exercised his discretion in allowing a deposit. Taking into

account not only the possible means of the applicant but the fact that he has already been in custody over a month. I am prepared to reduce the amount of deposit to £150. I so order. Had the matter gone before the Stipendiary Magistrate when the applicant last appeared before him, I think he would have done likewise.

Order accordingly.

[1980–87 Gib LR 460]

TRADE LICENSING AUTHORITY v. BIGIB LIMITED

SUPREME COURT (Kneller, C.J.): April 24th, 1987

Trade and Industry—trading licence—specifying premises—Trade Licensing Ordinance, s.3(1)(b) requires statement of specific place where business will be "carried on"—"on site" insufficient—by s.16, Trade Licensing Authority needs to be able to assess impact of business on surrounding area

European Community Law—free movement of goods—import restrictions—EEC Member State nationals to comply with Trade Licensing Ordinance, s.3(1)(b)—EEC Treaty, arts. 30–36 ending quantitative import restrictions not applicable to Gibraltar—in same position as before UK's accession to Treaty, as Gibraltar removed from the list of countries which accepted EEC liberalization of import restrictions but outside of customs union—EEC Treaty, art. 3(a) commits Member States to ending import restrictions, but this does not override Gibraltar's specific exclusion

The respondent, Bigib Ltd., appealed to the Magistrates' Court against the refusal of a trade licence by the Trade Licensing Authority.

Bigib was a Gibraltar company that wished to trade in fruit and vegetables imported from other countries, some of which were EEC Member States. The Trade Licensing Ordinance (1984 Edition) required Bigib to apply for a licence to trade; s.3(1)(b) required an applicant to state where the business would be carried on. Bigib claimed that its goods would be sold "on site," but gave no specific address. The Trade Licensing Authority refused the application.

On appeal to the Magistrates' Court against the refusal of the application, questions arose as to the validity of s.3(1)(b) and whether, if the sub-section were valid, the words "on site" were sufficient to comply with