CHAPTER 8

THE ONUS OF PROOF IN BAIL PROCEEDINGS

8.1 INTRODUCTION

The question of onus has probably been the most contentious issue concerning bail under South African law in recent times. It is especially since the advent of the Interim Constitution that it has been unclear what the proper situation is. No study of problematic areas concerning bail would therefore be complete without reference to this issue.

The question of onus is of utmost importance in bail applications (as in respect of any court procedure). In its ordinary sense the onus of proof allocates the duty which one or other of the parties has of finally satisfying the court that he is entitled to succeed with his claim, application or defence.[1]

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[1] Hoffmann & Zeffert (1992) 495.

In *Pillay v Krishna*[2] Davis AJA held that the only correct use of the word "onus" is the true and original sense as described in D 31.22. According to Davis AJA it is the duty that is cast upon the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be. It is not in the sense merely of his duty to adduce evidence to combat a *prima facie* case made by his opponent.

In other words, the incidence of the burden of proof decides which party will fail on a given issue if, after hearing all the evidence, the court is left in doubt. Wigmore referred to it as "the risk of non-persuasion".[3] Other writers have referred to it as a "persuasive burden".[4] Schmidt indicates that the burden of proof will determine which party will suffer a defeat if insufficient grounds are tendered before court for a decision regarding a factual dispute.[5]

It is clear that where the onus of proof rests on the accused, the testimony by the state and the role of the investigating officer is of secondary importance. All that is needed is for the state to oppose the granting of bail.[6] If the state opposes bail it is up to the accused to satisfy the court on a balance of probabilities that he should be released on bail.

The incidence of onus is therefore an important indicator of the balance that exists between the interests of society and the individual's right to bail. It has also been one of the main weapons in the hands of the South African

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2 1946 AD 946 952.

3 (1940) par 2485.

4 Williams (1961) chapter 23.

5 (1989) 23.

6 See also Cowling (1996) 9 *SACJ* 50 53.

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government in tightening the requirements for and the procedures in respect of bail.

In this chapter the question of onus under Canadian and South African law is discussed and compared.

The much clearer and more settled position under Canadian law is demonstrated. Under South African law the unsettled history of the provisions regarding the onus in bail proceedings is shown along with an opinion on the correct interpretation of the relevant present provisions. Consideration is also given under South African law as to whether the reverse onus in terms of section 60(11) of the Criminal Procedure Act withstands constitutional scrutiny.

8.2 CANADIAN LAW

8.2.1 Before the Bail Reform Act

While the accused was entitled to bail as of right in the case of misdemeanours at Canadian common law, the justice under the Criminal Code, prior to 1970, had a discretion to grant bail in the case of summary conviction offences if he decided to postpone or adjourn proceedings. In the instance of indictable offences the justice had to enquire into the charge. The justice had the discretion to grant bail at any time before committal for trial. The decision to grant bail was a judicial one and no onus was cast on any party.[7]

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7 See Teed & Shannon (1982) 60 *Can Bar Rev* 720 721 - 722 and Salhany (1968) 47 and further.

The bail granted by a justice only lasted until the completion of the preliminary enquiry and once the accused was committed to stand trial following a preliminary enquiry, a new bail application had to be lodged.[8]

On hearing the application the magistrate or a judge had the discretion to grant bail, and if granted, the discretion to determine the terms of bail.[9]

Where only a judge of a superior court could grant bail in the instance of a serious offence, the presiding officer also had the discretion to determine if bail should be granted, and if granted, the terms thereof.[10]

8.2.2 The Bail Reform Act 1970 - 71 - 72 (Can) c 37

8.2.2.1 General

The Bail Reform Act introduced a liberal and enlightened system of pre-trial release in which the onus is on the prosecution to justify the detention of the accused.[11]

Section 457(1) of the Criminal Code[12] set out the duties of a justice before whom a person in custody was taken. In terms of this provision an accused had to be released on the order of a justice upon his giving of an

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8 *Ibid.*

9 *Ibid.*

10 *Ibid.*

11 Under the Criminal Code RSC 1970, c C - 34 sections 457 - 459.1 governed what is called judicial interim release. Under the Criminal Code RSC 1985, c C - 46 judicial interim release is governed by sections 515 - 523.

12 As amended. When the Revised Statutes of Canada (1985) were proclaimed the section number changed to 515(1) but the provision stayed the same.

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undertaking without conditions, unless the prosecution, having been given a reasonable opportunity to do so, showed cause otherwise.[13] The principle of release before trial was affirmed, and it was up to the prosecutor to convince the judge that incarceration was necessary and that none of the intermediary solutions were appropriate.[14]

With regards to the standard of proof that rests on the Crown, a contention that section 11(e) raises the standard to more than the civil standard, was rejected by the Provincial Court of Nova Scotia.[15]

8.2.2.2 The Criminal Law Amendment Act 1974 - 75 - 76 (Can) c 93

8.2.2.2.a General

After some four years of experience with the Bail Reform Act, Parliament, in response to concern expressed by some segments of the public, modified the original legislation by way of the Criminal Law Amendment Act. Parliament placed the onus on the accused in a limited number of offences including murder to show that his detention was not justified.[16] This was done by way of sections 457(5.1) and 457.7 of the Criminal Code.[17]

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13 Unless a plea of guilty is accepted (457(1)[1970]; 515(1)[1985]).

14 The intermediary solutions were:

- An undertaking with conditions.
- A recognisance to pay a sum of money with or without sureties.
- The deposit of a sum of money.

15 *R v Paul Daniel Sparks* (1982) 8 WCB 182 (NS Prov Ct) per Kimball Prov J.

16 See *R v Quinn* (1977), 34 CCC (2d) 473 476, 34 NSR (2d) 481 (NS Co Ct).

17 RSC 1970, c C - 34. Now provided for by section 515(6) and section 522(2) RSC 1985, c C - 46 respectively.

But there has been some disagreement as to the constitutionality of these provisions. In 1982 Tarnopolsky and Beaudoin observed that the provisions of the Code with respect to pre-trial release do not in themselves appear to conflict with section 11(e). They were of the opinion that the reversal of the burden of proof in certain cases appeared to be justified.[18]

However, the Law Reform Commission of Canada in its Working Paper 57[19] was unimpressed with the reverse onus and recommended that it be repealed. They found it inconsistent with fairness and the values of the Canadian Charter. They furthermore found it unjustified whether at the trial or pre-trial stages that the accused should show cause. Moreover, they did not think that placing the onus on the Crown was an onerous burden, or that it would pose a threat to public safety either.

At the time of the enactment of the Canadian Charter in 1982 sections 457(5.1) and 457.7 had been enforced for some years. Although these reverse onus provisions were on many occasions challenged before the courts as being offensive to section 11(e) of the Charter, these provisions were never challenged as being offensive to section 2(f) of the Bill of Rights.[20]

I will now discuss these "reverse onus provisions" under the Criminal Code RSC 1970 and 1985.

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18 (1982) 320.

19 (1988) *Compelling Appearance, Interim Release and Pre-Trial Detention* 37 - 8 as cited by Friedland & Roach (1997) 198.

20 See *R v Bray* (1983) 2 CCC (3d) 325 329. The wording of section 2(f) is virtually identical to that of section 11(e) and has the same meaning. This might raise the argument that the Charter would have employed different language if it was considered that the reverse onus provision offended the guaranteed right not to be denied bail without just cause. But the Canadian Bill of Rights is not a constitutional, but a "quasi-constitutional document" and the argument does not seem convincing.

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8.2.2.2.b The Criminal Code RSC 1970, c C - 34

8.2.2.2.b.1 Section 457(5.1)

The Criminal Code section 457(5.1)[21] applied to most indictable offences other than murder, offences relating to acts done while on judicial interim release, and acts done under the Narcotic Control Act.[22] This section provided that a justice of the peace

> shall order that the accused be detained in custody until he is dealt with according to law, unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified ... .

A number of courts found that the reverse onus provision contained in section 457(5.1) did not contravene the Canadian Charter.[23]

8.2.2.2.b.2 Section 457.7

Section 457.7 of the Code provided the following:[24]

> (1) Notwithstanding anything in this Act, where an accused is charged with an offence punishable by death, an offence under sections 50 to 53 or sections 76.1 to 76.3 or non-capital murder, no court, judge or justice, other than a judge presiding in a superior court of

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21 RSC 1970, c C - 34, s. 457(5.1) [en 1974 - 75 - 76, c 93, s. 47; am 1985, c 19, s 84]

22 RSC 1970 c N - 1.

23 See *R v Lundrigan* (1982), 67 CCC (2d) 37, 2 CRR 92 (Man Prov Ct); *Ibrahim v Attorney - General of Canada* (1982) 1 CRR 244 (Que SC); *R v Frankforth* (1982) 70 CCC (2d) 448 (BC Co Ct).

24 As amended when the courts in *R v Bray* (1983), 2 CCC (3d) 325, 40 OR (2d) 766 and *R v Pugsley* (1982), 2 CCC (3d) 266,144 DLR (3d) 141 dealt with the constitutionality of the reverse onus provisions in section 457.7 of the Criminal Code.

criminal jurisdiction for the province in which the accused is so charged, may release the accused before or after committal for trial.

(2) Where an accused is charged

(b) with an offence mentioned in subsection 1 other than the offence of having committed a murder, and the offence is alleged to have been committed while he was at large awaiting trial for another indictable offence,
(c) with an indictable offence mentioned in subsection 1 other than the offence of having committed murder, and is not ordinarily resident in Canada,
(d) with an offence under any of subsections 132(2) to (5) that is alleged to have been committed while he was at large awaiting trial for an offence mentioned in subsection 1 or
(d.1) with the offence of murder or the offence of conspiring to commit murder,

and he is not required to be detained in custody in respect of any other matter, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is charged shall order that the accused be detained in custody unless

(f) in the case of an accused to whom any of paragraphs (b),(c), (d) or (d.1) applies, the accused having been given a reasonable opportunity do so, shows cause why his detention in custody is not justified within the meaning of subsection 457(7).

The Ontario Court of Appeal in *R v Bray*[25] and the Nova Scotia Supreme Court, Appeal Division in *R v Pugsley*[26] had opportunity to discuss the reverse onus in section 457.7(2)(f). In both these judgments it was argued that section 457.7(2)(f) contravened section 11(e) of the Canadian Charter.

In the view of the court in *R v Bray* section 457.7(2)(f) did not contravene the provisions of section 11(e) of the Charter. The court indicated that section 11(e) provided that a person charged with a criminal offence shall not be denied bail without "just cause". "Just cause" is constituted by the primary and secondary grounds specified in section 457(7).[27] The court held

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25 (1983), 2 CCC (3d) 325, 40 OR (2d) 766, 769.

26 (1982), 2 CCC (3d) 266,144 DLR (3d) 141, 145.

27 See par 7.2.5. Under the RSC 1985 the section number changed to

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that section 11(e) did not address the issue of onus and said nothing about onus. Furthermore the legal rights guaranteed by the Charter are not absolute and under section 1 are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

The court found the reverse onus provision in section 457.7(2)(f) a reasonable limitation even if *prima facie* it conflicted with section 11(e). The reverse onus provision entailed that the accused must satisfy the judge on a balance of probabilities that his detention is not justified on either the primary or secondary ground, a burden which the court found to be in the accused's power to discharge.

Contrary to the decision in *R v Bray* the court in *R v Pugsley* found a glaring inconsistency between section 457.7(2)(f) of the Code and section 11(e) of the Canadian Charter. The court by way of the application of section 52 of the Constitution Act, 1982 found the provision contained in the Code to be of no force or effect. The court found that under the Charter a person who is charged with an offence is entitled to reasonable bail unless the Crown can show just cause for the continuance of his detention. The court therefore found that section 457.7(2)(f) placed a very substantial burden on the accused, and this, the court found unconstitutional.

8.2.2.2.c The Criminal Code RSC 1985, c C - 46[28]

8.2.2.2.c.1 Section 515(6)

Under the provisions of section 515(6) an accused charged:

515(10).

[28] As amended.

(a) with an indictable offence, other than an offence listed in section 469,

(i) that is alleged to have been committed while at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 679 or 680, or
(ii) that is an offence under section 467.1 or an offence under this or any other Act of Parliament alleged to have been committed for the benefit of, at the direction of or in association with a criminal organization for which the maximum punishment is imprisonment for five years or more,

(b) with an indictable offence, other than an offence listed in section 469 and is not ordinarily resident in Canada
(c) with an offence under any of subsections 145(2) to (5) that is alleged to have been committed while he was at large after being released in respect of another offence pursuant to the provisions of this Part or section 679, 680 or 816, or
(d) with having committed an offence punishable by imprisonment for life under subsection 5(3) or (4), 6(3) or 7(2) of the Controlled Drugs and Substances Act or the offence of conspiring to commit such an offence,

must be detained unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention is custody is not justified.

In *R v Pearson*[29] the Supreme Court found that section 515(6)(d) was a departure from the basic entitlement to bail. The court found it sufficient to conclude that there was a denial of bail for the purposes of section 11(e) and that this denial of bail must be with "just cause" in order to be constitutionally justified. Instead of requiring the prosecution to show that pre-trial detention is justified, it requires the accused to show that pre-trial detention is not justified. The very wording of section 515(6)(d) has the effect of denying bail in certain circumstances. In terms of the section "the justice shall order that the accused be detained in custody" in certain circumstances. It now becomes necessary to determine whether there is

29 (1992) CRR (2d) (SCC) 1.

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just cause for this denial.[30] The court gives two reasons for its conclusion that there is just cause for the denial of bail by section 515(6)(d).[31]

Firstly bail is only denied in a narrow set of circumstances. Secondly, the denial of bail is necessary to promote the proper functioning of the bail system and is not undertaken for any purpose extraneous to the bail system.

The court said that section 515(6)(d) applies only to a very small number of offences, all of which involve the distribution of narcotics. The court further held that not all persons in this category were denied bail but that it rather denied bail only when these persons were unable to demonstrate that detention was not justified having regard to the specified primary or secondary grounds. The narrow scope of the denial of bail under section 515(6)(d) was deemed essential to its validity under section 11(e). The basic entitlement of section 11(e) could therefore not be denied in a broad or sweeping exception.[32]

The court found that the offences included under section 515(6)(d) had specific characteristics that justify differential treatment in the bail process. These characteristics were described by the *Group de travail sur la lutte contre la drogue.*[33] The report indicates that drug trafficking in Quebec is generally under the control of members of organised crime. They are responsible for the distribution of drugs in all areas. Using well-organised networks, the capacity to finance major deals allows them to import large quantities of drugs, often even using legitimate businesses as a cover. For

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30 At 19.

31 At 20.

32 *Ibid.*

33 (1990) *Rapport du groupe de travail sur la lutte contre la drogue* Quebec: Publications du Quebec at 18 and 19 as cited by the court in *Pearson* at 20.

some time they have invested and pooled their resources to optimise the financial return on their investments. The cartels go so far as to plan a type of risk insurance that allow them to distribute losses suffered in police raids amongst themselves. They act as importers, wholesalers and retailers at the same time, and sell the drugs by the tonne, by the kilo and even by the gram through outlets controlled by themselves. They are particularly active in cannabis and heroin trafficking. While the traffickers in this category are of various origins, arrests since 1985 of foreign nationals who maintained ties with producing countries, have become more frequent. These international ramifications enable organised crime to be active in both the producing and consuming countries and in this regard one cannot ignore the existence of links between the Montreal Mafia and the criminal elements in certain South American countries.

The court elaborated on the unique characteristics of drug offenders indicating that these offences were committed in a very different context than most other crimes.[34] In contrast to most other crimes these crimes are committed systematically and within a highly sophisticated commercial setting. It is usually a way of life, and the huge incentives are conducive for continued criminal behaviour, even after arrest and release on bail. The normal process of arrest and release on bail will therefore not normally be effective in bringing an end to criminal behaviour. Special rules are required to establish a bail system that maintains the accused's right to pre-trial release, while discouraging continuing criminal activity.

The court concluded that there is a marked danger that a person charged with the offences under section 515(6)(d) will abscond, rather than appear for trial.

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34 At 21.

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As accepted in South Africa,[35] the Supreme Court of Canada found that the primary purpose of any system of pre-trial release was to ensure the appearance of the accused at trial. The system must therefore be structured to minimise the risk that an accused will abscond rather than face trial.

The court distinguished the risk of absconding when arraigned on one of the offences mentioned from most other offences.[36] The court indicated that the risk that an accused will abscond when arraigned on another offence was minimal. It is not easy to abscond from justice in Canada. The accused must either remain a fugitive from justice for the rest of his lifetime, or must flee to a country, that does not have an extradition treaty with Canada.[37] Alternatively the accused must remain in hiding. Neither of these prospects is possible unless the accused is wealthy or part of a sophisticated organisation, that can assist him in the difficult task of absconding. Unlike drug importers and traffickers, the ordinary offender is neither wealthy nor is he a member of a sophisticated organisation. Accordingly these offenders pose a significant risk of absconding rather than facing trial.[38]

Proulx JA in the court of appeal expressed concern about the scope of section 515(6)(d). He contended that it was inequitable to treat a person who distributes a few joints of marijuana in the same manner as a person running a sophisticated network to traffic cocaine. The Supreme Court found these concerns to be legitimate saying that the scope of the Narcotic

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35 See for example Van der Merwe in Du Toit *et al* (1987) 9 - 2 and Neveling & Bezuidenhout in Nel & Bezuidenhout (1997) par 20.4.1.

36 At 21 - 22.

37 Or whose extradition treaty does not cover the specific offence that the accused is alleged to have committed.

38 See pages 22 and 23 of the case report for a discussion of the evidence in the United States and Australia which demonstrate that those charged with narcotic offences, pose a particular danger of absconding while on bail.

Control Act was very broad.[39] The court also indicated that "narcotics" included both hard and soft drugs. Furthermore under section 2 of the Narcotic Control Act "trafficking" means to "manufacture, sell, give, administer, transport, send, deliver or distribute" a narcotic or to offer to do any of the above.[40]

Section 515(6)(d) therefore also applies to "small fry" drug dealers from someone who shares a single joint of marijuana at a party to hardened drug traffickers.

However, the Supreme Court found that these arguments do not lead to a conclusion that section 515(6)(d) violates section 11(e). The "small fry" and "generous smoker" will normally have no difficulty to justify their release and to obtain bail. Section 515(6)(d) does not mandate a denial of bail in all cases and therefore does allow deferential treatment based on the seriousness of the offence. The court deemed it reasonable to place the onus on the "small fry" or "generous smoker" to convince the court that he is not part of a criminal organisation engaged in distributing narcotics as he is most capable of providing this information.

In summary it can therefore be said that the specific characteristics of the offences subject to section 515(6)(d) suggests that special bail rules are necessary to create a bail system which will not be subverted by continuing criminal activity and by the absconding of accused.[41] The special bail rules

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39 At 23.

40 In *R v Lauze* (1980), 60 CCC (2d) 468, 17 CR (3d) 90 (Que CA) the court found that trafficking can even be committed by giving a narcotic to a friend for safekeeping.

41 However, the *Report on the Systemic Racism in the Ontario Criminal Justice System* (1996) as cited by Friedland & Roach (1997) 206 calls for the repeal of the reverse onus for these offences because of the dramatic difference in admission rates between white and black adult males.

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do not have any outside purpose to the bail system but rather merely establishes an effective system for specific offences for which the normal bail system will not provide.[42]

8.2.2.2.c.2 Section 522(2)

Where an accused is charged with one of the serious offences listed in section 469[43] he may not be released other than by a judge of or a judge presiding in a superior court of criminal jurisdiction.[44] In these cases the

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42 The Supreme Court also discussed the question whether section 515(6)(d) violated section 9 of the Charter. The court found that there was no question that section 515(6)(d) provided for a person to be "detained" within the meaning of section 9 of the Charter. What had to be decided was whether the persons were detained "arbitrarily". The court referred to the decision of *R v Hufsky* (1988), 32 CRR 193 [1988] 1 SCR 621, 40 CCC (3d) 398 (SCC) where the meaning of "arbitrarily" was discussed. In *R v Hufsky* the court found that a random police spot check of motor vehicles constituted arbitrary detention under section 9 because the selection was in the absolute discretion of a police officer. A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise. The court found it arbitrary because of the unstructured discretion of the police officer. The court in *R v Pearson* found section 515(6)(d) not to be arbitrary, because the section sets out a process with fixed standards. The process is in no way discretionary and specific conditions for bail are set out. The court found that this section was also subject to very exacting procedural guarantees (sections 516, 518(1)(b), 523(2)(b)) and to review by a superior court (sections 520 and 521). The court accordingly concluded that section 515(6)(d) did not violate section 9.

43 The offences are treason, "alarming Her Majesty", "intimidating Parliament or a legislature", "inciting to mutiny", "seditious offences", piracy, "piratical acts" and murder. Also included are accessory after the fact to high treason or murder, bribery by the holder of judicial office, attempt to commit the first six offences mentioned, and conspiracy to commit the first seven offences mentioned.

44 Section 522(1):

> Where an accused is charged with an offence listed in section 469, no court, judge or justice, other than a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is so charged, may release the accused before or after the accused has been ordered to stand trial.

burden also rests on the accused to convince the court of his release.[45]

In *R v Beamish*[46] the court examined whether the reverse onus requirement in section 522(2) of the Criminal Code does not offend section 11(e) of the Charter. Section 522 compels an individual charged with murder to show cause why his detention in custody is not justified within the meaning of section 515(10)[47] of the Criminal Code.[48]

Jenkins J held that the denial of bail occurred only in a narrow set of circumstances, one of which is the offence of murder as listed in section 469. Section 522 does not deny bail to all those persons who are charged with murder. It rather denies bail only to those accused, who after having been given a reasonable opportunity to do so, failed to show cause why their detention in custody is not justified within the meaning of section 515(10). Section 522 appropriately applies to the charge of murder where a human life has been taken and a penalty upon conviction would be life imprisonment. In this instance the normal bail system does not function properly. It thus meets the second requirement of just cause by establishing a set of special bail rules.

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45 Section 522(2):

> Where an accused is charged with an offence listed in section 469, a judge of or a judge presiding in a superior court of criminal jurisdiction for the province in which the accused is charged shall order that the accused be detained in custody unless the accused, having been given a reasonable opportunity to do so, shows cause why his detention in custody is not justified within the meaning of section 515(10).

46 (July 19, 1995), Doc GSS - 3344 (PEITD) as cited by Mcleod, Takach, Morton, Segal (1993) 16 - 25.

47 See par 7.2.5.

48 Jenkins J adopted the same reasoning as Martin JA speaking for the court in *R v Bray* (1983) 40 OR (2d) 766 769 (Ont CA).

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The court explained that in the circumstances there is a significant motivation to flee. As the accused already faces the maximum penalty that could be imposed, the normal penalty which acts to deter further criminal acts, is no longer operative.

As to the nature of the crime, the court indicated that the planned deliberate taking of life strikes at the very foundation of society. There can be no greater crime. The concern of all citizens that justice be done, and that individual members of the public are protected, and are safe, is of paramount consideration.

The onus on the accused is reasonable in that it requires him to provide information on the factors which are set out in section 515(10) as the primary and secondary grounds that he is most capable of providing.

The court concluded that section 522(2) of the Criminal Code as it relates to a section 235 offence of murder, does not violate section 11(e) of the Charter.[49]

The justice, magistrate or judge therefore had the discretion to grant bail prior to 1970 under Canadian law. The Bail Reform Act[50] introduced a liberal and enlightened system of pre-trial release in which the onus is on the prosecution to justify the detention of the accused. The original legislation was modified some four years later by the Criminal Law Amendment Act[51] in that the onus was placed on the accused in a number of offences to show that his detention was not justified. Although the

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49 In *Re Kent and The Queen* (1985), 23 CCC (3d) 178, 36 Man R (2d) 246 (Man QB), and *R v Kevork* (1984), 12 CCC (3d) 339 (Ont HCJ) per Ewaschuk J, it was also held that section 457(1) and 457(2) of the Criminal Code did not contravene the requirements of section 11(e) of the Charter.

50 1970 - 71 - 72 (Can) c 37.

51 1974 - 75 - 76 (Can) c 93.

reverse onus provisions were on many occasions challenged before the courts as being offensive to section 11(e) of the Charter, the majority of courts have found that these provisions withstand constitutional scrutiny. At present there is a basic but circumscribed constitutional entitlement to bail before conviction, where the onus is on the state to justify continued incarceration except in certain prescribed instances.

8.3 SOUTH AFRICAN LAW

8.3.1 Before the Interim Constitution

8.3.1.1 General

Before the advent of section 25(2)(d) of the Interim Constitution it was commonly accepted that an arrested person bore the onus on a balance of probabilities[52] to show that he should be granted bail.[53] The bail procedure was regarded as a form of civil application.[54] The accused had to bring a bail application and in accordance with the South African civil procedure the

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52 In some cases the impression was created that a bail applicant charged with murder carried a heavier burden of proof. See *R v Mtatsala* 1948 (2) SA 585 (E). This impression is correctly criticised by Hiemstra (1987) 143. He indicates that it is an unscientific way of putting it. Hiemstra explains that the burden of proof of the applicant for bail was simply more onerous according to the gravity of his probable sentence and the strength of his defence. This view is supported by Nel (1985) 100. In *Ali Ahmed v Attorney-General* 1921 TPD 587 590 it was pointed out that in judging the likelihood of the accused not standing trial, a court should ascribe to the accused the ordinary motives that sway human nature. The standard of proof does not vary but the possibility of the death sentence makes it more probable that the accused might not stand his trial.

53 See *S v Hudson* 1980 (4) SA 145 (D) 146A; *De Jager v Attorney-General Natal* 1967 (4) SA 143 (D) 149G; *S v Maharaj* 1976 (3) SA 205 (N) 208A; Van der Merwe in Du Toit *et al* (1987) 9 - 28.

54 Cowling (1996) 9 *SACJ* 50 51.

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applicant bore the onus on a balance of probabilities.[55] In accordance with the normal principles, the party that bore the onus of proof had the duty to begin with evidence.[56] The state could rebut this evidence by leading evidence as to why the accused should not be released on bail.[57]

It must be agreed with Cowling that there was a tendency on the part of the courts to rubber-stamp the investigating officer's decision to release on bail.[58] This happened because of time restraints and the inability of the bulk of the accused appearing before the criminal courts to successfully argue a bail application.

However, bearing in mind that the principle of bail rests on the presumption of innocence, and the right to individual liberty that are well known principles of our common law, the South African courts started to move away from the formal approach prescribed even before the Interim Constitution. In *S v Hlongwa*[59] the court held that one should lean towards granting bail, unless there is a likelihood that the interests of justice will be prejudiced. In *S v Hlopane*[60] it was taken further in that the judicial officer remarked that one cannot rely on an accused's silence to justify a failure to inquire into bail. This meant that there was a duty on the judicial officer to

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55 See Van der Berg (1986) 6.

56 Schmidt (1989) 23.

57 See Van der Merwe in Du Toit *et al* (1987) 9 - 28. There seems to have been some fear to burden the state with the onus. If the state bore the onus, the state would have to begin and adduce evidence justifying a refusal to grant bail. If the state failed to do so the accused would automatically be entitled to be released on bail. The obvious inherent dangers in this approach has to a large extent been canceled by section 50 of the Criminal Procedure Act in terms of which the bail application may be postponed. See par 2.6.3.2.

58 See Cowling (1996) 9 *SACJ* 50 52.

59 1979 (4) SA 112 (D).

60 1990 (1) SA 239 (O).

inquire *mero motu* into bail. It was therefore no longer accepted that bail is a form of civil application and that the accused solely bore the responsibility for initiating such application.[61]

But in view of earlier decisions, one may ask why the accused was burdened with an onus of proof.[62]

8.3.1.2 The origin of the burden of proof on an applicant for bail

It seems that the onus of proof that rests on an accused, originated from the case of *Ali Ahmed v Attorney-General*[63] where the accused was arraigned on two charges of rape. Wessels JP held that the court could not possibly tell with certainty whether a man charged with murder, rape, or high treason would stand his trial or not. The court could only guess. He indicated that some courts have gone so far as to say that where the penalty is a very severe one, they will presume that a person would prefer to abscond across the border, rather than stand trial.

The court indicated that it was not concerned with whether that presumption was justified or not. It has been one of the underlying principles, and therefore the courts have scanned the evidence in order to see what penalty would in all probability be inflicted. If the court is satisfied from the evidence as tendered at the preparatory examination that a severe

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61 Cowling (1991) 4 *SACJ* 65 67.

62 In *McCarthy v R* 1906 TS 657 at 659 Innes CJ, on behalf of the full bench, held that a court was always desirous to allow an accused bail if it is clear that the interests of justice will not be prejudiced. More particularly, if it thinks upon the facts before it, that he will appear to stand his trial in due course. However, in cases of murder, great caution is always exercised in deciding upon an application for bail. In this decision, as in *Kaspersen v R* 1909 TS 639, no mention is made of a burden of proof.

63 1921 TPD 587 (according to the majority decision in *Ellish v Prokureur-Generaal, Witwatersrand* 1994 (5) BCLR 1 (W)).

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penalty is not likely to follow, then the court will, as a rule, grant bail. If there is any uncertainty in the mind of the court as to what penalty will eventually be imposed, then the court in the three cases mentioned ought not to grant bail.[64]

Wessels JP concludes that on taking these circumstances into consideration, the applicant has not discharged the onus which lies upon him of satisfying the court that he will stand his trial, and that the idea of his escaping from justice is a very remote one.[65]

In *Perkins v R*[66] Matthews AJP for the full bench placed an onus on the accused to convince the court that he will stand his trial if bail was granted. In *R v Mtatsala*[67] Lewis J held the following:[68]

> Judged by the long line of decisions in this Court, I venture to think that in a case where the Crown opposes an application for bail the onus is cast upon the accused to satisfy the Court that, if bail is granted, he will not abscond or tamper with the Crown witnesses ... .

The accused in the last-mentioned case were also arraigned on a charge of murder, and were therefore not entitled to bail. However, the court had a discretion to grant bail.

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64 *Ibid* 588.

65 *Ibid* 589. Under the law at the time of these decisions, a court had the discretion to grant bail for rape, murder or treason, if the court was of the opinion that justice will prevail in a specific instance. The point of departure was that if an accused was arraigned on any of these charges, the accused should rather be kept in custody than be granted bail.

66 1934 NPD 276.

67 1948 (2) SA 585 (E).

68 *Ibid* 592.

8.3.2 The Interim Constitution

8.3.2.1 General

The Interim Constitution came into force on 27 April 1994 and provided that every person arrested for the alleged commission of an offence, shall have the right to be released from detention with or without bail, unless the interests of justice require otherwise.[69]

This section led to conflicting supreme court decisions as to whether

- the concept of onus in the true sense is appropriate in bail procedures, and whether
- the onus rested on the accused to establish that he is a suitable person to be released on bail,[70] or whether the state bore the onus of showing that the accused should not be released on bail.[71]

The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*,[72] in order not to get caught up in the debate, deliberately refrained from using the term "onus" when it referred to the position under the Interim Constitution. However, the Constitutional Court did accept that the starting point was that an arrested person was entitled to be released.

The two viewpoints most frequently held by the high courts were that a bail application was not amenable to an onus in the true sense and that the

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69 See section 25(2)(d) in Annexure C.

70 See *S v Mbele* 1996 (1) SACR 212 (W) and my discussion in par 8.3.3.4.

71 As will be shown legal scholars did also not agree on the question of onus in bail proceedings. However, it seems that it was mostly accepted that a basic entitlement to bail was bestowed by the provision.

72 1999 (7) BCLR 771 (CC).

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effect of the constitutional provision was to shift the onus onto the state. I will now discuss these two viewpoints.

8.3.2.2 Bail application not amenable to an onus in the true sense

In *Prokureur-Generaal van die Witwatersrandse Plaaslike Afdeling v Van Heerden*[73] the concept of an onus was found to be inappropriate in bail proceedings. Eloff JP explained that the notion that an arrested person should be released where possible was nothing new, and in this respect section 25(2)(d) of the Constitution did not reflect a new philosophy. The court indicated that bail application proceedings were judicial proceedings and not criminal proceedings, and in these proceedings, the question of an onus did not play a comparable role with that in criminal proceedings.[74] The court required that the state should place indications before the court why the interests of justice require that the person in question should not be released.[75] However, it was said that the state was not burdened with an onus in the true sense of showing that the interests of justice were stronger than those of the applicant.[76] The state must first be given the opportunity of motivating and substantiating its position. If it did not do so the inference would probably be drawn that the interests of justice did not stand in the way of a release on bail. If the state did place evidentiary matter before the court which required an answer or explanation, the court should then give the applicant an opportunity to place evidentiary material before the court. If he did not do so an adverse inference could be drawn. In this sense there was an onus and an onus of rebuttal.

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73 1994 (2) SACR 469 (W).

74 At 479e - f.

75 At 480g.

76 At 479c.

In *S v Njadayi*[77] Jennett J seemed to agree with the above approach by Eloff JP. The court stated that it may be accepted that if at the end of the day the court cannot say that the interests of justice require otherwise, bail should be granted. To this extent the court considered that there was an onus on the state. The state had to adduce evidence that will ultimately satisfy the court that bail should not be granted, if that was indeed the attitude of the state.

In *S v Mabaza*[78] Swart J, before the full bench decision in *Ellish*, came to the conclusion that the judgment of Eloff JP was correct and had to be followed, and set out additional reasons in support of the view expressed by Eloff JP.[79] He indicated that if it were intended to place an onus on the state, explicit wording to that effect would have been expected. To imply an onus on the state from the portion of the section introduced by the word "unless" might be superficially attractive, but was unsound. Rather than creating a right to bail qualified by an "exception" (such that the authority relying on the exception had to bring the case within its terms), the framers of the Constitution had merely given recognition to the right and its qualification in one and the same provision. Section 25(2)(d) provided simultaneously with the recognition of the right to bail the circumstances in which the right could not be claimed. Such a construction was consistent with the scheme of section 25 in general. The other rights created in section 25 were without qualification and could be enforced by a mandamus or interdict. It was significant that in delineating the right in section 25(2)(d) the framers of the Constitution had built in the limitation on it.

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77 1994 (5) BCLR 90 (E). The judgment was delivered on 17 June 1994.

78 1994 (5) BCLR 42 (W). The judgment was delivered on 11 August 1994.

79 The court sitting alone added that the question remained what the framers of the Constitution intended by section 25(2)(d).

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In *Ellish v Prokureur-Generaal, Witwatersrand*[80] Van Schalkwyk J for the majority concluded that the approach adopted by Eloff JP in the court *a quo* was correct. The court concluded that there is no onus in a bail application. The presiding officer is expected to exercise a discretion in weighing the interests of the applicant in his freedom against the interests of the community in the administration of criminal justice. The latter interest is no less important than the former. As regards procedure, section 25(2)(d) requires that the state should begin. If at the end of the day the scales are evenly balanced, the applicant must be granted bail. This result follows from the provisions of section 25(2)(d) and not from the failure to discharge an onus.[81]

It was thus held by Van Schalkwyk and Mynhardt JJ that bail proceedings were *sui generis* proceedings in which the issue of a burden of proof did not arise.[82]

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80 1994 (4) SA 835; 1994 (5) BCLR 1; 1994 (2) SACR 579 (W). The judgment was delivered on 19 August 1994.

81 Viljoen in the *Bill of Rights Compendium* (1996) indicates that this is nothing but a burden of proof. Van der Merwe in Du Toit *et al* (1987) argues that this issue can only be solved by imposing an onus. He contends that section 25(2)(d) creates a right to bail which can only be denied if the interests of justice so require. Furthermore, it is the state that seeks detention pending investigation or trial. There is an onus, and it should rest on the state.

82 The court referred to the decision in *Buch v Buch* 1967 (3) SA 83 (T) where Claassen J decided that there was no onus of proof in maintenance proceedings. This is so because there is a duty on the presiding officer to act inquisitorially. At 87D - F the court held as follows:

> In view of these provisions it seems to me it is no longer correct to speak of an onus resting on a party in connection with proceedings before a maintenance court. The responsibility of placing evidence before the court no longer rests only on the parties concerned, but is shared by the maintenance officer and the presiding judicial officer. Thus even where the parties are legally represented the maintenance officer and the presiding officer may have to call relevant evidence not called by the legal representatives. Then at the conclusion of all the evidence the presiding officer will decide whether to make an order to pay maintenance or vary an existing order to pay

Van Schalkwyk J for the majority in *Ellish v Prokureur-Generaal, Witwatersrand* explained that a bail application was unique.[83] Testimony can be presented in an informal manner. It can be done by way of hearsay or documentary evidence. An accused applying for bail can as in the present instance motivate his application by way of a sworn statement. The test to be applied at every bail application is focused on the probable future conduct of the detainee. Will he attend his trial? Will he probably interfere with state witnesses or try and defeat the ends of justice? Will he probably commit further crimes while awaiting trial? In the past as well as in the present no bail application could be completed before attention has been given to one or more of these three issues.

Apart from the onus of proof the court found it clear that a presiding officer had a duty to see that justice prevailed.[84] It means that care must be taken that the right of the detainee to be released is weighed and balanced against the interest of the community that justice prevails. A presiding officer does not comply with this task by merely observing how two competing parties argue while none of them necessarily strive for justice. The accused is set on freedom and the prosecution is set on an eventual conviction. The interests of the accused are not the same as the interests of justice. The interests of the state and of the accused at a bail application even if vigorously pursued are therefore not necessarily going to deliver an answer as to what really is in the interests of justice. It is ultimately the task of the presiding officer to make sure that justice prevails. The question whether justice may be advanced or defeated is a weighty issue that in the

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> maintenance. In doing so he will no doubt consider all the relevant factors. These I need not enlarge on here, but in general he will look after the interests of children and see that justice is done between the parties in accordance with their means and ability to pay.

83 At SA 841.

84 *Ibid*.

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answering thereof demands all the legal skills and knowledge of men that is available to the presiding officer. It is a value-judgment that is not susceptible to the application of an onus of proof.

The court explained that the process of reasoning that the presiding officer has to apply must be directed at the probable future conduct of the accused.[85] This is determined by way of certain details that concern the present and the past. The official therefore has to venture a prediction on the basis of his human knowledge and the presented details. That which is adjudicated is not a fact or a set of facts but merely a future perspective that is speculative in nature even though it is based on proven facts. The court held that to talk of a burden of proof in this regard would be a misappreciation of this concept that could easily lead to the neglect of his duty by the presiding officer.

It has already been found that a magistrate should be inquisitorial at a bail application and if important information is not available he should take steps to obtain the information. It necessarily follows that he must have the authority to take the necessary steps to obtain such information after the state and the accused has presented the evidence of their choice.[86]

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85 *Ibid*.

86 In deliberation the court *inter alia* referred to the position in England which has no Bill of Rights, and where the position with regards to bail is regulated by the Bail Act of 1976. The premise of the Act is that bail should be granted to an accused. Although it is referred to as a "presumption in favour of bail" it is not deemed to be an onus of proof.

However, certain exceptions are made in schedule 1 par 9 of the Bail Act in which event bail may be refused:

> In taking the decisions required by para 2 of this part of this Schedule, the Court shall have regard to such of the following considerations as appear to it to be relevant; that is to say -
>
> (a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it),

This approach is accepted by at least one legal author. Hiemstra had the following to say:[87]

> *Die vraag kan trouens gestel word of daar hoegenaamd 'n bestaansrede vir 'n bewyslas by 'n borgaansoek is. Die voortydig, interlokutêre, informele, inherent dringende, toekomsgerigte en andersins unieke aard van die verrigtinge pas ten ene male nie in 'n gerieflike nis nie.*

(b) the character, antecedents, associations and community ties of the defendant,

(c) the defendant's record as respects the fulfilment of his obligations under previous grounds of bail in criminal proceedings,

(d) except in the case of a defendant whose case is adjourned for enquiries or a report, the strength of the evidence of his having committed the offence or having defaulted, as well as any others which appear to be relevant.

The court also refered to Chatterton in *Bail: Law and practice* (1986) 53 - 4 where the function of a court is described as follows:

> 3.10 The Court will consider the gravity of the offence, the evidence against the accused and the likely sentence, the circumstances, antecedents and any criminal record of the accused. It will determine also whether it has sufficient and accurate information to arrive at a proper decision. On these facts it will test the exceptions to bail - absconding, committing further offences or interfering with the course of justice. If the Court finds that there are no substantial grounds for remanding the accused in custody, it shall grant him bail, with or without conditions.

In a report compiled by the British Home Office under the heading "Bail Procedures in the Magistrate's Court" (Report of the Working Party, 1974) the following is said on page 44: "The bail decision ... should be based on the fullest possible information about the defendant, if the Court is to arrive at a rational decision."

The majority in *Ellish* took statements like these into consideration when it decided that there was an obligation in the English Law on the presiding officer to make sure that he obtains all possible relevant information.

87 (1993) 150.

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8.3.2.3 Onus on the state

In *Magano v District Magistrate, Johannesburg (2)*[88] the court accepted that section 25(2)(d) of the Interim Constitution reversed the onus, and that the onus now rested upon the state to establish that the interests of justice require the continued detention of an accused. If the state failed, bail should be granted.[89] Van Blerk AJ explained that the word "unless" added weight to the argument that the onus rests on the state. He was of the view that section 35(3) of the Interim Constitution enjoined a court to uphold the rights of an accused to freedom at least until there is a finding of guilt.[90]

In *S v Maki (1)*[91] Froneman J gave the same interpretation to section 25(2)(d). Froneman J held that the recent trend, to place the onus on the person causing a deprivation of liberty, should apply to bail applications. The presumption of innocence in chapter 3 of the Interim Constitution reinforced this argument. Froneman J accepted that considerations of proper administration of justice present themselves at bail applications that were not necessarily relevant in other instances of loss of freedom. This merely meant that in specific instances the burden of proof on the state was probably easier to discharge in bail applications than in other instances. Consequently the court approached the application on the basis that the burden was on the respondent to show that the incarceration of the

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88 1994 (4) SA 172 (W); 1994 (2) BCLR 125; 1994 (2) SACR 308 (W).

89 At BCLR 128E - G.

90 Section 35(3) under the heading "[i]nterpretation" provided as follows:

> In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this chapter.

91 1994 (2) SACR 630 (E).

applicants was necessary for the proper administration of justice in the sense that it could probably lead to the applicants not standing their trial.[92]

The minority judgment in *Ellish v Prokureur-Generaal, Witwatersrand*[93] also favoured this approach.[94] Southwood J found the language in section 25(2)(d) to be clear and unambiguous. The court indicated that an arrested person was entitled to be released from detention subject to one qualification - that the interests of justice do not require otherwise. The words following "unless" defined the exception to this right. The person who or authority which sought to continue the detention must show why, and it cannot be expected of the arrested person who has a right to be released from detention with or without bail, to prove that his release is not contrary to the interests of justice. Southwood J found this the only reasonable construction of the wording of the section itself. The fact that bail proceedings are *sui generis* and inquisitorial in nature does not affect the fact that at the end of the inquiry the court may be left in doubt as to whether the evidence justifies the refusal to release the arrested person or not. The court furthermore indicated that an onus in the true and original sense as described in *Pillay v Krishna*[95] must be placed on the state. The state must accordingly also lead evidence first.[96]

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92 At 641f - i.

93 1994 (4) SA 835; 1994 (5) BCLR 1; 1994 (2) SACR 579 (W).

94 At SA 850 - 852; SACR 596D - 597A.

95 1946 AD 946 952 - 3.

96 Van der Merwe in Du Toit *et al* (1987) 9 - 30 found much merit in this approach put forward by Southwood J. He contends that in bail proceedings there is a clearly defined issue. Is the arrested person entitled to his freedom or not? Two parties, the arrested person and the state are eminently interested in the issue and are entitled to lead evidence and to be heard on the issue. The fact that bail proceedings are *sui generis* and inquisitorial in nature does not affect the fact that at the end of the inquiry the court hearing the bail proceedings may be left in doubt as to whether the evidence justifies the refusal to release the arrested person or not. The use of a true onus as described in *Pillay v Krishna* 1946 AD 946 952 - 3 to

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8.3.2.4 Appraisal of viewpoints

It appears that the two different views were the result of a different understanding of the concept of an onus rather than a fundamental difference in opinion as to the mechanics of a bail hearing brought about by section 25(2)(d) IC. The proponents of the view that an onus is not amenable to a bail application appear to hold the view that an inquisitorial approach as applied in bail applications under South African law, and the fact that testimony can be presented in an informal manner, is not compatible with a true onus. The proponents of the other view see no problem in combining these principles.

The true and original use of the word "onus" as described in D 31.22 casts a duty on a particular litigant to finally satisfy the court if he is to succeed in his claim or defence as the case may be.[97] While I do not understand this to mean that testimony must be presented in a formal manner, it can possibly

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resolve the issue is therefore both practical and juridically sound. Van der Merwe indicates that the use of an onus in this sense will not change the nature of the proceedings conducted when an arrested person seeks his release. As authority he refers to the history of bail procedure in South Africa, as outlined by Van Schalkwyk J in his judgment. For many years the courts have accepted that the accused bears the onus but that has not resulted in any change in the inquisitorial nature of the proceedings. There is no reason to think that if the onus is now shifted to the state, the court will seize to play the role that it did before the Constitution came into force. As long as the court bears in mind that it is not required to simply play a passive role, the use of an onus will not result in any injustice. He indicates that on the approach of Van Schalkwyk J, injustice may in any event arise if the court simply plays a passive role in bail proceedings. Van der Merwe agrees with Van Schalkwyk J that a court hearing an application for the release of a detained person must always bear in mind that its task is to ensure that justice is done. He contends that by clearly placing an onus on the state as suggested above, it becomes absolutely clear that it is the state which must lead evidence first. That is the usual consequence of the onus in its true and original sense. It will also have no effect on the role of the court in such proceedings.

97 See also the other definitions in par 8.1.

be argued that the original use of the term does not leave room for an inquisitorial approach where the presiding officer has a duty to see that justice prevailed. However, both views agree that if at the end of the day the presiding officer is left in doubt as to whether the arrested person should be released, the arrested person is entitled to release. In this sense there is an onus on the state.

In the final analysis it may be a question of semantics as the two views agree on the basic mechanics of a bail hearing under section 25(2)(d) IC. It is understood that there is a basic entitlement to bail. If no evidence is therefore presented the arrested person is entitled to bail. If the state wishes to oppose bail the state has to start and submit evidence. If the evidence requires an answer the arrested person must be given the opportunity to submit evidence. If information that the presiding officer deems important is not available he must take steps to obtain this information. If at the end of the day the presiding officer is left in doubt as to whether the arrested person should be released, the arrested person must be released.

8.3.3 The Criminal Procedure Second Amendment Act 75 of 1995

8.3.3.1 General

This Act, which has numerous and detailed provisions dealing with bail, was enacted to clarify certain aspects of bail and it seems with the purpose of bringing the law pertaining to bail in line with the Constitution. It also guided the courts in the light of the judgments referred to previously.[98] The Act moved away from the traditional approach under which the accused

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98 The Act came into force on 21 September 1995.

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was required to initiate bail proceedings. It also established grounds that would justify his release.[99]

8.3.3.2 Section 60(1)(a) of the Criminal Procedure Act

The wording of section 60(1)(a) of the Criminal Procedure Act was changed by the amendment in that the words "shall apply" was substituted with "shall ... be entitled to be released on bail".[100]

Does this in view of the decision in *Ellish v Prokureur-Generaal, Witwatersrand*[101] mean that the state consequently bears an onus? I will deal with the view of the legal academics first.

Viljoen submits that section 60(1)(a) was amended in such a way that the onus in bail proceedings is to be placed on the state in accordance with section 25(2)(d) of the Interim Constitution.[102] There was no longer a duty to make an application for bail. It therefore follows that if no evidentiary material is brought the accused should be released.[103] The duty of the state to start bail proceedings is therefore clarified. It is not for the accused to "apply" anymore, but for the state to show why the "entitlement" to bail

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99 Cowling (1996) 9 *SACJ* 50 52.

100 The amended section 60(1)(a) reads as follows:

> An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6) and (7), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, unless the court finds that it is in the interests of justice that he or she be detained in custody.

101 1994 (4) SA 835; 1994 (5) BCLR 1; 1994 (2) SACR 579 (W).

102 See the *Bill of Rights Compendium* (1996) 5B - 41.

103 See Viljoen in the *Bill of Rights Compendium* (1996) 5B - 41.

should not be enforced. It can therefore be said that section 60(1)(a) confirms the rights entrenched in section 25(2)(d).[104]

However, according to Cowling,[105] it appeared that section 60(1)(a) confirmed that the state ultimately carried a burden of persuasion in a very general sense. It did not bear any onus in the narrow sense. Cowling further submits that this blended in with the trend that bail applications should take the form of an inquisitorial hearing where the evidence of both sides are weighed and balanced against each other.[106]

8.3.3.3 Section 60(11) of the Criminal Procedure Act

The legislator also saw fit to introduce section 60(11) by way of the Criminal Procedure Second Amendment Act to curtail bail for suspects in serious cases. This provision also came into force on 21 September 1995. Section 60(11) provided for accused charged with an offence referred to in schedule 5,[107] or in schedule 1[108] which was allegedly committed whilst he

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104 Section 25(2)(d) obviously enjoys the overriding application.

105 (1996) 9 *SACJ* 50 53.

106 It can be argued that the legislator agreed with the interpretation of section 25(2)(d) of the Interim Constitution in *Ellish v Prokureur-Generaal Witwatersrand* 1994 (4) SA 835; 1994 (5) BCLR 1; 1994 (2) SACR 579 (W) and for that reason formulated section 60(1) of the Criminal Procedure Act in a similar fashion.

107 Schedule 5 was added by section 14 of Act 75 of 1995 and lists the following crimes:

Treason. Murder involving the use of a dangerous weapon or firearm as defined in the Dangerous Weapons Act, 1968 (Act 71 of 1968). Rape. Robbery with aggravating circumstances and robbery of a motor vehicle. Any offence referred to in sections 13(f) and 14(b) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992). Any statutory offence relating to the trafficking of, dealing in, or smuggling of firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament. Any offence relating to exchange control, corruption, fraud, forgery, uttering or theft involving amounts in excess of R500 000,00.

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was released on bail in respect of a schedule 1 offence. The court shall notwithstanding any provision of the Act, order that the accused be detained in custody, until he is dealt with in accordance with the law. Unless the accused, having been given a reasonable opportunity to do so, satisfied the court that the interests of justice do not require his detention in custody.

Two questions arose. Did this place an onus on the accused and secondly, if so, did this not infringe on the accused's rights entrenched in terms of section 25(2)(d)? Again I deal with the views of legal academics first.

Cowling submitted that as in the case of section 60(1)(a) there should be a move away from an onus in bail applications,[109] and instead there should be referred to a burden of persuasion. According to Cowling this did not detract from the fact that the state had to initiate the bail inquiry, or that the presiding judicial officer actively had to elicit information and evidence from both sides. This he said was confirmed by the amendments. Cowling argued that the accused's right entrenched in section 25(2)(d) was

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108 Schedule 1 lists the following crimes:

> Treason. Sedition. Public violence. Murder. Culpable homicide. Rape. Indecent assault. Sodomy. Bestiality. Robbery. Kidnapping. Child stealing. Assault, when a dangerous wound is inflicted. Arson. Malicious injury to property. Breaking or entering any premises, whether under the common law or statutory provision, with intent to commit an offence. Theft, whether under the common law or a statutory provision. Receiving stolen property knowing it to have been stolen. Fraud. Forgery or uttering a forged document knowing it to have been forged. Offences relating to the coinage. Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefore may be a period of imprisonment exceeding 6 months without the option of a fine. Escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this schedule or is in such custody in respect of the offence of escaping from lawful custody. Any conspiracy, incitement or attempt to commit any offence referred to in this schedule.

109 (1996) 9 *SACJ* 50 54.

preserved in this way. However, at the end of the day it is incumbent upon the accused to show that, notwithstanding the seriousness of the offence, he should nonetheless be entitled to bail.[110]

Cowling furthermore argued that the provisions of the Criminal Procedure Second Amendment Act including section 60(11) attempted to strike a balance between crime control and a due process of law. Cowling sees these sections as a message to the court to give grave consideration to granting bail to persons who have committed certain serious offences. In other words the fact will weigh more heavily on the accused in the final balancing process. Cowling argues that it cannot be construed as imposing an onus of proof on the accused. This Cowling says is further confirmed by the long title of the Act.[111]

However, Van der Merwe[112] and Viljoen[113] are convinced that section 60(11) places an onus of proof on the accused.

Van der Merwe indicates that the proceedings are of an inquisitorial nature and that the accused carries the burden of proof on a balance of probabilities.[114] He deems section 60(11) to be in conflict with the constitutional presumption of innocence and the constitutional right to bail as contained in sections 25(3)(c) and 25(2)(d) of the Interim Constitution. However, he accepts that constitutional rights are not absolute and argues

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110 Again it can be argued that this is nothing else than a burden of proof.

111 Cowling must have referred to the part that reads: "to empower a court to, in respect of certain serious offences, order the accused to satisfy the court that the interests of justice do not require his or her detention in custody"

112 In Du Toit *et al* (1987) 9 - 31.

113 In the *Bill of Rights Compendium* (1996) par 5B - 41.

114 In Du Toit *et al* (1987) 9 - 32.

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that section 60(11) may be a permissible limitation as provided for in section 33(1) of the Interim Constitution.

Viljoen sees the wording of section 60(11) diametrically opposed to that of section 60(1), and in accordance with his arguments stated earlier, he argues that the accused will carry the onus in the instance of section 60(11) and that in all other instances the onus will be on the state.[115]

8.3.3.4 Court decisions

In *S v Mbele*[116] Leveson and Stegmann JJ considered the implications of sections 60(1) and 60(11). With regard to section 60(1) the court accepted that it was bound by the decision in *Ellish v Prokureur-Generaal, Witwatersrand*.[117] However, the court criticised the reasoning and finding of the majority in *Ellish* stating that a bail application can become formal, and would then more closely resemble a trial. The court explained that if the application became opposed both parties were entitled to lead their evidence through witnesses in the ordinary way. All witnesses could also be subjected to cross-examination. In these instances the inquiry seized to be informal and the proceedings resemble a trial. The court could see no reason why the rules and procedures pertinent to a trial hearing could not be employed.[118]

According to Stegmann J the approach by Eloff JP and the majority in *Ellish* had practical shortcomings. Stegmann J explained that the judicial officer faced with the decision will not know what to do in a case in which the

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115 In the *Bill of Rights Compendium* (1996) par 5B - 41.

116 1996 (1) SACR 212 (W).

117 1994 (4) SA 835; 1994 (5) BCLR 1; 1994 (2) SACR 579 (W).

118 At 216E - F.

interests of justice which favour the release of the applicant pending his trial,[119] are almost evenly balanced by the other interests of justice which favour his continued detention.[120] The court pointed to the law as stated before 27 April 1994. Judges replete with the wisdom of two or three generations refused an applicant release with or without bail pending his trial, unless an applicant succeeded in persuading a court that the interests of justice which favoured the protection of his liberty, outweighed the interests of justice which would be put at risk by his release.

However, the court indicated that under the law as stated in *Ellish*'s case, to which the court respectfully acknowledged to be bound, that accumulated wisdom has ceased to reflect the law. The applicant is no longer required to persuade the court to release him. Neither is the attorney-general or his representative, as the respondent, required to persuade the court not to release him. It is left to the magistrate or judge to decide the issue. He must take the initiative and conduct an inquisitorial proceeding. If the first stages of the inquiry reveal a more or less equal balance between those interests of justice which favour the release of the applicant with or without bail, and those interests of justice which do not, the inquisitor is presumably required to keep on digging until his inquiry satisfies him one way or the other.[121]

The court found that section 25(2)(d) of the Constitution did not deal with the question of onus at all, expressly or by implication. Stegmann J based his interpretation of section 25(2)(d) of the Constitution on the fact that the

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119 The court defined these interests as the interests of justice in protecting the liberty of the individual and upholding the presumption of his innocence until the contrary is proved.

120 The court indicated these interests as essentially being considerations to ensure that the trial can duly take place and that it will be of a quality that will have a good chance of getting at the truth.

121 236g - 237c.

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specific provision was essentially aimed at securing a situation where neither the executive nor the legislator could ever again be permitted to take away or truncate the jurisdiction of the courts.[122] For this reason no conflict between section 25(d) of the Constitution and section 60(11) of the Criminal Procedure Act could ever arise. The court accordingly interpreted "satisfy" in section 60(11) to mean that the accused must satisfy the court on a preponderance of probability where the interests of justice lie. The court therefore found that a clear onus was placed on the accused.

This decision can therefore be understood as indicating that section 25(2)(d) was not intended to revolutionise the relevant principles of law governing bail applications and had nothing to do with the determination of onus of proof or persuasion in bail applications. The overall effect of this decision would be that the traditional and well-established principle, whereby an accused bears the onus of persuading a court in a bail application, remains unaltered and hence section 60(11) does not violate the Interim Constitution.

In *S v Vermaas*[123] Van Dijkhorst J held that the amendment to the Criminal Procedure Act had been passed amidst a full-blown debate regarding bail, bail conditions and the onus in bail cases. The court also acknowledged that at the time of the passing of the Act there were conflicting decisions on the questions of onus. In the circumstances one had to accept that the wording of section 60 as a whole, and section 60(11) in particular, had been well

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122 The court thought the purpose of the section to be to ensure compliance with the doctrine of separation of powers and referred to the example where the executive power locked out judicial discretion to grant bail in section 30 of the Internal Security Act (74 of 1982). The primary function of section 25(2)(d) is to ensure that the individual enjoys the "benefits of the ordinary law of bail as administered by the Courts" (234f - g).

The court also mentioned the now repealed section 61 of the Criminal Procedure Act as an example.

123 1996 (1) SACR 528 (T) on 22 December 1995.

chosen. The general rule set out in section 60(1)(a) was that the accused was entitled to be released on bail unless the court found that it was in the interests of justice that he be detained in custody. This wording the court said created an onus. The onus rested upon the person who asserts that the accused should not be released, that is, the state. In the case of section 60(11) the converse applied. It was expressly worded as an exception by the use of "notwithstanding any provision of this Act" and was limited to the crimes stated in schedule 5 and the commission of crimes set out in schedule 1 while out on bail. The wording of section 60(11) is imperative: "The Court shall order the accused to be detained."

The accused was burdened to satisfy the court that the interests of justice did not require his detention in custody. The judge furthermore remarked that clearer wording could not be sought for an onus on the accused.

In *S v Shezi*[124] Els J reiterated that section 60(11) could not be interpreted otherwise than to accept that there is an onus of proof on the accused. It is for the accused to convince the court that the interests of justice do not require his further incarceration. Els J referring to section 60(11) said that the court was obliged to hold a person in custody when he is charged with an offence in schedule 5, or schedule 1, which offence was committed while out on bail. The court furthermore concluded that a distinction must be drawn between a burden to begin and a burden of proof. Before a burden rests on the accused in terms of section 60(11) the state must show that the accused is arraigned on charges mentioned in schedule 5, or those mentioned in schedule 1 referred to above.

In *Prokureur-Generaal, Vrystaat v Ramokhosi*[125] Edeling J discussed the present legal position in respect of bail. He contended that the starting point

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[124] 1996 (1) SACR 715 (T). The judgment was delivered on 21 February 1996.

[125] 1996 (11) BCLR 1514 (O), on 25 July 1996.

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in every bail application, was that the arrested person was *prima facie* entitled to be released on bail in terms of section 25(2)(d) of the Interim Constitution. It was only in those instances where the interests of justice required the contrary that bail could be denied. In each case the state was required to take the initiative to place material before the court in regard to whether circumstances existed to justify further detention. This did not imply that the state bore an onus. The fact that the right contained in section 25(2)(d) was qualified was significant. The qualification was no less important than the right. The framers of the Constitution intended that the rights of the individual had to be balanced against those of the community. Any person desiring the continued detention of an arrested person (and therefore desiring a denial of bail) had to do more than simply place such material before the court. The opposition to bail would not succeed if the court did not, or could not find, that the interests of justice required further detention. Depriving an unconvicted person of his freedom by arrest constituted a drastic curtailment of a fundamental right.

The court also held that the court itself had to conduct inquiries if necessary, in order to gather the material required to determine whether the interests of justice required further detention. The court did not have to find that the interests of justice did not require further detention before an application for bail could be granted. If it cannot find that the interests of justice required further detention, the arrested person was entitled to his release. This applied in all cases, but section 60(11) of the Criminal Procedure Act on the face of it created an exception. It appeared to the court that this provision might not be constitutional. In any event, the court stated that the inquisitorial approach must also be applied to section 60(11), even if this section does place an onus on the accused.

8.3.4 The Final Constitution

8.3.4.1 General

Section 35(1)(f) of the Final Constitution provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. Even though section 35(1)(f) replaced section 25(2)(d) of the Interim Constitution, section 60(1)(a) of the Criminal Procedure Act was not amended correspondingly. While section 60(1)(a) still echoes the former provision, the constitutional right to be released from custody now depends on whether the interests of justice permit.

The qualifying reservation "unless" of the Interim Constitution has therefore been substituted with the word "if" under section 35(1)(f).[126] Under the Interim Constitution an applicant for bail also had the right to be released on bail unless the interests of justice "require" otherwise. Release from detention under section 35(1)(f) depends on whether the interests of justice "permit". The question arises whether these amendments influenced the question of onus.

8.3.4.2 The influence of section 35(1)(f) on onus

At the outset it seems from the wording that the right of an arrested person is considerably weaker and that section 60(1)(a) favours liberty more than the minimum required by the Constitution. The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[127] accordingly indicated that the constitutional position changed from the starting point that one was entitled to be released, to a more neutral position.

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126 This wording appeared for the first time in the draft of 15 April 1996.

127 1999 (7) BCLR 771 (CC).

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The court in watering down the right further indicated that the Constitution did not create an unqualified right to personal freedom. It rather created a circumscribed one. Section 35(1)(f) therefore inherently sanctioned the loss of liberty required to bring a person suspected of an offence before a court of law. The court held that section 35(1)(f) established that unless the equilibrium is displaced, an arrested person is not entitled to be released.

If the right would be so weakened as to place an onus on the accused some may argue that section 60(11) of the Criminal Procedure Act may survive constitutional scrutiny in terms of the 1996 Bill of Rights on just this argument alone.[128]

In the certification process the bail provision was challenged in that it was said to place an onus on the applicant. However, the Constitutional Court declined to answer this question in the first certification judgment.[129] It rejected the challenge in a single paragraph as having "no merit" since the only ground for denying certification to the clause would be if it failed to recognise a "universally accepted fundamental right", and the right to bail was not universally formulated.

Viljoen approaches this problem by asking the following question: "Does the arrested person who must prove that he should be granted bail have the right to be 'released from detention if the interests of justice permit?'"[130] He argues that the golden thread running through our criminal justice system is that an arrested or accused person is presumed to be innocent until proven

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128 De Waal, Currie & Erasmus (1998) 430.

129 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) par 88.

130 See the *Bill of Rights Compendium* (1996) 5B - 43.

guilty. This entails that the interests of justice permit the release of all arrested persons on bail. This also falls within the right to freedom and security of the person.[131] Viljoen concludes that by placing an onus on the arrested person to show reasons for his release section 35(1)(f) is *prima facie* violated. The state would therefore have to show why this limitation is reasonable.[132]

Van der Merwe[133] in line with his previous arguments contend that the onus remains on the prosecution in all instances except those provided for in section 60(11) of the Act. He too argues that section 60(11) may be a permissible limitation on the right to bail.

Snyckers asks the question whether the new section 35(1)(f) does not place an onus on the applicant.[134] If so, he argues, it would be a lamentable inversion of the ordinary operative presumption in favour of liberty in the sphere closest to its core. As authority he refers to both foreign[135] and local authority.[136] He therefore argues that section 35(1)(f) should not be read as

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131 Section 12 of the Final Constitution.

132 Section 36 of the Final Constitution.

133 In Du Toit *et al* (1987) 9 - 31.

134 In Chaskalson *et al* (1996) 27 - 56.

135 In *United States v Salerno* 107 S Ct 2095 (1987) the discussion was premised upon the constitutional necessity that the state would be required to prove the applicability of the grounds for refusing bail. In *R v Pearson* [1992] 3 SCR 665 691 (Can) the Canadian Supreme Court referred to a "basic entitlement to be granted reasonable bail unless there is just cause to do otherwise". The International Covenant on Civil and Political Rights (1966) in art 9 (3) provides that "it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial".

136 *Prokureur-Generaal, Vrystaat v Ramakosi* 1996 (11) BCLR 1514 (O) where it was said that an onus upon a bail applicant as a provision had no place in the new democratic constitutional order (at 1531).

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placing an onus on the applicant for bail.[137] However, he is certain that it could not be read as placing an onus on the state as indicated by some decisions and authors with regard to the Interim Constitution. Snyckers is convinced that the *travaux preparatoires* was aimed at the view that the onus was on the state to prove grounds for refusing bail.[138]

He also refers to the reasoning that it has to be accepted that there must be an onus at least in the sense of a default position in cases of extreme uncertainty. Snyckers submits a new view, which he considers to be the best. He contends that this section should be interpreted in such a manner that the applicant has to present evidence indicating his likely appearance at trial, which entails a threshold level of adequacy. Once such evidence has been submitted, which may be oral, the court must adopt an inquisitorial approach and must then decide whether the interests of justice permit release or require detention. The court must in deciding whether the interests of justice permit release or require detention, accord much weight to the status of the applicant's presumed innocence. The "end of the day onus" is explained by the author as follows:[139]

> The problem of an 'end of the day onus' can be solved by considering the peculiar nature of the *probandum* - 'the interests of justice permit'. It is submitted that this *probandum*, to the extent that it is one, possesses a build-in default position. The use of the word 'permit' rather than 'require' confirms this view. Uncertainty that what the interests of justice *require* means they *permit* release. If the court is left in a state of uncertainty, then the interests of justice permits release on bail. The interests of justice would then permit detention as well. But the applicant has to show only that release is permitted. The applicant would then have discharged any burden of persuasion entailed by the formulation. In this way the settled structure of rights analyses requiring the applicant to prove the application of a right (and its violation if alleged) can be maintained without entailing the

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137 In Chaskalson *et al* (1996) 27 - 56.

138 See the explanatory memorandum to the early Draft Bill of Rights of 9 October 1995.

139 Chaskalson *et al* (1996) 27 - 56.

unacceptable conclusion that uncertainty about what the interests of justice require should mean they do not permit.

In *S v Tshabalala*[140] Comrie J on behalf of the full court held that section 35(1)(f) of the Constitution did not establish an onus of proof, but entrenched a standard.[141] An arrested person was entitled to be released from detention "if the interests of justice permit" and subject to conditions which were reasonable. Every decision allowing or refusing bail had to be informed by the entrenched standard and had to endeavour to match it, whatever the bail legislation might at any given time provide. In the case of conflict, the constitutional standard had to prevail. The court also held that the language of section 35(1)(f), especially when contrasted to its predecessor, allowed Parliament to enact bail legislation that cast an onus or burden of proof on the arrested person in appropriate cases. The legislative provision in question had to be analysed in order to determine whether or not it departed from the constitutional standard. Only if the provision failed that test, did the issue of a limitation under section 36 of the Constitution arise. *In casu* schedule 5, which triggered the reverse onus under section 60(11), contains only serious crimes which did not create the impression, especially in these times, that Parliament had cast its net wider than was necessarily.

The court held that section 60 of the Act places some kind of onus, or burden of proof, on the state or the applicant for bail. This was concluded while taking into account that section 60(3) vested the court hearing the application with an inquisitorial function where relevant. According to the court there had to be a practical burden on the state to adduce evidence or to submit information to show the likelihood that the accused would conduct himself in the way described in the four paragraphs of section

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140 1998 (2) SACR 259 (C). The judgment was delivered on 19 June 1998.

141 At 263 and further.

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60(4) in the cases not governed by section 60(11). If the state failed that, section 60(9) would seldom assist because the factors mentioned there were mainly in favour of the accused. The court decided that if it was not an onus of proof then surely it was something very close thereto. If section 60(11) applied, it reversed the aforesaid onus. The applicant for bail in this instance had to satisfy the court that the interests of justice mentioned in section 60(4) did not require his continued detention, and that it was improbable that he would conduct himself in that particular way.

On a mere reading of section 35(1)(f) it seems that the substitution of "unless" under the Interim Constitution with "if" in section 35(1)(f) may well influence the constitutional position concerning the onus. Under the Interim Constitution the right to bail existed and could only be taken away if the interests of justice dictated otherwise. Under section 35(1)(f) the right to bail has been made subject to the interests of justice permitting. It may well be argued that if the equilibrium is not displaced an arrested person may be entitled to bail under the Interim Constitution but not under section 35(1)(f).

However, this would be a deplorable inversion of the right to freedom and security of the individual that is at the core of the criminal procedure rights including the right to bail.[142] The criminal procedure rights are merely illustrative of the protection of the freedom and security of the individual. As such one would expect the right to bail to confer at least a basic entitlement to bail. If the provision does not provide a basic entitlement to bail but rather sanctions the loss of liberty it should have no place alongside the right to freedom and security of the individual and the other criminal procedure rights in the Bill of Rights. However, I do not think that it was the intention of the legislature to do away with the basic entitlement to bail heralded by the Interim Constitution. In watering down this right the

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142 See chapter 6.

legislature rather wished to create a playing-field which allowed Parliament more room in which to act against serious crime especially. The fact that section 60(1)(a) of the Criminal Procedure Act was not amended correspondingly confirms this view. The amendments should therefore not be seen as imposing an onus on an applicant for bail.

8.3.5 The Criminal Procedure Second Amendment Act 85 of 1997 and position as at 30 June 1999[143]

8.3.5.1 General

This Act which commenced on 1 August 1998 did not change the wording of section 60(1)(a) and did therefore not influence the question of onus with regard to offences not provided for by section 60(11).

However, this Act replaced section 60(11) with an even more stringent provision.[144] No changes have subsequently been effected. Section 60(11) now provides that:

> Notwithstanding any provision of this Act, where an accused is charged with an offence referred to -
>
> (a) in Schedule 6,[145] the court shall order that the accused be detained in custody until he or she is dealt with in accordance

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143 As amended by the Judicial Matters Amendment Act, 34 of 1998.

144 Schedule 6 was added by section 10 of Act 85 of 1997.

145 Schedule 6 lists the following offences:

Murder, when- (a) it was planned or premeditated; (b) the victim was- (i) a law enforcement officer performing his functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his holding such a position; or (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in schedule 1; (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences: (i) rape; or (ii) robbery with aggravating

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with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;

(b) in Schedule 5,[146] but not in Schedule 6, the court shall order that the accused be detained in custody until her or she is

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circumstances; or the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Rape- (a) when committed- (i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice; (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy; (iii) by a person who is charged with having committed two or more offences of rape; or (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus; (b) where the victim- (i) is a girl under the age of 16 years; (ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or (iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act, 1973 (Act 18 of 1973); involving the infliction of grievous bodily harm.

Robbery, involving- (a) the use by the accused or any co-perpetrators or participants of a firearm; (b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or (c) the taking of a motor vehicle.

Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm.

An offence referred to in schedule 5- (a) and the accused has previously been convicted of an offence referred to in schedule 5 or this schedule; or (b) which was allegedly committed whilst he was released on bail in respect of an offence referred to in schedule 5 or this schedule.

146 Schedule 5 was added by section 14 of Act 75 of 1995 and substituted by section 9 of Act 85 of 1997.

Schedule 5 lists the following offences:

Treason. Murder. Attempted murder involving the infliction of grievous bodily harm. Rape.

Any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992), if it is alleged that- (a) the value of the dependence-producing substance in question is more than R50 000,00; or (b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or

> dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.

The Act differentiates between the extremely serious cases listed in schedule 6 and the serious cases in schedule 5. The legislature also provided procedural teeth by providing for a mechanism to establish whether one is dealing with a schedule 6 or 5 offence.[147]

If one looks at the operative part of the new section 60(11) it is in the first instance clear that the last part of the direction has been changed from "satisfied the court that the interests of justice do not require his or her detention in custody" to "adduces evidence which satisfies the court that exceptional circumstances exists which in the interests of justice permit his

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> furtherance of a common purpose or conspiracy; or the offence was committed by any law enforcement officer.
>
> Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament. Any offence in contravention of section 36 of the Arms and Ammunition Act, 1969 (Act 75 of 1969), on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in section 39(2)(a)(i) of that Act.
>
> Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft- (a) involving amounts of more than R500 000,00; or (b) involving amounts of more than R100 000,00 if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or if it is alleged that the offence was committed by any law enforcement officer– (i) involving amounts of more than R10 000,00; or ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.
>
> Indecent assault on a child under the age of 16 years.
>
> An offence referred to in schedule 1- (a) and the accused has previously been convicted of an offence referred to in schedule 1; or which was allegedly committed whilst he was released on bail in respect of an offence referred to in schedule 1.

147 Section 60(11A).

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or her release"[148] and "adduces evidence which satisfies the court that the interests of justice permit his or her release".[149] Before the amendment the accused could satisfy the court not only by way of oral testimony under oath but also by way of other forms of evidence traditionally allowed in bail applications that he should be released. Does this mean that the accused in this instance is now obliged to adduce evidence in the normal understanding thereof to satisfy the court, and cannot do so by merely making submissions from the bar or in any other way which will not be "evidence"? I submit that the legislature did not intend such a result but included the words "adduces evidence" to indicate that the applicant has the duty to begin and forms part of a provision that burdens the detained person with the onus of proof.[150]

However, it may be argued that the legislator by introducing these words intended to indicate, that in the case of section 60(11), the burden of proof is not only on the accused but in this instance the proceedings are not of an inquisitorial nature. This view would be supported by the first part of section 60(11) that reads: "Notwithstanding any provision in this Act." The accused therefore has the duty to introduce evidence. Without this evidence he may not be released from custody. However, it seems that the introduction to section 60(11) was merely inserted to remove any clash with section 60(1)(a).[151]

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148 Section 60(11)(a).

149 Section 60(11)(b).

150 Kotzé (1998) 1 *De Jure* 188 seems to confirm the view that the accused does not have to present evidence in its narrow sense. He proposes that a communication from the bar, or confirmation from the legal representatives should be sufficient where the accused carries the burden of proof, and the facts are not in dispute. He argues that another interpretation would be absurd and waste valuable court time.

151 This view seems to be supported by Kotzé *ibid*. In discussing section 60(11)(a), he indicates that even where the facts are not in dispute, the presiding officer has to decide for himself whether bail should be granted or not.

I therefore submit that there is an onus on an applicant charged with a schedule 5 or 6 offence to convince the presiding officer on a balance of probabilities that he is a suitable candidate for release.[152] But, due to the *sui generis* nature of bail hearings the adjudicator is expressly not a passive umpire and must make up his own mind.

Still, it may also be argued that the accused in order to obtain bail would have to start and adduce evidence. The court will have to act inquisitorially in accordance with the Act and determine whether circumstances exist for the interests of justice to permit his release. If at the end of the day there is uncertainty about what the interests of justice require it means that they do not permit release. In this instance there will not be an onus proper.

The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[153] while dealing with the constitutional acceptability of various provisions in section 60(11)(a) accepted that there was a formal onus on an applicant falling under section 60(11)(a) to "satisfy the court".[154] Kriegler J on behalf of the court remarked that it was not suggested by defence counsel that the imposition of a reverse onus on an applicant for bail, was constitutionally objectionable. Kriegler J added that such a contention would in any case not have been sustained. Referring to section 35(1)(f) of the Constitution Kriegler J indicated that section 60(11)(a) did not create something with regards to onus that did not exist. It merely described how it had to be discharged and added to its weight.

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152 A number of courts confronted with schedule 6 offences have subsequently supported this view. See *S v Jonas* 1998 (2) SACR 677 (SE); *S v H* 1999 (1) SACR 72 (W); *S v Swanepoel* 1999 (1) SACR 311 (O).

153 1999 (7) BCLR 771 (CC).

154 See par 61 and 78 and further of the judgment.

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8.3.5.2 The present position

In my endeavour to interpret the relevant provisions I have taken into account that:

- The South African right to bail seems to have borrowed from its Canadian equivalent. Under Canadian law the Crown has to show cause why the accused has to remain in custody. Where a person is charged with certain serious offences the applicant is burdened to convince the presiding officer that he should be released.
- Notwithstanding the burdens of proof under Canadian law the presiding officer has the right to act inquisitorially under Canadian law but is not obliged to make enquiries as is expected in some instances by the Criminal Procedure Act under South African law.
- The right to bail must be regarded as part of specific instances of the right to freedom and security of the person. Section 12 of the Final Constitution therefore should assume the character and status of a generic and residual "due process" right, which acts independently, and indicates how section 35 should be interpreted.[155]
- The Amendment Acts and the Final Constitution were enacted amidst a full-blown debate concerning the question of onus and in many respects the provisions were in response to the debate. It is therefore reasonable to expect that the wording of the relevant sections had been deliberate.
- The Criminal Procedure Act must be interpreted so as to be in line with

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155 In chapter 6 I submitted that a due process wall was incorrectly erected between sections 11 IC (12 FC) and 25 IC (35 FC) by the Constitutional Court.

It furthermore seems that some legal scholars and courts have taken the view that the presumption of innocence being the cornerstone of our criminal justice system is not limited in its content at the bail stage to the wording of section 35(1)(f). They require that a person's rights are not impeded before he is proven guilty according to accepted principles (including the principle that the state should start and adduce evidence.)

the Constitution.[156]

My understanding of the correct situation is that with regards to section 60(11)(a) and (b) the accused has to adduce evidence. This the legislature has made clear. It is submitted that he would also have to begin and carries the burden of proof.[157] In the case of section 60(11)(a) exceptional circumstances would have to be proved on a balance of probabilities. Notwithstanding the formal onus the presiding officer is expressly instructed to act inquisitorially. This is possible because of the interlocutory and inherently urgent nature of a bail application.

This interpretation would be in line with section 35(1)(f) and also the general international trend to build inquisitorial elements into the accusatorial system.[158]

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156 This was confirmed by the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC).

A similar principle existed in Roman-Dutch law where a statute was ambiguous and was expressed in the maxim *in ambigua voce legis ea potius accipienda est significatio, quae vitio caret*. The meaning which avoids invalidity of the provision in question was thus preferred.

157 It is to be noted that the DPP considers the approach by Snyckers with regards to the existence of an implied onus and the quantum thereof to be the best one for sections 60(11)(a) and (b) (see par 5.2 of the heads of argument by the DPP in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) and par 8.3.4.2 for the approach by Snyckers). On this interpretation they argue that the inquisitorial elements that have been introduced by the new Act, act as security.

158 By using this model although not perfect the advantage of the best characteristics of both the Anglo-American and Continental legal systems can be obtained.

One might suggest the "modest approach" as under American law with regards to the trial stage. The judges are explicitly given the duty to further accurate fact-finding by seeking and presenting information the advocates failed to develop. However, they are not invested with Continental-style powers such as the authority to call and first question witnesses or otherwise direct the course of the trial.

In this instance a bigger responsibility is placed on the presiding officer to

With regard to the offences outside section 60(11) it is submitted that there is no "real onus" and that the proceedings are clearly inquisitorial in nature. This can be seen from the wording of the Amendment Acts.[159] The state must begin in line with the wording of section 60(1)(a).[160] If at the end of the day it is uncertain what the interests of justice require, release is permitted. This is borne out by the change of wording from "require" in the Interim Constitution to "permit" in the Final Constitution. It is furthermore submitted that the legislature in view of the fierce debate would specifically have placed a burden on the state if it desired that result.[161]

8.3.5.3 Constitutional scrutiny of the "reverse onus" in section 60(11)

If it is accepted that section 35(1)(f) places a burden on the accused, the onus in section 60(11) would survive constitutional scrutiny on that basis alone. However, even if it is submitted that section 35(1)(f) does not impose a burden of proof, the onus in section 60(11) will be saved by the limitation clause.[162]

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ensure that bail is granted or denied judiciously.

159 Sections 60(1)(c); 60(3) *et cetera* of the Criminal Procedure Second Amendment Act 85 of 1997.

160 This is in line with the majority decision in *Ellish v Prokureur-Generaal Witwatersrand* 1994 (4) SA 835; 1994 (5) BCLR 1; 1994 (2) SACR 579 (W) decided on 18 August 1994. It is submitted that the legislature agreed with this interpretation and in spite of many opportunities to rectify the situation only changed the position with regards to certain offences.

161 In the Canadian Criminal Code the legislature specifically provides that a person shall be released in certain circumstances and if not released *the State must convince* the court that the accused must not be released.

162 Under section 33 IC a stricter level of scrutiny for certain rights, including the right to bail was required. However, this notion has been abandoned in the Final Constitution. In order for any restriction on the right to bail to survive under the Interim Constitution the infringement had to be both "necessary" and "reasonable and justifiable in an open and democratic society based on freedom and equality". Under the Final Constitution the

Constitutional analysis under the Bill of Rights takes place in two stages. The applicant first has to prove that the activity for which protection is sought falls within the sphere of activity protected by a fundamental right, and also that government action actually impedes that right.[163] The government then has an opportunity to justify this *prima facie* infringement under section 36(1) which is the general limitation clause:[164]

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infringement to the right to bail does not have to be "necessary" any more. The infringement need only be "reasonable and justifiable in an open and democratic society based on human dignity, freedom and equality" (see section 36 discussed in this paragraph).

163 See *S v Zuma* 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) 414; *S v Makwanyane* 1995 (6) BCLR 665 (CC) 707D - E.

164 As South African limitation analysis borrowed heavily from the Canadian Charter the guidelines in *R v Oakes* [1986] 1 SCR 103, 26 DLR (4th) 200 227 - 8 (SCC) were quoted by many South African courts dealing with limitation issues. See for example *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E); *S v Majavu* 1994 (4) 268 (Ck). See also *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (Nm). See *R v Chaulk* [1990] 3 SCR 1303, 62 CCC (3d) 193 216 - 7 (SCC) for a concise exposition of the limitation test under Canadian law. The guidelines from *Oakes* were crucial in applying the "more vague" limitation clause (section 33) in the Interim Constitution and was inevitable, *via* the judgment in *S v Makwanyane ibid*, discounted in the more detailed section 36 of the Final Constitution. The *Oakes* test requires the following:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'. ... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s.1 protection. It is necessary, at the minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s.1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test'... . Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of

> The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
>
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.

Chaskalson indicates that the limitation test is driven by two primary concerns.[165] In the first place it provides a vehicle for subjecting infringements of fundamental rights to vigorous review. In the second instance it provides a mechanism which permits the government or some other party to undertake actions which, though *prima facie* unconstitutional, serve pressing public interests. Chaskalson indicates that one can expect any limitation test to pose roughly the same kind of questions. Firstly whether the objective of the law under scrutiny warrants the infringement of the right. Secondly whether the means employed to realise that objective are rationally connected to that objective. Thirdly whether the government or some other party defending the law at issue could have some means less restrictive of the rights of the aggrieved party. [166]

> individuals or groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair, or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly the means even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question ... .
>
> Thirdly, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance.'

165 See Chaskalson *et al* (1996) 12 - 47.

166 Under contemporary Canadian law the limitation test is also less strictly interpreted. The *Oakes* test required that the government go to great

A quick glance at schedules 5 and 6 will reveal that it is predominantly in the instance of very serious or damaging offences that the burden of proof is to be reversed.[167] The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[168] while deliberating whether the much graver intrusion of the combined effect of section 60(11)(a) was saved by the limitation clause,[169] pointed to the grim statistics which show that our society is racked by a surge in violent criminal activity that has made all ordinary law abiding citizens fearful for their safety and that of their loved

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lengths to answer the questions satisfactory. The courts after *Oakes* saw the requirement of impairing the right "as little as possible" as mandating the government to find and employ the least restrictive means to achieve its objectives. Because of this the courts soon criticised this requirement saying that it invited significant intervention into legislative policy-making, a task for which the courts are not suited. In their quest to eradicate the problem of judicial interference the courts called for a more flexible approach which would give the courts more room in which to maneuver. This approach was introduced in *Edward Books & Art Ltd v The Queen; R v Nortown Foods Ltd* [1986], 2 SCR 713,35 DLR (4th) 1 (SCC) and *Irwin Toy Ltd v Quebec (Attorney-General)* [1989], 1 SCR, 927; 94NR 167; 24 QAC 2, 58 DLR (4th) 577 (SCC). In *Edward Books* the court changed the test from "as little as possible" to "as little as *reasonable* possible" [the italics are mine]. See also *Reference re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act (Alta)* [1987], 1 SCR 313 392, 38 DLR (4th) 161 (SCC). The court in *Edward Books* did also not require the same standard of proof and held that the same questions need not be asked in every case. See also *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)* [1990], 1 SCR 1123 1138, 56 CCC (3d) 65 (SCC) and *RJR-MacDonald Inc v Canada (Attorney-General)* [1995], 3 SCR 199; 127 DLR (4th) 1 (SCC); Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 627 and further.

167 It also operates "in a narrow set of circumstances" as was required by the Canadian Supreme Court in *R v Pearson* (1992) 12 CRR (2d) 1 and *R v Morales* (1992) 12 CRR (2d) 31.

168 1999 (7) BCLR 771 (CC).

169 It has been indicated that it was not suggested by anyone that the imposition of an onus in itself was constitutionally objectionable. The court in any event found that such a submission could not be sustained. The court in its deliberation pointed to the fact that the objection against a reverse onus was the risk of a wrong conviction. As there was no such risk in a bail application the root of the unacceptability disappears.

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ones.[170] The Constitutional Court reiterated that the seriousness of the offence, and with it the heightened temptation to flee because of the severity of the possible penalty, have always been important factors relevant to deciding whether bail should be granted.

There is no doubt that the effect of widespread violent crime is deeply destructive of the fabric of our society. Accordingly all steps that the Constitution allows, must be taken to curb violent crime.

Provision is also made for the burden to be placed on the applicant where the applicant is a repeat offender, the alleged offence is committed while out on bail or where there is some kind of common purpose or conspiracy.[171]

The arguments by the Canadian courts in favour of limiting a person's right to bail by placing the burden of proof on the applicant when charged with certain crimes, are even more convincing when applied to the South African situation. South Africa under the new dispensation has a far greater incidence of crime in general and specifically of serious and violent crime. Coupled to this is an ineffective police force and criminal justice system. There is a real risk that the perpetrators of the crimes under scrutiny will abscond rather than face trial. Where it may be difficult to abscond from justice in Canada I submit that it is not as difficult in South Africa.

It is further noted that bail is only denied to those applicants that cannot demonstrate that detention is not in the interests of justice. Although this

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170 In this judgment the Constitutional Court found even the combined effect of section 60(11)(a) to be saved by the limitations clause.

171 See par 8.2.2.2.b - 8.2.2.2.c for the very similar tendencies under Canadian law.

burden might well be in an accused's power to discharge, one must not forget that the majority of accused in South Africa are unsophisticated and come before the lower courts without legal representation. This problem is to a large extent eliminated when the presiding officer acts inquisitorially.

The answer is of course to bring the police force and criminal justice system up to par with all the resultant spin-offs. A proper functioning criminal justice system would ensure that the prosecution is ready to contest a bail application. If the prosecution is able to place the necessary facts before court there would be no need to place an onus on the accused. The serious nature or otherwise of the offence and the influence thereof would then be a factor that the court has to take into account to determine whether the state has proved that incarceration is necessary. Failing that, one would have to resort to measures like these to make the system function. In our current situation it therefore seems to be legitimate government action.

8.4 CONCLUSION

Before the advent of section 25(2)(d) of the Interim Constitution in 1994 it was commonly accepted that an arrested person bore the onus on a balance of probabilities to show that he should be granted bail under South African law. However, it does seem that an applicant for bail was not always burdened with an onus of proof but that it originated from a decision by the Transvaal Provincial Division in 1921, and followed by the other courts thereafter. In line with a civil application the applicant had to start leading evidence. Yet, even before the advent of the Constitutional era some courts have indicated views more in favour of granting bail. Under Canadian law the justice, magistrate or judge had the discretion to grant bail prior to 1970.

At present under both systems there is a basic but circumscribed entitlement to bail before conviction, where the onus is on the state to

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justify continued incarceration, except in certain prescribed instances.[172] However, under South African law this may not be an onus in the true sense.

While the onus is reversed under both Canadian law and South African law in the instance of some serious offences, the list of offences where the burden is reversed, is much more extensive under South African law. The onus under both systems is also similarly cast upon the applicant where he is a repeat offender, the alleged offence is committed while out on bail, or where there is some kind of common purpose or conspiracy.[173]

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172 Even if it is accepted that section 35(1)(f) of the South African Constitution does not confer a basic entitlement to bail, section 60(1)(a) of the CPA surely does so. See my discussion in par 8.3.4.2. Under Canadian law it is afforded by the Canadian Charter and the Criminal Code of Canada.

173 The greater responsibility on the presiding officer to act inquisitorially under South African law has been shown in chapters 2 and 4. In South Africa the presiding officer is tasked to make sure that justice prevails. In the essentially adversarial system under Canadian law the judicial role is mainly passive. The presiding officer approaches the dispute with an open mind leaving it to the parties to convince the court that bail should be granted or denied. Because of the lesser ability of the prosecution and the applicant in general to present the presiding officer with the necessary facts the greater responsibility is better suited to achieve equitable criminal justice in South Africa. It is especially the many uninformed and unrepresented applicants for bail that would be unable to present their case and so doing make sure that justice prevailed.

The difference in approach in that the onus is on the prosecution to convince the court that lesser terms of release are not adequate, has been shown in chapter 7.