# PROBLEMATIC ASPECTS OF THE RIGHT TO BAIL UNDER SOUTH AFRICAN LAW: A COMPARISON WITH CANADIAN LAW AND PROPOSALS FOR REFORM

THESIS SUBMITTED IN CONFORMITY WITH THE REQUIREMENTS OF THE DEGREE LLD

AT

THE FACULTY OF LAW

UNIVERSITY OF PRETORIA

BY

WILLEM PETRUS DE VILLIERS

BIUR LLB (PRET)

UNDER THE PROMOTORSHIP

OF

PROF FJ VILJOEN

NOVEMBER 2000

## SUMMARY

The right to bail has been a contentious issue for some time under South African law. In recent times many interested parties have proclaimed that bail is not granted judiciously.

This study investigates whether an equitable balance has been achieved between the individual's right to liberty and the interests of society under South African law. As part of the process the correct interpretation and application of the principles are proposed. This is effected by considering and comparing the relevant principles under contemporary Canadian and South African law, and the circumstances under which they operate.

The historical origins and the development of these principles up to 30 June 1999 are studied to clarify the principles and purpose of bail and to investigate the balance that existed at different times in history. The constitutional history of Canada confirms that the Canadian Charter and Charter jurisprudence are suitable sources of reference for human rights in South Africa.

The presumption of innocence as the fundamental principle underlying the right to bail is researched. It is also investigated whether the constitutional guarantees to bail are part of, or specific instances of the rights enumerated in section 7 of the Canadian Charter and section 12 of the South African Bill of Rights. If so, does that mean that there is a residual right to procedural fairness in terms of the last-mentioned sections? The scope of the respective enshrined rights provided for by sections 11(e) of the Canadian Charter and 35(1)(f) of the Final Constitution is also discussed in some detail. By dissecting these provisions an attempt is made to clarify their exact scope.

This is followed by a discussion of some of the principles and provisions that have caused the most controversy of late under South African law.

The first of these is the question of onus that is crucial in all proceedings, including bail applications. I also discuss the admissibility at the subsequent criminal trial of evidence tendered by the accused for purposes of bail proceedings, and the question of access to police information for purposes of the bail application under South African and Canadian law.

My conclusions indicate that the Canadian Charter is an excellent model to learn from. I show that the foundational basis on and structure within which the right to bail operates, is often misunderstood under South African law. It is also shown that the liberty right in the context of the right to bail, to a great extent favours the applicant under Canadian law, when compared to the South African situation. I indicate that the policy-makers have in their quest to find a balance overstepped the mark in combating crime, also if compared with the situation in Canada. A threshold constitutional protection of the right to bail is proposed, along with measures enhancing due process and an equitable balance between the liberty interests of the applicant (or accused) and the interests of society.

## OPSOMMING

Die reg op borgtog is reeds vir 'n geruime tyd 'n omstrede aangeleentheid in die Suid-Afrikaanse reg. In die onlangse verlede het talle belanghebbende partye verklaar dat borgtog nie oordeelkundig toegestaan word nie.

Die studie ondersoek of 'n billike balans tussen die individu se reg op vryheid en die belange van die gemeenskap in die Suid-Afrikaanse reg bereik is. As deel van die proses word die korrekte interpretasie en toepassing van die beginsels voorgestel. Dit word bewerkstellig deur die oorweging en vergelyking van die relevante beginsels onder die huidige Kanadese en Suid-Afrikaanse reg en die omstandighede waaronder dit fungeer.

Die historiese oorsprong en ontwikkeling van hierdie beginsels tot en met 30 Junie 1999 word bestudeer om duidelikheid aangaande die beginsels en doel van borgtog te kry en om ondersoek in te stel na die balans wat histories bestaan het. Die konstitusionele geskiedenis van Kanada bevestig dat die "Canadian Charter" en "Charter"-regsleer gepaste verwysingsbronne vir menseregte in Suid-Afrika is.

Die vermoede van onskuld as die fundamentele beginsel onderliggend aan die reg tot borgtog word nagevors. Dit word ook nagevors of die grondwetlike waarborge op borgtog deel vorm van, of spesifieke verskynings is van, die regte uiteengesit in artikel 7 van die "Canadian Charter" en artikel 12 van die Suid-Afrikaanse handves van menseregte. Indien dit so is, beteken dit dat daar 'n residuele reg op regverdige prosedures in terme van laasgenoemde artikels is? Die omvang van die onderskeie verskanste regte vervat in artikel 11(e) van die "Canadian Charter" en artikel 35(1)(f) van die Finale Grondwet word ook uitvoerig bespreek. Deur die bepalings te dissekteer word gepoog om die presiese omvang daarvan te verhelder.

Dit word gevolg deur 'n bespreking van sommige van die beginsels en bepalings wat die meeste omstredenheid in die onlangse verlede in die Suid-Afrikaanse reg besorg het.

Die eerste hiervan is die vraag na die bewyslas, wat krities in alle verrigtinge insluitende borgaansoeke is. Ek bespreek ook die toelaatbaarheid by die opvolgende kriminele verhoor van getuienis aangebied deur die beskuldigde vir doeleindes van die borgaansoek, en die vraag om toegang tot die informasie gehou deur die polisie vir doeleindes van die borgaansoek onder die Suid-Afrikaanse en Kanadese reg.

My gevolgtrekkings dui aan dat die "Canadian Charter" 'n uitstekende model is om van te leer. Ek wys daarop dat die basis waarop, en struktuur waarbinne die reg op borgtog funksioneer, onder die Suid Afrikaanse reg dikwels misverstaan word. Dit word ook uitgewys dat die reg op vryheid in die konteks van 'n reg op borgtog, tot 'n groot mate die applikant onder Kanadese reg, wanneer dit vergelyk word met die Suid-Afrikaanse situasie, bevoordeel. Ek dui ook aan dat die beleidsmakers in hulle strewe om 'n balans te vind te vêr gegaan het om misdaad te bekamp, ook indien dit met die situasie in Kanada vergelyk word. 'n Drumpel grondwetlike beskerming van die reg op borgtog word voorgestel, tesame met maatstawwe wat 'n billike balans tussen die belange in vryheid van die applikant (of beskuldigde) en die belange van die gemeenskap bevorder.

## ACKNOWLEDGEMENTS

It has been said that a thesis is a monster with many heads. In conquering this monster many people's lives are unfortunately compromised. I happily take this opportunity in extending gratitude to the following people:

My promoter Frans Viljoen for his competent and speedy guidance, systematic approach, and meticulous attention to detail.

Anita Muller, whose prompt typing over an extended period, of a substantial part of the manuscript, saved me lots of time.

My friends and family, who had to sacrifice and endure with me.

My friends and colleagues, Chris Nagel, Johan Lötz and Dirk Kotzé who contributed in different ways.

The friendly assistance of Cora Badenhorst and the other personnel of the Law Library at the University of Pretoria.

The University of Pretoria is also thanked for allowing me to take leave at a crucial time during my research.

# CONTENTS

## CHAPTER 3 CONSTITUTIONAL LAW OF CANADA

**CHAPTER 11 CONCLUSIONS AND RECOMMENDATIONS**

**ANNEXURES**

**SOURCES**

## ABBREVIATIONS AND ACRONYMS

(The abbreviations and acronyms appear in alphabetical order. Where an abbreviation or acronym is repeated the meaning appears from the context.)

| | |
|---|---|
| Alta CA | Alberta Court of Appeal/Alberta Supreme Court Appellate Division |
| Alta LR | Alberta Law Reports |
| Alta QB | Alberta Court of Queen's Bench |
| AR | Alberta Reports |
| BC Co Ct | British Columbia County Court |
| BCCA | British Columbia Court of Appeal |
| BCLR | British Columbia Law Reports |
| BCLR | Butterworths Constitutional Law Reports |
| BCSC | British Columbia Supreme Court |
| CC | Constitutional Court |
| CCC | Canadian Criminal Cases |
| CCC | Criminal Code of Canada |
| CPC | Carswell's Practice Cases |
| CJQB | Chief Justice of the Queen's Bench |
| CODESA | Convention for a Democratic South Africa |
| Cox | Cox's Criminal Cases |
| CPA | Criminal Procedure Act |
| Cr App R (S) | Criminal Appeal Report, Sentencing |
| Cr App R | Criminal Appeal Report |

| | |
|---|---|
| CR | Criminal Reports |
| CRNS | Criminal Reports, New Series |
| CRR | Canadian Rights Reporter |
| Ct Martial App Ct | Court Martial Appeal Court |
| DLR | Dominion Law Reports |
| DPP | Director of Public Prosecutions |
| EHRR | European Human Rights Reports |
| FC | Canada Law Reports, Federal Court |
| FC | Final Constitution |
| Fed Ct TD | Federal Court, Trial Division |
| FOIA | Freedom of Information Act |
| FLQ | *Front de Libération du Québec* |
| FTR | Federal Trial Reports |
| HL | House of Lords |
| IC | Interim Constitution |
| KBD | King's Bench Division |
| Man CA | Manitoba Court of Appeal |
| Man KB | Manitoba Court of King's Bench |
| Man Prov Ct | Manitoba Provincial Court |
| Man QB | Manitoba Court of Queen's Bench |
| Man R | Manitoba Reports |
| MVR | Motor Vehicle Reports |
| NB Co Ct | New Brunswick County Court |

| | |
|---|---|
| Nfld & PEIR | Newfoundland & Prince Edward Island Reports |
| Nfld CA | Newfoundland Court of Appeal |
| NR | National Reporter |
| NS Co Ct | Nova Scotia County Court |
| NS Prov Ct | Nova Scotia Provincial Court |
| NSCA | Nova Scotia Court of Appeal/ Nova Scotia Supreme Court Appeal Division |
| NSR | Nova Scotia Reports |
| NSSC | Nova Scotia Supreme Court |
| OAC | Ontario Appeal Cases |
| Ont CA | Ontario Court of Appeal |
| Ont Div Ct | Ontario Divisional Court |
| Ont HCJ | Ontario High Court of Justice |
| Ont Prov Ct | Ontario Provincial Court |
| Ont Prov Div | Ontario Provincial Division |
| OR | Ontario Reports |
| PC | Privy Council |
| PEISC | Prince Edward Island Supreme Court |
| PEITD | Prince Edward Island Trial Division |
| QBD | Queen's Bench Division |
| Que CA | Quebec Court of Appeal |
| Que SC | Quebec Superior Court |
| RCMP | Royal Canadian Mounted Police |

| | |
|---|---|
| RSC | Revised Statutes of Canada |
| SA | South African Law Reports |
| SACC | South African Journal of Criminal Law and Criminology |
| SACR | South African Criminal Law Reports |
| Sask CA | Saskatchewan Court of Appeal |
| Sask QB | Saskatchewan Court of Queen's Bench |
| Sask R | Saskatchewan Reports |
| SCC | Supreme Court of Canada |
| SCR | Canadian Law Reports, Supreme Court |
| WCB | Weekly Criminal Bulletin |
| WWR | Western Weekly Law Reports |

# CHAPTER 1

# INTRODUCTION

1.7 WORK ALREADY DONE IN THE FIELD

## 1.1 CONTEXTUAL BACKGROUND

The Interim Constitution[1] commenced[2] against the background of a criminal procedure system that is derived from the common law, as amplified, modified, and supplemented by extensive statutory enactment, presently contained in the Criminal Procedure Act.[3] That this transition had an effect on the criminal justice system and that everybody concerned was confronted with a new environment, cannot be refuted. In many ways the chapter on fundamental rights codified the common law criminal procedure rights, and in other ways the common law was changed or added to.[4] One of the rights specifically enshrined was the right to bail in section 25(2)(d).

---

1 Constitution of the Republic of South Africa, 1993 Act 200 of 1993, which includes chapter 3 under the heading "Fundamental Rights Provisions" (referred to as the Interim Constitution or IC).

2 On 27 April 1994.

3 51 of 1977 as amended. The basic system is derived from English law and is thus adversarial in nature and character. However, over the years the South African system of criminal procedure, particularly as regards pre-trial procedures, has acquired certain distinctive features of inquisitorial systems such as the Italian and Dutch systems. This convergence of the principles of adversarial and inquisitorial systems is not unique to South Africa. Jörg, Field & Brants in Fennel, Harding, Jörg & Swart (1995) 41 point out that the inquisitorial and adversarial criminal justice systems in Europe are also acquiring features of one another.

4 The Bill of Rights entrenched basic norms such as the duty on the state to prove the guilt of an accused beyond a reasonable doubt and the duty on the state to make out a case against the accused before he needs to respond (see section 25(3)(c) IC) along with some "new" rights. An example of such a "new" right was the right to information in terms of section 23 IC. Although the common law afforded some protection to the basic norms that existed prior to the advent of the Interim Constitution, Parliament could pass legislation amending the common law as it deemed fit. Since the advent of the Interim Constitution the courts were empowered to declare invalid laws and conduct inconsistent with the Bill of Rights. The Bill of Rights therefore

Although the right to liberty is not absolute in any jurisdiction, and all states recognize the need for the curtailment of personal freedom where a person has been arrested and awaits trial,[5] the public in the wake of a massive crime wave with the advent of the new dispensation seemed to (and to a lesser extent still seems to) have a perception that bail is granted injudiciously.[6] From time to time voices were and are still heard admonishing the authorities for releasing persons accused of serious crimes, and instances are quoted of persons who commit further offences while on bail.[7] It is also

---

did not replace the ordinary rules and principles of criminal procedure but provided how they should be applied. See also par 2.6.1, 7.3.3.1.a and Steytler (1998) 1 - 6.

5 Provided the period between arrest and trial is not unreasonably long.

6 See also South African Law Commission (1994) 98.

The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) footnote 6 described the situation as follows:

> Some Judges and a number of spokespersons of provincial attorneys-general, police liaison officers and unions as well as influential national non-governmental organisations publicly expressed concern about the perceived laxness in the granting of bail. Indeed, a rise in the rate of crime in general and violent crime in particular became the subject of ongoing public debate and political contention in and outside Parliament. Regrettably the product was often heat rather than light.

(Because all the cases concerned certain constitutional challenges to specific sections of the Criminal Procedure Act regarding bail, the cases were considered together for judgment (see par 1 of the judgment).)

7 See for example "Mufamadi hits out at early bail" (translation) *Beeld* 20 September 1994 page 4:

> (T)he Minister for Safety and Security, Mr Sidney Mufamadi, ... said he and the Government were extremely concerned about the tendency of suspects out on bail to commit further violent crimes,

the perception of a large section of the public that the fundamental rights in both the Constitutions that impact on the criminal process tend to favour the accused and disregard the rights of victims.[8]

It was against this background and in the context of serious debates on the question of bail among courts and legal scholars[9] that the Final Constitution[10]

---

since this could only have a negative effect on Police morale and motivation to combat crime.

If this trend was not halted it would undermine the efforts of the Government and Police to combat crime and violence, as it would the public's faith in the legal system.

8 See for example "Bailing out criminals" *The Star* 6 September 1994 page 10:

> There is a well-founded perception that bail is being granted too easily to suspects. It arises because people are more conscious of their vulnerability than ever. Police also claim that they are hopeless when 'known perpetrators' are seen on the street a day after their arrest, even after bail has been opposed. ...
>
> It is tempting to call for rigid guidelines, but that is not the answer. South African justice, to its detriment, has previously limited the discretion of the courts. What is needed now is for judicial officers to apply their minds more vigorously to the doctrine of 'what is required by justice'.
>
> Justice is surely not served when murder accused and people identified by the community as gangsters are set free for little more than petty cash. The public needs assurances; the police need to be able to function effectively. And it is up to the courts to play a greater role in this regard.
>
> The perception is growing that criminals under the new dispensation are being favoured to the detriment of society. We cannot thrive in a country where the balance of citizen *versus* criminal is loaded in favour of the latter.

9 The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) footnote 6, seemingly unimpressed, described the situation as follows:

and amendments to the Criminal Procedure Act were introduced.[11] These amendments were also to a large extent in reaction to the factors mentioned, in that the legislature made the granting of bail more difficult in certain cases. The legislative amendments also intended to clarify but sadly brought with it more questions than answers.[12] Many have raised the view that aspects of these amendments were and are not in line with constitutional rights.[13]

---

Although there was a steady stream of new and stimulating insights from legal academics, their views were inherently prospective, sometimes speculative and seldom harmonious. At the same time, judicial pronouncements by the high courts on the interaction between constitutionality and criminal justice were relatively few and uncoordinated, arising as they do on a case-by-case basis. For historical and jurisdictional reasons, judgments by the high courts were seldom constitutionally based. Under both constitutions cases are resolved only where it is necessary to do so and, under the interim Constitution, provincial and local divisions of the Supreme Court had limited constitutional jurisdiction while the Appellate Division had none at all.

10 Constitution of the Republic of South Africa, 1996 Act 108 of 1996 (referred to as the Final Constitution or FC). The Final Constitution commenced on 4 February 1997.

11 Notably the Criminal Procedure Second Amendment Act 75 of 1995 which commenced before the Final Constitution on 21 September 1995, and the Criminal Procedure Second Amendment Act 85 of 1997 which commenced after the Final Constitution on 1 August 1998.

12 See for example:

- Par 7.3.5 below, where the problems in interpreting the term "in the interests of justice" as used in section 35(1)(f) of the Final Constitution and section 60 of the Criminal Procedure Act are discussed.
- Chapter 8 below, where the problems in determining the exact nature and incidence of the onus in bail proceedings are discussed.

13 See for example:

- Par 7.3.5 below, where the requirement that an applicant for bail falling under section 60(11)(a) must prove "exceptional circumstances" is discussed.

But one does not get a clear understanding of the exact content of a right in the Bill of Rights by simply reading it. The rights have been framed in "broad" and "ample" terms[14] and are subject to constitutional analysis. The written constitution does therefore not reflect how the courts have interpreted and applied these principles.

Soon after the advent of the fundamental rights era the Constitutional Court of South Africa committed itself to a method of interpretation which is value-based.[15] Inherent in this approach is an understanding that an assessment of

---

- Chapter 9 below, where section 60(11B)(c) CPA, which provides for the admission of evidence tendered at a bail hearing at the subsequent trial, is discussed.

14 See the judgments and my discussion in par 10.3.4.

15 See *S v Makwanyane* 1995 (3) SA 391 (CC) par 262 per Mahomed DP concurring and par 303 per Mokgoro J concurring; *S v Zuma* 1995 (2) SA 642 (CC) par 15 per Kentridge AJ. The Constitutional Court was quick to recognise the similarity between value-based and the "purposive" interpretation applied under Canadian law with the dictum by Dickson J in *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 (SCC) 395 - 6 becoming a primary referent for purposive interpretation.

However, other approaches to constitutional interpretation have been formulated by legal scholars. One approach seeks the meaning of the Constitution in the intention of its drafters. This approach seems to be fundamentally flawed. While the text remains important, the meaning of the Constitution can also not be found by simply decoding the written text. However, the written document remains the starting point for interpretation and to that extent exercises its limiting, containing and ultimately disciplinary function upon interpretation. See par 10.3.4.

It is submitted that value-based interpretation is the soundest in principle and practice and lends coherence in procedure. See Kentridge & Spitz in Chaskalson *et al* (1996) chapter 11.

a constitution must not be made in a vacuum, but in the historical context of the developments in a country.[16]

In accordance with the approach by the Constitutional Court in interpreting the Interim Constitution, the Final Constitution requires that the Bill of Rights be interpreted to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[17] However, these values are not self-evident. In the interpretation reference may be had to foreign law.[18] Yet the use of foreign precedent requires "careful management" in light of the differences in the criminal justice system and society that might present itself.[19] One must be careful not to import

---

16 See *City Council Of Pretoria v Walker* 1998 (3) BCLR 257 (CC) par 26 per Langa DP; *Shabalala v The Attorney-General of the Transvaal* 1996 (1) SA 725 (CC) par 26 per Mahomed DP. Consideration of the political context of a constitutional provision is therefore essential for a court to make the value judgments required. When interpreting South Africa's Constitution proper weight must be given to the fact that it is not a foreign or international instrument that needs to be construed. The lack of local judicial precedents upholding human rights means that international and foreign law will at least for the time being provide important guidance. In addition section 39(1) of the Final Constitution prescribes that international law must be considered and foreign law may be considered.

It furthermore does not mean that constitutional rights should be cut down by reading restrictions into them so as to bring them in line with the common law. What is defensible from the past will be kept but that which is not in line with a "democratic, universalistic, caring and aspirationally egalitarian ethos" must be rejected. See *S v Makwanyane* 1995 (3) SA 391 (CC) par 262.

17 Section 39 FC.

18 See section 39(1)(c) FC.

19 See *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) par 26.

doctrines associated with foreign constitutions into an inappropriate South African setting.[20]

My investigations confirm that, in one's quest to assess the right to bail under South African law, it is of great practical and theoretical value to have regard to the equivalent right to bail under the Canadian Charter of Rights and Freedoms.[21] Canada is an excellent example of a society where the values that underlie that society are based on openness, democracy, human dignity, equality and freedom. Legal practitioners, the courts and other legal scholars have also since the introduction of the fundamental rights provisions, treated Canadian Charter jurisprudence as perhaps the most authoritative guidance from abroad when dealing with fundamental rights issues.[22] In addition, the Canadian Charter was an important source of

---

20 See the dictum by Cloete J in *Shabalala v The Attorney-General of the Transvaal* 1994 (6) BCLR 85 (T) 119 quoting Froneman J in *Qozoleni v Minister of Law and Order* 1994 (3) SA 625 (E) 633F - G.

21 Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11 hereafter referred to as the "Canadian Charter" or "Charter".

The Canadian Charter and Charter jurisprudence is an excellent source of reference for human rights, and the right to bail in particular, in South Africa. This view is confirmed by my discussion on the historical context of human rights in Canada (chapter 3) and the principles of comparative law (see par 11.2).

22 It seems reasonable to surmise that Canadian Charter jurisprudence has been the most consistently quoted foreign guidance by legal academics, practitioners and the South African courts dealing with fundamental rights issues. In many instances Canadian Charter authority is the sole foreign authority quoted. See for example the chapter on "Arrested, Detained and Accused persons" in De Waal, Currie & Erasmus (1998), the decisions by the Constitutional Court in *Key v Attorney-General, Cape of Good Hope Provincial Division* 1996 (6) BCLR 788 (CC) and *Ferreira v Levin NO; Vreyenhoek v Powell NO (No 2)* 1996 (4) BCLR 441 (CC) and the supreme court in *S v Strauss* 1995 (5) BCLR 623 (O). Steytler (1998) 7 confirms the view that Canadian Charter jurisprudence has been the most influential foreign guidance in the South African courts.

reference when the fundamental rights provisions in our Constitution were constructed.[23] The general limitation clause in the Interim Constitution was adopted from predominantly Canadian law.[24] This determined the structure of fundamental rights analysis and is therefore on its own an important influence. Many even regard the role of the Canadian Charter when the Bill of Rights was drafted as so pivotal that they consider the South African Bill of Rights to be largely based on the Canadian Charter.[25]

---

23 See Steytler (1998) 7, *S v Nortje* 1996 (2) SACR 308 (C) 319b-c, *S v Agnew* 1996 (2) SACR 535 (C) 542d and *S v Lavhengwa* 1996 (2) SACR 453 (W) 494f.

24 It also has a German flavour. See Du Plessis & Corder (1994) 47.

25 See for example *S v Shongwe* 1998 (9) BCLR 1170 (T) 1186I and *Key v Attorney-General, Cape of Good Hope Provincial Division* 1996 (6) BCLR 788 (CC) footnote 6. In *Key* the Constitutional Court per Kriegler J held that the resemblance of the Canadian Charter to the Bill of Rights in the Interim Constitution does not require discussion.

However, Du Plessis & Corder (1994) 46 indicate that in constructing the fundamental rights, the technical committee dealing with fundamental rights for the transitional constitution, also took into account the bills previously drafted by the negotiating parties. The SA Law Commission also submitted an annotated version of its unpublished third (draft) Bill of Rights as a discussion document. Other "less official" drafts such as the Charter for Social Justice was also examined.

Du Plessis & Corder (1994) 46 further indicate that the committee also looked at other sources from abroad. Long standing international human rights documents such as the Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights (1966), the International Covenant on Civil and Political Rights (1966), and the European Convention on Human Rights (1950) were examined. In the second instance Bills of Rights of other countries were looked at, for example the German Basic Law (1949), the Canadian Charter (1982) and the chapter on Fundamental Rights and Freedoms in the Constitution of the Republic of Namibia (1990).

The approach to interpretation adopted by the South African Constitutional Court finds an antecedent in that of the Canadian Supreme Court. The Supreme Court of Canada has similarly held that the rights and freedoms guaranteed by the Charter must be ascertained by an analysis of the purpose of such guarantee.[26] This may be ascertained by reference to the character and the larger objects of the Charter itself, the language used to articulate the specific right or freedom, to the historical origin of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.

When sections of the Canadian Charter are in issue, for example the right to life, liberty and security of the person,[27] the Canadian courts try to determine the thinking behind these provisions and what purposes these rights are intended to serve in the larger society. Understanding the "purpose" of any given constitutional provision requires a thoughtful study of history, political and constitutional theory, and the circumstances of the case in the context of current affairs in society. It is obviously not an exact science, and conclusions are frequently not unanimously accepted.

## 1.2 AIM OF THE STUDY

The aim of this study, which is titled "Problematic Aspects of the Right to Bail under South African Law: A Comparison with Canadian Law and

---

26 *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321. This judgment has been quoted with approval by the Constitutional Court on many occasions. See for example *S v Zuma* 1995 (2) SA 642 (CC) par 15 per Kentridge AJ and *S v Makwanyane* 1995 (3) SA 391 (CC) par 9 per Chaskalson P.

27 Section 7.

Proposals for Reform", is to research whether there is merit in the contention that bail is not granted according to sound judgment under South African law.

This is done by considering and comparing the relevant principles regarding bail under Canadian and South African law and the circumstances under which the principles function in each system. The study also takes note of the principles that have been applied, and the balance between the individual's right to freedom and security, and the interests of society that has been struck at different times in history.[28] The question can then be addressed whether an equitable balance has been achieved between the individual's right to freedom and security, and the interests of society under present South African law.[29] Integral to this process is the correct

---

28 Under the previous South African government individual freedom in some instances probably contested with the interests of the state. See par 2.5.2.1 - 2.5.2.2.

29 It has been suggested that it may be an oversimplification to draw a distinction between the interests of the accused on the one hand, and the interests of society on the other. Not only the accused in this equation might have an interest in his freedom and security. See the decision by the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) footnote 79. However, the court did not think it necessary to resolve the issue and elsewhere in the judgment referred to the conventional interests of society *versus* the interests of the accused (see for example par 101.15). Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche, Van der Merwe & Van Rooyen (1999) 11 indicate that what is at stake is not the community *versus* the individual, but rather two competing community interests. The community is said to have an interest in crime control and in the fair treatment of its members. The community is therefore interested in less crime and the protection of human rights. See also *Key v Attorney-General, Cape of Good Hope Provincial Division* 1996 (6) BCLR 788 (CC) par 13 per Kriegler J. However, I have decided to refer to this equation in the conventional manner supported *inter alia* by the acceptance of a triad of sentencing interests, the third of which is "the interests of society" by the Appellate Division in *S v Zinn* 1969 (2) SA 537 (A). See also for example the acceptance of this equation by the Constitutional Court in *S v Makwanyane* 1995 6 BCLR (CC) at par 250 per Madala J: it "calls for a balancing of the interests of society against those of the individual".

interpretation and application of principles. Many of the concepts, for example the presumption of innocence and the right against self-incrimination, are the product of years of accumulated wisdom and have been designed to ensure a fair contest between the state and the individual exposed to the criminal justice system. The correct interpretation and application of these principles is therefore integral to an equitable system.

The study researches the presumption of innocence as the underlying principle for the existence of the right to bail and its role in bail proceedings. It investigates the constitutional structure within which the right to bail operates. Close attention is paid to the constitutional guarantees to bail, as being the primary provisions under both systems.

It researches and compares certain problematic aspects of bail, where the battle to find a balance has been very contentious recently under South African law.

The study also considers whether the Canadian Charter and Charter jurisprudence is indeed a suitable model for human rights in South Africa.

It draws conclusions and makes proposals for the protection of the individual's right to bail, which would be in balance with the interests of society.

## 1.3 IMPORTANCE OF THIS TOPIC

The rules of criminal procedure play a crucial role in the South African legal order and with the inclusion of some of these rights in a Bill of Rights they

have an even more important social function.[30] However, there has been widespread disillusionment with the criminal justice system in South Africa. It is hardly necessary to mention the seriousness of crime in South Africa and the impact it has on almost every aspect of our lives. Many South Africans live in fear, if not panic, because of the random acts of violence which assault our sense of security and repose. It is of paramount importance for the well-being of this country (as that of any other country) and its citizens to have in place an effective and equitable criminal justice system.

The principles of bail have caused much of this disillusionment. On the one hand one finds those, which seem to include the majority of the public, who advocate the crime-control approach to the granting of bail. They propose that severe restrictions be placed on the rights of an applicant to bail. Proponents of the crime-control approach stress that the dominant purpose of the criminal justice system is to prevent and prosecute crime effectively.[31]

---

30 The FC directs that the rights in the Bill of Rights must be protected and promoted (section 7(2)) in order to improve the quality of life of all its citizens (Preamble). Along with the other rights in the Bill of Rights, the criminal procedure rights therefore have a role to play in reconstructing South African society. In this exercise the criminal procedure rights (section 35) in the Bill of Rights must be balanced out against the duty that has been cast on the state to protect individuals against criminal violence (section 12(1)(c)).

31 See Viljoen in the *Bill of Rights Compendium* (1996) 5B - 5 and 5B - 6. It is a moot question whether the setting of strict conditions of bail will in the first instance inhibit criminal conduct. The comments of at least two prominent judges have played down the usefulness of the setting of strict conditions of bail in deterring crime. In *S v Makwanyane* 1995 (6) BCLR 665 (CC) the Constitutional Court per Chaskalson J held that "[t]he greatest deterrent of crime is the likelihood that offenders will be apprehended, convicted and punished" (par 122). Cameron J then of the Transvaal High Court in his Alan Paton Memorial Address indicated that what inhibits crime is rather the prospect of certain pursuit, apprehension and punishment. In the absence of pursuit, apprehension and punishment harsher bail conditions will remain at best a distraction (see (1997) 114 *SALJ* 504 509).

On the other hand one finds those who favour the due process model. Proponents of the due process model of criminal justice require that the rights and freedoms of the accused be strictly observed at every step of the proceedings. In doing so, they try to ensure that the accused spends as little time as possible in custody pending the outcome of the criminal trial.[32] While the criminal justice system without a doubt has to be effective, those who encourage the crime-control approach might have forgotten the dangers in bestowing too much power on the government of the day and the dire social consequences caused by unnecessary incarceration.

While it is therefore of obvious importance to determine whether bail is indeed not granted according to sound discretion, or as it is popularly said "too easily", the study also seeks the cause of the muddle that the bail system finds itself in. It points to the acceptable principles of such a system, and proposes amendments for an effective and equitable dispensation.

## 1.4 OVERVIEW OF CHAPTERS

Excluding the first chapter, this study is presented in the following ten chapters:

**Chapter 2** examines the origins and development of the principles of bail under South African law up to the present position. The Roman, Roman-Dutch and English law heritage as a precursor of the South African

---

32 The term "due process" is derived from American law. Other rights-based democracies which provide procedural safeguards against executive abuse of power are Australia, New-Zealand and the states of western Europe. See Neveling & Bezuidenhout in Nel & Bezuidenhout (1997) chapter 20 ("Summary") and par 20.1 and Viljoen *ibid.* See Gora (1978) and Tribe (1988) 663 - 768 for discussions on due process.

legislation is researched and the developments on South African soil are briefly shown along with a description of the position as at 30 June 1999.

**Chapter 3** gives a general overview of the origins and development of constitutionally protected rights in Canada in historical context. It describes the court structure so that the importance and relative weight of a specific decision can be ascertained.

**Chapter 4** provides a brief survey of bail under Canadian law before the Bail Reform Act.[33] It shows the changed attitude towards pre-trial release with the Bail Reform Act and states the position as at 30 June 1999. To provide a proper picture, aspects of arrest are also mentioned. It compares the general position under Canadian law with the general position under South African law as at 30 June 1999.

**Chapter 5** investigates the presumption of innocence, which is the cornerstone of the criminal law under Canadian and South African law. It investigates the operation of the presumption of innocence and its role in bail proceedings under both systems. It determines whether this presumption protects the security and freedom of an individual when application is made for bail at the different stages of the criminal process. It compares the position under Canadian and South African law.

**Chapter 6** investigates whether section 7 of the Canadian Charter or section 12 of the Final Constitution affords an applicant protection at the bail hearing. It considers whether an applicant in bail proceedings under Canadian and South African law can rely on a residual right to procedural fairness in

---

[33] 1970 - 71 - 72 (Can) c 37.

terms of section 7 of the Canadian Charter, and section 12 of the Bill of Rights respectively.

**Chapter 7** examines and compares the scope of the right to bail in terms of section 11(e) of the Canadian Charter and section 35(1)(f) of the Bill of Rights.

**Chapter 8** investigates and compares the incidence of the onus in bail proceedings under Canadian and South African law.

**Chapter 9** determines whether the evidence tendered for purposes of bail proceedings and derivative evidence is admissible at the subsequent criminal trial under present Canadian and South African law. It also indicates whether it should be permissible.

**Chapter 10** examines whether access is allowed to the information held by the state for purposes of a bail application under present Canadian and South African law. It also examines if and when it should be available.

**Chapter 11** provides a holistic overview. It draws together the issues that have been pursued and the conclusions that have been reached. It indicates whether the Canadian model is an appropriate one to learn from. It compares the individual's right to bail under Canadian and South African law and takes note of the principles that have been applied over time. It indicates whether the correct balance between the individual's right to freedom and security, and the interests of society has been reached. It makes recommendations to attain an equitable system.

## 1.5 DIFFICULTIES AND LIMITATIONS OF THIS STUDY

### 1.5.1 General

The development of the principles in respect of bail under South African law has had a very unfortunate history, all of which contributes to the lack of credibility, uncertainty and complexity facing anybody who wishes to study these principles. The principles in respect of bail under South African law are generally vague, even at the "elemental level".[34] The constitutional right to bail was due to a misconception drafted into a structure that led to serious difficulties.[35] Unclear, and sometimes questionable, legislation in recent times has made matters worse. Disharmony between, and uncertainty and foundational confusion by some South African courts in applying the human rights principles have caused further problems.[36]

This murkiness is worsened by the lack of consensus under South African jurists as to the contents and scope of the common-law presumption of

---

34 See the comments by the court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) par 3:

> The origins of bail are 'obscured in the mists of Anglo-Saxon history' and its modern dimensions remain 'an incoherent amalgam of old and new ideas serving more to defeat than to achieve the aims of the criminal process.' In South Africa, judicial pronouncements on the topic have been called 'labyrinthine'. There is murkiness even at the elemental level of the source(s) of South African power to grant bail, i.e. whether the power derives exclusively from - and is circumscribed by - chapter 9 of the Criminal Procedure Act (the CPA) or whether there is a parallel reservoir of 'inherent' or 'common law' power on which a judge can draw.

35 See chapter 6 in general and specifically par 6.3.2 including footnote 45.

36 See especially chapters 5 - 10.

innocence as a principle of fundamental justice, let alone its application in the fundamental rights era.

### 1.5.2 Difficulty in determining principles fuelled in some instances by South African legislature

The task to determine and understand, and in the instance of the courts also to apply, the constitutionally based principles of bail, was in many instances not made any easier by unclear and sometimes questionable legislation. It is the more the pity as our policy makers had tried and tested systems, for example the relevant provisions of the Canadian Criminal Code, to refer to. This in itself has led to much debate and contributed to the "labyrinthine" build-up of court pronouncements.

For example, while the use of the term "in the interests of justice" in many subparagraphs of section 60 the Criminal Procedure Act[37] has now been confirmed as incorrect by the Constitutional Court, many hours were spent in trying to harmonise these principles. Where the legislature supposedly wanted to give demarcated guidelines and set a structure to determine the crucial norm, "in the interests of justice", in section 35(1)(f) of the Final Constitution, it rather created immense problems for those who wished to understand the principles.

The problem was exacerbated by the unfortunate wording of section 60(4) of the Criminal Procedure Act which seems to be a deeming provision in conflict with the Bill of Rights. Section 60(4) does not seem to permit other factors to be taken into account.[38] The court is therefore directed to come to

---

37 51 of 1977.

38 See my conclusions par 11.3.4.8

a factual conclusion, that might differ from that to which an objective evaluation might lead. However, the section was unconvincingly saved through some legal gymnastics by the Constitutional Court, on 3 June 1999.[39]

### 1.5.3 Foundational confusion

The South African courts in general have had difficulties in imposing the human rights principles on a system that had evolved under a totally different system. In addition the disharmony between the courts and on many occasions between members of the same court, and foundational confusion by some concerning human rights principles, caused further problems for this study.

The Constitutional Court even seems to have changed its mind on a crucial issue without indicating it as such. On six occasions the court denied conceptual similarity in the analytical process when it built up a conceptual wall between sections (11) IC; 12 FC and 25 IC; 35 FC. However, when the same court was faced with certain issues concerning bail in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[40], the unanimous court, some of whom were instrumental in erecting the wall, and all the parties concerned, seemed to accept that section 35(1)(f) is part of, or is a specific instance of, the right enumerated in section 12. Meanwhile many high court decisions tested bail problems as a liberty issue in terms of section 12. The applicability of section 12 is of course crucial for the bail process because it guarantees due process, and, as will be indicated, allows for the transplantation of

---

39 See par 7.3.5.

40 1999 (7) BCLR 771 (CC).

persuasive doctrines and principles leaving little scope for foundational confusion.[41]

It is a pity that the substantial jurisprudence under Canadian law did not point the way. The relationship between section 7 and sections 10 and 11 of the Canadian Charter were clearly spelt out and apparent for all who would wish to study it.[42]

Confusion concerning the basic structure of the fundamental protection of the individual's right to freedom and security, coupled with obvious disagreement between the members of the court when it dealt with sections 11 and 12, does not instil confidence in the Constitutional Court's ability to decide issues pertaining to bail.

To make matters worse, it seems that the policy makers closely follow the decisions of the Constitutional Court when drafting legislation. The factors mentioned in section 36 of the Bill of Rights is a point in issue.[43] On its part the Constitutional Court on occasion, even when it points out a provision to be imperfect, does not strike it down, leaving a precarious position.[44] It can even be argued that the judgments of some courts, in the first instance due to lack of experience in upholding fundamental rights, follow the arguments by the prosecution too closely, and are unduly influenced by the outcry of

---

41 See chapter 6.

42 *Ibid.*

43 The factors were copied almost verbatim from Chaskalson P's discussion of proportionality in *S v Makwanyane* 1995 (6) BCLR 665 (CC) 708E - F.

44 For example section 60(4) of the CPA. See *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC).

society. This whole sequence of events, sometimes starting from the court accepting the prosecution's argument, of course ends in the contentions of the state carrying the day.

One is therefore forced to unravel the decisions and provisions dictating bail very closely.

### 1.5.4 Difficulty in comparative approach

The application of a comparative approach also led to some difficulties. While the principles are much clearer under Canadian law, it proved a challenge to trace some of the relevant sources. Many of the numerous different sets of law reports reported under Canadian law are for example simply not available in South Africa or on the Internet.[45] If I therefore obtained a case reference to one of these sets of reports I was forced to find the case in the reports available in South Africa or on the Internet. However, the case names frequently differ from the one case report to the other. Sometimes the change is subtle, sometimes the case is reported under a completely different name. This situation is worsened by the fact that many Canadian authors and law reports use their own style when referring to case law. In addition it takes some months for the latest information regarding Canadian law to be placed on the Internet and for the other sources to filter through. As an example the Internet during October 1999 still only reflected the Criminal Code of Canada as at 30 April 1999. Notwithstanding, every effort was made to secure all available information up to the cut-off mark.[46]

---

45 For example the Saskatchewan Reports, the Weekly Criminal Bulletin and the Western Weekly Law Reports.

46 Par 1.5.5.2 states the cut-off date as 30 June 1999.

### 1.5.5 Limitations

#### 1.5.5.1 Scope

The study by its nature has to be selective. It is not possible to properly research and compare all the aspects concerning bail under South African and Canadian law in a study of this scope. The study does not therefore pretend to cover all the aspects regarding bail. A choice was made of the topics that I thought would be most helpful to show whether bail is granted injudiciously, and which has been the most contentious under present South African law.

#### 1.5.5.2 Time frame

The study is also limited by the fact that the South African law is in flux. While the principles under Canadian law concerning bail seem to be infinitely more settled, the protection of fundamental rights in South Africa is in its infancy, and many changes to the present position are sure to follow. The development therefore has to be "frozen" at some point. It is accordingly inevitable that the study be subject to time frames. I had originally planned to make the cut-off date earlier, but because of the importance for this study of the Constitutional Court's decision in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat,*[47] I decided to wait for the decision until the end of June 1999. When the decision was delivered on 3 June 1999 I managed to obtain an unreported copy soon thereafter and decided to stay with 30 June 1999 as cut-off date. Consequently developments such as the publishing of the

---

47 1999 (7) BCLR 771 (CC).

Promotion of Access to Information Act[48] were not taken into account.[49] I therefore state the position as at the end of June 1999.

1.5.5.3 Limitation in comparative approach

The two societies that I compare are very different and there are some differences in the respective criminal justice systems. One cannot therefore simply take cognisance of the principles on bail under Canadian law outside these contexts.[50] As with any other comparative legal study, this study might therefore be inherently limited as one might not be able to adequately appreciate all these differences when conclusions are reached and recommendations are made.[51] However, in doing a study like this, one is exposed to the Canadian criminal justice system and the sociological factors in Canada as they appear from the case law and other writings of Canadian scholars over an extended period of time. This knowledge was applied when conclusions were reached and recommendations were made. To a large extent these risks have therefore been minimised.

---

48 Act 2, 2000 which was published on 3 February 2000 by way of Government Gazette 20852 (General Notice 95 of 2000). See chapter 10.

49 As I have included some remarks by politicians after 30 June 1999 and referred to the United Nations Human Development Report 2000 there is in a sense no specific cut-off mark. However, legal developments after 30 June 1999 have not been included.

50 See my *caveat* in par 1.1.

51 The high court has warned of the danger of relying on foreign law outside these contexts. In *Nortje v Attorney-General, Cape* 1995 1 SACR 446 (C) 450a - i Marais J elaborated on the difficulties in assessing foreign law due to the difference in the criminal justice systems and sociological factors prevailing between South Africa and the foreign country. In *Berg v Prokureur-Generaal, Gauteng* 1995 (11) BCLR 1441 (T) 1445G - H the court per Eloff JP refused to take foreign case law into consideration without having full information on the criminal justice systems and constitutions of those countries.

## 1.6 *MODUS OPERANDI* AND RESEARCH METHODOLOGY

### 1.6.1 *Modus operandi*

The approach of this study is partly comparative and partly historical. The main focus is a description and comparison of contemporary South African and Canadian law with limited reference to other foreign and international law. In addition, historical balances and principles are identified in an overview of the origins and development of the principles of bail. The suitability of Canadian law as a source of reference is also investigated. After each section conclusions are reached. In the end the lines that have been followed and the conclusions that have been reached are drawn together to give a complete view of the subject matter.

The study is also prescriptive in that it does not only describe whether bail is indeed granted injudiciously under present South African law, but it identifies the shortcomings of the system and makes proposals for an equitable balance between the interests of society and an applicant for bail. The study also tries to secure consensus by proposing the correct interpretation and application of principles.

### 1.6.2 Research methodology

The following are some of the sources that were consulted and avenues that were explored:

#### 1.6.2.1 Interviews

Interviews were held with members of the legal profession who participated in the drafting of the fundamental rights provisions of the Interim and the Final Constitution.

#### 1.6.2.2 Literature review

The following literature was reviewed:

- The reports of the "Technical Committee on Fundamental Rights during the transition" were consulted.
- The "Draft Minutes of the Combined Meetings of the Ad Hoc Committee and the Technical Committee on Fundamental Rights during the transition" were consulted.
- Under South African law all the information available on the web-site with address <http://www.constitution.org.za> was canvassed.
- A thorough literature search was conducted including books, journals and CD's.
- The data base Lexis-Nexis assisted me with some foreign sources that proved elusive. Beyond Lexis-Nexis the Internet could only provide limited assistance as to the literary search.
- Many Canadian web-sites, for example the web-site of the Canadian Justice Network at <http://www.acjnet.org> and the web-site of the Centre for Research into Public Law at <http://www. lexum. umontreal. ca>, were canvassed.
- I also referred some issues to the Department of Justice of Canada *via* the information desk at the Canadian High Commission. However, I was

informed that the Department does not supply legal advice or information through its web-site.[52]

## 1.7 WORK ALREADY DONE IN THIS FIELD

Because the question of bail has been a contentious issue for some time, a relatively substantial number of publications on various aspects of bail have appeared in South African legal journals over the last two decades. It is especially the advent of the fundamental rights provisions, and developments and pronouncements of the last few years, that have urged many to reach for the pen.

As far as research projects are concerned, two court studies, and three projects mainly on the principles of bail in general, were undertaken and completed in the pre-constitutional era. Another project of the South African Law Commission, although mostly carried out in the pre-constitutional era, was finished after 27 April 1994 and took into account constitutional principles.

The results of the first of these court studies by NC Steytler was published in 1982 as "Deciding on liberty - a bail study of the Durban magistrates' courts".[53] The study analysed the bail process in a few selected magistrates' courts.

---

52 My personal experience as commissioner, court martial president, prosecutor, magistrate and advocate in private practice also proved valuable.

53 (1982) 6 *SACC* 3.

The results of the second court study by LD Fernandez was published as "Bail: an aspect of justice" in the same year.[54] The study was aimed at establishing the functional role of certain factors, for example race and sex, in the criminal justice process.

The first work on the principles of bail in general, an unpublicised LLM dissertation by TJ Nel with the title *Borgtog in die Suid-Afrikaanse strafprosesreg/ Bail in the South African law of criminal procedure* was submitted at the University of Stellenbosch in 1985. TJ Nel followed up the dissertation in 1987 with a guide titled *Borgtoghandleiding* that was mainly based on his dissertation.

At around the same time J van der Berg published a guide for practitioners titled *Bail - a practitioner's guide*. It stated the law as at 31 July 1986.

In November 1990 JH Du Plessis submitted an LLD thesis with the title *Aspekte van borgtog: 'n Regsvergelykende studie* at the University of South Africa. In this study Du Plessis investigated and compared the development of the English and South African law of bail and set out the principles involved. This seems to be the only other LLD study on the subject-matter under South African law.

In March 1986 TJ Nel initiated a process which culminated in a report under the title *Project 66 - Reform of the South African law of bail* by the South African Law Commission in December 1994. The Commission researched and made recommendations concerning perceived defects in the South African law on bail.

---

54 (1982) 6 *SACC* 72.

It is to be noted that these research projects, except to a limited extent the study by the Law Commission, did not research and deal with the question and principles of bail in a constitutional dispensation with protected rights, including *inter alia* the right to bail and freedom and security of the person. The contribution of these sources for my study was therefore mainly limited to the study of the history and development of the principles of bail up to 1994, which forms a small part of this study.

In the fundamental rights era, two "mini-dissertations" have been completed under the leadership of professor NC Steytler at the University of the Western Cape.[55] The first of these dissertations by JO Wells deals with the admissibility of evidence in bail proceedings against an accused at his[56] later trial and was submitted before the commencement of section 60(11B)(c) of the Criminal Procedure Act on 1 August 1998. The second dissertation by ZCN Madotyeni investigates an accused's right of access to police dockets for purposes of the bail hearing.[57]

---

55 The dissertations weigh one fifth towards obtaining examination-based LLM degrees.

56 In writing this thesis I endeavoured to use gender-neutral language where appropriate. Perhaps illogically and understandably offensive to some, the masculine pronoun is used where neutral language is inappropriate. This was done not due to a lack of sensitivity but because of the provision in section 6 of the Interpretation Act 33 of 1957. Section 6 provides that in every law unless the contrary intention appears, words imputing the masculine gender include females.

57 From the table of results of the Division for Social Sciences & Humanities at the Human Sciences Research Council, it seems that there are two further research projects towards obtaining Masters degrees under way under the auspices of the University of South Africa. But it is not known whether these are full-length dissertations or also "mini-dissertations" as part of examination-based courses. The author, title and year of commencement given by the data base is:

- MB Ndokweni, The meaning of the phrase "in the interests of justice" in the context of the right to bail in section 25(2)(d) of the

It appears that no comprehensive comparative study of the principles of bail in the new era of protected rights has been done under South African law. It is hoped that this comparison with mainly Canadian law, a system on which South African scholars rely extensively for guidance when dealing with human rights issues, will help to fill this vacuum and provide information or answers in the ongoing debate on the question of bail. The study also researches many aspects that have not been researched under South African law before and updates the research by those mentioned above.

---

constitution of the Republic of South Africa, 1993 (Act no 200 of 1993), 1995.

- TM Ngutshane, The application for bail in South Africa, 1997.

# CHAPTER 2

## HISTORICAL OVERVIEW OF THE ORIGINS AND DEVELOPMENT OF BAIL UNDER SOUTH AFRICAN LAW UP TO 30 JUNE 1999

## 2.1 INTRODUCTION

An understanding of the principles and purpose of bail within the criminal process is in the first instance necessary before a pronouncement can be made on whether bail is currently granted injudiciously under South African law. However, there is no unanimity regarding these principles, and the role that bail must fulfil. It is expected that an investigation into the origins and development of these principles will provide some clarity. It therefore remains important to investigate the origin and development of these principles.

The historical overview will also help to establish whether bail is currently being granted too freely under South African law in view of the prevailing circumstances. This chapter considers the balance that existed at different times between the individual's right to freedom and security, and the interests of society. It also identifies some of the principles that have been recognised in history.

My research shows that the principles of bail under South African law stem from Roman, Roman-Dutch and English roots. Roman-Dutch principles were applied following the occupation of the Cape in 1652 by the Dutch East India Company. After the second British occupation in 1806 English law was introduced. As a result a system began to develop that embraced elements of both these systems. The Roman, Roman-Dutch and English roots are described as a background to the overview of the development of the principles on bail under South African law up to 30 June 1999.

The principles of bail as at 30 June 1999 under South African law are only stated briefly in this chapter. Although this study concentrates on particular comparisons, a summary of the present position is necessary to be able to

make a general comparison of the law pertaining to bail under South African and Canadian law. The comparisons and analysis are left for later chapters.

This chapter also shows why there is a need for the constitutional protection of a threshold right to bail.

## 2.2 ROMAN LAW

### 2.2.1 Introduction

A survey of ancient Roman law[1] reveals no true criminal law as we understand it today. Each household was united under its own *paterfamilias*. If any offence was committed against a member of a group,[2] that group avenged the wrong.[3] There was therefore no clear distinction between public and private law. Offences, which are today prosecuted as criminal offences, resulted in private disputes.

State intervention only existed in as far as the submission of disputes to a central authority was regulated.[4] Buckland refers to it as "state regulation of self-help".[5] As such, bail was unknown. An offence could only be prosecuted

---

1 It is not clear when the Roman society started as there is nearly a total lack of documentary evidence of the time before 450 BC. According to word of mouth Roman society existed as far back as the eight century BC. See Van Zyl (1983) 3. However, it seems that the history I describe dates back to at least some time before the composition of the Twelve Tables in 451 - 450 BC.

2 By a member of another group.

3 Maine (1861) 369.

4 Buckland (1963) 606.

5 *Ibid*.

by the injured party and the punishment was left to the injured party or his kin. The notion of injury to the community had little to do with the earliest interference by the state.[6] According to Maine the magistrate simulated the role of a private arbitrator.[7] Mommsen describes this role as follows:[8]

> The magistrate here interposes between the contending parties as a mediator: on the one hand he settles or causes to be settled the question of fact; on the other hand, when a wrong has been proved, he either gives self-help its course, or else enjoins the injured party to renounce it on consideration of receiving compensation.[9]

This practice did not survive legislation indefinitely. The state either undertook to punish the crimes as was done with certain crimes[10] under the Twelve Tables[11] or private vengeance gave way to compulsory compensation prescribed by the state.[12] However, as Kunkel explains, the Twelve Tables was still largely based on the right of an injured party to private vengeance.[13] Punishment was inflicted by the state only in limited instances. In all other

---

6 Maine (1861) 374. This lack of any clear distinction between criminal law and law pertaining to delicts subsisted even until the era of Roman-Dutch law. See Du Plessis (1990) 16.

7 (1861) 378.

8 (1899) 905.

9 My translation.

10 Such as high treason (*perduello*) and perhaps in the case of certain grave crimes of a sacral kind. See Kunkel (1973) 27.

11 *Lex Duodecim Tabularum*.

12 Strachan-Davidson (1969) 42.

13 (1973) 27.

instances, including murder, punishment was left to the injured party or his kin.[14]

It is not difficult to understand why private vengeance gave way to compulsory compensation in the private criminal suit. The task of private vengeance was without doubt a heavy task on the injured, the weak, the indigent and those without influence. This was an even more daunting task when the culprit had strong family connections or was strong of body or both. It is therefore not surprising that when the state emerged from anarchy, a magisterial hand was extended to help the weak.[15]

The culprit was fined a definite sum. The plaintiff was now in the position of a judgment creditor who may proceed *per manus injectionem*.[16] This was again self-help for it may be initiated *non expectata judicis auctoritate*.[17] The advantage of having first obtained a judgment lay therein that in the unadjudicated cases the defendant could resist seizure,[18] but not so with decided cases.[19] Where a judgment has first been obtained Gaius tells us *"nec*

---

14 Caecilius argued that the permission of *talio* in the Twelve Tables was only granted when the culprit refused a proper reparation. The injured party could therefore not refuse reasonable satisfaction. See Strachan-Davidson (1969) 42.

15 Strachan-Davidson *ibid* 43 indicates that there is no record that the authorities dealt out the punishment or that the private person was assisted in his vengeance. However, he reminds us that no specific instance of vengeance being carried out was ever recorded.

16 The plaintiff could seize the defendant.

17 Without the expected authority of the judge (without a warrant of arrest).

18 *Manum depellere.*

19 Here the formula runs *tibi pro judicato manum injicio.*

*licebat judicato manum depellere*".[20] According to Strachan-Davidson this can only mean that in the case of resistance the state will lend its force to compel submission.[21]

The changes to the judicial practice is aptly summarised by Mommsen as follows:[22]

> From that time forward capital punishment by private suit is set aside, and never reappears. The conception of ransom money, which has from the first entered with effect into the procedure for crimes against individuals, henceforth reigns supreme in this sphere.

The crimes that the Romans wanted to punish other than by pecuniary means were removed to the sphere of public justice.[23]

In the long evolution of the Roman law the forms of legal redress also underwent fundamental changes.[24] State regulation of self-help gave way to three systems of litigation that succeed each other in time. They were:[25]

---

20 I 4 21 - 25.

21 (1969) 44.

22 (1899) 941 (translation by Strachan-Davidson 45).

23 See Strachan-Davidson (1969) 45. The "private criminal law" of the Twelve Tables proved increasingly inadequate as Rome grew into a metropolis accompanied by a rise in crime. In the course of the third century BC a drastic police-jurisdiction arose directed against crimes such as arson, poisoning and theft. An arrested person was punished officially though the procedure could be initiated by a private citizen by means of the giving of information (*nominis delatio*).

24 Buckland (1963) 607.

25 Primitive institutions excluded.

- *legis actio*
- *formula* and
- *cognitio extraordinaria*[26]

These three systems are now discussed and the origins and development of the principles of bail are identified.

### 2.2.2 The *legis actio*-procedure[27]

The earliest roots of bail in Roman law can already be found in this procedure. With the increasing level of civilisation a system developed whereby the state satisfied itself that there was an issue (*lis*) between the parties and the dispute was submitted to a peer as a peaceful alternative to self-help.[28] The procedure was accordingly divided into two stages:

- the assertion of the claim before the magistrate *in iure*; and
- the actual hearing and decision of the case *apud iudicem* by the judge.[29]

For the procedure to work, both parties had to appear before the magistrate and play their part when the claim was asserted *in iure*.[30] The plaintiff was

---

26 See Buckland (1963) 607; Thomas (1976) 119; Strachan-Davidson (1969) 46 and further.

27 Modern knowledge of this ancient procedure is derived principally from Gaius book IV. See Thomas *ibid* 73.

28 Thomas *ibid* 70.

29 *Ibid*.

30 See G 4 183 and De Zulueta (1967) 301. See also Buckland (1963) 610 with regard to the *sacramentum*.

responsible to get the defendant before the magistrate.[31] This was done by oral summons (*in ius vocatio*), of which the prescribed form (if there was one) is unknown.[32] The defendant either had to obey the summons by going to court or give a surety (*vindex*) who would be responsible for his appearance.[33] If the defendant did neither, the plaintiff having called someone to witness, could then arrest the defendant and drag him to court by force if necessary. Although uncertain, it seems that one might have been excused from attending in certain circumstances for example *morbis sonticus*[34] when the case will be postponed.[35]

The magistrate had to go through a set of rituals comprising specific acts and declarations (*actiones*). These formalities had to be strictly complied with since the slightest deviation could nullify the procedure.[36]

The term *actio* refers to the acts and declarations that the plaintiff had to execute to assert his claim. There appears to have been an appropriate *legis*

---

31 See *ibid* and Borkowski (1994) 61.

32 XII Tab 1 1. See also Van Warmelo (1970) 297; De Zulueta and Borkowski *ibid* and Buckland (1963) 610 with regard to the *sacramentum*.

33 Even though direct evidence of there having been a *vindex* in this period is lacking, the weight of authority and argument seems to favour this view. *Vindex* could not have been an invention of the formulary period (see G 4 46). See Van Warmelo, De Zulueta and Borkowski *ibid*. See also Buckland *ibid* 613 with regard to the *sacramentum*. What the exact function of the *vindex* in this period was is not altogether clear. See Buckland (1963) 613 and De Zulueta (1967) 302 footnote 3.

34 This refers to a serious disorder that excuses one from duty.

35 See Buckland (1963) 610 with regard to the *sacramentum*. Borkowski (1994) 61 indicates that if the defendant was sick or infirm through age transport had to be arranged for him.

36 See Buckland *ibid* 610 - 611 and Van Zyl (1983) 368.

*actio* for each wrong, but Gaius indicates that there were but five moulds into which every *legis actio* (the one or the other) was cast.[37] The *sacramentum* was a general action applicable in all cases where no special procedure was prescribed.[38] Although not altogether clear, the *sacramentum* was probably an oath which each party took to the righteousness of his plea. A false oath would render him *sacer* to the God invoked.[39] Initially, this lead to the death of the liar but later on extenuating circumstances were taken into account. Each party therefore beforehand gave beasts or money, which shall cleanse him from guilt in case he turns out to have sworn wrongly. At an even later stage security of a specific amount was taken depending on the nature of the case and the amount involved.[40]

The next step was to appoint a *iudex*, originally immediately, but after an uncertain date,[41] after 30 days[42] delay, to give the parties time to settle their dispute.[43]

The magistrate could not proceed if the *in ius vocatus* refused to co-operate after he had been brought to court. The case could not be adjudicated.[44] As

---

37 G 4 12. *Sacramentum, iudicis arbitrive, postulatio, condictio, manus iniectio* and *pignoris capio.* The first three *actiones* were directed at resolving the dispute between the parties. The last two were applied for purposes of executing a judgment. See Van Warmelo (1970) 233 and Van Zyl *ibid.*

38 G 4 13.

39 See Thomas (1976) 74 and De Zulueta (1967) 235.

40 A sum of 50 asses if the matter was worth less than 1000 or it was a question of liberty, in other cases 500. See Buckland (1963) 611.

41 *L Pinaria* of uncertain date.

42 G 4 15.

43 See Buckland (1963) 611.

the proceedings might not finish in one day and there was a delay of 30 days to appoint a *iudex*,[45] the presence of the summoned party during these adjournments also had to be ensured. Security for the defendant's reappearance *in iure* could be given by *vadimonium*.[46] *Vadimonium* could be used for all adjournments of the *legis actio*,[47] even for the transfer from *ius* to hearing.[48] If postponement of the *iudicium* was needed *vadimonium* was not used and it seems that judgment went by default.[49]

Where the action was for a judgment debt or on a payment made by a sponsor,[50] *vadimonium* was taken equal to the sum being claimed. In other cases the *vadimonium* was limited to half the amount claimed not exceeding 100 000 sesterces.[51] *Vadimonium* also took various forms. Sometimes it was with surety, sometimes a mere promise and sometimes it was under oath.[52] In some cases the *vades* gave security by *subvades.*[53]

---

44 Buckland *ibid* 613 and De Zulueta (1967) 302.

45 The *iudex* did not act at once. There was a delay to the third day on which the hearing began. See Buckland *ibid*.

46 *Ibid*.

47 Aul Gell 6 1 9.

48 G 3 224; 4 15.

49 This point is controverted *inter alia* by Bertolini *Il Processo Civile* 1 96.

50 Although direct evidence is slight it seems that a sponsor's earliest function was the acceptance of *obligatio* on behalf of another. The term therefore denotes a guarantor. See De Zulueta (1967) 152.

51 G 4 186.

52 G 4 185.

53 Aul Gell 16 10 8.

The earliest roots of bail therefore stems from the fact that the summoned party could guarantee his appearance *in iure* in the form of a *vindex*, or his reappearance *in iure* by way of *vadimonium*.

### 2.2.3 The *formulae*-procedure

Although the old practice of allowing a summoned party to guarantee his appearance *in iure* in the form of a *vindex*, or for his reappearance *in iure* by way of *vadimonium* was carried foreward into this classic form, certain changes were effected that concern bail under this system.

This new system of procedure to resolve disputes between citizens was in use by the second half of the second century BC.[54] The *legis actiones* gradually fell into disfavour as a result of their exaggerated formalism, archaic nature and limited effectiveness and it seems that suitors could proceed by either the *legis actio* or the *formulae* until two *Leges Iulia* of 17 BC swept away the *legis actio* altogether.[55]

The formulary system was essentially a modification of the *legis actiones*.[56] The proceedings generally started with an *in ius vocatio* and the proceedings

---

54 G 4 30; See Buckland (1963) 628 and Thomas (1969) 84. Even though it was legitimated by a *lex Aebutia* of the second century BC *formulae* were probably in use before this enactment. See Thomas *ibid* and Watson (1963) 9 *RIDA* 431.

55 See Wlassak (1888 - 1891) Vol 1 9 - 10 and Van Zyl (1983) 372. Gaius 4 30, 31 tells us that it survived in the case of *damnum infectum* and where the case was to go before the *centumviri*, in which case it had to be tried by *sacramentum*. It seems that this procedure was dominant in approximately the first three and a half centuries AD.

56 Mackenzie (1991) 362 remarks that this system was a modification of the preceding one, freed from its mysterious and sacramental forms. The initiative

were still divided into two stages - that *in iure* before the magistrate and the actual trial *apud iudicem.* However, instead of the oral declaration of *certa verba in iure*, proceedings before the magistrate were directed at obtaining a written *formula* to be addressed to the proposed judge[57] with instructions on how he was to adjudicate.[58]

The formula usually consisted of three distinct parts called the *demonstratio*, the *intentio*, and the *condemnatio.* The *demonstratio* briefly stated the facts that gave rise to the litigation.[59] The *intentio* set forth the plaintiff's claim, and the question that the *iudex* had to decide. The *condemnatio* gave the judge the power to acquit or condemn the defendant after he had examined the matter.

The magistrate had greater powers than under the *legis actio*-procedure. Instead of only submitting an "unjust" or "just" *sacramentum* to the *iudex* the magistrate defined more closely in the written document what precise issues had to be decided, and what effect these decisions were to have on the final verdict.[60] The magistrate could create new actions and defences and could refuse actions where civil law allowed them.[61] These rights or the refusal thereof were then inserted in the *formula* in the imperative mode. The *intentio* was always stated as a hypothesis: "If it should appear ... ".[62] As Mommsen

---

remained with the parties to the dispute, even though the power of the praetor was considerably enhanced in consequence of the *lex Aebutia.*

57 Said to be a lay person.

58 See Buckland (1963) 627 and Thomas (1969) 84.

59 *Res de qua agitur.*

60 Strachan-Davidson (1969) 67.

61 See Buckland (1963) 627.

62 See Strachan-Davidson (1969) 67 and Van Zyl (1983) 374 - 375.

explained, when the praetor says to the *iudex*, *"si paret ... condemna"*, this is only a polite way of saying *"si tibi paret, ego condemno"*.[63]

The normal course was still to begin the action with an *in ius vocatio* which meant that the defendant had to appear or give a *vindex*. The *vindex* was liable to an action *in factum* if he did not produce his principal *in iure*,[64] and the defendant himself was liable to an action *in factum* and to *missio in possessionem* if he neither appeared nor gave a *vindex*.[65]

The old right of taking the defendant by force before the magistrate remained if he refused to come before the magistrate or give a *vindex*, but there was an alternative to the *in ius vocatio.*[66] *Vadimonium*, which was used to ensure the attendance of a party, should a postponement become necessary, could also be used by agreement as a substitute for the *in ius vocatio* to secure a first appearance.[67] In this period *vadimonium* consisted in the defendant binding himself to appear *in iure* by way of a verbal contract.[68] In the event of non-appearance the penal sum was as stated previously, and had in some cases to be supported by sureties or otherwise.[69]

---

63 (1899) 176, note 4. Translated it reads "if it be proved ... condemn" and "if it is proved to you, I condemn".

64 To declare the law.

65 The plaintiff could be authorised to take over his property, as would be the case if the defendant went into hiding to avoid his summons. See Buckland (1963) 631 and Thomas (1969) 85.

66 Buckland *ibid*.

67 See Cicero, *pro Quinctio*, 19 61 and Buckland *ibid.*

68 G 4 184.

69 See par 2.2.2 (G 4 185 -186). *Vadimonium* used to start proceedings was

The system of *formulae* was increasingly superseded and eventually replaced by the *cognitio* system. However, many traces of it could still be found in the *Digest.*[70]

### 2.2.4 *Cognitio extraordinaria*[71]

#### 2.2.4.1 Introduction

This process became increasingly prominent, even though Augustus virtually made the *formula* the exclusive form of litigation in Italy.[72] In 342 AD the *formula* was formally abolished by Constantinus II.[73]

The *cognitio*-procedure was often referred to as *extra ordinem*, signifying its distinctness from the formulary system of classical times.[74] The development of an extensive bureaucracy procedure during the post-classical times to a certain extent led to the imposition of this procedure.[75] It was *par excellence* a procedure of the Roman Empire which also blended in with the new approach

---

extra-judicial and because it was a matter of agreement there was no general rule regarding surety. See also Buckland *ibid,* De Zulueta (1967) 302 and Borkowski (1994) 66.

70 Mommsen, Kreuger & Watson (1985) xv.

71 It seems that this type of procedure had its inception in approximately the second half of the third century AD.

72 Thomas (1976) 120.

73 C 2 57 1.

74 See Van Zyl (1983) 384 and Van Warmelo (1970) 323.

75 See Van Zyl and Van Warmelo *ibid* and Borkowski (1994) 73.

to legal matters.[76] The imperial autocracy was not conducive to the survival of the lay judge. Under this system, the proceedings from beginning to end took place before an imperial magistrate, or his appointed deputy, who was more independent than under the *legis actio*.[77] The magistrate controlled the whole procedure. There was no division of proceedings and the initiative or jurisdiction no longer rested on the agreement of the parties.[78] In accordance with this the security to ensure the appearance and attendance during proceedings had to be made to the state. As such the process reminds much more of a modern legal system than anything used previously in Roman law.

#### 2.2.4.2 Before Justinian[79]

The plaintiff submitted his written complaint or statement of claim[80] to the magistrate, which was communicated[81] to the defendant by an official. The defendant was also summonsed to appear on a date not less than 10 days later[82] and to before then, enter a defence.[83]

---

76 The starting-point was no longer the process in which framework the law was built up. More, as in modern times, the legal rule rather acted as the starting point to be applied in the legal process. See Van Warmelo *ibid*.

77 The administration of justice was just another aspect of government where the emperor through his appointed officials resolved the disputes of his subjects. See Van Zyl (1983) 384, Van Warmelo *ibid* and Borkowski (1994) 73.

78 Thomas (1976) 120; Mommsen, Kreuger & Watson (1985) xii.

79 Nov 53 3. This period refers to the latter part of post-classical era up to the governance of Justinian in 527 - 565 AD.

80 *Libellus conventionis.*

81 Thomas (1976) 120 says that a copy was sent to the defendant.

82 Nov 53 3 2. Under Justinian the period was 20 days.

83 *Libellus contradictionis*.

Security was required to secure the attendance of the defendant.[84] Du Plessis points out the following:[85]

- The security went to the court and not to the plaintiff as in the case of *vindex* and *vadimonium*.
- A defendant who denied the allegations against him had to give a *cautio iudicio sisti* with sureties.[86]
- If the defendant refused or neglected to give his *cautio* he could be arrested by the *executor* and be held in gaol until the end of the trial.

2.2.4.3 Justinian law[87]

Under Justinian the process was begun not by *in ius vocatio* or by *vadimonium* but by *litis denuntiatio*[88] issued under the authority of the magistrate.[89] A complaint was lodged with the magistrate who in turn submitted it to the defendant.[90]

---

84 Thomas (1976) 120; Buckland (1963) 665.

85 (1990) 22.

86 A bond, security or guarantee had to be given along with sureties to ensure his appearance.

87 Justinian governed the Roman Empire from 527 to 565 AD. See Van Zyl (1983) 8.

88 C Th 2 4.

89 C Th 2 4 2. At first *denuntiato* may have been a private act, like in *ius vocatio*, but early in the fourth century AD the intervention of the authorities was required.

90 Buckland (1963) 665 is of the opinion that it had to be in writing.

After this the plaintiff had four months to submit his statement of case,[91] and another four months could be obtained for cause. There was an automatic extension of time in certain cases[92] and a further postponement of not more than two months could be arranged by consent.[93]

During this period the defendant always had to furnish security for his appearance.[94] This was merely a modernised form of *vadimonium* and *cautio iudicio sisti* and it was sometimes by oath, for example for those *in sacro scrinio militantes*[95] or by mere promise, as in the case of *illustres*, or in ordinary cases by *satisdatio*,[96] varying with the status of the parties.[97]

Ulpian[98] tells us that the Proconsul decided on the custody of accused persons.[99] He decided whether an accused would be held in prison, handed

---

91 Mitteis *Grundzüge der Papyrusf* 2 1 40 as cited by Buckland (1963) *ibid*.

92 C Th 2 6 1.

93 C Th 11 33 1.

94 I 4 11 2.

95 C 12 19 12. This category comprised persons employed in the offices of the Imperial Secretaries, as well as their wives, parents and children. It also included the tenants, serfs and slaves of the persons employed in the offices of the Imperial Secretaries that reside in Rome, and the ordinary employees.

96 The giving of bail or security.

97 D 2 6; D 2 11.

98 Ulpian is one of the most illustrious names in Roman Jurisprudence. See Salmon (1968) 311 and Nicholas (1962) 30. He held the post of Prefect of the Praetorian Guard under Alexander Severus (222 - 235 AD) as was murdered by his own troops in 223 AD. See Nicholas (1962) 30.

99 D 48 3 1 (Duties of Proconsul, book 2)

over to the military, be entrusted to sureties or be freed on his own recognisance. This decision depended on the nature of the charge brought, the status,[100] the wealth, the harmlessness, or the rank of the accused.

In reply to a letter from the inhabitants of Antioch, Pius sent a rescript in Greek indicating that a person prepared to give sureties should not be put in chains, unless it is agreed that the crime is of such a serious nature that he should not be entrusted to a surety, or to soldiers, but should suffer imprisonment even before punishment.[101]

If the plaintiff did not appear on the arranged date, his claim was dismissed.[102] However, he could renew his action as there had been no *litis contestatio*.[103] If the defendant was absent his sureties might be proceeded against.[104] The magistrate could also decide to fine[105] the defendant or compel his attendance by force.[106]

---

100 Sallustius *Bellum Catilinae sive de Conjuratione Catilinae* (1825) *Cap xxx*; Sigonius *De Iudiciis Lib 2 Cap 3.* In the case of honourable people a type of house arrest was used. The person was kept in the house of a magistrate or a private person. In the latter instance it was called *custodia liberae.*

101 D 48 3 3 (Duties of Proconsul, book 7).

102 C Th 2 6 1.

103 Under Justinian there was an elaborate machinery, that depending on the cause, gave different results.

104 Ulpian D 48 3 4 (Duties of Proconsul, book 9) writes that if the surety failed to produce the insured he suffered a monetary penalty. If the surety connived not to produce the suspect, he is also liable to condemnation *extra ordinem*. If a fixed sum has not been decided upon, or a sum had not been fixed by the governor's decree, and a custom does not exist which provides a set form, the governor shall decide which amount has to be paid.

105 *Multare.*

106 Thomas (1976) 120 mentions the possibility of judgment being given against

In the case of women and slaves somewhat different rules applied. Du Plessis states that women were not normally held in prison even where the offence merited incarceration.[107] If a surety could be found, she was released into his care and if she swore under oath that she could not find a surety, she was allowed to take an oath that she would appear when called upon.[108] If a slave was accused of a capital offence, bail had to be pledged for his appearance, by either his master or another. If he was not defended, he had to be submitted to prison to stand his trial in chains.[109]

It was frequently asked whether a master could subsequently put up bail and so have his slave released.[110] An Edict of Domitian provided that amnesty could not be given to these slaves and furthermore forbade release before the slave had been tried.[111] It thus seems doubtful. Papinian[112] argued that this

---

the defendant in his absence.

107 (1990) 25. In the event of a very serious crime she had to be held at a convent or in the care of a woman. Constantine decided that when held in a prison a woman may not be kept in the same cell as a man (C 9 4 3). Constantine governed the Roman Empire in the period 306 - 337 AD. See Van Zyl (1983) 8.

108 Nov 134 9.

109 Papinian D 48 3 2 (Adulteries, book 1). Du Plessis (1990) 26 indicates that bail could even be given by a foreigner.

110 Papinian *ibid*.

111 Papinian *ibid*.

112 Papinian is considered to be one of the greatest Roman jurists. See Salmon (1968) 311 and Nicholas (1962) 30. He is first heard of as head of the department of the imperial chancery which dealt with petitions by individuals. From 203 AD until 212 AD he held the most powerful appointment in the empire, that of Prefect of the Praetorian Guard. In 212 AD he was put to death by Aurelius Antoninus (Caracalla). See Nicholas (1962) 30.

was excessively severe on a slave whose master was away, or temporarily did not have the means to put up surety, nor could it be said that the slave was without a master or without a defence.[113]

By the end of the reign of Justinian the principles of bail had therefore already undergone much development. The principles that had evolved were a mixture of general principles and casuistic rules.

## 2.3 ROMAN-DUTCH LAW[114]

### 2.3.1 Introduction

From the works of the famous Roman-Dutch authors such as Van der Keessel,[115] Voet,[116] Matthaeus[117] and Van Leeuwen[118] it is evident that many of the principles of bail under Roman-Dutch law had already crystallised under Justinian law. As under Justinian law, the presiding officer for example decided on the custody of accused persons. He could commit the accused to prison, hand him over for military custody, entrust him to sureties or free him on his

---

113 Papinian D 48 3 2 (Adulteries, book 1).

114 Simon van Leeuwen was the first to use the phrase Roman-Dutch law when he used it as the sub-title to his work titled *Paratitla Juris Novissimi* published in 1652. The phrase describes the system of law that existed in the province of Holland from the middle of the fifteenth century to the beginning of the nineteenth century. The general reception of the Roman law in Holland completed a process, which by various means and passages, had been at work for more than a thousand years. See Lee (1953) 2 & 3.

115 Trans Beinart & Van Warmelo 1972.

116 Trans Gane 1955; 1957.

117 Trans Hewett & Stoop 1994.

118 Trans Kotze 1886.

own recognisance. This decision depended on factors including the nature of the crime and the status of the accused. Security went to the court and a surety could be proceeded against.

Van der Keessel, when discussing the production or transfer of accused persons, points out that the accused must be produced to the prosecutor, so that he can join issue with the accused.[119] An absent person in the case of a capital offence cannot be prosecuted,[120] nor can he be convicted.[121]

The judge, in accordance with the nature of the crime, the quality and standing of the person and his position and means had the discretion to do the following:[122]

- He could commit the apprehended person to gaol.
- He could hand him over for military custody.
- He could release him on his mere promise.
- He could release him to a surety.[123]

---

119 (Trans Beinart & Van Warmelo 1972) *praefatio ad* 48 3.

120 *Ibid* relying on C 9 2 6.

121 *Ibid* relying on D 48 19 5.

122 *Ibid* 48 3 3 relying on D 48 3 1; D 48 3 3 and 14; C 9 4 1 and 3; the *authentica bodie*; C 9 4 6; C 12 1 16 and 17; Nov 134 9; Acts of the Apostles, ch 28 verse 16, and ch 12 verse 4 *et seq*. However, Voet (trans Gane 1957) 48 3 3(a) indicates the factors to be taken into account as:

- the seriousness of the crime;
- the position of the accused; and
- "whether heavier or lighter presumptions fight against him."

123 According to Matthaeus (trans Hewett & Stoop 1994) 48 14 2 2 the accused had to be taken to prison for more serious crimes. The latter three options thus normally only presented themselves in the case of less serious offences.

As the fourth option is akin to bail and therefore of special relevance this option is discussed in more depth. The other possibilities are dealt with more briefly.

### 2.3.2 Imprisonment[124]

In accordance with the Justinian law an accused had to be placed in prison in the following instances:

- where the accused has confessed to the crime;[125]
- where the accused has been convicted of a crime;[126]
- where the crime is of a serious nature and military custody is not secure enough or appropriate;[127] and
- where a slave has been charged with a capital offence and he is not defended.[128]

Because military custody came to be used less frequently, and prisons were built more in accordance with the norms prescribed by Constantine the

---

124 For a complete discussion see Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3; Matthaeus (trans Hewett & Stoop 1994) 48 14 2 and further; Voet (trans Gane 1957) 48 3.

125 D 48 3 5. D 48 5 4 *pr in fine*.

126 C 9 3 2; C 9 4 2.

127 D 48 3 3.

128 D 48 3 2; *Heraldus, De rerum judicatarum auctoritate*, bk 1 ch 12.

Great,[129] Van der Keessel proposed that greater use should be made of imprisonment instead of military incarceration.[130]

Van der Keessel also indicates that:[131]

- an accused should not be lodged in prison unless there is sufficient proof;
- an accused can only be jailed for serious offences; and
- because imprisonment constitutes a serious breach of a person's freedom it must only be considered when necessary.

Although the latest law under Justinian prohibited the lodging of women in gaol,[132] Voet confirms that the earlier civil law was introduced under which women were delivered to prison just as much as men, provided that they had bolted chambers.[133]

### 2.3.3 Military custody[134]

Military custody had application:[135]

---

129 The norms can be found in C 9 4 1.

130 (Trans Beinart & Van Warmelo 1972) 48 3 3.

131 *Ibid* 48 3 4 relying on D 48 3 3.

132 See the discussion on Justinian law.

133 (Trans Gane 1957) 48 3 5.

134 For a complete discussion see Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3 3 and further.

135 *Ibid*.

- in the case of crimes where a surety could be allowed but one could not be found; or
- where it was a crime for which the accused had to be held in prison and the probabilities militated in favour of the accused.
- in the case of more serious offences and when it was appropriate and adequate.

The accused was committed to a soldier either:

- in chains; or
- free of chains in which case it was called free custody;[136] or
- tied by a fairly loose chain by his right hand to the left hand of the soldier.[137]

Van der Keessel indicates that there formerly existed another type of free custody where especially persons of honourable rank used to be placed under house arrest with private persons or magistrates.[138]

---

136 This is the manner in which the apostle Paul was guarded at Rome (Acts, ch 28, verse 16).

137 Voet (trans Gane 1957) 48 3 10 distinguishes between the following three types of military custody:

- "free military custody" which is closely watched but not fastened to the soldiers by bonds or chains as in the case of the Apostle Paul.
- "open military custody" which is outside prison but fastened to two soldiers.
- "close military custody" which is in prison fastened to two soldiers as appears to have happened to the Apostle Peter.

138 (Trans Beinart & Van Warmelo 1972) 48 3 3.

### 2.3.4 Recognisance[139]

The accused could be released on recognisance where:[140]

- the arguments and probabilities in favour of innocence were evident;[141] or
- the offence was not of a serious nature, and the punishment therefore was of a pecuniary nature, and the accused was possessed of ample means;[142] or
- the accused was of illustrious rank and the crime was not a heinous one, in which event he must be allowed to give a guarantee under oath.[143]

### 2.3.5 Release to sureties

Persons who occupied lesser positions were committed to sureties.[144] To this group Matthaeus adds persons whose good character and innocence "are presumed from a life previously led".[145]

---

139 For a complete discussion see Voet (trans Gane 1957) 48 3 14; Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3 and further.

140 Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3 3.

141 As Cujacius *Paratitla ad* C 9 4 interprets the words "according to the innocence of the person in D 48 3 1". See Van der Keessel *ibid*.

142 Relying on D 48 3 1.

143 Relying on C 12 1 17. For a discussion as to who are persons of illustrious rank see Matthaeus (trans Hewett & Stoop 1994) 48 14 2 3. (People of high rank as well as professors and doctors seem to have fallen in this category.)

144 Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3 3 relying on C 12 1 6.

145 (Trans Hewett & Stoop 1994) 48 14 2 16. For the position on women see the discussion on Roman law under Justinian.

Once the judge in a criminal trial had decreed that an accused could be released to sureties, a surety could intervene on behalf of the accused. The surety guaranteed that the accused would attend his trial by either promising a fixed sum of money or without specifying an amount, merely guarantees that he will stand his trial.[146]

If the surety failed to produce the accused at the hearing, and he was without intent, he was liable for the fixed amount that he promised, or for the amount that the governor had set when he decreed that the accused could be released to sureties. If no amount has been specified and no usage indicated which determines a fixed scale, the surety was liable for a discretionary sum.[147] On the other hand if the surety intentionally failed to secure the attendance of the accused, he could in extraordinary proceedings be subjected to physical punishment.[148]

However, the surety is not punished immediately when the accused does not present himself for trial, but is granted grace for the same amount of time that the accused had to appear.[149] If the accused died in the first period that the

---

146 Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3 3 relying on D 48 3 4. Matthaeus (trans Hewett & Stoop 1994) 48 14 2 13, stated that it was not absolutely necessary for a fixed sum to be stated in the stipulation.

Similar principles are still applied under modern Dutch law. A surety under contemporary Dutch law can support the undertaking of the applicant for bail to comply with the conditions of release by providing security for the accused's appearance, or by merely vouching that the accused will stand his trial (see Uit Beijerse (1998) 164).

147 Van der Keessel *ibid*.

148 *Ibid*. However, see Matthaeus (trans Hewett & Stoop 1994) 48 14 2 14 who is of a different opinion.

149 Voet (trans Gane 1957) 48 3 13 (not for longer than six months).

accused had to appear, the surety was protected from the penalty, but not so if the accused died in the second period.[150]

Voet mentions that once the surety has taken up the defence of the accused, either during the first or the second of the periods of grace, and then abandons the defence, the surety cannot be released from the penalty by producing the accused.[151] It seems that if the surety takes up the defence and carries it through, he has fulfilled his duty. But if the defence was taken up in the second period, and this period lapses, the surety will in every way be held liable, even though the defence is not abandoned.[152]

The Roman-Dutch law followed the Roman principle that criminal cases had to be finalised in two years from the date of joinder of issue. If the case was not finalised the accused was acquitted.[153] From this it followed that the surety could neither be bound for the appearance of the accused beyond the period of two years.

The obligation of security is extinguished if the accused is convicted or acquitted.[154] Where the accused did not appear the surety is released when the penalty has been paid.

---

150 *Ibid*.

151 *Ibid*. See also C 8 40 26.

152 Voet *ibid*.

153 *Ibid*. Also see C 8 1 17; Dig 48 3 1.

154 Voet (trans Gane 1955) 2 8 11; (trans Gane 1957) 48 3 13.

It appears that a person in the Roman-Dutch period could only be granted bail (in a certain sum) in respect of less serious offences.[155] Van Leeuwen says that security could only be given for petty and minor offences, for which the punishment is not corporal.[156] In an ordinance issued by King Philip II in 1570, it is indicated that if the case is not too serious the accused shall be released to appear upon bail *fide jussoor* or *juratoir* taking into account "the degree of the person and the crime."[157]

Van Leeuwen explains the reasoning behind the rule that security may only be given for less serious offences:[158]

---

155 See D 48 3 1, 2, 3, 4. In the year 1387 it was granted to the people of Amsterdam by the charter of Duke Albrecht of Batavia:

> That the officers may not for any delicts or wrongful acts which a free citizen of Amsterdam may have committed, imprison, apprehend, hinder, or injure such citizen in life or property, if he can give sufficient security, in the discretion of the Aldermen, that he will abide by what the officers have to charge him, excepting, however, murder, arson, rape, robbery, and where the citizen takes up arms against the government, or commits a crime within the ditch Reygersbroek at the old Amstel, and against the Duke's rabbits in Gooyland.

156 (Trans Kotze 1886) 4 4 6.

In spite of of these words Van Leeuwen *ibid* refers to the *Costuymen of Utrecht* rubric 36 art 1 - "that in all delicts, the punishment for which is life, limb, public punishment on the scaffold, whipping, and the like, the accused shall not be let out on bail unless the officer has shaped his demand civilly, and the judge considers that it ought to be so."

157 Art 52. On 9 July 1570 King Phillip II of Spain issued the Criminal Procedure Ordinance which formed the basis of the criminal procedure of the Netherlands during the seventeenth and eighteenth centuries. See Dugard (1977) 5.

158 (Trans Kotze 1886) 4 4 6.

- The person who undertakes to deliver the offender subjects himself to that of which the latter himself is guilty, in the event of non-appearance of the offender.[159]
- Because of this the surety would be as difficult to find as the offender himself and the crime would go unpunished.

Due to this, bail was not allowed except in cases where pecuniary fines would be inflicted, or where the sheriff could not impose any further punishment.[160]

There is an indication that bail could be decided only after the accused on his own recognisance appears in court, or a person that has been jailed is brought before court.[161] This happened respectively where in the first instance the accuser asked that the accused be given to sureties and in the second instance if the jailed accused requested to be given to sureties.[162] The decision to free an accused on bail rested exclusively with "the public authority" of the judge.[163]

---

159 *Ibid*. According to Matthaeus (trans Hewett & Stoop 1994) 48 14 2 14 and 15 the surety could not promise to undergo the penalty of death or other punishment affecting his body in the event that the accused did not stand his trial. This was contrary to the purpose of punishment and the surety could not dispose of his life and limbs in this manner. Van der Keessel (trans Beinart & Van Warmelo 1972) 48 3 3 is of the opinion that the surety should also not be allowed to accept the penalty of banishment or exile on behalf of the accused but Matthaeus (trans Hewett & Stoop 1994) 48 14 2 16 disagrees in this regard. Voet (trans Gane 1957) 48 3 12, again is of the opinion that suretyship should be allowed in the case of banishment, but only if he is banished from a certain place and not banished to a certain place.

160 Van Leeuwen *ibid*.

161 See art 28 *et seqq* and arts 52 and 53 Criminal Procedure Ordinance of 1570, *Groot Placaet-Boeck*, Vol 2 1051 and 1055 - 1056.

162 And it is so decided.

163 See art 31 and art 53 Criminal Procedure Ordinance of 1570, *Groot Placaet-Boeck*, Vol 2 1051 and 1055.

The rules concerning the production of accused persons for trial including bail therefore underwent further refinement under Roman-Dutch law. One of the notable changes effected was that imprisonment came to be preferred above military custody.

## 2.4 ENGLISH LAW

Bailing suspected criminals was already an ancient practice in the time of the reign of Queen Elizabeth I[164] and may be traced back to the English Kings Hlothaere[165] and Eadric.[166] Accused persons were required to pay a sum of money called "borh"[167] to the alleged victim of the crime to temporarily satisfy the accuser and to prevent a feud between the families of the parties.[168] The money was refunded if the accused was found innocent. In the very early times an accused person was arrested in some instances without a preliminary investigation. In serious cases this meant that the accused had to wait until the arrival of the justices.[169] In some cases this delay went on for years and it became important for the accused to be released from custody. Due to this, the concept of "borh" was modified.

---

164 Elizabeth I ruled Great Britain during 1558 - 1603. See Meiklejohn (1897) 336.

165 673 - 685 AD. See Dow (1981) 59.

166 685 - 687 AD.

167 Van der Berg (1986) 2 makes a connection between this term and the Afrikaans word *"borg"*.

168 Dow (1981) 59.

169 Donovan (1981) 23.

Prior to the Norman conquest in 1066 a system was introduced whereby the accused was allowed to pay a sum of money to the sheriff to avoid pre-trial incarceration.[170] At the time the emphasis of bail shifted to make sure that the accused would attend his trial.[171] Accused persons were released into the custody of their friends or relatives who convinced the court that the accused would stand trial and who undertook to surrender themselves in the event that the accused absconded.[172] It appears that in the early days, those people who offered themselves, literally bound themselves body for body. However, Holdsworth indicates that in the thirteenth century these sureties were only liable to amercement if they allowed their prisoner to escape.[173] At a later stage, both the promise to pay a sum at the non-production of the prisoner and the surrender of their bodies were used separately or combined. If the accused was committed to the custody of the surety he was the bail of the surety, and if the surety merely gave security for his appearance, he was said to give "mainprize" and to be a "mainpernor".[174]

The right to be released from custody on bail was recognised by Glanville[175] and Bracton during approximately 1176 - 1239 in the golden period of medieval justice.[176] Bracton indicates that the sheriff needed to be able to

---

170 See Dow (1981) 59; Pollock (1898) xiv *LQR* 291 296 - 7.

171 See Hampton (1982) 91.

172 See Freed & Wald (1964) *Yale LJ* 966 and Kerper (1979) 269.

173 (1937) 525.

174 *Ibid* 525 - 528.

175 (LIB xvi c) 1.

176 See Donovan (1981) 23 as to bail. Turner (1985) 1 and further informs us that Glanville and Bracton were two prominent royal justices in a new system of professional public servants. King Henry II created a new machinery of justice for his subjects and in doing so revived the practice of sending itinerant

exercise a discretion in regard to the bailing of accused persons, having regard to the importance of the charge, character of the person and the gravity or the evidence against him.[177] The sheriff was the local representative of the Crown and the administrator of criminal justice. It was he who would free an accused on bail if he thought proper.[178] The sheriff could also decide if he wanted to take bail or mainprize. It was apparently only in the event that homicide was averred that the sheriff did not have a discretion.

At a later stage the list of non-bailable offences and where mainprize could not be given were extended to include offences against the forest law and arrest by special command of the King. The sheriff had the discretion to refuse bail when it ought to be refused and it was thought to include crimes punishable by death or mutilation. However, this discretion led to abuses but these were dealt with in the Statute of Westminster I.[179] This Act provided that certain categories of people could not get bail.[180] They were as follows:

---

commissioners to the counties. Ranulph de Glanville first served as itinerant justice as head of one of the three circuits and later as justiciar of the justiciar's court. While Glanville is also suggested to be the author of two other works, his best known work is probably *Tractatus de legibus et consuetudinibus regni Angliae*. Henricus de Bracton was the Justice of Assize in 1245, the chancellor of Exeter Cathedral and by special dispensation held three ecclesiastical benefices at the same time. His famous work *De legibus et consuetudinibus Angliae libri V: in varios tractatus distincti, ad diversorum et vetustissimorum codices collationem typis vulgati* which was compiled around the 1220s - 1230s remains uncompleted. It has been suggested that this work was compiled a little bit later, somewhere between 1250 - 1256. See Roberts (1942) 59.

177 *De Corena* ii, 261, 283, 287 - 9 and 293.

178 The writ by which the sheriff could be compelled to release the prisoner on bail or "mainprize" was the writ *de homine replegiando.*

179 III Edw 1,c XII, 1275.

180 Donovan (1981) 24.

- prisoners outlawed;
- men who had abjured the realm;
- approvers (who had confessed);
- such as to be taken with the manour;
- those who had broken the King's prison;
- thieves openly defamed and known;
- such as were taken for felonious arson;
- or for false money;
- for counterfeiting the King's Seal;
- or persons excommunicate taken at the request of the Bishop;
- or for manifest offences;
- or for treason touching the King himself.

The Act further provided that certain people could be bailed:[181]

- people indicted in larceny;
- or of light suspicion;
- or of petty larceny not above the value of 12d;
- guilty of receipt of felons, (accessories in general);
- guilty of some other trespass;
- a man appealed by the prover after the death of the prover.

It can be agreed with Donovan that the two categories seem to be based on the seriousness of the offence, the likelihood of conviction and the "outlawed status" of the offender.[182]

However, Samaha indicates that under the Statute of Westminster I all forms of homicide were also not susceptible to bail.[183] There existed much controversy on this aspect and different views were put forward by the learned

---

181 During 1444 this statute was supplemented by a provision that the sheriff must, bar certain exceptions, grant bail to all persons in custody by reason of any personal action, or by reason of any indictment for trespass.

182 See Donovan (1981) 24.

183 (1981) 25 *AJLH* 190.

English jurists.[184] The Elizabethan jurist Lambard indicated that a distinction must be drawn between murder and manslaughter.[185] Bail is only excluded in the case of premeditated murder.[186] During the reign of King Charles I[187] a conference of judges disagreed -"a man is not entitled to bail for manslaughter".[188] Dalton, at around 1630, only conditionally agreed with Lambard.[189] Lord Hale in the seventeenth century asserted that bail could not be given by the justices for murder, although it could be done by the King's bench. In the case of manslaughter two justices of the peace, of which one is of the *quorum,* if the matter be doubtful and uncertain, may bail that man.[190]

After 1275 the power to grant bail was to a great extent transferred to the justices of the peace by a series of statutes.[191] It is thought that this power was transferred to the justices in certain cases by the statutes of Edward III. However, it is certain that it was conferred by statute in general terms in 1483 - 1484.[192] In 1486 it was recognised that bail should be granted by justices of the peace and it was further indicated that bail had to be granted by two justices.[193]

---

184 *Ibid*.

185 Lambard (1972) 254 - 257.

186 *Ibid*.

187 1625 - 1649. See Meiklejohn (1897) 385.

188 Hale (1736) 138 - 139.

189 Samaha (1981) 25 *AJLH* 190.

190 Hale (1736) 139.

191 Du Plessis (1990) 48.

192 Holdsworth (1937) 525 - 528.

193 By the statute of 3 Hen VII, 3.

With the advent of the Tudors,[194] stricter control was kept over the way these powers were exercised. In 1487 a statute determined that bail had to be granted by two justices, one of whom was to be of the *quorum,* and that the prisoners that they bailed had to be certified at the next general sessions of the peace or sessions of gaol delivery. However, this statute did not stop the misuse of these powers and in 1554 it was stated that one justice in the name of himself, and another who knew nothing of the case, by "sinister labour and means" set at large notable offenders.[195]

These practices led to the imposition of further rules, namely:

- bail can only be granted to someone bailable under the 1275 statute;
- accused must be bailed in open session ;
- at least two justices must be present when bail is granted;
- one justice must be of *quorum;*
- a certificate must be made to the next sessions of gaol delivery.[196]

Even though later statutes were enacted to ensure that justices were persons of substance and to guard against collusion between justices and prisoners, the

---

194 Henry the Seventh (Henry Tudor of Richmond) succeeded in 1485. See Meiklejohn (1897) 277.

195 Many examples of the inconsistent rendering of bail are given by Samaha (1981) 25 *AJLH* 190 192. In one instance one Alice Neath was committed to gaol to await trial on overwhelming evidence that she stabbed her sister in law to death and one Lambert Hewson was given bail in the face of strong evidence that he had murdered his infant daughter.

196 The justices of gaol delivery were given power to fine justices for breach of these provisions.

statute of 1275 as to bailable offences, and the 1554 statute as to the procedure, remained the basis of the law on this subject until 1826.[197]

In 1826 a general provision on bail was passed which repealed all the previous statutes.[198] This provision was again superseded by various Acts in the reign of Victoria.[199] In terms of these provisions the committing justice may, at his discretion, admit to bail any person charged with a felony or with any of a listed number of misdemeanours. However, bail could not be granted for libel, conspiracies, unlawful assembly, night poaching and seditious offences. In certain cases bail could not be refused.[200]

These Acts remained in force until they were replaced by the Bail Act of 1976.[201]

## 2.5 SOUTH AFRICAN LAW BEFORE THE INTERIM CONSTITUTION

### 2.5.1 South African law before unification

The early development of the law on bail in South Africa can roughly be divided into two different periods. The first period spanned from 1652 to 1828 when the Roman-Dutch principles of criminal procedure were applied, and the second the years after 1828, when these principles were substituted under

---

197 Holdsworth (1937) 525 - 528. See also McCall (1979) 71.

198 7 Geo IV c 64.

199 11 and 12 Vic c 52, section 23. See Du Plessis (1990) 49. Victoria ruled Great Britain during 1837 - 1901. See Meiklejohn (1897) 589.

200 Donovan (1981) 25.

201 1976 Statutes c 63. See Du Plessis (1990) 50.

British rule by two ordinances, up to 1910.[202] The Republics of the Transvaal and the Orange Free State, and the colony of Natal, only came into being after 1828 and therefore fall under the second period.[203]

2.5.1.1 The position in the Cape during the period 1652 - 1828

With the arrival of Jan van Riebeeck in 1652, the Cape came under the control of the Dutch East India Company. In its Charter[204] the Company was authorised to maintain law and order in the areas under its authority. This led to the application of the Roman-Dutch law in the Cape.[205] Dugard is of the opinion that it is the same system of criminal procedure embodied in the Criminal Procedure Ordinance of 1570 that was in force subject to certain modifications.[206] This system remained in force throughout the time of the Dutch East India Company (1652 - 1795), the first British occupation (1795 - 1803), and the rule of the Batavian Republic (1803 - 1806). The Roman-Dutch law remained the law of the day until the criminal procedure in the Cape was

---

202 The South African Law Commission (1994) 9 divides the early development of the law on bail into three different periods:

- The period 1652 - 1806;
- The period 1806 - 1878;
- The period 1827 - 1910.

203 The administration of justice in the early territories of the Voortrekkers in Transvaal seem to have come about in the early 1840s. The Orange Free State Republic was constituted at the Bloemfontein Convention of 1854 providing *inter alia* for a legal system. Shortly before 1845 Natal became a dependency or "district" of the Cape and in 1857 acquired representative government. See Dugard (1977) Vol 4 28 - 33.

204 *"Oktrooi"*.

205 Dugard (1977) Vol 4 1 - 56; Van Zyl & Van der Vyver (1982) 205 and further.

206 Dugard *ibid* 18.

substituted by Ordinance 40 of 1828 and the law of evidence was substituted by Ordinance 72 of 1830.[207]

In accordance with the Roman-Dutch law bail was only allowed in respect of less serious offences and it was in the sole discretion of the magistrate. In the event of a more serious offence the accused was detained from the date of his arrest until the conclusion of the trial. According to Dugard it was not undesirable at the time to use torture to extract a confession from an accused. The procedure used to decide whether bail should be granted was inquisitorial.[208]

2.5.1.2 The position in the Cape during the period 1828 - 1910

After the demise of the Roman-Dutch law, the proceedings in a criminal trial were governed by Ordinance 30 of 1828 and the First Charter of Justice which empowered the supreme court to issue the rules of court, and Ordinance 72 of 1830 which regulated the evidence.[209] The 1830 Ordinance was a codification of the rules of evidence that existed in the early 19th century in England. However, some of the rules were apparently too complicated to codify. In those instances the law that applied in "His Majesty's Courts of Record at

---

207 See Du Plessis (1990) 50 and Dugard (1977) 25. In 1823 a two-man commission consisting of 2 gentleman, Biggy and Colebrooke, was appointed by the British Government to investigate affairs regarding the legal system and to make any recommendations they deemed necessary. The recommendations of the commission was substantially accepted by the British government and led to the imposition of large scale reforms in the fields of the administration of justice by the First Charter of Justice, and the anglicization of the criminal procedure and evidence by the ordinances mentioned. See also Botha (1923) 40 *SALJ* 396.

208 South African Law Commission (1994) 9.

209 See South African Law Commission *ibid*; Dugard (1977) 19 and further.

Westminster" prevailed.[210] These reforms effectively put an end to the inquisitorial system and replaced it with an accusatorial English procedure.

In this time a system of pre-trial investigation that was held *in camera*, and during which information regarding the alleged offence was gathered, was begun.[211] On the basis of this information the courts could order that an accused be arrested and brought before them, or in the case of a less serious offence or uncertain evidence implicating the accused, a summons to this effect could be issued.[212] An indictment[213] containing details of the offence with which he was charged was issued to the accused at least three days before the trial and the accused had to be tried within eight days. If the accused objected to the indictment, he was obliged to answer the questions by the prosecutor. On the other hand if the accused refused to answer the questions put to him, this was seen as contempt of court and he was detained for the duration of the trial. This in effect amounted to a refusal of bail.[214]

If the innocence of the accused was established, he was acquitted, but if the evidence was insufficient he was provisionally set free after giving security for

---

210 See Schmidt (1989) 13.

211 Preparatory "informations" were taken from witnesses on oath.

212 Bail was still only allowed in the case of less serious offences.

213 Based on the information taken at the preparatory examination.

214 South African Law Commission (1994) 9. Dugard (1977) 21 seem to indicate that the accused was immediately interrogated, and if he refused to answer the questions put to him, he was incarcerated for the duration of the trial irrespective of the fact that he objected to the charge or not.

his reappearance. In the absence of other evidence in the following twelve months implicating him, he had to be acquitted.[215]

In terms of Ordinance 40 of 1828 and Ordinance 72 of 1830, a right to bail before the conclusion of the preliminary examination was not recognised. However, bail could be granted at the discretion of the magistrate. Once the preliminary investigation had been completed the accused could be released on bail by the court with the approval of the attorney-general. After an accused had been committed for trial, he was entitled to bail except in the case of capital offences. In respect of these offences the supreme court could grant bail.[216]

2.5.1.3 The position in the Transvaal Republic

The criminal procedure in the Transvaal was regulated by Ordinance 5 of 1864 and Ordinance 9 of 1866 and was largely based on the law that applied in the Cape.[217] The attorney-general had a discretion to grant bail.[218] It was only in 1903 that the most comprehensive criminal code in Southern Africa was adopted in the Transvaal.[219] This ordinance was based on the law that applied in the Cape and English law and also showed influences of the criminal codes of Canada (1892), Queensland (1899), and India (1898).[220]

---

215 Dugard (1977) 22.

216 South African Law Commission (1994) 9 - 10.

217 Strauss (1960) *Acta Juridica* 157.

218 In terms of section 66, Ordinance 5 of 1864 and an amending provision in section 2, Act 7 of 1896. See also *Hildebrand v The Attorney-General* 1897 (4) OR 120.

219 Ordinance to Establish a Code of Criminal Procedure 1 of 1903.

220 Dugard (1977) 31.

In terms of chapter VIII[221] of the 1903 Ordinance all accused persons (except in the case of murder and high treason) were entitled to bail as soon as they were committed for trial.[222] At the time of the committal an application could verbally be made for bail[223] and thereafter the bail application had to be made in writing, to the appropriate magistrate or judge of the supreme court.[224] The magistrate had twenty-four hours in which to decide whether bail should be granted or not, and if so what the amount of bail was. Application for bail was decided on the facts as they appeared in the warrant of committal for trial.[225] The supreme court had the power to grant bail at any stage of the proceedings and in respect of any offence.[226] The bail amount could not be excessive and an accused could take the decision as to the amount of bail on appeal to the supreme court.[227] Bail could be lodged by the accused himself or by a surety. Only cash was accepted and the guarantee given by the surety was that the accused would appear at the set time and place of the hearing. If conditions as to bail were set they could be amended at any time.[228] Bail could also be withdrawn at any stage.[229]

---

221 Sections 97 - 113.

222 Section 97.

223 Section 98.

224 Section 99.

225 Section 100.

226 Section 101.

227 Sections 103 and 104.

228 Section 105.

229 Section 110.

The appeal in a criminal case did not suspend the execution of a sentence,[230] unless the court against whose judgment or sentence the appeal was made, had released the accused on bail.[231]

2.5.1.4 The position in the Orange Free State Republic

The law in this republic was also largely based on the law that applied in the Cape and was regulated by the Ordinance as to Criminal Procedure 12 of 1902.[232] Bail could not be granted before the preliminary examination had been completed and was in the discretion of the magistrate. With the exception of a capital offence an accused was entitled to bail after he had been committed for trial. Before committal for trial the application could be made verbally and after this it had to be made in writing. Again the amount of bail was in the discretion of the court and an excessive amount was not permitted. As in the Transvaal Republic the decision regarding bail had to be made within twenty-four hours by the magistrate. If the accused failed to meet the requirements of bail a fine of 100 pounds could be imposed.[233] A decision as to the granting of bail or not, and the amount set could be taken on appeal to a higher court. In its discretion the supreme court had the power to grant bail in all cases.

---

230 Except capital or corporal punishment.

231 Section 271.

232 See Strauss (1960) *Acta Juridica* 157 and South African Law Commission (1994) 11.

233 *Ordonnantie, Wijzigende de Manier van Procederen in Crimineele Zaken in den Oranje-Vrijstaat 4 van 1856* (Ordinance 4 of 1856).

2.5.1.5 The position in Natal

In Natal the criminal procedure and the law of evidence was based on the two Cape Ordinances[234] and was accepted in Natal by Ordinance 18 of 1845.[235]

**2.5.2 South African law after unification**

2.5.2.1 The period 1910 - 1955

At the time of the unification in South Africa there was no uniform Criminal Procedure Act. All four the provinces had statutory provisions based on the two Cape Ordinances for the granting of bail.[236] It was only in 1917 that an uniform arrangement was made for the Union when the Criminal Procedure and Evidence Act of 1917 was adopted.[237] Ordinance 1 of 1903, the code accepted in the Transvaal, formed the basis because it was the most sophisticated codification.

The Act provided that a magistrate had the discretion to release an accused on bail even before the end of the preliminary investigation,[238] except in the case

---

234 Ordinance 40 of 1828 and Ordinance 72 of 1830.

235 Ordinance for regulating the manner of the proceeding in criminal cases in the district of Natal. See Du Plessis (1990) 50; South African Law Commission (1994) 11.

236 Ordinance 40 of 1828 and Ordinance 72 of 1830. See Dugard (1977) 33 and South African Law Commission (1994) 11.

237 Act 31 of 1917. Bail was regulated by sections 86 and 99 to 117 of the Act.

238 Preparatory examinations remained a prerequisite for superior court trials and only minor changes were instituted in repect of this procedure. See section 92 of Act 31 of 1917.

of murder, treason or rape.[239] After the case had been referred for trial, the accused was entitled to be granted bail, except in the case of murder, treason or rape.[240] The supreme court had the power to grant bail in respect of all offences and at any stage of the proceedings.

At the trial itself the accused could verbally apply for bail to the magistrate.[241] If the amount of surety was set too high or the application was unsuccessful it could be taken on appeal to a higher court.[242] It was also expressly stated that an excessive amount may not be fixed.[243] Bail in the form of a surety could either be given by the accused himself or by him and another or more persons in order to gain freedom.[244]

In the case of minor offences,[245] a police official with the rank of sergeant or higher was allowed to release an accused on cash bail.[246]

---

239 Section 86 of Act 31 of 1917.

240 Section 99 of Act 31 of 1917.

241 South African Law Commission (1994) 12.

242 *Ibid.*

243 *Ibid.*

244 *Ibid.*

245 According to Du Plessis (1990) 54 these were offences with the exception of sedition, murder, rape, robbery, assault where a dangerous wound was inflicted, arson, housebreaking with the intention to commit a crime be that at common law or statute, theft, receiving stolen property knowing it to be stolen, fraud, forgery and uttering if the amount applicable is more than 100 pounds, any offence under any Act that deals with the illegal possession or trafficking with gems or any precious metals, any offence that has to do with the production of money, any conspiracy, incitement or attempt to commit any of the above-mentioned offences.

246 Section 116(2) of Act 31 of 1917 read with part two of the second schedule to the Act.

An accused who had been sentenced and who appealed against the decision of a lower court, was entitled to have bail set.[247] Execution of his sentence would not be suspended unless he was released on bail. A convicted person who appealed against the decision of a superior court could request his release on bail from such court.[248] The execution of his sentence was not suspended by the making of an appeal unless such application for bail was granted.

In 1926 the magistrate was given the discretion to grant bail to an accused for the crime of rape, and murder by a mother of her "newly born child" or where the accused was under 16 years of age.[249]

In 1955 the authority of the magistrate was further extended in that he could now refuse bail, after the accused was referred for trial, if there was reason to believe that the accused would not comply with his bail conditions. [250]

In the same year the Criminal Procedure Act 56 of 1955 repealed and replaced the 1917 Act.[251] The numerous amendments to the 1917 Act, as well as the fact that the 1917 Act was in English and Dutch only, without there being an official Afrikaans version, gave rise to the 1955 Act.[252] It was a consolidating

---

247 Section 98 of the Magistrates' Courts Act 32 of 1917.

248 Section 373 of Act 31 of 1917.

249 In terms of section 16 of Criminal and Magistrate's Courts Procedure Amendment Act 39 of 1926 the power of the magistrate to grant bail was extended.

250 Section 18 of the Criminal Procedure and Evidence Amendment Act 29 of 1955.

251 South African Law Commission (1994) 12.

252 House of Assembly debates Volume 87 col 1405 (21 February 1955).

statute in its strictest sense[253] and followed the same pattern as its predecessor. In terms of this Act release of a person on bail was essentially a judicial power. The wide powers regarding bail that were conferred upon the supreme court by the 1917 Act[254] were re-enacted.[255] A superior court that had jurisdiction in respect of an offence, could grant bail at any stage of the proceedings in any court. The execution of a sentence, passed by such court pending an appeal, could also be suspended by the superior court, by releasing the accused on bail.[256]

However, after the adoption of the 1955 Criminal Procedure Act numerous changes were legislated which tipped the balance that existed between the accuser and the accused at the pre-trial stage, including bail, towards the state. These enactments were for the greatest part the result of the struggle between the legitimate social and political aspirations of the black people of South Africa, and the ruling whites who saw their salvation in their protection from evil forces bent on the destruction of society in its present form.[257]

The South African legislature acted on the premise that the established principles were inadequate for the task of ensuring order in contemporary circumstances. In the ensuing decades the National Party government passed draconian laws, mainly against the opponents of the "apartheid state", and in the process made drastic inroads into the freedom and security of the

---

253 House of Assembly debates Volume 88 col 7563 - 5 (13 June 1955).

254 Section 109.

255 By way of section 90(a).

256 Section 368 of the 1955 Act.

257 See also section 13 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971 where it was not politically motivated.

opponents of the government of the day. It marks a dark period in our country's history and should be a reminder to those that choose to ignore fundamental rights under the guise of a limitation because of pressing issues. The discussion shows how concepts such as the "public interest" and "public safety" were manipulated to advance the interests and safety of the unelected governing minority as opposed to the interests or safety of the public in general. I will now discuss these legislative changes and the developments leading up to the 1977 Criminal Procedure Act.

2.5.2.2 The period 1955 - 1977: Statutory inroads into the right to bail

The changes were brought about by amendments to the 1955 Criminal Procedure Act and by way of other Acts. For the biggest part the legislative changes had one thing in common. They usurped the powers of the judiciary to release on bail under certain circumstances.[258]

The first of these amendments empowered the attorney-general to prohibit the release of an accused on bail for twelve days where public safety was threatened.[259] A certificate could be issued to this effect but only in the event of more serious offences such as murder and arson.[260] This emergency power to refuse bail was initially only valid for one year but was thereafter extended

---

258 In the Roman-Dutch, English and South African law this power was previously regarded as essentially in the judicial domain.

259 Section 108*bis* was included in the 1955 Act by way of section 4 of the General Amendment Act 39 of 1961.

260 The offences were listed in part II *Bis* of the second schedule to the Act. The offences were sedition, murder, arson, kidnapping, child-stealing, certain offences under the Suppression of Communism Act, sabotage, treason, robbery and housebreaking with aggravating circumstances and also where the attorney-general considered it in the interests of justice or the administration of justice.

every year[261] until it became a permanent fixture in 1965.[262] The powers of the presiding officers were expressly subjected to the overriding discretion of the attorney-general.[263]

The second of the legislative changes was the so-called "90 day" determination in the General Law Amendment Act of 1963.[264] Section 17 of the 1963 amendment provided for the incarceration of people, suspected of having committed or intending to commit the crime of sabotage or any offence under the Internal Security Act,[265] or the Unlawful Organizations Act.[266] The incarceration was at the instance of a commissioned officer for a period of 90 days "on any particular occasion" without bail for "interrogation purposes" and until he has to the satisfaction of the Commissioner of the South African Police replied to all the questions asked. However, this provision was repealed by way of a proclamation of the State President in 1964.[267]

The third of these changes provided that a witness for the state could be held for 180 days or until the conclusion of the trial in terms of a warrant of arrest from the attorney-general.[268] In practice witnesses, as well as potential

---

261 By section 17 of Act 76 of 1962, section 9 of Act 37 of 1963 and section 23 of Act 80 of 1964.

262 Section 6(a) of Act 96 of 1965.

263 In terms of sections 87, 88 and 98 of the 1955 Act.

264 Act 37 of 1963.

265 44 of 1950. This Act was eventually repealed by the Internal Security Act 74 of 1982.

266 34 of 1960.

267 Published as Proclamation R320 of 1964 on 11 January 1965. By way of Extraordinary Government Gazette No 960 of 30 November 1964.

268 Section 215*bis*, which was inserted by section 7 of the Criminal Procedure

accused, were held under this provision. The provision was primarily used for offences under the Internal Security Act but could also be used by the attorney-general for certain serious offences of a non-political nature.[269]

The powers of the police to deny bail were extended by the General Law Amendment Act of 1966.[270] This Act authorised incarceration by a commissioned officer above the rank of lieutenant-colonel of anyone "he has reason to believe" to be a terrorist, or has committed the crime of sabotage or an offence under the Internal Security Act.[271] Someone who "intends to commit such an offence" could similarly be arrested without a warrant and be detained without trial for a period not exceeding fourteen days. The Commissioner of Police could apply to a judge to have the detention extended for further periods. Written submissions could be made by the detainee to counteract the request for further incarceration.[272] Apart from this the jurisdiction of the court was excluded.

The Terrorism Act also deviated from the procedural norm and excluded bail to a person charged under the Act unless the attorney-general consented to his release.[273] Arrest could be effected by a commissioned officer above the rank of lieutenant-colonel without a warrant on the belief that someone was a terrorist, or was withholding information relating to terrorists or to offences

---

Amendment Act 96 of 1965.

269 See Dugard (1977) 48 and further.

270 62 of 1966.

271 Section 22.

272 See Matthews (1971) 155.

273 Section 5(f) and 6 of Act 83 of 1967. This Act was also repealed by the Internal Security Act 74 of 1982.

under the Act. What makes the situation worse is that one could be detained for interrogation until the questions had been satisfactory answered to the satisfaction of the Commissioner of Police, or that no useful purpose would be served by further detention. In practice this meant that detainees were held for long times, some for more than a year without the courts being able to pronounce on the validity thereof.[274]

During 1968 magistrates were granted the power to grant bail for all offences.[275] However, in practice this did not improve their powers significantly as the attorney-general usually exercised his powers in terms of section 108*bis* in the case of murder or treason.[276]

---

274 While the Criminal Procedure Act thus authorised the detention of certain suspects much along the same lines, these other Acts compromised the freedom from arbitrary arrest and detention existing under the normal rules by *inter alia* disposing of:

- The procedure of arrest by warrant.
- The right of a person arrested without a warrant to be informed of the cause of arrest.
- The right to be brought before a court within forty-eight hours.
- The relief provided by the writ of *habeus corpus* or the *interdictum de homine libero exhibendo.*
- Access to a legal advisor.

The last-mentioned Acts even authorised interrogation in solitary confinement before the arrested was brought to trial. Unfortunately the interrogation was not subject to judicial control and the detainee was not represented.

275 Sections 3 and 4 of Act 9 of 1968, amending sections 87 and 88 of Act 56 of 1955.

276 In 1970 the State President appointed a commission of enquiry into the law of criminal procedure and evidence in South Africa, with Botha J of the Appellate Division as its sole member. In 1971 Botha submitted a report that had a great influence on the future course of criminal procedure in South Africa (Dugard (1977) 51 - 52). The increased powers of the attorney-general in respect of bail and the detention of witnesses was also examined by Botha. He recommended that the great powers of the attorney-general to withhold bail be restricted to cases affecting public safety and the maintenance of public order. Although he

In 1976 the Suppression of Communism Act was renamed as the Internal Security Act, and by way of the Internal Security Amendment Act of 1976[277] new sections on bail and the detention of witnesses that were fundamentally the same as sections 108*bis* and 215*bis* of the Criminal Procedure Act of 1955, were inserted.[278] An attorney-general, if he considered it necessary "in the interest of the safety of the State or the maintenance of public order", could issue an order that a person arrested on a charge of having committed sedition, treason, sabotage, terrorism or certain offences under the Internal Security Act, not be released on bail before sentence has been passed, or before he has been discharged.[279]

2.5.2.3 The period 1977 - 1994: The Criminal Procedure Act 51 of 1977

In 1977 the present Criminal Procedure Act was placed on the statute book. In terms of this Act, the preparatory examination disappeared, except when

---

did not propose the scrapping of section 108*bis* of the Criminal Procedure Act, he advocated a return to the position before 1968 where the attorney-general could refuse bail "in the interests of justice". With regard to section 215*bis* of the Criminal Procedure Act he recommended that the attorney-general's decision be subject to judicial control by way of a procedure that obliged the attorney-general to apply for permission from a judge in chambers when he wanted to hold a witness (Dugard (1977) 53). Botha also proposed that the provisions relating to sureties should lapse and that a person should only be released on bail if the decided amount is deposited in cash (RP 78/1971, 51 (11.15.1). Although the main recommendations of this report received attention (see Dugard (1977) 54 - 56), it seems that little came of the recommendations regarding bail.

277 Act 79 of 1976, amending Act 44 of 1950.

278 These new sections as before also referred to the detention of witnesses.

279 Section 12A of the Internal Security Act. Section 12B of the Act simply repeated the provisions of section 215*bis* in respect of serious political offences. See Dugard (1977) 55.

requested by an attorney-general. This resulted in important changes to the system, as the 1955 Act provided for a system that was premised on the existence of a preparatory examination. In terms of the 1955 Act an accused was entitled to be released on bail, subject to a number of exceptions once he was committed for trial or sentence. No such right existed while the accused was attending a preparatory examination.[280] Under the 1977 Act these distinctions between the various stages of the process based on the preliminary examination disappeared.

Although the 1977 Act repealed the 1955 Criminal Procedure Act, the new Act did not change the position regarding bail radically.[281] In case of less serious crimes an accused could be released on bail before his first appearance in the lower court by a senior police official once a sum of money determined by that official was deposited.[282] The presiding officer in a lower, or the supreme court, had the power to release the accused on his application on any charge pending before such court. An amount of bail fixed by the court had to be deposited with the required authority, or on good cause shown the court could permit an accused to furnish a guarantee, with or without sureties, that he will pay and forfeit to the state the sum set by the court.[283]

---

280 Sections 87 and 88 of Act 56 of 1955.

281 Dugard (1977) 73; South African Law Commission (1994) 13.

282 Section 59.

283 Section 60. The recommendation by the Botha report (see footnote 276) that an accused should only be released on bail if he deposits a fixed amount of money in cash, and that sureties be abolished, was not taken up in this Act. In terms of the report it was indicated that nobody accepted sureties anymore, and that this ruling would bring the theory into line with practice.

However, bail could only be granted to the accused subject to the provisions of section 61.[284] In terms of this provision the court was obliged to refuse an application for bail where the attorney-general objects to the granting of bail and informs the court that information was available to him which in his opinion:

- cannot be disclosed without prejudice to the public interest or the administration of justice;
- shows that the release of the accused on bail is likely to affect the administration of justice adversely or to constitute a threat to the safety of the public or the maintenance of the public order.[285]

The attorney-general's decision could not be tested in a court of law until ninety days had lapsed. If no evidence was brought against the accused within 90 days after his arrest, he could apply to the court to be released on bail and the normal principles relating to the release on bail applied. Even though the

---

284 The attorney-general could only exercise his power under section 61 in respect of offences listed in part 3 of schedule 2.

285 Section 61 essentially replaced section 108*bis* of the 1955 Criminal Procedure Act. Section 108*bis* authorised an attorney-general to withhold bail for 90 days in respect of certain serious offences of both a political and non-political nature if the attorney-general considered it necessary "in the interest of the administration of justice or the safety of the public or the maintenance of public order".

The Botha Commission (see footnote 276) considered section 108*bis* and concluded that it deviated from the basic rule that the granting or refusal of bail was a judicial function. According to Botha it could only be justified in the case of politically subversive activities that is in the interest of public safety or the maintenance of public order. Botha further commented that as far as the withholding of bail "in the interest of the administration of justice" was concerned, the withholding of bail by an attorney-general could never be in the interest of the administration of justice. Botha proposed that the phrase "in the interest of the administration of justice" be deleted from section 108*bis*. This recommendation was not accepted. See Dugard (1977) 75.

powers conferred on the attorney-general in terms of section 61 was a serious departure from the general principles it was not as serious as the corresponding measures in terms of section 12A of the Internal Security Act which was inserted in 1976.[286] Under section 12A there was no limitation of 90 days on the order of the attorney-general. The court's discretion to grant bail was therefore completely excluded under section 12A.

If the court granted bail, it could impose conditions, which may be varied or amended at any stage of the proceedings.[287]

The accused could appeal to the superior court against the decision of a lower court:

- refusing bail; or
- against the amount of bail fixed by that court; or
- against the conditions of bail imposed.[288]

In terms of the 1955 Act a superior court could entertain an application for bail which has failed in the lower court, other than by means of an appeal.[289] This power was abolished by the 1977 Act.[290]

---

286 By section 6 of Act 79 of 1976. In par 2.5.2.2 I indicated that section 12A authorised an attorney-general to issue an order that a person arrested on a charge of having committed sedition, treason, sabotage, terrorism or certain offences under the Internal Security Act, not be released on bail before sentence has been passed, or before he has been discharged if he considered it necessary "in the interest of the safety of the State or the maintenance of public order".

287 Sections 62 and 63.

288 Section 55.

289 Section 98.

If the accused failed to meet the conditions of bail, the court could cancel the bail and declare the money deposited forfeited to the state.[291] If the accused failed to appear at the place and time set for his next appearance the court could cancel bail, declare the bail money forfeited to the state and issue a warrant for the arrest of the accused.[292] Where evidence was presented to the court by the state that the accused is about to abscond the court was empowered to order the bail to be cancelled, and that the accused be arrested and detained until the conclusion of the proceedings.[293]

A different position applied to juveniles, that is, persons under the age of eighteen. The court had the option of releasing the juvenile accused or detaining him in a place of custody as defined in the Children's Act.[294]

Although the Criminal Procedure Act of 1955 made no provision for an accused to be released on his own responsibility, a practice in favour of such a form of release developed in the lower courts.[295] However, this practice was criticised in 1967 on the ground that it had no basis in the Criminal Procedure Act.[296] However, the new Criminal Procedure Act gave statutory form to this

---

290 The Minister of Justice refused to reinstate a section 98 type provision in the new Act. See House of Assembly debates, columns 3453 - 7 (11 March 1977).

291 Section 66.

292 Section 67.

293 Section 68.

294 Section 71.

295 Scholtemeyer (1964) 27 *THRHR* 219; Van Greunen (1969) 86 *SALJ* 93.

296 See *S v O'Neill* 1967 (4) SA 84 (SWA).

practice in section 72.[297] The section provided that the court or a police official may instead of bail, release the accused from custody and warn him to appear at the next specified time of hearing, and to remain in attendance at the proceedings. If the person was under the age of eighteen years and was released in this way, he could be placed in the care of the person in whose custody he was and the warning extended to that person. Failure to appear at the hearing as warned, or to produce the juvenile entrusted to one's care, constituted a criminal offence.

The first appearance of the accused was not necessarily within office hours but could be requested by the accused after hours.[298]

With the advent of the Interim Constitution[299] the position with regards to bail was mainly regulated by sections 58 to 71 of the Criminal Procedure Act 51 of 1977. The Internal Security Act of 1982[300] provided for the refusal of bail in certain circumstances until 31 July 1992 when section 30(1) was repealed by the Criminal Law Second Amendment Act of 1992.[301] However, the legal position on bail was not found exclusively in the existing legislation but also in decisions relating to this aspect of the law.[302]

---

297 Pursuant to the recommendation of the Botha Commission.

298 *Twayie v Minister of Justice* 1986 (2) SA 101 (O).

299 Act 200 of 1993 which commenced on 27 April 1994.

300 Act 74 of 1982.

301 Act 126 of 1992.

302 Nel (1987) 1.

The Criminal Procedure Act provided for the granting of bail in the following situations:

- By a lower court pending the finalisation of a review by a provincial division of the supreme court.[303]
- By a provincial division as a result of review.[304]
- By a lower court pending the disposal of an appeal to the provincial division.[305]
- By a provincial division after an appeal.[306]
- By a provincial division as trial court of first instance pending an appeal to the Appellate Division (or to a full bench of the provincial division).[307]

However, the wide powers of a division of the supreme court having jurisdiction in respect of an offence to grant bail at any stage of the proceedings, was not incorporated in the 1977 Act.[308]

---

303 Section 307.

304 Sections 304(2), 3), (4).

305 Section 309(4)(b) read with section 307.

306 Section 309(3) read with section 304(2)(c)(vi).

307 Section 321(1)(b) and (2).

308 South African Law Commission (1994) 14.

## 2.6 SOUTH AFRICAN LAW IN THE CONSTITUTIONAL ERA AFTER 1994

### 2.6.1 Introduction

Langa indicates that South Africans are distinguished tellers of horror stories not so much because of collective imagination but because of stories that can be dredged from the past.[309] The stories of incarceration at the hands of the previous government are undeniably part hereof. It seems reasonable to say that barely 15 years ago most South Africans would have thought it far-fetched that South Africa would undergo the monumental constitutional change that it has. South Africa has a history of perceived conflict of interests and violent confrontations. But the change did not come all of a sudden and can be roughly divided into four stages:[310]

- The pre-negotiating stage which were "negotiations about negotiations" from September 1985 to December 1991.
- The negotiation stage which were substantive negotiations from December 1991 to November 1993.[311]
- The post-negotiating stage from December 1993 until May 1994. The first South African democratic election took place on 27 April 1994. On the same date negotiated outcomes were implemented by way of the Interim Constitution.

---

309 In Bell (1997) 8. He is a poet, writer and was the president of the Congress of the South African Writers in 1997.

310 See Hough & Du Plessis (1994) 1 where they categorise the first three stages.

311 All-party negotiations formally began when the Conference for a Democratic South Africa (CODESA) was convened on 20 December 1991. The negotiations culminated in a forum called the Multi-Party Negotiation Process (MPNP). Some information on the Multi-Party Negotiations is provided in footnote 315.

- The drafting of the Final Constitution in accordance with the constitutional principles in the two years following 10 May 1994 and the certification thereof by the Constitutional Court during the second part of 1996.[312]

There was especially a flurry of activity from the unbanning of the national liberation movements and the release of Nelson Mandela from prison in 1990. Members of the legal fraternity travelled to every corner of the earth studying different constitutions. But if the politics was encouraging the result was not. Violence and crime in general soon got out of hand. A new source of horror stories was born.

In spite of the two incessant themes of sovereignty and individual freedom that marked the history of South Africa, the negotiations continued.[313] These themes were matched by the determination of many in the previous government to stay in power.[314] Taking this into account, what happened at the Word Trade Centre at Kempton Park between 1992 and 1993, and the Constitutional Assembly between 1994 and 1996 is remarkable.

The Bill of Rights and the underlying philosophy of human rights was meant to achieve social justice for all in the country.[315] Although not the longest chapter

---

312 Some information on the drafting of the Final Constitution and the certification process is provided in footnote 315.

313 Effectively the battle for civil rights started as far back as the rule of the Dutch East India Company.

314 See Bell (1997) 12.

315 By the end of April 1993 the Negotiating Council at the Multi-Party Negotiations decided to appoint seven technical committees to assist it in formulating proposals for the Interim Constitution. One of these committees dealt with fundamental rights and was called the Technical Committee on Fundamental Rights. At the insistence of the ANC who primarily wanted to ensure a fair election this committee initially only dealt with political rights. In

in the Constitution, it created more public debate than all the other chapters put together. This was where the individual sought protection against the abuse of power by the state. It had to establish the duties of government towards the people.

---

the end it dealt with all the rights and reported to the council on a weekly basis. In formulating their proposals it relied on the agreements reached at CODESA and the Multi-Party Negotiating Process, written submissions made by participants in the MPNP and feedback from the discussion of their reports in the Negotiating Council. On this basis the rights were developed. Some problem areas were referred to the Ad Hoc Committee on Fundamental Rights, which comprised also of representatives of the political parties. Evidence of interaction between these two committees can be found. During this time many of the differences were solved by bilateral and informal discussions between the parties which were then conveyed to the Ad Hoc Committee. See also Du Plessis & Cordier (1994) 8.

Some of the main functional bodies at the drafting of the Final Constitution were:

- The Constitutional Committee under Cyril Rhamaphosa, which was the engine room.
- The Management Committee which concentrated on the procedural aspects also under Cyril Rhamaphosa; and
- The officials of the Constitutional Assembly.

Theme committees were established to work on different parts of the Constitution. Theme Committee 4 dealt with fundamental rights. A technical committee consisting of specialists in particular fields supported each theme committee. The theme committees had to ensure the inclusive nature of the constitution making process. In approximately October 1995 a draft was submitted and published for input in December 1995 even though there were still disagreement on some aspects. The comments were taken into account and many progress reports were submitted to the Constitutional Committee. At a point Theme Committee 4 ceased to function and the Constitutional Committee carried on with negotiations. Many issues were solved in bilateral and in informal discussions. In the end the Technical Refinement Team refined the text of the Constitution. But, the Constitutional Court was still required to certify that all the provisions complied with the constitutional principles. The Constitutional Court at first referred some provisions back to the Constitutional Assembly, but the text was finally certified by way of "the second certification judgment" in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of South Africa, 1996* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC). See also Ebrahim (1998) 180 and further.

However, it seems to have been commonly understood that the road ahead would not be an easy one. While the Bill of Rights would point the way, it could not provide all the answers. New structures would have to be built and new mechanisms would have to be implemented to give life and meaning to it.

The Interim Constitution did away with the Westminster-style of sovereignty where legal positivism flourished side by side with ideological bigotry. From the Multi-Party Negotiations emerged a federal state with a distribution of powers and functions among different levels of government. The Preamble to the Interim Constitution made it clear that the 1994 Constitution was a transitional Constitution which provided for the continued governance of the country while an elected Constitutional Assembly draws up the Final Constitution.

The Interim Constitution, which included a Bill of Rights, bound all legislative, executive and judicial organs and was upheld by an independent judiciary. The fundamental rights were spelled out with some measure of exactitude and any law inconsistent therewith was unconstitutional. These themes were carried into the Final Constitution in accordance with a "solemn pact" recorded as the 34 Constitutional Principles.[316]

### 2.6.2 The period 1994 - 30 June 1999

It was against the background of unacceptable incarceration policies by the previous government that the citizens of South Africa drafted the right to be

---

316 The Constitutional Principles are contained in schedule 4 to the Interim Constitution.

released from detention with or without bail, unless the interests of justice require otherwise in the Interim Constitution.[317]

But the authorities soon hereafter started to water down the right to bail. Certain changes were made to the position regarding bail in the Criminal Procedure Act by way of the Criminal Procedure Second Amendment Act 75 of 1995.[318] Notwithstanding the fact that the new section 60(1)(a) of the Criminal Procedure Act echoed the right contained in section 25(2)(d) of the Interim Constitution, the changes may be seen as an attempt on the part of the legislature to clarify, tighten up and align the principles of bail with the constitutional norm in section 25(2)(d). This was followed by the introduction of the Final Constitution.[319]

The higher level of protection afforded to the right to bail under the Interim Constitution, fell away under the Final Constitution. The infringement of the right to bail therefore does not have to be "necessary" any more.[320] In terms of section 35(1)(f) of the Final Constitution 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.

---

317 Section 25(2)(d) provided that every person arrested for the alleged commission of an offence shall in addition to the rights which he has as a detained person, have the right to be released from detention with or without bail, unless the interests of justice require otherwise.

318 It commenced on 21 September 1995.

319 Act 108 of 1996. The Final Constitution was signed by Nelson Mandela at Sharpville on 4 February 1997.

320 See chapter 8 footnote 162.

Soon hereafter the Criminal Procedure Second Amendment Act 85 of 1997 followed.[321] It too was generally aimed at tightening up bail requirements and procedures.

### 2.6.3 A summary of the position as at 30 June 1999

#### 2.6.3.1 General

Section 35(1)(f) in the Constitution is the primary provision regarding bail. After the changes referred to above, the Criminal Procedure Act 51 of 1977 provides for the granting of bail in the following situations:

- For less serious offences, before the first appearance in a lower court, by a police official of or above the rank of non-commissioned officer in consultation with the police official charged with the investigation;[322]
- By an attorney-general or duly authorised prosecutor in respect of offences referred to in schedule 7 and in consultation with the police official charged with the investigation;[323]
- By a court at any stage preceding the conviction;[324]
- By a provincial or local division as a result of a review;[325]

---

321 As amended by the Judicial Matters Amendment Act 34 of 1998. The Act commenced on 1 August 1998.

322 Section 59.

323 Section 59A. This bail may of course also be granted outside office hours. Notwithstanding the so called "police bail" under section 59 and "prosecutors bail" under the new section 59A the granting or refusal of bail is primarily a judicial function.

324 Section 60.

325 Section 304(2)(c)(vi); (4).

- By the court that imposed the sentence pending review in terms of section 307(2)(b);
- By the court that imposed the sentence pending review[326] in terms of section 308A(a);
- By the court that imposed the sentence pending appeal in terms of section 309(4)(b) read with section 307;[327]
- By the supreme court giving the decision on appeal in terms of sections 309(5)/309(3) read with section 304(2)(vi).
- By a superior court as trial court of first instance pending an appeal.[328]

Section 77(8) of the Criminal Procedure Act makes provision for the granting of bail to a person found capable of understanding the proceedings[329] and who is convicted, or not capable of understanding the proceedings,[330] and who appeals the finding. The appeal is to be made in the same manner, and subject to the same conditions, as an appeal against a conviction from a lower

---

326 Under section 304(4).

327 In terms of Government Gazette No 20036 dated 30 April 1999, sections 1 and 3 of the Criminal Procedure Amendment Act (Act 76 of 1997) commenced on 28 May 1999. Magistrates now have to grant leave to appeal. However, the question arises whether reasonable prospects of success have to be taken into account for purposes of granting bail. The application for bail will in many instances also be heard before the request for leave. In *S v De Villiers* 1999 (1) SACR 297 (O) Hancke and Cillié JJ on 27 October 1998 indicated that the prospects of success should not be taken into account by magistrates except in the clearest circumstances. This was said because magistrates had not been trained in this skill, and it was not acquired overnight. See also *S v Hudson* 1996 (1) SACR 431 (W) where all the relevant cases are mentioned and discussed. This does not bode well for the whole process.

328 Sections 321(1)(b) and (2).

329 In terms of subsection (5).

330 In terms of subsection (6). And against whom the finding is not made in consequence of an allegation by the accused. See section 77(8)(ii).

court.[331] Bail can also be provided where a court in terms of section 78(6) finds that an accused committed the act, but that he at the time of the commission by reason of mental illness or defect is not criminally responsible and that decision is appealed. The appeal is also to be made in the same manner, and subject to the same conditions, as an appeal against a conviction from a lower court.[332]

Inasmuch as it is clear from all these provisions that the forfeiture of freedom may be sanctioned by society pending the determination of guilt, or the next step in the criminal process, such forfeiture of freedom is subject to judicial supervision and control.[333] While some principles that influence an applicant's right to bail are found under the principles of arrest, the effect, rules and consequences of bail can primarily be found under the principles governing release on bail before conviction. These principles are now discussed.

2.6.3.2 Arrest as method of securing the attendance of an accused in court

Section 40 of the Criminal Procedure Act provides that arrest may only be effected in certain instances without a warrant. An arrested person shall, if not released otherwise, be brought before a lower court as soon as reasonably possible, but not later than forty-eight hours after the arrest. If the forty-eight hours expires outside normal court hours or on a day that is not an ordinary

---

331 In *S v Malcolm* 1999 (1) SACR 49 (SE) it was indicated that even if no power was implied by section 77(8), the high court would have inherent power to grant bail to the accused pending such appeal. See also *S v Hlongwane* 1989 (4) SA 79 (T).

332 Section 78(8)(b).

333 See also Joubert (1998) 136 and further, and Neveling and Bezuidenhout in Nel & Bezuidenhout (1997) 279 and further for concise expositions of the principles.

court day, the accused shall be brought before a lower court not later than the end of the first court day.[334]

Any person who is arrested with or without a warrant for allegedly committing an offence, must be informed by the court of the reason for his further detention, or be charged and be entitled to apply to be released on bail.[335] If the accused is not so informed or charged he shall be released.

A person arrested with or without a warrant, is not entitled to be brought to court outside ordinary court hours, as was previously the case.[336]

The lower court hearing the application may postpone such proceedings or application to any date or court for a period not exceeding seven days at a time

---

334 Section 50(1). In *Garces v Fouche* 1998 (2) SACR 451 (Nm) the full bench held that the mere fact that section 50(1) authorised detention for forty-eight hours, did not mean that an accused arrested on a criminal charge, could not bring himself before court before the forty-eight hours expired. Because this section set the maximum time and not the minimum, nothing precluded him from doing so. However, real urgency on a case by case basis has to be determined before a court will hear a bail application outside hours. This view is also held by Du Toit *et al* (1987) 5 - 34B.

335 Section 50(6)(a). In terms of the Final Constitution the arrested person is of course entitled to apply for bail before he is charged. See par 7.3.3.2.

336 Section 50(6)(b). The relationship between the "right to bail" and the "right to liberty" before the advent of the fundamental rights era, led the courts to allow bail applications at all hours. See *Twayie v Minister of Justice* 1986 (2) SA 101 (O) 104E - F:

> *Elke verhoorafwagtende is 'n potensiële onskuldige, en onnodige inperking van die burger se vryheid druis teen alle beskaafde gevoel in ... . Teen die agtergrond van hierdie algemene beginsels sal al bevredegende antwoord wees dat beide die Hooggeregshof sowel as die laerhowe 'n gearresteerde, wat hom oor sy arrestasie beswaard voel, te enige tyd, op sy aansoek, sal aanhoor en dit wel uit hoofde van voormelde artikel 60* [of the Criminal Procedure Act before amendment] *ten einde die werking van hierdie artikel ten volle effektief te maak.*

and on conditions which are not inconsistent with the provisions of the Criminal Procedure Act.[337]

2.6.3.3 The granting of bail before conviction

2.6.3.3.a General

Chapter 9 of the Criminal Procedure Act provides a comprehensive framework for the granting of bail before conviction. In *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[338] the Constitutional Court observed that the chapter created a complex and comprehensive interlocking mechanism that was designed to govern the whole procedure whereby an arrested person will be released from custody. It is therefore necessary to briefly describe the provisions of chapter 9.

---

337 Section 50(6)(d). The court may only do so if:

(i) The court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application;
(ii) The prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60(11A);
(iii) The prosecutor informs the court that the person is going to be charged with an offence referred to in Schedule 6 and that the bail application is to be heard by a regional court;
(iv) It appears to the court that it is necessary to provide the State with a reasonable opportunity to -
(aa) procure material evidence that may be lost if bail is granted;
(bb) perform the functions referred to in section 37; or
(v) It appears to the court that it is necessary in the interests of justice to do so.

338 1999 (7) BCLR 771 (CC).

2.6.3.3.b The effect and conditions of bail

Section 58 describes the effect of bail and sets out the peremptory conditions. Discretionary conditions of bail may be added.[339] On application by the prosecutor, any court before which a charge is pending and where bail has been granted, may add any of the conditions of bail set out in section 62. Where bail has been granted the prosecutor or accused may apply to have the amount of bail increased or reduced or the bail conditions amended.[340]

2.6.3.3.c Bail before first appearance of accused in lower court

Section 59 provides that bail may be granted by certain police officials in respect of certain less serious offences.[341] In terms of section 59A the attorney-general or an authorised prosecutor may release a suspect arrested for certain more serious offences on bail.[342] If bail is not granted as envisaged by section 59 of 59A he must be brought before a lower court as soon as reasonably possible but not later than forty-eight hours after arrest.[343] Bail will then be considered as envisaged in section 60.

---

339 See sections 59A(3)(b) (attorney-general) and 60(12) (court). A police official who acts in terms of section 59 does not have the power to determine special conditions of bail. See in general *S v Cronje* 1983 (3) SA 739 (W) 742C.

340 Section 63.

341 Section 59(1)(a) provides that bail may not be granted for the more serious offences listed in part II or part III of schedule 2 of the CPA.

342 Section 59A(1) limits the offences to those listed in schedule 7 of the CPA.

343 Subject to section 50(1)(d). See also par 2.6.3.2.

2.6.3.3.d Bail application in court

Section 60 of the Criminal Procedure Act was substituted by section 3 of the Criminal Procedure Second Amendment Act 75 of 1995,[344] and further amended by the Criminal Procedure Second Amendment Act 85 of 1997. The new section 60 contains procedural and evidentiary rules concerning bail applications and identifies various factors which the court should consider in deciding whether one or more of the grounds referred to in sections 60(4)(a) to 60(4)(e) are present.[345] These factors which are now contained in sections 60(5) to 60(8A) were formally found in the case law, common law and common sense.[346] Cowling is of the opinion that the factors listed, or identified in support of a particular ground, may equally be relevant to the establishment of other grounds.[347]

Except for the fact that section 60(1)(a) is limited to the period before conviction, the wording seems to be in line with the Interim Constitution. However, this right to be released prior to conviction is subject to the provisions of section 50(6) of the Act.[348] A person's right to institute bail proceedings are regulated and qualified by section 50(6). A person arrested for

---

344 Before this amendment this section stood unamended since its inception in 1977.

345 There is precedent in comparable democracies other than under Canadian law for providing courts with such guidelines. See section 32 of the Australian Bail Act, 1978 and schedule 1 par 9 of the 1976 English Bail Act.

346 The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) par 40 indicated that these factors could in the main be traced back to case law. See also Van der Merwe in Du Toit *et al* (1987) 9 - 17 with regard to the grounds referred to in sections 60(4)(a) - (d).

347 (1996) *SACJ* 50 75.

348 See par 2.6.3.2.

the alleged commission of an offence must as soon as possible be informed of the right to apply for bail.[349]

In terms of section 60(1)(b), the court referring an accused to any other court for trial or sentencing, retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act, until the accused appears in such other court for the first time.

It is now expected of the presiding officer to act inquisitorially and not as a passive umpire. If the question of bail is not raised by the accused or the prosecutor, the court must ascertain whether he wishes that question be considered by the court.[350] In *S v Ngwenya*[351] it was held that a judicial officer has a duty to inform an unrepresented accused of his right to apply for bail, and of the nature of the procedure to be followed.

In respect of matters that are not in dispute between the accused and the prosecutor, the presiding officer may in an inquisitorial and informal manner acquire the information that it is needed for its decision or order regarding bail.[352] It is submitted that the court is not bound by the normal evidentiary rules governing bail applications in this regard, and may rely on statements from the bar, or on statements of fact drawn up by the parties.[353]

---

349 Section 50(1)(b).

350 Section 60(1)(c).

351 1991 (2) SACR 520 (T).

352 Section 60(2)(b).

353 See Van der Merwe in Du Toit *et al* (1987) 9 - 16.

With regards to matters that are in dispute between the parties, the prosecutor or the accused as the case may be, may be required to adduce evidence.[354]

It is furthermore submitted that the word "evidence" in section 60(2)(c) does not require oral evidence, but also other forms of evidence which have been traditionally applied in bail applications. Affidavits can for example be received.[355] Even though it is intended to be a formal court procedure it is considerably less formal than a trial because of the interlocutory and inherent urgent nature of the proceedings.

If the court has acquired the information that is not in dispute, and has taken cognisance of the evidence submitted by the prosecutor and the accused, and is of the opinion that it does not have sufficient or reliable evidence at its disposal, or lacks certain information, the presiding officer must order that such information or evidence be placed before the court.[356]

Section 60(9) provides that the "interests of justice"[357] be weighed against the right of the accused to his personal freedom and in particular the prejudice that the accused is likely to suffer if detained in custody.[358] This balanced approach

---

354 Section 60(2)(c). Van der Merwe in Du Toit *et al* (1987) 9 - 16 submits that this subparagraph empowers the court to decide who has the duty to lead evidence first. He does not see it as a mechanism to allocate an onus proper.

355 See *S v Pienaar* 1992 (1) SACR 178 (W).

356 Section 60(3). It is submitted that the normal procedure when bail is contested would be to call on the party that is burdened with the "onus" to begin. See chapter 8.

357 See par 7.3.5 for a discussion as to the meaning of the term "interests of justice" as used in the Constitution and in the various subsections of section 60 of the Criminal Procedure Act.

358 The factors to be taken into account are:

was put forward by Mahomed J in *S v Acheson*[359] and codifies the common law approach.

It is furthermore provided in section 60(10) that the court has to weigh the personal interests of the accused against the interests of justice notwithstanding the fact that the prosecution does not oppose the granting of bail. Thus even where the prosecution concedes bail the court must still make up its own mind. Edeling J in *Prokureur-Generaal Vrystaat v Ramokosi*[360] clearly states that sections 60(3) and 60(10) provide for bail procedures to be inquisitorial in nature. Logic dictates that the presiding officer should first call upon the prosecution to indicate why bail is not opposed. If the court needs further information to reach a decision on bail the court can order that such information be placed before the court in terms of section 60(3).

The Act also provides for two instances in section 60(11)(a) and section 60(11)(b) where the court must order that the accused be kept in custody,

---

(a) The period for which the accused has already been in custody since his or her arrest;
(b) A probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
(c) The reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
(d) Any financial loss which the accused may suffer owing to his or her detention;
(e) Any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
(f) The state of health of the accused;
(g) Any other factor which in the opinion of the Court should be taken into account.

359 1991 (2) SA 805 (Nm) 823.

360 1997 (1) SACR 127 (O).

unless the accused, having been given a reasonable opportunity to do so, satisfies the court that the interests of justice permit his release.[361]

Section 60(11B) compels the accused or his legal advisor to inform the court whether the accused has previously been convicted of any offence or has any charges pending against him. The accused or advisor must also inform the court whether he has been released on bail in respect of those charges. The refusal to supply the information or the supply of false information is an offence. Section 60(11B)(c) also provides that the record of the bail proceedings, except the information as to previous convictions or other pending charges, will form part of any trial that may follow upon the bail application.[362]

In terms of section 60(14) no accused shall for the purposes of the bail proceedings have access to any information in the police docket, unless otherwise directed by the prosecutor.[363]

2.6.3.3.e Appeal to superior court with regard to bail

In terms of section 65 an aggrieved accused may appeal to a superior court against the refusal of bail by a lower court, or the imposition of any condition of bail, and also the amount of bail.[364] Conversely section 65A makes it possible for the attorney-general to appeal to a superior court having jurisdiction against the decision of a lower court to release the accused on bail,

---

361 See par 8.3.3.3 and further.

362 See chapter 9.

363 See chapter 10.

364 The superior court may consist of a single judge.

or against the imposition of a condition of bail. An appeal with regard to bail is analogous to an ordinary appeal despite the principle that a bail application should be heard as soon as possible.[365] There is no provision that additional information be furnished to the high court hearing the appeal. The judge can therefore only intervene if he is satisfied that the magistrate was wrong. An appeal to the Supreme Court of Appeal is limited to a superior court's decision to release an accused on bail.

2.6.3.3.f Failure to observe conditions of bail

When an accused has been released on bail subject to conditions under sections 60 or 62, including an amendment or supplementation under section 63, and the prosecutor applies to lead evidence to prove that the accused has failed to comply with such condition, the court shall if the accused is present and denies that he failed to comply with such condition or that his failure was due to his fault proceed to hear such evidence as the prosecutor and accused may place before it.[366]

If the accused is not present when the prosecutor applies to lead evidence that the conditions of bail have been breached, the court may issue a warrant for the arrest of the accused. When the accused appears before court and denies

---

365 See in general *S v Maliwa* 1986 (3) SA 721 (A).

366 Section 66(1). The state bears the onus to prove on a balance of probabilities that the accused has breached the conditions of bail due to fault on his part. See *Sebe v Magistrate, Zwelitsha* 1984 (3) SA 885 (Ck) 890B. The state therefore has to bring the matter within the provisions of section 66. See also *Ayob v Minister of Justice* 1963 (1) SA 775 (T) 781E - F. Once the state has proved that the conditions of bail are breached there is a burden upon the accused to prove on a balance of probabilities "such facts as are relevant to persuade the Court not to withdraw the bail or declare it forfeited to the State". See *Sebe v Magistrate, Zwelitsha* 1984 (3) SA 885 (Ck) 890B - C.

that he failed to comply with the condition in question, the court proceeds to hear such evidence as the prosecutor and the accused may place before it. If it is found that the failure to comply with the condition is due to the fault of the accused, the court may cancel the bail and declare the money forfeited to the state.[367] It seems that the court has to apply its mind and exercise its discretion in respect of two distinct and separate issues.[368] Once it has been decided to cancel bail, the court has to consider as a separate matter the question as to whether or not the bail money should be forfeited to the State.[369]

2.6.3.3.g Failure of accused on bail to appear

A court is compelled to provisionally cancel bail, declare it provisionally forfeited to the state and to issue a warrant if an accused who is on bail fails to appear at the time and date appointed for his trial, or to which the proceedings are adjourned or fails to remain in attendance at such trial or at such proceedings.[370]

---

367 *Mens rea* in the form of *dolus* or *culpa* is required before the bail can be cancelled and the money declared forfeited to the state. See *Jack v Vermeulen* 1979 (1) SA 659 (C) 660D - G. See also generally *S v Swartbooi* 1991 (2) SACR 54 (Nm).

368 *Sebe v Magistrate Zwelitsha* 1984 (3) SA 885 (Ck).

369 The weight of authority favours the view that proceedings in terms of section 66 are only reviewable and not appealable. See generally *Ex Parte Estate Phillips: In re R v Phillips* 1958 (1) SA 803 (N); *Pillay v Regional Magistrate, Pretoria* 1977 (1) SA 533 (T); *Jack v Vermeulen* 1979 (1) SA 659 (C) and *Sebe v Magistrate Zwelitsha* 1984 (3) SA 885 (Ck).

370 Section 67(1). See also *S v Cronje* 1983 (3) SA 739 (W) 741A and *S v Mudau* 1999 (1) SACR 636 (W).

If the accused does not appear within fourteen days of his failure, the provisional cancellation of bail and the provisional forfeiture of bail shall become final.

If the accused appears within the fourteen days since the issue of warrant, the court shall confirm the provisional cancellation of bail and provisional forfeiture, unless the accused satisfies the court that his failure to appear or remain in attendance was not due to his fault.[371]

Since 1995 and against the backdrop of cases like *S v Sibuya*,[372] *S v Ndwayana*,[373] *S v Nkosi*[374] and *S v Bobani*,[375] the non-compliance with conditions of bail or failure to appear has been criminalised. Section 67A creates a statutory offence and the normal rules and standards should apply. The burden of proof beyond a reasonable doubt is on the prosecution who has to prove the absence of good cause.[376]

---

371 See *S v Cronje ibid* 741G. It is submitted that the civil standard of proof should be applied. See also *S v Mudau ibid* where the court points to the amended section 70 that now also enables the court to remit the whole of the bail money forfeited.

372 1979 (3) SA 192 (T).

373 1983 (1) PH H93 (E).

374 1987 (1) SA 581 (T).

375 1990 (2) SACR 187 (T).

376 Section 67A does not require the accused to show good cause or satisfy the court of the presence of good cause. However, see Cowling's interpretation of section 67A in (1996) *SACJ* 50 59.

2.6.3.3.h Cancellation of bail

Section 68 of the Act also provides for the cancellation of bail by the court before which the charge is pending, where there is information upon oath that the accused:

- is about to evade justice or about to abscond in order to evade justice; or
- interferes (or threatens or attempts to interfere) with witnesses; or
- defeats or attempts to defeat the ends of justice; or
- poses a threat to the safety of the public (or of a particular person); or
- has not correctly disclosed all his previous convictions in the bail proceedings or where his true convictions has come to light; or where
- further evidence has come to light including that the accused has supplied false evidence which might have affected the decision to grant bail; or
- it is in the interests of justice.

The court may issue a warrant for the arrest of the accused and make any order it deems fit, including an order that the accused be committed to prison until the conclusion of the criminal proceedings.[377]

The accused may apply for the cancellation of his bail where:

- he is in custody on any other charge;
- where he is serving a sentence.

This is done by way of an application in terms of section 68A.

---

377 It is submitted that the state has to prove on a balance of probabilities that there are sufficient grounds for cancellation in terms of section 68. Section 68 applies *mutatis mutandis* to bail pending a review in terms of section 307 or an appeal in terms of section 309. See *Allie v De Vries* 1982 (1) SA 774 (T).

## 2.7 CONCLUSION

Since the earliest times the question has been asked in all criminal justice systems: What must be done with the accused, whose guilt has not been proved, between arrest and final adjudication? To a large extent this vexing question was answered by the development of the principles on bail.

In most primitive societies self-help and tribal vengeance took the place of the trial. Trials are the hallmark of advanced societies. The progress along the evolutionary scale can thus be measured by the extent to which a society accepts the trial procedure instead of arbitrary methods of self-help.[378]

The principles regarding bail in South Africa can be traced back to the legal principles regarding *vindex* and *vadimonium* in Roman law, surety under Roman-Dutch law, and "borh" under English law. From these histories much can be learnt about the purpose and principles of bail, and the balance that has existed in history between the individual's right to liberty and the interests of society.

History shows that bail has long since evolved into a contract in terms of which a detained person is set at liberty upon his payment or furnishing of a guarantee to pay a fixed sum of money. The state, on the other hand, undertakes to respect his liberty if the conditions of bail are met. Bail acts as a reconciling mechanism to accommodate both the defendant's interest in his liberty, and society's interest in assuring the defendant's presence at trial. The

---

[378] See Wigmore JH, (1941) *A Kaleidoscope of Justice* 715 as cited by Dugard (1977) 1. See also Maine (1890) chapters IX and X for the history of procedural systems in primitive societies.

purpose of bail in general is to minimise the loss of freedom to the accused where he has not been convicted.

There are many examples where bail could only be granted in respect of certain and usually less serious offences. Roman-Dutch, and early South African law are cases in point. Early English law under the Statute of Westminister I refused bail in the event of homicide and the list of non-bailable offences was extended from time to time.

However, the not too distant South African history has caused concern in that the attorney-general was empowered to prohibit the release of an accused on certain serious or "political" offences effectively removing that decision from the discretion of the court. The individual was thus effectively at the mercy of the state which led to government heavy-handedness that in some instances ran along political or racial lines and brought great hardship. This led to the realisation that the decision whether bail should be granted or not could not be subject to what the government of the day thought was necessary to maintain law and order.

The idea that a person should only be entitled to bail once enough information has been gathered regarding his transgression, is not new to our law but was introduced by Ordinances 30 of 1828 and 72 of 1830 along with the introduction of the preliminary investigation. This was done by conferring a right to bail only once the preliminary investigation has been completed. However, the magistrate had the discretion to grant bail. After completion of the preliminary investigation, but before committal for trial, the attorney-general had to approve the release.

From this time and into the Union the principle existed that only once the case had been committed to trial, the accused was entitled to bail. The Criminal Procedure and Evidence Act of 1917 again made the granting of bail possible before the facts of the case had been adequately considered, except in the case of certain serious offences. However, the entitlement to bail still only arose after committal for trial and then only the supreme court could grant bail for certain serious offences. Still, bail could be granted by the supreme court at any stage of the proceedings.

However, an accused was entitled to be brought before a court at his request to pursue his release in the previous era at any time, even after hours. There was also no provision enabling the state to postpone an application for bail in order to gather information.

A greater responsibility was furthermore recently cast upon the presiding officer, in that he is obliged to act inquisitorially. Yet, this idea is not new under South African law. We have already seen that the procedure to determine bail in the time period 1652 until 1806 had been inquisitorial.

Under present South African law the regional court has to consider the granting of bail for the "most serious" offences mentioned in schedule 6. The high court in South Africa would only have to consider bail if the case has already been transferred to it, and a bail application is thereafter instituted. On the same principle the regional court would also have to consider the bail application for a "lesser" offence once the case has been transferred to it. The Criminal Procedure and Evidence Act of 1917 went further in that it limited the granting of bail for certain serious offences to the supreme court.

Even though objections have been raised under recent South African law against the propensity to commit crimes as being preventative detention, this objective has been recognised as a legitimate objective of pre-trial detention at common law, along with the danger of the offender to society. The strength of the case, and the nature of the offence against the offender, have similarly been determining factors, although the nature of the offence seems to have in some instances been incorrectly used as punishment. Even under Roman-Dutch law it was understood that an offender (or the surety) would be less willing to stand trial in view of the harsh punishment that could be imposed.

# CHAPTER 3

# CONSTITUTIONAL LAW OF CANADA

## 3.1 INTRODUCTION

The study of Canadian history is important, if not essential, to understand contemporary political and constitutional issues in Canada. If you want to know where you are going it helps to know where you have been. The Canadian Charter did not arrive suddenly or unexpectedly in Canada on 17 April 1982.[1] It

---

[1] By way of the Constitution Act, 1982.

was the product of a complex history and political forces that must be kept in mind by those who wish to understand its meaning.

In this chapter a historical overview of the development of Canadian society up to the present constitutional dispensation is given. In particular, the factors, influences and process that resulted in the imposition of protected fundamental rights are highlighted. The chapter shows why there is a need for the constitutional protection of a threshold right to bail. It confirms that it was wise to have borrowed from Canadian law when the Bill of Rights was drafted, and that Charter jurisprudence can be relied on with confidence.

This chapter also describes the court structure so that the importance of a specific decision can be ascertained.

## 3.2 THE HISTORICAL CONTEXT

The periods of importance to the development of the Constitution, including human rights, in Canadian history are as follows:[2]

### 3.2.1 Pre-colonial times

The Aboriginal people lived in "Canada" under an Aboriginal government when the Settlers came in 1497. They were organised in societies and lived as they had done for centuries.[3]

---

2 See Funston & Meehan (1994) 12 and further; Hogg (1992) 27 and further; Scott (1977) 3 and further; Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 5 and further; Whyte, Lederman & Bur (1992) 2 - 2 and further, for constitutional histories of Canada.

3 See *Calder v British Columbia* (Attorney-General) [1973] SCR 313 328 (Can) per Judson J.

### 3.2.2 Colonial settlement and governance

#### 3.2.2.1 A summarised history

Between 1497 and 1535 Europeans explored and settled in the Atlantic Provinces, Eastern Arctic and St Lawrence Valley and the eastern United States. From 1535 to 1663 outposts of the European nations evolved in New France[4] and in the valley of the St Lawrence River.[5] The period 1663 to 1702 saw the emergence of colonial governments as a Royal government emerged in New France. The Hudson's Bay Company started and England's commercial interests emerged. Alliances were forged with the Aboriginal peoples.[6]

After this and up to 1763, the French and the British Empires struggled with their Aboriginal allies on the military and the commercial front for control of North America. In the years that followed, dissatisfaction grew among the parties and under the Royal Proclamation of 1763 the British North American Policy came into being. A change in British policy took place by way of the Quebec Act of 1774. An independent United States of America emerged with

---

4 The territory now comprising Ontario and Quebec was part of the colony of New France. In 1763 after the British victory over France on the Plains of Abraham the whole of New France was ceded to Great Britain by way of the Treaty of Paris. See Hogg (1992) 33.

5 See Funston & Meehan (1994) 13. It seems that the first Europeans were of French origin. The British traders only came to Hudson Bay in the seventeenth century. See Scott (1977) 14. The chief source of immigration was from England and France. Most European emigrants left their homelands for greater economic opportunity. This urge was frequently reinforced by a yearning for religious freedom or a determination to flee from political oppression.

6 The Aboriginal population was Indian and Eskimo. See Scott (1977) 14.

the Declaration of Independence adopted on July 4 1776. A first attempt to form a Canadian union was made with the Constitutional Act of 1791.

The attempts by the English and the French settlers in Canada during 1791 to 1860 to reconcile their differences saw the emergence of responsible government in the provinces and colonies that would eventually form Canada. The American civil war between 1861 and 1867 and economic advantages of a common market giving increased wealth to undertake large public projects formed an impetus for the Canadian union.[7]

3.2.2.2 Early colonial influences

The organisation of the political and legal systems of Canada according to a constitution is a relatively recent development. Today Canadian society is governed by elected representatives operating in democratically sanctioned institutions. In the early years the colonies were by contrast governed by the prerogative of the Crown.[8] The laws were made and enforced in the name of the Monarch and even where provision was made for the election of assemblies the governor was not bound to follow their advice.

Many of the rights that Canadians now possess can be traced to the legal system Canada inherited from Great Britain.[9] In terms of section 11(f) of the Canadian Charter, for example, trial must be by jury. This existed in at least rudimentary form as early as the Norman Conquest.[10] Many other fundamental

---

7 See Hogg (1992) 36.

8 Read (1948) 26 *Can Bar Rev* 621. See also Mewett & Manning (1994) 3.

9 Although Quebec did not inherit the common law with regard to civil matters, it did with regard to public law.

10 See Walker (1980) 1238.

rights and liberties initiated from epochal manifestos like the Magna Carta,[11] the English Bill of Rights, the Habeas Corpus Acts, and the Act of Settlement[12] to the gradual case by case decision making of the common law courts.[13] There seems to be wide agreement that the British common law was retained for criminal matters, where many rights disputes arise.[14] Despite ambiguity in the wording of the Quebec Act, British law was inherited by Quebec with respect to Crown law, constitutional law, and probably public law in general.[15] Quebec's civil law also contained many provisions protective of civil liberties.[16]

There is a vast and important body of inherited and judicially developed protections of civil liberties in Canadian law. It may be said that there are significant differences between the law of Quebec and the law of the common law provinces, but judicially developed protections of fundamental rights prevail throughout Canada.[17]

---

11 This was the first time in English history that there had been a written organic instrument exacted from a sovereign ruler which purports to lay down binding rules of law that the ruler himself may not violate. In 1215 at Runnymede, King John was forced to agree to abide by "the law of the land" in his dealings with his subjects. Also see Gora (1978) 1 and further.

12 See Pound (1957) 61 - 63.

13 This inheritance should not be regarded as a body of static principles because the Canadian courts have both refined and added substantially to the principles since 1867.

14 See for example MacIntosh (1995) 1 and Gibson (1986) 2.

15 See Cote (1977) 15 *Alta L Rev* 29 41 - 42.

16 Scott (1959) 37 *Can Bar Rev* 135.

17 Gibson (1986) 3.

However, the significance of this inheritance should not be overstated. According to Scott one fundamental principle that was inherited from the United Kingdom, was parliamentary supremacy.[18] This meant that whatever the elected legislators decided to enact no matter how inconsistent it was with traditional liberties, it is the law of the land until legislatively repealed, and must be enforced by the courts.[19] Even guarantees as sacrosanct as those contained in the Magna Carta have been abrogated by statute in Canada.[20]

### 3.2.3 The formation of the Canadian federation

A series of colonial conferences that were held between 1864 and 1867 in Charlotte Town, Quebec City and London, lead to the implementation of a confederation and the self-governing Dominion of Canada.[21] It did not create an independent country and the federating provinces were all British colonies. However, the provinces did achieve a large measure of self-government.[22]

---

18 (1977) 212. However, the various Parliaments were not sovereign in all respects. They had to stay within the scheme of federalism. See Hogg (1992) 303. The principle of parliamentary sovereignty (or so-called Westminster constitutional system) was also inherited from Britain into the South African law in 1910 when the British Parliament passed the South Africa Act, 1909. In 1994 the Interim Constitution replaced this system with a system of constitutional supremacy. In the Final Constitution the supremacy of the constitution is primarily reflected in section 2 which determines that the constitution is the supreme law of the land. See Burns (1999) 4 & 8 and Basson (1994) 16 & 59.

19 Gibson (1986) 4.

20 See Thomas (1969) 12 *Can Bar J* 234. Lord Chancellor Gerald Gardner stated in 1969 that 27 of the articles had already been repealed.

21 By way of the British North America Act, 1867. Section 3 created "one Dominion under the name of Canada". The confederation scheme was settled at the conferences mentioned. See Hogg (1992) 36 & 104.

22 Hogg *ibid* 45.

The delegates' instructions at the conferences were to work out the plans for a new union.[23] From these conferences a set of 72 resolutions was eventually adopted at the Quebec City conference. It turned out that some of the provinces were not convinced of the idea of a union and the Quebec City Agreement proved difficult to implement. The plan was nearly abandoned. A slightly revised agreement was finally adopted by Upper and Lower Canada, Nova Scotia and New Brunswick in London on 4 December 1866.[24]

Paragraph 2 of the revised agreement proposed a general government charged with matters of common interest to the whole country and local governments for each of Upper and Lower Canada, and for the provinces of Nova Scotia and New Brunswick, charged with the control of local matters in their respective sections. It was seen to be the system of government best adapted under existing circumstances to protect the diversified interests of the various provinces and secure efficiency, harmony and permanence in the working of the Union.[25]

The Resolutions in paragraph 2 acted as the drafting instructions for the preparation of the British North America Act of 1867. The Act was passed by the British Parliament and came into force on 1 July 1867.[26]

---

23 According to Funston & Meehan (1994) 10 the blueprint for Canada did not stem directly from the demands of the people but rather from the aspirations of colonial government leaders.

24 The agreement comprised of 69 numbered paragraphs. See Funston & Meehan *ibid*.

25 Provision was also made for the admission into the Confederation on equitable terms of New Foundland, Prince Edward Island, the North West Territory, and British Columbia.

26 Funston & Meehan (1994) 10.

### 3.2.4 The Constitution Act, 1867[27]

In the preamble to the Act it is indicated without further explanation that the new dominion would have "a Constitution similar in principle to that of the United Kingdom". The Constitution Act of 1867[28] therefore built on traditions and already-existing colonial constitutions.[29] However, even though the preamble recites a desire for "a Constitution similar in principle to that of the United Kingdom" it also indicated the wish of the founding colonies "to be federally united into one dominion".

Federalism as a form of government is very different from the unitary structure of the United Kingdom Constitution and it implies the need for judicial review of legislative actions in order to ensure legislators' compliance with their constitutional obligations.[30]

Morton did not see the Resolutions in paragraph 2[31] as professing to enshrine an ideal or claiming to advance a principle.[32] The purpose was therefore not to achieve sought-after privileges and liberties, but to preserve an inheritance of freedom long enjoyed and a tradition of life valued beyond any promise of profit or of demagoguery. Confederation was to preserve by union the constitutional

---

27 (UK) 30 & 31 Vict, c 3 (now RSC 1985, App ii).

28 The British North America Act, 1867 was renamed the Constitution Act, 1867 in 1982.

29 Funston & Meehan (1994) 11.

30 Strayer (1988) 1 - 2.

31 See par 3.2.3.

32 Morton (1969) 320.

heritage of Canadians from the Magna Carta of the barons to the responsible Government of Baldwin and Lafontaine and, no less, the French and Catholic culture of St Louis and Laval.[33]

The formula in the Constitution Act of 1867 thus provided for a division of powers. The main role of the original Constitution was to facilitate and supervise the distribution of lawmaking and governmental powers between the provinces and the federal authorities.[34] The people of a particular province or territory decide what happens in that area unless it directly affects another province or territory or the people in it. Being democratic, the occupants of all the provinces or territories together elect a federal government to attend to matters that generally affect the whole country and its occupants. The structure has for the most part stayed unchanged.

But the original constitution also had to enforce a few constitutional provisions concerning fundamental rights.[35] From the "Confederation debate" of the

---

33 The motivating factors to the 1867 Act was described by George Brown as:

- the civil war ... in the neighbouring republic,
- the possibility of war between Great Britain and the United States,
- the threatened repeal of the Reciprocity Treaty;
- the threatened abolition of the American bonding system for goods in transit to and from these provinces;
- the unsettled position of the Hudson's Bay Company; and
- the changed feeling of England as to the relation of great colonies to the parent state.

See Funston & Meehan (1994) 12. George Brown was alive in 1867 and played a significant role in Canada's formation. He indicates that these factors brought earnest attention to the gravity of the situation, and united all in one vigorous effort to meet the emergency. See Funston & Meehan (1994) 11.

34 See Hogg (1992) 36 - 37; Scott (1977) vii & 37 and further; Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 5.

35 Gibson (1986) 6.

legislator of the united Canada's in 1865 it is clear that it was the intention of the "Fathers of the Confederation" to remove from the reach of the elected lawmakers certain constitutional rights.[36]

There was still a long way to go but the Constitution Act of 1867 at least advanced the legal protection of fundamental rights and freedoms in two ways:

- it established for Canada the legitimacy of constitutionally entrenched, judicially enforceable rights; and
- it accorded such protection to a handful of rights that were regarded at the time as particularly important.[37]

But only a few rights were entrenched,[38] and the attitudes of lawyers and judges trained in the British tradition of legislative supremacy were not yet receptive to the idea of entrenchment.[39]

---

36 See the *Parliamentary debates on the subject of the confederation of the British North American Provinces* (1865) as cited by Gibson (1986) 7. But, not all the parties were in favour of the constitutional protection of rights. One JS McDonald argued that entrenching rights was not democratic. In argument he indicated that it was not his wish to interfere with the rights and privileges of minorities or any other denomination. However, he pointed to the experience that has been had in Canada that denial of the right of the majority to legislate on any given matter, has always led to grave consequences. He voiced his astonishment not to trust the judgment of the majority adding that in all countries the majority controlled affairs and the minority had to submit. However, the amendment proposed by McDonald was defeated by a very large margin. (*Parliamentary debates ibid* 1025 & 1026.)

37 Viscount Haldane pointed this out to counsel during the argument of *Toronto Electric Commissioners v Snider* [1925] AC 396 (PC). Also see Brown (1967) 34.

38 See Scott (1977) 213.

39 Gibson (1986) 8.

It has been indicated by Whyte that "laws and constitutions are not so much extracted from ideal forms, but chosen to accommodate interests".[40] This is particularly true as far as the 1867 Constitution is concerned. The 1867 Constitution is the result of the management of relationships. These relationships had been developing for 200 years and shaped the events leading up to 1867.[41] These relationships included:

- the early relationships between French and British settlers and Aboriginal peoples in North America;
- the relationships among Britain, France, Aboriginal peoples and American colonists resulting from their respective commercial and military policies in North America;
- the relationship between British colonies and what would become the United States and those in what would become Canada;
- the relationship of Canadian and American colonies to the imperial governments in London, England; and
- the relationships between Francophones and Anglophones[42] and between Catholics and Protestants.

From time to time there has been some impressive ideas about major constitutional amendments but the basic structure remained for the biggest

---

40 (1993) vol 2:10.

41 Funston & Meehan (1994) 9.

42 It seems that these terms refer to the French and Anglo-Saxon "founding peoples". See Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 604.

part. However, in 1982 the citizens of Canada were reminded by the Canadian Charter[43] that they too have rights.

### 3.2.5 The period after 1867 up to the 1950s

Between 1868 and 1912 the Canadian federation extended east, west and north with the acquisition of territories, settlements and the admission or creation of new provinces. The end of Canada's status as a "colony"[44] was formally recognised by the British Statute of Westminster in 1931.[45] Canada became an independent nation within the British Commonwealth. In the period 1931 to 1949 Canada experienced the great depression, the emergence of fiscal federalism and World War II. In 1949 Newfoundland and Labrador joined the federation.

The relationships that were central to the dynamics of evolving Canadian nationhood after 1867 can be briefly stated:

- a new relationship among former colonial governments (that is, provinces) and a new national government in Ottawa;
- the relationship between Canadian citizens and their two levels (federal, provincial) of government (Canada's federation was unique being based on the supremacy of Parliament's within defined spheres of power, unlike the

---

43 Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11.

44 The term colony does not seem completely appropriate for Canada which had already achieved a substantial degree of self-government. See Hogg (1992) 45.

45 The Statute provided that no new British statute would apply to Canada unless enacted at the request and with the consent of Canada. See Hogg *ibid* 48; Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 6; Whyte, Lederman & Bur (1992) 3 - 13.

American republic which was based on sovereignty of the people, who delegated power to the state and federal governments to exercise subject to a system of checks and balances that governed the exercise of authority);

- the relationship between French-speaking and English-speaking residents of the new country;
- the relationships between the regions and their different economic, social, cultural and linguistic circumstances;
- the relationship between Canada and other nations, particularly the United States of America and the United Kingdom; and
- the relationship between the emerging Canadian society and the Aboriginal peoples.

However, the 75 years from 1867 until approximately 1950 saw little improvement in the legal protection of civil liberties. The fundamental rights and freedoms of Canadians were frequently disregarded.[46] In Canada, as in South Africa, there are many indications that treatment was based on race. The Chinese and Japanese immigrants were subjected to intolerable discrimination from the beginning of oriental immigration to Canada in the 1850s.[47] In 1914 the Supreme Court of Canada held, that as long as treatment was based on race rather than on alien or naturalised status it was constitutionally permissible.[48] During World War II a curfew was at first imposed on Japanese-Canadians. Later they were evacuated, interned and frequently forced to work

---

46 Scott (1977) 209.

47 Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 560.

48 *Quong Wing v The King* (1914) 18 DLR 121 129 (SCC). On 19 May 1914 leave to appeal to PC was refused. In Walter Tarnopolsky's book, *Discrimination and the law* (1982) 1 - 25 as cited by Gibson (1986) 5, the court's failure to provide effective safeguards against discrimination in the provision of public services can be seen.

in labour camps. Their property was also confiscated.[49] Scott reminds of the deportation of Japanese-Canadians after World War II.[50]

In the matter of religion there was similar intolerance. This is exemplified by the persecution of Jehovah's Witnesses by the government of Quebec.[51] Another distressing example of the fragility of rights can be seen in the British Columbia Law Society's refusal to grant practising privileges to an otherwise qualified lawyer who acknowledged a belief in democratic Marxism. The courts approved this refusal and it does seem that unpopular minorities could not rely on the protection from actions of an inflamed majority, even in the hands of professed champions of liberty like O'Halloran J who presided.[52] The disregard for human rights can also be seen from the fact that in Quebec women did not have the right to vote until 1941.[53]

The history of Canada's courts show a non-recognition of the native peoples' rights and the excessive deference with which Canadian courts have customarily treated political matters. This is illustrated by the refusal of the Supreme Court of Canada in 1943 to order a provincial government to obey its own statute requiring that an election had to be held in a vacant consistency.[54] In 1946 a Royal Commission on Espionage sat which was widely condemned

---

49 Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 569.

50 (1977) 190.

51 *Ibid* 193.

52 *Martin v Law Society of British Columbia* (1950) 3 DLR 173 (BCCA) 178 - 86.

53 Scott (1977) 320.

54 *Temple v Bulmer* (1943) 3 DLR 649 (SCC).

for its curtailment of the civil rights of individuals who were being investigated.[55]

### 3.2.6 The 1950s - Judicial activism

#### 3.2.6.1 General

The period from 1950 saw the strengthening of the provincial governments and can be referred to as the modern era, with Canada searching for prosperity and unity. Many atrocities were committed against certain groups and classes of people during World War II. This abuse of the power of government led to a growing awareness of the need for the protection of human rights.[56] The universal recognition of human rights set the stage for a deeper commitment to guaranteeing human rights in Canada.[57]

In 1949 another badge of colonial status was removed when the Judicial Committee of the British Privy Council was replaced by the Supreme Court of Canada as Canada's court of last resort.[58] A new type of activism developed among the judges of the Supreme Court and some landmark rulings on civil

---

55 Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 589. The judges that presided were Robert Taschereau and Roy Kellock. Commission counsel were Gèrald Fauteux, a future judge of the Supreme Court and EK Williams president of the Canadian Bar Association and soon to be appointed Chief Justice of the Manitoba Court of Queen's Bench. See also Gibson (1986) 5.

56 For example the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950) and the International Covenant on Civil and Political Rights (1966).

57 See Black-Branch (1997) 4 and further.

58 Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 6.

liberties were made during the 1950s.[59] In *Smith & Rhuland Ltd v The Queen ex rel Andrews*[60] it was for example found to be unlawful for the Nova Scotia Labour Board to refuse to certify a trade union because one of its officers was a communist.

3.2.6.2 "Criminal law" and "implied liberties" as approach

An unusual Supreme Court ruling of the 1930s formed the prototype and inspiration for the libertarian judicial activism of the 1950s.[61] In 1935 the Social Credit government of Alberta came to power and passed legislation designed to create a social credit monetary system within the province. Because this legislation and the government's theories came under heavy ridicule, an accompanying Act popularly known as the Press Act was passed to regulate criticism. The entire package of legislation was referred to the Supreme Court of Canada for a ruling on its constitutionality. The Supreme Court and later the Judicial Committee of the Privy Council[62] found the package of legislation to be unconstitutional because it invaded the federal fields of money and banking. It was therefore not in the power of a province to regulate these fields.

However, half of the panel of six judges in the Supreme Court offered two additional reasons for the striking down of the Press Act. The judges held that the curtailment of freedom of expression in the public interest is a question of "criminal law". This fell under the exclusive jurisdiction of the Parliament of

---

59 *Boucher v R* (1951) 2 DLR 369 (SCC); *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689 (SCC); *Noble and Wolf v Alley* (1951) 1 DLR 321 (SCC).

60 (1953) 3 DLR 690 (SCC).

61 *Reference re Alberta Legislation* [1938], SCR 100, (1938) 2 DLR 81 (SCC).

62 *Attorney-General for Alberta v Attorney-General for Canada* [1939] AC 117 (PC).

Canada under the Constitution Act, 1867[63] and meant that repressive provincial legislation was invalidated on the ground that it constituted "criminal law".[64] The distribution of powers approach became the basis of many of the rulings in the 1950s.[65]

The court stating the second additional reason for striking down the Press Act propounded a novel idea subsequently labelled the "implied bill of rights". The "implied bill of rights" had its roots in the preamble to the Constitution Act, which describes the Canadian Constitution as "similar in principle to that of the United Kingdom". The Preamble was not seen as having legal force on its own, but was used as an aid to the interpretation of operative provisions.[66] The three judges held that section 17 of the Constitution Act called for the existence of a "Parliament of Canada". When interpreted in light of the British experience it meant a legislative body working under the influence of public opinion and public discussion. The Constitution thus by implication prohibited abolition of public debate.

The "implied bill of rights" approach, although adopted and approved by the judiciary, and extra-judicially by a number of prominent authorities, was never invoked in a conclusive manner.[67]

---

63 Section 91(27).

64 Only the federal government could therefore enact criminal law.

65 See for example *Henry Birks & Sons (Montreal) Ltd v Montreal and Attorney-General of Quebec* (1955) 5 DLR 321 (SCC); *Switzman v Elbling and Attorney-General of Quebec* (1957) 7 DLR (2d) 337 (SCC).

66 Gibson (1986) 10.

67 *Switzman v Elbling and Attorney-General of Quebec* (1957) 7 DLR (2d) 337 (SCC).

3.2.6.3 Criticism of approaches

However, criticism can be levelled at both the "criminal law" and "implied liberties" approaches.

The "criminal law" method that became the basis for many of the libertarian decisions of the 1950s entangled issues of freedom with issues of federalism. Decisions that should have been decided on whether it was desirable from a libertarian point of view was instead based on whether the federal or provincial order of government is the more appropriate body to regulate a particular activity in question. Since "criminal law" was the constitutional responsibility of the Parliament of Canada, this process also tended to amplify federal power, which some proponents of balanced federalism found disturbing.[68] This approach also offered no relief against repressive laws at federal level.

The "implied bill of rights" theory addressed the principle issues and it avoided the difficulties just mentioned. It applied both federally and provincially.[69] This also meant that the federal provincial division of powers was not under threat, but it involved a degree of judicial activism that some thought excessive.[70] According to Gibson this also required an uncommon level of creative imagination on the part of the courts.[71]

---

68 Weiler P, The Supreme Court and the law of Canadian federalism (1973) 23 *U Toronto LJ* 307 as cited by Gibson (1986) 10.

69 See *Switzman v Elbling and Attorney-General of Quebec* (1957) 7 DLR (2d) 337 (SCC) 368 where Abbott J commented on its applicability to federal laws.

70 Gibson (1986) 10.

71 (1986) 11.

### 3.2.7 Adoption of Bill of Rights - 1960

#### 3.2.7.1 General

The idealism of the 1950s was echoed in the Canadian Bill of Rights of 1960.[72] This Act was the most notable civil liberties development of the 1960s and recognised Canada's commitment to human rights under federal legislation.[73] The Bill was essentially the result of the work of Prime Minister John G Diefenbaker, who had campaigned for protected rights from as early as 1945 when he became a member of Parliament.[74]

The Bill was introduced into Parliament on September 1958 and the Canadian Bill of Rights was enacted in a revised form in August 1960. However, the enthusiasm for protected rights had by then cooled down, and the Canadian Bill of Rights was not constitutionally entrenched. It applied only to matters within the federal sphere of jurisdiction and was an ordinary statute of the Parliament

---

72 Canadian Bill of Rights, SC 1960, c 44. See Tarnopolsky (1975) 12 - 14 for a legislative history.

73 Black-Branch (1997) 9.

74 See Hansard (1945), 2455. See also Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 589. In 1938 the Manitoba legislator passed an almost unanimous resolution to this effect (Winnipeg Tribune, 5 February 1938). The resolution was introduced by a prominent independent MLA, Lewis St George Stubs. In 1945 Co-operative Commonwealth representative Alistar Stuart and John Diefenbaker of the Conservatives motioned similar resolutions in the Federal House of Commons. During 1950 a special senate committee on human rights and fundamental freedoms approved a constitutionally entrenched guarantee of rights. The special senate committee acknowledged that such a step would have to await agreement on the deadlock question of an all-Canadian formula for constitutional amendments. See Gibson (1986) 30. However, Black-Branch (1997) 8 indicates that Alistar Stuart was the first to motion a Bill of Rights in the Federal House of Commons in 1945. The author contends that John Diefenbaker only stressed the need for a federal Bill of Rights to protect Canadians in 1946.

of Canada.[75] It could therefore be altered by the normal legislative process. The reach of the Bill was also weakened by the fact that other Acts of Parliament could potentially ignore the primacy provision of the Bill[76] and in addition there were questions with regards to protection of newly acquired rights under the Bill.[77]

Gibson gives two explanations for this limited scope:[78]

- Canadian politicians were still years away from agreeing on a formula to amend the constitution (in a way that such an important innovation could be achieved in a matter befitting an independent nation).
- There was intense disagreement among influential Canadian politicians as to the desirability of giving constitutional status to additional categories of rights.

Even thought the scope was limited, the Canadian Bill of Rights contained a fuller declaration of fundamental rights and freedoms than ever before in legislative form.[79]

---

75 Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 591.

76 See section 2, Annexure A.

77 It became known as the "frozen concepts" interpretation. See par 3.2.7.4. See Black-Branch (1997) 10.

78 (1986) 12.

79 See Annexure A for selected provisions, which I deem of relevance for this study.

3.2.7.2 Impact of Bill of Rights on non-legislative matters

The Canadian Bill of Rights had a minimal impact on the Canadian legal system.[80] It was infrequently used as a basis for ensuring that police, courts or administrators observed elementary forms of fairness, such as

- the right to telephone a lawyer, before complying with a Police request for a breath sample;[81] or
- the opportunity of a convicted person to make representations to the court before sentence was passed.[82] Successful applications usually involved some independent basis for the asserted right and the Bill was used as a mere makeweight or interpretative aid.[83]

3.2.7.3 Impact of Bill of Rights on legislation

3.2.7.3.a General

It was an even more rare occurrence that legislation was invalidated because of inconsistency with the Bill. However, this little-used remedy has on occasion been implemented by the Supreme Court,[84] but judgments were difficult to

---

80 Tarnopolsky (1975) 53 *Can Bar Rev* 649.

81 *Brownridge v The Queen* (1972) 28 DLR (3d) 1 (SCC).

82 *Lowry and Lepper v The Queen* (1972) 26 DLR (3d) 224 (SCC).

83 Gibson (1986) 14.

84 See *R v Drybones* (1969) 9 DLR (3d) 473 (SCC). In *Re Singh and Minister of Employment and Emigration and 6 other appeals* (1985), 17 DLR (4th) 422, [1985] 1 SCR 177 (SCC); Beetz J held that for the purposes of the seven cases at bar, part of section 71(1) of the Immigration Act, 1976 was inoperative.

reconcile and much uncertainty remained. The origin of the uncertainty was twofold:

- The legal status or effect of the Bill was uncertain.
- Its content was uncertain.[85]

As to the status or effect of the Bill with regards to other legislation the Bill itself stated in section 5(2) that it applied only to federal legislation enacted before or after the coming into effect of this Act. However, it was asked by lawyers how a statute lacking constitutional status could be given supremacy over other legislation in a constitutional system that respects the principle of parliamentary supremacy. The principle of parliamentary supremacy, even in the restricted form in which it applied in Canada, dictates that the Bill, unlike the Charter, must yield to new legislation of different intent.[86] The Supreme Court of Canada nonetheless made it clear that it did not prevent the subjection of federal statutes and regulations to the Bill's requirements in appropriate circumstances. However, a distinction must be made between laws passed before the Bill came into force, and those subsequently enacted. These two categories are now discussed in greater detail.

3.2.7.3.b Pre-Bill legislation

Legislation can be affected by a statute like the Bill of Rights in two different ways. In the first instance the Bill may act as an "Interpretation Statute" when the language of legislation is ambiguous. It is thus an interpretative aid directing the courts to adopt a more libertarian construction. It could go even further in

---

85 Gibson (1986) 14 is of the opinion that much of the confusion resulted from a failure to distinguish clearly between these two matters.

86 Gibson *ibid* 14 -15.

that it could invalidate pre-Bill legislation where no interpretation can be found that is compatible with the Bill. The concept of parliamentary supremacy demands this for new legislation because it by implication amends or repeals inconsistent previous laws.[87] It is widely accepted that as far as the Canadian Bill of Rights contradicted pre-Bill federal statutes and regulations, it repealed or amended those laws.

However, there was difference of opinion among legal scholars as regards the meaning of the Bill itself. The argument of some, that it was not intended to do more than provide a guide to interpretation, was based on the wording of the principal operative provision: "Every law of Canada shall ... be so construed and applied as not to abrogate, abridge or infringe ... any of the rights and freedoms herein recognised and declared."[88]

According to these scholars "construed and applied" meant that the Bill was only intended to facilitate interpretation. The courts should therefore attempt to find interpretations compatible with the Bill and should stop short of declaring incompatible legislation to be inoperative. This was said to be the only purpose of the Bill of Rights, and it was contended that laws which abrogate rights and freedoms unequivocally, cannot be affected by the Bill.[89]

---

87 The accompanying principle is that subsequent general legislation should not be construed to derogate from previous specific legislation. This is a guide to determine whether the subsequent law is really inconsistent with the earlier one. The legislator's manifest intentions as to the script of the new law is of equal or greater importance.

88 Section 2.

89 The "interpretation" theory. In *R v Gonzales* (1962) 32 DLR (2d) 290 292 this viewpoint was expressed by the British Columbia Court of Appeal. The view was further approved by Cartwright CJC in a dissenting judgement in *R v Drybones* (1969) 9 DLR (3d) 473 476 - 477 (SCC). However, the same passage was rejected by the Chief Justice in *Robertson and Rosetanni v The Queen*

However, the legal and political context within which the Bill was created has to be kept in mind. At the time the Canadian common law principles of interpretation already had two presumptions that would achieve virtually everything that could be accomplished legally by a libertarian interpretation statute:

- Legislation must be interpreted for the benefit of the subject. Penal laws must therefore be constructed narrowly.
- If there is an ambiguity, the interpretation that is more consistent with the liberties of the subject, must be followed.[90]

This matter was finally resolved by the Supreme Court of Canada in *R v Drybones*.[91] In this matter the court held a pre-Bill provision to be inoperative "because it conflicted with the right of individuals under Section 1 of the Bill to 'equality before the law', without discrimination by reason of race". The

---

(1963) 41 DLR (2d) 485 489 (SCC) which contributed to the confusion.

90 Interpretation Act, RSC 1970 c 1 - 23, section 11.

From statements by the architects of the Bill it was clear that they intended more than to simply provide a fresh articulation of the well-established presumptions mentioned. Fulton J in his testimony before the House of Commons Special Committee that examined the proposed bill in 1960, said: "In my view you cannot enshrine a Bill of Rights which would be anymore sacrosanct" by constitutional amendment than by the legislative methods proposed. "If there is a violation by a legislative body the courts will not enforce or give effect to the violation." Fulton J added that if Parliament wished to continue the impugned law it could be "sanctioned anew" by means of a statutory declaration under section 2 of the Bill that the law would operate "notwithstanding the Bill". In removing any doubt as to the government's intention in this matter he added "we are creating, or are declaring substantive law". Gibson (1986) 16.

91 (1969) 9 DLR (3d) 473 (SCC).

majority judgement was delivered by Ritchie J who rejected the "interpretation" theory.[92]

3.2.7.3.c Post-Bill legislation

When we turn to the effect of the Canadian Bill of Rights on federal statutes passed after its enactment, there are different legal considerations to take into account. The Bill can always be used to interpret future legislation, because that is precisely what interpretation Acts do. The question is whether the future statute can be rendered inoperative if there is no interpretation, by which it can be reconciled with the Bill. If one applies the same principle of legislative supremacy that supports the implied repeal or amendment by the Bill of inconsistent pre-existing laws, it might seem to suggest that incompatible post-1960 statutes operate as implied repeals or amendments of the Bill.[93] However, there are two legal arguments upon which the Bill of Rights can be accorded primacy over inconsistent subsequent legislation. The first of these countervailing principles is the "manner and form" theory and the other is the principle that requires legislation dealing with fundamental rights to be repealed expressly rather than by implication.

The manner and form theory is based in the notion of rule of law.[94] The rule of law theory entails that even though Parliament has the power to change the law

---

92 A Native Indian was charged with being "unlawfully intoxicated of a reserve" contrary to a provision of the Federal Indian Act. This provision applied only to Indians and was significantly more stringent than any applicable to non-Indian citizens.

93 Gibson (1986) 17.

94 The rule of law principle that the constraints of the law are applicable to all Canadians, high or low, private or governmental was a well established principle in Canadian jurisprudence before the Canadian Bill of Rights was enacted. See

it must abide by the existing law until it has been changed. Parliament is subject to the rule of law and if the Parliament of Canada for example enacted that future statutes of a certain type would require two-thirds majorities in the Commons and Senate, and that amendments to that requirement must be made in the same manner, this new method will be binding until altered by the new method itself.[95] This obligation then forms the constraint on legislative supremacy.[96]

The Canadian Bill of Rights thus established a "manner and form" by which the rights and freedoms it declares may be abrogated or infringed upon by future legislation: The "notwithstanding" clause in section 2. If a future law is therefore intended to abrogate a protection in the Bill, it has to follow the procedure set out in the Bill itself. The future statute will have to make an express statutory declaration that the law in question "shall operate notwithstanding the Canadian Bill of Rights".[97] Gibson is of the opinion that

---

*Roncarelli v Duplessis* (1959) 16 DLR (2d) 689 706 - 707 (SCC). See also *Reference re Language Rights under the Manitoba Act, 1870* (1985) 19 DLR (4th) 1 (SCC).

95 Gibson (1986) 18 indicates that there is considerable judicial and academic support for the view that where such a manner and form is lawfully established for the exercise of legislative powers, it must be observed.

96 Tarnopolsky (1975) 110 - 112. Although Acts of Parliament could not be tested under South African law before the Interim Constitution, the supreme court had so-called procedural testing rights in terms of which the court could investigate whether constitutionally prescribed procedures had been followed when an Act of Parliament was passed. See *Harris v Minister of the Interior* 1952 (2) SA 428 (A) and *Collins v Minister of the Interior* 1957 (1) SA 552 (A).

97 A similar conclusion was reached in *Winnipeg School Division 1 v Craton* (1985) 6 WWR 166 (SCC). However, Gibson (1986) 19 argues that neither the doctrinal basis of this ruling nor the full extent of its operation is clear. According to him it may simply be treated as a special principle of statutory interpretation or it may be viewed as a judicially created "manner and form" requiring an express statutory "opt out" before legislation concerning fundamental rights can be restricted by subsequent amendment. He also finds

although it is not explicitly stated that amendments to the procedure require the same method, it is implied. [98]

It is clear that the Canadian Bill of Rights is not susceptible to implied repeal and it is "fundamental" enough to have prospective and retrospective effect.[99]

In *Curr v The Queen*[100] the Supreme Court of Canada acknowledged the prospective reach of the Bill. In this decision and also other decisions by the Supreme Court of Canada it is not indicated whether this is the result of the "manner and form" doctrine, or the principle invoked in the *Craton* case.

Laskin J on behalf of the court suggested that the court's power to declare a statute inoperative, should in the case of the Bill of Rights be exercised more cautiously and on the basis of more compelling evidence of incompatibility, than in the case of a constitutional guarantee.[101]

The court seems to indicate that post-1960 federal statutes that are not compatible with the Bill can be "sterilised" but it requires a higher level of persuasion as to incompatibility that would be required in the case of a constitutionally infringed guarantee. However, from this judgement it is clear

---

the scope not altogether clear. It may be limited to a narrow range of statutes or may apply to any of the rights or freedoms listed in the Universal Declaration of Human Rights (1948).

98 (1986) 19.

99 The Quebec Superior Court reached a similar conclusion with respect to the Quebec Charter of Human Rights and Freedoms in *Ford v Attorney-General of Quebec* (1984) 18 DLR (4th) 711 (QUE SC).

100 (1972), 26 DLR (3d) 603 (SCC); See also *Re Singh v Minister of Employment and Emigration and 6 other appeals* (1985) 17 DLR (4th) 422 (SCC).

101 *Curr v The Queen ibid* 613 - 614.

that federal legislation that cannot be construed in a manner compatible with the Canadian Bill of Rights, and does not contain a "notwithstanding clause" opting out of the Bill, is to be declared inoperative, whether it was enacted before or after the Bill came into force. As was discussed, the Supreme Court of Canada has been relatively forthcoming as to the general effect of the Canadian Bill of Rights. It is thus disappointing to note that it has not been so bold in determining the content of the rights and freedoms it protects.

#### 3.2.7.4 Contents of Bill: Frozen rights?

Section 1 of the Bill recognises and declares the rights and freedoms that "have existed and shall continue to exist" and the Bill does not "enact" the various rights and freedoms but merely "recognises and declares".[102] This invites the conclusion that the Bill merely reiterates the pre-1960 legal status quo. However, the "frozen rights" theory has been the source of much confusion and has been accepted by the Supreme Court in some cases and rejected in others.

The confusion can only be swept away by recognising that there are two different "frozen rights" theories, one which the Supreme Court has denounced, and one which it appears to have accepted.[103] Both these theories are based on section 1 of the Bill.

In terms of the one "frozen rights" theory no pre-Bill restriction on rights should be regarded as affected by the Bill, because Parliament, by declaring that the protected rights "have existed" in the past, must not have regarded any existing

---

102 The Charter is different, in that it has no enacting clause itself. The Constitution Act, 1982 says "enacted" and "shall come into force", and particular rights are expressed in the present tense.

103 Gibson (1986) 21.

restrictions as inconsistent with such rights.[104] In the *Drybones* case Richie J held that the rights protected by the Bill are not to be held "circumscribed by the laws of Canada as they existed on August 19, 1960".[105] It does seem that this was the last knell for the extreme "frozen rights" notion.

However, what the Supreme Court of Canada seems to have accepted in two judgments after the *Drybones* case, namely *R v Burnshine*[106] and *R v Miller and Cockriell*,[107] was the view that the Canadian Bill of Rights applies only to rights of the same general type as existed prior to the Bill's enactment.

---

104 It seems that this is the gist of the remarks made by Richie J in *Robertson and Rosetanni v The Queen* (1963), 41 DLR (2d) 485 (SCC). However, this approach was rejected by Ritchie J again on behalf of the majority in the *Drybones* case.

105 482 - 483 DLR.

106 (1974) 44 DLR (3d) 584 (SCC). The court by way of Martland J at 590 - 592 made some general remarks about the rights protected by the Canadian Bill of Rights. Section 1 of the Bill was said to declare that six defined human rights and freedoms "have existed" and that they should "continue to exist". All of them had existed and were protected under the common law. The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and, further, by section 2, to protect them from infringement by any federal statute.

The court found that, in 1960, when the Bill of Rights was enacted, the concept of "equality before the Law" did not and could not include the right of each individual to insist that no statute could be enacted which did not have application to everyone and in all areas of Canada. Such a right would have involved a substantial impairment of the sovereignty of Parliament in the exercise of its legislative powers under section 91 of the British North America Act, 1867, and could only have been created by constitutional amendment or by statute. The wording of the Bill of Rights did not do this, because the express wording declared and continued existing rights and freedoms. It was those existing rights and freedoms, which were not to be infringed by any federal statute. Section 2 did not create new rights. Its purpose was to prevent infringement of existing rights.

107 (1976) 70 DLR (3d) 324 (SCC). Ritchie J at 329 based his decision in part on the "frozen rights" notion. He subscribed to the analysis of the meaning and effect of sections 1 and 2 of the Bill of Rights to be found in the reasons for

The Bill of Rights is still in force.[108] It does seem that the Bill's capacity for the protection of rights and freedoms is considerable. Although most of its protections have been supplanted by the stronger provisions of the Charter, it embodies a few rights not expressly duplicated in the Charter.[109] What has been decided on the status and scope of the Bill is also useful by way of analogy to the interpretation and application of similar bills and charters of rights that have been adopted by some of the provinces.[110]

Having said this, the Bill has produced few tangible results, and because of the restrictive interpretations the courts gave to the particular rights and freedoms, the Canadian citizens' rights have only been minimally advanced since the Bill's introduction. Tarnopolsky said the following about the first 15 years of the Supreme Court of Canada's application of the Bill: "My answer to the question ... how civil libertarian was the Supreme Court in interpreting the Canadian Bill of Rights? Must be: with few exceptions, hardly at all."[111]

---

judgement of Martland J, speaking for the majority of the same Court in *R v Burnshine*. However, Laskin CJ in the same case took direct issue with the "frozen rights" theory. See also Gibson (1986) 25 for an analysis of the meaning and effect of section 1 and 2 of the Bill of Rights.

108 See *Re Singh v Minister of Employment and Emigration and 6 other appeals* (1985) 17 DLR (4th) 422 (SCC).

109 Tarnopolsky & Beaudoin (1982) 1.

110 For example the Saskatchewan Bill of Rights, SS 1947, c 35 (Now the Saskatchewan Human Rights Code SS 1979, c S- 24.1); Charter of Human Rights and Freedoms SQ 1975, c 6; Alberta Bill of Rights, RSA, 1980, c A - 16.

111 Tarnopolsky (1975) 53 *Can Bar Rev* 649 671.

The interpretation of provincial bills and charters has proved even more disappointing.[112] Although it may still have theoretical potential, it seems that the experiment with a statutory bill of rights largely failed with the Bill of Rights of 1960.[113]

### 3.2.8 The period 1960 up to 1980

#### 3.2.8.1 Loss of enthusiasm by judiciary

During the 1960s and 1970s, just as the rest of North American society, including the United States Supreme Court, was being caught up in the great libertarian tidal wave of the 1960s, the Canadian judiciary seemed to lose its enthusiasm for civil liberties. The Canadian courts seemed to take a more restrained approach to the protection of fundamental freedoms.[114] The idealism of the 1950s faded and a marked change of attitude by Canadian judges was obvious. The "implied bill of rights" and "criminal law" techniques for protecting civil liberties were gradually abandoned.

---

112 See for example *Re Martin and Department of Social Services* (1980) 108 DLR (3d) 765 (Sask CA); *Reference re Legislative Assembly and Executive Council Act* (1981) 128 DLR (3d) 561 (Sask CA).

113 It is possible that the failure can be attributed to the peculiar manner in which the Bill was drafted. Narrower constructions were invited by terms like "recognised and declare", "have existed", and "construed and applied". It is clear that the Bill of Rights was too restrictively worded to have any effective long-term guarantee of rights. However, it does seem that the major proportion of the blame must be directed towards the judiciary. The judges were not sure that the politicians and voters they represented wanted them to be more active in the enforcement of individual rights. This resulted in non-action.

114 Gibson (1975) 53 *Can Bar Rev* 621.

In 1969 both these techniques were finally buried with the decision of *Attorney-General of Canada v Dupond*.[115] This case dealt with the validity of a controversial ban on public assemblies by the City of Montreal. Because of political unrest in Quebec in the late 1960s numerous and often violent street demonstrations were held. Montreal passed a by-law prohibiting public demonstrations that endanger tranquillity, safety, peace, or public order. Furthermore all public assemblies (even peaceful ones) could be temporarily prohibited if recommended by law enforcement authorities. In November 1969 such an ordinance suspended all public assemblies, parades and gatherings in Montreal for a period of 30 days. The validity of the ordinance was challenged on the following constitutional grounds:

- It invaded the federal domain of "criminal law".
- It abrogated the "right of public debate ... in public meetings".

These arguments were rejected by Beetz J, on behalf of the majority of the Supreme Court of Canada.[116] The court referred to the "criminal law" argument and held that the by-law constituted valid "regulations of a merely local character".[117] With regards to the "implied bill of rights" argument the court rejected it outright, saying that none of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation.[118]

---

115 (1978) 84 DLR (3d) 420 (SCC). See Swinton's comment (1979) 57 *Can Bar Rev* 326.

116 Laskin CJ and two other justices dissented.

117 In *Re Nova Scotia Board of Censors v McNeil* (1978) 84 DLR (3d) 1 (SCC) on the same day the court upheld a provincial film censorship statute also denying that it involved criminal law. However, the Supreme Court did find that one severable provision involved criminal law, as it appeared to duplicate a section of the Criminal Code of Canada.

118 This statement was again approved by the Supreme Court of Canada in *Attorney-General of Canada v Law Society of British Columbia; Jabour v Law*

### 3.2.8.2 Libertarian initiatives by politicians

#### 3.2.8.2.a Adoption of human rights legislation

The traditional deference of Canadian judges to elected authorities and their instinctive diffidence concerning social or political controversy during the 1960s and 1970s stood in sharp contrast to the libertarian activism of politicians during the same period. While the judges were hesitant to protect civil liberties, new forms of human rights legislation bloomed across the country.[119]

The most important of the new statutes dealt with the problem of discrimination.[120] Although some anti-discrimination measures had been introduced as early as the 1930s and 1940s, it was not until 1962 when the Ontario Human Rights Code[121] was passed that an attempt was made to deal comprehensively with anti-discrimination measures. The other provinces soon followed. By 1977 when the Parliament of Canada enacted a Canadian Human Rights Act, all eleven sovereign legislators had passed similar (though not identical) legislation.[122]

---

*Society of British Columbia* (1982) 137 DLR (3d) 1 (SCC).

Hogg (1985) 638 suggests that the "implied bill of rights" notion may still have a future role to play in situations where Parliament or a provincial legislator has "opted out" of the Canadian Charter. Gibson (1986) 12 stresses that this argument has little, if any, current judicial support.

119 Gibson (1986) 28.

120 A more comprehensive discussion on this topic can be found in Gibson *ibid.*

121 SO 1961 - 62 c 93.

122 Although it is not appropriate to review this jurisprudence it must be borne in mind that it may contain material of use in the interpretation of the Charter of Rights and Freedoms.

At about the same time most provincial legislators created the office of the ombudsman.[123] The ombudsman operated largely without judicial assistance and many of these reforms bypassed the judiciary. The human rights violations, although not susceptible to conciliation, were carried out by specialist tribunals with the courts playing a supervisory role.[124]

---

123 See Alberta: SA 1967, c 59; New Brunswick: SNB 1967, c 18; Quebec SQ 1968, c 11; Manitoba: SM 1969 (2nd SESS), c 26; Nova Scotia: SNS 1970 - 71, c 3; Saskatchewan: SS 1972, c 87; British Columbia: SBC 1977, c 58; Newfoundland: RSN 1970, c 285; Ontario: SO 1975, c 42. See Gibson (1986) 28.

This office of the independent overseer was borrowed from Scandinavia after its successful transplantation to both New Zealand and the United Kingdom. By investigating complaints about administrative actions it oversaw government administrators. The ombudsman tried to resolve by conciliation the complaints, but normally had no legal powers other than those that are necessary to carry out investigations. The ombudsman published reports and the potential impact thereof on the public, and the prestige of the office, proved to be reasonable effective in persuading governments to remedy administrative blunders and abuses.

124 Under South African law the Final Constitution makes provision for a public protector (sections 181 - 183). The Interim Constitution also made provision for the appointment of provincial public protectors which could in no way derogate from the functions and powers of the national public protector (section 114). However, it seems that the legislative powers of the provinces under the Final Constitution include the power to make such appointments. The powers of the public protector is regulated by the Public Protector Act 23 of 1994 (as amended) and includes the authority to:

- Investigate any conduct in the public administration in any sphere of government, or state affairs, that is alleged or suspected to be improper or may result in impropriety or prejudice.
- Report on the conduct and take remedial action.

See Burns (1999) 234.

During the same two decades other legislative initiatives strengthened the rights and freedoms of Canadians.[125] However, legislation that did not favour the rights and freedoms of Canadians still found its way onto the statute books. In response to the "October crisis" of 1970, the Public Order (Temporary Measures) Act of 1970[126] was passed. This Act which empowered the attorney-general to detain accused persons for prolonged periods, caused much concern.[127]

---

125 Privacy Acts were for example adopted by several provinces. See Gibson (1980) 73 and 111. For other examples and a more thorough discussion see Gibson (1986) 29.

126 SC 1970 - 71 - 72, c 2.

127 During October 1970 the *Front de Libération du Québec*, a violent Quebec separatist organisation, kidnapped a British diplomat and a Quebec cabinet minister (who was later killed by his abductors). The separatist organisation made various demands on condition of their release. In response the federal government proclaimed that an "apprehended insurrection exists" in terms of the War Measures Act of 1914 bringing the Act into force. The government then issued Public Order Regulations in terms of the Act. The regulations outlawed the FLQ and conferred new powers of search, seizure, arrest and detention on the police. 497 people were arrested in terms of these powers of which only 62 were charged. Of the 62 charged less that one third were convicted. From the facts that emerged during the trials of the kidnappers it became evident that there was never any possibility of an insurrection from the small and ill-organised FLQ. The reaction by the federal government to the "October crisis" showed a remarkable suspension of civil liberties. These unnecessary and abusive detentions became contentious and contributed towards the desire for a Bill of Rights with universal values that stood above the government of the day. The proclamation of the War Measures Act and the Public Order Regulations were revoked on December 3, 1970 by the Public Order (Temporary Measures) Act. However, the latter Act provided for a more limited version of the laws previously contained in the regulations. See Hogg (1992) 458.

3.2.8.2.b The initiatives in adopting a Charter

It became apparent to the politicians that the Canadian judiciary was hesitant to protect civil liberties. Judges clung to restrictive precedents[128] and if they came across more liberal precedents they tended to ignore it. The politicians realised that if they wanted the judges to play an active role in meeting the public demand for improved and expanded rights and freedoms, they would require a constitutionally expressed invitation.

However, prominent Canadians of most political persuasions have for many years before the introduction of the Charter proposed a constitutionally entrenched, judicially enforced guarantee of individual rights and freedoms.[129]

After the Confederation of Tomorrow Conference in 1967 the government of Quebec had been pushing for constitutional change, giving Quebec more recognition and power as the French Canadian homeland. The Canadian government countered these demands by proposing entrenched rights and freedoms designed to unify the provinces of Canada.[130] In 1968 the Canadian government published a white paper entitled *A Canadian Charter of Human*

---

128 Such as the rule that the admissibility of evidence was not effected by the fact that it was obtained illegally.

129 For earlier initiatives see footnote 74. The move towards protected rights was assisted by the erosion of the connection between the United Kingdom and Canada. In addition many of the post-war immigrants came to Canada from countries where there was not the same trusting attitude towards the state implicit in British parliamentary supremacy. British parliamentary supremacy no longer seemed central to Canadian identity and an interest and positive appraisal of American constitutional theory developed. In the late 1960s and 1970s support for the Charter was driven by the need to contain centrifugal pressures. See Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 603 - 604.

130 *Ibid* 606 - 607.

*Rights*.[131] However, this paper only supported the idea in principle and did not discuss in specific terms the form to be taken by such a charter. In February 1968 at the constitutional conference the Canadian government took the position that first priority should be given to that part of the Constitution that deals with the rights of the individual. This included the individual's rights as a citizen of a democratic federal state and as a member of the linguistic community in which he has chosen to live.[132] Because of Quebec's reluctance to proceed without agreement on some important amendments, a number of possible substantive changes were proposed including the addition to the Constitution of an entrenched Charter of Rights.[133]

By the time of the second constitutional conference in February 1969 the government had drawn up a paper entitled, *The Constitution and the People of Canada*.[134] The paper repeated the Charter of Rights as the first priority in constitutional change.[135] Although the paper mostly referred to provisions that it "should" contain, some rights and freedoms were drafted in precisely the same language as in the Canadian Bill of Rights. It seems that an attempt had been made to preserve as much of the Bill's text as possible.[136] The variations that were thought necessary to achieve constitutional entrenchment and to avoid perceived problems in the interpretation of the Charter were included. Some

---

131 Hansard (1968) 6233.

132 Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 607.

133 The Fulton-Favreau amending formula. See Gibson (1986) 30.

134 Ottawa: Queens Printer, 1969. See Gibson (1986) 31.

135 Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 607.

136 Gibson (1986) 31.

new rights were also included.[137] It was also no longer possible to employ a "notwithstanding" clause.[138]

The proposals did not meet wide acceptance at the conference. A decision was made to refer some of the rights to committees. The "fundamental" rights were studied by one of the committees and at the third constitutional conference in February 1971 tentative agreement was reached on entrenching two groups of rights. Several alterations were made and new rights were added.[139]

Of importance is that it was agreed to qualify all the "political" rights.[140] They were made subject to "such limitations as are prescribed by law and as are reasonably justified in a democratic society in the interests of national security, public safety, health or morals, or the fundamental rights or freedoms of others".[141]

A "Canadian Constitutional Charter" was prepared for the fourth and final constitutional conference held at Victoria in June 1971. However, it seems that

---

137 For example freedom of conscience was added to religion (section 1(a)); protection was added against "unreasonable searches and seizures" (section 2(a)); protection was added against retroactive penal laws (section 2(g)). Remembering previous problems, no specific reference was made to rights having existed in the past. A specific provision was included calling for "past or future" laws interfering with protected rights and freedoms to be "invalid" to the extent of the interference (section 5). See Gibson (1986) 31.

138 See my discussion of the Bill of Rights, 1960 (especially par 3.2.7.3.c) for the effect and function of a "notwithstanding" clause.

139 Gibson (1986) 31.

140 The fundamental rights of the Charter were referred to as "political" rights.

141 The "reasonable limits" concept referred to borrowed greatly from the European Convention on Human Rights (1950) and evolved into section 1 of the present Charter. See Gibson (1986) 32.

the spirit had dissipated by June and an agreement was only reached (subject to ratification) on a modest group of amendments known as the Victoria Charter. In the end the accord failed because the government of Quebec refused to ratify it.[142]

In 1972 the final report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada appeared, being the only event of significance for the next seven years concerning the entrenchment of rights and freedoms.[143] Immediate developments after the report seem to indicate that the energy and optimism of the report did not persist. However, several new features were proposed which found their way into the Charter. From the Victoria Charter were removed the references to "public safety, order, health or morals ... national security or ... the rights and freedoms of others". The phrase "due process of law" that caused so much trouble under the Canadian Bill of Rights was proposed to be replaced by "principles of fundamental Justice".[144]

During 1974 the Trudeau government pressed for provincial acceptance of the Victoria proposals, or something similar.[145] The efforts did not impress the provinces. In April 1976 Trudeau sent a letter to the provinces indicating three possible ways of achieving patriation. He also indicated that the federal

---

142 Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 610.

143 This report was referred to as the "Molgat-MacGuigan Report" in honour of its joint chairmen. See Gibson (1986) 32; Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 611.

144 Record 16 of the report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (4th Session, 28th Parliament, 1972, App B, 106. See Gibson (1986) 32.

145 See the *Winnipeg Tribune* of 3 October 1974 page 8.

government would proceed unilaterally if provincial accord could not be reached.[146] This "threat" caused a flurry of activity during the summer but by the scheduled federal-provincial meeting of mid-December an agreement had not been reached. The election of the separatist *Parti Quebecois* government in Quebec on 15 November changed everything and the plans by the federal government fell by the wayside.[147]

After these unsuccessful attempts to achieve patriation the Trudeau government in June 1978 introduced the Constitutional Amendment Bill.[148] The Bill was designed with eventual entrenchment in mind but was described as an interim measure. It was to be applicable at federal level only, until constitutional entrenchment became possible. The text took the 1972 Special Joint Committee Report to heart and expanded upon the rights embodied in the Victoria Charter.[149] For the first time an enforcement provision was expressly included, empowering courts "of competent jurisdiction" to grant relief by means of declaration, injunction, or "similar relief".[150]

---

146 *Winnipeg Free Press*, 6 April 1976 at page 4; See also Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 609.

147 *Winnipeg Free Press*, 4 December 1976. A softer "Draft Resolution" was circulated in January 1977. See also (1978) *Proposals on the Constitution 1971 - 1978* 14 as cited by Gibson (1986) 33.

148 Bill C - 60. See Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 611. It had been preceded by a white paper called "A Time for Action". See *House of Commons, Debates*, 30th Parliament, 3rd Session, 121: 6278, 12 June 1978. See Gibson (1986) 33.

149 Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 611.

150 Section 24. However, this power was not available with respect to certain rights that would involve the prerogatives of Parliament or legislators (section 27). Also see Gibson (1979) 9 *Man LJ* 363 388 - 391.

Bill C-60 led to considerable controversy and much discussion. The government of Canada referred the Bill to another special committee of the senate and house of commons. On 10 October 1978 after 35 meetings, the committee's interim

The provincial leaders resented the ultimatum that was put to them in April 1976 and also disagreed on some of the substantive provisions of the proposal, including the basic principle of constitutionally entrenching rights and freedoms.[151] This resentment led to the provincial premiers opposing the proposal made at a meeting in Regina in August 1978. This was followed (and not surprising) by a failure to achieve an accord on constitutional revision in the Federal Provincial First Ministers Meetings, in October 1978 and February 1979.

However, some good came from the controversy and the discussions. A "best efforts" draft was released in early 1979 by the Continuing Committee of Ministers on the Constitution. Some progress was made but floundered on the concept of entrenchment due to the opposition of several provincial leaders. One of the co-chairmen of the Continuing Committee of Ministers on the Constitution stated the problem as follows: "The largest continuing obstacle to full agreement remains the fundamental difference between those who favoured the principle of entrenchment and those who supported the status quo."[152]

The idea of a legislative "notwithstanding clause" capable of overriding a Charter, was introduced to the debate by Saskatchewan as a possible compromise. However, the gulf between the participants on the fundamental question of entrenchment was too wide, and grew wider with each attempt to expand the scope of the Charter.

---

report (see the Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, Issue 20, 10th October, 1978) was submitted containing several suggestions for improvement. See Gibson (1986) 34.

151 Romanow, White & Leeson (1984) 12.

152 Romanow, White & Leeson *ibid* 45.

In spite of the serious disagreement by the provinces several new ideas were introduced at this stage that later found their way into the final Charter.[153]

### 3.2.9 The period 1980 to 1982

During 1980 to 1982 the patriation of Canada's Constitution took place.[154] A new Charter and a new amending formula emerged. The momentum in the quest for a charter was re-established by two events of early 1980: The re-election of Trudeau's Liberals federally and the defeat of the *Parti Quebecois`* proposal for "sovereignty association" in a Quebec referendum. On the back of this the federal government took the initiative and sent a new set of proposals to the provincial governments. The new federal proposals was a thoroughly revised edition of previous versions and in style much closer to the final Charter than the Canadian Bill of Rights.[155]

The new federal draft of the Charter went further than any previous proposal. Its sweep was made wider by expressly stating that the draft was binding on both federal and provincial orders of government and it was now furthermore unequivocally designed to be entrenched. The draft stated that law and administrative acts inconsistent with the Charter would be "inoperative and of no force or effect to the extent of the inconsistency".[156]

---

153 For a discussion on these ideas see Gibson (1986) 35.

154 The "patriation" of the Canadian Constitution means bringing it home to Canada. Because the British North America Act has never been a Canadian Act it can not be "repatriated". Although the term is widely accepted by Canadians the exact meaning thereof is still unclear. See Hogg (1992) 53.

155 Federal Draft of the Charter - Document No 830 - 81/027, 4 July 1980 as cited by Gibson (1986) 35.

156 Section 18.

In September 1980 a revised federal draft was presented by the Continuing Committee of Ministers on the Constitution which brought the draft much closer to the final form.[157] In this revised draft the "reasonable limits" clause was for the first time inserted at the beginning of the document and a specific list of purposes for such limits was eliminated where they had been retained in the last few drafts.[158] The principle of "due process" also seen in recent drafts was rejected in favour of "principles of fundamental justice" and this provision was no longer grammatically linked to more specific legal rights.[159]

In October 1980 the federal government could wait no longer and on the back of the minister's failure to achieve consensus they announced their intention to proceed unilaterally to obtain patriation and an entrenched charter from the British Government.[160] The document discussed at the first ministers conference, having been slightly rearranged and modified, was included in the resolution placed before Parliament.[161]

This unilateral initiative by the federal government was followed by rancorous debate on many fronts. The constitutionality of the action was challenged in Newfoundland, Manitoba and Quebec.[162]

---

157 Document No 800 - 14/064, 3 September 1980 as cited by Gibson (1986) 36.

158 Section 1.

159 Section 6.

160 *The Canadian Constitution 1980: Proposed Resolution Respecting the Constitution of Canada* (1980). See Gibson (1986) 36.

161 The only major difference was that a section was included which explicitly stated that the Charter applied to the Parliaments, legislators, and the governments of Canada and the provinces, and to "all matters within the authority" of those bodies (section 29(1)).

162 The initiative was opposed in first six and ultimately eight provincial

The issue was once again referred to yet another joint parliamentary committee after a vicious debate in Parliament.[163] A sense of urgency and vigour saw the committee meet 106 times between 6 November 1980 and 13 February 1981.[164] A great number of comments, presentations and briefs were received from most of the principal political parties as well as a large number of individuals and groups from the general public.[165] From the comments received approximately two thirds favoured constitutional entrenchment.[166] The committee's hearings resulted in a total of 76 amendments being recommended.[167]

Important alterations were made to the proposed Charter on the lines of these amendments:

- The "reasonable limits" clause took its final form with the elimination of the reference to parliamentary government, and the addition of the requirement

governments. See *Reference re Amendment of the Constitution of Canada* (1981) 117 DLR (3d) 1 (Man CA); *Reference re Amendment of the Constitution of Canada (No 2)* (1981) 118 DLR (3d) 1 (Nfld CA); *Reference re Amendment of the Constitution of Canada (No 3)* (1981) 120 DLR (3d) 385 (Que CA). The idea was apparently that the actions would be consolidated in a final appeal before the Supreme Court of Canada.

163 See Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, issue 57, 13 February 1981 as cited by Gibson (1986) 37.

164 See Gibson (1986) 37.

165 *Ibid.*

166 Minutes *ibid* 92.

167 *Ibid* 6.

that the reasonableness of limits be capable of being "demonstrably justified".[168]

- The enforcement provision was reinstated after having been dropped from the previous version.[169]
- The draft also contained a declaration that the Constitution "is the Supreme Law of Canada", making inconsistent laws "of no force or effect".[170]

In April 1981 the parliamentary committee reported back and two further amendments were made in Parliament: The preamble was added recognising the supremacy of God and the Rule of Law.[171] A statement, now found in section 28, was added that the Charter's rights and freedoms "are guaranteed equally to male and female persons".[172]

In September 1981 the Supreme Court of Canada delivered its judgement on the constitutional challenge to unilateral patriation. The Supreme Court ruled that Canada would defy constitutional convention if it proceeded unilaterally but added that it had a distinct legal right to do so.[173] The judgment was followed by intense negotiations between the federal government and the nine provinces on a package of constitutional reforms that included patriation, an amending formula, and an entrenched charter of rights. However, the government of

---

168 Section 1.

169 Section 24(1).

170 Section 58. Changes were also made to many of the rights and freedoms. Native rights were also strengthened. See Gibson (1986) 37 - 38.

171 See Elliot R, *Interpreting the Charter - Use of the earlier versions as an aid* 15 and 23 as cited by Gibson (1986) 38.

172 Elliot *ibid* 15 and 52.

173 *Reference re Amendment of the Constitution of Canada (Nos 1, 2 & 3)* (1981) 125 DLR (3d) 1 (SCC).

Quebec was left out of these discussions and consequently refused to accept the compromise.[174]

Although it was agreed that fundamental rights and freedoms should be entrenched, the cost of an agreement was the shrinkage of some of its protections. The "opt out" clause again came to the fore and was included by section 33 which permitted Parliament or a provincial legislator to opt out of many of the Charter's most fundamental guarantees with respect to particular legislation, for renewable five year periods. The federal or provincial legislator could therefore enact legislation that shall operate "notwithstanding" the provisions of the Charter.[175]

The resolution received final approval from the House of Commons on 2 December 1981, and from the Senate on 8 December 1981. The United Kingdom Parliament acting upon the joint address contained in the resolution, enacted the Canada Act 1982, which received royal assent on 29 March 1982. The Canada Act brought into existence the Constitution Act, 1982, part 1 of which is the Canadian Charter of Rights and Freedoms. The Constitution Act, 1982 was proclaimed in force on 17 April 1982 and the Charter came into effect on the same date with the exception of the equality rights section, section 15, which took effect on 17 April 1985.[176]

---

174 Romanow, White & Leeson (1984) 209 - 210.

175 See also chapter 7 footnote 1 and par 11.3.1.

176 Section 32(2) postponed the commencement of section 15 to enable federal and provincial governments to put their houses in order. It gave them three years to study their statute books, policies and practices to pre-emptively deal with any equality violations rather than waiting for challenges to be raised in court. See Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 987.

### 3.2.10 The Constitution Act, 1982

Some of the main features of Canada's Constitution are that it:

- Establishes a political and economic union based on federal and democratic principles;
- Outlines a framework for the machinery of government and establishes governmental institutions (for example Parliament, courts);
- Distributes legislative and executive powers between the provincial and national levels of government, thereby imposing legal limits on what a particular level of government can do and not do in relation to other governments;
- Provides the rules and procedures for changing the Constitution itself.[177]

Since 1982 it also guarantees certain individual and collective rights and places limits on the powers of governments and legislators respecting these matters by way of the Charter. Because this constitutional renovation is extremely relevant for this study and some sections will be frequently referred to and discussed, I will give an overview of the Charter.

Section 1 guarantees the rights and freedoms contained in the Charter "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This section recognises that rights and freedoms are not absolute. Section 2 guarantees certain fundamental freedoms such as conscience and religion. Sections 3, 4 and 5 entrench democratic rights. Section 6 provides for mobility rights of citizens. Sections 7 to 14 of the Charter outline a series of constitutionally entrenched legal rights

---

177 Funston & Meehan (1994) 8.

primarily designed to protect persons subject to the criminal process.[178] Section 15 guarantees equality rights. Sections 16 to 22 concern language rights. Section 23 provides for "Minority Language Educational Rights". Section 24 makes it clear that the enforcement of the Charter rights is the responsibility of the judiciary. Sections 25 through 31 provide interpretative tools for Charter analysis. Section 32 provides that the Charter applies to the Parliament and government of Canada and to the legislature and government of each province and territory. Section 33 provides for an override of some Charter rights including the legal rights contained in sections 7 to 14.[179]

Section 52, although not actually part of the Charter, states that the Constitution (of which the Charter is part) is the supreme law of Canada and that "any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect".

### 3.2.11 1982 up to the end of June 1999

#### 3.2.11.1 The judiciary

The early Charter judgments by the Supreme Court exuded confidence in the court's new role. The Canadian judges seemed to accept that they were being called upon by the Constitution to play a major new socio-political role and the complacency and diffidence referred to earlier were, for the greater part, put aside. However, the courts did not set out on a novel venture in applying the

---

178 See Annexure B.

179 See also chapter 7 footnote 1 and par 11.3.1.

Charter. There were other instruments that shared certain features and therefore the courts had developed bodies of principles to rely on.[180]

As can be expected there were also exceptions to the rule. Scollin J in *Re Balderstone and The Queen* observed that the "Charter did not repeal yesterday and did not abolish reality".[181] Scollin J also warned that the Charter should not be understood as being a warrant for rule by a judicial oligarchy.[182]

In the first Charter case heard by the Supreme Court of Canada in *Law Society of Upper Canada v Skapinker* [183] Estey J on behalf of the court said the following: [184]

> We are here engaged in a new task. ... The Charter comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian Law. Indeed, it 'is the supreme law of Canada'. ... It cannot be readily amended. The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. ... With the Constitution Act, 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.

In *Hunter v Southam Inc*[185] Dickson J pointed out on behalf of the entire court that the function of a constitutional Charter of Rights is to provide a framework

---

180 For example the American Bill of Rights and the International Covenant on Civil and Political Rights (1966). See Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 627.

181 (1983) 143 DLR (3d) 671 680 (Man QB), affirmed 4 DLR (4th) 162 (Man CA), leave to appeal to SCC refused 4 DLR (4th) 162n.

182 *Ibid.*

183 (1984) 9 DLR (4th) 161 (SCC).

184 At 167 - 168.

185 (1984) 11 DLR (4th) 641 (SCC).

for "the unremitting protection of individual rights and liberties", and that "the judiciary is the guardian of the Constitution ...".[186]

In February 1985, after Dickson J became Chief Justice of Canada, he discussed the difference in approach by the courts to the Charter and the Canadian Bill of Rights to an audience of Alberta lawyers.[187] Dickson CJ expressed his belief that the experience of the Canadian Bill of Rights would not be repeated. He also mentioned that it was often said that, when dealing with the Bill of Rights, the Canadian judiciary were indecisive and unadventurous, and that they "sapped the Bill of Rights of necessary potential for protection against government heavy-handedness".[188] However, he did not think that the same accusation could be levelled against the judiciary in dealing with Canadian Charter cases. He said:

> Canadian courts, including the Supreme Court of Canada, had accepted the new responsibility which has been thrust upon them by the Parliamentarians. They recognise the vital role they will play in determining the kind of society Canada is and will become under the Charter. I expect that in our Court we will proceed with the Charter cases one by one in a reasonable and principled way, guarding against excessive enthusiasm in light of the various and serious implications of striking down otherwise valid legislation, but willing to impose limits upon governmental action when warranted by the dictates of the Charter.

Dickson CJ underlined the incremental nature of the process. He added that a charter must be capable of growth and development over time to meet new social, political and historical realities, often recognised by its framers.

---

186 At 649.

187 Address to mid-winter meeting of the Alberta Section, Canadian Bar Association, Edmonton, 2 February 1985 as cited by Gibson (1986) 41.

188 *Ibid*.

However, the framework within which the Supreme Court operates seems to have evolved. The Supreme Court early on seemed to suggest that its role as the guardian of the Constitution dictated its interpretative choice. The court understood its mandate as measuring all other laws against the supreme law of the Constitution and adopted a purposive approach looking for the purpose underlying the guarantee from the view of the holder of the guarantee. The court understood that it had to constrain governmental action inconsistent with those rights and freedoms. The court also accepted the generality of the formulation of the rights, as an invitation to a liberal interpretation of the guarantees. The early cases seemed to hold the view that rights were the norm and limits the exception. The limits were subject to stringent principled justification by their proponents.[189]

This trend towards a relatively stringent view, which only cedes the protection of rights and freedoms in rare instances, culminated in *R v Oakes.*[190] While the *Oakes* case has become a paradigm for constitutional interpretation there has been a movement towards a more deferential, flexible, "reasonableness-based" approach to the *Oakes* test. The Supreme Court seems to hold the view that its initial approach had been too stringent and mechanistic. A less stringent view on justification was taken where the court tried to balance the competing interests.[191]

---

189 The Supreme Court held that administrative expediency often relied on by governments would only be allowed to justify a rights infringement in exceptional circumstances such as in an emergency (see *Reference re section 94(2) of the Motor Vehicle Act* [1985] 2 SCR 486 (Can)) or where protection of the right would entail prohibitive costs (see *Re Singh v Minister of Employment and Emigration and 6 other appeals* (1985), 17 DLR (4th) 422, [1985] 1 SCR 177 (SCC)).

190 [1986] 1 SCR 103; 26 DLR (4th) 200. See the discussion of *Oakes* in chapter 8 footnote 164.

191 See chapter 8 footnote 166.

3.2.11.2 On the political front

Since 1983 there has been a search for a new federation. Much constitutional debate has taken place. Aboriginal rights were discussed and treaties were concluded. Quebec demanded further reforms and in 1987 the provincial premiers and the Prime Minister agreed on the Meech Lake Accord.[192] Due to pressure from Quebec (disappointed with the failure of the Meech Lake Accord) and the Aboriginal peoples, Canada also saw the multilateral "Canada Round" of negotiations and the Charlottetown Accord was drawn up.[193] Growing concerns with fiscal federation brewed and there was the threat of a Quebec separation.[194]

On the political front another development occurred which does not favour libertarian views.[195] Stuart explains that the recent disdainful attitude by the Parliament and Ministers of Justice of Canada to Supreme Court decisions pose a serious threat to the standards set by the Supreme Court.[196] Parliament has

---

192 The government of Quebec did not agree to the 1982 reforms because the reforms failed to address controls on the federal spending power and increased powers of the Quebec legislature. The accord was a set of proposed constitutional amendments *inter alia* dealing with these matters. The accord died in 1990 because it did not have the required support in all the provincial legislatures at the end of the three-year time limit set by the amending formula. See Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 7.

193 This Accord consisted of a more comprehensive set of principles. However, the Accord was rejected in a national referendum in 1992.

194 See Funston & Meehan (1994) 14 and Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 7.

195 As recently as 1997. The less stringent approach by the courts had already been adopted by the Supreme Court after *Oakes* in 1986. See chapter 8 footnotes 164 & 166.

196 (1998) 11 *SACJ* 325 335.

succumbed to the popular concern that criminals have too many rights at the expense of victims and the constant calls in the media to toughen up the criminal law.[197] On a few recent occasions Parliament has enacted amendments to the Criminal Code to achieve positions already declared unconstitutional by the majority of the Supreme Court.[198]

## 3.3 THE JUDICIAL SYSTEM OF CANADA

### 3.3.1 Introduction

The legal rules of the Constitution are modified in the course of interpretation by the courts and therefore the accepted rules and principles that underline the Constitution present a moving target.

Due to the principle of precedent, judge-made decisions as in South Africa thus became a major source of law. The doctrine of precedent (*stare decisis*) directs the court to follow the precedent set by case law when adjudicating future cases with similar facts. The decision of a higher court acts as binding authority on a lower court within the same jurisdiction.[199] A court's decision in another jurisdiction acts as persuasive authority. However, judges can distinguish cases in order to avoid the binding or persuasive nature of *stare decisis*. As in South

---

197 *Ibid* 325 & 326.

198 For example Parliament's:

- adoption of the minority position of the Supreme court which afford very limited access to the medical and therapeutic records of complainants in sexual assault cases (Bill C - 46), and
- exclusion of the extreme intoxication defence to sexual assault and other general intent crimes (Bill C - 77). See Stuart (1998) 11 *SACJ* 325 335.

199 Gall (1983) 220. See also MacIntosh (1995) 2.

Africa, the various provinces sometimes differ in their interpretation of the law until the difference is settled by the Supreme Court of Canada.

With regard to Charter litigation, few Canadian cases decided before 1982 will be applicable when applying the doctrine of precedent. However, the cases arising out of the Canadian Bill of Rights will be more relevant but not compelling.[200]

In view of this I deem it necessary to give a brief outline of the court system so that the prominence and importance of a specific decision can be ascertained.

The judicial system in Canada consists of federally[201] and provincially[202] constituted courts.[203]

### 3.3.2 Federal courts

#### 3.3.2.1 General

The federal government was granted the authority to establish and maintain the courts required to administer the laws of Canada.[204] Pursuant to this the Parliament of Canada created by statute the Supreme Court of Canada,[205] the

---

200 Hogg PW, (1992) *Constitutional law of Canada* third edition (supp) Carswell vol 1 8 - 19 as cited by Funston & Meehan (1994) 53.

201 Section 101.

202 Section 92(14).

203 The Constitution Act, 1867.

204 Section 101 of the Constitution Act, 1867.

205 Supreme Court Act, RSC 1985, c S - 26.

Federal Court of Canada[206] and the Tax Court of Canada.[207] The enabling statutes specify the functions of these courts and other federal statutes may define them further.[208]

The federal government has the power to appoint judges to these federally constituted courts.[209] The Judges Act[210] determine the salaries of the judges who are paid by the federal government.

3.3.2.2 Supreme Court of Canada[211]

Although the Constitution Act, 1867 did not provide for this court the federal government relied on its authority under section 101 to enact the Supreme Court Act, which established this court.[212]

Appeals from the provincial courts in both criminal and civil matters are heard by this court composed of one Chief Justice and eight other justices who together exercise jurisdiction. The Supreme Court will also hear cases where

---

206 Federal Court Act, RSC 1985, c F - 7.

207 Tax Court of Canada Act, RSC 1985, c T - 2. As this court only hears appeals regarding assessments made under the Income Tax Act RSC 1952 c 148 and the Canada Pension Plan Act RSC 1985 c C - 8, this court is not discussed.

208 Gall (1990) 149.

209 See section 101.

210 RSC 1985, c J - 1; Gall (1990) 106.

211 The composition, authority, functions and jurisdiction of the court is governed by the Supreme Court Act.

212 The Supreme Court was therefore enacted by ordinary statute but the amending formula in sections 41 and 42 of the Constitution Act, 1982 gave some status to some aspects of this court. See Gall (1990) 82.

issues of national importance or appeals on issues of law are raised.[213] Constitutional or other outlined cases can also be referred to the Supreme Court by the federal government for adjudication.

An accused whose acquittal on an indictable offence has been set aside by a provincial court of appeal has an automatic right of appeal to the Supreme Court of Canada. The Supreme Court of Canada will also hear an appeal in a criminal case where a judge in a provincial court of appeal has given a dissenting judgement on a question of law or where leave to appeal is granted by the Supreme Court.[214]

3.3.2.3 Federal Court of Canada[215]

In terms of section 101 of the Constitution Act, 1867 a Federal Court was also established. The Federal Court is divided into a trial division and an appellate division.[216]

The trial division has exclusive jurisdiction over some areas of intellectual property,[217] certain actions concerning members of the Canadian armed forces, and actions for equitable relief against any federal board, commission or

---

213 *Ibid* 107.

214 MacIntosh (1995) 14.

215 Hogg (1992) 173 and further indicates that the establishment of a Federal Court over and beyond the provincial courts and the Supreme Court of Canada is an unwarranted step in the direction of the dual court system of the United States. Hogg cautions that the existence of a parallel hierarchy would give rise to wasteful jurisdictional disputes and multiple proceedings.

216 Federal Court Act, RSC 1985, c F - 7 section 4.

217 *Ibid* section 20.

tribunal.[218] It also shares jurisdiction with other courts on specific matters such as aeronautics, inter-provincial works and undertakings[219] and has original concurrent jurisdiction over claims against the federal Crown.[220] It furthermore adjudicates over disputes between provincial legislators or between provincial and federal legislators.[221]

The appellate division hears appeals from the trial division,[222] appeals by way of certain federal statutes, and applications regarding decisions of federal boards, commissions or tribunals on specific grounds.[223] Matters can also be referred to this court by these federal boards, commissions and tribunals.

Not more than 29 judges, one Associate Chief Justice and one Chief Justice are provided for by the Federal Court Act.[224]

### 3.3.3 Provincial courts

#### 3.3.3.1 General

The Constitution Act, 1867 empowers the provinces to establish "superior courts" for the "administration of justice".[225] The functions and powers of the

---

218 *Ibid* section 18.

219 *Ibid* section 23.

220 *Ibid* section 17.

221 *Ibid* section 19.

222 *Ibid* section 27.

223 *Ibid* section 28.

224 *Ibid* section 5.

provincial courts are described by statutes such as the Provincial Judicature Acts and by the Rules of Court, or Rules of Practice within each province.[226] However, the power to regulate criminal laws including criminal procedure is reserved for Parliament.[227] As the question of bail is a criminal justice issue the same principles have to be applied throughout all the provinces. Strong evidence can be found that the "Fathers of the Federation" sought to avoid the United States experience when they gave Parliament the exclusive power to legislate in the field of criminal law.[228] In the United States, the states have the

---

225 Section 92(14).

226 Funston & Meehan (1994) 39.

227 By way of section 91. Sir John A Macdonald (who was then Attorney-General of Canada) in a debate in the House of Commons argued that criminal law should be under federal jurisdiction: (See MacIntosh (1995) 11)

> The criminal law too - the determination of what is a crime and what is not, and how crime shall be punished - is left to the General Government. This is a matter almost of necessity. It is of great importance that we should have the same criminal law throughout the provinces - that what is crime in one part of British America, should be crime in every part - that there should be the same protection of life and property as in another.

228 Sir John A Macdonald in the same debate *ibid* criticised the drafters of the US Constitution for giving the states the power to decide criminal law :

> It is one of the defects of the United States system, that each separate state has or may have a criminal code of its own – that what may be a capital offence in one state may be a venial offence, punishable slightly, in another. But under our Constitution we shall have one body of criminal law, based on the criminal law of England, and operating equally throughout British America, so that a British American, belonging to what province he may, going to any part of the Confederation, knows what his rights are in that respect, and what his punishment will be if an offender against the laws of the land. I think this is one of the most marked instances in which we take advantage of the experience derived from our observations of the defects in the Constitution of the neighbouring Republic.

exclusive power to pass criminal law and as a result criminal laws frequently differ from state to state.

Generally speaking the provincial court system is a three-tiered system consisting of the following:

- The superior court which includes a court of appeal as well as a trial division.
- The county or district courts.
- The inferior courts which in most provinces are now called "Provincial Courts".

3.3.3.2 Federally appointed judges

The federal government is vested with the power to appoint the judges to the latter courts which include the district and county courts in the province.[229] This is so even although the superior courts are established and administered by the provinces.[230] The judges are to be selected from lawyers practising in the province where the judge is to preside.[231]

The superior courts established in each province consist of a trial division or court of Queen's bench, and the appellate division or court of appeal. Federally appointed judges preside over the intermediate and highest trial courts and courts of appeal of the provinces and territories.[232]

---

229 Pursuant to section 96 of the Constitution Act, 1867.

230 Gall (1990) 154.

231 Sections 97 to 100 of the Constitution Act, 1867.

232 Funston & Meehan (1994) 39.

The highest superior courts of each province (going from west to east) are the British Columbia Supreme Court, the Alberta Court of Queen's Bench, Saskatchewan Court of Queen's Bench, Manitoba Court of Queen's Bench, Ontario Court of Justice (General Division), Quebec Superior Court, New Brunswick Court of Queen's Bench, Prince Edward Island Supreme Court, Nova Scotia Supreme Court, Newfoundland Supreme Court, and in the territories, the Yukon Supreme Court and North West Territories Supreme Court.[233]

The trial division of these provincially and territorially constituted courts has a very wide jurisdiction that includes most criminal matters, appeals from summary offences, civil matters above a certain monetary amount, divorces, separations and certain administrative law matters.[234] The appellate division hears appeals from the trial division.[235]

3.3.3.3 Provincially appointed judges

Each province is granted the exclusive legislative power over the administration of justice in the province, including the constitution, maintenance and organisation of provincial courts.[236] The provinces may also appoint judges but they are appointed to a lower level of court. These courts have jurisdiction over civil matters as well as criminal matters. They are constituted under provincial statutes and the judges within these courts are appointed by their respective provincial governments. The judges are paid by their respective provincial

---

233 *Ibid* 40.

234 Gall (1990) 154.

235 *Ibid*.

236 Pursuant to section 92(14) of the Constitution Act 1867. See Funston & Meehan (1994) 40.

governments and their salaries are set by the enabling provincial statute.[237] However, these judges cannot perform the same functions as federally appointed judges.[238] The two territories have similarly established territorial courts and their governments have appointed judges to those courts.[239]

The jurisdiction of the provincially appointed judges is limited and consists of the small claims court or provincial court (civil division), the provincial court (criminal division), the family court or provincial court (family division) and the youth court or provincial court (youth division). The small claims court handles the smallest civil cases[240] and the statutory or monetary jurisdiction varies in respect of each province.[241] The provincial court (criminal division) has jurisdiction over specified and less serious criminal cases, all preliminary hearings and all summary convictions. Some criminal offences are also heard in the family court along with others matters relating to children, maintenance and custody under provincial statutes.[242] Youth offenders as well as other matters involving children and welfare are dealt with by the youth court.[243]

Because these courts are established by the authority of each province the court structures of the provinces may vary.[244]

---

237 *Ibid*.

238 Gall (1990) 147.

239 Funston & Meehan (1994) 40.

240 As in South Africa.

241 Gall (1990) 155

242 *Ibid*.

243 *Ibid*.

244 *Ibid* 151.

## 3.4 CONCLUSION

Canada evolved from the early years of the Aboriginal societies through the early years of the colonies where the government was the prerogative of the Crown, to a federal state with democratically elected institutions based on a constitution. The present Constitution includes guarantees of certain individual and collective rights such as the legal rights in sections 7 to 14 and the language rights in sections 16 to 22, and places limits on the powers of governments and legislators in respect of these rights.

However, the development of constitutionally protected rights under Canadian law did not happen by chance. It resulted from the balancing of interests between different groupings and an understanding that the individual's rights had to be protected. Before 1982 the citizens and politicians tried to harmonise the interests of different groupings by way of federalism. The protection afforded proved to be insufficient, especially for those individuals that did not agree with the policy of the rulers of the day. Massive violations of individuals' rights took place especially where race, religion and communism played a role. This led to an extended bout of introspection and the development of new divisions relating for example to ethnicity, sex and to people experiencing some situation particular to themselves. These new divisions joined the traditional divisions of federalism that required the constitution to fashion harmonious coexistence between the federal and provincial spheres. The protection of group interests seem to have moved to newly politicised social categories. The constitutional identities of Canadians have therefore for some time not been restricted to their membership in Canadian and provincial governments. These rights and freedoms give Canadians a legitimate basis for making constitutional claims.

But constitutionally protected rights did not come easily. The inheritance of the principle of parliamentary supremacy from the British Empire initially formed the catalyst for the denial of such rights. Later on tentative protection was afforded by the Bill of Rights, 1960 and human rights legislation. Eventually formal entrenched guarantees saw the light in the Charter.

The Canadian Charter is an excellent model to learn from. Some of the fundamental rights and liberties date from as far back as manifestos like the Magna Carta, the English Bill of Rights, the Habeas Corpus Acts and the Act of Settlement. The need for and scope of constitutional rights that are immune to the lawmakers have been debated from as far back as 1865 at the "Confederation debate". As a result of the management of relationships we already see the constitutional protection of a limited amount of rights in the Constitution Act of 1867. The balancing of interests has therefore for a very long time formed part of Canadian law.

It is especially the serious and sometimes frantic debate among legal scholars and especially politicians from the 1950s up to 1982 when the Charter commenced that is invaluable. As far back as 1960 the Canadian Bill of Rights already contained a declaration of fundamental rights and freedoms which contributed to the development of a human rights culture. Although the rights in the Bill, including the right to bail, were not entrenched, it ensured their scrutiny, especially by the courts, as both legislative and non-legislative matters had to be construed in light of the Bill. It so also happens that some of these rights, including the right to bail, were duplicated in the Charter. In the 1960s and 70s there were also many other legislative initiatives mainly dealing with discrimination that strengthened the rights of Canadians.

Of utmost importance is the clarifying role that the Canadian courts have played after the advent of the Canadian Charter. The Canadian courts in accepting their new socio-political role to reconcile the individual and the community, interpreted and applied the Charter and thereby built up a substantial body of judicially developed protections. The Canadian courts not only show the experience that has been gained but point to the kind of society that Canada is and wishes to be. It is not surprising that there is a wide perception that as far as human rights are concerned, Canada is the best country to live in.[245]

---

245 See for example the United Nations Human Development Report 2000. According to the "Human Development Index" taken up in this report Canada is ranked number 1 as far as any country's achievements in terms of "life expectancy, educational attainment and adjusted real income" are concerned. On the same index South Africa is ranked number 103.

# CHAPTER 4

# BAIL UNDER CANADIAN LAW



## 4.1 INTRODUCTION

Under the contemporary Canadian law the provisions governing pre-trial

incarceration are mainly to be found in the Criminal Code RSC 1985.[1] It is a system that gives due consideration to the right to security and freedom of the individual concerning arrest, detention and release and is in line with the move towards strong protected rights. However, the regulations have not always been as libertarian. The Bail Reform Act of 1970[2] introduced a change in attitude towards pre-trial incarceration. In this chapter the changed attitude of the Canadian Parliament towards pre-trial release is illustrated. To provide a proper picture of the change in attitude towards pre-trial incarceration, and the structure within which the principles of arrest and pre-trial release operate, the changes to arrest are also briefly mentioned.[3] The immediate history of the system before the Bail Reform Act is discussed to demonstrate this change in attitude, and to complement the English-law roots of bail.

---

1 Sections 493 to 529.5 as amended. The Report of the South African Law Commission (1994) 25 refers to the Bail Reform Act as the Act regulating bail in Canada, even quoting a section as an example. This is misleading as the position with regards to bail in Canada is governed by the Criminal Code of Canada as amended by the Bail Reform Act. The section quoted is furthermore contained in the Criminal Code RSC (1970) and not in the Bail Reform Act. The Law Commission also failed to take into account that the Revised Statutes of Canada commenced on 12 December 1988 which resulted in changes to the numbering. The full bench of the Witwatersrand Local Division in *Ellish v Prokureur-Generaal, Witwatersrand* 1994 (5) BCLR 1 (W) 8 similarly indicated that with regards to bail in Canada the Bail Reform Act is followed. This could also be misleading as the position with regards to bail in Canada after 1988 is governed by the Criminal Code of Canada RSC 1985, the respective sections in the Canadian Charter, and in theory the Bill of Rights of 1960.

2 1970 - 71 - 72 (Can) c 37.

3 It also aids in the comparison with South African law. While both the Canadian and South African law provides for principles of arrest and pre-trial release, some principles of pre-trial release under Canadian law are treated as principles of arrest under South African law. Section 503 of the Criminal Code, for example, which provides that an arrested person must be brought before a justice within 24 hours forms part of the "release provisions" under Canadian law (see par 4.3.5.1). Under South African law section 50 of the Criminal Procedure Act provides that an arrested person must be brought before court within 48 hours. However, section 50 forms part of the "arrest" provisions (see par 2.6.3.2).

The immediate history of the system before the Bail Reform Act is therefore discussed, the principles of arrest are briefly mentioned, and a general overview of the structure of pre-trial release is given. In conclusion the contemporary principles are compared with the principles under South African law.

## 4.2 BRIEF SURVEY OF BAIL UNDER CANADIAN LAW BEFORE THE BAIL REFORM ACT, 1970 - 71 - 72 (Can) c 37

At common law the sole object of arrest was to ensure the appearance of the accused[4] before court.[5] The purpose of bail was not to mete out punishment but merely to secure the attendance of the prisoner at the trial.

The right of a person accused of a crime to seek bail in the years prior to 1970 was guaranteed by the Bill of Rights,[6] but the power to grant bail was specifically provided for and contained in the Criminal Code.[7]

If a person was arrested before 1970 there was technically no way in which he could be released, until after his appearance before a justice of the peace.[8]

---

4 In terms of section 493, part XVI RSC 1985 an "accused" in part XVI includes a person to whom a peace officer has issued an appearance notice under section 496, and a person arrested for a criminal offence. MacIntosh (1995) 73 indicates that if the offence is indictable the named person is an accused under the Code. If it is a summary conviction matter he is called a defendant.

5 *R v Rose* (1898) 18 Cox CC 717.

6 Section 2(f), 1960 (Can) c 44.

7 Sections 451, 463 - 465, 484, 710(2).

8 Although section 2(f) of the Bill of Rights recognised the right not to be deprived reasonable bail without just cause.

After the arrest the peace officer was required to bring the accused before a justice and no release could be effected until a justice dealt with the matter.[9] However, in practice, the accused was often released on the posting of cash bail by the peace officer without legal authority. The practice to release persons arrested for minor crimes existed in most areas of the country although the procedure was not authorised by the Code or any other law. The procedure was also not uniform throughout Canada.[10]

The procedures for causing an accused to appear without being arrested were limited, and was done by way of summons.[11] If a suspect was arrested with or without a warrant he had to be physically taken before a justice.[12] Prior to the changes made by the Bail Reform Act in 1970 there was no provision for the issuance of an appearance notice[13] or a promise to appear.[14]

---

9 See sections 451 and 710 of the Criminal Code prior to the 1970 amendment.

10 Teed & Shannon (1982) 60 *Can Bar Rev* 720 720 and further.

11 Section 440 of the Criminal Code prior to the 1970 amendment.

MacIntosh (1995) 82 indicates that a summons to appear is similar to an appearance notice, except that it is signed by a justice of the peace, or a judge, rather than by a police officer. A summons will order the accused in the name of the Queen to attend court at a given time or on a particular day. If the accused is required to attend for fingerprinting, a statement to this effect will be made in the summons. In terms of section 493 of the RSC "summons", means a summons in form 6 issued by a justice or judge.

12 Section 438(2) of the Criminal Code prior to the 1970 amendment.

13 MacIntosh (1995) 81 indicates that an appearance notice informs the accused of the alleged offence and specifies the date that he has to appear in court. Under RSC 1985 the notice will inform the accused that a failure to appear is a criminal offence under section 145(5) of the Code. If it is an indictable or a hybrid offence the notice will require the accused to have his fingerprints taken in accordance with the Identification of Criminals Act RSC 1985 c I - 1 and will specify the time and place for the prints to be taken. In terms of section 493 RSC an "appearance notice" means a notice in form 9 issued by a peace officer.

If the accused appeared before a justice, regardless of how he got there, two different procedures were applicable.

The first approach applied where the accused was charged on a summary conviction offence.[15] If the accused was arraigned and he pleaded not guilty, the court was to proceed with the trial.[16] However, the court had the jurisdiction to postpone or to adjourn the matter before or during the trial. Where the trial was adjourned the court could:

- allow the accused to be at large;
- commit the accused to prison;
- discharge the accused upon his recognisance[17] with or without securities or upon depositing such sum of money as the court directed.[18]

---

14 MacIntosh *ibid* indicates that a promise to appear is similar to an appearance notice. Here the accused promises to appear at the time and place indicated in the notice or to have his fingerprints taken as specified. In terms of section 493 RSC 1985 a "promise to appear" means a promise in form 10.

15 The present Code RSC 1985 c C - 46 divides offences into three classifications, namely indictable offences, summary conviction offences and hybrid or dual procedure offences. Summary conviction offences are the less serious crimes in the Criminal Code and also many offences created by other Acts of Parliament. Section 787(1) of the same Code provides for a maximum fine and term of imprisonment or both for someone convicted of such an offence. The rules pertaining to summary conviction offences are set out in part XXVII of the present Criminal Code. See MacIntosh (1995) 73, 74.

16 Section 707(1) of the Criminal Code prior to the 1970 amendment.

17 MacIntosh (1995) 82 indicates that a recognisance is an acknowledgement to the Crown that the accused will owe a certain amount of money in the event that he fails to attend court or have fingerprints taken as required. In terms of section 493, RSC 1985 "recognizance" when used in relation to a recognisance entered into before an officer in charge, or other peace officer, means a recognisance in form 11. When used in relation to a recognisance entered into before a justice or judge, means a recognisance in form 32.

A different procedure was followed if the charge was for an indictable offence.[19] When the accused appeared before a justice irrespective of whether he was brought there by arrest, due to the issuance of summons or merely by chance, the justice had to enquire into the charge.

The justice had the jurisdiction to grant the accused bail at any time before committal for trial as a result of the preliminary enquiry.[20] The accused could be admitted to bail if he:

- entered into a recognisance with securities;
- entered into a recognisance and deposited an amount directed by the justice; or
- entered into a recognisance without more.

When an accused was charged with a serious offence there were limitations upon the power of the justice and only a judge of a superior court could grant bail.[21] Bail granted by a justice only lasted until the completion of the preliminary enquiry.

Once the accused was committed to stand trial following a preliminary enquiry, a new bail application had to be lodged. The application had to be made to a

---

18 Section 710(1) of the Criminal Code prior to the 1970 amendment.

19 Indictable offences include the most serious crimes such as murder, robbery and treason which are punishable by life imprisonment, as well as some indictable offences which are only punishable by two years imprisonment.

20 Section 451 of the Criminal Code prior to the 1970 amendment.

21 Section 464 *ibid.*

magistrate or judge being judicial officers of at least one step higher in the judicial hierarchy than the justice.[22] The purpose of bail remained to ensure the appearance of the accused at the trial.[23]

Where the accused was entitled to bail as of right in the case of misdemeanours at common law, the court under the Criminal Code prior to 1970, had the discretion to grant bail in the case of equivalent summary conviction offences. For indictable offences the propriety of bail was to be determined with reference to the accused's probability of appearing at his trial, which was the object of bail, and not with reference to his supposed guilt or innocence.[24] In *Re Robertson*[25] Coleridge J as far back as 1854 said that the sole test as to whether or not an accused shall be admitted to bail was the consideration as to whether he was likely to appear at the trial.

Regardless of this basic principle, the courts started a trend to refuse bail on considerations other than the probability of the accused standing his trial. This included the probability of guilt, severity of the crime and the possibility of further criminal or unlawful action.

In *Re Johnson's Bail Application*,[26] the factors that had to be considered when exercising the discretion to grant bail were thoroughly dealt with. The court held that the following factors should be considered:

---

22 Section 463(i) *ibid*.

23 *McIntyre v Recorders Court* (1947) RL 357 (Que).

24 *Ex Parte Fortier* (1902) 6 CCC 191 (Que CA).

25 (1854) 23 CJQB 286.

26 (1958) 122 CCC 144 (Sask QB).

- the nature and seriousness of the charge;
- the strength of the Crown's case;
- the character and co-operation of the accused and the ties that are likely to bind him to remain in the jurisdiction;
- whether or not there is likely to be a delay in the prosecution.

Some courts also endeavoured to develop a distinction between granting bail prior to the preliminary hearing and granting bail after the accused has been committed for trial.[27]

In *R v Russell*[28] the doctrine of refusing bail or release from arrest for fear of endangering the public peace was discussed for the first time but not determined.

Grounds other than the probability of the appearance of the accused including the probability of danger to the public therefore gradually crept into the judicial system as reasons for refusing bail.[29] This unregulated discretion and variety of processes led to uncertainty and differing chances of release across the country.

---

27 *R v Hawken* (1944) 81 CCC 80 (BCSC). In this case the basic concept of assurance of appearance was acknowledged but the trend of the courts to differentiate was recognised.

28 (1919), 32 CCC 66, 29 Man R 511 (Man KB).

29 See *Re N* (1945) 87 CCC 377 (PEISC) where the court took into consideration that the accused suffered from a communicable disease which would have endangered the public if he was permitted to remain at large. See also *R v Russell*, *ibid*.

## 4.3 INFLUENCE OF THE BAIL REFORM ACT AND THE POSITION AS AT 30 JUNE 1999[30]

### 4.3.1 General

The Bail Reform Act introduced a liberal and enlightened system of compelling attendance and pre-trial release. The Act intended to rectify the problems concerning bail by making fundamental changes to the bail procedure and to the rights of individuals. The Act:

- provided for uniformity of the principles of arrest and release;
- endeavoured to avoid imprisonment before trial; and
- provided for only one release instead of two successive bail applications.

The premise of the Bail Reform Act is that the accused is innocent until proven guilty. However, the Act allows for a person's custody after arrest if there are grounds for believing that a further crime might be committed.[31]

The prior practice of detaining an accused until an appearance was made before a justice was virtually reversed. In terms of the Bail Reform Act the principle was adopted that a suspect was not to be arrested, and if arrested, was to be released, if at all possible, prior to appearance before a justice and in

---

30 The Bail Reform Act commenced on 3 January 1972 and amended the Criminal Code with regards to bail as of that date. However, the Revised Statutes of Canada (1985) were proclaimed in force on December 12 1988. This consolidation resulted in changes to the section numbers of the Canadian Criminal Code as well as other federal statutes. Because the courts have interpreted many of the relevant sections regarding bail under the consolidation of the 1970 revised statutes (Criminal Code RSC 1970) reference will also be made to the position before 1988.

31 See section 452(1)(f)(iii) [1970].

any event before his preliminary enquiry or trial. Where once the authority to release an arrested person rested with the judicial officers some of these powers were transferred to the peace officer who arrested the accused or the officer in charge of the lock-up. Since the advent of Act, there appears to be no reported decision relating to an improper refusal to release an arrested person before his appearance before a justice.[32]

When dealing with a refusal of a justice to release an arrested person, several courts have discussed the philosophy behind these changes effected by the Bail Reform Act. In *R v Thompson*[33] Anderson J while dealing with a review of a refusal to grant bail on a possession of narcotics charge in 1972, stated that in his opinion the legislation should be interpreted in a liberal manner. In the first instance he based his opinion on the fact that the legislation when read as a whole, seems to indicate that all accused persons should be released pending trial, except where it is clearly shown by the Crown that it is necessary that an accused should not be released. Secondly, in comparing the new legislation[34] with the old provisions it appeared to the judge that the intention of the new legislation was to prevent unnecessary detention. The new legislation seemed to give greater consideration to the offender and less to the nature of the offence. He continued:[35]

> Parliament must be taken to have assumed the risk that under the new legislation it would be to some degree less likely that as many accused persons would appear for trial as would be the case under the old system. Parliament

---

32 This is probably due to the brief lapse of time before an actual appearance before a justice. This results in insufficient time for a person arrested or detained in violation of the Code, to apply for a *habeas corpus* or other remedy.

33 (1972), 7 CCC (2d) 70, 18 CRNS 102 (BCSC).

34 Inclusive of section 457 to 457.8 of the Criminal Code.

35 At 71 CCC.

> must also be taken to have assumed that it was better to take the aforesaid risks than keep large numbers of accused persons in custody pending trial. It is not, therefore for the Court to substitute its views for those of Parliament by applying the 'old' rules to avoid the risk which must have been foreseen by Parliament prior to the enactment of the *Bail Reform Act*.

In *R v Quinn*[36] in an appeal from a refusal by a justice to grant bail Anderson Co Ct J of Nova Scotia explained the underlying principle of the relevant sections of the Code. He held that the basic philosophy still was that prior to conviction, all those persons who did not constitute a danger to the public, and who will show up for trial, ought not to be detained in custody. This, he said, prompted Parliament to enact the Bail Reform Act.

It is therefore not surprising that the scheme of the 1985 Criminal Code is to secure the release of persons in all but the most serious cases, unless the public interest dictates that a release should not be made. Major changes were also made relating to arrest.[37]

---

36 (1977) 34 CCC (2d) 473 (NS Co Ct). The accused was charged with possession of narcotics.

37 However, an extract from the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* of 1996 as cited by Friedland & Roach (1997) 204 seem to indicate that the excessive detention of untried prisoners were not reduced by the Bail Reform Act. In 1992/93 49% of admissions to Ontario prisons were unsentenced prisoners of whom the majority had not been tried. By 1993/94 the remand admissions accounted for 54% of the provincial prison population. The report also seems to indicate that the new liberal approach did not resolve the trend of higher admission rates for people classified as Black, South Asian, Asian or Arab. In 1992/93 for example admission rates for people classified as Black, South Asian, Asian or Arab were at least twice as high as their sentenced admission rates. For people classified as Aboriginal or White the remand and sentenced admission rates were virtually identical. The report also shows that approximately 18% of people found not guilty at trial had been denied bail. Again there is a disparity in that 21% of black accused have this unfortunate experience while it only happens to 14% of white accused.

### 4.3.2 Arrest of accused by peace officer

The former section 435 (before 1970) allowed a peace officer to arrest a person without a warrant:

- who had committed an indictable offence, or
- who on reasonable and probable grounds had committed or was about to commit an indictable offence, or whom he found committing an indictable offence.

These grounds were re-enacted[38] and another ground allowing arrest by a peace officer without a warrant was added:

> who he has reasonable grounds to believe that a warrant of arrest or committal, in any form set out in Part XXVII in relation thereto, is in force within the territorial jurisdiction in which the person is found.

However, new provisions were added which limit these rights of arrest. A peace officer shall not arrest a person without a warrant for:[39]

- an indictable offence over which a provincial court judge has absolute jurisdiction and which does not provide for a penalty of five years or more;[40]
- an offence for which a suspect may be prosecuted by indictment or for which he may be punished on summary conviction;

---

38 As sections 450(1) [1970] and 495(1) [1985].

39 See sections 450(2) [1970] and 495(2) [1985] which qualify sections 450(1) [1970] and 495(1) [1985] respectively.

40 An offence in terms of section 483 [1970), 553 [1985].

- an offence punishable on summary conviction, in any case where he has reasonable grounds[41] to believe that the public interest, having regard to all the circumstances including the need,
  - to establish the identity of the person;
  - to secure or preserve evidence of or relating to the offence, or;
  - to prevent the continuation or repetition of the offence or commission of another offence, may be satisfied without so arresting the person.[42]

The peace officer must not have any reasonable grounds to believe that if he does not so arrest the person, the person will fail to attend in court, in order to be dealt with according to law.[43]

If no arrest is made, the peace officer may issue to the person an appearance notice[44] or go before a justice and lay an information[45] as has been done in the past.[46]

---

41 And probable grounds [1970].

42 In other words where he believes that the public interest can best be served by compelling the accused's appearance by other means.

43 See sections 450(2) [1970] and 495(2) [1985].

44 Section 451 [1970]; 496 [1985].

45 A formal accusation in the form of an indictment against a person for some criminal offence without the intervention by a grand jury. See *Black's Law Dictionary* (1990) 779.

46 Section 455 [1970], for indictable offences, and section 723 [1970] for summary conviction offences.

### 4.3.3 Release from custody by peace officer

However, if a peace officer arrests a person for an offence described in section 450(2) [1970];[47] 495(2) [1985][48] he shall as soon as practicable release the person from custody with the intention of compelling his appearance. This can be done by summons, or the peace officer may issue an appearance notice and thereupon release the person. If reasonable grounds[49] exist to indicate that it is necessary in the public interest that the person be detained,[50] or his release be dealt with under another provision, or reasonable grounds[51] indicate that the person will fail to attend the court if released from custody, the person does not have to be released.[52]

Subsequent sections of the Criminal Code similarly respect the release of the persons who have been arrested prior to their being brought before a justice.

These sections provide that if a peace officer is of the belief that arrest is necessary, he must still release the person arrested after giving him an appearance notice except in certain cases. Where a peace officer has not

---

47 Section 452(1).

48 Section 497(1).

49 And probable grounds [1970].

50 Regard must be had to all the circumstances including the need to:

- establish the identity of the person
- secure or preserve evidence of the offence or relating to the offence, or
- prevent the continuation or repetition of the offence or the commission of another offence.

51 And probable [1970].

52 Excluding arrests made for an offence allegedly committed in another province or territory (section 452(1) [1970]).

released an arrested person, or where a person has been arrested by any person other than a peace officer and delivered to a peace officer, there is provision for an officer in charge to effect release.[53]

If a person has been arrested and not released on an appearance notice, either because it is an indictable offence for which the peace officer is not authorised to effect the release, or the arresting officer is of the belief that it is not in the public interest to do so, there is in effect a review by a superior.

### 4.3.4 Release from custody by officer in charge[54]

Release from arrest *without* a warrant is provided for under the following circumstances:[55]

- for indictable offences punishable with imprisonment of five years or less,
- an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction,
- an offence punishable on summary conviction, or
- any other offence that is punishable with imprisonment of five years or less.

after refusal of release by a peace officer, or after arrest by a civilian and delivery to a peace officer.

In these cases the officer in charge shall release the person:

---

53 Section 453(1) [1970]; 498(1) [1985].

54 He is defined as the person in command of the Police Force responsible for the lock-up to which the person arrested is taken on his arrest.

55 See section 453(1) [1970]; 498(1) [1985].

- with the intention to issue a summons;
- upon his promise to appear; or
- upon entering into a recognisance or for a person not an ordinary resident upon entering into a recognisance with a cash deposit

unless the officer in charge has reasonable grounds[56] to believe that it is necessary in the public interest, that the person be detained in custody or his release should be dealt with under another provision, or that if released, he will fail to attend in court.

Provision now also exists for the release from custody by an officer in charge where arrest was made *with* a warrant.[57] Where a person who has been arrested with a warrant by a peace officer is taken into custody for an offence other than one mentioned in section 522, the officer in charge may, if the warrant has been endorsed by a justice under section 507(6):

- release the person on the person's giving a promise to appear;
- release the person on the person's entering into a recognizance before the officer in charge without sureties in the amount not exceeding five hundred dollars that the officer in charge directs, but without deposit of money or other valuable security; or
- if the person is not ordinarily resident in the province in which the person is in custody or does not ordinarily reside within two hundred kilometers of the place in which the person is in custody, release the person on the person's entering into a recognisance before the officer in charge without sureties in the amount not exceeding five hundred dollars that the officer in

---

56 And probable grounds [1970].

57 In terms of section 499(1) RSC 1985.

charge directs and, if the officer in charge so directs, on depositing with the officer in charge such sum of money or other valuable security not exceeding in amount or value five hundred dollars, as the officer in charge directs.

It seems that the Criminal Code warrants only a limited number of situations in which a person is to be arrested and detained in custody. A person must either be released on an appearance notice or a promise to appear, or on the indication that a summons will be issued, or on a recognisance with or without sureties or a cash deposit. However, where the accused is kept in custody the Code requires a prompt appearance before a justice.[58]

### 4.3.5 Judicial interim release

#### 4.3.5.1 Appearance before a justice of the peace

In terms of section 454(1) [1970]; 503(1) [1985] a person arrested with or without a warrant shall be detained in custody by the peace officer and be taken before a justice of the peace within twenty-four hours of being arrested.[59] The section applies where a person has been arrested with or without a warrant by a peace officer, or where a person has been delivered to a peace officer[60] and is not released by a peace officer or officer in charge.[61]

---

58 Section 454(1) [1970]; 503(1) [1985].

59 In accordance with the principles stated in the section.

60 Under section 449(3) [1970]; 494(3) [1985].

61 Under the provisions of section 451, 452 or 453 [1970]; 497, 498, 499 [1985]. Section 503(1) provides as follows:

4.3.5.2 The interim release hearing

When an accused is taken before a justice the same principle, namely that an arrested person should not be detained in custody, applies. The accused shall be released on the order of a justice upon his giving of an undertaking without conditions unless the prosecution, having been given a reasonable opportunity to do so, shows cause otherwise.[62] The principle of release before trial is affirmed and it is up to the prosecutor to convince the judge that incarceration is necessary and that none of the intermediary solutions are appropriate.[63]

However, the original legislation was modified by the Criminal Law Amendment Act 1974 - 75 - 76 (Can) c 93 by placing the onus on the accused in a limited

---

(a) where a justice is available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period, and

(b) where a justice is not available within a period of twenty-four hours after the person has been arrested by or delivered to the peace officer, the person shall be taken before a justice as soon as possible,

unless, at any time before the expiration of the time prescribed in paragraph (a) or (b) for taking the person before a justice,

(c) the peace officer or officer in charge releases the person under any other provision of this Part, or

(d) the peace officer or officer in charge is satisfied that the person should be released from custody, whether unconditionally under subsection (4) or otherwise conditionally or unconditionally, and so releases him.

62 Unless a plea of guilty is accepted. See section 457(1) [1970]; 515(1) [1985]. This section sets out the duties of a justice before whom a person in custody is taken. (Under the Criminal Code RSC 1970, c C - 34 sections 457 - 459.1 governed what is called judicial interim release.)

63 For example an undertaking with conditions, recognisance to pay a sum of money with or without sureties and deposit of a sum of money.

number of offences, including murder, to show that his detention is not justified.[64] Apart from these limited instances it is clearly the intention of the Code that a person arrested and in custody must be taken before a justice, and shall be released unless cause is shown. The court shall direct an enquiry to the prosecution if there is any objection to the release. If there is an objection, the prosecution will be given an opportunity to show cause. This might result in a remand of the case for the accused to attend a bail hearing.

A justice may before or at any time during the course of the proceedings under section 515, adjourn the proceedings and remand the accused in custody on application by the prosecution or the accused. However, no adjournment may be for more than three clear days, without the consent of the accused.[65]

Section 518(1) in addition provides that a justice may subject to paragraph (b)[66] in any proceeding pursuant to section 515 make such enquiries, on oath or otherwise of and concerning the accused as he considers desirable.

However, it appears that the Bail Reform Act has in the past been considered to be too enlightened by some provincial court judges. This situation arose where a person appeared before a justice while not in custody.

---

64 See *R v Quinn* (1977), 34 CCC (2d) 473 476, 34 NSR (2d) 481 (NS Co Ct). This was done by way of sections 457(5.1) and 457.7 of the 1970 Code and is now reflected in sections 515 and 522 of the 1985 Code.

65 See section 516 [1985].

66 The justice may not examine the accused concerning the alleged offence.

4.3.5.3 Person before justice while not in custody

4.3.5.3.a General

A practice has developed in some provincial courts where a person, while not in custody, appeared before a justice, and the information was read to him. If he pleaded not guilty, or asked to have the matter set over for plea, there appears to have been a practice by some provincial court judges to enquire from the prosecutor whether there was any objection to his release. If the prosecutor objected the accused was remanded in custody.[67] This practice does not seem to be authorised by the Criminal Code.

The Crown can only object to a person's release when he has been "taken" before a justice while in custody.[68] However, there are a number of different situations where an accused will appear before a justice although he is not so "taken". The following possibilities exist:

- If for example an accused voluntary appears before a justice because he believes a charge will be made, or because an information has been laid before a justice.
- Where a summons is issued, either without an arrest,[69] or after he is arrested, and subsequently released.[70]
- After an appearance notice before arrest.[71]

---

67 Teed & Shannon (1982) 60 *Can Bar Rev* 720.

68 In terms of section 457 [1970]; 515 [1985].

69 Section 455 [1970]; 507(4) [1985].

70 Section 453.1(2) [1970]; 498 [1985].

71 Section 451[1970]; 496 [1985].

- If an appearance notice has been issued after his arrest with a subsequent release.[72]
- After a promise to appear has been given after his arrest and the person is subsequently released.[73]
- After a recognisance has been given after his arrest and he is subsequently released.[74]
- Finally, after a recognisance has been given, and a cash deposit is made after his arrest with a subsequent release.

The question is whether the justice has the right or the jurisdiction on the initial appearance of the person to interfere with his freedom if he has not been arrested, or if he has been arrested and released. May the justice order his detention, or even ask the prosecutor if he objects to his release?

As indicated, the Crown can only object to a person's release when he has been "taken before" a justice.[75] In order to be "taken before" a justice it follows that a person must at the time be in "custody". He must therefore actually be detained or imprisoned.[76] From a reading of sections 452(1) [1970];

---

72 Section 452(1) [1970]; 497(1) [1985].

73 Section 354(1)(f)) [1970]; 498(1)(f) [1985]

74 Section 453(v) [1970]; 498 [1985].

75 In terms of section 457 [1970]; 515 [1985].

76 *Black's Law Dictionary* (1990) 384 indicates that the term "custody" has been understood to include persons under restraint of liberty such as persons on bail or own recognisance for purposes of *habeas corpus* proceedings. See also section 453.3(3) discussed later on in this paragraph. However, on the wording and in the context of section 457 [1970]; 515 [1985] the term custody can only be understood to refer to physical detention or actual imprisonment. In the context under discussion the options of bail and recognisance only become available if just cause for release from custody has been proven.

497(1) [1985] or 453(1) [1970]; 498(1) [1985] it is clear that when a person is arrested, he is detained.[77] If the person is for example released by way of an appearance notice or promise to appear he is not in custody, in this context, because he must appear in court. The person is also not in custody when he voluntary appears in court and is charged with an offence. It is submitted that the person is not "taken before" the justice as is meant by section 454(1) [1970]; 503 [1980] or 457(1) [1970]; 515(1) [1985]. Because he is not in "custody" he cannot be released.

This conclusion is confirmed by the 1970 Criminal Code which specifically provided that a person at large on an appearance notice issued by a peace officer, or a promise to appear given to, or a recognisance entered into before an officer in charge, is deemed to be in custody for a specific purpose only:[78]

> An appearance notice issued by a peace officer or a promise to appear given to, or a recognizance entered into before an officer in charge may, where the accused is alleged to have committed an indictable offence, require the accused to appear at the time and place stated therein for the purposes of the *Identification of Criminals Act*, and a person so appearing *is deemed for the purposes only of that Act, to be in lawful custody* charged with an indictable offence.[79]

Where an accused has promised to appear or is given a summons or an appearance notice, the promise to appear, summons or appearance notice continues in force until the trial of the accused is completed. This situation

---

77 See also the term "arrest" in *Black's Law Dictionary* (1990) 109: "To deprive a person of his liberty by legal authority ... for the purpose of holding or detaining him ... ."

78 See section 453.3(3).

79 My emphasis. Apart from this section where a legal fiction of custody for a particular purpose is created, this section recognises that a person who has been released is not in custody at all. The "fiction" is not included in the wording of the 1985 Criminal Code.

applies to a person who was not arrested and also to someone who was arrested and released before appearing before a justice.[80]

Similarly if a justice who receives an information,[81] summons an accused to appear in court to answer to a charge of an offence,[82] the accused is not "taken" before the justice pursuant to section 457(1) [1970]; 515(1) [1985].

In summary it can be said that the prosecution may only object to a person's release, where such person is physically detained or incarcerated at the relevant time and is taken before a justice. The prosecution cannot object where a person appears pursuant to an appearance notice, or a promise to appear, recognisance or summons, since the person is not in custody, nor has he been taken before a justice.

When a person has been taken before a justice and has been released,[83] provision is made for the cancellation of such release. The release will only be after cause has been shown by the prosecution. The form of release can also be changed from the original release if the justice so chooses.[84]

---

80 See section 457.8(1) [1970]; 523(1) [1985].

81 Other than an information in terms of section 505 [1985] and subject to section 523(1) [1985]. Section 505 provides that an information shall be laid before a justice where an appearance notice has been issued to an accused under section 496, or an accused has been released under section 497 or 498.

82 Under section 455.3 [1970]; 507(1) [1985].

83 In terms of section 457(1), (2), (5.1) or (5.3); 515(1), (2), (6) or (7) [1985] section 457.8(2) [1970]; 523(2) [1985].

84 Section 523(2) provides as follows:

> Notwithstanding subsections (1) and (1.1),
>
> (a) the court, judge or justice before which or whom an accused is

Section 523(2) only applies to the situation where a justice has made an order for the detention or release of an accused. It does not give a justice the authority to order the detention of an accused to whom an appearance notice has been given, or who is compelled to appear in court by way of summons.

In *R v Agawa*[85] the distinction between an appearance before a justice or judge by a person who has not been arrested or has been arrested and released prior to his appearance before a justice, and appearance by a person who has been arrested and released by order after appearance before a justice, is set out. In terms of this decision an accused who has been released by reason of an order made by a justice under section 457 [1970] can have his order of release revoked. But if an accused is before the court not by reason of an order, but

---

being tried, at any time,

(b) the justice, on completion of the preliminary inquiry in relation to an offence for which an accused is ordered to stand trial, other than an offence listed in section 469, or

(c) with the consent of the prosecutor and the accused or, where the accused or the prosecutor applies to vacate an order that would otherwise apply pursuant to subsection (1.1), without such consent, at any time

(i) where the accused is charged with an offence other than an offence listed in section 469, the justice by whom an order was made under this Part or any other justice,

(ii) where the 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, or

(iii) the court, judge or justice before which or whom an accused is to be tried,

may, on cause being shown, vacate any order previously made under this Part for the interim release or detention of the accused and make any other order provided for in this Part for the detention or release of the accused until his trial is completed that the court, judge or justice considers to be warranted.

85 (1977) 36 CCC (2d) 444 (Ont Prov Ct).

pursuant to an appearance notice (or presumably any other reason) he is not there by virtue of an order of release and section 457.8(2) [1970][86] does not apply. A justice will then not be able to revoke his release.

The question begs to be asked if there is any control over a person who has been released prior to his court appearance or has not been arrested at all prior to his court appearance. What can therefore be done if a person at large on an appearance notice or after a summons has been issued or an undertaking or recognisance has been given is about to break the law? The Criminal Code provides that where a justice is satisfied that there are reasonable and probable grounds to believe that an accused has violated or is about to violate any summons, appearance notice, undertaking or recognisance, he may issue a warrant for that person's arrest. Upon the arrest and appearance of this person in court, the judge shall cancel the summons, appearance notice, undertaking or recognisance and order that this person be detained in custody.[87] But before the order is made the accused must be given a reasonable opportunity to show why his detention in custody is not justified.[88]

A further anomalous situation which may occur, is where a person who is under arrest and in custody is before the court and the original charge for which he was arrested and brought before court is withdrawn and a new information is preferred.

It is submitted that once the initial information is withdrawn the effect of the summons, notice to appear or promise to appear ceases and the accused is

---

86 Section 523(2) [1985]. See footnote 84.

87 Section 458(1) [1970]; 524(1) [1985].

88 Section 458(4) [1970]; 524(4) [1985].

before the justice voluntarily. On his appearance before the justice the prosecutor thus withdraws the information before plea and prefers a new information with a different charge.

When the new information is laid and the accused is asked to plead, he is in the situation of being before the justice, not by virtue of any requirement, but in effect at that moment voluntarily or per chance. It is submitted that the justice has no authority to require his detention for a "show cause".

4.3.5.3.b Conclusion

It follows that a justice may only cause the detention of a person in three situations:

- Where he is brought before the justice after arrest and while in custody and the Crown establishes that his detention is required.[89]
- If there has been an arrest and an order for interim release, when the prosecution has satisfied the court or a justice, after a hearing and proper grounds has been shown, that an order for interim release should be vacated.[90]
- When a justice is satisfied that there is a probability of a violation of the summons or appearance notice, or an indictable offence has been committed after a summons, appearance notice, promise to appear, undertaking or recognisance, and he has issued a warrant for the arrest,

---

89 Section 457(1) [1970]; 515(1) [1985].

90 Section 457.8(2) [1970]; 523(2) [1985].

and an opportunity has been given to the accused to show cause why the detention is not justified.[91]

It is submitted that it is clear that a justice does not have the authority in the first instance to order the detention of an accused who has been given an appearance notice, or promise to appear or summons and is not still under arrest.

These sections show that the intention of the Bail Reform Act is firstly to avoid arrest, by providing for no arrest except under certain circumstances. Secondly if an arrest is required the intention is to avoid keeping a person in custody by providing that a peace officer shall release, or in more serious cases his supervisor shall release. Thirdly if a person is in custody to minimise the length of custody by providing that he must be released on appearance before a justice unless there is cause shown against his release.

It is submitted that to direct a peace officer not to arrest a person or to release him after arrest, and then subject him to incarceration pending a hearing on an objection by the prosecution, is to defeat the entire purpose of the legislation.

Any practice whereby a person who appears before a justice, and who is not in custody, is subject to a prosecutor's request to "show cause" why he should not be incarcerated appears to be unwarranted and contradicts both the intent and the wording of the Criminal Code.

Therefore, it is suggested that a person who appears before a justice voluntarily without the requirement of an appearance notice, promise to appear or summons, cannot be detained by a justice under the Criminal Code. It can

---

91 Section 458 [1970]; 524 [1985].

certainly be argued that it would be improper to arrest him as he is already before the court, and the basic purpose of an arrest is to ensure his appearance before a justice. To issue a summons also seems unreasonable as the person is already before the court. One might argue that the justice could direct a peace officer to effect the arrest of the accused whom he finds before him voluntarily, but it is submitted that such action would be contrary to the intent of the Criminal Code and would probably constitute a false arrest. The object of the arrest is to ensure the appearance before a justice and if the person is already before the justice without an arrest, the object of arrest has been fulfilled and any arrest would be redundant.

### 4.3.6 Bail review

A review may be sought by either the prosecutor or the accused.[92] Where a justice makes an order that an accused be detained in or released from custody, or released on certain conditions,[93] or makes or vacates an order on completion of the preliminary enquiry concerning the offence for which he is to stand trial,[94] the accused or prosecutor may have the order of the justice reviewed by a judge at any time before the trial.[95] The party that seeks the review must give the other party two clear days notice.[96] The accused must be present at the hearing if the judge so orders or if the prosecutor or the accused

---

92 Section 520 deals with the rights of an accused to seek a review. Section 521 deals with the rights of the prosecutor to do the same.

93 Under sections 515(2), (5), (6), (7), (8) or (12) if the accused seeks a review and under sections 515(1), (2), (7), (8) or (12) if the prosecutor seeks a review.

94 Under section 523(2)(b). Other than an offence listed in section 469.

95 Section 520(1) and 521(1).

96 Section 520(2) and 521(2).

or his counsel so requests.[97] The hearing may be adjourned upon the application of either the accused or the prosecutor. If the accused is in custody the adjournment may not be for more than three clear days unless the accused consents to a longer adjournment.[98]

At such a hearing the judge will consider the record of proceedings before the justice and any additional evidence which may be presented by the accused or the Crown.[99] The reviewing judge will not set aside the initial order simply on the basis that he would not have come to the same conclusion as the justice.[100] At such a hearing the accused, if he is to succeed, must show that his detention is not justified. In such event the judge will vacate the order previously made by the justice and make any other order provided for in section 515 that he considers to be warranted.[101] Where the application is brought by the prosecution, the judge shall either dismiss the application, or if the prosecutor shows cause, vacate the order previously made by the justice and make any other order provided for in section 515 that he considers to be warranted.[102]

Section 525 provides that where an accused has been charged with an offence other than an offence listed in section 469,[103] and has been held in custody for

---

97 Section 520(3) and 521(3).

98 Section 520(4) and 521(4).

99 Section 520(7) and 521(8).

100 See MacIntosh (1995) 88.

101 Section 520(7)(e).

102 Section 521(8).

103 And is not detained in respect of any other matter.

a period of ninety days, the person having custody of the accused shall apply to a judge to fix a date for hearing to determine whether he should be released from custody.[104] A similar provision applies in the case of summary conviction offences, but the time for such action is thirty days, rather than ninety.[105] This section provides for a review of the detention of an accused person when that person's trial has been delayed and has not commenced. The section only applies where the accused is held on a detention order, and not where bail has been set and the accused is unable to meet the conditions of bail.[106] This section also does not apply where the accused has applied unsuccessfully for a review of the detention, as in that case his remedy is to apply under section 520 for a further review.

Upon receipt of the application the judge must fix a date for the hearing.[107] He must also direct that notice be given to the prosecutor and the accused and to such other persons and in the manner specified by him.[108] At the hearing the judge will consider whether the accused or the prosecutor has been responsible for any unreasonable delay.[109] If the judge is not satisfied that the detention of the accused is justified within the meaning of section 515(10)[110] he must

---

104 Section 525(1).

105 Section 525(1).

106 Where he is being held by virtue of section 519.

107 Section 525(2).

108 *Ibid*.

109 Section 525(3).

110 See par 7.2.5.

release the accused.[111] Where the release of the accused is not ordered the judge may give directions to expedite the trial of the accused.[112]

## 4.4 CONCLUSION

The Bail Reform Act has made fundamental changes to the principles and administration of arrest and detention. It has established the principle that detention before conviction is to be avoided and that in some instances it even cannot be effected without a warrant.

If ever there was a concept that pre-trial release was a privilege, it was discarded by the Bail Reform Act. The Bail Reform Act has put Canada at the forefront of those nations that value the liberty of the individual and subscribe to the notion of the presumption of innocence.

In general comparison it appears that an accused under Canadian law has an advantage over his South African counterpart.[113]

Both systems provide that a peace officer may make an arrest without a warrant only in certain circumstances. Even though the unlawful arrest can surely be contested in court under both systems, the detainee under Canadian law is advantaged in that the Criminal Code directs the arresting officer to release such person as soon as practicable hereafter. In certain instances of arrest without a warrant there is even in effect a review by a superior under Canadian law. There is no such review under South African law.

---

111 Section 525(4).

112 Section 525(9).

113 See the South African principles in par 2.6.3.

If arrest is effected legally, the Criminal Code of Canada provides that the arrested person must be brought before a justice of the peace without delay, and in any event within a twenty-four hour period after arrest. Where a justice is not available in this time period, the arrested person shall be taken before a justice as soon as possible. Under South African law an arrested person who is similarly not released by a police official or the prosecuting authority has to be brought before a lower court as soon as possible, but not later than forty-eight hours after arrest. If the forty-eight hours expire outside court hours or an ordinary court day, the accused must be brought before a lower court not later than at the end of the first court day.

The accused under Canadian law is further advantaged, in that the enquiry as to whether the accused should be released on bail or otherwise, may not be postponed upon application by the accused or the prosecution for more than three clear days at a time, without the permission of the accused. Under South African law, the enquiry may be postponed by the court for not more than seven days at a time.

Under Canadian law the presiding officer has the power to act inquisitorially, but the system is basically accusatorial. Under South African law a greater responsibility is cast upon the presiding officer in that he is obliged to act inquisitorially. Also, it seems where the reverse onus applies.[114] The Criminal Procedure Act expressly instructs the court not to act as a passive umpire. If neither side raises the question of bail, the court must do so.[115] If the party that carries the burden of proof does not of his own accord adduce the

---

114 See par 8.3.5.1 - 8.3.5.2.

115 Section 60(1)(c).

necessary evidence, the court must take the initiative.[116] Even where the prosecution does not contest bail, the court must still make up its own mind.[117]

Under Canadian law we find the principle that only the Supreme Court may grant bail for certain serious offences.[118] Under South African law the regional court has been allocated with the duty to consider bail for the "most serious" offences.[119] The high court in South Africa would only have to consider bail if the case has already been transferred to it, and a bail application is hereafter instituted. On the same principle the regional court would also have to consider the bail application for a "lesser" offence once the case has been transferred to it.

The Criminal Code of Canada provides that the accused or the prosecutor may have any order made by the justice reviewed by a judge on two clear days notice at any time before the trial. While the hearing may be adjourned, the adjournment may not be for more than three clear days if the accused is in custody.[120] At such a hearing the judge will consider the record of proceedings before the justice and any additional evidence which may be presented by the accused or the Crown. The reviewing judge will not set aside the initial order simply on the basis that he would not have come to the same conclusion as the justice. Under South African law an aggrieved accused may appeal to a superior court against the refusal of bail by a lower court, or the imposition of any condition of bail, and also the amount of bail. Conversely the attorney-

---

116 Section 60(3).

117 Section 60(10).

118 Listed in section 469 of the Canadian Criminal Code.

119 Mentioned in schedule 6 of the Criminal Procedure Act.

120 Unless the accused consents.

general may appeal to a superior court having jurisdiction against the decision of a lower court to release the accused on bail, or against the imposition of a condition of bail. An appeal with regard to bail is analogous to an ordinary appeal despite the principle that a bail application should be heard as soon as possible. There is no provision that additional information be furnished to the high court hearing the appeal. The judge can therefore only intervene if he is satisfied that the magistrate was wrong. An appeal to the Supreme Court of Appeal is limited to a superior court's decision to release an accused on bail.

The Criminal Code of Canada furthermore provides for "automatic review" in those instances where the trial is delayed and the accused is held on a detention order. If a person has custody of an accused charged with an offence other than an offence listed in section 469 for ninety days,[121] and the trial has not commenced, he must fix a date for a hearing before a judge to determine whether there is just cause for release. At the hearing the judge will consider whether the accused or the prosecutor has been responsible for any unreasonable delay. In the case of summary conviction offences the period is thirty days. There is no such automatic review procedure under South African law.

---

121 And who is not detained in respect of any other matter.

# CHAPTER 5

## THE OPERATION OF THE PRESUMPTION OF INNOCENCE AND ITS ROLE IN BAIL PROCEEDINGS UNDER CANADIAN AND SOUTH AFRICAN LAW

## 5.1 INTRODUCTION

The presumption of innocence has long been a feature of Canadian[1] and South African common law and has been described as the "golden thread" woven throughout the web of criminal law.[2] It forms the cornerstone of the Canadian and South African criminal justice systems.

While this presumption enjoys wide acceptance as a fundamental principle of criminal justice nationally and internationally, serious disagreement and uncertainty under South African law as to its exact contents and application has led to a variation in the normative value afforded to it.[3] While there is some clarity as to its application at trial under South African law, its application (if any) outside the trial context, especially in the fundamental rights dispensation, has proved to be troublesome.[4]

---

1 MacIntosh (1995) 93.

2 The presumption of innocence was outlined by Viscount Sankey in the classic judgment of *Woolmington v DPP* [1935] AC 462 (HL) 481:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence by either the prosecution or the prisoner ... prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial ... the prosecution must prove the guilt of the prisoner as part of the common law of England and no attempt to whittle it down can be entertained.

According to Stuart (1987) 37 this passage was relied on by the Supreme Court in *R v Manchuk* [1938] SCR 341 349 (Can) and has been cited consistently ever since under Canadian law.

3 See Schwikkard (1998) 11 *SACJ* 396. Schwikkard drew this article from her LLD thesis (Schwikkard (1998)) subsequently submitted at the University of Stellenbosch. Her thesis was published by Juta in the latter part of 1999 as *Presumption of innocence*.

4 See par 5.3.1.1 and 5.3.1.2. The exact content and application of this presumption has also led to disagreement and problems in other jurisdictions. See for example the diverse views regarding this presumption referred to by Uit Beijerse (1998) 2 - 3 in her doctoral thesis on

Still, it is of crucial importance to anyone reviewing the legal position of an applicant for bail to know whether this presumption has any application outside the trial context, and more specifically, at the bail hearing. Does the presumption of innocence therefore act as a policy directive protecting the fundamental security and freedom of an individual when application is made for bail? If the answer is yes, what is the content thereof, and does its content remain the same throughout the criminal justice process? How is this presumption discounted in a system with protected fundamental rights? It is also investigated whether the role that this presumption plays is different when a new trial has been ordered as opposed to where bail is sought when initially confronted with the criminal justice system in the normal course of events.

These issues are investigated in this chapter by analysing and comparing the positions under Canadian and South African law.

## 5.2 CANADIAN LAW

### 5.2.1 General

#### 5.2.1.1 Application at trial

In terms of section 11(d) of the Canadian Charter any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

Of all the substantive rights of persons "charged with an offence" in section 11, this right is perhaps the most all-encompassing, or at least contains the

---

imprisonment on suspicion under Dutch law. Referring to the diverse views she comments that it leaves many questions open. Has the legislature recognised this presumption and if so, in what manner? Can the criminal character of pre-trial incarceration be reconciled with this presumption?

most substantive constituent elements. In the first federal government draft of the Charter[5] section 11(d) was one subparagraph of several which were embraced in what was, in effect, a basket clause.[6] The basket clause in the first draft contained the phrase "due process" rather than the present "principles of fundamental justice".[7] Both phrases appeared in the 1960 Canadian Bill of Rights.[8] It is therefore not surprising that many of the cases dealing with section 11(d) also deal with section 7.

Early in the 1980 - 82 drafting process the rights, currently found in sections 8 - 14, were afforded status on their own as separate sections rather than appearing as subparagraphs in a larger section. During that change in format

---

5 Presented during the 1980 - 82 drafting process.

6 Then section 6(1), now section 7.

7 See Mcleod, Takach, Morton & Segal (1993) 15 - 3.

8 The former in section 1(a), the latter in section 2(e). Section 1(a) appeared under the heading "Recognition and declaration of rights and freedoms". The provision read as follows:

> It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by *due process of law;*

Section 2(e) appeared under the heading "Construction of law". The provision read as follows:

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> (e) deprive a person of the right to a fair hearing in accordance with *the principles of fundamental justice* for the determination of his rights and obligations;

the words "according to law" were added after the words "proven guilty" in section 11(d). There were no further changes.[9]

An examination reveals that section 2(f) of the 1960 Canadian Bill of Rights is identical to section 11(d).[10] Section 2(e) of the Bill of Rights is also relevant because it was part of the "fair hearing" provision.

In *R v Goguen*[11] Biron J explained that section 11(d) of the Canadian Charter did not introduce new concepts into Canadian law.[12] The presumption of innocence and the right to be tried in a fair and public hearing by an independent and impartial tribunal have benefited accused persons for a long time.[13] What has been added, is section 24(1), which entitles an accused, if his rights have been infringed, to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. This right, the court held, is more than a mere right of appeal.

A long line of authority has developed establishing a very specific understanding of the effect of the presumption of innocence in section 11(d) as a right which is violated if conviction is possible despite the existence of

---

9 See Mcleod, Takach, Morton & Segal (1993) 15 - 3.

10 The pre-Charter position is distinguishable from the pre-Bill of Rights South African era in that since 1960, section 2(f) of the Canadian Bill of Rights has guaranteed that someone charged with an offence, is "presumed innocent until proved guilty according to law, in a fair and public hearing by an independent and impartial tribunal". The Canadian Bill of Rights RSC 1970, App III requires that no law of Canada be construed or applied so as to provide otherwise.

11 (Que SC), November 16, 1982 (unreported) as cited by Mcleod, Takach, Morton & Seagal (1993) 15 - 4.

12 At 7 - 8 of the judgment.

13 Since the rights that are guaranteed by section 11(d) are not new, the Criminal Code had provisions designed to protect these rights and still contains some.

a reasonable doubt about guilt. In *R v Oakes*[14] Dickson CJC described the effect of the presumption of innocence in section 11(d) as follows:[15]

> In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of the offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt.

The effect of the presumption of innocence in section 11(d) is therefore to create a procedural and evidentiary rule at trial that the prosecution must prove guilt beyond a reasonable doubt. This procedural and evidentiary rule has no application at the bail stage of the criminal process,[16] where guilt or innocence of the accused is not determined and where punishment is not imposed.[17] In other words, section 11(d) sets out the presumption of innocence in the context of its operation at the trial of an accused person.[18]

---

14 (1986), 50 CR (3d) 1, 26 DLR (4th) 200, [1986] 1 SCR 103 132 (SCC).

15 After *Oakes*, this understanding of the presumption of innocence in section 11(d) was reiterated in *R v Vaillancourt* (1987), 32 CRR 18, [1987], 2 SCR 636, 39 CCC (3d) 118, 47 DLR (4th) 399, 68 Nfld & PEIR 281, at 33 CRR, 655 SCR (SCC); *R v Whyte* (1988), 35 CRR 1, [1988], 2 SCR 3, 29 BCLR (2d) 273, 42 CCC (3d) 97, 51 DLR (4th) 481, (1988), 5 WWR 26 (SCC); *R v Chaulk* (1990), 1 CRR (2d) 1, [1990], 3 SCR 1303, 62 CCC (3d) 193, 69 Man R (2d) 161, (1991), 2 WWR 385 at 20 CRR, 1330 - 31 SCR (SCC); *R v Wholesale Travel Group Inc* (1991), 7 CRR (2d) 36, [1991], 3 SCR 154, 4 OR (3d) 799n, 67 CCC (3d) 193, 84 DLR (4th) 161, at 97 CRR, 196 - 97 SCR (SCC).

16 See *R v Frankforth* (1982) 70 CCC (2d) 448 451 (BC Co Ct); *R v Tailor* (1983) 8 CRR 29 (BCSC) per Toy J.

17 See *R v Pearson* (1992), 12 CRR (2d) 1, 17 CR (4th) 1, 77 CCC (3d) 124, 3 SCR 665 (SCC). The court investigated whether section 515(6)(d) of the Criminal Code of Canada limited the rights guaranteed in section 7, 9, 11(d) and 11(e) of the Canadian Charter. It was found that section 515(6)(d) does not violate section 11(d). The court held that the Charter challenge falls to be determined according to section 11(e), rather than under section 7. Section 11(e) offers "a highly specific guarantee" which covers precisely the respondent's complaint.

18 See *Dubois v The Queen* [1985], 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, (1986) 1 WWR 193, 23 DLR (4th) 503 (SCC) at 7 CRR, 357 SCR.

5.2.1.2 Application outside the trial context

In *Reference re section 94(2) of the Motor Vehicle Act*[19] Lamer CJC noted that sections 8 to 14 of the Charter addressed specific deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice, and are as such, violations of section 7.[20] The court explained that those sections were therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice."

Consistent with this view, the Supreme Court of Canada in *R v Oakes*[21] held that the presumption of innocence, although expressly protected in section 11(d) of the Charter, lies at the very heart of the criminal law and is "referable" and integral to the general protection of life, liberty and security of the person. The court accordingly indicated that the operation of the presumption of innocence at trial, where the accused's guilt of an offence is in issue, does not exhaust the operation of the presumption of innocence as a principle of fundamental justice in the criminal process. This presumption is thus also integral to the rights enumerated in sections 7 and 11(e) of the Charter.[22]

The presumption of innocence is therefore an active principle throughout the criminal justice process. The fact that it comes to be applied in its strict evidentiary sense at trial pursuant to section 11(d) of the Charter, in no way diminishes the broader principle of fundamental justice. The starting point of

---

19 [1985], 2 SCR 486, 48 CR (3d) 289, 36 MVR 240, (1986) 1 WWR 481, 69 BCLR 145, 63 NR 266, 23 CCC (3d) 289, 24 DLR (4th) 536, 18 CRR 30, (SCC) at 512 SCR.

20 These rights appear in the Charter under the heading "Legal Rights". See Annexure B for the content of these rights.

21 (1986), 26 DLR (4th) 200, 50 CR (3d) 1, 1 SCR 103 (SCC) per Dickson CJC at 322 CRR, 119 SCR.

22 *Ibid.*

any proposed deprivation of life, liberty or security of the person of anyone charged with or suspected of an offence must be that the person is innocent.

The words of Dickson CJ in *R v Oakes*[23] are indicative of the status and content of the presumption of innocence under Canadian law:

> The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that, until the state proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

Stuart indicates that the complex and expansive system of police and prosecutors in Canada gives the state a powerful advantage against an accused.[24] He contends that if innocence is not presumed, an elementary sense of fairness would require that the system be radically revised to give the accused an equivalent fact-finding capability. Before tampering with the presumption of innocence, the whole pattern of evidential rules would have to be changed. A trial is not a relentless search for the truth. The risk is taken to set free some who are guilty, for fear of convicting the innocent.

As noted by Lamer CJC in *R v Pearson*[25] this does not mean that there can be no deprivation of life, liberty and security of the person until guilt is established beyond a reasonable doubt by the prosecution at trial. The court indicated that the term "principles of fundamental justice" is not a right, but

---

23 *Ibid.*

24 (1987) 38.

25 (1992), 12 CRR 1, 17 CR (4th) 1, 77 CCC (3d) 124, 3 SCR 665 (SCC).

a qualifier of the right not to be deprived of life, liberty and security of the person. The function of the term is to set the parameters of that right.[26]

The deprivations of life, liberty and security of the person otherwise than in accordance with the principles of fundamental justice set out in sections 8 to 14 of the Charter are illustrative of this conclusion. Section 8 as an example speaks of an *unreasonable* search and seizure, section 9 of *arbitrary* detention and section 11(e) of the right not to be denied reasonable bail *without just cause*. In terms of these provisions it is clear that certain deprivations of liberty and security of the person may be in accordance with the principles of fundamental justice where there are reasonable grounds for doing so rather than only after guilt has been established beyond reasonable doubt.

La Forest J on behalf of the majority of the Supreme Court of Canada noted in *Lyons v The Queen* that it was clear that the requirements of fundamental justice were not immutable but varied according to the context in which they were invoked.[27] Therefore, in one context certain procedural protections might be constitutionally mandated, but not in another.

This statement is especially true of the presumption of innocence as a substantive principle of fundamental justice in section 7 of the Canadian Charter. While the presumption is pervasive in the criminal process, its particular requirements will vary according to the context in which it comes to be applied.

To determine the precise content of the substantive principle in a specific context one must look at the examples given in the Charter itself: sections 8 to 14. The basic principles of penal policy that have animated legislative and

---

26 *Ibid* 12 CRR 1 13.

27 (1987), 32 CRR 41, [1987] 2 SCR 309, 37 CCC (3d) 1, 44 DLR (4th) 193, 82 NSR (2d) 271 (SCC), at 82 CRR, 361 SCR.

judicial practice in Canada and other common law jurisdictions are also instructive.[28]

Many examples can be found of how the criminal process has accommodated itself to the fundamental principle that the assumed innocence of an accused or a suspect is the starting point of any proposed interference with a person's life, liberty or security. These examples cover the various stages of the criminal process.

Someone who proposes to lay an information must believe on reasonable grounds that an offence has been committed.[29] The justice who receives the information must consider before issuing process, that a case for doing so has been made out.[30] Similarly a peace officer must have reasonable grounds to effect an arrest. Reasonable and probable grounds are required to demand a breath sample[31] and reasonable grounds must be shown before a search warrant may be issued.[32] These are all examples of the broad but flexible scope of the presumption of innocence as a principle of fundamental justice under section 7 of the Charter.

The principle does not necessarily require anything in the nature of proof beyond reasonable doubt, because the particular step in the process may not involve the determination of guilt. Precisely what is required depends on the basic tenets of the Canadian legal system as exemplified by the specific Charter rights, basic principles of penal policy as viewed in the light of the sources, nature and essential role of that principle in the legal system and

---

28 *Lyons v The Queen ibid* at 58 CRR, 327 SCR.

29 See section 504 of the Criminal Code.

30 See section 507(1) of the Code.

31 Under section 254(3) of the Code.

32 In terms of section 487(1) of the Code.

judicial process as it evolves.[33]

In *R v Généreux*,[34] where the appellant relied on both sections 7 and 11(d), the interaction between section 7 and 11(d) of the Charter is well illustrated by a *dictum* of Lamer CJC:

> In *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)* (1985), 18 C.R.R. 30, (1985) 2 S.C.R. 486 ... this court decided that ss. 8 - 14 of the Charter, the 'legal rights', are specific instances of the basic tenets of fairness upon which our legal system is based, and which are entrenched as a constitutional minimum standard by s. 7. Consequently in the context of the appellant's challenge to the independence of the General Court Martial before which he was tried, s. 7 does not offer greater protection than the highly specified guarantee under s.11(d). I do not wish to be understood to suggest by this that the rights guaranteed by ss. 8 - 14 of the Charter are exhaustive of the content of s. 7, or that there will not be circumstances where s. 7 provides a more compendious protection than these sections combined. However, in this case, the appellant has complained of a specific infringement which falls squarely within s. 11(d), and consequently his argument is not strengthened by pleading the more open language of s. 7.

Commenting on this *dictum*, the Supreme Court in *R v Pearson*[35] found that sections 11(d) and 11(e) provided for parallel rights. The court explained that section 11(e) entrenched the effect of the presumption of innocence at the bail stage of the criminal process. Section 11(d) did the same at the trial stage. Sections 11(d) and 11(e) defined the procedural content of the presumption of innocence at the bail and trial stages of the criminal process, and constituted both the extent and the limit of that presumption at those stages. The substantive right in section 7, to be presumed innocent, was operative at both the bail and trial stages, in the sense that it created a legal

---

33 *Reference re section 94(2) of Motor Vehicle Act* [1985], 2 SCR 486, 48 CR (3d) 289, 36 MVR 240, (1986) 1 WWR 481, 69 BCLR 145, 63 NR 266, 23 CCC (3d) 289, 24 DLR (4th) 536, 18 CRR 30 (SCC) at 53 CRR, 513 SCR.

34 (1992), 8 CRR (2d) 89, [1992], 1 SCR 259, 70 CCC (3d) 1, 88 DLR (4th) 110 (SCC), at 124 CRR, 310 SCR.

35 (1992), 12 CRR (2d) 1, 17 CR (4th) 1, 77 CCC (3d) 124, 3 SCR 665 (SCC) at CRR 17. The court on this reasoning held that section 515(6)(d) does not violate section 7 unless it fails to meet the procedural requirements of section 11(e).

rule that the accused was presumed legally innocent until proven guilty, but it did not contain any procedural content beyond that contained in sections 11(d) and 11(e).

Of course there have been other legal scholars who have not understood the presumption of innocence in exactly the same way. McDonald indicates that the presumption of innocence contained in section 11(d) should probably be read together with section 11(e), which guarantees a right "not to be denied reasonable bail without just cause".[36] He raises the further possibility that the guarantee of presumption of innocence may be used as the basis for a contention that an accused person's conditions of detention, before conviction, should differ from those of a person already convicted.[37]

---

36 (1989) 465.

37 Jacobs, commenting on the presumption of innocence contained in article 6(2) of the European Convention on Human Rights of 1950, also draws a relationship between the presumption of innocence and these two possibilities (see McDonald (1989) 466). Without citing any decisions, Jacobs expresses the opinion that everyone must be presumed to be innocent in pre-trial proceedings. This he deems as important, as limiting the use of detention on demand under article 5(3) of the same Convention. Also, if it is found necessary to detain a person it must be as an innocent person suspected of an offence, and not as a convicted prisoner (see the *European Convention on Human Rights* (1975) 111). Under the same Convention the court in *Austria v Italy (Pfundres Village case)* 6 Yearbook European Convention on Human Rights 740 782 - 84; Collection of Decisions 45, 132 held that the consequence of the presumption of innocence, was that the prosecution carries the onus to prove guilt, and the accused benefits from any doubt. Jacobs referring to this decision states that article 6(2) was primarily concerned with the attitude of the judges. It may be necessary for the court to correct any impression of prejudice, which may result from the attitude of the prosecution, or of witnesses in the case. If the presiding judge failed to react against such behaviour, the impression might be given that the court shared the obvious animosity to the accused and regarded him from the outset as guilty. See the *European Convention on Human Rights* (1975) 111 - 12.

### 5.2.2 Bail after conviction

#### 5.2.2.1 Prelude

The question to be addressed is whether the presumption of innocence has a role to play after conviction. Does this presumption therefore act as a policy directive protecting the fundamental security and freedom of an individual after conviction? If it still operates, does it afford the same protection to an applicant for bail pending sentence and on appeal or review and how does it fit into the system created by the Canadian Charter?

Many courts have correctly accepted that the rights enumerated in section 11, or given to persons "charged with an offence", are pre-trial or trial rights which are extinguished by a verdict.[38] As a general rule section 11, including sections 11(d) and 11(e) of the Charter, is therefore not applicable as soon as a finding has been made in a case.

Still it has been argued, as in *R v Farinacci*,[39] that there is at least a residual presumption of innocence sufficient to support the application of section 11(e). The court disagreed. However, these deliberations are misdirected. While many may agree that there is at least a residual presumption of innocence after conviction, it is accepted that section 11(e) does not apply after conviction.

It is quite another question whether the presumption of innocence as a principle of fundamental justice operates after conviction. There are those

---

38 See *R v Potvin* (1993), 16 CRR (2d) 260, [1993] 2 SCR 880 (SCC) where Sopinka J at 268 CRR remarked that many of the rights in section 11 cannot apply to appeals and that the rights in section 11 are primarrily concerned with what occurs at trial. Exceptionally they may have application on appeal. See also *R v Gallagher* (1993), 16 CRR (2d) 287, [1993], 2 SCR 861 (SCC); *R v Frazer* (1993), 16 CRR (2d) 283, [1993], 2 SCR 866 (SCC). All the judgments were delivered on August 12, 1993. See also par 7.2.3.1

39 (1993) 18 CRR (2d) 298 303 (Ont CA).

that strongly argue that the presumption of innocence is spent by the verdict, be it a conviction or an acquittal. A conviction, it is said, does not create a presumption of guilt. It constitutes a legal, conclusive finding of guilt. Like an acquittal, it is enforceable unless and until reversed. After a conviction there is no presumption left, one way or the other. It is not possible to make a finding of guilt.[40] Because it is accepted that a right not to deny reasonable bail without just cause is rooted in the presumption of innocence, it follows that the right to bail lapses on conviction. However, there are also strong arguments suggesting that the presumption does function after conviction. I will now investigate these viewpoints further.

#### 5.2.2.2 Pending sentence

The interaction of the presumption of innocence at the sentencing stage came to be decided by the Supreme Court of Canada in *R v Gardiner*[41] just after the advent of the Canadian Charter.

The court was faced with the following questions:

- What burden of proof must the Crown sustain in advancing contested aggravating facts in a sentencing proceeding, for the purpose of supporting a lengthier sentence?
- Is the standard that of the criminal law, proof beyond reasonable doubt, or maybe an "intermediate" standard of "clear and convincing" evidence, or that of the civil law, proof on a balance of probabilities?

The Crown argued for something less than the normal onus of proof at a criminal trial, which applied to determine guilt. The Crown contended that there was a sharp demarcation between the trial process and the sentencing

---

40 See for example the judgment by the court in *R v Farinacci ibid* which agreed with this view.

41 [1982], 2 SCR 368, 68 CCC (2d) 477, 140 DLR (3d) 612 (SCC) (judgment was delivered on August 9 1982).

process. The Crown submitted that once a plea or finding of guilt is entered, the presumption of innocence no longer operates and the necessity of the full panoply of procedural protection for the accused ceases. In the alternative the Crown contended that if the essentially civil onus of preponderance of evidence is rejected, the "intermediate" standard of "clear and convincing" evidence must be applied.[42]

Counsel for the respondent on the other hand argued for the application of the reasonable doubt standard to sentencing hearings. He saw the sentencing stage as the most critical part of the whole trial process and indicated that the standard with respect to disputed facts should not be relaxed at this point. To do so would be prejudicial to the accused. He contended that administrative efficiency, as contended by the Crown, was insufficient justification for so radical a departure from the traditional criminal onus of beyond a reasonable doubt.[43]

It would seem that the respondent argued for the full application of the presumption of innocence. The Crown, on the other hand, even though indicating that the presumption of innocence no longer operated, in effect argued for some lesser application of the presumption of innocence. This is borne out by the argument by the Crown that the full panoply of procedural protection of the accused was not necessary in the sentencing process. The substantive principle affording this "lesser protection" is the presumption of innocence. It is the presumption that would provide that the Crown must prove the aggravating facts on a preponderance of probabilities, or on the other "intermediate" standard.

In its deliberations the Supreme Court reviewed Canadian authority which indicate that it was up to the Crown to prove the material facts on a balance

---

42 At 507 - 508 CCC.

43 At 508 CCC.

of probabilities.[44] However, the Supreme Court held that the cases referred to in *R v Cieslak*[45] dealt with the general practice followed at the time of sentencing rather than with the burden of proof. The court also referred to Canadian[46] and English[47] authority that called for the "beyond a reasonable doubt" test.[48]

In reviewing American authority, on which the Crown relied heavily, the court commented that the uneven line of American jurisprudence was not applicable in the Canadian context. The court pointed out that almost all American judicial pronouncements, with respect to the burden of proof on sentencing, evolved around considerations of American constitutional protections, particularly those afforded by the due process clause. However,

---

44 See the Ontario Court of Appeal in *R v Cieslak* (1977) 37 CCC (2d) 7 9. The Ontario Court of Appeal in coming to a decision relied on *R v Carey* (1951), 102 CCC 25, (1952) OR 1, 13 CR 333 (Ont CA); *R v Benson and Stevenson* (1951), 100 CCC 247, 13 CR 1, 3 WWR (NS) 29 (BCCA) under Canadian law and an English decision of the Court of Criminal Appeal in *Van Pelz MP* (1942) 29 Cr App R 10.

45 (1977) 37 CCC (2d) 7.

46 See the decision by the Alberta Supreme Court, Appellate Division in *R v Pinder* (1923), 40 CCC 272, (1923) 3 DLR 707, (1923) 2 WWR 997 where it was considered that no exception could be taken to giving the benefit of the doubt to the accused. However, the Supreme Court in *Gardiner* indicated that approximately 60 years later in *R v Christopher* (unreported) the same court applied *Cieslak* and the balance of probabilities. See also *R v Knight* (1975) 27 CCC (2d) 343 (Ont HCJ) where Mordan J applied the "moral certainty" that is the beyond a reasonable doubt test. See also the unreported case of *R v Wettlaufer* [summarized] 6 WCB 311 as cited by the Supreme Court in *Gardiner*; the decision of the Manitoba Court of Appeal in *R v Parenteau* (1980) 52 CCC (2d) 188, 190; *R v Boileau; R v Lepine* (1979), 50 CCC (2d) 189, 19 MVR 168 (Que SC); the decision by the Appeal Division of the Nova Scotia Supreme Court in *R v Davis and Fancie* (1976) 15 NSR (2d) 461, 463.

47 See *R v Sadler* (decided November 22, 1973); *R v Miller, Vella and Walker*, (decided December 2, 1974); the Court of Criminal Appeal *in R v Taggart* [1979] 1 Cr App R (S) 144.

48 Reference was also made to judgments by the Federal Supreme Court of Nyasaland (presently Malawi), and the Courts of Appeal of East Africa, Hong Kong and New Guinea which all indicated that the test was beyond a reasonable doubt.

due process bears a very different meaning in Canada than that which has been accorded the phrase in the United States. The court referred to the frequently quoted American decision of *Williams v New York*,[49] indicating that the situation under Canadian law was different from American law.[50] Under Canadian law due process is guaranteed at trial and at sentencing.[51] The court recalled that the *Williams* case dealt with the admissibility of hearsay evidence. Arguments militating for relaxation at sentencing of the rules of the admissibility of evidence at trial do not necessarily support a reduction of the criminal standard of proof from beyond reasonable doubt to a preponderance of credible evidence.

The Supreme Court, in explaining the principles, said that sentencing was part of the fact-finding and decision-making process of the criminal law.[52] As the stakes were high for both society and the individual, sentencing was a critical stage of the criminal justice system and the obtaining and weighing of the evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable. As the facts that justify the sanction are no less important than the facts which justify the conviction, both should be subject to the same burden of proof.[53] The court found that crime and punishment were inextricably linked and it

---

49 337 US 241, 93 L Ed 1337(1949).

50 See also *Curr v The Queen* (1972), 7 CCC (2d) 181, 26 DLR (3d) 603, [1972] SCR 889 (SCC).

51 It seems that the *Williams* decision has subsequently also been questioned in the United States. See *Fatico v United States* 440 US 910, 59 L Ed 2d 458 458F Supp 388 (1978); *Gardner v Florida* 430 US 349, 51 L Ed 2d 393 (1977); *Gregg v Georgia* 428 US 153, 49 L Ed 2d 859 (1976).

52 At 513 CCC.

53 At 515 CCC the court cited with approval the following passage from John A Olah, *Sentencing: The last frontier of the criminal law* (1980), 16 CR (3d) 97 121:

> [B]ecause the sentencing process poses the ultimate jeopardy to an individual enmeshed in the criminal process, it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process.

would appear well established that the sentencing process is merely a phase of the trial process. Upon conviction the accused is not abruptly deprived of all procedural rights existing at trial: He has a right to counsel, a right to call evidence and cross-examine prosecution witnesses, a right to give evidence himself and to address the court.

The issue again came before the Supreme Court in *R v Pearson.*[54] Yet, the court did not seem to be altogether sure on this issue, and had to stabilise a rickety start. The court indicated that the way that section 7 and section 11(d) interacted was well illustrated in the sentencing stage of the criminal process. According to the court some people were quick to argue that section 11(d) had no application at the sentencing stage of the trial. However, the court, citing *R v Gardiner*[55] with approval, found it clear that where the Crown advanced aggravating facts in sentencing which were contested, the Crown had to establish those facts beyond reasonable doubt.[56] The court explained that the *Gardiner* case was not a Charter case but the problem if confronted could readily be restated in terms of sections 7 and 11(d) of the Charter. The court then seemed to get it right by holding that the presumption of innocence as specifically articulated in section 11(d) may not cover the question of the standard of proof of contested aggravating facts at sentencing, but the broader substantive principle in section 7 almost certainly would.[57]

It is unclear what the residual content of this presumption is when application is made for bail pending sentence. In principle the same residual content of the substantive principle in section 7 should be functional as

---

54 (1992), 12 CRR 1, 17 CR (4th) 1, 77 CCC (3d) 124, 3 SCR 665 (SCC).

55 [1982], 2 SCR 368, 68 CCC (2d) 477, 140 DLR (3d) 612 (SCC), at 415 SCR.

56 (1992), 12 CRR 1, 17 CR (4th) 1, 77 CCC (3d) 124, 3 SCR 665 (SCC) at CRR 14.

57 At CRR 15.

when application is made for bail pending appeal. The applicant would thus seem to have to justify his post-conviction release but would not carry the burden on the same issues as on appeal.[58]

5.2.2.3 Pending appeal or review[59]

In *R v Farinacci*[60] the applicant applied for bail pending appeal. The question arose whether the passage by Lamer CJ in *R v Pearson* concerning the presumption of innocence and sentencing suggests that there is a presumption of innocence after a conviction has been made.[61]

Arbour JA, on behalf of the Ontario Court of Appeal, found that this passage does not suggest that there is a presumption that an accused is innocent of the very offence for which he has been convicted, which survives the conviction.[62] She indicated that in its due process embodiment, the presumption of innocence is a direction to state officials to proceed as though guilt were an open question. It directs the process by which factual guilt may be transformed into a legal finding of guilt.[63]

The court held that when the enquiry into guilt, that is the trial, has been completed, there is no meaningful presumption of innocence left with respect to that defence. The appellate process, which contains its own due process requirements, is not required to treat guilt as an open question.[64]

---

58 See par 5.2.2.3.

59 Review after conviction and sentence.

60 (1993) 18 CRR (2d) 298 (Ont CA).

61 See page 303 and further.

62 *Ibid* 304.

63 See also Packer (1968) 161 - 163.

64 At 304.

The court accordingly indicated that there was no residual presumption of innocence after conviction sufficient to support the application of section 11(e) or section 7 of the Charter. But the court nevertheless indicated that there is a sufficient residual liberty interest at stake in the post-conviction appellate process to engage section 7 of the Charter in some form.[65] The court found the contention that bail pending appeal was a privilege rather than a right, and thus escaping section 7, unacceptable in the Charter context. The court ascribed to the approach by Wilson J in *Re Sing and Minister of Employment and Immigration and 6 other appeals*[66] where she endorsed the dissenting comments by Laskin J in *R v Mitchell.*[67] Wilson J held that a parolee was entitled to procedural fairness in the revocation of parole, even though he had no absolute right to be released in the first place.

Arbour JA explained that the state could not deprive people of their liberty or security without complying with the principles of fundamental justice. However, the court did not find it necessary to express an opinion as to the exact scope or foundation of the right to bail pending appeal that may be contained in section 7.[68] I submit that it is the presumption of innocence as the substantive principle of fundamental justice in section 7 that is the basis of this right.

The court also found it appropriate to deal with the report of the Canadian

---

65 At 306. See also *R v Gamble* (1988), 37 CRR, 1 [1988] 2 SCR 595, 45 CCC (3d) 204 where the Supreme Court held that non-eligibility for parole encompassed enough of a residual liberty interest to come within the ambit of section 7.

66 (1985), 14 CRR 13, [1985] 1 SCR 177 (SCC).

67 [1976] 2 SCR 570 (Can).

68 See page 313 of the case report for the other arguments on which section 7 can provide applicants with a basis upon which to anchor a constitutional entitlement to bail pending appeal.

Committee on Corrections of 1969[69] under the chairmanship of Roger Quimet. The committee found that the principle that bail will be granted pending appeal in exceptional circumstances only, was too restrictive in view of the more liberal policy with respect to bail that the committee has recommended should be adopted prior to the trial of the accused. The committee furthermore found that the principle of exceptional circumstances did not provide enough guidance for the presiding officer before whom the application is made.

The committee reiterated the view that an accused who has not been proven guilty, should not be kept in custody unless it is necessary for the protection of the public or to ensure his appearance at trial. The onus to justify pre-trial detention should be on the prosecution, and not upon the accused to justify his release.

However, the committee seemed to be of the view that the onus should rest upon the applicant to justify release on bail after the conviction, and pending appeal. Still, the committee warned that even though the accused is no longer entitled to be presumed innocent, he may nevertheless not be guilty. If acquitted by the court of appeal after having been denied bail, an injustice was done.

According to Arbour JA these comments do not suggest that bail pending an appeal is perceived as resting on the presumption of innocence, even though the possibility that an appeal may ultimately lead to an acquittal, either directly or after a new trial, is a prerequisite of any logical entitlement to bail.[70]

Arbour JA explained that justice did not require prescience. If there was a just cause to deny bail before trial, even though the accused is acquitted at

---

69 126 as cited in *R v Farinacci* (1993) 18 CRR (2d) 303 304 (Ont CA).

70 *R v Farrinaci ibid* 304.

trial, there has been no violation of the principles of fundamental justice. In the same way, if a conviction is overturned on appeal and the appellant was denied bail pending appeal, there would have been an injustice only if bail was unjustly denied. The granting of bail only in "exceptional circumstances"[71] may have led to such injustices. However, it does not follow that the criterion for granting bail before trial and after conviction must be the same.[72] Nevertheless, the court indicated that there is no doubt that the Bail Reform Act[73] liberalised access to bail, both at the pre-trial stage and pending appeal.

The present position regarding release on bail pending the determination of an appeal, seems to be in line with the view of the Quimet Report. Section 679 provides that the judge of the court of appeal may order that the appellant be released pending the determination of his appeal once the appellant has given notice to appeal, or where leave is required, once notice of his application for leave has been given.[74] However, release can only be effected once the appellant has established that:

- the appeal or application for leave to appeal is not frivolous,
- he will surrender himself into custody in accordance with the terms of the order, and
- his detention is not necessary in the public interest.[75]

The applicant is therefore burdened to justify his post-conviction release. In the case of an appeal against sentence only, the judge of appeal may only

---

71 Which according to the Quimet Report was the standard before the major reform of the law of bail in the early 1970s.

72 At 305.

73 1970 - 71 - 72, (Can) c 37.

74 See sections 679(1)(a) and 679(1)(c).

75 Section 679(3).

grant bail once leave has been given to appeal.[76]

The protection afforded by the provision in the respective circumstances seems to be in line with the remaining content of the presumption of innocence in section 7. Entitlement to bail is surely the strongest when denial of bail would render that appeal nugatory, for all practical purposes.

In *R v Baltovich*[77] the contrast between bail prior to trial, and bail pending appeal was shown. However, the court gave its decision on the basis that the presumption of innocence was spent upon conviction. Baltovich was convicted of second degree murder and applied for bail pending appeal. Goodman JA, before considering whether his detention was necessary in the public interest, found that the appeal was not frivolous on the basis of the material filed and the submissions made. The court also found that the grounds relied on contained matters of substance and were clearly arguable.[78]

However, the court was not persuaded that the accused had satisfied the burden of establishing that he would surrender himself into custody in accordance with the terms of any order made. The court also took into account that the applicant was released by order of the same court pending his trial, and that the court that granted bail, was satisfied that he would surrender himself for trial.[79]

---

76 Section 679(1)(b).

77 (1992), 10 OR (3d) 737 (Ont CA).

78 *Ibid* 738 - 39.

79 See *R v Baltovich* (1991), 6 OR (3d) 11, 68 CCC (3d) 362 (Ont CA). In this prior case the court reviewed a decision by Trainor J who refused an interim judicial release order on the same ground namely that the court must be satisfied that the applicant will stand his trial. In granting a release order, Doherty JA at 13 OR, 365 - 65 CCC, in delivering judgment for the court held that the evidence as revealed to that point did not permit any firm conclusion as to the probability of conviction. In so holding the court indicated that they do not usurp the role of the jury, nor do they express any conclusion or opinion as to the applicant's guilt. Rather, they hold that the

Goodman JA explained that the position of the applicant has changed drastically since the order was made. At that time, he enjoyed the presumption of innocence. Evidence at trial indicated that he had expressed the opinion prior to trial that he would be acquitted and that there was no possibility that anyone would find the body. He was a well-educated young man without any prior criminal record and a member of a respected family, the members of which were prepared to be his surety. In those circumstances, it would be a reasonable inference from the facts that he would appear for his trial. The burden of establishing that he would surrender himself is somewhat easier to satisfy in those circumstances than it is after a conviction.

The applicant's present situation is now greatly different. The case for the prosecution has been shown to be sufficiently strong that a jury has convicted him of murder. He is no longer presumed to be innocent. He has been sentenced to life imprisonment without eligibility for parole for a period of seventeen years. This prospect might reasonably be expected to have a negative effect on a decision to surrender his custody. His position has changed from one of a young unattached male with a reasonable hope of or expectation of being acquitted of the charges of murder, to that of a young unattached male facing a lengthy term of imprisonment subject to a very real uncertainty with respect to the success of his appeal.

It therefore seems that there is some disagreement as to whether it is the presumption of innocence that forms the substantive principle in section 7 of the Charter, which affords protection in the criminal justice process after conviction. What is certain, is that the substantive principle in section 7 provides protection after conviction up to the end of the criminal process. However, the residual content of the substantive principle is determined by the particular step in the process.

---

evidence is not as cogent as to provide a satisfactory basis for the continued pre-trial detention of the applicant.

### 5.2.3 Bail pending new trial

Section 679(7) of the Criminal Code provides as follows:

> Where, with respect to any person, the court of appeal or the Supreme Court of Canada orders a new trial or new hearing or the Minister of justice gives a direction or makes a reference under section 690, this section applies to the release or detention of that person pending the new trial or new hearing or the hearing and determination of the reference, as the case may be, as though that person were an appellant in an appeal described in paragraph 1(a).[80]

The question immediately arises whether this section is constitutionally valid insofar as it purports to make section 679 applicable to a person pending a new trial.

In *R v Sutherland*[81] the Saskatchewan Court of Appeal had to decide the constitutional validity of section 679, insofar as it applied to an accused whose conviction of first degree murder has been set aside on appeal, and who was awaiting a new trial. The court decided that the cases of *R v Branco*[82] and *R v Farinacci*[83] were not directly in point because Mr Sutherland was one stage beyond the appellants in the cases mentioned. In this case the appeal had been heard and allowed and a new trial ordered. There is no conviction outstanding against him and he is entitled to the presumption of innocence[84] and the right to reasonable bail.[85] He is charged

---

80 See my discussion on section 679(1)(a) read together with section 679(3) in par 5.2.2.3.

81 (1994) 21 CRR (2d) 338 (Sask CA) per Sherstobitoff JA.

82 (1993) 19 CRR (2d) 338 (BCCA).

83 (1993) 18 CRR (2d) 298 (Ont CA).

84 In terms of section 11(d).

85 In terms of section 11(e).

with one of the serious offences in section 522 and is in exactly the same position as a person to whom this section would normally apply. He carries the burden of proof and must convince the court that his detention is not justified on one of the grounds mentioned in section 515(10).[86] However, Parliament, rather than leaving him within the purview of section 522 and 515(10), has by section 679(7) and (1)(a) put him in the same position as a person appealing against a conviction, that is, within the purview of section 679(3).[87]

The court held that the reason for section 679(7) may be that an order for a new trial by a court of appeal, and a new trial, are considered to be all part of the appeal process. Bail is then accordingly dealt with by a judge of the court of appeal under the bail provisions that apply to persons appealing against convictions.

However, the court in *R v Sutherland* held that it does not matter how logical it may seem to include a person in the position of an applicant awaiting a new trial within the purview of section 679. The inclusion offends his rights under both sections 11(d) and 11(e) of the Charter.[88] Once the conviction is set aside the applicant is a person charged with an offence and awaiting trial, and as such entitled to the benefits of those provisions of the Canadian Charter. But section 679(7) requires for the purposes of bail that the applicant be treated as though he were an appellant described in section 679(1)(a), as though he were a person convicted of an offence and appealing against that conviction. The person is thus not entitled to the benefit of sections 11(d) and (e) of the Charter as described in both *Branco*

---

86 See par 7.2.5 and 8.2.2.2.c.2.

87 See par 5.2.2.3. Some may argue that a strict analysis leads to the ludicrous conclusion that the applicant for bail pending a new trial would first have to give notice of appeal. Before release can be effected the applicant would also have to convince the court that his appeal is not frivolous as required by the first ground in section 679(3).

88 At 345 of the judgment.

and *Farinacci*. The court found the conflict obvious and held section 679(7) to be constitutionally invalid to the extent that it applied to a person in the position of the applicant.

## 5.3 SOUTH AFRICAN LAW

### 5.3.1 General

#### 5.3.1.1 Application at trial

In this part it is investigated what the role of the presumption of innocence is in the context of the trial. In terms of the well-known common law maxim an accused or suspect is presumed innocent until his guilt has been established in court.[89] In *R v Ndhlovu*[90] the Appellate Division accepted that this presumption requires the state to prove the guilt of an accused beyond reasonable doubt otherwise the accused is entitled to his acquittal. Hoffmann and Zeffertt describe the presumption as a general rule of policy that usually requires the prosecution to bear the onus in all issues.[91] Does this mean that the effect of the presumption of innocence at trial is limited to protection against conviction despite the existence of doubt, or does it provide wider protection?

The basic tenor of our common law, which was designed to safeguard the rights of the individual, appears to have described the application of this presumption even at trial a little wider than the mere protection against conviction despite the existence of doubt. According to our common law, the presumption of innocence entails that criminal trials should at least

---

89 *In favorem vitae libertatis et innocentiae omnia praesumuntur.* Freely translated this maxim provides that everything is presumed in favour of the life of a free and innocent person.

90 1945 AD 369.

91 (1992) 513.

conform to the following rules:[92]

- The state has the duty to begin and to make out a case against the accused before he needs to respond, either by testifying, adducing evidence, or otherwise.[93]
- The state bears the burden of proof and must satisfy the court of the guilt of the accused in order to secure a conviction.[94]
- The required standard is proof beyond reasonable doubt.

Any provision which requires the accused to adduce evidence first, which burdens him with the onus of proof,[95] or which lowers the standard of proof required, offends the presumption of innocence and would have to be justified in terms of the general limitation provision. This applies not only to the elements of the offence but to every issue relating to the innocence or guilt of the accused. It applies equally to a defence, excuse, justification or exception.[96]

These principles are also reflected in the Final Constitution. However, section 35(3)(h) provides that every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent, and not to testify during the proceedings.[97] The Constitution therefore, even if

---

92 See Trengove in Chaskalson *et al* (1996) 26 - 9.

93 Express provision for this rule was made in section 25(3)(c) of the Interim Constitution. The section guaranteed the right "to remain silent during the pre-proceedings or trial and not to testify during trial". In the Final Constitution it is provided in section 35(3)(h) that the accused has the right to "remain silent, and not to testify during the proceedings".

94 *Pillay v Krishna* 1946 AD 946 952.

95 See *S v Marwane* 1982 (3) SA 717 (A) 746H and 756C; *Namibian National Students' Organisation v Speaker of the National Assembly for SWA* 1990 (1) SA 617 (SWA) 630 - 2; *S v Pineiro* 1993 (2) SACR 412 (Nm) 415 - 17; *S v Shangase* 1994 (2) BCLR 42 (D) 46 - 7.

96 Trengove in Chaskalson *et al* (1996) 26 - 9.

97 Section 35(3)(h). In the Interim Constitution section 25(3)(c) provided every accused person with the right to a fair trial, which include the right "to be

restating the close relationship between these rights by lodging them together, does not include the right to remain silent and not to testify during the proceedings in the application of the presumption of innocence. As the Constitution forms the basis of these rights in contemporary South Africa, the effect of the presumption of innocence at trial must be limited to an understanding that the presumption is violated if conviction is possible despite the existence of reasonable doubt about guilt.[98] This procedural and evidentiary rule only applies at trial, where the innocence or guilt of the accused is decided.[99]

---

presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial".

98 The presumption of innocence is embedded in numerous constitutional instruments, for example article 6(2) of the European Convention on Human Rights (1950) which provides that "everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law". Article 14(2) of the International Covenant on Civil and Political Rights (1966) provides that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". Article 8(2) of the American Convention on Human Rights (1969) under the heading "right to a fair trial" guarantees every person accused of a criminal offense "the right to be presumed innocent so long as his guilt has not been proven according to law." See also Bayefsky (1992) 318 and further. In the United States, the Constitution does not speak expressly of the presumption of innocence. However, the Supreme Court of the United States has held that it is a "bedrock, 'axiomatic and elementary'" constitutional principle that the due process clause of the Fourteenth Amendment "protects the accused against conviction upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged". See *Re Winshop* 397 US 364 (1970).

As a matter of constitutional principle, the trial judge in the United States must include the terms of the presumption of innocence in his direction to the jury. In *Taylor v Kentucky* 438 US 478 (1978) the court held that an accused's right to a fair trial in a criminal case is violated where the trial judge fails to give an instruction, requested by counsel, that there is a presumption of innocence. This is so even if the trial judge tells the jury that the prosecution must prove its case beyond a reasonable doubt. The court said that the presumption of innocence instruction has a "purging effect" that is separate and distinct from the reasonable doubt instruction.

99 See Steytler (1998) 134. See also *S v Mbele* 1996 (1) SACR 212 (W) where it was held that a bail application was not a criminal proceeding, as proved facts did not have to be weighed. The court rather had to speculate on the basis of information laid before it.

5.3.1.2 Application outside the trial context

In *R v Ndhlovu*[100] the Appellate Division held that the *Woolmington* decision[101] accurately reflected the position in South Africa. If this decision is to be accepted, one would have to accept that this maxim does not extend beyond the trial context, where it requires the prosecution to prove guilt beyond a reasonable doubt. However, some courts after the advent of the fundamental rights era, have described an interrelationship between the presumption of innocence and some other rights in the Constitution.

In *S v Zuma*[102] the Constitutional Court concluded that the common law rule in regard to the burden of proving that a confession was voluntary had not been a coincidental development. It is an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be compelled to be a witness against oneself. The court explained that these rights were, in turn, the necessary reinforcement of Viscount Sankey's "golden thread" depicted in *Woolmington v DPP.*[103] It is for the prosecution to prove the guilt of the accused beyond a reasonable doubt. Reverse the burden of proof and these rights are seriously compromised and undermined. The court therefore considered the common-law rule on the burden of proof as being inherent in the rights specifically mentioned in sections 25(2) and 25(3)(c) and (d) and as being part of the right to a fair trial.[104] In so interpreting these provisions of the Interim Constitution, the court took into account the historical background and comparable case law. The court also found that such an interpretation promoted the values which underlie an open and democratic

---

100 1945 AD 369.

101 [1935] AC 462 481 (HL). See this chapter footnote 2.

102 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) per Kentridge AJ.

103 [1935] AC 462 481 (HL).

104 Par 33 of the judgment.

society and indicated that it was entirely consistent with the language of section 25.[105]

In *S v Coetzee*[106] the same court similarly mentioned that there was a "cluster of rights" associated with the presumption of innocence. These rights were the general right to a fair trial, the privilege against self-incrimination, the right not to be compelled to be a witness against oneself, and the right to silence.[107]

In *S v Nombewu*[108] the high court held that the cluster of rights associated with the presumption of innocence, namely the right not to be compelled to be a witness against oneself, the right to silence and the right not to be compelled to make an admission or confession, acted to reinforce and preserve it.

However, these decisions, except maybe *S v Zuma*,[109] do not seem to be authority to widen the scope of the presumption of innocence beyond the narrow evidentiary rule at trial, where the risk that an accused be convicted while there is doubt is to be neutralised. The decisions seem to have rather indicated that the rights exist separately.[110]

---

105 *Ibid.* Scwikkard (1998) 11 *SACJ* 399 is of the opinion that this extract cannot in the light of the court's earlier definition of the presumption of innocence, be read as creating a broad definition incorporating the right to remain silent and the privilege against self-incrimination. The court earlier indicated that the presumption is infringed whenever the accused is liable to be convicted despite the existence of a reasonable doubt.

106 1997 (3) SA 527 (CC).

107 At par 9 of the judgment.

108 1996 (2) SACR 396 (E).

109 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC).

110 Scwikkard (1998) 11 *SACJ* 397 argues that there is sufficient authority, as well as policy reasons, for adopting the narrower approach as a rule requiring the prosecution to prove guilt beyond a reasonable doubt. Scwikkard (1998) 57 concludes that a conflation of the presumption of

Other courts before the fundamental rights era have in line with the maxim stated at common law[111] required that the pre-trial treatment of the accused proceed from the assumption that he is innocent. His basic rights are therefore not to be disturbed or ignored, before his guilt is proved by the state in a fair public trial before an ordinary court.[112]

In *S v Essack*[113] the high court, in adjudicating a bail application, held that the presumption of innocence operates in favour of the applicant even where there is a strong *prima facie* case against him. However, if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the court would be fully justified in refusing him bail.[114]

Miller J in *S v Fourie*[115] found it a fundamental requirement of the proper administration of justice that an accused person stand trial. However, if there is any cognisable indication that he will not stand trial if released from custody, the court will serve the needs of justice by refusing to grant bail,

---

innocence with the cluster of rights associated with it would render an unwieldy definition. She argues that such a definition would be difficult to apply and may undermine associated rights. Consequently she prefers the narrow definition.

111 See par 5.3.1.1.

112 Mohammed J (as he then was) in *S v Acheson* 1991 (2) SA 805 (Nm) 822A - B remarked that an accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. Scwikkard (1998) 11 *SACJ* 396 and further indicates that it is the concept of legal guilt rather than the presumption of innocence that requires that an accused be treated as if he were innocent irrespective of the probable outcome of the trial. See also Scwikkard (1998) 43 and further.

113 1965 (2) SA 161 (D) 162D - E.

114 This passage was quoted with approval in *S v Ramgobin* 1985 (3) SA 587 (N) 589; *S v Smith* 1969 (4) SA 175 (N) 177; *S v Bennett* 1976 (3) SA 652 (C) 654; *S v Lulane* 1976 (2) SA 204 (N) 212.

115 1973 (1) SA 100 (D).

even at the expense of the liberty of the accused and despite the presumption of innocence.[116]

In *Attorney-General, Zimbabwe v Phiri*[117] Reynold J indicated that the presumption of innocence applied to bail applications. However, he held that this fact must not be overemphasised for the ends of justice would not be served if the accused were to be granted bail when there was some "cognisable indication" that the accused would not abide by the conditions of the bail recognisance.[118]

The establishment of a protected right to be presumed innocent has brought a new dimension to the problem, and even more uncertainty as to the correct application and scope of the presumption of innocence. While the right to be presumed innocent in terms of section 25(3)(c) of the Interim and section 35(3)(h) of the Final Constitution are arguably limited to the strict evidentiary rule at trial, some courts have held that this provision had to be considered when bail was adjudicated.[119] On other occasions, courts and academics have argued that the presumption of innocence had to be discounted when application is made for bail, without it being altogether clear whether reference is made to the right to be presumed innocent in the Constitution, or the common law presumption.[120] Comments are for example made that a person's rights at the bail hearing are not to be impeded before he is found guilty in terms of accepted principles.

From what has been said it is clear that there is disagreement on whether the presumption of innocence has application outside the trial context. In

---

116 At 101.

117 1988 (2) SA 696 (ZH).

118 At 700.

119 See for example *Nortje v Attorney-General, Cape* 1995 (1) SACR 446 (C); *S v C* 1998 (2) SACR 721 (C).

120 See for example the comments by Kotzé (1999) 1 *De Jure* 188 191.

addition, those who after the advent of the fundamental rights era, have understood this presumption to apply outside trial, have not always appreciated that it is only the effect of the presumption of innocence at trial that is entrenched by the provision in the Constitution.[121]

### 5.3.2 Bail after conviction

#### 5.3.2.1 Prelude

The same questions are addressed as under Canadian law. It is asked whether the presumption of innocence has a role to play after conviction. Does this presumption therefore act as a policy directive protecting the fundamental security and freedom of an individual after conviction? If it still operates, does it afford the same protection to an applicant for bail pending sentence and on appeal or review and how does it fit into the system created by the Bill of Rights?

Even though it is certain that the Constitution set out to reform the principles with regard to bail, and did so in many ways, it is submitted that section 35(1)(f) of the Final Constitution did not change the position with regard to the right to bail after conviction. Everyone who is arrested for allegedly committing an offence has the right to be released from detention. In contrast a convicted person did not *allegedly* commit an offence.[122]

When a person has been lawfully arrested on a charge for the purpose of criminal proceedings, his right to be released on bail until he is sentenced in

---

121 See par 5.2.1.1 under Canadian law and par 5.3.1.1 under South African law for the effect of this presumption at trial. See par 5.2.1.2 under Canadian law for the role and effect of the presumption of innocence in the Canadian Charter. See also par 5.3.4 under South African law where I propose the same application for the Bill of Rights.

122 In terms of the Canadian Constitution a person must be *charged with an offence* to have the rights set out in sections 11(d) and (e). A convicted person is not charged with an offence.

the trial court is regulated by chapter 9[123] of the Criminal Procedure Act.[124]

In terms of the Criminal Procedure Act an accused is entitled to be released on bail *preceding* his conviction.[125] Once an accused has been convicted his bail lapses. This would indicate that other principles exist once an accused is convicted. The content that the presumption of innocence might have in section 35(1)(f) therefore has no role to play after conviction.

But the question whether section 35(3)(h) has application after conviction is a more difficult one. In terms of section 35(3) every accused has the right to a fair trial which includes the right to be presumed innocent and the right to an appeal or review by a higher court. From the wording of section 35(3) it therefore seems that one remains an accused until after the final appeal or review in a case. In *Attorney-General, Eastern Cape v D*[126] the Eastern Cape Local Division remarked that an appeal is not a re-trial or a trial *de novo.* It is an extension or a continuation of the *lis* between the state on the one hand and the accused on the other. It follows that if one is "an accused" after conviction, one has the right to be presumed innocent in terms of section 35(3)(h). However, I submit that this contention is misleading because section 35(3)(h) was meant to apply only at trial. A convicted person is no longer an "accused".[127]

Because of the decision in *Ferreira v Levin NO and Vryenhoek v Powell*

---

123 Sections 58 - 71.

124 *S v Hlongwane* 1989 (4) SA 79 (T).

125 Section 60.

126 1997 (7) BCLR 918 (E), 1997 (1) SACR 473 (E) at SACR 475.

127 See also the position under Canadian law where a convicted person is no longer "charged". A "charged" person also does not have an enumerated right of appeal or review under Canadian law. It is rather effected by section 7 of the Charter.

*NO*[128] there is also no residual due process right aiding the applicant on the basis of his right to freedom and security in the Final Constitution.[129] For this reason, the presumption of innocence cannot act as an animating principle through section 12.

5.3.2.2 Pending sentence

In *S v Moeti*[130] an accused applied for bail pending the imposition of sentence. Hendler J came to the conclusion that the normal principles of bail were not applicable.[131] He held that the presumption of innocence, which operates in favour of an accused person, and which is one of the corner-stones on which the principles of bail is based, did not apply after conviction. The question of the applicant's liberty and the outcome of the trial played no role. The court held the correct approach to be similar to the position when bail is granted pending appeal and indicated that the accused should carry the burden of proof.

Because the accused's right to bail lapses upon conviction an accused that is not sentenced immediately must request the court to extend his bail pending sentence.[132] The accused is in the position described in *S v Moeti*.[133] Accordingly the presumption of innocence does not function in favour of the accused and he is burdened to convince the court that he should be released. However, the court equated the position pending sentence with that on appeal. Subsequently the decision to grant bail

---

128 1996 (1) BCLR 1 (CC). See par 6.3.1.

129 Section 12.

130 1991 (1) SACR 462 (B).

131 *Ibid* 463 par b.

132 Section 58 of the Criminal Procedure Act provides for the extension of bail.

133 1991 (1) SACR 462 (B).

pending appeal has been left in the discretion of the court.[134]

Furthermore, section 58 of the Criminal Procedure Act provides that where a court convicts an accused of an offence mentioned in schedules 6 or 5, the court must apply sections 60(11)(a) or (b), as the case may be, when adjudicating bail pending sentence. The court must also take into account the fact that the accused has been convicted and the likely sentence to be imposed. If the accused is in any event burdened with the onus in all instances pending sentence, and the factors mentioned would automatically be taken into account when adjudicating bail, it might imply that another situation exists outside the very serious and serious offences.[135] All this might indicate that the decision to grant bail is in the discretion of the court for those offences outside schedules 6 or 5.

5.3.2.3 Pending appeal or review[136]

South African authorities have accepted that there is no right to bail, or a presumption in favour of bail, with regard to a sentenced person.[137] Other authority decided before the advent of the fundamental rights dispensation, indicated an absence of the right to bail, and furthermore placed an onus on the applicant to prove certain factors on a balance of probability in order to obtain bail.[138]

In 1994 the South African Law Commission recommended that the granting of bail, either on review or on appeal, should be in the discretion of the

---

134 See par 5.3.2.3.

135 Even if it is taken into account that the requirement of proving exceptional circumstances would be added for the very serious offences.

136 Review after conviction and sentence.

137 South African Law Commission (1994) 82; *S v Moeti* 1991 (1) SACR 462 (B) 463.

138 See *S v Beer* 1986 (2) SA 307 (SE); *R v Mthembu* 1961 (3) SA 468 (D); *S v De Abreu* 1980 (4) SA 94 (W) and *S v Williams* 1981 (1) SA 1171 (ZA).

court.[139]

This seems to be the route that the legislature took, by affording the lower court which imposed the sentence pending review the discretion to:[140]

- extend the bail granted under section 59 or 60 either on the same amount or another amount; or
- release the sentenced on deposit of the sum of money determined by the court.[141]

With respect to bail pending an appeal a sentencing lower court has a similar discretion.[142] The provincial or local division of the high court hearing an appeal against a decision of the magistrate's court has exactly the same powers.[143]

It therefore appears that the South African authorities agree that there is no right to bail, or a presumption that favours bail, after conviction. Pending sentence the court must apply sections 60(11)(a) or (b), as the case may be, where a person has been convicted of a schedule 6 or 5 offence. It seems that the court has the discretion to grant bail when a person has been convicted of another offence and applies for bail pending sentence. The South African authorities afford the sentencing court, and the court of appeal or review, the discretion to grant bail after conviction and sentence. It seems that in this instance this presumption, even though its application

---

139 At 82 and 84.

140 Section 307.

141 In addition section 307(6) provides that the provisions of sections 63, 64, 65, 66 and 68 shall apply *mutatis mutandis* with reference to bail pending review.

142 Section 309(4)(b). It does so by providing that sections 307, 308 and 308A shall apply *mutatis mutandis* to the sentence appealed against.

143 Section 309(5).

after conviction is not accepted under South African law, is given greater effect than under Canadian law, where the application of the substantive principle in section 7 is accepted.[144]

### 5.3.3 Bail pending new trial

No authority could be found dealing with the issue directly in point. However, it seems reasonable to accept that the same principles would apply as those applicable to one who is initially confronted with the criminal justice system. He is a person accused of an offence and awaiting trial. He is therefore entitled to the same protection, including the presumption of innocence.

### 5.3.4 Appraisal

There is little consensus as to the content and scope of this presumption concerning bail under South African law. However, under Canadian law the situation is far more settled.

It is submitted that the basic analysis under Canadian law is sound, and should be accepted under South African law. It is after all the same "golden thread" that runs through both systems. Our Bill of Rights also seems to have borrowed heavily from the Canadian Charter.

I suggest that the following approach is the correct one: The presumption of innocence has benefited accused persons for a long time by acting as an animating principle throughout the whole criminal justice process. In a fundamental rights dispensation this presumption is discounted in every provision impacting on the criminal justice process.[145] It is therefore the

---

144 And it is accepted that the presumption of innocence is the substantive principle in section 7 of the Canadian Charter.

145 See sections 12 and 35 of the Final Constitution in Annexure C.

starting point for any interference with the freedom and security of the person. Section 12, together with the rights of arrested, detained and accused persons in section 35, are thus the safeguard against abuse of the state's power to curtail physical liberty through arrest, detention and imprisonment.

The link between liberty and the presumption of innocence was shown in the decision *of Uncedo Taxi Service Association v Maninjwa*.[146] Pickering J held that it was clearly unconstitutional to deprive a person of his liberty upon proof merely on a balance of probabilities.[147]

The operation of the presumption of innocence at trial, where the accused's guilt is in issue and plays its most active role, therefore does not exhaust the operation of this presumption as a principle of fundamental justice.[148] However, its operation at the different stages of the criminal process is described by the different protected rights, and has no meaning beyond that. The extent and limit of the presumption of innocence, procedural or otherwise, in the context of bail for one arrested for allegedly committing an offence, is therefore determined by section 35(1)(f).[149]

With regards to the position after conviction it is clear that the presumption of innocence underlying section 35(1)(f) and as articulated in section 35(3)(h) of the Final Constitution does not apply. Because of the decision in

---

146 1998 (3) SA 417 (E) 426I, 1998 (6) BCLR 683 (E).

147 At 692D.

148 See also Snyckers in Chaskalson *et al* (1996) 27 - 85.

149 If section 35 FC did not limit the procedural content of the presumption of innocence, it could of course be argued that its due process embodiment prescribes procedural fairness when application is made for bail. It is also clear that if the narrow interpretation of the presumption of innocence proposed by Scwikkard (1998) 11 *SACJ* 396 is to be accepted, it would also not allow any influence by this presumption outside of the specific provision.

*Ferreira v Levin NO and Vryenhoek v Powell NO*[150] the presumption of innocence cannot act as an animating principle through section 12.[151] Also, if one favours the narrow approach that the presumption of innocence only applies in the trial context, there can be no application thereof after conviction.

Nevertheless, it is submitted that section 12 should and does apply after conviction and therefore also the substantive principle contained therein.[152] Pending sentence, appeal or review, the case has not been finally determined or finalised. Until the guilt of the accused has been finally determined, the presumption of innocence provides that the accused's freedom cannot be taken away without due process.

Public confidence in the administration of justice requires that judgments be reviewed and that errors, if any, be corrected. This is so particularly in the criminal field where liberty is at stake. There may have been a time when appellate or review delays were so short that bail pending appeal could safely be denied. This is no longer the case. Ideally, judgments should be reviewed before they are enforced. If this is not possible, an interim regime may need to be put in place which must be sensitive to a multitude of factors including the anticipated time required for the appeal or review to be decided and the possibility of irreparable and unjustifiable harm being done in the interval. This is important for the attitude of the judges when faced with evidence or submissions from the bar in an application for bail at that stage.

However, it is submitted that the affording of a discretion to the trial court and the court of second instance to grant or extend bail on review or appeal is in line with the remaining contents of the presumption of innocence and

---

150 1996 (1) BCLR 1 (CC).

151 See chapter 6.

152 If one accepts that sections 12, 35(1)(f) and 35(3)(h) do not apply after conviction it seems that the common law principles would apply anyhow.

the shift towards an inquisitorial approach.[153] If it is accepted that the court, after conviction but pending sentence, has the discretion to grant bail for an offence other that the offences mentioned in schedules 5 and 6, this discretion would similarly seem to be in line with the remaining contents of the presumption of innocence. If the contention is that there is a burden of proof on the applicant for bail convicted of these offences it would seem that the effect of the presumption has not been taken into account properly. To do away with any misconception it is suggested that legislation be introduced that clearly affords the presiding officer the discretion to grant bail pending sentence for offences not contained in schedules 5 and 6.

## 5.4 CONCLUSION

Under Canadian law the role that the presumption of innocence plays in the phase before conviction is certain. Section 11(d) of the Canadian Charter ensures that the presumption of innocence operates at trial, where the guilt or innocence of the accused is to be established. It is also accepted that this presumption protects the fundamental liberty of every person that comes into contact with the criminal justice system. Section 11(e) entrenches the effect of the presumption at the stage of the bail hearing.[154]

Yet, there is some disagreement as to whether it is this presumption that forms the substantive principle in section 7 of the Charter, which affords protection in the criminal justice process after conviction. What is certain, is that the substantive principle in section 7 provides protection after conviction up to the end of the criminal process. However, the residual content of the substantive principle is determined by the particular step in

---

153 Even if section 12 was to be applied it would be in line with the limitation of the right to freedom and security. The argument will of course not be the same when the accused was initially burdened with the onus of proof in terms of sections 60(11)(a) or (b) of the Criminal Procedure Act. Otherwise the applicant may seem to be better off once convicted and sentenced.

154 Also see chapter 6 for the effect of the presumption of innocence as substantive principle in section 7 on the bail process.

the process. For example, an applicant for bail pending appeal of a conviction is burdened to satisfy the court on certain issues before bail may be granted. Although the same issues as on appeal would not have to be proved, it also seems that an applicant for bail pending sentence would have to convince the court of his release. When only the sentence is appealed, bail may only be granted where leave to appeal has been granted.

Under South African law the presumption of innocence is entrenched in section 35(3)(h) of the Bill of Rights. Section 35(3)(h) operates at trial where the guilt or innocence of the accused is to be established. However, even the extent of this presumption at trial has not always been altogether agreed upon, and its operation outside the trial context, if any, has posed immense problems.

In South Africa the Constitutional Court and some high courts have indicated an interrelationship between this presumption and some other rights in the Bill of Rights. However, these decisions do not seem to be authority to widen the scope of the presumption outside the narrow context at trial. The common law and at least one high court have indicated that the presumption operates at all pre-trial procedures and up to conviction. A number of high courts have indicated that the presumption applies at the bail hearing before trial.

In spite of indications that section 35(3)(h) only applies to trial, some courts have held that the constitutional provision had to be considered when bail was considered. On other occasions courts and academics have argued that the presumption of innocence had to be discounted when application is made for bail, without it being clear whether reference is made to the constitutional provision, or the common-law presumption.

The South African authorities seem to agree that there is no right to bail, or a presumption that favours bail, after conviction. Pending sentence the court must apply sections 60(11)(a) or (b), as the case may be, where a person

has been convicted of a schedule 6 or 5 offence. It seems that the court has the discretion to grant bail when a person has been convicted of another offence and applies for bail pending sentence. The South African authorities afford the sentencing court, and the court of appeal or review, the discretion to grant bail after conviction and sentence. It seems that in this instance this presumption, even though its application after conviction is not accepted under South African law, is given greater effect than under Canadian law, where the application of the substantive principle in section 7 is accepted.[155]

When a new trial has been ordered, the Canadian case law indicates that the accused is in the same position as a person confronted with a new trial. He has a conviction outstanding against him and is entitled to the same presumption of innocence. Under South African law no authority could be found dealing directly with this issue. It seems reasonable to accept that the same principles would apply as those applicable to one who is initially confronted with the criminal justice system.

---

155 And it is accepted that the presumption of innocence is the substantive principle in section 7 of the Canadian Charter.

# CHAPTER 6

# THE POSSIBLE RELIANCE OF AN APPLICANT IN BAIL PROCEEDINGS UNDER CANADIAN AND SOUTH AFRICAN LAW ON A RESIDUAL RIGHT TO PROCEDURAL FAIRNESS IN TERMS OF SECTION 7 OF THE CANADIAN CHARTER AND SECTION 12 OF THE FINAL CONSTITUTION RESPECTIVELY



## 6.1 INTRODUCTION

Both the Canadian and South African Constitutions contain specific provisions that provide for the right to a "fair trial",[1] "bail"[2] and the "freedom and security"[3] of the person. The question arises whether an applicant in bail

---

1 See section 11(d) of the Canadian Charter and section 35(3) of the Final Constitution. Also see section 34 FC which affords the right to a fair public hearing to decide any dispute that can be resolved by application of law.

2 See section 11(e) of the Canadian Charter and section 35(1)(f) of the Final Constitution.

3 See section 7 of the Canadian Charter and section 12 of the Final Constitution.

proceedings under Canadian and South African law can rely on a residual right to procedural fairness in terms of section 7 of the Canadian Charter and section 12 of the Final Constitution. The answer to this question is crucial in determining the rights of an applicant for bail. If the answer is yes, it means that the courts have to abide by the rules of fair play when adjudicating bail. If the answer is no, it opens up a huge gap between the protection afforded at trial, and the protection afforded at the bail application under Canadian and South African law.[4] In other words, the implication will be that in terms of the Canadian and South African Constitutions the guilt or innocence of an accused must be determined fairly, but fairness is not essential when bail is adjudicated.[5]

In this chapter it is investigated whether there is a right to procedural fairness at the bail hearing in terms of the Canadian and South African Constitutions. An appraisal is made of the position under Canadian and South African law. In conclusion, the principles under the two systems are compared.

---

4 That is before conviction (see chapter 5 where the presumption of innocence is discussed). Unless of course, due process at the bail application is guaranteed by some other provision in the Canadian Charter or South African Bill of Rights. See section 34 FC.

5 There will of course not be much cause for concern if there are policies or legislation in place which secure and promote procedural fairness. While the Canadian government proactively adopted legislation as far back as the early 1970s which promotes procedural fairness at the bail hearing, the procedural deficiency of the South African policies and legislation has been shown time and again in the instance of bail matters. It is accordingly crucial that the South African Constitution provide a safety net by ensuring that the notions of basic fairness, which now applies to the trial (see section 35(3)), also be applied to the bail hearing. See *S v Zuma* 1995 (4) BCLR 401 (CC) par 16 per Kentridge J with respect to the change in policy concerning the trial heralded by section 25(3) of the Interim Constitution.

## 6.2 CANADIAN LAW

### 6.2.1 General

The Canadian Charter provides as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[6]

Two aspects of the Canadian Supreme Court's interpretation of section 7 have comparative value for my analysis of section 12 of the Final Constitution:[7]

- the restrictive definition of "liberty";
- the residuary definition of "fundamental justice", a definition which invites the court to entertain a wide and un-enumerated variety of substantive challenges to the law.[8]

"Liberty" is the functional equivalent of "freedom" in section 12 of the South African Constitution and has been interpreted by the Canadian Supreme Court to mean freedom from physical restraint. This restraint primarily occurs in the criminal context and has been understood to include imprisonment,[9] mandatory

---

6 Section 7.

7 The relatively restrictive definition of "security of the person" seems to primarily deal with some guarantee of personal autonomy. See Hogg (1992) 1029.

8 See Currie & Woolman in Chaskalson *et al* (1996) 39 - 2.

9 See *Reference re section 94(2) of the Motor Vehicle Act* [1985], 2 SCR 486 512 (Can); *R v Swain* [1991], 1 SCR 933, 63 CCC (3d) 481 (SCC); *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)* [1990] 1 SCR 1123 (Can).

fingerprinting,[10] document production[11] and oral testimony.[12]

The Canadian courts have opted for (due process) seepage of the provision in the Canadian Charter relating to deprivations of liberty "in accordance with the principles of fundamental justice" in section 7 above, to the specifically enumerated criminal procedure rights found in sections 8 to 14 of the Charter. In *Reference re section 94(2) of the Motor Vehicle Act*[13] Lamer J held that the enumerated criminal justice rights in sections 8 to 14 of the Charter were merely illustrative of the generic due process right contained in section 7. It also seems that section 7 is not limited in its ambit to procedural challenges, but the Supreme Court appears to have imputed a substantive dimension to the term "fundamental justice".[14] Section 7 therefore not only protects those

---

10 See *R v Beare* [1988], 2 SCR 387, 45 CCC (3d) 57 (SCC).

11 See *Thomson Newspapers Ltd v Canada (Director of Investigation & Research, Restrictive Trade Practices Commission)* [1990], 1 SCR 425, 67 DLR (4th) 161 (SCC).

12 *Ibid*; *Stelco Inc v Canada* (Attorney-General) [1990], 1 SCR 617, 68 DLR (4th) 518 (SCC).

Liberty for purposes of section 7 does not include political liberty (freedom of expression, association or political activity) which is protected elsewhere in the Charter. It also does not include economic liberty in the sense of for example freedom of contract. It is noted that the protection of property has also been omitted from section 7 and also from the other provisions of the Charter. This supports the proposition that the section is not concerned with rights and obligations in respect of economic interests. However, Hogg (1992) 1027 points out that some of the members of the Supreme Court of Canada have called for a more expansive approach. Wilson J for one citing *Re Singh v Minister of Employment and Immigration and 6 other appeals* [1985], 1 SCR 177 205, 17 DLR (4th) 422 (SCC); *Operation Dismantle Inc v The Queen* [1985], 1 SCR 441 488, 18 DLR (4th) 481 (SCC); *R v Jones* [1986] 2 SCR 284 318 - 19 (Can); *R v Morgentaler* [1988] 1 SCR 30, 164 - 6 (Can) as authority for the proposition, has constantly argued for a broad definition of liberty that would bring economic liberty within its ambit.

13 [1985] 2 SCR 486 502ff (Can).

14 See *Reference re section 94(2) of the Motor Vehicle Act* [1985] 2 SCR 486

values already guaranteed in the criminal justice rights provided for in sections 8 to 14 of the Charter. If none of the provisions in sections 8 to 14 is understood to apply to a particular factual situation, section 7 will also be used to determine whether the law in question corresponds with the principles of fundamental justice.[15]

### 6.2.2 Appraisal

From the general discussion it appears that the structural relationship of this right with, and its effect on criminal justice rights, have been wholly settled. The utilisation of section 7 of the Canadian Charter as a generic and residual "due process right" ensures structural and conceptual similarity in the analytical process that allows for transplantation of persuasive doctrines and principles with relatively little scope for foundational confusion. The safeguards built into this conceptual structure can be easily assimilated into the analysis of constitutional criminal procedure rights.

---

(Can).

15 See for example *Thomson Newspapers Ltd v Canada (Director of Investigation & Research, Restrictive Trade Practices Commission)* [1990] 1 SCR 425 (Can) where an oral inquiry into whether a corporation had committed an offence was not found to violate either the section 11(c) protection against self-incriminating evidence or section 13's provision that self-incriminatory evidence given in one proceeding cannot be used against a witness in another. However, the Supreme Court held that section 7 could be read to include additional rights against self-incrimination. On this reading section 7 can be used to create new rights not expressly provided for in existing and applicable sections of the Charter.

## 6.3 SOUTH AFRICAN LAW

### 6.3.1 General

In terms of section 12 of the Final Constitution everyone has "the right to freedom and security of the person, which includes the right –

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trail;

(c) to be free from all forms of violence from either public or private sources;

(d) not to be tortured in any way; and

(e) not to be treated or punished in a cruel, inhuman or degrading way".[16]

---

16 The Interim Constitution provided for similar protection in section 11:

(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.

(2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhumane or degrading treatment or punishment.

Section 12(1)(a) and (b) of the Final Constitution correspond with similar protections against arbitrary arrest and detention in a number of international human rights instruments. See article 3 of the Universal Declaration of Human Rights (1948), article 9 of the International Covenant on Civil and Political Rights (1966), article 5 of the European Convention on Human Rights (1950) and article 7 of the American Convention on Human Rights (1969). See also Dinstein "Right to life, physical integrity, and liberty" in Henkin (ed) *The International Bill of Rights* (1981) 114, 128 - 136, Sieghart *The International law of human rights* (1983) 134 - 159 as cited by De Waal, Currie & Erasmus (1998) 193.

However, the question as to the interrelationship between section 12 and the criminal justice rights has created immense problems for many concerned with bail matters.

The right to freedom and security of the person played a conspicuous role in the early days of South African constitutional jurisprudence. Its predecessor[17] was considered in five Constitutional Court decisions.[18] This right proved difficult to interpret and led to disagreement between the members of the court.

In *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* Sachs J, while focusing on the rights subsumed in the expression "freedom and security of the person", pointed out some of the difficulties.[19] He held that determining the precise limits and content of these words would no doubt burden the Constitutional Court for a long time to come. He pointed out that other jurisdictions have battled with the

---

17 Section 11(1) IC.

18 See *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC); *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC); *Bernstein v Bester NO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC); *Nel v Le Roux NO* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC); *S v Coetzee* 1997 (3) SA 527 (CC), 1997 (4) BCLR 437 (CC).

19 In a separate judgment but agreeing with the order proposed by Kriegler J for the majority of the court. The constitutionality of section 65 of the Magistrates' Courts Act (32 of 1944) which provides for the enforcement of judgment debts was considered in this case. The system referred to allowed for the imprisonment of a recalcitrant debtor. In light of the substantial invasion of freedom and security that imprisonment involves, Sachs J did not think it necessary to investigate any of these complex issues. Kriegler J in addressing the question of whether the limitation of the right to freedom could be justified in terms of the limitation clause, found the absence of procedural safeguards decisive and declared imprisonment in terms of section 65 unconstitutional.

problem of whether the phrase should be construed as referring to one right with two facets, or to two distinct, if conjoined rights.[20] According to Sachs J another jurisprudentially controversial matter has been whether the words should be considered as applying only or mainly to the absence of physical constraint, or whether it should be regarded as having the widest amplitude and extend to all the rights and privileges which have long been considered fundamental.[21] Sachs J saw as even more difficult the questions relating to:[22]

- the nature of citizenship and civic responsibility in a modern industrial-administrative state;
- the degree of regulation that is appropriate in contemporary economic and social life; and
- the extent to which freedom and personal security is achieved by protecting human autonomy on the one hand and recognising human interdependence on the other.

The words of Sachs J were prophetic in that it was not long after this that the members of the Constitutional Court were engaged in a dispute on the interpretation of section 11(1) IC. Ackermann J in *Ferreira v Levin* saw the "right to freedom" in section 11(1) as the constitutional protection of a sphere of individual liberty. Read in this way, he contended that the right amounted to a presumption against the imposition of legal and other restrictions on conduct without sufficient reason: "I would, at this stage define the right to

---

20 Sachs J referred to two Canadian decisions as authority. They are *Re Singh v Minister of Employment and Immigration and 6 other appeals* (1985) 17 DLR (4th) 422 458 (SCC) and *R v Morgentaler* (1988) 44 DLR (4th) 385 493 (SCC).

21 Par 44 of the judgment.

22 *Ibid*.

freedom negatively as the right of individuals not to have 'obstacles to possible choices and activities' ... placed in their way by ... the State."[23] Ackermann J proceeded to hold that an unspecified number of residual freedom rights, guaranteeing liberties not specifically protected elsewhere in the Bill of Rights, are also protected by section 11(1). Included among these residual freedom rights was an immunity against self-incrimination in contexts where section 25(3) IC fair trial rights of accused persons did not apply.

However, Ackermann J's expansive analysis of the right was largely rejected by the majority of the court. Chaskalson P held that the primary though not necessarily the only purpose of section 11(1) was to ensure the protection of the physical liberty and physical security of the individual.[24] According to the majority it did not depend on the construction of section 11 in isolation whether "freedom" had a wider meaning but on its construction in the context of chapter 3.[25] They found chapter 3 to be an extensive charter of freedoms that guarantees and gives protection in very specific terms.[26] The detailed formulation of the rights in chapter 3 could therefore not be ignored in construing section 11. However, the majority accepted that section 11(1) had

---

23 At par 54 of the judgment.

24 Chaskalson P for the majority (with Mohamed DP, Didcott, Langa, Madala JJ and Trengove AJ concuring) argued that this was also the primary sense in which the phrase "freedom and security of the person" was used in public international law. They found nothing to suggest that the primary purpose was anything different in our law. They also found support in its contextual setting and being juxtapositioned with provisions dealing with torture and detention without trial.

25 See par 170 of the judgment.

26 See par 171 of the judgment. The abstract notion of freedom includes more than the protection of physical liberty and physical security. The wider concept of freedom is in the majority of cases protected by other specific provisions in the Bill of Rights. See Currie & Woolman in Chaskalson *et al* (1996) 39 - 16; De Waal, Currie & Erasmus (1998) 191.

a residual content and that it may, in appropriate cases, protect fundamental freedoms not enumerated elsewhere in chapter 3.[27]

The court accordingly interpreted section 11(1) IC as principally protecting the individual against arbitrary detention or imprisonment. In the process the court rejected an interpretation of the subsection as a right of the individual to be free of state interference or otherwise stated at its widest, "to be left alone". However, the possibility was left open that section 11(1) may confer a right to substantive due process in cases where some residual but fundamental freedom of the individual is violated.[28]

In *De Lange v Smuts NO*[29] the Constitutional Court read section 12(1) FC in much the same way as it read section 11(1) IC in *Ferreira v Levin*. The court indicated that the right to freedom and security of the person primarily

---

27 The finding that section 11 did not protect fundamental freedoms enumerated elsewhere in chapter 3 was apparently based on the argument that all the fundamental rights were subject to a limitation clause in section 33. It was said to be significant that section 33 differentiated between the criteria to be used when the different categories of rights are to be limited. In the case of some the limitation not only had to be "reasonable" but "necessary". This was an indication that section 11 was concerned with a freedom of "higher order" than the freedoms not subject to such an onerous test.

Apparently underlining the contention that "freedom" should be interpreted narrowly they found that it would be highly anomalous to give unenumerated rights forming a residue in section 11(1) a higher status, subject to closer scrutiny, than other important rights which were only subject to the "reasonable" test. It was furthermore contended that if freedom were to be given its broad meaning all regulatory laws of our modern society would have to be justified as being "necessary". Courts would then have to sit in judgement on essentially political issues. This could not have been the intention. See par 173 and 174 of the judgment.

28 See par 184 of the judgment. See also Currie & Woolman in Chaskalson *et al* (1996) 39 - 1.

29 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC).

protected an individual's physical integrity. The right to freedom functions as a "residual right, and may protect freedoms of a fundamental nature - especially procedural guarantees - not expressly protected elsewhere in the Bill of Rights".[30]

The Constitutional Court had therefore erected a conceptual wall between the right not to be deprived of liberty in terms of section 12 and the rights of persons once detained, arrested or accused in terms of section 35. This prevented "due process seepage" from section 12 to section 35. It follows that because the right to be released from detention has been specifically catered for in section 35(1)(f), the residual right to procedural fairness in terms of section 12 will not be activated when release from detention is adjudicated.[31]

---

30 At SA 794 par 16 and further.

31 However, this principle of the Constitutional Court of rejecting recourse to a general right contained elsewhere have often been disregarded by the courts. In dealing with section 25 rights (and therefore also section 35) the courts have at times based their arguments on the principles of liberty and due process. See for example *Moeketsi v Attorney-General, Bophuthatswana* 1996 (7) BCLR 947 (B), 1996 (1) SACR 675 (B) where the right to be tried within a reasonable time after being charged was discussed in terms of *inter alia* the right to liberty. In *S v Manyonyo* 1996 (11) BCLR 1463 (E) the right to pass through the criminal justice system within a reasonable period was discussed exclusively around the common law right of the liberty of the individual. In *Msomi v Attorney-General Natal* 1996 (8) BCLR 1109 (N) the court decided a question involving the taking of fingerprints without consent, in terms of the right against self-incrimination contained in section 25(3)(d) IC rather than in terms of section 11 IC, but relied on Canadian seepage jurisprudence relating to the principles of fundamental justice, to hold that there was no violation of the right against self-incrimination. In *S v Vilakazi* 1996 (1) SACR 425 (T) the presiding officer discussed the unlawful taking of fingerprints in the light of the presumption of innocence and the right to liberty even though there is a right against self-incrimination at trial in the Constitution.

The fact that the conceptual wall erected by *Ferreira* and *Nel* has not been respected by the courts, does not make the relationship between liberty, due process and section 35 FC any clearer.

Looking at the cases it seems that section 11 of the Interim and section 12 of the Final Constitution are not deemed broad enough to provide a general right to procedural fairness at all stages of the criminal process.[32]

However, the approach by the Constitutional Court in *S v Dlamini; S v Dladdla; S v Joubert; S v Schietekat* is of special significance.[33] Kriegler J, on behalf of the unanimous court while referring to section 35(1)(f), indicated that the "Constitution itself ... places a limitation on the liberty interest protected by s. 12".[34] As authority Kriegler J quoted the provisions of section 7(3): "The Rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, *or elsewhere in the Bill.*"[35] Later in the judgment Kriegler J held: "But it is not only trial courts that are under a statutory and *constitutional* duty to ensure that fairness prevails in judicial proceedings.[36] The command that the presiding officer ensure that justice is done applies with equal force to a bail hearing."[37]

---

32 See Klaaren in Chaskalson *et al* (1996) 25 - 1.

33 1999 (7) BCLR 771 (CC).

34 See par 6 of the judgment.

35 The italics are mine.

36 See par 99 of the judgment (the italics are mine). In footnote 145 Kriegler J added that the message in *R v Hepworth* 1928 AD 265 remained as valid as it ever was. At page 277 Curlewis J stated:

> A criminal trial is not a game where the one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.

37 Par 99 *ibid*.

It is furthermore noted that both the Director of Public Prosecutions and counsel for the defence treated section 12 as if there were no conceptual wall.[38] It therefore seems that the parties concerned, including the court, while not specifically deliberating about the interaction between sections 12 and 35, chose to ignore the prior decisions by the Constitutional Court.

### 6.3.2 Appraisal

It therefore appears that if you are an accused, procedural fairness at trial is ensured by section 35(3). If the right to a fair trial does not apply, the right to freedom provides protection if the physical liberty and security of a subject is deprived without due process of law. Physical freedom is described narrowly and is something analogous to detention. A deprivation by way of arrest or detention that is not authorised by law or that is not in compliance with law will be a clear violation of the right to freedom.[39] However, a deprivation will not comply with section 11 simply because it is authorised by law.[40] The authorisation in law may be arbitrary in the sense that it is not in accordance with fair or due process.[41] The requirements of fair process will depend on the

---

38 See page 86 of the heads of argument by the DPP and par 36 on page 33 of the judgment.

39 A principle of the rule of law is that the state's action must be lawful.

40 *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC).

41 *Nel v Le Roux NO* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC). The sections in the Criminal Procedure Act dealing with applications for bail being of specific relevance.

particular circumstances of the case.[42] However, detention by order of a court will violate where it follows extraordinary procedures, which impact unfairly on the detainee.[43]

Irrespective of the sound principles stated by the *Coetzee* and *Nel*[44] cases, there is no constitutional principle of procedural fairness in terms of section 12 at the bail hearing, because it has been excluded by the majority in *Ferreira v Levin*.[45]

However, if one bears in mind that the Bill of Rights proposes to ensure that a

---

42 *Ibid.*

43 *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC).

44 See *ibid* and footnote 41.

45 The erection of the conceptual wall by the Constitutional Court is supported by the Explanatory Memorandum to the Early Draft Bill of Rights of 9 October 1995 where it states as follows:

> Section 25 deals separately with the rights of detained (including sentenced), arrested and accused persons in the context of the right to freedom of the person (s 11) and the right to fair pre-trial and trial proceedings. This represents a departure from international instruments and foreign bills of rights, but it is an innovation which constitutes an improvement on these international and national instruments as it allows for greater clarity and certainty.

It may also be argued that section 7 of the Canadian Charter that requires procedure to adhere to the "principle of fundamental justice" can more easily be interpreted to lay down a principle of due process.

In addition even if it is decided that section 12 applies the decisions seem to indicate that the sort of "trial" that one is entitled to in terms of section 12 differs from the one in terms of section 35(3). The former lays down less rigorous requirements, or requirements less generous to the individual concerned than the latter.

government can be called upon to justify as fair the procedures it uses to mediate interactions between itself and the public, the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[46] must without a doubt be correct where it holds that there must be fair play at the bail hearing.[47]

The approach by all the parties concerned in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[48] in tearing down the wall between sections 12 and 35 is also, I submit, correct. The criminal justice process constitutes an interference with the liberty of the subject by the state starting with the framing of laws which prohibit conduct. This is followed by the arrest and detention of suspects, the process of determining guilt, the passing and enforcing of sentence, up to the restoration of the subject's liberty, either upon acquittal or the setting aside of a conviction, or after service of sentence, or on parole. It does therefore seem that the rights in section 35 of the Final Constitution must be regarded as part of, or specific instances of, the right enumerated in section 12 of the Final Constitution.[49]

In addition, the objection of the Constitutional Court in *Ferreira v Levin* as to the different criteria that have to be applied to different rights has disappeared with the new limitations clause in section 36 of the Final Constitution.[50] The

---

46 1999 (7) BCLR 771 (CC).

47 See par 99 of the judgment.

48 1999 (7) BCLR 771 (CC).

49 See also Snyckers in Chaskalson *et al* (1996) 27 - 1 and further; Du Plessis & Corder (1994) 171 where they indicate that the rights in section 25 of the Interim Constitution are either direct or indirect manifestations of the right to freedom of the person entrenched in section 11(1) or manifestations of the right to security of the person.

50 See footnote 27.

unenumerated rights would therefore not enjoy a higher status than the rights specifically protected by way of section 35 and in so doing defeat conceptual similarity in the analytical process.

Whatever the case may be, it seems that the drafters of the Final Constitution wanted to strengthen procedural fairness by expanding the procedural guarantees of the Interim Constitution. As an example, the provision ensuring access to courts now includes the right to a "fair public hearing"[51] and arrested, detained and accused persons can rely on the provision for the exclusion of evidence obtained in a manner which violates a fundamental right.[52]

It is suggested that the new "access to courts" provision in section 34 is certainly able to perform the due process seepage into section 35 that the Constitutional Court in *Ferreira* and *Nel* denied the deprivation of liberty clause.[53] Section 34 FC provides that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public

---

51 Section 34.

52 See section 35(5) FC. Also see De Waal (1997) 13 *SAJHR* 228 229.

53 This is especially so if regard is had to the interpretation of article 6 of the European Convention on Human Rights which bears a remarkable resemblance to section 34 FC. Article 6(1) is the general fair trial provision that applies to "everyone" in the determination of his civil rights and obligations or where a criminal charge is laid against him. The Convention organs have afforded this general fair trial right an "extensive and autonomous" interpretation resulting in its operation not only as a residual fair trial right, but also impounding on those aspects of a fair trial which are specifically provided for in article 6(2) and 6(3). As an example the right to be presumed innocent which is not even contained under the "minimum" inclusionary umbrella of article 6(3) is granted in isolation to everyone "charged with a criminal offence" and has been held to apply outside the sphere of criminal conviction wherever a penalty may be exacted. See *Adolf v Austria* (1982) 4 EHRR 313, *Minelli v Switzerland* (1983) 5 EHRR 554 & Snyckers in Chaskelson et al (1996) 27 - 11.

hearing before a court or, where appropriate, another independent and impartial tribunal".

The pertinent mention of "fair public hearing" in section 34 is clearer than the reference to "trial" in section 12(1)(b) of the Final Constitution and the reference to deprivation of freedom "arbitrarily or without just cause" in section 12(1)(a). Some might argue that this is an indication by and the intention of the legislator that the Constitutional Court should break down the conceptual wall that was built up in their judgments on section 11 and 12.

However, in *S v Pennington*[54] the unanimous court remarked *obiter* that section 34 FC did not apply to criminal proceedings:[55]

> The words 'any dispute' may be wide enough to include criminal proceedings, but it is not the way such proceedings are ordinarily referred to. That section 34 has no application to criminal proceedings seems to me to follow not only from the language used but also from the fact that section 35 of the Constitution deals specifically with the manner in which criminal proceedings must be conducted.

Having mentioned the two contenders it is not clear on what the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* based the constitutional duty, to ensure that fairness prevails at the bail hearing. However, I agree that there must be and is such a constitutional duty.

Perhaps the most compelling reason for the existence and acceptance of a general "principle of fundamental justice" is the fact that provision cannot be specifically made for fairness at each occurrence that might present itself in the criminal justice process. This is presumably exactly the reason why an

---

54 1997 (4) SA 1076 (CC), 1997 (10) BCLR 1413 (CC) as per Chaskalson P.

55 At par 46 of the judgment.

accused is guaranteed a fair trial apart from the specific enumerated rights in section 35(3) of the Final Constitution. This misconception by the drafters of the Bill of Rights and the Constitutional Court has been evident time and again in the instance of bail procedures.

Taking into account the close link between the presumption of innocence, the right to freedom and security in section 12, and the criminal procedure rights in section 35, it is difficult to accept otherwise than that section 12 must have a residual due process function in the Canadian fashion. As far as the protection of the liberty of someone confronted by the criminal justice system goes, section 34 therefore seems redundant. Because section 12 has its own due process function, the application of section 34 to issues of liberty alongside section 12 might even cause a dissimilarity in approach by the criminal justice system towards someone who comes into contact with that system.

## 6.4 CONCLUSION

Under Canadian law section 7 of the Charter operates as a generic and residual "due process" right and assumes the character and status thereof. This due process right operates independently and informs the interpretation of all the rights dealt with in sections 8 to 14 of the Charter. This includes the right to bail in section 11(e). If none of the provisions in sections 8 to 14 is understood to apply to particular facts, section 7 will be used to determine whether the law in question corresponds with the principles of fundamental justice.

The utilisation of section 7 as a generic and residual "due process right" ensures structural and conceptual similarity in the analytical process that would allow for transplantation of persuasive doctrines and principles with relatively little scope for foundational confusion. The safeguards built into this

conceptual structure could then be easily assimilated into an analysis of constitutional criminal procedure rights.

Although this utilisation of section 7 forms part of the Canadian "fundamental justice" jurisprudence, it seems that the Constitutional Court did not approach the situation in the same way. The Constitutional Court has erected a conceptual wall between the right not to be deprived of liberty in terms of section 12 and the rights of persons in terms of section 35 once detained, arrested or accused. This prevents "due process seepage" from section 12 to section 35. However, remarks by Kriegler J on behalf of the unanimous Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[56] may now indicate that there was a change of heart.

It therefore appears that an applicant for bail under Canadian law can rely on a residual right to procedural fairness in terms of section 7 of the Canadian Charter. Because the Constitutional Court erected a "conceptual wall" between section 12 and 35,[57] it would notwithstanding the approach by all parties in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat,* have to be accepted that an applicant for bail under South African law is not afforded similar protection.

---

56 1999 (7) BCLR 771 (CC).

57 When it specifically addressed the interaction between the liberty and criminal procedure rights.

# CHAPTER 7

# THE SCOPE OF THE RIGHT TO BAIL PROVIDED FOR BY SECTION 11(e) OF THE CANADIAN CHARTER AND SECTION 35(1)(f) OF THE FINAL CONSTITUTION

7.3.6 "subject to reasonable conditions"

7.3.6.1 General

7.3.6.2 Release on bail without or with conditions as envisaged by chapter 9 before sentence and release on bail pending appeal or review without or with conditions as envisaged by chapter 30

7.3.6.3 Juvenile may be placed in place of safety or under supervision

7.3.6.4 Release on warning

7.4 CONCLUSION

## 7.1 INTRODUCTION

Sections 11(e) of the Canadian Charter and 35(1)(f) of the Final Constitution are the primary provisions governing bail under Canadian and South African law.[1] They set the tone and parameters within which all other provisions

---

[1] These guaranties are not unique. A somewhat similar guarantee can for example be found in the eighth amendment in The American Bill of Rights, where it is provided that "excessive bail shall not be required". For a discussion of this right see LaFave and Israel (1992) 600 - 606.

However, under Canadian law this provision may be overridden by applying the "notwithstanding" clause provided for in section 33 of the Charter and the constitutions of both countries contain "amendment formulas" by which the constitutions can be changed (see also par 11.3.1). Under Canadian law section 33 of the Charter provides that "Parliament or the legislature of a province may expressly declare ... that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter". Part V (sections 38 to 49) of the Constitution Act, 1982 provides for five amending formulae. Section 38, the "general formula", which applies to an amendment of the Charter provides that an amendment may be made by proclamation issued by the Governor General under the Great Seal of Canada when authorised by resolutions of the Senate and House of Commons and the legislative assembly of at least two-thirds of the provinces that have, in the aggregate, at least fifty per cent of all the population of all the provinces. See Hogg (1992) 70 and further and 891 and Funston & Meehan (1994) 192 & 197.

Under South African law section 74 of the Final Constitution provides that the Bill of Rights may be amended by a bill passed by the National Assembly with a supporting vote of at least two thirds of its members, and the

regarding bail must function.[2]

While the Bail Reform Act under Canadian law pro-actively created a dispensation, which for the major part seems to have complied with the constitutional guarantee, a principal attack under South African law has been that certain provisions in the Criminal Procedure Act do not comply with this constitutional provision. In view of the fact that the South African legislature has watered down section 35(1)(f) to a large extent, the question also arises whether section 35(1)(f) still does justice to a constitutional guarantee to bail.

It therefore seems necessary to determine the exact scope of the right under South African law. The constitutional provision under Canadian law will furthermore be indicative of an acceptable standard of a constitutional guarantee to bail.

In this chapter the constitutional guarantees under Canadian and South African law are dissected and discussed.[3] In each component part the same issues are investigated under the respective systems. Regard will also be had to the provisions in "lesser" statutes that were designed to set the structure and serve as guidelines in each component part. In conclusion the

---

National Council of Provinces with a supporting vote of at least six provinces. Section 74 also prescribes special procedures for constitutional amendments. See also Gloppen (1997) 219.

2 Along with sections 7 of the Canadian Charter and 12 of the Final Constitution (if applied correctly) that ensure due process when "bail" is adjudicated. See chapter 6. With regard to persons under the age of 18 section 28(1)(g) additionally provides that they "may not be detained except as a measure of last resort, in which case, in addition to the right a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time ...".

3 As far as possible I stayed with the wording as provided in the constitutional guarantees. Even though the alliance between the words of the last part of the guarantee under Canadian law makes it easier to explain as a unit, the Canadian provision was dissected and discussed in the same sequence as under the comparable South African dissection, to aid comparison.

situation under Canadian law is compared with the situation under South African law.

## 7.2 CANADIAN LAW: THE SCOPE OF SECTION 11(e)

### 7.2.1. General

Section 11(e) of the Canadian Charter provides that "any person charged with an offence has the right not to be denied reasonable bail without just cause".[4] The wording of section 11(e) is very similar to section 2(f) of the Canadian Bill of Rights, which provides that a person charged with a criminal offence is not to be deprived of "the right to reasonable bail without just cause".[5]

Section 11(e) will now be dissected and each of its component parts will be

---

4 In the French version: *Tout inculpé a le droit de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable.*

5 However, this does not mean that section 2(f) of the Bill of Rights was merely adopted into the Charter, or that the constituting parties always agreed on what the guarantee to bail in the proposed Charter should provide. The provincial and federal approaches during the 1980 - 1982 drafting process differed with regards to the wording of this subsection. The 28 August 1980 draft prepared by the provinces reads as follows: "(d) not to be denied pre-trial release except on grounds provided by law and in accordance with prescribed procedures." The second federal draft during the drafting process was identical to the final version. However, after further federal-provincial discussions the 6 October 1980 Resolution placed before the Joint Committee of the Senate and House of Commons by the federal government was worded in a similar manner to the 28 August 1980 provincial draft. Section 11(e) appeared in the October 1980 version of the Charter as a watered-down section 11(d): "(d) not to be denied reasonable bail except on grounds, and in accordance with procedures, established by law." In this version there was no requirement that bail be denied only for just cause. A denial in accordance with the law (even if not for just cause) would be unreviewable. The present language of section 11(e) was included in the April 1981 version of the Canadian Charter. See Mcleod, Takach, Morton & Segal (1993) 16 - 1.

See *R v Bray* (1983), 2 CCC (3d) 325, 40 OR (2d) 766 770 (Ont CA) where the court said that the language was virtually identical and had the same meaning. For a discussion of section 2(f) see Tarnopolsky (1975) 276 - 277.

discussed.

### 7.2.2 "Any person"

In this part the meaning to be attached to the term "any person" for purposes of section 11(e) is investigated. The discussion reveals whether this aspect of section 11(e) only applies to natural persons, or whether corporations are also included.

No case could be found dealing primarily with the words "any person" as applied to section 11(e).[6] As these words are relevant for the purposes of each of the substantive rights found in section 11(a) - (i), some answers may be found in cases dealing with these other subsections. However, no Charter case could also be found interpreting these words as applied to sections 11(d), 11(g), 11(h), or 11(i).[7] In addition, the early cases seem to indicate that the interpretation of this term may vary depending on the particular subsection in issue.

However, the meaning to be attached to the term "any person" for purposes of section 11(e) becomes abundantly clear from the reasoning by the courts in interpreting the term for purposes of some of the other subsections in section 11. In *Re PPG Industries Canada Ltd and Attorney-General of Canada*[8] the British Columbia Court of Appeal discussed the meaning of the words "any person" for purposes of section 11(f). This decision is particularly relevant as the court also referred to the meaning of the words in section 11(e).

---

6 It seems fair to submit that case law dealing primarily with section 11(e) could not be found as a corporation has no interest falling within the scope of the guarantee.

7 See section 11 of the Charter in Annexure B.

8 (1983), 42 BCLR 334, 3 CCC (3d) 97, 146 DLR (3d) 261, 71 CPR (2d) 56 (BCCA).

Nemetz CJBC explained that the meaning of the word "person" must first be considered.[9] The judge had no doubt that under given circumstances that word can encompass bodies corporate. In argument it was said that if section 11(f) was read in its literal sense, "person" must include a body corporate. Still, the court agreed with the views expressed by Driedger,[10] who believed that in interpreting statutes there is no such thing as a "literal meaning". Nemetz CJBC quoted with approval from *DPP v Schildkamp*:[11]

> If the question is whether a word should be given its full unrestricted meaning or a restricted meaning, and the context dictates a restricted meaning, then the restrictive meaning is the literal meaning.

Nemetz CJBC was of the view that the context dictated a restrictive meaning be given to the word "person". In the context of section 11(f), "person" must mean a natural person, since only a natural person can be subjected to imprisonment for five years or more.[12]

The court held that it could reasonably be seen that some paragraphs of section 11 applied to a corporation while others did not. Obviously section 11(e) providing for bail is not applicable. In that context "person" means an individual and it does not include a corporation. Likewise, paragraph (c) is not applicable. The court also examined the wider category of rights under the heading "Legal Rights".[13] It noted that three modes of expression are used to open each of these sections. Sections 13 and 14 use the words "witness" or "party and witness". Sections 7, 8, 9, 10 and 12 use the word "everyone" and only section 11 uses the words "any person".

---

9 3 CCC (3d) 97 103.

10 (1981) 59 *CBR* 780.

11 [1971] AC 1 (HL).

12 See also *The Pharmaceutical Society v The London and Provincial Supply Association Ltd* [1880] 5 AC 857 862 (HL).

13 Sections 7 - 14.

The court concluded that if the specificity of the opening word or words in sections 13 and 14 is left aside, it is significant that in every other section save section 11, the word "everyone" is used. The word "everyone" is ordinarily defined as meaning "everybody". If it were used in section 11 one might be able to argue that "everyone" was a universal term which included a corporation. However, the words used are "any person". Why, it was asked, did the draughtsman change from using the word "everyone" to using the words "any person"? It can be seen that in setting out "mobility rights"[14] the draughtsman used the word "every citizen". Manifestly, that is a restriction when juxtaposed with the word "everyone". Likewise, under section 15 the words "every individual" appear to have a narrower meaning than "everyone". Looking at the entire Charter, Nemetz CJBC came to the conclusion that it was intended that the words "any person" have a more restricted meaning than the word "everyone". He held that the restriction together with the plain reading of section 11(f), lead to the conclusion that the benefit of a trial by jury is not the right of "everyone" but only of natural persons who are charged with an offence attracting imprisonment of five years or more severe punishment.

Seaton JA, although dissenting, agreed with the Crown that paragraphs (c) and (e) could not be applicable to a corporation but added that it did not follow that the words "any person charged with an offence" did not include corporations.[15] In his opinion it did but in the case of paragraphs (c) and (e) one deals with rights that are not applicable to a corporation because they cannot be enjoyed by a corporation. They are rights that everyone has but which a corporation does not need.

In *R v CIP Inc*[16] the Supreme Court of Canada interpreted these words for

---

14 Section 6.

15 At 108.

16 (1992), 12 CR (4th) 237, 71 CCC (3d) 129, 135 NR 90 (SCC).

purposes of section 11(b). In this case the respondent contended that because of its corporate status the appellant had very limited recourse to the Charter. In support of its position the respondent referred to the decision of *Irwin Toy Ltd v Quebec (Attorney-General)*[17] where a corporation was precluded from asserting an infringement upon the right to life, liberty and security in terms of section 7 in the absence of penal proceedings.

Stevenson J on behalf of the unanimous court held that the respondent's argument on this issue overlooked the generally accepted contextual and purposive approach to charter analysis.[18] The judge pointed out that it was not the absence of penal proceedings *per se* in *Irwin Toy Ltd* that precluded the respondent corporation from invoking section 7. Rather, the court focused on the language of the right in combination with the nature of the specific interests embodied therein, and concluded that in that context, section 7 could not logically apply to corporate entities. Stevenson J did not see that decision as ruling out the possibility of corporations asserting other guarantees. On the contrary, he contended, *Irwin Toy Ltd* went only so far as to establish an appropriate and practical framework. Whether or not a corporate entity can invoke a Charter right will depend upon whether it can establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision.[19]

The second argument put forward by the respondent in *R v CIP Inc*[20] was

---

17 [1989], 1 SCR, 927; 94NR 167; 24 QAC 2, 58 DLR (4th) 577 (SCC).

18 135 NR 90 98 - 108.

19 In an earlier decision the Supreme Court in *R v Amway Corp* [1989], 1 SCR 21, 91 NR 18, 56 DLR (4th) 309 (SCC) applied the same approach. The court held that a corporation cannot be a witness and therefore cannot come within the scope of section 11(c) of the Charter. Sopinka J on behalf of the court at 40 SCR applied a purposive interpretation and stated that section 11(c) was intended to protect the individual against the attack on his dignity and privacy. It afforded protection against a practice which enabled the prosecution to force the person charged to testify personally.

20 (1992), 12 CR (4th) 237, 71 CCC (3d) 129, 135 NR 90 (SCC).

based on the connection between section 7 and sections 8 through 14 of the Charter. Relying on *Reference re section 94(2) of the Motor Vehicle Act*[21] the respondent proposed that section 11(b) was simply illustrative of a specific section 7 deprivation, and contended that the scope of the right could therefore be no greater than that of the section 7 guarantee. If a corporation therefore cannot rely upon section 7 pursuant to *Irwin Toy Ltd* it stands to reason that it cannot invoke section 11(b) either.

The court agreed that it was the view of Lamer J in *Motor Vehicle Act* that it would be incongruent to interpret section 7 more narrowly than the rights in sections 8 to 14 of the Charter.[22] Lamer J saw the latter rights as examples of instances in which the right to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice.[23]

However, the court in *R v CIP Inc* held that the concern over incongruity related to the scope of the principles of fundamental justice, not to that of life, liberty and security of the person. The court found that the deprivation of life, liberty or security of a person was not a prerequisite to relying upon the protection afforded by sections 8 to 14. Section 7 it was said did not define the scope of the rights contained in the provisions that follow it. An example is the right of the witness to the assistance of an interpreter as provided for in section 14. On this argument it is therefore not inconsistent with *Motor Vehicle Act* to hold that section 11(b) can encompass interests in addition to those that have been recognised as falling within section 7.

The term "any person" can therefore include corporations. However, this depends on the legal nature and purpose of the right. Because a corporation

---

21 [1985], 2 SCR 486; 63 NR 266; (1986) 1 WWR 481; 24 DLR (4th) 536; 23 CCC (3d) 289; 48 CR (3d) 289; 36 MVR 240; 69 BCLR 145; 18 CRR 30 (SCC).

22 At 502 SCR.

23 *Ibid.*

cannot be detained, it has no interest falling within the scope of the right to bail. For the purposes of section 11(e) the term therefore only applies to natural persons.

### 7.2.3 "charged with an offence"

This part reveals the circumstances under which a natural person is entitled to the right set out in section 11(e). The phrase under discussion contains two separate qualifying concepts, that is, "charged" and "with an offence". These concepts are discussed separately.

#### 7.2.3.1 "charged"

In this paragraph I indicate when one becomes "charged" with an offence, and when a person ceases to be "charged". The term "charged" has been the focus of a number of decisions dealing with different rights in section 11 of the Charter. Because it is submitted that the term "charged" must have a constant meaning when used in relation to any of the paragraphs found in section 11, these cases will be considered.

The Supreme Court of Canada in *R v Chabot*,[24] in noting that the word "charged" was not defined in the Criminal Code,[25] quoted the following dictum by Idington J in *Re The Criminal Code, Re The Lord's Day Act*[26] who considered a section in the 1907 Criminal Amendment Act:[27]

> [The section] deals only with the case of the trial of any person charged with a criminal offence. How charged? Is it confined to those who have been judicially so charged, by virtue of the provisions of the law for

---

24 (1980), 18 CR (3d) 258, 22 CR (3d) 350 (Fr), 55 CCC (2d) 385, (1980) 2 SCR 985, 117 DLR (3d) 527, 34 NR 361 (SCC) at 399 - 401 (CCC).

25 Per Dickson J.

26 (1910), 16 CCC 459, 43 SCR 434 (SCC).

27 Section 873A of the Criminal Code Amendment Act, 1907 (IK), c 8.

> committing the accused for trial? How can it mean aught else? The word 'charged' is the apt one to designate a person accused and in charge. Doubtless it has another meaning, but it may well be argued that it is in this restricted sense that the Act applies it.

The Supreme Court also quoted the words of Field J in the decision in *R v D' Eyncourt and Ryan*:[28]

> I am of the opinion that word 'charged' (in the Metropolitan Police Courts Act 1839, s. 29 (repealed; see now Police (Property) Act 1897, s. I(1) must be read in its known legal sense, namely, the solemn act of calling before a magistrate an accused person and stating, in his hearing, in order that he may defend himself, what is the accusation against him.

Reference was also made to the decision in *Stirland v Director of Public Prosecutions*,[29] where it was held that "charged" for the purposes of the Criminal Evidence Act,[30] meant accused before a court.

The court furthermore referred to *Arnell v Harris*,[31] where "Person charged" was accepted as meaning at least accused of some felony or misdemeanour.

The court also consulted the dictionaries. According to the court the fifth edition of *Black's Law Dictionary* defines "charged", for the purposes of the criminal law, as an "Accusation of a crime by a formal complaint, information, or indictment".[32] In *Jowitt's Dictionary of English Law*, the word is given the meaning, among others, "to prefer an accusation against anyone".[33]

---

28 (1888) 21 QBD 109 119.

29 [1944] AC 315 (HL).

30 1898 (IK), c 36, section 1(f).

31 (1945) KB 60, [1944] 2 All ER 522 (KBD).

32 This seems to be slightly misquoted. Black (1979) 212 does not require the complaint to be formal.

33 (1977) 321.

In the same case the Crown contended that when section 463 of the Code speaks of an inquiry into "that charge", reference is made to the formal written charge. When the section speaks of "any other charge against that person", the word "charged" takes on another meaning namely, any other allegation which arises during the course of the inquiry. This allegation may arise out of the evidence and need not be in existence at the outset of the inquiry. The court responded by accepting that occasionally it may be necessary to give a word a somewhat different meaning in different parts of an enactment. However, the court found it strange to give a word different meanings in the same section of an enactment, and indeed in the same line of a section.

The court seemingly with approval referred to the decision of the Supreme Court of the United States in *United States v Patterson*.[34] This case indicated that a criminal charge, in its strict sense, only existed when a formal written complaint had been made against the accused, and a prosecution had been initiated. A person is only charged with crime in the eyes of the law when he is called upon in a legal proceeding to answer to such charge.

Dickson J accepted this definition of "charged" and indicated that he would follow it.[35]

After this decision some "lesser" courts came to their own conclusions before the Supreme Court again had the opportunity consider the situation.

In *R v Baldinelli*[36] Wallace Prov J referred to the wording of section 11(a) and

---

34 150 US 65 68 (1893).

35 Although the court referred to the US decision it does seem that the court did not find it necessary that the person had to be called upon to answer the allegations, before a person was "charged."

36 (1982) 70 CCC (2d) 474 475 - 477 (Ont Prov Ct).

reiterated that it is only when a person has been "charged with an offence" that he has the right to certain information. The justice pointed out that section 11(a) does not use the words "suspected of an offence" nor "accused of an offence," but "charged with an offence".

As to when proceedings begin, Wallace Prov J referred to part XXIV of the Criminal Code[37] where it deals with summary convictions. Section 723(1) provides that proceedings under that part shall be commenced by laying an information in form 2.

In the case of *The King v Wells*[38] Carleton Co Ct J said that a complaint or information was "the beginning and foundation of summary proceedings". A justice cannot legally act without it, except in cases where a statute empowers him to convict on view.

In *Re McCutcheon and City of Toronto*[39] Linden J was of the view that no charge came into existence against the applicant at the time of the issuance of the parking ticket, nor at the time of the issuance of the notice of summons. The court explained that the two documents were only preliminary administrative steps that may lead to a charge, and were not charges themselves, contrary to the impression that may be imparted by these documents.

In *R v Heit*[40] the accused was charged with unlawfully passing a stationary school bus under sections 153(1) and 253 of the Vehicles Act.[41]

---

37 RSC 1970, c C - 34.

38 (1909), 15 CCC 218 222 (NB Co Ct).

39 (1983), 41 OR (2d) 652, 20 MVR 267, 22 MVLR 139, 147 DLR (3d) 193 (Ont HCJ). At (OR) 664 - 665, (MVR) 280 - 281.

40 11 CCC (3d) 97, 28 MVR 46, (1984) 3 WWR 614, 7 DLR (4th) 656, 31 (Sask R) 126 (Sask CA).

41 RSS 1978, c V - 3.

Approximately one month after the date of the offence the accused was first notified of the offence by summons. The court on appeal agreed with the contention of the Crown that section 11(a) of the Charter had no application to the period before a person is charged with an offence.[42] The court held that the normal meaning of the statutory provision makes it clear that the right attaches only when a person is "charged with an offence". On face value, the protection of this section is activated only when this step has taken place and affords no protection to a person not yet charged. The words "charged with an offence" cannot be equated with "when the authorities are or may be in a position to commence proceedings". Nor do the words mean "or to be charged with an offence". The provision is not intended to prevent prejudice to an accused person caused by the passage of time before he is charged with an offence for that interest is protected by other provisions in the Charter and by statutory limitation periods.

The court furthermore held that the phrase "charged with an offence" modified the term "any person". The phrase "any person charged with an offence" must have a constant meaning when used in relation to subparagraphs (a) to (i) of section 11. It cannot, for example, have one meaning when used in relation to subparagraph (a) and a different meaning when used in relation to subparagraph (e). The court concluded that any meaning ascribed to the phrase must harmonise with each of these subparagraphs.[43] To ascribe to the phrase the meaning "or to be charged with an offence" would be redundant when used in relation with section 11(e).

The court held that a person to be charged is simply in no need of bail. This is so because prior to the charge, the liberty of the individual will not be subject to restraint nor will he or she stand accused before the community

---

42 By way of Tallis JA at (CCC) 99 - 102, (MVR) 50 - 53, (WWR) 617 - 620, (DLR) 659 - 661, (Sask R) 129 - 131.

43 It has already been noted that the interpretation of "any person" may vary depending on the subsection in issue.

of committing a crime. Therefore, those aspects of the liberty and security of a person which are protected by section 11(e) (as opposed to those other aspects of the liberty and security of the person which are protected through section 7 and section 11(d)) will not be placed in jeopardy prior to the institution of judicial proceedings against the individual.[44]

In *Re Garton and Whelan*[45] Evans CJHC held that section 11(b) of the Charter extended its protection to a person who has been "charged" with an offence. He accepted the definition given by Ewaschuk J in *R v Boron*[46] in the context of section 11(b):[47] "the word 'charged' in s. 11 of the Charter refers to the laying of an information, or the preferment of a direct indictment where no information has been laid."

The court found this interpretation consistent with the Supreme Court of Canada's analysis of the word "charged" in *R v Chabot*,[48] and with the judgment of the Ontario Court of Appeal in *R v Antoine*.[49]

---

44 See also *British Columbia (Attorney-General) v Craig*, 52 CR (3d) 100, (1986) 4 WWR 673 (SCC).

45 (1984), 14 CCC (3d) 449, 47 OR (2d) 672 (HC) at (CCC) 461 - 463, (OR) 685 - 690 (Ont HCJ).

46 (1983), 43 OR (2d) 623, 36 CR (3d) 329, 8 CCC (3d) 25, 3 DLR (4th) 238, 6 CRR 215 (Ont HCJ).

47 *Ibid* 628 OR, 31 CCC.

48 [1980], 2 SCR 985, 55 CCC (2d) 385, 117 DLR (3d) 527 (SCC).

49 (1983), 41 OR (2d) 607, 5 CCC (3d) 97, 148 DLR (3d) 149 (Ont CA).

In view of the *stare decicis* principle it surprises that some lower courts took a somewhat different view of the term "charged" with respect to section 11 of the Charter. In *R v Perrault*, (Ont Dist Ct), July 24, 1985 (unreported) as cited by Mcleod, Takach, Morton & Segal (1993) 12 - 14 the accused was arrested on a charge of theft and was questioned by the police. It would appear that he gave a statement of an exculpatory nature. At that time the accused was told by the police that he was charged with theft.

Gratton DCJ at 4 stated:

I submit that the question at hand was decisively dealt with by the Supreme Court in *R v Kalanj* per McIntyre J.[50]

McIntyre J, turning to the main issue on the appeals, said that section 11(b) of the Charter provided that "Any person charged with an offence has the right ... to be tried within a reasonable time".[51] This section, he observed, refers to only those persons who are "charged with an offence". The court then proceeded to answer the question: "When is a person 'charged with an offence' within the meaning of section 11(b)?"

The court initially seemed to indicate that the word "charged" or "charge" is of a varying and not of a fixed meaning at law. It could describe a variety of events and is used in a variety of ways. A person is clearly "charged with an offence", it was said, when a charge is read out to him in court and he is

---

> It seems rather incongruous for the prosecution to take the position that s. 11(b) does not apply simply because technically the accused had not been charged by the process of laying of information or the preferment of an indictment, when it is otherwise clear that the accused was told at the time of his arrest that he was charged with theft that it was for that reason that he was being held in custody. By their conduct the police officers have lead this accused to believe that he was in fact charged at the time of his arrest. I feel compelled to adopt the approach of Muldoon, J in Gaw and I accordingly conclude that the effective date was when the accused was first arrested.

Similarly in *Primeau v R* (Sask QB), September 24, 1982 (unreported) as cited by Mcleod, Takach, Morton & Segal (1993) 11 - 7 it was accepted by the court that the accused was "charged" for the purposes of section 11 when he was informed by his wife that she had laid a charge of common assault against him. In this case the accused on at least five occasions contacted the police to see if there was a charge against him. On each occasion he was advised that there was no charge. Numerous summonses were issued but none were served. The police knew where the accused could be located. Thirteen months lapsed between the swearing of the information and the eventual service of a summons.

50 70 CR (3d) 260, 48 CCC (3d) 459, [1989] 1 SCR 1594, (1989) 6 WWR 577, 96 NR 191 (SCC).

51 At (CR) 267 - 275, (CCC) 465 - 472, (WWR) 583 - 591.

called upon to plead.[52]

McIntyre J proceeded to indicate that in a general or popular sense a person could be considered to be "charged with an offence" when informed by one in authority that "You will be summoned to Court". Or upon an arrest when, in answer to a demand to know what all this is about, an officer replies "You are arrested for murder". The popular mind may on many other occasions assume to be "charged". The court supported this view by referring to Mewett,[53] who indicated that the word "charged" had no precise meaning at law but merely means that steps are being taken which in the normal course will lead to a criminal prosecution. Still the court saw it as its duty to develop the meaning of the word, as used in section 11 of the Charter despite the imprecision of the word "charged" or the phrase "a person charged".

Referring to opinions to the contrary and other judgments by the Supreme Court, the justice concluded that it could not be agreed that the word "charged" had a flexible meaning varying with the circumstances of the case. It was held that a person is "charged with an offence" within the meaning of section 11 of the Charter when an information is sworn alleging an offence against him, or where a direct indictment is laid against him when no information is sworn.

This construction in *R v Kalanj* is supported by the wording of the Charter and a consideration of its organisation and structure. Section 11 is one of eight sections grouped under the heading "Legal rights". Section 7 guarantees the general "right to life, liberty and security of a person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". This section applies at all stages of the investigatory

---

52 As authority the court referred to *R v Chabot* [1980], 2 SCR 985, 55 CCC (2d) 385, 117 DLR (3d) 527 (SCC) and the cases sited therein.

53 (1988) *An introduction to the criminal process in Canada* as cited by the court.

and judicial process. Sections 8 and 9 afford guarantees of rights of particular importance in the investigatory or pre-charged stage, as does section 10, which deals with rights upon arrest. Section 11 deals with a later stage of the proceedings, that is, when judicial proceedings are instituted by a charge. Sections 12 and 13 deal with matters which follow the trial, and section 14 again refers to matters during trial.

In dealing with section 11 it must first be noted that it is limited in its terms to a special group of persons, those "charged with an offence". It deals primarily with matters regarding trial. Section 11 is distinct from section 10 and serves a different purpose. The two sections must not be equated. The framers of the Charter made a clear distinction between the rights guaranteed to a person arrested and those of a person upon charge. Sections 8 and 9, as well, guarantee essential rights ordinarily of significance in the investigatory period, separate and distinct from those covered in section 11. It has been said that the purpose of section 11 should be considered in deciding upon the extent of its application. This purpose it has been said, is to afford protection for the liberty and security interests of persons accused of crime. While it is true that section 11 operates for this purpose, it does so within its own sphere. It is not, nor was it intended to be, the sole guarantor and protector of such rights. As stated above, section 7 affords broad protection for liberty and security, while the other sections, particularly those dealing with legal rights, apply to protect those rights in certain stated circumstances. Section 11 affords its protection after the accused is charged with an offence. The specific language of section 11 should not be ignored, and the meaning of the word "charged" should not be twisted in an attempt to extend the operation of the section into the pre-charged period. The purpose of section 11 is concerned with the period between the laying of the charge and the conclusion of the trial and it provides that the person charged with an offence has a right to bail.

That raises the question as to when a trial is concluded. In *R v Gingras*[54] the majority granted bail to the applicant pending appeal notwithstanding the absence of a statutory equivalent to section 608 of the Criminal Code.[55] The court found it unnecessary to invoke section 11(e) of the Charter in arriving at this determination. Marceau J (in dissent) dealing with the applicability of section 11(e) did not consider the argument that was attempted to be made from section 11(e) of the Charter to be of any validity.[56] He was of the view that the section could not be interpreted as giving a person found guilty of an indictable offence, and who has been lawfully and properly sentenced to a term of imprisonment, the right to be released on bail pending the disposition of an appeal from his conviction. Implicit authority to suspend execution of the sentence, and to release the convicted person on bail or otherwise, can therefore not be derived directly from the Charter by the court hearing the appeal as if this were merely giving effect to a fundamental right to which every citizen is entitled.

In *Re Hinds and the Queen*[57] a member of the military forces was convicted by a standing court martial established under the National Defence Act of Canada[58] on a charge of possession of cannabis resin for the purpose of trafficking, in contravention of the Narcotic Control Act.[59] The decision was appealed and an application was brought for his release pursuant to section 24 of the Canadian Charter. The Superior Court of British Columbia granted bail pending an appeal even though the National Defence Act contained no provision for bail.[60]

---

54 (1982) 70 CCC (2d) 27 (Ct Martial App Ct).

55 [1970] (re - en RSC 1970, c 2 (2nd Supp), section 12).

56 At 32.

57 (1983) 4 CCC 322 (BCSC) per Ruttan J (National Defence Act, RSC 1970, c N - 4).

58 RSC 1970, c N - 4.

59 RSC 1970, c N - 1.

60 Section 11(e) of the Charter guarantees the right to bail even where the

It was submitted on behalf of the state by that section 11 could not apply here because it commenced with the phrase any person "charged" with an offence. It could therefore not govern the present applicant who did not have the status of being charged, but had been convicted.

Ruttan J thought it too narrow an interpretation to define section 11 as applying only to persons "charged", that is, in custody pending trial prior to conviction or dismissal: [61]

> I find that 'charged' under s. 11 includes in its definition the status of an accused person throughout the period of his involvement in the offence until the final determination of any appeal procedures and until he is ultimately punished or dismissed. He remains 'charged' until the final determination of his case, and the ambit of s. 11 is not limited to the point where he is first committed for trial. Thus s. 11(h) and (i) extend to cover the accused until he is 'finally acquitted', or 'found guilty of the offence'.

Ruttan J followed the decision of Tailor J in *R v Lee*[62] and found the right to grant bail under section 11(e) to be within the jurisdiction of the Supreme Court of British Columbia. Ruttan J, pointing to *R v Lee,* said that he realised that the accused in that case was under charge and not yet convicted. He also realised that the bail order had been granted but was defective and could not be corrected under the Criminal Code. However, he said it was held that it was appropriate to grant relief under section 24 of the Charter "as the only relief available". The court found that section 608 of the Criminal Code could similarly not be invoked in this case, and the only other statutory relief available was under section 11(e) of the Charter.

---

statute governing the offence does not provide for bail.

61 At (CCC) 325 - 326, (DLR) 733 - 734 and further.

62 (1982) 69 CCC (2d) 190 (BCSC).

> In this case it was held that on the particular facts the existing order constituted a denial of rights to reasonable bail guaranteed by section 11(e) of the Canadian Charter. It was also found that the Supreme Court had jurisdiction under section 24(1) of the Charter to grant the appropriate remedy by varying the bail order.

It is submitted that the Ontario High Court got it right in *Ontario (Attorney-General) v Perozzi*.[63] McRae J reiterated that once a person has already been convicted he is not, to use the words of the Charter, "a person charged with an offence".[64]

It therefore seems that one is charged with an offence when an information is sworn alleging an offence against him, or where a direct indictment is laid against him when no information is sworn. As to when one ceases to be charged, the Supreme Court has indicated that section 11 is concerned with the period between the laying of the charge and the conclusion of the trial. It is not clear whether the Supreme Court saw the conclusion of the trial as the final determination of all procedures, or the conviction or acquittal of the accused. "Lesser" court decisions seem to favour both viewpoints.

7.2.3.2 "with an offence"

This part deals with the question whether the protection afforded by section 11(e) is limited to the ordinary criminal process or whether the section also provides wider protection. While there seems to be agreement that true criminal proceedings attract the protection of section 11, it has not always been clear what other proceedings attract this protection. It has also been asked what constitutes true criminal proceedings.

The heading "Proceedings in criminal and penal matters", under which section 11 appears in the Charter, seems to indicate that it also applies to

---

63 Ont HC, July 22, 1986 (unreported) at pages 2 - 3 as cited by Mcleod, Takach, Morton & Segal (1993) 13 - 8.

64 The latter view is in line with the accepted view on the interrelationship between and structure of the presumption of innocence and sections 7 and 11(e) of the Charter. See also par 5.2.2.1. As a general rule section 11 rights are not applicable as soon as a finding has been made in a case.

matters where penalties can be incurred.

In *Re Law Society of Manitoba and Savino*[65] the Manitoba Court of Appeal indicated, per Monnin CJM,[66] that section 11 spoke of a person charged with an offence.[67] He indicated that the nine sections dealt with criminal matters including:

- the right to be informed without delay of the offence;
- to be tried within a reasonable time;
- to be presumed innocent until found guilty;
- to be charged by jury in certain cases; and
- not to be tried again for the same offence.

Monnin CJM was far from convinced that section 11(d) had any implication to a professional body conducting an investigation into the conduct of one of its members. The main purpose of section 11(d) was seen to deal with matters involving criminal offences.

The court accepted that section 11 was primarily meant to cover crimes or quasi-crimes whether under federal or provincial legislation. Even though professional misconduct,[68] was subject to a fine, suspension or even disbarment, it was not of a criminal nature.

In *Re Malartic Hygrade Gold Mines (Canada) Ltd and Ontario Securities Commission*[69] Griffiths J indicated that the Supreme Courts of Manitoba,

---

65 (1983), 6 WWR 538, 1 DLR (4th) 285, 23 Man R (2d) 293 (Man CA).

66 With whom Huband JA concurred in respect of this point.

67 At (WWR) 545 - 546, (DLR) 292 - 293, (Man R) 298.

68 It was described by the court as "conduct which would be reasonably regarded as disgraceful, dishonourable or unbecoming of a member of the profession by his well-respected brethren in the group - persons of integrity and good reputation amongst the membership".

69 (1986), 54 OR (2d) 544, 19 Admin LR 21, 24 CRR 1, 27 DLR (4th) 112, 15

Quebec and British Columbia, and the Manitoba Court of Appeal, have all held that professional bodies dealing in disciplinary matters regarding its members, are not governed by section 11 of the Charter.[70] The court held that the common reasoning in those cases were that section 11 applied to persons charged with "offences", that is, with crimes or quasi-crimes where criminal sanctions are to be imposed. The fact that in "another aspect", and in another context, the alleged misconduct may be a criminal offence, does not convert the proceedings before the disciplinary body into a penal prosecution so as to make section 11 of the Charter applicable.[71]

In *Re Barry and Alberta Securities Commission*[72] the Alberta Court of Appeal had to decide whether section 11 of the Charter applied to a hearing before the Securities Commission. Under the Alberta statute which contained a scheme similar to that of Ontario, the Alberta Securities Commission proposed to conduct a hearing to determine whether the appellants were parties to a misleading statement contained in a prospectus. The appellants held that in terms of section 11(d) of the Charter they had the right to be heard before an independent tribunal. The appellants contended that because the commission staff under the direction of the chairman of the commission recommended that proceedings be taken, the commission was not independent. The Alberta Court of Appeal held that section 11(d) of the Charter did not apply. Stevenson J delivering the reasons of the court indicated that he did not understand section 11 as impacting upon all proceedings arising out of prohibited conduct, but only upon those in which

---

OAC 124, 9 OSCB 2286 (Ont Div Ct).

70 At (OR) 548 - 549, (Admin LR) 26 - 28, (DLR) 116 - 117.

71 See also *Re Rosenbaum and Law Society of Manitoba* (1983), 150 DLR (3d) 352, 6 CCC (3d) 472, (1983) 5 WWR 752 (Man QB); *Re Law Society of Manitoba and Savino* (1983), 1 DLR (4th) 285, (1983) 6 WWR 538, 23 Man R (2d) 293 (Man CA); *Re James and Law Society of British Columbia* (1983) 143 DLR (3d) 379 (BCSC); *Belhumeur v Discipline Committee of Quebec Bar Ass'n and Quebec Bar Ass's* (1983) 34 CR (3d) 279 283 - 284 (Que SC).

72 (1986) 25 DLR (4th) 730.

the sanctions can be characterised as criminal or quasi-criminal, as distinct from protective.[73] Where the public is protected by the imposition of disqualifications as part of a scheme for regulating an activity, the proceedings to determine qualifications for a licence cannot be characterised as criminal or quasi-criminal.

Counsel for the appellants contended that the characteristics of the punishment had to be analysed.[74] It was further argued that stigmatisation was present, and that there could be a loss of rights that others would enjoy. The court pointed out that although McDonald J in *R v TR (No 2)* found stigmatisation and loss of rights to be ingredient characteristics of punishment, he did not say that because some legislatively authorised sanction may be characterised as a punishment, proceedings imposing that sanction are now proceedings in relation to an "offence".

The court also explained that the object of both the hearing and the "remedies" available was protective even though the result may seem punitive. The court did not hesitate to distinguish the proceedings from criminal or quasi-criminal proceedings where public protection is but one object. Section 11 therefore found no application.

In *Wigglesworth v The Queen*[75] the Supreme Court of Canada, by way of Wilson J for the majority, reviewed a number of conflicting authorities on the interpretation of the opening words in section 11.[76] Wilson J found

---

73 *Ibid* 736.

74 As authority they referred to the judgment by McDonald J in *R v TR (No 2)* (1984), 7 DLR (4th) 263, 11 CCC (3d) 49, 30 Alta LR (2d) 241 (Alta QB).

75 60 CR (3d) 193, 37 CCC (3d) 385, [1987] 2 SCR 541, (1988) 1 WWR 193, 28 Admin. LR 294, 61 Sask R 105, 24 OAC 321, 45 DLR (4th) 235, 32 CRR 219, 81 NR 161 (SCC).

76 This judgment was accepted by the Supreme Court in *R v Généreux* (1992), 70 CCC (3d) 1, 8 CRR (2d) 89, 88 DLR (4th) 110, 133 NR 241 (SCC). Lamer CJ for the majority on the same reasoning found that section 11(d) of the Charter does apply to the proceedings of a Court Martial. The Chief

favour in the narrower interpretation afforded to section 11 by the majority of the authorities. He found the rights guaranteed by section 11 of the Charter to be available to persons prosecuted by the state for public offences involving punitive sanctions, that is, criminal, quasi-criminal and regulatory offences, either federally or provincially enacted.[77]

The court indicated that the kind of matter which fell within the scope of section 11 was of a public nature, and that it intended to promote public order and welfare within a public sphere of activity. It falls within the section because of its very nature. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and

---

Justice indicated that a General Court Martial attracted the application of section 11 of the Charter for both the reasons suggested by Wilson J in *Wigglesworth*. The court found that although the Code of Service Discipline was primarily concerned with the maintenance of discipline and integrity in the Canadian armed forces it did not serve merely to regulate conduct that undermines such discipline and integrity. The Code served a public function as well, by punishing specific conduct, which affected the public order and welfare. Many of the offences with which an accused may be charged under the Code of Service Discipline, relate to matters which are of a public nature. (Parts IV to IX of the National Defence Act, (RSC) 1970, c N - 4. Sections 9, 10 and 12 (am 1985, c 26, section 65).) As an example any act or omission that is punishable under the Criminal Code or any other Act of Parliament is also an offence under the Code of Service Discipline. The court pointed out that three of the charges laid against the appellant related to conduct prescribed by the Narcotic Control Act (RSC 1970, c N - 1, section 4(2) now RSC 1985 c N - 1). According to the court, service tribunals therefore serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct in circumstances where the offence is committed by a member of the military or other persons subject to the Code of Service Discipline. In terms of sections 66 and 71 of the National Defence Act an accused who has been tried by a service tribunal cannot also be charged by an ordinary criminal court. For these reasons the court found that the appellant who is charged with offences under the Code of Service Discipline and is subject to the jurisdiction of a General Court Martial, may invoke the protection of section 11 of the Charter. In any event the court found that the appellant faced a possible penalty of imprisonment even if the matter dealt with was not of a public nature. Therefore section 11 of the Charter would nonetheless apply by virtue of the potential imposition of true penal consequences.

77 At (CR) 206, (CCC) 397, (WWR) 206.

professional standards or to regulate conduct within a limited private sphere of activity.[78] The court found a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity, and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which section 11 applies. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which section 11 applies. The kind of offences to which section 11 was intended to apply are all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation.

However, the court indicated that a person charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline or integrity, or to regulate conduct within a limited private sphere of activity, may possess the rights guaranteed under section 11. This was so not because these matters are the classic kind intended to fall within the section, but because they involve the imposition of true penal consequences. The court held that a true penal consequence would be imprisonment or a fine which by its magnitude would appear to be rather imposed for the purpose of redressing the wrong done to society at large, than to the maintain internal discipline within the limited sphere of activity.

The court proceeded to comment on an explication by Stuart of *Wigglesworth v The Queen.*[79] Stuart opined that other punitive forms of

---

78 As authority the judge referred to *Re Law Society of Manitoba and Savino* (1987), 6 WWR 538, 1 DLR (4th) 285,23 Man R (2d) 293 (Man CA) at DLR 292; *Re Malartic Hygrade Gold Mines (Canada) Ltd and Ontario Securities Commission* (1986), 54 OR (2d) 544 549,19 Admin LR 21, 9 OSCB 2286, 27 DLR (4th) 112,24 CRR 1, 15 OAC 124 (Ont Div Ct); and *Re Barry and Alberta Securities Commission* (1986), 25 DLR (4th) 730 736, per Stevenson JA, 24 CRR 9, 67 AR 222 (Alta CA).

79 "Annotation to R v Wigglesworth" (1984) 38 CR (3d) 388 389 as cited by

disciplinary measures, such as fines or imprisonment, were indistinguishable from criminal punishment and accordingly these measures should fall within the protection of section 11(h).

The court agreed with this comment, but with two cautions. In the first instance, the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity, and therefore may not attract the application of section 11. It was the view of the court that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under section 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. One indication of the purpose of a particular fine is how the body is to dispose of the fines that it collects. If the fines are not to form part of the Consolidated Revenue Fund, but are to be used for the benefit of the force as in the case of proceedings under the Royal Canadian Mounted Police Act, it is more likely that the fines are purely an internal or private matter of discipline.[80]

In the second instance the court cautioned that it was difficult to conceive of the possibility of a particular proceeding failing what the court called the "by nature" test but passing what the court called the "true penal consequence" test. The court had serious doubts whether any body or official that existed in order to achieve some administrative or private disciplinary purpose could ever imprison an individual. The court thought that such a serious deprivation of liberty would only be justified when a public wrong or transgression against society, as opposed to an internal wrong, has been committed. However, as this point was not argued the court assumed that it was possible that the "by nature" test can be failed but the "true penal consequence" test passed. The court indicated that in cases

---

the court.

80 Royal Canadian Mounted Police Act, section 45 [RSC 1970, c R - 9]

where the two tests are in conflict the "by nature" test must yield to the "true penal consequence" test. Where an individual is to be subject to penal consequences such as imprisonment, which was the most severe deprivation of liberty known under Canadian law, that person was entitled to the highest procedural protection.[81]

The court found that the proceedings before the RCMP service court therefore failed what it called the "by nature" test.[82] The proceedings are neither criminal nor quasi-criminal in nature and appear not to be the kind of proceedings that fall within the ambit of section 11. However, the court found it apparent that an officer charged under the Code of Discipline faced a true penal consequence. In terms section 36(1) of the Royal Canadian Mounted Police Act a person may be imprisoned for one year if found guilty of a major service offence.[83]

The court was thus faced with the unusual position where the proceedings failed the "by nature" test but passed the "true penal consequence" test. According to the court the "by nature" test had to give way to the "true penal consequence" test in the case of conflict, and consequently found that section 11 applied to proceedings in respect of a major service offence, before the RCMP service court.

The right to bail is therefore not limited to the ordinary criminal process but applies to all matters of a public nature, intended to promote public order and welfare within a public sphere of activity. If a person is charged with a

---

81 At (CR) 210 - 212, (CCC) 401 - 402, (WWR) 210 - 211.

82 At (CR) 213, (CCC) 403 - 404, (WWR) 212 - 213.

83 In his deliberations Wilson J referred to *Re Van Rassel and Cummings* (1987), 1 FC 473 484, 31 CCC (3d) 10, 7 FTR 187 (Fed Ct TD). This matter also dealt with a section 11(h) claim with respect to proceedings for a major service offence under the Royal Canadian Mounted Police Act. Joyal J on behalf of the court stated that the statute, as a consequence of the provision for imprisonment, was as much a penal statute as was the Criminal Code.

private, domestic or disciplinary matter, which is primarily intended to maintain discipline or integrity or to regulate conduct within a limited private sphere of activity, the right to bail will exist if the proceedings involve the imposition of true penal consequences.

### 7.2.4 "has the right not to be denied ... bail"

This part deals with the basic entitlement to bail that has been transformed into a constitutional right. It also discusses whether the term bail only refers to the particular form of release where money or other valuable property must be deposited by an accused with the court as a condition of release, or whether such term refers to any form of interim release.

The majority of the current bail provisions in the Criminal Code were enacted by the Bail Reform Act.[84] These provisions, for the most part, have also been proven to be in line with the right to bail afforded by section 11(e) of the Charter. The premise of the Bail Reform Act was that there was a basic entitlement to bail. When an accused is charged with an offence other than one of the limited prescribed offences in the Code, the accused is entitled to be released upon his unconditional undertaking to appear in court on the day of trial. This principle applies unless there is some reason to believe that something more is required to ensure appearance at trial.[85]

As to the meaning of the term "bail", the Bail Reform Act replaced the term "bail" with the term "judicial interim release". The term "bail" has therefore not actually been used in the Criminal Code since the commencement of the latter-mentioned Act. Even though the old provisions regarding "bail" were replaced with new provisions regarding "judicial interim release", the nomenclature seems to be irrelevant. What section 11(e) requires is that pre-

---

84 SC 1970 - 71 - 72, c 37; now Criminal Code RSC 1985, c C - 46, sections 515 - 526.

85 See chapters 4 and 8 for an elucidation of this right.

trial release from custody, called by whatever name, must be "reasonable" in its terms and conditions and must not be denied "without just cause".[86] According to the court in *R v Pearson* these two distinct elements are made clearer by the French version than does the English version. The French version demonstrates that two separate rights are operative.[87]

According to the judgment in *R v Pearson* the dual aspect of section 11(e) mandates a broad interpretation of the word "bail" in this section. Seeing that section 11(e) guarantees the right to obtain "bail" on terms that are reasonable, then "bail" must refer to all forms of judicial interim release under the Criminal Code. Generally speaking the word "bail" sometimes refers to the money or other valuable security which the accused is required to deposit with the court as a condition of release. If one takes into account

---

86 *R v Pearson* (1992), 12 CRR (2d) 1, 17 CR (4th) 1, 77 CCC (3d) 124, 3 SCR 665 (SCC).

Section 11(e) is not violated merely because the accused does not understand or is confused by the bail process. In *Re R and Brooks* (1982) 1 CCC (3d) 506 510 - 11 (Ont HCJ) Eberle J held that the concept of denial of reasonable bail without just cause in the language of section 11(e) of the Charter required a consideration of the circumstances of each case, the circumstances of the offence or offences alleged to have been committed, as well as the circumstances of the particular accused person. The court did not see it particularly relevant whether or not the accused person understood or was confused about the bail process (in ordinary circumstances). The court furthermore explained that an accused might completely understand the bail hearing and process and yet, an order might result which denied him reasonable bail without just cause. However, the accused's understanding of the process would not cure that, and would be quite irrelevant.

87 The comparable provision in the Unites States can be contrasted to the dual aspects of section 11(e). In the United States the clause in the Constitution's eight amendment provides only that "excessive bail shall not be required". While it is clear that this wording refers to the terms of bail, it is not so certain whether it creates a right to obtain bail and has led to considerable debate. See *Stack v Boyle* 342 US 1 4 (1951); *Carlson v Landon* 342 US 524 545 (1952); *United States v Edwards* 430A 2d 1321 1325 - 26 and 1329 - 30 (DC 1981); *United States v Salerno* 481 US 739 752 - 55 (1987). Also see Verrilli Jr (1982), 82 *Colum L Rev* 328.

However, in Canada there is no doubt that section 11(e) creates a broad right guaranteeing both the right to obtain bail and the right to have that bail set on reasonable terms.

that many accused are released on less onerous terms, restricting the word "bail" to this meaning would render section 11(e) nugatory. All forms of judicial interim release will have to be included in the meaning of bail in section 11(e) for this guarantee to be effective.[88]

It follows that a reference to "bail" should be understood as a reference to judicial interim release in general and not as a reference to any particular form of interim release.

### 7.2.5 "without just cause"

In this part it is shown how the "just cause" aspect of section 11(e) defines the basic entitlement to bail. "Just cause" refers to the right to obtain bail. Bail must not be denied unless there is "just cause" to do so. This aspect therefore imposes constitutional standards on the ground upon which bail is granted or denied.

The "showing cause" principle in the Code is designed to ensure that people charged with criminal offences are released in the least restrictive manner possible, unless a prosecutor, having been given a reasonable opportunity to do so, shows cause why a person who is the subject of a bail hearing should not be released or only released upon strict conditions. Therefore, once the court determines that the accused should not be released upon his undertaking without conditions, a justice or judge shall release the accused upon his giving an undertaking of such conditions as the justice directs, unless the Crown attorney shows cause why the accused should not be so released. If the judge is not satisfied that the accused can be released upon his entering into an undertaking of such conditions as the judge directs, the judge must then consider whether the accused can be released upon his entering into a recognisance without sureties in such amount and with such

---

88 *R v Pearson* (1992), 12 CRR (2d) 1, 17 CR (4th) 1, 77 CCC (3d) 124, 3 SCR 665 (SCC), at 12 CRR (2d) 18.

conditions, if any, as the judge directs. If the judge is not so satisfied, he then considers the remaining parts of section 515(2) in determining whether the accused can be released under those parts.

Since its amendment in 1971 until 1997/8 the Criminal Code provided that the pre-trail detention of an accused is justified on only two grounds, namely:

- That the accused's detention is necessary to ensure his attendance in court; or
- That his detention is necessary in the public interest[89] or for the protection or safety of the public having regard to the likelihood that he would commit further crimes pending his trial.

In *R v Bray*[90] it was held that these two grounds constitute "just cause" for a denial of bail (judicial interim release). The onus was therefore on the prosecution to establish one of the two grounds for a denial of bail.

In 1997/8 this section was adjusted and another ground (see section (c)) was added. The words "public interest" were omitted from the section. In the previous section 515(10) (contrary to the present provision) it was also provided that the secondary ground (b) shall only be determined in the event that and after it is determined that his detention is not justified on the primary ground.

It now provides as follows:

---

89 The Supreme Court of Canada in *R v Morales* (1992) 77 (CCC) (3d) 91 99 - 103 (SCC) struck down the words "public interest" in section 515(10)(b) holding that the words violate section 11(e) of the Charter as the term public interest authorises pre-trial detention in terms that are vague and imprecise. The majority held that the term creates no criteria for detention and thus authorises detention without just cause.

90 (1983), 2 CCC (3d) 325, 40 OR (2d) 766, 769 (Ont CA).

For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

(b) where the detention is necessary for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

(c) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

This aspect therefore imposes a constitutional standard on which bail is either denied or granted. Bail may only be denied if there is "just cause" to do so. The "just cause" aspect is further designed to ensure that people who are charged with criminal offences are released in the least restrictive manner possible. Section 515(10) further defines the basic entitlement to bail by establishing grounds on which pre-trial detention is justified.

### 7.2.6 "reasonable"

This part discusses the terms of bail. "Reasonable bail" therefore refers to the terms of bail. The quantum of "bail" and the restrictions imposed on the accused's liberty while on bail must be "reasonable".[91] If a justice does not

---

[91] Infringement does not necessarily occur if recognisance is set at a very high amount. In *R v Yanover* (1982), 37 OR (2d) 647, 70 CCC (2d) 376 (Ont HCJ), the accused was charged with unlawfully conspiring to murder the President of South Korea. An order for judicial interim release was made on a recognisance of 400 000 American dollars with the necessary sureties. It was found that there was "just cause".

Hollingworth J hearing the application to vary the earlier order stated at (OR) 649, (CCC) 379 (CRR) 230:

> [Counsel] argues persuasively that the reasonable bail provisions of the new Charter equate with the requirements of [prohibition against] excessive bail in the United States Bill of Rights which are perhaps

release the accused under section 515(1)[92] of the Criminal Code, other forms of release in terms of sections 515(2), (2.1), (2.2) and (3) come into play.[93]

---

> exemplified best in the decision of *Stack et al v Boyle, U.S. Marshal*, 72 S.Ct.1 (1951) per, Vinson C.J., at p.3 and Jackson J., at p. 5. He claims in this particular case that his client has been denied reasonable bail and therefore I should apply the provisions of the new Charter and consequently vary the provisions set forth by DuPont J.

And further at (OR) 651, (CCC) 380, (CRR) 231:

> I further find that [counsel's] submission under the Canadian Charter is answered by the words "without just cause." I feel there is no denial of Mr.Yanover's basic rights under the Canadian Charter and consequently the terms thereof cannot be invoked in the present case.

Where the amount fixed for sureties is so high that in effect it amounts to a detention order it will be reduced accordingly (*R v Cichanski* (1976) 25 CCC (2d) 84 (Ont HCJ).

92 Section 515(1) under the heading "Order of release" states:

> Subject to this section, where an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, order, in respect of that offence, that the accused be released on his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made and where the justice makes an order under any other provision of this section, the order shall refer only to the particular offence for which the accused was taken before the justice.

93 The sections read as follows:

> Release on undertaking with conditions, etc. -- s. 515(2)
>
> (2) Where the justice does not make an order under subsection (1), he shall, unless the prosecutor shows cause why the detention of the accused is justified, order that the accused be released
>
> (a) on his giving an undertaking with such conditions as the justice directs;
> (b) on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;

It therefore seems that the least onerous terms of release have to be implemented unless the prosecution convinces otherwise. The more onerous prescribed terms only come into play if the prosecution has proved that the "lesser" terms are inadequate. Excessive bail may not be granted. The Criminal Code of Canada therefore provides for release:

---

(c) on his entering into a recognizance before the justice with sureties in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security;

(d) with the consent of the prosecutor, on his entering into a recognizance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs and on his depositing with the justice such sum of money or other valuable security as the justice directs; or

(e) if the accused is not ordinarily resident in the province in which the accused is in custody or does not ordinarily reside within two hundred kilometres of the place in which he is in custody, on his entering into a recognizance before the justice with or without sureties in such amount and with such conditions, if any, as the justice directs, and on his depositing with the justice such sum of money or other valuable security as the justice directs.

Power of justice to name sureties in order -- s. 515(2.1)

(2.1) Where, pursuant to subsection (2) or any other provision of this Act, a justice, judge or court orders that an accused be released on his entering into a recognizance with sureties, the justice, judge or court may, in the order, name particular persons as sureties.

Alternative to physical presence -- s. 515(2.2)

(2.2) Where, by this Act, the appearance of an accused is required for the purposes of judicial interim release, the appearance shall be by actual physical attendance of the accused but the justice may, subject to subsection (2.3), allow the accused to appear by means of any suitable telecommunication device, including telephone, that is satisfactory to the justice.

Idem -- s. 515(3)

(3) The justice shall not make an order under any of paragraphs (2)(b) to (e) unless the prosecution shows cause why an order under the immediately preceding paragraph should not be made.

- On an undertaking with or without conditions.
- On the accused entering into a recognisance before the justice, with or without sureties, in such amount and with such conditions, if any, as the justice directs but without deposit of money or other valuable security.
- With the consent of the prosecutor, on his entering into a recognisance before the justice, without sureties, in such amount and with such conditions, if any, as the justice directs and on his depositing with the justice such sum of money or other valuable security as the justice directs; or
- If the accused is not ordinarily resident in the province in which he is in custody or does not ordinarily reside within two hundred kilometres of such place, on his entering into a recognisance before the justice, with or without sureties, in such amount and with such conditions, if any, as the justice directs. He must also deposit with the justice such sum of money or other valuable security as the justice directs.

## 7.3 SOUTH AFRICAN LAW: THE SCOPE OF SECTION 35(1)(f)

### 7.3.1. General

Section 35(1)(f) 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".[94]

Section 35(1)(f) is now dissected and each component is examined against

---

[94] Section 35(1)(f) appears under the heading "Arrested, Detained and Accused Persons". This section was preceded by section 25(2)(d) of the Interim Constitution. The previous section provided that every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right to be released from detention with or without bail, unless the interests of justice require otherwise.

the background of the issues addressed under the Canadian law.

### 7.3.2 "Everyone"

In this part the meaning to be attached to the term "everyone" for purposes of section 35(1)(f) is investigated. The discussion reveals whether this aspect of section 35(1)(f) only applies to natural persons, or to corporations as well.

The phrase "everyone has the right ..." frequently appears in the Bill of Rights.[95] In some instances the phrase "everyone" is qualified. An example is section 35(1)(f), where the phrase "who is arrested" is included to qualify "everyone". In particular instances, only certain natural persons may be bearers of particular rights. Political rights are for example only enshrined for "every citizen".[96]

The fact that only particular persons are the bearers of a particular right, is determined largely by the nature of, and particulars of, a specific right. A person that is not detained or arrested or an accused, simply has no need to be protected by the rights embodied in section 35.[97]

---

95 Chapter 2 of the Final Constitution.

96 Section 19. This phenomenon is present in most Bills of Rights. Section 6(4) of the German Constitution (1949) for example provides that "every mother" shall be entitled to protection and care of the community. Section 12 of the European Convention on Human Rights (1950) accords a right to marry and to found a family to all men and woman of "marriageable age".

97 Still, the exclusion of persons as bearers of specific rights in an entrenched Bill of Rights does not necessarily mean that they do not have such rights. People above the age of 18 may, like children, be in need of "security, basic nutrition and basic health and social services" (section 28(1)(c)). The fact that these people do not have an enshrined right does not mean that they necessarily have to go without these rights. Prior to the interim Bill of Rights the position was that every individual possessed every conceivable right insofar as it had not been abolished or limited by ordinary law. It is submitted that this position remained for those who are not the bearers of particular rights entrenched in the Constitution. In this regard section 39(3) reads as follows: "The Bill of Rights does not deny the existence of any

In principle the Bill of Rights protects every natural person as an individual human being. This is so because Bills of Rights owe their existence to human experience, to the knowledge that, over many centuries, those who exercise governmental authority have been in a favourable position to inflict harm on those whom they govern, and that they are inclined to do so when not controlled.[98] On this basis the Bill of Rights is a cornerstone of democracy in South Africa.[99] It enshrines the rights of all people in the country and provides that the state must respect, protect, promote and fulfil the rights embodied in the Bill of Rights.[100]

But are juristic persons entitled to these rights? Section 8(4) of the Bill of Rights provides that a juristic person[101] is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights, and the nature of that juristic person.[102]

---

other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

98 Rautenbach (1995) 35.

99 See section 7 of the Constitution.

100 Section 7(2).

101 The Constitution does not contain a description of a juristic person. In principle it would include all entities acknowledged as having legal personality by South African law.

102 Except for the fact that the German provision only applies to "domestic" juristic persons section 19(3) of the German Constitution is almost identical to the South African provision: *Die Grundrechten gelten auch für inländische juristische Personen, soweit sie ihrem Wesen nach auf diese anwendbar sind.*

The American Constitution does not expressly regulate the position of juristic persons as bearers of rights. However, the Supreme Court has as early as 1886 indicated that the due process and equal protection clauses of the fourteenth amendment of the Constitution, apply to juristic persons. This principle has never been deviated from. Kauper *Constitutional law* (1966) 605 - 605 as cited by Rautenbach (1995) 37 explains that juristic persons may not be bearers of all rights in American law:

The drafters of the Constitution have therefore decided that juristic persons are potentially full-fledged bearers of rights. However, because a juristic person cannot be detained, it does not require a right to bail. Neither the so-called private juristic persons nor the so-called public juristic persons, would therefore be entitled to the right set out in section 35(1)(f).[103]

### 7.3.3. "who is arrested for allegedly committing an offence"

This part reveals the circumstances under which a natural person is entitled to the right set out in section 35(1)(f). The phrase under discussion contains three separate qualifying concepts, that is, "who is arrested", "for allegedly committing" and "an offence". These concepts are discussed below.

---

Although corporations have been and continue to be recognised as 'persons' within the meaning of Section 1 of the Fourteenth amendment, it is clear that they cannot claim any status as citizens within the meaning of the privileges and immunities clause of this section. See Western Turf Assn. v Greenberg, 204 U.S. 359, 27 S.Ct. 384, 51 L. Ed. 520 (1907). Likewise, it has been held that although corporations may assert the protection of the due process clause of Section 1 with respect to their property rights, they cannot claim depravation of 'liberty' under this clause, since the liberty referred to in the Fourteenth amendment is 'the liberty of natural, not artificial, persons.' Northwestern National Life Insurance Co. v Riggs, 203 U.S. 243, 27 S.Ct. 126, 51 L. Ed. 168 (1906). To the same effect, see Western Turf Assn. v Greenberg, supra. But compare Times-Mirror Co. v Superior Court of California, sub. nom. Bridges v California, 314 U.S. 22, 62 S.Ct. 190, 86 L. Ed. 192 (1941), holding that the contempt conviction of a newspaper publishing corporation impaired freedom of the press and thereby violated the Fourteenth amendment; also the earlier decision in Grosjean v American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L. Ed 660 (1936), holding invalid under the due process clause of the Fourteenth amendment a state privilege tax levied on a newspaper corporation, likewise on the ground that this violated freedom of the press.

103 See the last part of section 8(4). A juristic person does not require such a right.

7.3.3.1 "who is arrested"

7.3.3.1.a General

Section 35 deals with the rights of arrested,[104] detained,[105] and accused[106] persons. The majority of the rights entrenched in section 35 are "classics" that have been developed over a long period of time. Most of these principles are well-established in South African criminal law and procedure and are protected under the existing common law as well as the Criminal Procedure Act.[107] But through their constitutionalisation these rights have been entrenched in the supreme law of the land and now form part of an integrated value system that will help shape the evolution and development of both the criminal law and the law of criminal procedure.[108]

The rights of detained,[109] arrested[110] and accused[111] persons were also protected by section 25 of the Interim Constitution and are similarly either direct or indirect manifestations of the right to freedom of the person entrenched in section 11(1) of the Interim Constitution, or manifestations of the right to security of the person.[112] In terms of section 25 of the Interim Constitution the rights of the three categories of protected persons overlap to some extent. The introductory sentence of section 25(2) states that

---

104 Section 35(1).

105 Section 35(2).

106 Section 35(3).

107 Act 51 of 1977.

108 Du Plessis & Corder (1994) 172 in their discussion of section 25 of the Interim Constitution.

109 Section 25(1).

110 Section 25(2).

111 Section 25(3).

112 See chapter 6.

arrested persons have in addition to the rights entrenched in that section the same rights as detained persons.[113] However, section 35 of the Final Constitution contains no express indication that the rights of these categories overlap.

As the rights of the different categories of persons differ, it is necessary to distinguish when a person is "arrested", "detained" or is an "accused" person. I will now discuss these concepts.

7.3.3.1.b What constitutes arrest?

Under South African law an arrest is effected in terms of section 39 of the Criminal Procedure Act. In terms of section 39(1) an arrest shall be effected with or without a warrant and, unless the person to be arrested submits to custody, by actually touching the person's body or, if the circumstances so require, by forcibly confining the person's body.[114]

Contact with the arrested person's body is a physical prerequisite for a valid arrest.[115] The arresting officer may only dispense with the physical touching of a person about to be arrested where the suspect clearly subjects himself to the arresting officer.[116]

However, De Waal[117] is of the opinion that the constitutional term "arrest" may not be synonymous with the term used in section 39 of the Criminal

---

113 In other words all the section 25(1) rights.

114 See section 39(1) of Act 51 of 1977; Du Toit *et al* (1987) 5 - 1; Hiemstra (1993) 84.

115 *Gcali v Attorney-General, Transkei* 1991 (2) SACR 406 (Tk) 408D.

116 *S v Thamaha* 1979 (3) SA 487 (O) 490; Du Toit *et al* (1987) 5 -2.

117 The chapter on the rights of detained, arrested and accused persons seems to have been originally drawn up by Kriegler after which the chapter was substantially revised by Viljoen for the 1997 edition. See the "Acknowledgements" in De Waal, Curry & Erasmus (1998).

Procedure Act.[118] De Waal argues that contact of a physical nature may not be required. He argues that whenever a suspect is questioned, apprehended or otherwise detained he may become an "arrested person". He further argues that an objective test should be developed to prevent the law enforcement authorities from circumventing the rights of arrested persons by refusing to "arrest" a suspect, or by arguing that the "arrest" does not meet the requirements of the Act.[119] If one considers the other rights of arrested persons, such as the right to be brought before a court within forty-eight hours, it is clear that it does not make sense when applied to non-arrested persons such as suspects. According to De Waal it may on the other hand be argued that section 35(1) rights are thus designed and only available to arrested persons as defined in the Criminal Procedure Act. People who make statements while not under any physical restraint, or any form of state compulsion, must therefore take the responsibility and bear the consequences of statements in which they voluntary incriminate themselves. Evidence obtained by way of police abuse can always be

---

118 See De Waal in De Waal, Curry & Erasmus (1998) 422.

119 In *S v Sebejan* 1997 (8) BCLR 1086 (T); 1997 (1) SACR 626 (W) Satchwell J referred to this problem. According to her the crux of the distinction between an arrested person and a suspect is that the latter does not know that he is at risk of being charged. A suspect that is not aware is therefore in jeopardy of committing some careless or unwise act or uttering potentially incriminating words which could subsequently be used against him at trial (par 45 of the judgment). Satchwell J added:

> If the suspect is deprived of the rights which have been afforded to an arrested person then a fair trial is denied the person who was operating within a quicksand of deception while making a statement. That pre-trial procedure is a determinant of trial fairness is implicit in the Constitution and in our common law. How can a suspect have a fair trial where pre-trial unfairness has been visited upon her by way of deception ... . The temptation should not exist that accused persons, who must *a fortiori* have once been suspects, are not advised of rights to silence and to legal representation and never receive meaningful warnings prior to making statements which are subsequently tendered against them in their trials because it is easier to obtain such statements from them while they are still suspects who do not enjoy constitutional protection. (Par 50, 56.)

Because of this Satchwell J concluded that the suspect is entitled to the same pre-trial procedures as an arrested person.

omitted if it would render the accused's trial unfair.[120]

Still, the manner and effect of arrest is fully regulated by the Criminal Procedure Act and it is unlawful when the regulations are not adhered to.[121] It follows that if the arrest is unlawful, the subsequent detention of the arrested person will be unlawful as well.[122]

7.3.3.1.c What constitutes detention?

In view of the previous discussion it must be asked: What constitutes detention? According to Snyckers detention refers to coercive physical interference with a person's liberty.[123] In *R v Therens*[124] the Supreme Court of Canada held that a person requested to undergo a breathalyser test was under detention. According to De Waal it is unlikely that the South African courts will follow this approach.[125] He sees "detention" as a more serious invasion of liberty. A person must therefore be physically restrained for a

---

120 De Waal, Currie & Erasmus (1998) 423.

121 Chapter 5 of the Criminal Procedure Act deals extensively with: The manner and effect of arrest (section 39). Arrest by peace officer without warrant (section 40). Name and address of certain persons and power of arrest by police officer without warrant (section 41). Arrest by a private person without a warrant (section 42). Warrant of arrest issued by a magistrate or justice (section 43). Execution of warrants (section 44). Arrest on telegraphic authority (section 45). Non-liability for wrongful arrest (section 46). Arrest by private persons when called upon (section 47). Breaking open of premises for the purposes of arrest (section 48). The use of force in effecting arrest (section 49). The procedure after arrest (section 50).

122 *Minister of Law and Order, Kwandebele v Mathebe* 1990 (1) SA 114 (A) 122D.

123 See Snyckers in Chaskalson *et al* (1996) 27 - 24.

124 (1985) 13 CRR 193 214 (SCC). The Canadian Supreme Court held that "detention" occurs when a government agent assumes control over the movement of a person by a demand or direction which may have significant legal consequences and which prevents or impedes access to counsel. In *R v Hawkins* (1993) 14 CRR (2d) 243 (SCC) it was held that pre-arrest questioning does not constitute detention.

125 See De Waal in De Waal, Curry & Erasmus (1998) 424.

more substantial period of time.

7.3.3.1.d When is one an accused?

Someone who has been formally charged is an accused person.[126]

7.3.3.1.e Significance of and interrelationship between categories

In the majority of cases detention follows arrest which is then followed with a formal charge. A person therefore first becomes "arrested" then "detained" and finally "accused". Arrest is therefore the legal basis for detaining a person in order to secure his attendance at the trial. Once detained after arrest, it is certain that the rights in section 35(2) may be invoked simultaneously with those in section 35(1). However, it does not seem that an arrested person will always be able to rely on the rights of a "detained" person.[127]

When a person is detained but not arrested, he will only have the rights under section 35(2) and will have to challenge the lawfulness of his detention under section 35(2)(d).

If a person is arrested, detained and then released the section 35(2) detention rights cease to apply, but the section 35(1) arrest rights seem to remain in operation. De Waal argues that arrest may be "detention" for the purposes of a criminal prosecution and that arrest presupposes detention.[128] Still an arrest does not always legitimise detention. If the person effecting the arrest does not intend to bring the detainee or the arrested person before

---

126 See Snyckers in Chaskalson *et al* (1996) 27 - 59.

127 As indicated the Interim Constitution stipulated that an arrested person additionally has the rights of a detained person. As this was not repeated in the Final Constitution it can therefore be argued that the omission implies that "arrest" does not necessarily include "detention".

128 See also Snyckers in Chaskalson *et al* (1996) chapter 27.

a court and arrests him for another reason, there can be no lawful arrest.[129]

On this basis it is evident that arrests for interrogation will come under attack as unconstitutional in that the primary and constitutional aim of arrest should be to bring a person before a court of law as soon as possible, but not later than forty-eight hours after the arrest.[130] On the other hand the intention might be to release the person failing an appearance before a court and obtaining a court order directing the accused person's further detention, pending a further trial or investigation. This does not entail that the matter cannot be investigated after arrest, but that the primary reason for arrest must be to bring the arrested person before the court not later than forty-eight hours after his arrest.

Section 39(2) of the Criminal Procedure Act also provides that the person effecting an arrest shall at the time of effecting an arrest or immediately thereafter inform the arrested person of the cause of the arrest. The arrested person is furthermore entitled to demand that the person arresting him hand to him a copy of the warrant authorising the arrest. In terms of section 35(1)(e) of the Final Constitution it is required that the arrested person at the first court appearance after being arrested be charged or be informed of the reason for the detention to continue, or be released. Upon reading section 35(1) it seems that an arrested person must at the first court appearance either be charged or be informed for the reason of the detention to continue. There is no right of an arrested person to be immediately informed of the reason for the arrest. A detained person only has this right in terms of the Final Constitution in section 35(2)(a) if he is "detained". However, it would

---

129 *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A); *Duncan v Minister of Law and Order* 1984 (3) SA 460 (T) 465ff. It is noted that detention is authorised by several other provisions, for example the Mental Health Act 18 of 1973, section 16 of the Aliens Control Act 96 of 1991 and section 50 of the Internal Security Act 74 of 1982. A sentenced prisoner is a detainee but not an arrested person. A detained person will therefore not always be able to rely on the rights of an arrested person.

130 See section 35(1)(d).

seem that if an arrested person is held in custody, that detention would soon be for a substantial amount of time.[131] I am therefore of the opinion that the arrested person would become "detained" for the purposes of section 35(2) even before his first appearance in court. The argument that arrest is detention for the purposes of criminal prosecution, and that arrest presupposes detention, is of course in line with the requirements of section 39(2) of the Criminal Procedure Act.

Even if it is accepted that section 39(2) of the Criminal Procedure Act is stricter than the requirements in section 35 of the Final Constitution, a person is only lawfully arrested in terms of section 39(2), and therefore an arrested person, when he has been notified formally of the reason for his arrest.[132]

Also, it is not every "accused" person who has been arrested or detained. If a person has been subpoenaed to appear in court the accused will therefore not have been detained or arrested. The accused will not have had the rights of an arrested or detained person.

7.3.3.2 "for allegedly committing"

To enjoy the rights in section 35(1) the affected person has to be arrested for the *alleged* commission of an offence.[133] A person detained for another purpose therefore does not have the rights of an arrested person. It follows that the basis of the arrest must be an offence recognised in South African law.

---

131 See par 7.3.3.1.c) where De Waal indicates that detention under South African law probably refers to substantial interference with liberty. A competent court of law has yet to indicate what a substantial amount of time would be.

132 This is so even if he is in any event aware of it. See *S v Matlawe* 1989 (2) SA 833 (B) 884G - 885D.

133 The same requirement can be seen in section 25(2) of the Interim Constitution.

A person needs only to be arrested on the basis of an allegation of the commission of an offence.[134] Certain basic rights are therefore available in South African law on the mere suspicion of the commission of an offence.

7.3.3.3 "an offence"

This part examines whether the protection afforded by section 35(1)(f) is limited to the ordinary criminal process or whether the section also provides protection in other forums. It is clear that the need to be released on bail only arises once a person has been taken into custody, and would normally only apply to criminal trials. However, the question has arisen before our courts whether section 25 of the Interim Constitution,[135] which encompasses many other rights, only applies to criminal trials. The cases referred to deal with the rights of an "accused" person in terms of section 25(3) of the Interim Constitution. In all these cases the "accused" was not arrested and was in any event therefore not entitled to bail in terms of section 25(2)(d) of the Interim Constitution or in need of bail.

In *Park-Ross v Director: Office for Serious Economic Offences*[136] the court had to decide whether or not section 25 of the Interim Constitution governs an inquiry made pursuant to section 5 of the Investigation of Serious

---

134 In *S v Mbele* 1996 1 SACR 212 (W) 225f Stegmann J said the following with regards to the similar approach in the Interim Constitution:

> The remedy of a detained person who has not been charged, and against whom no allegation has been made that he has committed an offence, is not to seek his release on bail: it is to move the court to protect his liberty by means of the common law remedy of the *interdictum de homine libero exhibendo*, a common law remedy which has now been entrenched by section 25(1)(e) of the Interim Constitution. (Now section 35(2)(d) in the Final Constitution.)

135 And therefore also section 35 of the Final Constitution.

136 1995 (2) BCLR 198 (C).

Economic Offences Act.[137] In terms of section 5 of this Act the Office of Serious Economic Offences could hold certain inquiries. The person questioned had to answer certain questions or face a criminal charge. It was argued that the person had the right in terms of section 25 to remain silent.[138] However, the court found that section 25 did not extend to investigations and inquiries outside criminal proceedings of arrest and trial.[139]

The court reiterated that section 25 according to its heading deals with detained, arrested and accused persons. The Constitution deals with the right to silence in a narrow and precise fashion and limits it to arrested persons, and to accused persons during plea proceedings and trial. The court found that section 25 did not lend itself to a wider general interpretation applicable to investigations and inquiries apart from criminal proceedings of arrest and trial. According to the court it was significant that no mention of the right to silence is made in relation to detained persons. A wider interpretation would mean that the court would have to search for and find it in some general consideration. The specificity of the framers of the Constitution in enacting section 25 would also have to be disregarded.

Still, it was held that if this evidence were to be introduced at a subsequent criminal trial, it would constitute a violation of the questioned person's right to remain silent.

In *Myburgh v Voorsitter van die Schoemanpark Ontspanningsklub Dissiplinêre Verhoor*[140] the question arose whether section 25 applied to disciplinary hearings of a non-governmental body. At the disciplinary hearing the person accused of misconduct stated that he had the right to a legal practitioner in terms of section 25 of the Interim Constitution.

---

137 119 of 1991.

138 Section 25(3)(c) of the Interim Constitution.

139 210I - 211C.

140 1995 (9) BCLR 1145 (O).

The court referred to the viewpoints of two academics. According to Van der Vyver[141] "disciplinary proceedings of a non-state institution" should comply with the procedural requirements in section 25:

> Not because of section 25(3) as such, but because of the common law rules pertaining to a fair trial, which are now to be adjusted, in view of section 35(3), to include amongst other things, a right to legal representation.

Van der Vyver is of the opinion that giving "due regard to the spirit, purport and objects" of chapter 3, entailed incorporating the specific requirements in section 25 into the general common law concept of "the rules of natural justice."

The court also referred to the view of the authors[142] in *Rights and Constitutionalism.* In this work the rights of criminal and civil litigants are contrasted. According to the authors section 25 could also apply to civil litigants who are detained such as detainees arrested to found jurisdiction.[143]

However, the court found that the section clearly only applied to criminal proceedings. The judge concluded that there was no indication in section 25 or in any other section of the Constitution that a person's right to legal representation ought to be extended to all internal disciplinary hearings. In other words the spirit, extent and goals of the Constitution did not call for an amendment or adaptation of the common law in this regard.[144]

Viljoen remarks that the judge seemed to have sifted through all the sections

---

141 (1994) 57 *THRHR* 378.

142 The authors of the chapter that the court referred to are J Milton, M Cowling, G van der Leeuw, M Francis, PJ Schwikkard and J Lund. See page vii under "Contents".

143 Van Wyk, Dugard, De Villiers & Davis (1994) at 420 and further.

144 See 1150E.

of chapter 3 of the Interim Constitution and found no clear right to legal representation for persons in "internal tribunals".[145] Viljoen is furthermore of the opinion that the judge in the absence of such a clear reference concluded that the spirit of the Constitution does not necessitate such a change to the common law. He reasons that this seems to be working the wrong way around. The spirit of the Constitution had to be analysed first. This had to be done with reference to the Constitution as a whole, which includes the important preamble, and the closing words under the title "National Unity and Reconciliation". Obviously other sections in the Constitution are also of importance - especially section 33(1) and 35(1). Once this has been done the court must ask itself whether its "application of the common law" is one which gives "due regard" to the spirit of chapter 3. Viljoen opines that the judge made no attempt to identify the spirit of the Constitution as a whole.

In *Cuppan v Cape Display Supply Chain Services*[146] someone appearing before the internal disciplinary hearing of a company argued that he was entitled to the services of a legal representative in terms of section 25(3)(e) of the Interim Constitution. The presiding judge without elaborating found that section 25 "is clearly concerned only with persons who are accused of offences in a court of law and has no application to domestic disciplinary tribunals".[147]

However, it is clear that certain tribunals or institutions other than criminal courts have the power to arrest, hear and sentence an individual for the alleged commission of an "offence".[148] Is such a person therefore not

---

145 See *The Bill of Rights Compendium* (1996) par 5B4.

146 1995 (4) SA 175; 1995 (5) BCLR 598 (D).

147 See 602D.

148 See for example the Defence Act 44 of 1957. The Act provides that the people mentioned in section 104(5) are subject to a Code of Discipline and may be arrested and held in order that a transgression be heard by either a Court Martial or by way of a summary trial. These tribunals have far-

entitled to bail in terms of section 35(1)(f) of the Final Constitution because we are not strictly dealing with a criminal trial?

Common sense dictates that an individual who is subject to this severe deprivation of liberty should be entitled to the highest procedural protection in our law. It would furthermore be in line with the spirit of the Constitution. Reference must also be made to the position under Canadian law where the equivalent right is afforded under specific conditions outside criminal trials.[149]

However, it seems that the courts have limited the right to bail to the ordinary criminal process.

### 7.3.4 "has the right to be released from detention"

This phrase denotes a basic entitlement to be released from detention.[150] On this part of the wording of section 35(1)(f), it can be argued that arrest would have to presuppose detention. It would also bring section 39(2) of the Criminal Procedure Act in line with the Constitution as indicated earlier. On the other interpretation this right would of course only be of value (and apply) if an arrested person is also detained.[151] It might be argued that the detention for the purposes of section 35(1)(f) does not have to be of a substantial nature as required for section 35(2) which would entitle a person to bail before his rights in terms of section 35(2) become available.

---

reaching and severe powers to punish in terms of the Act. Imprisonment is but one possibility.

149 See par 7.2.3.2.

150 However, the entitlement has been made dependent on whether the interests of justice permit (see par 7.3.5.) See par 2.6.3.3 and further and par 8.3.4 and further for an explanation of this right.

151 Although it seems that this right should have been given to a "detained" person, a person "charged" under Canadian law does likewise not have to be in custody to enjoy the right to "bail."

The question arises whether the term "detention" is wide enough to include all forms of release including the right to bail. Although section 25(2)(d) of the Interim Constitution referred to the right "to be released from detention with or without bail", the words "with or without bail" have been omitted from the Final Constitution.

Van der Merwe[152] submits that the absence of a reference to bail in the final wording is of no significance. He explains that the wording of section 35(1)(f) is wide enough to include a right to bail. I am similarly of the opinion that the purport of the Final Constitution in this regard remained the same, taking into account that the words "subject to reasonable conditions" have been added to the 1996 right. Where a person could be released with or without bail (that is, by depositing an amount of money) under the Interim Constitution, bail is but one of the conditions upon which a person may be released under the Final Constitution.

It therefore seems that the wording of section 35(1)(f) mandates a broad interpretation of the right to include all forms of release including bail.

### 7.3.5 "if the interests of justice permit"

The phrase "if the interests of justice permit" qualifies the right to obtain bail by making the right to bail dependent on whether the interests of justice permit it. This aspect therefore imposes constitutional standards on the ground under which bail is granted or denied. In this part it is investigated how this aspect of section 35(1)(f) defines "the basic entitlement to bail".

The term "interests of justice" is well known to South African jurists and at first glance denotes a broad value judgment of what would be just and fair to all parties concerned. However, if one has regard to the guidelines given

---

152 In Du Toit *et al* (1987) 9 - 31. See also *S v Letaoana* 1997 (1) BCLR 1581 (W) 1588J - 1589A.

in the various subsections of section 60 of the Criminal Procedure Act, one realises that something is awry. Where the "interests of the accused" could be included in "the interests of justice" in section 35(1)(f), and sections 60(1)(a), 60(11) and 60(12) of the Criminal Procedure Act, the interests of the accused are clearly excluded under subsections (4), (9) and (10). Subsection (9) for example specifically directs that the right of the accused should be weighed against the interests of justice. Because it is most unusual for one expression to bear different meanings in one statute and because the legislature in our law is presumed to use language consistently[153] this oversight created tremendous problems for those who wished to understand the law pertaining to bail.[154]

In *Prokureur-Generaal, Vrystaat v Ramokhosi*[155] the court tried to harmonise sections 60(9) and 60(4). The court held that even where it was found that one of the prescribed or other similar grounds that warrants incarceration in the interests of justice exists as a probability, it is merely a provisional ground or grounds warranting a refusal of the bail application. Section 60(9) prescribed in as many words that the question whether it can finally be found to be in the interests of justice that bail not be afforded had to be adjudicated by weighing the interests of justice against the interest of the accused in his liberty.

The court found the provision in section 60(9) confusing to some degree. However, the court held that it was sensible to read the words *"prima facie"* into the preliminary sentence of section 60(4) in-between the words *"in bewaring is"* and *"in die belang van geregtigheid"*, where it appears therein.

---

153 *South African Transport Services v Olgar* 1986 (2) SA 684 (A) 688. See also the authorities cited therein.

154 One can of course deviate from this presumption if it would lead to an absurdity or it would deviate from the manifest intention of the legislature. See *Venter v R* 1907 TS 910 915 and *Bevray Investments (Edms) Bpk v Boland Bank Bpk* 1993 (3) SA (A) 622D - I.

155 1997 (1) SACR 127 (O) 155d - h.

The sentence will then read as follows: [156]

> *Die weiering om borgtog toe te staan en die aanhouding van 'n beskuldigde in bewaring is prima facie in die belang van geregtigheid waar een of meer van die volgende gronde vasgestel word:*

Where the *prima facie* situation arises due to determination of the prescribed requirements it must be weighed up against the right of the accused to his personal liberty as prescribed and intended in section 60(9) before a final decision is made. The court agreed that section 60(4) was not meant to be a comprehensive exposition of all possibilities that can act as grounds for a finding that a refusal of bail would *prima facie* be in the interests of justice.

In *S v Tshabalala*[157] it was argued with regards to section 60(11) that it could be interpreted to mean that the section 60(9) interests of the applicant were irrelevant and that the phrase "interests of justice" as used in section 60(11) corresponded with the meaning in section 60(4). The court decided that this view could not be supported. The court held that section 60(11) had to be interpreted in the light of section 35(1)(f) of the Constitution which provided that an arrested person was entitled "to be released from detention if the interests of justice permit, subject to reasonable conditions". The phrase "interests of justice" as used here bore a wider meaning so as to include as factors relevant to the enquiry the right to personal freedom, the prejudice flowing from continued detention, and other matters of the kind set forth in section 60(9). Section 60(11) therefore had to be limited to preserve its constitutional validity. In the phrase "interests of justice" the factors enumerated in section 60(4) and the factors emanating from section 60(9) had to be included.

Southwood J in *S v De Kock*[158] in referring to section 25(2)(d) of the Interim

---

156 The sentence was constructed in Afrikaans.

157 1998 (2) SACR 259 (C).

158 1995 (1) SACR 299 (T).

Constitution reiterated that the concept "interests of justice" meant nothing more than the usual factors which ought to be taken into account in bail proceedings. He furthermore indicated that the usual factors were those enumerated by Mahomed AJ (as he then was) in *S v Acheson*:[159]

- Is it more likely that the accused will stand his trial or is it more likely that he will abscond and forfeit his bail?
- Is there a reasonable likelihood that, if the accused is released on bail, he will tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or distorted?
- How prejudicial might it be for the accused in all circumstances to be kept in custody by being denied bail?[160]

Still the courts on many occasions did not include the rights of the accused in the "usual factors".

In *S v Hlongwa* it was said that for the accused to obtain bail he had to show that the interests of justice would not be prejudiced, namely:[161]

- that it is likely that he will stand his trial; and
- likely that he will not tamper with state witnesses; or
- otherwise interfere with the administration of justice or the investigation of the case against him.

In other instances the accused, in order to obtain bail, had to convince the court that he:

- would stand his trial;

---

159 1991 (2) SA 805 (Nm) 822B - 823C.

160 Mahomed AJ also indicated that the determination of every factor involved the consideration of other sub-issues and enumerated them separately.

161 1979 (4) SA 112 (D).

- would not interfere with state witnesses or the police investigation;
- would not commit further crimes;[162] and
- that the maintenance of law and order or public safety would not be endangered if he were to be released on bail.[163]

When one looks at subsections (4), (9) and (10) of section 60 of the Criminal Procedure Act it does therefore seem that the "interests of the accused" is not included in the term "interests of justice". Because subsection (4) was specifically enacted to act as a guideline as to when the interests of justice in section 35(1)(f) permit, the same meaning will have to be attached to the term in the Final Constitution. This will also be in line with the presumption that the South African legislature uses language consistently.

If one of the grounds in section 60(4) of the Criminal Procedure Act were therefore established, the interests of justice would not permit the accused to be released on bail in terms of the Constitution. It therefore means that the Constitution does not require the interests of the accused to be taken into consideration. In other words if the "interests of justice" do not permit - that is the end of the story.

On this argument, subsections (9) and (10) set additional factors to be taken into account that are not required by the Constitution:

---

162 These first three guidelines have long been settled as reasons for denying bail. Steytler (1998) 143 indicates that the danger of an accused committing further crimes is also a recognised ground for refusing bail in international and foreign law. See *Stöggemuller v Austria* 10 Nov 1969 series A no 9 & 14, *B v Austria* 28 March 1990 series A no 175 & 42 and *Schall v Martin* 467 US 253 (1984).

163 Van der Merwe in Du Toit *et al* (1987) 9 - 28; *De Jager v Attorney-General Natal* 1967 (4) SA 143 (D) 149; *Liebman v Attorney-General* 1950 (1) SA 607 (W) 611; *R v C* 1955 (1) PH H93 (C); *Sandig v Attorney-General JC* 198/ 36 (T) as cited by Van der Merwe in Du Toit *et al ibid* ; *R v Mtatsala* 1948 (2) SA 585 (E) 592; *R v Desai* 1953 (2) PH H192 (N); *S v Hudson* 1980 (4) SA 145 (D) 146A; *S v Maharaj* 1976 (3) SA 205 (N).

(9) In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely -

(a) the period for which the accused has already been in custody since his or her arrest;
(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
(d) any financial loss which the accused may suffer owing to his or her detention;
(e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
(f) the state of health of the accused; or
(g) any other factor which in the opinion of the court should be taken into account.

(10) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9) to weigh up the personal interests of the accused against the interests of justice.

However, sections 60(9) and 60(10) seem to be in line with the principle of our common law.[164]

Be that as it may, the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*,[165] when confronted with this problem, felt compelled to deviate from the presumption of legislative consistency. Kriegler J on behalf of the unanimous court explained as follows:[166]

> [I]t is plain that the drafters of the 1995 amendment failed to distinguish

---

164 At least as was stated by Mahomed AJ (as he then was) in *S v Acheson* 1991 (2) SA 805 (Nm).

165 1999 (7) BCLR 771 (CC).

166 Par 47 of the judgment.

> between two separate and distinct meanings of the phrase 'the interests of justice'. In three of the six subsections that were inserted at that stage, the phrase was used synonymously with the interim Constitution's criterion for bail; but in the case of three of the subsections - (4) - (9), and (10) - something different must have been intended. In those subsections the drafters must have contemplating something closer to the conventional 'interests of society' concept or the interests of the state representing society. ... That must also be the sense in which the 'interests of justice' concept is used in sub-s (4).

It therefore seems that the Constitution requires what the courts always had to do, that is, to bring a reasoned and balanced judgment to bear in an evaluation where the liberty of the applicant is given the equal value afforded by the Constitution. In deciding whether the interests of justice permit release, the considerations in subsections 4(a)-(e) therefore have to be weighed against the factors for bail as contemplated by subsections (9) and (10).

However, certain factors or considerations have been developed by our courts, either on their own or on a cumulative basis, to assist the court in making a proper assessment whether or not the accused should be released on bail.[167]

The law regarding the interests of justice that developed prior to the Interim and Final Constitutions is therefore still relevant. Because the case law on

---

[167] For example, if the court has to decide the risk of the accused standing his trial the following factors or considerations had to be taken into account:

- The seriousness of the offence charged and the likelihood of a severe sentence. See *S v Price* 1973 (2) PH H92 (C); *De Jager v Attorney-General, Natal* 1967 (4) SA 143 (D); *R v Grigoriou* 1953 (1) SA 479 (T); *S v Nichas* 1977 (1) SA 257 (C) 263G - H: "if there is a likelihood of heavy sentences being opposed the accused will be tempted to abscond."
- Previous convictions of the accused. See *S v Berg* 1962 (4) SA 111 (O) 114F - G. See also Nel (1985) 246 where he indicates that an accused's previous convictions may hamper his application for bail. For the court after conviction on the present charge would be obliged to impose a heavier sentence. The prospect of such a heavy sentence would serve as an incentive for the accused to flee and that is why bail must be refused.

this topic, prior to the constitutional era, was not in complete harmony, the legislator decided to clarify any uncertainty in this regard by way of the Criminal Procedure Second Amendment Act.[168] It provided four possible grounds on which refusal to grant bail "shall be in the interests of justice":

- where there is a likelihood that the accused will endanger the safety of the public or any particular person or the public interest, or will commit certain offences;[169]
- where there is a likelihood that the accused will attempt to evade his trial;[170]
- where there is a likelihood that the accused will interfere with witnesses or evidence;[171] and
- where there is a likelihood that the accused will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system.[172]

The fourth ground is additional to the normal grounds on which bail could be refused and can be said to be a broad one.[173] The legislator went further and gave guidelines which may be taken into account in considering whether the grounds stated have been established. These guidelines are listed separately and refer to the requirements set out in section 60(4). For the most part it therefore seems to be a codification of the existing common law but in some respects the common law is changed or added to.[174]

---

168 75 of 1995.

169 Section 60(4)(a) of the CPA as amended.

170 Section 60(4)(b) of the CPA as amended.

171 Section 60(4)(c) of the CPA as amended.

172 Section 60(4)(d) of the CPA as amended.

173 It is submitted that this ground for refusal was borrowed from the Canadian law. See *R v Pearson* (1992), 12 CRR (2d) 1, 17 CR (4th) 1, 77 CCC (3d) 124, 3 SCR 665 (SCC).

174 See Viljoen in *Bill of Rights Compendium* (1996) 5B - 43.

Section 60(4) of the Criminal Procedure Act was amended by way of the Criminal Procedure Second Amendment Act[175] that commenced on 1 August 1998. The amendment entailed that the criterion of "the public interest" was removed from section 60(4)(a) and expanded into "the public order" and "public peace or security" and added as another ground by way of subparagraph (e).[176] In keeping with the previous Amendment Act, section 60(8A) was also inserted which enumerated the factors to be taken into account when subsection (4)(e) is considered. Section 60(4) now reads as follows:

> The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established:[177]

---

175 85 of 1997.

176 I submit that this was done as a direct consequence of the finding of the Supreme Court of Canada in *R v Morales* (1992) 77 (CCC) (3d) 91 (SCC) that the words "public interest" in section 515(10)(b) violated section 11(e) of the Charter as the term authorised pre-trial detention in terms that are vague and imprecise. As has been indicated the majority held that the term created no criteria for detention, and thus authorised detention without just cause.

177 The court in *S v Schietekat* 1999 (2) BCLR 240 (C) 248G - 249A and *S v Joubert* 1999 (2) BCLR 237 (C) found that this provision offended the separation of powers doctrine. The judge in *Schietekat* held it to be a deeming provision that prescribed to the courts what is and what is not in the interests of justice, thus usurping the court's constitutionally entrenched power to decide that question. On appeal from both these decisions the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) endorsed an objection to a deeming provision in a statute which had the effect of obliging a court to come to an unjust factual conclusion conflicting with that to which an objective evaluation would lead, and which might also conflict with a provision of the Bill of Rights. However, the court by allowing for the substitution of one constitutional formulation of the right to bail for another decided that subsections (4) and (9) were not intended as deeming provisions at all (see par 41 of the judgment). The court while admitting that the drafting was by no means perfect, decided that subsections (4) and (9) did not command a court to come to an artificial conclusion of fact. Subsections (4) and (9) merely provided guidelines as to factors that are for and against the granting of bail. Whether the factors are present and what weight they must be afforded is left to the judgment of the presiding officer. The court furthermore pointed to the fact that "any other factor" may according to subsections (5) to (8A)

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a schedule 1 offence;
(b) Where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial;
(c) Where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence;
(d) Where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;
(e) Where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

However, in contrast to paragraphs (b), (c) and (d) that provide for the primary objectives of pre-trial detention, objections have been raised against the inclusion of subsections (a) and (e).[178] The basis of the challenge is mainly that it allows for preventative detention which is constitutionally impermissible.

Snyckers referring to subsection (4)(a) is of the opinion that the fear of the authorities that an arrested person will commit other crimes than the one for which he is arrested, should not be allowed as a ground for denying bail.[179] On this Snyckers expresses himself as follows:

---

be taken into account. Because of this the court may look beyond the listed factors. Even if the court does find criteria listed or unlisted which tilt the scales against bail, it must ultimately make up its own mind.

Kotzé (1999) 1 *De Jure* 188 191 regards the legislation as an unnecessary impediment upon the discretion of the court to decide the granting of bail. He compares it with the unwanted situation that existed with sections like the repealed section 61 of the CPA that prescribed to the court not to grant bail in certain circumstances. Kotzé indicates that experience has shown that the courts in the past have in any event, in the case of serious crimes, considered the normal circumstances with more care. It is therefore unnecessary and undesirable for the legislator to prescribe to the courts in this regard.

178 And therefore also subsections (5) and (8A).

179 In Chaskalson *et al* (1996) 27 - 53.

> The principle that the question to be answered be directed at the object of securing a trial of the applicant for the offence in question must inform all the subsidiary questions relating to bail conditions, lest the state be allowed to incarcerate in defiance of the presumption of innocence as long as some arrest has been made. After all, the purported reason for the detention in cases of arrest is prosecution for a particular offence. Other grounds for detention, if they exist, need to be declared at apprehension, and justified in any *habeus corpus* application. They cannot be allowed to surface decisively in any bail proceedings.

It is also of value to note that the European Convention on Human Rights[180] in section 5(3) limits the grounds on which bail may be denied to "guarantees to appear for trial".

However, the constitutional permissibility of subsections (4)(a) and (5) and also (4)(e) and (8A) was recently decided by the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*.[181] In dealing with subsections (4)(a) and (5) separately the court indicated that the challenge could only succeed if the factors in subsections (4)(a) and (5) could never be relevant in determining whether the interests of justice permit release. The court saw the question to be decided as whether the factors in the category mentioned in subsection (4)(a) measured up to the norm in section 35(1)(f) of the Constitution. The court found that subsection (a) although not falling within the ambit of the trial-focused pre-trial objectives had a legitimate objective not only recognised at common law[182] but also sanctioned by the Constitution.

Even though the Constitutional Court accepted that section 35(1)(f) of the Constitution presupposed a deprivation of freedom for the limited purpose of ensuring that an arrested person is duly and fairly tried, the court found that section 35(1)(f) did not require only trial factors to be taken into account in

---

180 (1950).

181 1999 (7) BCLR 771 (CC).

182 The court referred to *S v Ramgobin* (3) SA 587 (N); 1985 (4) SA 130 (N) as authority.

determining the interests of justice. The court found that broad policy considerations could include the likelihood that an applicant will commit a fairly serious offence when let out on bail.

The court also dealt with the contentions of counsel in *Dladla*[183] and *Schietekat*[184] that sections 60(4)(e) and 60(8A) infringed upon the liberty interest in section 35(1)(f) because it took into account the public opinion and likely behaviour of persons other than the detained person.[185] This, counsel argued, smacked of preventative detention and put the sentiments of society above the interests of the detained person, which is constitutionally impermissible.[186]

The court acknowledged that there was merit in this argument and found it upsetting that the individual's legitimate interests should so invasively be subjected to societal interests. The court found it even more disturbing that the likelihood of public disorder at an applicants' release, may be found independent of any influence of the applicant. The court nevertheless reluctantly and, subject to express qualifications, found that the provision was saved by section 36 of the Constitution, in light of the harsh society that it operated in. The court therefore found that the public peace and security are at times compromised by the release of persons awaiting trial from custody. The limitation caused by sections 60(4)(e) and 60(8A) would therefore be justifiable in an open and democratic society based on human

---

183 The applicants gained direct access to the Constitutional Court from the Protea magistrate's court. The application was heard under case number CC 22/98.

184 CCT 4/99. 1999 (2) BCLR 240 (C) a quo.

185 In argument counsel concentrated on paragraph (8A)(b): "whether the shock or outrage of the community might lead to public disorder if the accused is released."

186 In *S v Schietekat* 1999 (2) BCLR 240 (C) and *S v Joubert* 1999 (2) BCLR 237 (C) subsections (4)(e) and (8A) were struck down not only because it contained a deeming provision but because it constituted "lynch law".

dignity and equality.[187]

In view of the ordinary exercise to be undertaken by a presiding officer adjudicating bail, the question furthermore arises whether section 60(11)(a) that requires "exceptional circumstances" be proven by persons charged with schedule 6 offences, constitutes an infringement of the liberty right protected under section 35(1)(f) of the Constitution.

This question finally came before the Constitutional Court but not before the supreme court had to grapple with it and legal academics had their say.

In *S v Jonas*[188] Horn AJ sitting alone found that as the term "exceptional circumstances" was not defined it could allude to many circumstances. An urgent medical operation or terminal illness could be such a circumstance. The court furthermore indicated that incarceration of an innocent person for an offence which he did not commit, would also constitute such an exceptional circumstance. The court found that it could not have been the intention of the legislator, when it amended section 60(11)(a), to legitimise the random incarceration of persons who are suspected of having committed schedule 6 offences. These persons must still be regarded as innocent until proven guilty in a court of law. The court held that section 60(11)(a) intended to make the obtaining of bail by accused persons charged with certain serious offences more difficult but not impossible. The state in opposing bail would also have to lead rebutting evidence or at least dispute the evidence of the appellant. Disputing the evidence would postulate a genuine dispute and be more than mere accusations as contained in the charge sheet. Thus the court found that if the accused's evidence denying his guilt on a charge of having committed a schedule 6 offence remains unchallenged by the state, the suggestion that the state's case is non-

---

187 See the analysis and discussion in paragraph 54 and further of the judgment.

188 1998 (2) SACR 677 (SE).

existent or doubtful becomes a foregone conclusion. The accused will then have succeeded in discharging the onus upon him.

In *S v C*[189] Conradie J held that the words of the legislator must be interpreted to place as little a burden as possible on the individual. He indicated that section 12(1) of the Constitution provided everyone with the right to freedom, and that this freedom could only be taken away as described in section 12(1)(b). The judge also referred to section 35(3)(h), which reiterates that the applicant is not guilty until he is found guilty. The court also pointed to section 35(1)(f) in terms of which the applicant, subject to reasonable conditions, is entitled to bail "if the interests of justice permit". He underlined the spirit of the Constitution and said that the same generous interpretation should be applied as under the common law when rights of liberty are in issue. The court concluded that if section 60(11)(a) is interpreted the term "exceptional circumstances" must be seen in light of these principles. It could not have been the intention of the legislator that if the applicant shows that he will comply with the requirements set out in section 60(4) he still has to be incarcerated. As soon as anything more is expected of the applicant he will be penalised. This interpretation, Conradie J said, must be rejected in total. The court concluded that all the legislator wanted to obtain by the term "exceptional circumstances", was that schedule 6 offences, must be viewed with exceptional care. The court must therefore be "more sure" that the applicant will do what is expected of him.

In *S v H*[190] Labe J indicated that the interests of justice served by the accused being detained, must be balanced by those interests served by permitting bail to be awarded to him. Unlike section 60(4)(e), read with section 60(8A) of the Act, the legislator did not give examples of the normal circumstances that could contribute towards there being exceptional circumstances as envisaged in section 60(11)(a). The meaning of

---

189 1998 (2) SACR 721 (C).

190 1999 (1) SACR 72 (W).

"exceptional circumstances" thus had to be found in the ordinary meaning of the words. The *Concise Oxford Dictionary*[191] defines exceptional as *inter alia* unusual or not typical.[192] The court then indicated that one should not attempt an exhaustive definition of what is meant by the words exceptional circumstances. The exceptional circumstances are thus circumstances that are not found in the ordinary bail application, but are peculiar to an accused person's specific position. The court must therefore examine all the relevant considerations not individually, but together in deciding whether an accused person has established something out of the ordinary, or unusual, which entitles him to relief under section 60(11)(a) of the Act. The court noted that the words "exceptional circumstances" appear in section 60(4)(e) and presumably bore the same meaning as in section 60(11)(a). The court indicated that the legislator in giving the factors in section 60(8A) indicate that they may, and did not have to be taken into account in deciding whether the grounds in section 60(4)(e) have been established. As all the factors must be considered to determine whether subparagraph (e) has been established, all the circumstances must be taken into account when exceptional circumstances are looked for in terms of section 60(11)(a) of the Act.

In *S v Mokgoje*[193] Steenkamp J indicated that the term "exceptional circumstances" limited the discretion of the court, because if such circumstances are not found, the court has no discretion to grant bail to the accused. However, the finding of the existence of exceptional circumstances is in the discretion of the court. Although the discretion is therefore limited, it has not been taken away. As the legislator did not define "exceptional circumstances", it depended on the facts of each case whether

---

191 1990.

192 See also *Fiat SA v Kolbe Motors* 1975 (2) SA 129 (O) 134H - 135A; *IA Essack Family Trust v Kathree; IA Essack Family Trust v Soni* 1974 (2) SA 300 (D) 304A - B; *Poole NO v Currie & Partners* 1966 (2) SA 693 (RA) 696H.

193 1999 (1) SACR 233 (NC).

such circumstances existed or not. But it did point to circumstances that are unique, unusual, rare and peculiar. Everyday or generally occurring circumstances could never be described as exceptional. The court furthermore indicated that the absence of factors mentioned in sections 60(4)(a) - (e) was not relevant during an inquiry into exceptional circumstances. Those factors, it was found, arose for consideration only after it had been established that exceptional circumstances existed, and that the court accordingly had the discretion to grant bail.

In the unreported decision of *S v Nompumza*[194] White J interpreted the construction to be placed on the phrase "exceptional circumstances exist which in the interest of justice permit his or her release". He said that the term "exceptional circumstances" must in the first instance be relevant to, and have a direct bearing on the interests of justice relating to the release of the accused. The court referred to *IA Essack Family Trust v Kathree; IA Essack Family Trust v Soni*[195] where it was held that the term "exceptional circumstances" in the Rents Act 43 of 1950, contemplated "something out of the ordinary and of unusual nature". The court held that the use of the term in section 60(11) has a similar meaning. What will be "exceptional circumstances" in each particular application for bail, will depend on the facts of that case. Those facts could refer to the circumstances of the case, the accused's personal circumstances, or any other facts or circumstances. It could be a combination of all such facts and circumstances, which are relevant to whether it is in the interests of justice to release the accused on bail. The court found it unsurprising, in view of the myriad of possibilities that exist, that the legislator has not attempted to define the phrase "exceptional circumstances".[196]

---

194 Unreported - case number CA + R57/98 (Ck) as discussed by Kotzé (1999) 1 *De Jure* 188.

195 1974 (2) SA 300 (D) 304A.

196 Kotzé (1999) 1 *De Jure* 188 191 indicated that he could not agree with the lack of a definition of exceptional circumstances in the Criminal Procedure Act. He argues that the legislator without a doubt had something in mind when he passed the legislation. If it is to be something "out of the ordinary

The whole section 60(11)(a) came under scrutiny and criticism in *S v Schietekat*,[197] *S v Dladla*[198] and *S v Joubert*.[199] Defence counsel in *Schietekat* and *Dladla* not only challenged the constitutional validity of various individual sections of section 60(11)(a), but argued that the combined effect of those provisions constituted an infringement on the liberty right protected under section 35(1)(f).[200] On appeal the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[201] summarised the provisions referred to as follows:[202]

---

and of unusual nature", the legislator must have contemplated such a circumstance. He sees the lack of clear guidelines rather as evidence of the "*ondeurdagtheid van die bepaling*".

197 1999 (2) BCLR 240 (C).

198 The applicants gained direct access to the Constitutional Court from the Protea magistrate's court. The application was heard under case number CC 22/98.

199 1999 (2) BCLR 237 (C).

200 Kotzé (1998) 1 *De Jure* 188 also criticises section 60(11)(a). He argues that an arrested person's right to be released "if the interests of justice permit", is protected by section 35(1)(f) of the Constitution 108 of 1996. This position, he says, is also confirmed by section 60(1)(a) of the Criminal Procedure Act. However, it is not an absolute right, but one that is qualified by the governing interests of justice. He found that this approach was in line with the common law and statutory developments around the law pertaining to bail and also that it discounted another fundamental legal principle, namely the presumption of innocence. He finds it clear that sections 60(11)(a) and (b) of the Criminal Procedure Act *prima facie* infringed upon this and started to move towards a penal provision - something that is not acceptable.

In the article Kotzé describes section 60(11)(a) as: "*'n ondeurdagte en onbeholpe stuk wetgewing*" that does not respect certain basic accepted fundamental legal principles. He also indicates an uneasy feeling that the content of the legislation, and the time in which it commenced, not only served strange judicial purposes, but also political ones. He further believes that the legislation violates the presumption of innocence, and that it does not recognise the logical and uncomplicated application of the accepted principles pertaining to the adjudication and the granting of bail in any instance.

201 1999 (7) BCLR 771 (CC).

202 Par 61 of the judgment.

> Under sub-s 11(a) the lawmaker makes it quite plain that a formal onus rests on a detainee to 'satisfy the court.' Furthermore unlike other applicants for bail, such detainees cannot put relevant factors before the court informally, nor can they rely on information produced by the prosecution; they actually have to adduce evidence. In addition, the evaluation of such cases has the predetermined starting point that continued detention is the norm. Finally and crucially, such applicants have to satisfy the court that 'exceptional circumstances' exist.

It was argued by defence counsel that all of this created an effective bar to persons charged with a schedule 6 offence of being released on bail and consequently infringed their right to a just evaluation of their claim.

However, the Constitutional Court on appeal saw the main thrust of the objection at the requirement of "exceptional circumstances".

In its analysis of the requirement of proof of "exceptional circumstances" the Constitutional Court concluded that the normal equitable test to determine the interests of justice on the basis of the considerations in subsections (4) to (9), is to be applied differently. Section 60(11)(a), it was decided, provides for a situation in which the balance between the liberty interests of the applicant, and the interests of society in denying bail, will be resolved in favour of incarceration, unless the applicant shows that "exceptional circumstances" exist. This exercise, it was said, departed from the constitutional standard set by section 35(1)(f), for it sets a more rigorous test than that contemplated by the Constitution.[203] It therefore added weight to the scales against the liberty interest of the accused and rendered bail more difficult to obtain than it would have been if the ordinary constitutional test of "the interests of justice" were to be applied. While the court found the exercise to determine whether bail should be granted in the case of section 60(11)(b) no different than that provided for in sections 60(4) to (9), it therefore found section 60(11)(a) to be offensive to the liberty right in

---

203 Par 64 of the judgment.

section 35(1)(f).[204]

However, the court in view of the present circumstances found the limitation to be reasonable and justifiable in terms of section 36 of the Constitution.[205]

Another concern raised before the Constitutional Court in *Dladla v Minister of Justice*[206] was that the term "exceptional circumstances" was vague. This was so, counsel argued, because of the way the courts have dealt with this concept. As the term has not been defined it was left to the courts to construe this concept. As authority defence counsel referred to the unreported decision in *Hendriks v S*[207] where Griesel J explained that because of the wide and general nature of the expression, a dictionary definition was not of much use. Griesel J saw the interpretation of the expression in other legislation of similar limited use, as the expression had to be interpreted in its context. Because of this, the same expression did not necessarily have the same meaning when used in subsections (4)(d) and (e) of the Amendment Act.

The argument was therefore that no amount of judicial interpretation of the term would be capable of rendering it a provision which provides any guidance for legal debate.[208] Furthermore, apart from the fact that exceptional circumstances had to be proved, it also has to be proved that exceptional circumstances in the "interests of justice" permit his release.

---

204 Par 65 of the judgment.

205 Par 77 of the judgment.

206 The applicants gained direct access to the Constitutional Court from the Protea magistrate's court. The application was heard under case number CC 22/98.

207 A 714/ 98, C.

208 It has already been indicated in par 5.2.2.3 that the Canadian Committee on Corrections rejected the principle of exceptional circumstances saying *inter alia* that it did not provide adequate guidance.

The Director of Public Prosecution's answer to this was that a provision is not vague because it is subject to interpretation. Absolute certainty would require an impossible constitutional standard. As authority the Director of Public Prosecutions quoted the words of Lamer CJC in *R v Morales*:[209]

> The fact that a particular legislative term is open to varying interpretations by the courts is not fatal. As Beetz J observe in R v Morgentale, supra (1988) 31 CRR 1, (1988) 1 SCR 30, at p 59 CRR, p 107 SCR, 'flexibility and vagueness are not synonymous'. Therefore the question at hand is whether the impugned sections of the Criminal Code can or have been given sensible meanings by the courts. [sic]

However, the Director of Public Prosecutions agreed that it was for the courts to give a meaning to this expression. Each instance would have to be judged on its own merits. What is exceptional in one case may not be exceptional in the other. The term "exceptional circumstances" in section 60(11)(a) will therefore have to be interpreted in the spirit of section 60 and the Constitution. [210]

It was furthermore contended on behalf of the applicant, that before it can be said that he has discharged the onus cast upon him, he has to convince the court that factors out of the ordinary and of an unusual nature exists, which permits his release from detention on bail. This, it was said, is borne out by the dictionary meaning of exceptional: "forming an exception; unusual; not typical."[211] Counsel for the applicant also argued that the words of the court in *S v Mushonga*[212] indicated that "exceptional circumstances" connoted something outside the norm:[213]

---

209 (1992) 12 CRR (2d) 31 43 (SCC).

210 See par 5.15 of the DPP's heads of argument.

211 Counsel for the applicant referred the court to the *Concise Oxford Dictionary* (1992).

212 1994 (2) SACR 782 (ZS).

213 At 790h. As further authority counsel referred to *S v Lizzy* 1995 (2) SACR

> It seems to me that the existence of the disciplinary tribunal's powers over legal practitioners justify the court in exercising its contempt jurisdiction only in exceptional circumstances, such as, for example where the legal practitioner has used scurrilous language *in facie curiae*.

D'Oliveira for the Director of Public Prosecutions contended that all that is required of an accused is to submit evidence, or to give information of circumstances of that which he is in the best position to give. This concept had to be pliable to leave room for interpretation by the courts. If this discretion is limited it will interfere with the independence of the courts. As authority for this view D'Oliveira referred to the decision of *R v Nova Scotia Pharmaceutical Society*[214] where it was indicated that one must be wary of using the doctrine of vagueness to prevent or impede state action in furtherance of valid social objectives. This was done if the law was required to achieve a degree of precision to which the subject matter does not lend itself. A delicate balance must be maintained between social interests and individual rights. A measure of generality also sometimes allows for greater respect for fundamental rights, since circumstances that would not justify the invalidation of a more precise enactment may be accommodated through the application of a more general one.

D'Oliveira therefore indicated that "exceptional circumstances" may also include circumstances that are not foreseeable, but if they exist, may lead to the granting of bail.

The Constitutional Court did not find any validity in the argument that the term under discussion was vague and indicated that the applicant was given a wide scope to establish these circumstances. It could be found in the nature of the crime, the circumstances of the accused or in anything else

---

729 (W) 730 g - h; *S v Bushebi* 1996 (2) SACR 448 (Nm) 451b - f; *Key v Attorney-General, Cape of Good Hope Provincial Division* 1996 (6) BCLR 788 (CC) 791E - F; *S v Phomodi* 1996 (1) SACR 162 (E) 166d - e.

214 (1992) 7 CRR (2d) 352 (NSCA).

that was relevant.[215] With reference to the statement that the circumstances must in addition[216] be "in the interests of justice" and therefore posed an insurmountable barrier, the court found the opposite to be true. The court indicated that the wider the net was cast, the easier it would be to bypass this barrier.[217]

The court found it too much to expect that the legislature should circumscribe that which is impossible to portray. The court indicated that if something is not exceptional, it is possible to imagine and outline it in advance.[218] This was of course not the case here.

The court also addressed the contention that because the "ordinary circumstances" enumerated in subsections (4) to (9) was so wide it was impossible to imagine what "exceptional circumstances" could be. The court held that the circumstances did not have to be above and beyond the circumstances in subsections (4) to (9) or generically different. The ordinary circumstances could therefore be present but to an exceptional degree.

In deciding whether the interests of justice permit release, the considerations in section 60(4)(a) - (e) of the Criminal Procedure Act therefore have to be weighed against the factors for bail as contemplated by sections 60(9) and 60(10) of the same Act. In the case of the very serious offences mentioned in schedule 6 the applicant must in addition prove "exceptional circumstances" to obtain release. The exceptional circumstances can be found in the nature of the crime, the circumstances of the accused, or in anything else that is relevant, including the normal circumstances.

---

215 Par 75 of the judgment.

216 Apart from being vague.

217 Par 75 of the judgment.

218 *Ibid*.

### 7.3.6 "subject to reasonable conditions"

#### 7.3.6.1 General

These words refer to the terms on which the arrested person may be released from detention. It follows that these terms must be reasonable. The Criminal Procedure Act provides for different terms of release.

#### 7.3.6.2 Release on bail without or with conditions[219] as envisaged by chapter 9 before sentence[220] and release on bail pending appeal or review without or with conditions[221] as envisaged by chapter 30[222]

When a person is granted bail in terms of chapters 9 or 30 of the Criminal Procedure Act the effect will be that upon his payment of, or the furnishing of a guarantee to pay the sum of money determined for his bail, the accused will be released from custody. For the purposes of chapter 9 he shall then appear at the place, date and at the time appointed for the trial, or to which

---

219 Section 60(12).

220 In terms of section 62 a court before which a charge is pending, and in respect of which bail has been granted, may add the conditions enumerated therein:

(a) with regard to reporting in person by the accused at any specified time and place to any specified person or authority;
(b) with regard to any place to which the accused is forbidden to go;
(c) with regard to the prohibition of or control over communication by the accused with witnesses for the prosecution;
(d) with regard to the place at which any document may be served on him under this Act;
(e) which, in the opinion of the Court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused;
(f) which provides that the accused shall be placed under the supervision of a probation officer or a correctional official.

221 Sections 307(4); 309(4)(b) and 309(5).

222 Sections 307(2)(b); 309(4)(b) and 309(5).

the proceedings relating to the offence in respect of which the accused is released on bail, is adjourned.[223] When granted bail in terms of chapter 30 it shall be a condition of the release that the convicted person shall upon service on him of a warrant for his committal, surrender on the time and at the place specified, in order to give effect to his sentence.[224]

Irrespective of who releases the accused there will therefore always be a "condition" to be present at the time and place where the proceedings relating to the offence is adjourned (chapter 9), or a condition to surrender if required in order to give effect to his sentence (chapter 30).

The fact that he has to appear or surrender can never be unreasonable for the purposes of the Constitution. However, it is submitted that the specific place, date and time appointed could be unreasonable and subject to constitutional scrutiny.

In terms of section 60(12) and 307(4) the court may release an accused on bail on any condition it deems fit.[225] It follows that these "other" conditions and the conditions that may be added in terms of section 62, have to be reasonable, and are subject to constitutional scrutiny.

The amount of bail would likewise have to be reasonable. Bail is of a non-penal character.[226] The purpose is not to punish an accused but to secure his presence in order that he may be tried. The amount of bail must not be based upon the consideration that a high amount has a deterrent effect in respect of possible future perpetrators.[227] The posting of too high an amount

---

223 In the case of the attorney-general and the police official the accused will be warned to attend his first appearance in court.

224 Section 307(3).

225 Which are in the interests of justice.

226 *S v Acheson* 1991 (2) SA 805 (Nm) 822A.

227 *S v Visser* 1975 (2) SA 342 (C).

of bail will constitute a denial of bail.

In terms of section 59A, 60 and 307 an accused is released when the prescribed amount of money has been deposited or a guarantee has been furnished, and in terms of section 59 where a police official posts bail, bail is secured by depositing the prescribed sum of money. Still, is it not reasonable for a detained person (after bail has been granted) to for example issue a cheque in lieu of cash or a guarantee?[228] Is it not his constitutional right? Would it not be reasonable for the detainee to furnish a guarantee when released at the police station?[229] In view of the countless problems that one encounters with payment other than cash and bank-guarantees, it is submitted that the requirements set by chapters 9 and 30 of the Act with regard to means of payment are "reasonable." However, it may be argued that the furnishing of guarantees must also be allowed at police stations.

7.3.6.3 Juvenile may be placed in place of safety or under supervision[230]

A person under the age of 18 years in custody in respect of any offence, who may be released on bail in terms of sections 59 and 60, may be placed in a place of safety[231] instead of being released on bail. Alternatively he may be placed under the supervision of a probation officer or correctional official until he is dealt with according to law.

---

228 One must consider that the accused has not been convicted. He is still presumed to be innocent and therefore the fact of his arrest may not be taken into account to determine his character.

229 At some courts only cash is accepted while other courts accept cash and bank-guaranteed cheques.

230 Section 71.

231 As defined in the Child Care Act, 74 of 1983.

### 7.3.6.4 Release on warning[232]

Even though the 1955 Criminal Procedure Act did not provide for release on warning a practice developed of releasing an accused on his own recognisance. The practice was taken up in section 72 of the present Act. In terms of section 72 a person may only be released on warning in those cases where an accused in custody for an alleged crime may be released on bail by a policeman,[233] or a court[234] respectively. It is meant for those cases where minor offences are at issue.[235] There is no danger of the accused not attending his trial[236] and no necessity for conditions.[237] However, section 72[238] does provide for the imposition of conditions either at the time of release, or any time thereafter.[239] In terms of section 72 a policeman may release a detained person on warning instead of bail where he is in custody for an offence other than an offence referred to in part II or III of schedule 2 of the Criminal Procedure Act. A document stating the particulars of the offence in respect of which he is being released, and details of the court in which he is to appear, and the time when, must be handed over. A court may release any accused on warning and may do so orally.

---

232 Section 72.

233 Section 59.

234 Section 60.

235 Du Toit *et al* (1987) 10 - 2. See also Joubert (1998) 155.

236 Du Toit *et al ibid*. Joubert (1998) *ibid* adds that it is also not expected that the accused will defeat the ends of justice.

237 Du Toit *et al ibid*.

238 Section 72(a).

239 Only the conditions enumerated in section 62 may be imposed. It is therefore understood that where an accused is released on bail any condition may be imposed and only the conditions mentioned in section 62 may be added. When released on warning only the conditions set out in section 62 may be imposed, or added at any time thereafter.

Where the person released is under 18 he is placed in the care of a person who has custody over him. The custodian will be warned appropriately or be given the written warning where the policeman authorised the release.

Upon non-appearance by the released, or his custodian where he is under 18, a warrant for the arrest of the released person or his custodian as the case may be, may be issued and an inexcusable failure to appear may constitute an offence.

## 7.4 CONCLUSION

In conclusion, the corresponding aspects of the respective constitutional provisions are juxtaposed and the analogous issues under both systems are compared.

**"Any person" and "Everyone"**

Does the right to bail under either system only apply to natural persons, or are corporations also included? The arguments under both systems are for the largest part very similar. They conclude that the relevant terms may include juristic persons. However, it depends on the nature and purpose of the right. Because a juristic person cannot be detained it has no interest falling within the scope of the right to bail. In this context these terms under Canadian and South African law therefore only refer to natural persons.

**"charged with an offence" and "who is arrested for allegedly committing an offence"**

Under what circumstances is a person entitled to the protection afforded by the right to bail? When is one therefore "charged with an offence" under Canadian law and when is one "arrested for allegedly committing an offence" under South African law? After some conflicting decisions the Supreme Court of Canada ultimately held that a person is "charged" within

the meaning of section 11 of the Charter when an information is sworn alleging an offence against him, or where a direct indictment is laid against him when no information is sworn. The Supreme Court further indicated that section 11 is concerned with the period between the laying of the charge and the conclusion of the trial. It is not clear whether the Supreme Court saw the conclusion of the trial as the final determination of all procedures, or the conviction or acquittal of the accused. "Lesser" court decisions seem to favour both viewpoints.[240]

Under South African law a person has the right to bail once legally arrested. It may be on the mere suspicion of an offence. Because one is not "charged with an offence" or "arrested for allegedly committing an offence" after conviction or acquittal, it seems that these rights do not extend beyond the verdict of the court *a quo*.

The right to bail seems to have wider application under Canadian law. It applies to all matters of a public nature, intended to promote public order and welfare within a public sphere of activity. If a person is charged with a private, domestic or disciplinary matter, which is primarily intended to maintain discipline or integrity or to regulate conduct within a limited private sphere of activity, the right to bail will exist if the proceedings involve the imposition of true penal consequences. Under South African law the courts seem to have limited the right to bail to the ordinary criminal process.

**"has the right not to be denied ... bail" and "has the right to be released from detention"**

While both phrases denote a basic entitlement to bail, the right to bail under South African law is dependent on whether "the interests of justice permit". But do these respective phrases provide for the same forms of release? The Supreme Court of Canada indicated that the "reasonable" and "just cause"

---

240 As a general rule section 11 rights are not applicable as soon as a finding has been made in a case.

aspects of section 11(e) mandated a broad enough interpretation of the word "bail" to include all forms of judicial interim release. While no South African court has indicated what is to be included in the term "detention", the "reasonable conditions" aspect of section 35(1)(f) seems to similarly warrant all forms of release, including bail.

**"without just cause" and "if the interests of justice permit"**

Under both systems a constitutional standard is imposed in terms of which bail is granted or denied. While these criteria, which set the normative pattern and are central to any discussion on bail, are described in different words, that is, "if the interests of justice permit" and "without just cause", the circumstances to be taken into account in terms of the respective enactments show great similarity. When appraising this standard, sight must not be lost of the fact that the liberty interests of the applicant are included in, and have to be given full value under both systems. The potential factors, broadly speaking, to be taken into account and which are common to both systems are: attendance at trial, protection of the public and good administration of justice. While the propensity to commit crimes is to be taken into account under Canadian law, the likelihood only to commit a schedule 1 offence is indicated under South African law as justifying refusal of bail.

The South African legislator went one step further in that it expects something above the constitutional standard from the applicant in the case of the very serious offences mentioned in schedule 6. However, Roger Quimet of the Canadian Committee on Corrections has as far back as 1969 indicated that the principle that bail will be granted only in exceptional circumstances, even pending appeal, was too restrictive.

Of late a new ground was added under each of the legal systems. Under South African law the refusal will also be in the interests of justice "where in exceptional circumstances there is the likelihood that the release of the

accused will disturb the public order, or undermine the public peace or security". Under Canadian law refusal of bail is justified "on any other just cause being shown and, without limiting the generality of the foregoing" "in order to maintain confidence in the administration of justice". However, the ordinary factors mentioned in the subsection that would point to incarceration in order to ensure that confidence be maintained are in main not new factors to be taken into account when bail is adjudicated. Only the ground, that is, to maintain confidence in the administration of justice, is an innovation.

But it seems that an adverse opinion by the public is not enough to constitute the disturbance or undermining that the South African addition requires,[241] while the maintenance of confidence is expressly included under Canadian law.

It is clear under Canadian law that any other just cause may be shown that would invite incarceration. However, the finding by the Constitutional Court that the open-ended character of section 60(5) to (8A) of the Criminal Procedure Act permits other factors than those in section (60)(4) to be taken into account, is not convincing. What the last subsection in subsections (5) to (8A) says, is that any other relevant factor may be taken into account, to determine whether the factors in subsection (4) are present. But it is clear that the constitution does not allow for such a limitation. The Constitutional Court's finding that other factors may be taken in account is therefore in line with the Constitution and the position under Canadian law. Still, the Constitutional Court should have concluded that the legislature overstepped the mark.

However, while the circumstances only have to be *likely* to prevent release under South African law, incarceration has to be *necessary* under Canadian law to ensure attendance or to maintain confidence in the administration of

---

241 See *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) par 54 and further.

justice. In addition custody under Canadian law is justified where there is a *substantial likelihood*, that the accused if released from custody will commit a criminal offence, or interfere with the administration of justice.

**"reasonable" and "subject to reasonable conditions"**

Under Canadian and South African law these words refer to the terms on which an arrested person is released from detention. However, there is a major difference in approach in that under Canadian law the least onerous terms of release have to be implemented unless the prosecution convinces otherwise. The more onerous prescribed terms therefore only come into play if the prosecution has proved that "lesser" terms are not adequate.

Both systems provide that excessive bail cannot be granted. By whatever name it is called, Canadian and South African law provide for release on warning with or without conditions.[242]

Where bail can be granted with or without conditions under South African law recognisance can be made with or without conditions under Canadian law. A recognisance is an acknowledgement to the Crown that the accused will owe a certain amount of money if he fails to attend court or if the conditions are not met. Sureties are first called for under the less onerous conditions. Money or other valuable security therefore only has to be deposited when the prosecution has proven the sureties to be inadequate. As a last resort before refusing release, Canadian law in one prescribed instance even provides that sureties may be called for and that money or other valuable security must be deposited.

---

242 Under Canadian law an "undertaking" is given.

# 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]

---

[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

---

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.

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]

---

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

---

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.

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]

---

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.

---

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.

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

---

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

---

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

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.

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

---

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.

---

34 At 21.

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

---

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

---

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.

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

---

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.

---

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).

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

---

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

---

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.

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

---

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

---

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)).

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.

---

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

---

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).

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.

---

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.

---

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).

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]

---

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

---

> 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*.

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]

---

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.

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

---

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]

---

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

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

---

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

---

98 The Act came into force on 21 September 1995.

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

---

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

---

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.

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

---

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

---

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.

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

---

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

---

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.

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

---

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

---

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

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

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.

---

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

127 1999 (7) BCLR 771 (CC).

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

---

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

---

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).

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

---

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

---

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

141 At 263 and further.

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

---

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

---

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

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

---

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

---

> 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).

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]

---

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.

---

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.

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

---

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]

---

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]

---

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]

---

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

---

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.

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

---

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

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]

---

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.

# CHAPTER 9

## THE ADMISSIBILITY AT THE SUBSEQUENT CRIMINAL TRIAL OF EVIDENCE TENDERED BY THE ACCUSED FOR PURPOSES OF THE BAIL PROCEEDINGS

9.4 CONCLUSION

## 9.1 INTRODUCTION

Section 60(11B)(c) of the Criminal Procedure Act, which provides that evidence tendered at a bail application by an accused forms part of the evidence at the subsequent criminal trial, has come under severe criticism from various legal quarters since its inception.[1] In this chapter it is investigated whether there is merit in this criticism, and whether this serious inroad into the freedom and security of an accused is sanctioned by the South African and Canadian Constitutions. Central to this discussion is the right against self-incrimination. The chapter also determines whether evidence, obtained as *a result of* evidence tendered by the accused during the bail application, may be used at the subsequent trial.[2] In conclusion, it compares the situations under Canadian and South African law.

Unlike countries with inquisitorial systems such as Holland and Italy, where the right against self-incrimination is not afforded the same value, this right has been a prominent feature of both the Canadian and South African legal systems and has been taken up in the constitutions of both countries.[3]

---

1 See for example *S v Schietekat* 1998 (2) SACR 707 (C); *S v Joubert* 1998 (2) SACR 718 (C) and Snyckers in Chaskalson *et al* (1996) 27 - 91 and further. Section 60(11B)(c) seems to provide for the whole bail record to become part of the trial record. See my discussion in par 9.3.1.

2 Where the evidence itself is not allowed.

3 MacIntosh (1995) 389, for example, indicates that under the inquisitorial system in Italy the accused is forced to testify at his trial and can be questioned about the offence by the presiding officer.

Griswold refers to the right against self-incrimination as follows:[4]

> I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilised. As I have already pointed out, the establishment of the privilege is closely linked historically with the evolution of torture. But torture was once used by honest and conscience public servants as a means of obtaining information about crimes which would not otherwise be disclosed. We want none of that today, I am sure. For a very similar reason we do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull a lever which springs the trap on which he stands. We have through the course of history developed a considerable feeling for the dignity and intrinsic importance of the individual man. Even the evil man is a human being.

However, the privilege against self-incrimination is not without its critics. This is evident from the comments of the well-known 19th century political philosopher, Jeremy Bentham:[5]

> One of the most pernicious and irrational rules that ever found its way into the human mind ... . If all criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking as guilt invokes the privilege of silence.

The conceptual relationship between the right to silence,[6] the right against self-incrimination and the presumption of innocence has caused some problems.

---

4 In his book *The Fifth Amendment Today* (1955) as cited by MacIntosh *ibid*. Griswold was dean of the Harvard Law School during the 1950s. However, MacIntosh *ibid* indicates that Griswold expressed the philosophy underlying the right to remain silent in the paragraph cited. MacIntosh indicates that the right to remain silent is sometimes referred to as the accused's freedom from self-incrimination as guaranteed by section 11(c).

5 As quoted by Salhany (1986) 99.

6 Section 35(3)(h) of the Final Constitution provides that every accused has a right to a fair trial which includes the right to be presumed innocent, to remain silent and not to testify during the proceedings.

For example, it has been held that the right to silence is the governing principle.[7]

In *R v Director of Serious Fraud Office, ex parte Smith*[8] Lord Mustill expressed the opinion that the "right to silence" did not denote any single right, but referred to a "disparate group of immunities". The immunities differed in nature, origin, incidence and importance.[9]

In *R v Hebert*[10] the Supreme Court of Canada indicated that the right to remain silent is protected as a fundamental principle of justice under section 7. It is broader than both the common law confession rule and the rule against self-incrimination. However, this decision may confuse as it contends that the underlying theme of both the common law confession rule, and the privilege against self-incrimination, was the individual's right to choose whether to make

---

7 See the decision by the House of Lords in *R v Brophy* [1982] AC 476 481, [1981] 2 All ER 705 (HL).

8 [1993] AC 1 (HL) 30 - 1.

9 The six identified immunities are:

- An universal immunity from being compelled on pain of punishment to answer questions;
- An universal immunity from being thus compelled to answer questions which may incriminate;
- A specific immunity of suspects undergoing interrogation from being thus compelled to answer questions;
- A specific immunity possessed by accused persons at trial from being thus compelled to testify and answer questions;
- A specific immunity by persons charged with an offence from being interrogated;
- A specific immunity possessed by an accused in certain circumstances from having adverse comment made on failure to answer questions before the trial or at the trial.

10 [1990], 2 SCR 151, 57 CCC (3d) 1 34 (SCC).

a statement to the authorities or to remain silent. This the court coupled with a concern with the repute and integrity of the judicial process.[11]

The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*,[12] when confronted with the constitutional validity of section 60(11B)(c) of the Criminal Procedure Act, also indicated that the right to remain silent was the governing principle. The court explained that the issue was not so much the right of an arrested person to be released on bail,[13] but the different constitutional right enjoyed by every person, upon arrest and thereafter, to remain silent. The court indicated that this right was expressed in the following number of complementary ways in the Constitution:

- to remain silent while under arrest;[14]
- not to be compelled while under arrest to make any confession or admission that could be used in evidence against that person;[15]
- to be presumed innocent, to remain silent, and not to testify at trial;[16] and

---

11 *Ibid* at 2. What the court did not indicate or accept was that the underlying principle in section 7 is the presumption of innocence and it is that principle which underlies the right to remain silent, the right not to incriminate yourself, and also underlies the common law confession rule.

But also see Chaskalson *et al* (1996) 27 - 40 and further; *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C) 162, 1995 (2) BCLR 198 (C); a decision by the Australian High Court in *Pyneboard (Pty) Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346 per Murphy J; *R v Jones* [1994] 2 SCR 229 249 (Can) (dissenting decision by Lamer CJ).

12 1999 (7) BCLR 771 (CC).

13 Under section 35(1)(f).

14 Under section 35(1)(a).

15 Under section 35(1)(c).

16 Under section 35(3)(h).

- not to be compelled to give self-incriminating evidence at trial.[17]

However, the silence and self-incrimination rights at trial are based upon the presumption of innocence. This was correctly endorsed by the Constitutional Court in *S v Zuma*:[18]

> [T]he common-law rule in regard to the burden of proving that a confession was voluntary has been not a fortuitous but an integral and essential part of the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself. These rights, in turn, are the necessary reinforcement of Viscount Sankey's 'golden thread' - that it is for the prosecution to prove the guilt of the accused beyond reasonable doubt ... . Reverse the burden of proof and all these rights are seriously undermined.

For practical and analytical purposes it can be said that the right to silence deals with the prohibition on compelling a person to testify, and whether inferences may be drawn from a failure to testify.[19] Self-incrimination deals with the extent to which an accused can be said to be compulsorily conscripted against himself by any given procedure. It is therefore clear that we are here dealing with the right not to incriminate oneself.

---

17 Under section 35(3)(j).

18 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC) par 33.

19 See *S v Brown* 1996 (11) BCLR 1480 (NC); 1996 (2) SACR 49 (NC).

## 9.2 CANADIAN LAW

### 9.2.1 General

Section 13 of the Canadian Charter provides that "a witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings".[20]

---

[20] Except in a prosecution for perjury or the giving of contradictory evidence. Although the primary provision, section 13 of the Charter is not the only provision that affords protection in this context. Section 5(2) of the Canada Evidence Act RSC 1985, c C - 5 that has been in place long before the Charter provides the following:

> Where with respect to any question a witness objects to answer on the ground that his answer may tend to incriminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or any provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence.

Section 5(2) guarantees a witness at a bail hearing that his testimony will not be admissible or used for any purpose against him at the subsequent criminal trial. However, section 5(2) will only apply when invoked by *objecting to answer questions* at the bail hearing on the ground that the answer might tend to incriminate or establish liability under civil proceedings. Section 5(2) therefore only affords protection to the answer given to a question of the Crown or presiding officer. It does not cover the testimony which the applicant of his own accord chooses to submit in order to obtain bail (whether he carries the burden of proof or not). It seems that if an applicant for bail, for example, testifies in order to obtain bail, but refuses to answer a question by the Crown on the merits of the case and is overruled, the answer will be shielded from the trial by section 5(2). However, except maybe in the instance where an accused has objected to answer a question at the bail application and the answer is used to test only the credibility of an accused during cross-examination at trial, section 13 of the Charter affords much wider protection in this context including the protection afforded by section 5(2). See par 9.2.1 and 9.2.2.

The Canadian Charter expressly deals with the privilege against self-incrimination in two contexts, namely in sections 11(c) and 13.[21] However, this does not preclude the implication of a similar and wider protection against self-incrimination in section 7.[22]

The enumerated rights in sections 8 to 14 are specific examples of emanations of the general right to life, liberty and security of the person protected by section 7. The specific mention of these rights serves to reinforce the general rights secured by section 7, rather than to restrict them. The right to remain silent is therefore embedded in the right to liberty and security of the person within the meaning of section 7. The specific rights in sections 11(c) and 13 are afforded an additional measure of sanctity. When section 7 affords protection, the rights may be restricted in accordance with the principles of fundamental justice. The specific rights in sections 8 to 14 are not so limited.[23]

---

21 The common law right was a right not to testify if the answers might tend to incriminate the witness. Canadian constitutional law has recognised *the right of an accused* not to testify, and that right has been enshrined in section 11(c) of the Charter. Canadian law has recognised *the right of a witness* not to be incriminated by evidence he has been compelled to give in another proceeding. That right was taken up in section 2(d) of the Canadian Bill of Rights. Section 13 of the Charter has given that protection constitutional status. See the decision by the British Columbia Court of Appeal in *Haywood Securities Inc v Inter-Tech Resource Group Inc; Haywood Securities Inc v Brunnhuber* (1985) 24 DLR (4th) 724 747 (BCCA).

22 See *RL Crain Inc v Couture and Restrictive Trade Practices Commission* (1983) 6 DLR (4th) 478 (SCQB) per Schebel J on December 1; *British Columbia Securities Commission v Branch* (1995) 123 DLR (4th) 462 (SCC); *Thomson Newspapers Ltd v Canada (Director of Investigation & Research Restrictive Trade Practices Commission)* (1990) 67 DLR (4th) (SCC) 161; *Dubois v The Queen* [1985], 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, (1986) 1 WWR 193, 23 DLR (4th) 503 (SCC).

23 The specific mention of the rights in sections 8 - 14 ensures their sanctity. The requirements for fundamental justice are furthermore determined by the specific rights themselves. See par 5.2.1.2.

The phrase "security of the person" in section 7 includes a right to personal dignity and a right to an area of privacy or individual sovereignty into which the state must not make arbitrary or unjustified intrusions. These considerations also underlie the privilege against self-incrimination.[24]

If the relationship between section 7 and the other sections is considered, it is suggested that section 11(c) does not preclude a right not to be compelled to be a witness against oneself from arising before a person is charged. Rather, section 11(c) provides additional protection by setting the point at which the right not to be compelled to be a witness against oneself is no longer subject to possible deprivation in accordance with the principles of fundamental justice.

Similarly section 13 guarantees to a witness the specific right not to have self-incriminating evidence used against him in other proceedings. This is a separate right, which arises regardless of whether the witness testified voluntarily or under compulsion.[25] Unlike section 5(2) of the Canada Evidence

---

24 *RL Crain Inc v Couture and Restrictive Trade Practices Commission* (1983) 6 DLR (4th) 478 (SCQB) 480.

25 *RL Crain Inc v Couture and Restrictive Trade Practices Commission ibid*; *Dubois v The Queen* [1985], 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, (1986) 1 WWR 193, 23 DLR (4th) 503 (SCC) at 525 DLR; *R v Sicurella* (1997), 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div) at CCC 422. See also *R v Carlson* (1984) 14 CRR 4 (BCSC) where Mckay J at 5 - 6 held that it had no bearing on the matter that the witness initiated the earlier proceedings and was under no compulsion to testify. It is significant to note that during the first part of the 1980 - 82 drafting process, this part of the section read "when compelled to testify". It was only in January 1981 when the revised resolution was placed before the Joint Committee of the Senate and House of Commons by the federal government that the wording was changed to "who testifies". See Mcleod, Takach, Morton & Segal (1993) 14 - 4. It is submitted that the protection has been broadened to cover all witnesses at the first or earlier proceedings whether they were compelled at that time to testify or not.

Act[26] section 13 does not require any objection on the part of the person giving the prior testimony.[27] It is applicable even where the witness in question is unaware of his rights.[28] It is also of no consequence whether the accused is compelled at the subsequent trial to testify or not.[29] The use of the accused's prior testimony at the trial is a violation of section 13 of the Charter.

The protection in section 13 inures to an individual at the moment an attempt is made to utilise previous testimony to incriminate him.[30] Furthermore the determination whether the use of testimony is incriminating is to be considered from the point of view of the second proceeding. It is of no consequence whether the evidence was or was not incriminating in the first proceeding.[31]

In *Dubois v The Queen* the Supreme Court, when faced with the question whether the Crown was correct to have used the accused's testimony from his first trial as part of the evidence in chief at the new trial, explained that section 13 was a specific form of protection against self-incrimination.[32] Section 13

---

26 RSC 1985, c C - 5.

27 See *Dubois v The Queen* [1985], 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, (1986) 1 WWR 193, 23 DLR (4th) 503 (SCC) at 524 DLR. Prudent council may advise a witness who is concerned that he might incriminate himself to object to answer questions subject to being ordered to do so in terms of section 5 of the Canada Evidence Act (and provincial counterparts). He would then also enjoy the protection of section 5.

28 *Dubois v The Queen ibid* in the dissenting judgment of McIntyre J at SCR 377.

29 *R v Sicurella* (1997), 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div).

30 *Dubois v The Queen* [1985], 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, (1986) 1 WWR 193, 23 DLR (4th) 503 (SCC) at 523 DLR.

31 *Ibid* at 527 DLR.

32 In this case the accused had been convicted but his conviction was overturned and a new trial ordered by the court of appeal. Before the Supreme Court, the

must be viewed in light of the related rights provided for in sections 11(c) and 11(d) of the Canadian Charter. To allow such evidence could result in the violation of both sections 11(c) and 11(d).[33] Section 11(d) provides for the right to be presumed innocent until proven guilty and imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he need respond, either by testifying or by calling other evidence. This burden on the Crown to establish guilt and the right to silence[34] also underlie the non-compellability right. The important protection is therefore that the Crown must prove its case before there can be any expectation that the accused respond. The case to meet is therefore common to sections 11(c), 11(d) and 13. In the context of sections 11(c) and 13 it specifically means that the accused enjoys "the initial benefit of a right of silence" ... and its corollary, protection against self-incrimination.[35]

Viewed in this context the purpose of section 13 is to protect individuals from being indirectly compelled to incriminate themselves, and to ensure that the Crown will not be able to do indirectly that which section 11(c) prohibits.[36]

---

accused argued that the use of his previous testimony in the second trial was a violation of section 13 of the Canadian Charter.

33 At 504 DLR.

34 The concept of a case to meet are essential elements of the presumption of innocence.

35 At 521 DLR and further.

36 At 523 DLR. The right provided for in section 11(c) of the Canadian Charter reflects the common law privilege against self-incrimination previously safeguarded by section 2(d) of the Canadian Bill of Rights. (The provincial Evidence Acts are in compliance with section 11(c).) An accused is not a competent witness for the prosecution and may therefore not be compelled to testify.

The court held that any evidence tendered as part of the case against the accused was clearly incriminating evidence. However, the Supreme Court did specifically not address the question whether previous testimony could be used for purposes of cross-examination if the accused chose to testify in his own defence at the subsequent trial.[37] I now turn to this issue.

### 9.2.2 The use of prior testimony for purposes of cross-examination

The courts have accepted that if prior testimony is used to incriminate an accused during cross-examination at the later hearing, section 13 will function to prohibit such use. However, it is not precisely clear whether section 13 will prohibit resort to previous testimony during cross-examination if the purpose is other than to incriminate the accused. On a plain reading, section 13 would not seem to prohibit the use of the prior testimony for another reason.

In *R v Mannion*[38] the Supreme Court had the opportunity to deal with the matter. The court had to decide whether the Crown was correct to have used the testimony by Mannion in the earlier trial, for purposes of cross-examination at the later trial. McIntyre J[39] found that the purpose of the cross-examination was to incriminate the respondent. The court held that the evidence was relied on to establish the guilt of the accused. Section 13 of the Canadian Charter clearly applied to exclude the incriminating use of the evidence of these contradictory statements. But, it seems that the Supreme Court might also have imputed protection against the use of previous testimony if used for other reasons than to incriminate the accused. The court referred to section 5 of the

---

37 At 528 DLR.

38 [1986] 2 SCR 272 (Can).

39 On behalf of the unanimous court at 279 - 281.

Canada Evidence Act and two cases that interpreted the effect thereof.[40] In these cases it was held that an accused may not be cross-examined or examined in chief upon evidence given at a previous hearing where he had invoked the protection of section 5. The court held that the Charter should not be construed as a limiting factor upon rights which existed prior to its adoption.

The British Columbia Court of Appeal in *Re Johnstone and Law Society of British Columbia*[41] did not interpret the *Mannion* decision as affording protection when the previous testimony was used during cross-examination for purposes of credibility. The court held that a lawyer who was subject to a disciplinary hearing, could be cross-examined on his previous testimony[42] for the purpose of determining his credibility.[43] However, if the main purpose of the cross-examination is to incriminate him, the cross-examination is contrary to section 13. In *R v B(WD)*[44] the Saskatchewan Court of Appeal agreed with *Johnstone*, holding that an affidavit sworn in a civil proceeding could be used to attack the credibility of an accused testifying in a criminal trial.

The Ontario Court of Appeal in *R v Kuldip*[45] disagreed with the interpretation of *Mannion* in *Johnstone*. Martin JA delivering the judgment explained that before

---

40 See *R v Wilmot* (1940) 74 CCC 1 (Alta CA) and *R v Cotè* (1979) 50 CCC (2d) 564 (Que CA).

41 (1987) 5 WWR 637 (BCCA).

42 Before the Registrar of the Supreme Court of British Columbia in a taxation of costs.

43 Per Craig JA, at 652. The other judges were in substantial agreement.

44 (1987) 45 DLR (4th) 429 (Sask CA).

45 (1988) 62 CR (3d) 336 (Ont CA).

the Charter, a witness that invoked section 5(2) of Canada Evidence Act could not be cross-examined on the prior testimony at the subsequent criminal proceeding either to incriminate him, or to challenge his credibility. But the witness only had the protection if he objected to the testimony, a position that had been subject to some criticism. The court indicated that one of the purposes of section 13 was to redress the unfairness that resulted if an uneducated witness or a witness that did not have the benefit of legal aid failed to invoke section 5(2). If the effect of section 13 were so restricted it would mean that a sophisticated witness would continue to enjoy the benefit of section 5(2). An unsophisticated witness, on the other hand, who did not know that he had to object, would not.

Martin J also pointed out that where the prior evidence is used ostensibly to break down the credibility of the accused it nevertheless assists the Crown in its case and, in a broad sense, may help to prove guilt. It is often difficult to distinguish when prior testimony is used to incriminate the accused and when it is used to attack his credibility.[46]

But does "testifies" and "evidence so given" as used in section 13 with reference to the prior proceedings include all forms of evidence? It also needs to be determined whether a bail application constitutes "any proceedings" as indicated in the wording of section 13 and whether the subsequent criminal trial constitutes "other proceedings" in relation to the prior bail application.

---

[46] At 346 - 347. However, section 13 specifically indicates that it prohibits the use of the prior testimony to *incriminate* the witness at the subsequent proceedings. Section 5(2) is not so limited.

### 9.2.3 "testifies" and "evidence so given"

In this part I consider the following questions:

- Do the phrases "testifies" and "evidence so given" limit the availability of the protection to the witness who gives *viva voce* testimony under oath in the first or earlier proceedings or is protection afforded from, for example, statements made from the bar?
- Is the wording broad enough to include other forms of evidence, for example, documentary evidence produced or identified by the witness in the earlier proceedings?
- Does the performance of an act during his prior testimony qualify for protection?

As to the first question, in *R v Carlson*[47] McKay J during a manslaughter trial, excluded evidence of certain incriminating statements made at a post-suspension hearing under section 16 of the Parole Act.[48] The accused had appeared before the Parole Board which procedures do not require testimony under oath. The court held that a person "testifies" for the purposes of section 13 of the Canadian Charter whether such testimony is made under oath or not, as long as the person is giving evidence "before a tribunal or officially constituted body".[49]

---

47 (1984) 14 CRR 4 (BCSC).

48 RSC 1970, c P - 2.

49 At 5 - 6.

In *R v Sicurella*[50] the accused brought an application to prevent the introduction of voice identification evidence which arose out of verbal communications of the accused, while under oath and before a judicial officer in the course of a bail hearing and subsequent bail review. The Crown attempted to submit the evidence at the trial of an officer who had overheard the accused testify on these two occasions. The officer had also heard the voice of the accused during authorised intercepted communications and wanted to testify that he believed the voice to be that of the accused.

Renaud Prov Div J ruled that this evidence was inadmissible indicating that the case law supported the view that the prosecution could not advance the tape of what was stated at the bail hearings to support a prosecution. The preliminary inquiry judge concluded that it was fundamental to emphasise that the courts must be vigilant to discern and to promote the calculus underlying the Charter. This must be done even at the stage of the preliminary inquiry, in order that the right to silence should not be undermined. To permit the prosecution to look to what the accused has said, in the course of a judicial proceeding, is to assist the Crown. It only serves to impair the right to silence and to shift the onus of proof. For the reasons given, the court applied section 13 of the Canadian Charter and did not permit the Crown to adduce in evidence anything emanating from the mouth of the accused in the course of the judicial proceedings held before a justice of the peace. It therefore seems that the protection afforded goes much further than testimony under oath and includes anything said by the accused at the prior proceedings even if only used for voice identification purposes.

As to the second question, in deciding whether documentary evidence is included in "testifies" and "evidence so given" the provision in section 5(2) of

---

50 (1997), 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div).

the Canada Evidence Act is taken into account.[51] Section 5(2) protects "the answer so given". This would presumably cover the testimony identifying the document. But does it cover the contents of the document? The policy in this regard was discussed in the *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence*.[52] The report indicates that most of the Evidence Acts made no reference to the privilege against self-incrimination insofar as it related to documents. According to the report this creates doubt about the intention of the legislators. The report indicates that the Law Reform Commission Evidence Code is likewise silent and, because it is a code, its silence must be understood as limiting the privilege to testimony. The report justifies this position on the ground that there is an intrinsic difference between compelling a person to condemn himself out of his own mouth and using documents already in existence to do the same thing. Documents as evidence do not involve the risk of perjury and therefore are similar to real evidence.

But the task force argued that whether a witness is asked to provide information to the court in the form of testimony or in the form of a document, it is still information which is being produced for the particular purpose of the case at bar. That compulsion to produce a document should not be used as a means of laying a foundation for a subsequent case against the witness. It was therefore concluded that the documentary evidence should be treated in exactly the same way as testimony insofar as the privilege is concerned.

It seems that the courts have previously not considered the production of documents to be within the scope of the privilege against self-incrimination.[53]

---

51 RSC 1985, c C - 5 and corresponding provisions of the Provincial Evidence Acts.

52 (1982) 440 - 441.

53 See, for example, *Attorney-General Quebec v Bégin* [1955], SCR 593, 112

However, these cases were all decided before the commencement of section 2(d) of the Canadian Bill of Rights[54] and section 13 of the Canadian Charter.

In *Re Ziegler and Hunter*[55] the Federal Court of Appeal compared and analysed section 2(d) of the Canadian Bill of Rights and section 13 of the Canadian Charter. The court concluded that section 13 extended to cover the production of incriminating documents at the prior appearance pursuant to a subpoena *duces tecum*.[56]

In *R v Sicurella*[57] Renaud Prov J found that Parliament by way of section 13 wished to protect the actual testimony and evidence arising out of such testimony.[58] It therefore seems that other forms of evidence arising out of the testimony will be protected by section 13.

With regard to the third question,[59] it is likely that the performance of an act such as the giving of a handwriting sample during his prior testimony will

---

CCC 209, 21 CR 217, (1955) 5 DLR 394 (SCC); *Curr v The Queen* [1972], SCR 889, 7 CCC (2d) 181, 18 CRNS 281, 26 DLR (3d) 603 (SCC), and *Reference under the Constitutional Questions Act; Re validity of section 92(4) of the Vehicles Act, 1957* (Sask) [1958], SCR 608, 121 CCC 321, 15 DLR (2d) 225 (SCC).

54 See Annexure A.

55 (1983), 39 CPC 234, 8 DLR (4th) 648, 51 NR 1 (Fed CA), leave to appeal to SCC refused (1984), 39 CPC 234n, 8 DLR (4th) 648n.

56 At DLR 675.

57 (1997), 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div).

58 At CCC 427. See also the reasoning of the court *supra* in my discussion of the first question.

59 See the questions at the beginning of this paragraph.

qualify for protection. The accused will therefore likely be protected from the use of that evidence at trial.[60]

### 9.2.4 "any proceedings" and "any other proceedings"

On a plain reading of the term "any proceedings" a bail application will qualify as "any proceedings" for the purposes of section 13. Hogg[61] referring to the same wording in section 14 of the Canadian Charter, indicates that it presumably included proceedings before both administrative tribunals and courts.[62]

The meaning of the phrase "any other proceedings" has proved more troublesome. The word "other" in "any other proceedings" led some judges to hold that certain proceedings in the criminal process were not "other" proceedings in relation to the earlier proceedings. However, none of the judges seem to indicate that a criminal trial does not constitute "any other proceedings" in relation to the prior bail hearing.[63]

---

60 See the reasoning by the task force on the uniform rules of evidence *supra* and the reasoning in *R v Sicurella ibid*. See also Paciocco *Charter principles and proof in criminal cases* (1987) 462 as cited by McDonald (1989) 579.

61 *Canada Act 1982 Annotated* 49 as cited by Mcleod, Takach, Morton & Segal (1993) 14 - 6.

62 At 49.

63 It is not clear whether a bail application would qualify for the subsequent or "other proceedings" in section 13 in relation to the prior trial. Would the prior testimony be "used to incriminate that witness in any other proceedings"? It seems not. In *Donald v Law Society of British Columbia* (1984) 2 WWR 46, additional reasons at (1985) 2 WWR 671 (BCCA) Hinkson JA had to consider whether a disciplinary proceeding against a lawyer qualified for the second proceeding in terms of section 13. He held that the Charter should not be restricted to criminal proceedings but should rather be given a broader meaning extending its operation to include any proceeding where an individual is exposed to a criminal charge, penalty or forfeiture as a result of having testified

In *R v Yakelaya*[64] the Ontario Court of Appeal held that a preliminary enquiry and a trial on the same charges are not *vis-à-vis* each other "other proceedings". In *R v Protz*[65] the Saskatchewan Court of Appeal held that sentencing procedures are not "other procedures" in relation to the trial before conviction.

This issue ultimately came to be decided by the Supreme Court in *Dubois v The Queen.*[66] McIntyre J in a dissenting judgment held that the retrial of an accused was not another proceeding for the purposes of section 13 of the Canadian Charter. McIntyre J explained that the term "proceeding" in section 13 for purposes of a criminal case meant all judicial proceedings taken "upon one charge to resolve and reach a final conclusion on the issue therein raised

---

in earlier proceedings. Soon thereafter he held that section 13 extended to include all proceedings (at 54). Anderson JA at 57 also on behalf of the British Columbia Court of Appeal similarly held that the plain and ordinary meaning of section 13 was that evidence given by a witness in any proceedings shall not be used to "incriminate" that witness "in other proceedings". He then pointed out that the specific disciplinary proceedings were penal in nature. This decision was followed by Estey J in *Bank of NS v Miller* (1985) 6 WWR 574 (Sask QB). Gallant J in *Johnson v Law Society of Alberta* (1986) 66 AR 345 (Alta QB) at 351 held that a lawyer before a discipline committee does not enjoy the protection of section 13. He indicated that the reference in section 13 to "incriminating evidence" and "incriminate" reinforced the interpretation that the rights in section 13 related to criminal and penal matters. But, in *R v Sicurella* (1997), 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div) it was specifically held by Renaud Prov Div J that a bail hearing and bail review, in the light of the broad interpretation that expression "proceedings" has received, fell within the meaning of "other proceedings" in section 13 of the Charter.

64 (1985) 20 CCC (3d) 193 (Ont CA) per Martin JA.

65 (1984) 13 CCC (3d) 107 (Sask CA) per Vancise JA.

66 [1985], 2 SCR 350, 18 CRR 1, 41 Alta LR (2d) 97, 22 CCC (3d) 513, (1986) 1 WWR 193, 23 DLR (4th) 503 (SCC). The facts appear from footnote 32.

between the same party and the crown".[67] In this McIntyre J included the preliminary hearing, the trial, an appeal and a new trial. McIntyre J further explained that as the new trial was on the same indictment, between the same parties and raising precisely the same issues, the new trial could not be considered "another proceeding".[68] However, all six of the other presiding judges found that a retrial on the same offence fell within the meaning of the words "any other proceedings". According to the majority another viewpoint, in the context of the facts before court, would result in the accused being conscripted against himself and would indirectly violate the accused's rights in terms of sections 11(c) and 11(d) of the Charter.[69]

### 9.2.5 Derivative evidence

Another related issue, is whether evidence of fact obtained as a result of testimony in the bail hearing may be used at the subsequent trial. [70]

In *R v Crooks*[71] O'Driscoll J stated that the law of Canada in this area was not analogous to the position in the United States of America.[72] Under American

---

67 At DLR 505.

68 *Ibid.*

69 See my discussion in par 9.2.1.

70 In *R v S (RJ)* [1995] 1 SCR 451 (Can) 552 the Supreme Court explained that derivative evidence was evidence found, identified or understood as a result of the "clues" provided by compelled testimony. Derivative evidence is therefore by definition independent from compelled testimony.

71 (1982), 39 OR (2d) 193, 2 CRR 124 (Ont HC), affirmed 2 CRR 124 at 125 (CA), leave to appeal to SCC granted, 46 NR 171, affirmed 2 CCC (3d) 57 at 64 N (CA).

72 See the United States Constitution, Fifth Amendment and 18 US Code 6002 (Immunity Statute).

law no information directly or indirectly derived from testimony or other information may be used against a witness in any criminal case.[73] The prohibition is against evidence given and derivative evidence. However, this protection goes further than the position created by sections 7, 11(c) and 13 of the Canadian Charter.[74]

In *Thomson Newspapers Ltd v Canada (Director of Investigation & Research Restrictive Trade Practices Commission)*[75] La Forest J[76] explained that section 7 did not provide inflexible protection against the subsequent use of evidence derived from that testimony.[77] The use of derivative evidence in subsequent trials for offences under the Act does not automatically affect the fairness of those trials and complete immunity against such use is not required by the principles of fundamental justice. Derivative evidence exists independently of the compelled testimony, meaning that in most cases it could also have been discovered independently of any reliance on the compelled testimony. Its use by the prosecutor does not raise the same concerns as those in respect of the use of pre-trial evidence. Admittedly there will be some situations in which the derivative evidence is so concealed or inaccessible as to be virtually undiscoverable without the assistance of the wrongdoer. For practical

---

73 Except in a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. 18 US Code 6002 prohibits the subsequent use of "information directly or indirectly derived from such testimony or other information".

74 See also *Ruben v R* (1983) 24 Man R (2d) 100 (Man QB) per Hewak J.

75 (1990) 67 DLR (4th) 161 (SCC).

76 On behalf of the majority of the court. Lamer and Sopinka JJ dissented in part and Wilson J dissented *in toto*.

77 At 163.

purposes, the subsequent use of such evidence would be indistinguishable from the subsequent use of pre-trial compelled testimony.

La Forest J elaborated that the principles of fundamental justice do not require an absolute prohibition against the use at trial of all derivative evidence on the ground that omission of such evidence can in some cases affect the fairness of the trial.[78] He held that the trial judge's power to exclude derivative evidence where appropriate was all that was necessary to satisfy the requirements of the Charter. This solution achieves an appropriate balance between the individual's right against self-incrimination and the state's legitimate need for information about the commission of an offence.[79] In this case La Forest J grounded his approach on the common law ability of judges now constitutionalised in section 11(d) of the Canadian Charter to ensure a fair trial by excluding evidence after considering its prejudicial effect and probative value.[80]

The presiding officer in subsequent criminal proceedings can therefore exclude derivative evidence where appropriate.[81] However, it seems that the Ontario Provincial Division in *R v Sicurella*[82] had stronger views on this issue.[83] Renaud

---

78 *Ibid.*

79 At 163. The Supreme Court in *R v S (RJ)* [1995] 1 SCR 451 (Can) at 563 and further confirmed this earlier approach by the Supreme Court. However, the court also observed that evidence such as self-incriminating evidence, which impacts on trial fairness, is almost always excluded. The court therefore found it likely that derivative evidence which could not have been obtained but for a witness's testimony will be excluded. See also *British Columbia Securities Commission v Branch* [1995] 2 SCR 3; 123 DLR (4th) 462 (SCC).

80 See also *R v S (RJ) ibid.*

81 See also *Mead v Canada* (1991) 81 DLR (4th) 757 (Fed Ct TD) at 757.

82 (1997), 14 CR (5th) 166, 120 CCC (3d) 406, 47 CRR (2d) 317 (Ont Prov Div).

Prov Div J indicated that Parliament intended to protect evidence arising out of testimony, in addition to the actual testimony itself.

## 9.3 SOUTH AFRICAN LAW

### 9.3.1 General

Section 60(11B)(c) of the Criminal Procedure Act provides as follows:

> The record of bail proceedings, excluding the information in paragraph (a),[84] shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.

It seems that the legislature with section 60(11B) intended to target testimony by the accused.[85] However, the first part of section 60(11B)(c) provides that

---

83 At CCC 422 and further. The court seems to have been unaware of the decision of the Supreme Court.

84 Information as to previous convictions, pending charges and whether the accused has been released on bail in respect of those charges.

85 Section 60(11B) provides the following:

(a) In bail proceedings the accused, or his or her legal advisor, is compelled to inform the court whether-
  (i) the accused has previously been convicted of any offence; and
  (ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.
(b) Where the legal advisor of an accused on behalf of the accused submits the information contemplated in paragraph (a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not.
(c) [see text]
(d) An accused who willfully-

the record of the bail proceedings, which would, for example, include the testimony by the investigating officer objecting to the granting of bail, forms part of the record of the subsequent criminal trial. On a literal interpretation, the record of proceedings at the bail hearing, excluding testimony by the accused, will therefore in any event form part of the trial record. If the accused is informed of the consequences and he elects to testify, that testimony is admissible at the subsequent criminal trial. Only the admissibility of evidence tendered by the accused is considered here.

Even though it is not indicated for which purpose the prior testimony may be used at the trial, I do not think that the intention of the legislature was that the evidence presented at the bail hearing by the accused should form part of the state case at the trial.[86] Using the evidence as part of the state case would clearly be an unjustifiable infringement of sections 35(3)(h) and 35(3)(j) of the Final Constitution.[87] It therefore seems that the intention must have been to use the prior testimony for purposes of cross-examination. I am of the opinion that the use of the prior testimony to incriminate an accused during cross-examination at trial would similarly be an unjustifiable infringement of sections

---

(i) fails or refuses to comply with the provisions of paragraph (a); or
(ii) furnishes the court with false information required in terms of paragraph (a),
shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding two years.

86 Also not the prior evidence by the state opposing bail. Another view would allow evidence without the accused having had the opportunity to contest that evidence at the trial.

87 See my discussions in par 9.3.9 and the Canadian Supreme Court judgment in *Dubois v The Queen* 23 DLR (4th) 503 at 504 and 521 and further. However, this view is not accepted by all. The high court in *S v Dlamini* 1998 (5) BCLR 552 (N) allowed the state to prove the prior statements made by the accused at the bail application as part of the state case at the subsequent criminal trial.

35(3)(h) and 35(3)(j).[88] But section 60(11B)(c) does not differentiate between the use of the prior testimony to incriminate or to test the credibility of the accused on trial. It would therefore seem to afford the right to both incriminate and test the credibility of the accused who elects to testify at trial.

When deciding on the admissibility of evidence given by an accused at bail proceedings for purposes of the subsequent criminal trial, section 60(11B)(c) must be considered in the light of sections 12[89] and 35(3)(j) of the Final Constitution. In terms of section 35(3)(j) "every accused person has a right to a fair trial, which includes the right not to be compelled to give self-incriminating evidence".[90] Regard must also be had to sections 235 and 203 of the Criminal Procedure Act.

### 9.3.2 Section 235 of the Criminal Procedure Act

Section 235 under the heading "Proof of judicial proceedings" provides:

> It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribes such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be *prima facie* proof that any matter purporting to be recorded thereon was correctly recorded.

---

88 See my discussion in par 9.3.9.

89 See chapter 6.

90 The Interim Constitution granted similar rights in section 25(3)(d). The section provided that every accused person shall have the right to a fair trial, which include the right to adduce and challenge evidence, and not to be compelled to be a witness against oneself.

In terms of section 235 of the Criminal Procedure Act the evidence so given at judicial proceedings[91] may be proved[92] by producing a copy of the record of those proceedings properly certified in terms of the requirements stated in section 235. Section 235 describes how judicial proceedings may be proved and does not decide what may be proved. This principle was not always accepted in the pre-constitutional era. In *S v Adams*[93] and *S v Venter*[94] it was held that the record of the bail application was admissible against the accused at trial in terms of section 235 and this was not affected by the accused's right against self-incrimination in terms of section 203.

After the advent of the Interim Constitution, Vivier J in *S v Nomzaza*[95] deviated from this finding by holding as follows:

- Evidence given by an accused will only be admissible in terms of section 235 if otherwise admissible.
- Each case must be handled on its own facts.
- In the light of the Constitution there will be cases where the admission of the bail proceedings will render the trial unfair.

---

91 It is submitted that the term "judicial proceedings" is wide enough to include a bail application.

92 Although the copy shall be *prima facie* proof that any matter recorded thereon was properly recorded the copy does not constitute *prima facie* proof of any fact recorded.

93 1993 (1) SACR 611 (C).

94 Case 59/95 unreported (A) as cited in Du Toit *et al* (1987) 24 - 110.

95 [1996] 3 All SA 57 (A). On 29 May 1996.

Because section 235 in any event allowed a certified copy of the bail record to be handed in at trial, the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[96] saw the first part of subsection (11B)(c) as an unremarkable procedural provision. The court indicated that subsection (11B)(c) merely acted as a shortcut for the incorporation of the bail record into the trial record.

It is therefore suggested that as in the case of section 235 the prosecution would only be able to rely on section 60(11B)(c) if the bail record contained otherwise admissible evidence.

### 9.3.3 Section 203 of the Criminal Procedure Act

Section 203 under the heading "Witness excused from answering incriminating question" provides:

> No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the thirtieth day of May, 1961,[97] have been compelled to answer by reason that the answer may expose him to a criminal charge.

Whereas the 1955 Act[98] protected a witness against any questions the answer to which might expose him to "any pains, penalty, punishment or forfeiture, or

---

96 1999 (7) BCLR 771 (CC).

97 The reference to 30 May 1961 in section 203 entails that the law of evidence as at that date, with inclusion of the then accepted English law of evidence, prevails with regards to the privilege against self-incrimination. The history of the rule is described by Wigmore (1961) par 2250 as a long story woven across a tangled warp. It is partly composed of the contrivances of the early canonists, the severe contest between the courts of the common law and the church and "of the political and religious issues of that convulsive period in English history, the days of the dictatorial Stuarts".

98 By way of section 234.

to a criminal charge, or to degrade his character",[99] section 203 presently confines the privilege to answers which may expose one to a criminal charge.[100] However, the protection has been limited by sections 204, 205 and lately section 60(11B)(c).

### 9.3.4 Pre-constitutional jurisprudence

The pre-constitutional nature and scope of the privilege against self-incrimination was considered at some length by the Appellate Division in *S v Lwane*,[101] and *Magmoed v Janse van Rensburg*,[102] some 26 years later.

---

99 See Du Toit *et al* (1987) 23 - 47; Hiemstra (1993) 491.

100 Section 200 of the CPA expressly provides that a witness in criminal proceedings may not refuse to answer a question on the ground that the answer may expose him to civil liability. See *Wessels NO v Van Tonder* 1997 (1) SA 616 (O) 620 - 1. Many varied considerations for this particularly English institution has been given throughout the years. The modern rationale for this rule has been said to be the belief that "the coercive power of the state should not be used to compel a person to disclose information which would render him liable to punishment". See May (1990) 245. In *Miranda v Arizona* 384 US 436 705 - 6 (1966) the American Supreme Court indicated that the idea that a man should be compelled to give answers exposing himself to the risk of criminal punishment is probably still repellent to public opinion, even though it was no longer based on the unpopularity of the Star Chamber. The court also considered that people must be encouraged to testify freely. In the absence of some kind of privilege against incrimination they might not be prepared to come forward as witnesses. Supporters of the rule have also argued that the rule encourages the search for independent evidence. If the police cannot rely on the evidence given by the suspect they would have to procure the evidence themselves. However, it has been unclear to what extent police resort to other investigations if the accused is not willing to assist. It has also been argued in support of the rule that an accused should not be asked to account of himself unless a *prima facie* case has been established against him. Another reason that has been advanced by the supporters of the rule was that the rule relieves the courts from false testimony. If an accused cannot bring himself to admit the crime he should therefore rather have the option to refrain from testifying rather than to perjure himself. See Zuckerman (1989) chapter 15.

101 1966 (2) SA 433 (A).

Even though section 203 does not require a witness to be cautioned in respect of self-incriminating evidence,[103] Thompson JA in *S v Lwane*[104] held that such a general rule of practice existed in South Africa.[105] The rule was based on the consideration that, in South Africa, the vast majority of persons who enter the witness-box are likely to be ignorant of the privilege against self-incrimination.[106] The effect of the non-observance of the rule was to be determined upon the particular facts of the case. In this enquiry the nature of the incriminating statement and the ascertained or presumed knowledge of his rights by the deponent will always be important factors.[107]

It would therefore seem that proof that an uncautioned witness was actually aware of his rights would ordinarily render the incriminating evidence admissible, despite non-observance of the rule of practice.[108] However, in a separate concurring judgment Holmes JA in *Lwane* indicated that non-observance of the duty of the court to inform a witness of his right against

---

102 1993 (1) SA 777 (A); 1993 (1) SACR 67 (A).

103 There is no rule in pre-30 May 1961 English Law of Evidence that a court must warn a witness that he is not obliged to answer questions that might incriminate him. See *R v Coote* [1873] LR 4 (PC) 599.

104 1966 (2) SA 433 (A).

105 At 440. See also *R v Ramakok* 1919 TPD 305 308 where the existence of the rule was confirmed much earlier. The rule was also confirmed in *R v Ntshangela* 1961 (4) SA 592 (A) at 598H.

106 At 439F and further.

107 At 440G - 441A.

108 The same approach seems to have been taken in *Magmoed.*

self-incrimination was an irregularity which would ordinarily[109] render the incriminating evidence inadmissible in a prosecution against the witness. [110]

In *Magmoed v Janse van Rensburg*[111] Corbett CJ explained that the criminal justice system and decisions of the courts evinced a general policy of concern for an accused person in a criminal case. This policy includes the rule that an accused should be fairly tried, as well as the various rules which exclude certain types of evidence on the ground that it would *inter alia* be unduly prejudicial to the accused. These measures place limitations on the power of the prosecution to obtain a conviction. They ensure that the accused is not wrongly convicted.

The court held that one such privilege in the sphere of the law of evidence was the privilege against self-incrimination in terms of section 203 of the Criminal Procedure Act. The court described the privilege as "a personal right to refuse to disclose admissible evidence".[112] The privilege is that of the witness and has to be claimed by him.[113] Where the privilege is claimed by the witness, the court must rule on it. Before allowing the claim of privilege, the court must be satisfied from the circumstances of the case and the nature of the evidence that there are reasonable grounds to apprehend danger to the witness if he is

---

109 In principle it has been stated that if the accused is represented or otherwise deemed to know of his right against self-incrimination, non-observance of this rule will not render the incriminating evidence inadmissible at the later proceedings.

110 1966 (2) SA 433 (A) 444F.

111 1993 (1) SA 777 (A); 1993 (1) SACR 67 (A).

112 819I SA.

113 819I SA.

compelled to answer.[114] The witness should be given considerable latitude in deciding what is likely to prove an incriminating reply.

The court held that where a witness objects to answering a question on the ground of the privilege against self-incrimination and the objection is overruled by the presiding officer who compels the witness to answer the question, then his reply, if incriminating, will not be admissible in subsequent criminal proceedings against him.[115]

The court also restated the established rule of practice that the court should inform a witness of his right to decline an answer which may be incriminating. This practice arose because in South Africa many uneducated persons enter the witness-box.[116] However, if the witness was not ignorant of this right, it was not necessary to caution him in this regard.

With regards to statements made at a bail application, the full bench in *S v Steven*[117] indicated that the accused could have invoked the privilege against self-incrimination. They chose not to do so. As they were represented by counsel there was no question whether the magistrate should have advised them of their rights. The court indicated that the question was not whether the magistrate had committed an irregularity, but rather whether the accused will

---

114 See also *R v Boyes* (1861) 1 B & S 311 at 330, 121 ER 730 738. The danger must be real and appreciable, not imaginary and of insubstantial character (*S v Carneson* 1962 (3) SA 437 (T) 439H). The privilege may therefore not be claimed where the possibility of criminal liability has been removed. For example where indemnity has been granted in terms of section 204. See *R v Hubbard* 1921 TPD 433 439.

115 821E SA.

116 820G - 820I SA.

117 Case number A1237/93 (unreported) (W) 20.

have a fair trial if the record of the bail application is admitted in evidence. However, it was common cause between the state and the legal counsel of the accused that where an accused gives evidence in a bail application, he retains the privilege against self-incrimination.

### 9.3.5 Case-law after the Interim Constitution

#### 9.3.5.1 General

After the advent of the Interim Constitution both the Constitutional Court and the supreme court had the opportunity to consider the nature and scope of the right against self-incrimination in the context of bail applications. The Constitutional Court also had the opportunity to discuss the link between the right against compelled pre-trial self-incrimination and the trial, and some supreme courts pronounced on the compulsion requirement.

#### 9.3.5.2 The right against self-incrimination in the context of bail

In *S v Zuma*[118] the Constitutional Court restated the policy that the testimony of an applicant for bail is inadmissible against him at his later trial if he was unaware of his right against self-incrimination. Kentridge AJ explained that the accused could not have a fair trial if he is cross-examined on the incriminating evidence he gave at the bail application, if he did so while ignorant of the right to refuse to answer incriminating questions. Kentridge AJ saw the question as whether the accused was unaware of the rule against self-incrimination.[119]

---

118 1995 (2) SA 642 (CC).

119 At 651J - 652D.

In *S v Nyengane*[120] the supreme court in applying the same policy refused to admit the testimony of an applicant for bail at his subsequent criminal trial.[121] The magistrate had failed to warn the accused that he was not obliged to answer questions that might have been self-incriminating. The court held that the fact that the accused was represented by counsel made no difference since his legal representative was an inexperienced candidate attorney whose ignorance, could not be held against the accused.

In *S v Botha (2)*[122] the court refused to allow the state to use the record of the bail application as evidence against the accused because the accused had been ignorant of his right to refuse to answer incriminating questions.[123] The magistrate at the bail hearing did not warn the accused that he had the right to refuse to answer incriminating questions. The accused also alleged that his legal representatives with whom he had only consulted for a mere 10 to 15 minutes before the bail application, had also not informed him of such right. Consequently the accused was cross-examined on the merits and gave incriminating answers.[124] Myburgh J held that the accused could not have a fair trial if such evidence were to be received.

Even though Myburgh J fell back on the old principles he also pointed to the dilemma that the accused faced.[125] The accused had a right to remain silent

---

120 1996 (2) SACR 520 (E).

121 The court also indicated and there was no provision in the Criminal Procedure Act that permitted the accused's testimony in the bail application to be used at the subsequent trial.

122 1995 (2) SACR 605 (W).

123 At 609 - 10.

124 At 608.

125 At 611. Some three years before the commencement of section 60(11B)(c).

and the right against self-incrimination. He also had a right to bail. However, if he exercised the first-mentioned rights he could be refused bail. If he decides to testify, his evidence may be used against him at the subsequent trial. The court indicated that the way to avoid burdening the accused with that choice, is to follow the procedure adopted with the evidence of an accused given at a trial within a trial. In this way the bail application would be insulated in a watertight compartment with no spill-over to the subsequent trial.[126]

The courts in the era of the Interim Constitution therefore treated the right against self-incrimination in the same way as before. If the accused was aware, or deemed to be aware of his right to refuse to answer self-incriminating questions at the bail application, his testimony would be admissible at the ensuing trail. However, one supreme court did point out that the accused after the advent of the Interim Constitution had a right to bail and the right against self-incrimination. If the evidence from the bail application was allowed to spill over to the trial it would mean that the accused would have to choose between his right to bail and his right against self-incrimination. It is therefore important to investigate whether there is a link between compelled pre-trial self-incrimination and the trial, and whether the exercise of this choice amounts to the sort of compulsion required by the right against self-incrimination. These issues were discussed by the courts in the same era.

---

126 As to the isolation of a trial within a trial see *R v Dunga* 1934 (AD) 223 226; *S v De Vries* 1989 (1) SA 228 (A) 233H - 234A; *R v Brophy* [1982] AC 476, [1981] 2 All ER 705 (HL) 709D - E; *S v Sithebe* 1992 (1) SACR 347 (A) 341a - c per Nienaber JA.

9.3.5.3 The link between the right against compelled pre-trial self-incrimination and the trial

The link between the right against compelled pre-trial self-incrimination and the trial was explained by the Constitutional Court in *Ferreira v Levin NO; Vreyenhoek v Powell NO*,[127] *Bernstein v Bester NO*[128] and strengthened in *Nel v Le Roux NO*.[129]

In *Ferreira v Levin NO; Vreyenhoek v Powell NO* the constitutional validity of section 417(2)(b) of the Companies Act 61 of 1973 was examined. In terms of this section an examinee was required to answer under the threat of a fine or imprisonment or both any question put to him notwithstanding that any answer to such question might be used in evidence against him in subsequent criminal proceedings. Chaskalson P, on behalf of the majority, held that the section infringed the rule against self-incrimination.[130] He explained that the rule against self-incrimination was "not simply a rule of evidence" but "a right", which, by virtue of the provisions of section 25(3) of the Interim Constitution, was a constitutional right. He also indicated that it was "inextricably linked to the right of an accused to a fair trial" and it existed to protect that right.[131] The reason why the evidence given by an examinee at an inquiry held under section 417(2)(b) could not be used against him if he was subsequently prosecuted

---

127 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC).

128 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC) par 60f.

129 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC).

130 Par 159 of the judgment.

131 *Ibid.*

flows from this connection between the privilege against self-incrimination and the right to a fair trial.[132]

In a minority judgment Ackermann J concluded that "the right of a person not to be compelled to give evidence which incriminates such person is inherent to the rights mentioned in section 25(2) and (3)(c) and (d) of the Interim Constitution".[133] The judge cited with approval the decision in *R v S (RJ)*[134] where the Canadian Supreme Court discussed the right against self-incrimination in terms of protecting the person concerned "against assisting the Crown in creating a case to meet". However, Ackermann J did not see that the constitutionality of section 417(2)(b) could be challenged in terms of section 25(3) of the Constitution.[135] He decided that section 417(2)(b) violated the widely interpreted provisions of section 11(1) of the Interim Constitution. In this regard Chaskalson P pointed out that the reasoning that led Ackermann J to conclude that section 417(2)(b) was inconsistent with section 11(1) would also have led him to conclude that it was inconsistent with section 25(3).[136]

---

132 Par 159 & 160 of the judgment.

133 Par 79 of the judgment. Sections 25(2), (3)(c) and (d) appear in Annexure C.

See also *S v Zuma* 1995(1) SACR 568 (CC) par 33 and *R v Camane* 1925 AD 570 575.

134 [1995] 1 SCR 451, 26 CRR (2d) 1 76.

135 Ackermann J held that section 25(3) rights only accrued to an "accused person" when such person became an accused in a criminal prosecution. An examinee at a section 417 enquiry was not an "accused person". Ackermann J explained that only when such evidence was tendered at the criminal trial did the threat to any section 25(3) right against self-incrimination arise.

136 In *Parbhoo v Getz NO* 1997 (4) SA 1095 (CC) *Ferreira*'s case was followed and applied in respect of sections 415(3) and (5) of the Companies Act in relation to the corresponding section of the Final Constitution, section 35(3). The court in *S v Mathebula* 1997 (1) BCLR 123 (W) 147 also accepted this principle as part of the right to a fair trial.

However, at supreme court level it was also held that the compulsion of some types of evidence does not violate the right against self-incrimination. In *Msomi v Attorney-General of Natal*[137] the division between "real" and "communicative" evidence made by the Canadian courts while dealing with fingerprints was invoked.[138] The court in *Msomi* held that only the compulsion of "communicative" evidence could be regarded as violating the right against self-incrimination.[139] But in *S v Hlalikaya*[140] there was a deviation of the "communicative" requirement where a suspect's standing in an identity parade, was given a self-incrimination dimension. A wider meaning regarding compulsory self-incrimination was also given in *S v Melani*[141] where the court

---

137 1996 (8) BCLR 1109 (N).

138 See *Collins v The Queen* [1987], (1) SCR 265, 33 CCC (3d) 1 (SCC). See also *S v Huma* 1996 (1) SA 232 (W) and *S v Maphumulo* 1996 (2) BCLR 167 (N).

139 *Msomi* followed the American decision in *Schmerber v California* 384 US 757 (1966) (blood sample not self-incrimination). In Canada, this reasoning was also applied by the Ontario Court of Appeal in *R v Altseimer* (1982), 1 CCC (3d), 142 DLR (3d) 246,38 OR (2d) 783 to a breath sample. However, the Supreme Court of Canada in *R v Therens* (1985), 13 CRR 193, (1985) 1 SJR 613 held that a breath sample amounted to conscription of the accused against himself. See also *R v Dersch* [1993], 3 SCR 768, 85 CCC (3d) 1 (SCC) (blood sample) and *R v Greffe* [1990], 1 SCR 755, 55 CCC (3d) 161 (SCC) (object extracted from rectum). In the latter cases the self-incriminating principles were entangled with the violations of the right to counsel.

In England the privilege against self-incrimination at common law is interpreted as not extending to the compelled production of intimate samples. See *Apicella AR* [1985] 82 Cr App R 295 (CA); *Smith RW* [1985] 81 Cr App R 286 (CA) and *Cooke S* [1995] 1 Cr App R 318 (CA).

140 1997 (1) SACR 613 (SE).

141 1995 (4) SA 412 (E), 1996 (2) BCLR 174 (E) 191, 1996 (1) SACR 335 (E).

viewed conscription as "through some form of evidence emanating from himself".[142]

9.3.5.4 The compulsion to testify

In *Davis v Tip*[143] the applicant was charged with misconduct and had to appear in a disciplinary enquiry. However, he had been criminally charged in respect of the same charges which proceedings had not been finalised. At the enquiry it was submitted that the applicant's right in terms of section 25(3)(c) IC would be violated if the inquiry proceeded since he might of necessity be called upon to answer evidence against him if he wished to avoid a finding of misconduct. This evidence could then be used against him in the criminal proceedings.[144]

Nugent J held that the exercise of this choice, even if it is an unpleasant one, to defend the applicant's interest in the disciplinary enquiry did not amount to the sort of compulsion required for the violation of "the right to remain silent".[145] However, the reasoning of the court in coming to this conclusion, is not convincing. The finding by the court, in the first instance, that the two Canadian cases referred to by the applicant do not provide authority for the proposition that such an illusory choice is equal to violating the applicant's

---

142 Snyckers in Chaskalson *et al* (1996) 27 - 46 submits that a distinction should be drawn between real evidence obtained independently of the person of the accused, and real evidence intimately connected with his person. He submits that compelled production of the former does not by itself amount to self-incrimination, but compelled reproduction of the latter may be a different matter.

143 1996 (1) SA 1152 (W), 1996 (6) BCLR 807 (W).

144 At SA 1154 - 1155.

145 At SA 1158H - J. See also *S v Mbolombo* 1995 (5) BCLR 614 (C).

"right to silence", is astonishing.[146] The two Canadian cases say in as many words that such a choice amounts to no choice at all and that the applicant will thus be *forced* to wave his "right to silence".[147] The court furthermore, while accepting that an accused may not be placed under compulsion to incriminate himself, perplexingly based its findings on the right to silence[148] rather than on the right against self-incriminating evidence.[149] The distinction also, that the court tried to make between the "compulsion to testify" as required by "the right to silence", and "the choice to testify" as in the application before court seems forced and unconvincing.

The court explained that what distinguished "compulsion to testify" from "making a choice to testify" was whether the alternative that presented itself constituted a penalty which served to punish a person from choosing a particular route as an inducement to him to not do so.[150] In the present case the applicant might be required to choose between incriminating himself or losing his employment. However, his loss of employment would be the consequence of him being found guilty of misconduct and not a punishment to induce him to speak.[151]

---

146 At 1158C. Counsel for the applicant referred to the decision of the Nova Scotia Court of Appeal in *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* (1993) 18 CRR (2d) D - 6 Digest and the Nova Scotia Supreme Court in *Williams v Deputy Superintendent of Insurance* (1993) 18 CRR (2d) 315.

147 See *Williams ibid* 331 and 337. The *Williams* decision followed the *Phillips* decision *ibid*.

148 Enumerated in section 25(3)(c) IC.

149 At 1158G - H.

150 At 1158H - J.

151 At 1159A - B.

In *Seapoint Computer Bureau (Pty) Ltd v Mcloughlin NO*[152] the applicant applied to stay a civil proceeding pending the determination of a criminal case. The applicant contended that the cross-examination during the civil proceedings would expose him to the risk of making incriminating statements that would prejudice his position in the criminal proceedings that might follow. In this case the court, relying heavily on the *Davis* decision and the analysis therein, also held that only the actual coercive compulsion to answer questions, as opposed to the exercise of a choice amounted to the sort of compulsion required for the violation of "the right to remain silent".[153] However, the *Seapoint* court seemed to base its decision on the equation of the common law right to silence with the right against self-incrimination.[154]

### 9.3.6 Case-law under the Final Constitution

During the period between the advent of the Final Constitution and the commencement of section 60(11B)(c) of the Criminal Procedure Second Amendment Act, the supreme court was also called on to decide whether the submissions by the applicant for bail should be admissible against him at his subsequent trial.[155]

---

152 1996 (8) BCLR 1071 (W).

153 See also *Osman v Attorney-General of Transvaal* 1998 (11) BCLR 1362 (CC) where the actual coercion to speak was also decisive.

154 At 1081 and further.

155 The decision came on 9 April 1998 after the Criminal Procedure Second Amendment Act 85 of 1997 was assented to on 26 November 1997, but before the date of commencement of *inter alia* subsection (11B)(c) which commenced with the remainder of the Act on 1 August 1998.

It was contended before Vahed AJ In *S v Dlamini*[156] that an accused person should be free to say whatever he wants at a bail application in order that he may feel comfortable and secure in securing his freedom at that stage.

Vahed AJ referred to the Supreme Court of Appeal in *S v Nomzaza*[157] which held that in general everything said by the accused at the bail application was admissible at the later trial unless there were circumstances rendering such statements inadmissible. He was of the opinion that *Botha*'s case[158] did no more than take the proposition one step further.[159] The court said that such a process was always available to the accused and to impose a blanket rule as suggested by counsel would result in bringing the administration of justice in disrepute. He saw this as a necessary consequence of a situation where the public would witness accused persons who had been fully informed of their rights, making incriminating admissions during the course of bail proceedings which admissions could not be proved against them at their subsequent trial.

The court also emphasised that it had to be assumed that the framers of the Constitution had been mindful of the possibility of including a provision similar to that of section 13 of the Canadian Charter in the Constitution and had deliberately refrained from doing so.[160] If the accused who applied for bail is

---

156 1998 (5) BCLR 552 (N).

157 [1996] 3 All SA 57 (A).

158 *S v Botha (2)* 1995 (2) SACR 605 (W).

159 *Botha*'s case pointed to the dilemma faced by the accused because of the conflict between the two rights in question. The court held that if it was real and material to the extent that in admitting the evidence the record of the bail proceedings might render the trial unfair, that question could be determined during the course of the trial within a trial.

160 The court does not seem to have been aware of the decision in *Dubois v The Queen* [1985], 2 SCR 350, 23 DLR (4th) 503 (SCC). In both *Dlamini* and *Dubois* the use of the record of the bail proceedings *as part of the state case*

placed in the dilemma referred to in *Botha*'s case this might have the effect of limiting one or the other of the rights in question, but such limitation was justifiable in the interests of not bringing the administration of justice in disrepute. It followed that there was no warrant for adopting a blanket rule that evidence given by an accused at bail proceedings would be inadmissible at his later trial.

### 9.3.7 The constitutionality of section 60(11B)(c)

The Criminal Procedure Second Amendment Act 85 of 1997, including section 60(11B)(c), commenced on 1 August 1998. In light of the constitutional right not to be a compellable witness against oneself, the framers of the Act presumably accepted that an applicant for bail would not be "forced" to forego his right against self-incrimination in pursuing his right to bail. In this part it is investigated whether section 60(11B)(c) can withstand constitutional scrutiny.

The first two cases decided on section 60(11B)(c) were both by Slomowitz AJ in the Cape Provincial Division, on the same reasoning.[161] In *S v Schietekat*[162] Slomowitz AJ explained that no person may be required to be a witness

---

came to be decided. However, this argument does not hold water when the admissibility of the bail record as part of the state case at trial comes to be decided. The Supreme Court of Canada held that in this instance section 13 merely insured that the Crown would not be able to do indirectly that which section 11(c) prohibits. The use of the testimony from a prior proceeding during the Crown case at the later trial was therefore in any case prohibited by section 11(c). It therefore seems that the right created in section 35(3)(j) is sufficient to prohibit the use of prior proceedings as part of the Crown case and does not call for a right similar to section 13 of the Canadian Charter to be taken up in the Constitution.

161 *S v Schietekat* 1998 (2) SACR 707 (C) and *S v Joubert* 1998 (2) SACR 718 (C).

162 At 714.

against himself. It was not an inquisition, for a bail proceeding was not a Star Chamber. Slomowitz AJ commented that whatever the purpose of Parliament may have been in enacting it, its effect was malevolent. He indicated that an accused who elects to exercise his right to apply for bail, runs the risk of being interrogated on the merits of the case against him. His own testimony will then be used against him as part of the state's case when he eventually comes to trial. Slomowitz AJ asked the question whether the provision was fashioned to discourage those who seek their liberty. An accused who testifies might well incriminate himself, whether that be of the crime charged or more seriously, of other offences unknown and uncharged. In conclusion the court felt bound to hold that the section violated the Constitution.

The constitutional validity of section 60(11B)(c) ultimately came before the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*.[163] In this decision which dealt with various constitutional challenges, the court also saw fit to discuss the law regarding bail in general. Of importance, for present purposes, in the general discussion, is the court's introduction to the new section 60(11B)(c):[164]

> Further, in a new sub-s (11B), another legislative innovation was introduced: an applicant for bail became obliged to furnish information to the court (upon pain of imprisonment for withholding it or furnishing it untruthfully) and the record of bail proceedings was made part of the trial record.

Still, when the court specifically dealt with the admissibility of bail proceedings at trial,[165] it disagreed with the reasoning and conclusion reached in *Botha*'s case that the record of bail proceedings should be kept distinct from the

---

163 1999 (7) BCLR 771 (CC).

164 Par 15 of the judgment.

165 Par 86 and further of the judgment.

evidence as to guilt. The court did thus not agree that it should be kept apart on the analogy of evidence in a trial within a trial, for example as to the whether a confession is voluntary or not.[166]

However, the court did accept that the evidence given at a bail hearing might return to haunt the accused at the trial.[167] The court could not deny that there is a certain tension between the right of an arrested person to make an effective case for bail by adducing all the requisite supporting evidence, and the battery of rights under sections 35(1) and (3) of the Constitution. Yet, the court did not see that kind of tension as unique to persons applying for bail. The court reiterated that people living in democratic and open societies are often called upon to make hard choices.

Kriegler J on behalf of the unanimous court explained that litigation in general, and defending a criminal charge in particular, can present a minefield of hard choices.[168] He saw it as an inevitable consequence of the high degree of autonomy afforded to the prosecution and the defence in a predominantly adversary system of criminal justice. An accused who is ideally assisted by a competent legal representative, in substance conducts the defence independently. He has to take many key decisions whether to speak or to keep silent. Does one volunteer a statement to the police or respond to police questions? If one applies for bail, does one adduce oral or written evidence, and if so, by whom? Does one for the purposes of obtaining bail disclose the defence (if any) and in what terms? Later, at the trial, does one disclose the

---

166 Par 93 of the judgment.

167 *Ibid.*

168 Par 94 of the judgment. This approach closely follows the argument by the DPP.

basis of the defence under section 115 of the CPA? Does one adduce evidence - one's own or that of others? The court explained that each and every one of these choices could have decisive consequences.[169] They therefore pose difficult decisions. But the court points out that the choice remains that of the accused and that the choice cannot be forced upon him.

Kriegler J commented that the reasoning in *Botha* wished to give the accused the best of both alternatives, or as it was bluntly put in *Dlamini*, the right to lie. One can therefore present any version of the facts without any risk of a come-back at the trial. At trial one can choose another version with impunity. However, the court did not consider the right to remain silent in the Constitution, or the right not to be compelled to confess or make admissions as offering blanket protection against having to make a choice. Still, the court agreed that the principal objective of the Bill of Rights was to protect the individual against abuse of state power. It does so, amongst others things, by shielding the individual faced with a criminal charge against having to help prove that charge. But the court indicated that the shield against compulsion does not mean that an applicant for bail can choose to speak, but not be quoted.[170] As a matter of policy the prosecution must prove its case without the accused being compelled to furnish supporting evidence. But if the accused, acting freely and in the exercise of an informed choice, elects to testify in support of a bail application, the right to silence is in no way impaired. Nor is it impaired, retrospectively as it were, if the testimony voluntarily given is subsequently held against the accused.[171]

---

169 *Ibid.*

170 See also par 9.3.5.4.

171 At par 95 of the judgment.

Referring to the ills that befell the accused in *Botha*, *Dlamini* and *Schietekat* the court indicated that there was no need in propounding a broad and radical remedy for an ill that must be treated conservatively and selectively. The court agreed with the Supreme Court of Appeal in *S v Nomzaza*[172] that:

- there was no general principle at common law excluding from the evidence at trial, incriminatory or otherwise prejudicial evidence given by an accused at a prior bail hearing; but
- if the admission of such evidence would render the trial unfair, the trail court ought to exclude it.

The court indicated that it was not the right to silence that was imperilled by the accused electing to speak, and found no warrant for creating a general rule, which according to the court, would exclude cogent evidence against which no just objection can be levelled. But, if there is a valid objection in particular circumstances the trial court should disallow such evidence. In *Botha*'s case, for example, where he did not know of his right not to answer incriminatory questions and effectively convicted himself, the incriminatory evidence should be excluded at trial.

The court accordingly found that the record of bail proceedings is not automatically excluded from, nor included in the evidentiary material at trial. Whether or not it is to be included depended, according to the court, on the principles of a fair trial.[173]

---

172 [1996] 3 All SA 57 (A).

173 Van der Merwe in Du Toit *et al* (1987) 9 - 34B approves this approach (in the revision service 22 which seems to have been published soon after this decision on 3 June 1999). He argues that sections 60(11B)(c) and 60(11) create special difficulties. An accused who has to testify in terms of section 60(11) in order to obtain bail, finds himself in the position that his testimony and answers in cross-examination, may be used against him at the subsequent

The Constitutional Court approvingly referred to the flexible approach advocated by Ackermann J in *Ferreira v Levin NO; Vreyenhoek v Powell NO*[174] and indicated that that approach should be followed. The court therefore found no inevitable conflict between section 60(11B)(c) of the Criminal Procedure Act and any provision of the Constitution.

### 9.3.8 Derivative evidence

But what about evidence deriving out of the evidence given by the accused at the earlier bail application? May that evidence be used against the accused at trial? This situation will present itself where the evidence given by the accused is ruled inadmissible, but certain evidence has emanated from such inadmissible evidence.[175]

---

trial. He says that the argument that there is nothing wrong with this conflict, overlooks the fact that evidence supporting bail differs "in ambit, objective and detail from testimony on the merits where guilt or innocence is the issue". He foresees the possibility that an accused who testifies at his trial is not fully aware of the "allegations of fact" that he would face at the trial against him. This is said to be especially the case where the charge sheet has not been drawn up, or no indictment or summary of facts have been served, or where the accused is denied access to the police docket in terms of section 60(14). He therefore argues that the mere fact that an accused has been warned that his testimony may be used at trial, cannot *ipso facto* make that evidence admissible. He argues that the final test is contained in section 35(5) of the Constitution. If the admission of the evidence would be unfair or otherwise detrimental to the administration of justice, it must for that reason be excluded.

174 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). Endorsed by the same court in *Bernstein v Bester NO* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC).

175 For example where the accused had been unaware at his earlier bail application that he had the right to refuse to answer incriminating questions.

In *Ferreira v Levin NO; Vreyenhoek v Powell NO* the court[176] held that a court had the discretion to exclude derivative evidence obtained because of compelled statements, where the statements themselves would be subject to use immunity to ensure a fair trial.[177]

In this regard section 35(5) of the Final Constitution provides the following: "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."[178]

No difference is drawn between direct and derivative evidence. Once it is determined that the evidence was obtained in an unconstitutional manner it must be decided whether the admission of such evidence will render the trial

---

176 1996 (1) SA 984 (CC), 1996 (1) BCLR 1 (CC). Relying on Canadian authority. See *R v S (RJ)* [1995], 1 SCR 451, 26 CRR (2d) 1 (SCC).

177 The Constitutional Court's decision superseded the supreme court in *Park-Ross v The Director, Office for Serious Economic Offences* 1995 (2) SA 148 (C) 162, 1995 (2) BCLR 198 (C) where it was held that the preferred view, which served the right against self-incrimination best, and which coincides with the position under American and English law, is that derivative evidence emanating from self-incriminating evidence should be excluded.

178 In deciding what could be detrimental to the administration of justice it is relevant to look at the public's perception of justice although this is not decisive. In *S v Melani* 1996 (1) SACR 335 (E) and *S v Ngcobo* 1998 (10) BCLR 1248 (N) the supreme court dealt with illegally obtained evidence under the Interim Constitution. The courts (at 352 and 1254F - G respectively) held that public opinion would probably show that the majority of the South African population at this stage in the history of the country, would be quite content if the courts allowed unconstitutionally obtained evidence. However, the Constitutional Court in *S v Makwanyane* 1995 (3) SA 391 (CC) par 88 has indicated that the fundamental values of the criminal justice system are not subject to public outcries and polls. The question to be asked is whether the admission of the evidence would bring the administration of justice in disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances. See *S v Malefo* 1998 (2) BCLR 187 (W) 213A and *Collins v The Queen* (1987) 28 CRR 122 at 136 - 7.

unfair or be detrimental to the administration of justice. If the answer to any one of the two legs of the question is affirmative, the evidence must be excluded.

In *Ferreira v Levin NO; Vreyenhoek v Powell NO* Ackermann J[179] indicated that derivative evidence "though not created by the accused and thus not self-incriminating by definition" was "self-incriminating nonetheless because the evidence could not otherwise have become part of the Crown's case".[180]

In principle it therefore seems that derivative evidence will have been obtained in an unconstitutional manner.[181]

However, on the reasoning by the court in *Ferreira v Levin* in allowing derivative evidence emanating from a section 417 enquiry, it may be argued that derivative evidence[182] emanating from a bail application should be allowed:[183]

- The hearing of a bail application serves an important public purpose and cannot be equated with evidence obtained as the result of unlawful conduct. Where the evidence was, for example, obtained as the result of torture, public policy might dictate that it be excluded even if the fact(s) can be proved independently. A different approach would allow the ends to

---

179 Again relying on *R v S (RJ)* [1995], 1 SCR 451, 26 CRR (2d) 1 (SCC).

180 Par 145 of the judgment.

181 The limitations clause must be applied before the Constitution's exclusionary rule comes into play.

182 And for that matter direct evidence given at the bail application.

183 See also Malan (1996) E12 - 41 and further.

justify the means.[184] Where the admission of evidence under the latter circumstances would bring the administration of justice into disrepute, the same cannot be said of the evidence emanating from a bail application.

- The state has a responsibility to protect its citizens against crime. To allow such evidence at trial cannot simply be said to bring the administration of justice into disrepute.[185]
- South Africa does not have nearly the resources to combat crime as effectively as the United States where derivative evidence is not admissible.[186] The use of such evidence may in certain cases be the only way to combat crime effectively.[187]

### 9.3.9 Critical appraisal

It is clear that the record of bail proceedings is inadmissible as evidence at trial, if the accused was unaware of his right against self-incrimination. However, section 60(11B)(c) now obliges the court to warn the accused at the bail application that the evidence may be used against him if he elects to testify.[188] Section 60(11B)(c) therefore sets stricter requirements and if the court does not warn the accused, the evidence is inadmissible, irrespective whether the accused was aware of his rights or not. It therefore follows that if a witness at

---

184 Par 150, page 91E - G of the judgment.

185 At par 151 page 92A - B the court explains that the public, and especially the victims of the crime, might find a denial of the right to use such evidence inexplicable.

186 See par 152 of the judgment. In this regard it must be remembered that Canada has similar resources as the United States to combat crime but the use of derivative evidence is allowed only under certain circumstances.

187 Par 152 of the judgment.

188 See the latter part of the wording of section (11B)(c) - "must inform ... and such evidence becomes admissible ... ."

the bail proceedings knew of his right against self-incrimination, but is not warned, and elects to testify, his evidence is not allowed at his future trial.

It also seems that where an arrested person is compelled to submit evidence before trial in this context, the absence of use immunity in the criminal proceedings could not be justified under the limitation provision.[189] At common law an accused could also not be compelled to give self-incriminating evidence. The right against self-incrimination therefore operated only at the trial where the incrimination might occur. No complaint based on self-incrimination, if any, outside that context had any meaning.[190]

If it is accepted that the underlying principle is the presumption of innocence and that the state bears the full burden of proving its case, the individual should not be obliged to assist the state in any way in proving its case against him. The state is not only the prosecutor but also the investigator of the crime. Against this the accused has a purely adversarial role to play. This approach must be applied to all forms of evidence emanating from the accused, including derivative evidence. The presumption of innocence, as the governing principle,

---

189 Section 36.

190 See *Nel v Le Roux NO* 1996 (3) SA 562 (CC), 1996 (4) BCLR 592 (CC), 1996 (1) SACR 572 (CC) where it was held that the applicant could not validly (and did not) object to answering self-incriminating questions in view of the transactional indemnity and use immunity provisions in section 204(2) and (4) of the CPA.

See also *Dabelstein v Hildebrandt* 1996 (3) SA 42 (C) at 66, in the context of Anton Piller orders.

It is submitted that one could still validly refuse to answer questions at pre-trial if other rights would be affected by the answers. Unless the threatened violation would be upheld as justified under limitation analysis. See *Bernstein v Bester NO* 1996 (4) BCLR 449 (CC) par 61 and *Nel v Le Roux NO* 1996 (1) SACR 572 (CC) par 6ff.

should therefore determine the extension and development of the scope of the right against self-incrimination.

Since the advent of the fundamental rights era the question whether the record of bail proceedings should be allowed at the subsequent trial rests on a different footing. The Final Constitution provides that an accused has a right to a fair trial, which includes the right against self-incrimination. The arrested person also has a right to bail in terms of section 35(1)(f) of the Final Constitution. The accused now faces a dilemma. If he fails to give evidence or refuses to answer incriminating questions at the bail application, he may be refused bail and in the instance of some more serious offences where he carries the burden of proof, he will be refused bail.[191] If he elects to testify or submit other evidence or answers incriminating questions in order to get bail (to which he has a right), he foregoes his right not to be compelled to give self-incriminating evidence, for the testimony may be used at his subsequent trial.

The reasoning of and conclusions reached by the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[192] cannot be supported. Even though it is without a doubt true that criminal litigation presents a litigant with difficult choices, the examples given by the court in paragraph 94 of the judgment are not comparable to the situation under discussion. One would not in one of the examples given have to forego one constitutional right in order to exercise another. Does an accused therefore in one of the examples given have a constitutional right to submit written evidence and also a constitutional right to adduce oral evidence? Would an accused have to abandon the one to

---

191 Kotzé (1998) 1 *De Jure* 188 seems to be of the similar view that the cumulative effect of sections 60(11) and 60(11B)(c) was to breach the right against self-incrimination.

192 1999 (7) BCLR 771 (CC).

exercise the other? Can he not do both? In this example given by the Constitutional Court it is but a choice that an accused has to make within one fundamental principle, that is, his right to be heard at the bail application.

The accused can furthermore obtain the legal remedy he pursues by submitting either oral or written evidence. It is merely a question of tactics dictating what would be appropriate in specific circumstances. He is not forced to do the one or the other, on pain of not being granted a remedy, should he refuse.

On the reasoning of the Constitutional Court it also seems that a witness under section 417(2)(b) of the Companies Act has a right to lie but in that instance it is acceptable.[193] In light of the judgment by the Constitutional Court it furthermore seems that the witness under section 417(2)(b) has a choice: Does he answer questions now and escape conviction and sentence under section 417(2)(b), or should he rather keep quiet and escape possible conviction and sentence because of his non-assistance later?[194]

It is argued that the evidence given at the bail hearing is not voluntary if it is done under pain of not receiving bail. An applicant in bail proceedings is obliged to give evidence or answer questions in order to obtain bail and is therefore "forced" to do so.[195] In principle there should be no difference

---

193 In par 94 Kriegler J commented that if an accused was allowed to present any version of facts at the bail application without any risk of come-back at trial, the accused would have the right to lie. See par 9.3.7. However, in *Ferreira v Levin NO; Vreyenhoek v Powell NO* 1996(1) SA 984 (CC) par 159 - 160 the Constitutional Court ruled that the testimony given at a section 417(2)(b) enquiry is protected from use at any subsequent trial. See par 9.3.5.3.

194 Where the charges may be more serious and personal liability for the Company's debt may be incurred.

195 Especially where he bears the burden of proof.

whether one faces a fine or imprisonment under section 417(2)(b), or imprisonment when one fails to testify at a bail application. In both cases the right against self-incrimination is offended and the testimony or answers should not be allowed at the subsequent trial.

In addition I submit that if an accused confesses because he has been promised incarceration on failure thereof, the confession will not be allowed because it was not done voluntarily. If an applicant for bail is told that he will be incarcerated if he does not give evidence, it was similarly not done voluntarily, and the evidence must be excluded.[196] In both these instances the choice is between incarceration and assisting the prosecution. If policy does not allow the one, the other should not be allowed either. Because of the inextricable link between the right against self-incrimination the right of an accused to a fair trial, there will in both these instances not be a fair trial if the evidence is allowed.

It is therefore submitted that the common-law rule in regard to the burden of proving that a confession was voluntary made should also be applied here. This rule is not accidental but an integral part of the right not to be a compellable witness against oneself. This in turn reinforces the underlying principle of the presumption of innocence which entails that the accused is not obliged to assist the state in proving its case. This is also how section 12 would inform the interpretation of section 35(3)(j).

For the reasons given I submit that section 60(11B)(c) offends the right against self-incrimination. Neither can it be saved by the limitation clause provided for in section 36(1) of the Final Constitution.

---

196 I submit that the fact that the threat might not have emanated from a person in authority should not change the principle.

Although the level of criminal activity is a "pressing and substantial"[197] concern and clearly a relevant and important factor in the limitations exercise undertaken in respect of section 36,[198] there are other factors relevant to such exercise. One must be careful to ensure that the alarming incidence of crime is not used to justify extensive and inappropriate invasions of individual rights.[199]

Section 36(1)(a) requires that the nature of the right that has been infringed must be taken into account. This is not only a separate enquiry but also an indication of how stringently the other factors must be viewed. If the right to be limited, as here, is crucial to the constitutional project, it must be understood to mean that the other limitation requirements must be tightened accordingly.[200] It will therefore be more difficult to justify the infringement of a

---

197 See *R v Oakes* (1986) 26 DLR (4th) 200 (SCC) where it was indicated that the objective had to be "pressing and substantial".

198 See section 36(1)(b) which provides that "the importance of the purpose of the limitation" must be taken into account. No fixed order in which the factors must be considered is prescribed. The following order has been proposed by Woolman in Chaskalson *et al* (1996) 12 - 49 to ensure that the correct questions be asked at the correct time:

- "The nature of the right";
- "The importance of the purpose of the limitation";
- "The relation between the limitation and its purpose";
- "The nature and extent of the limitation";
- "Less restrictive means to achieve its purpose".

However, Theme Committee Four seems to have softened any rigidness in approach with statements like: "[t]he list of factors should remain open-ended", "none of the factors should be regarded as a conclusive test" and "care should be taken not to formulate these factors as tests."

199 See *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) par 68.

200 See also Woolman in Chaskalson *et al* (1996) 12 - 50.

right that is of particular importance to the constitution's ambition to create an open and democratic society based on human dignity, equality and freedom.

As a matter of concern for an accused person in criminal trials, our courts and legal scholars have indicated that it is unacceptable that an accused be compelled to assist the state in obtaining a conviction. It has on many occasions also been indicated that this right was inextricably linked to the right of an accused to a fair trial. Non-compliance with this offends the underlying principle, namely the presumption of innocence. Such is the importance of this right.

In addition, section 36(1)(c) provides that the nature and extent of the limitation must be taken into account. This factor ensures that where a serious infringement of a right occurs, the infringement will carry a great deal of weight in the exercise of balancing rights against justifications for its infringement. From the point of view of the individual affected by this invasion: his right against self-incrimination is taken away completely in this instance. [201]

---

201 Under the Interim Constitution the "essential content" requirement reminded the court that there is a point beyond which the government may not go in limiting a fundamental right notwithstanding how important and pressing the government's objectives might be. See Woolman in Chaskalson *et al* (1996) 12 - 16. The focus is thus taken away from the plight of the government and regard is had to the detrimental effect that the limitation may have on the right of the right-holders.

However, the "essential content" requirement was deleted from the Interim Constitution and therefore does not appear in the Final Constitution. This was due to the inability of the courts and legal scholars to give substance to this requirement. See, for example, *S v Makwanyane* 1995 (3) SA 391 (CC) where four different opinions were given. Chaskalson P at 446G - 448A explained that the purpose of the provision was to ensure that rights may not be taken away altogether and that a meaningful distinction can be drawn between the objective and subjective content of a right. Kentridge AJ 470 rejected Chaskalson P's understanding and found it difficult "on any rational use of language" to explain the essential content of a right in terms of a subjective dimension. Ackermann J 458F - H disagreed with Chaskalson P on the

It is well established that section 36 requires a court to counterpoise the purpose, effects and importance of the infringing legislation on the one hand against the nature and importance of the right limited on the other.[202]

If the object of the government is to control the violent and serious crimes mentioned in schedules 5 and 6, it seems that the government could have used some means less restrictive of the rights of accused.[203] In the first instance, an accused can be prevented from saying one thing with impunity at the bail hearing and another at the trial, without invading his right against self-incrimination. This can be done by allowing the record of the bail proceedings,

---

objective and the subjective content. Mahomed DP 496G - J indicated that there might be a third way to understand the term "essential content". However, the court found that the "essential content" requirement could be established by simply tightening the rest of the tests during limitation analysis. See also De Waal (1995) 11 *SAJHR* 18 - 21.

When the Final Constitution was written Theme Committee Four and the Constitutional Assembly also recognised that at least one of the factors recognised by the court in *Makwanyane* (and adopted in section 36) could be utilised to perform the same function. This, the Theme Committee said, could be done by taking into account "the extent and nature of the limitation", and dropped the requirement from the limitation clause.

202 This requirement was explained by the court in *S v Williams* 1995 (7) BCLR 861 (CC) 880D - E before the express requirement in section 36. The court indicated that the test relied on proportionality. It is a process of weighing the individual's right, which the state wishes to limit, against the objective that the state seeks to achieve by such limitation. This evaluation must necessarily take place against the backdrop of the values of the South African society as articulated in the Constitution.

203 See section 36(1)(e) and par 8.3.5.3. It has been indicated that the state has to prove the requirement of minimal intrusion. See also *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) 770J - 771; *Mohlomi v Minister of Defence* 1996 (12) BCLR 1559 (CC). See *Tétreault-Gadoury v Canada (Employment and Immigration Commission)* (1991) 4 CRR (2d) 12 26 (SCC); *Rodriquez v British Columbia* (Attorney-General) (1994) 17 CRR (2d) 193 222 and 247 (SCC) and *R v Laba* (1994) 120 DLR (4th) 175 179c (SCC) under Canadian law.

to test only the credibility of the accused at trial. There also does not seem to be an obvious need to cast the net so widely as to include the record of all bail proceedings, whatever the charge, in the trial record. There seems to be no common sense connection between these "lesser" crimes and the purpose of the legislature.

It is therefore submitted that this is one instance where the equilibrium between the freedom and security of the accused and the interests of society is out of balance and needs to be corrected.

## 9.4 CONCLUSION

Under Canadian law the testimony by the accused at the bail hearing may not be used as part of the Crown case at trial or to incriminate the accused during cross-examination. This prohibited testimony includes oral testimony whether under oath or not, documentary evidence introduced and other acts performed while testifying. It is not clear whether section 13 of the Canadian Charter allows the use of the prior testimony to test the credibility of the accused during cross-examination. However, section 5(2) of the Canada Evidence Act protects an accused at the trial from an answer given at the bail hearing, where he objected to answer the question on the grounds that the testimony might tend to incriminate or establish his liability in a civil proceeding. Such answer may therefore not be used to test the credibility of the accused during cross-examination at trial.

Under South African law the intention does not seem to have been that the record of the bail proceedings should form part of the state case at trial. However, it does seem that the evidence presented by an applicant informed of his right against self-incrimination, and pursuing his right to obtain bail, may

be used to incriminate or to test the credibility of an accused who elects to testify at his trial. All the evidence that forms part of the record of the bail proceedings is allowed. While the evidence may be excluded under South African law in the interests of justice, it is usually not seen to be in the interests of justice where the applicant has so been informed. Under the same circumstances Canadian law prohibits the use at the trial of the previous testimony at the bail hearing.

However, where the use of evidence is prohibited under South African law, for example where the accused was unaware of his right against self-incrimination, the admissibility of derivative evidence at the subsequent criminal trial is on similar footing as under Canadian law. Here the courts under both systems have the discretion to exclude the evidence to ensure a fair trial.[204]

---

204 An evaluation of the principles indicate that modern Canadian law has extended the doctrine of protection against self-incrimination beyond the common law principle which protects a witness from being compelled to respond to questions which might incriminate him. Since the advent of the Canadian Charter, section 13 has guaranteed that the prior testimony of a witness (including an applicant for bail) may not be used to incriminate that witness at any other proceeding whether it was given freely or under compulsion. As this right is at odds with the aim of the prosecution to secure the conviction of the guilty, this extension under Canadian law must be ascribed to the fact that the prosecution in Canada can function effectively without any assistance from the accused. Under Canadian law the administration of justice therefore has the luxury of being able to benefit from both the extended right against self-incrimination and a capable prosecution.

On the other hand South African law, by admitting the record of the bail hearing at the trial, has fallen short of the same common law principle that was taken up in our law. See my arguments in par 9.3.9. On the face-value thereof this heavy blow has come about due to the fact that the Constitutional Court has found that the Hobson's choice that an applicant for bail has does not amount to the type of compulsion required for the violation of the right against self-incrimination. Even if the indication by the Constitutional Court seems to be that the common law principle is not to be degraded one cannot help but wonder whether public opinion and an ineffective prosecution in recent times has anything to do with the finding by the court.

# CHAPTER 10

# ACCESS TO INFORMATION HELD BY POLICE OR STATE OFFICIALS FOR PURPOSES OF BAIL APPLICATION



## 10.1 INTRODUCTION

The inclusion of a right to information in the Interim Constitution sparked the debate as to whether an accused should have access to the information held by the state. At first, it was primarily the issue concerning the right to discover the contents of the police docket for purposes of trial that came before the courts. When the duty of the state to disclose information for purposes of the

bail hearing eventually came before the high court, and on appeal to the Constitutional Court, the question was not decided on the basis of the right to information afforded by the Constitution.

Due to this state of affairs, and because no Canadian authority could be found dealing directly with the duty to disclose for purposes of the bail hearing, it is necessary to examine the general duty to disclose information under both criminal justice systems. These principles, and under South African law, the Constitutional Court judgment that dealt with a confined attack on section 60(14),[1] are taken into account and an appraisal is made of the duty to disclose for purposes of the bail hearing. The positions under Canadian and South African law are also compared.

As section 11(a) of the Canadian Charter[2] and section 35(3)(a) of the Final Constitution,[3] which provides for a similar right, were not meant to bestow a

---

1 Of the Criminal Procedure Act 51 of 1977. See par 10.3.1 and par 10.3.3.

2 Section 11(a) provides that any person charged with an offence has the right to be informed without reasonable delay of the specific offence.

Beaudoin and Ratushny (1989) 479 state the importance that the accused knows exactly what the alleged misconduct is. The scope of the proceedings and the identity of the accuser are also stressed. The writers conclude that while the right to a specific accusation was extremely important, the Criminal Code contained detailed protections in this respect. They gather that section 11(a) would have no significant impact on the criminal process in the immediate future.

With regard to indictable offences section 581 of RSC 1985, c 27 (1st Supp), s 118 under the heading "General provisions respecting counts" provides:

> (1) Each count in an indictment shall in general apply to a single transaction and shall contain in substance a statement that the accused or defendant committed an indictable offence therein specified.

right on an applicant to information in the police docket or otherwise in possession of the state, this chapter does not explore these provisions. Both these sections merely enumerate a specific right to proper accusation. It has been stated that the purpose of these rights are to guarantee that the accused knows whether the offence is one known to law, and what case must be met.[4] In addition, section 35(3)(a) only confers on an accused the right to proper accusation for purposes of trial.

## 10.2 CANADIAN LAW

### 10.2.1 General

The Law Reform Commission of Canada, in their 1974 working paper[5] and a 1984 report,[6] recommended comprehensive schemes regulating disclosure by

---

(2) The statement referred to in subsection (1) may be

(a) in popular language without technical averments or allegations of matters that are not essential to be proved;
(b) in the words of the enactment that describes the offence or declares the matters charged to be an indictable offence; or
(c) in the words that are sufficient to give the accused notice of the offence with which he is charged.

(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

3 In terms of section 35(3)(a) of the Final Constitution every accused has a right to a fair trial, which includes the right to be informed of the charge with sufficient details to answer it.

4 McDonald (1989) 405.

5 The paper is titled *Criminal procedure: Discovery* (the "1974 Working Paper") and formed the second part of a study report on discovery in criminal cases.

the Crown.[7] However, no legislative action other than a limited response contained in section 603 of the Criminal Code,[8] has implemented the proposal. The legislature has been content to leave the development of this area of the law to the courts. The right to information during litigation is therefore not governed by the Canadian Access to Information Act of 1982, or any other Act providing for the right to information.[9]

---

6 Titled *Disclosure by the prosecution* (the "1984 Report").

7 See "1974 Working Paper" 35 and further and *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) 244.

8 RSC 1985 (c C - 46).

9 Canadian case law dealing with the right to information in possession of the Crown confirms this by looking for answers elsewhere.

The purpose of the American FOIA was explained by the court in *Miller v Bell* 661F 2d 623 (1981) at 625: "to allow public access to official information unnecessarily shielded from public view ... . An agency must release information in its possession unless it falls within one of the nine statutory exemptions to the Act."

And at 626: "it is also well to note that it is not the purpose of this Act to benefit private litigants, ... by serving as an adjunct or supplement to the discovery provisions of the Federal Rules of Civil Procedure."

In note 10 of *NLRB v Sears, Roebuck & Co* 421 US 132, 143 n 10, 95 S Ct 1504, 1512 n 10, 44 L Ed 2d 29 (1975) it was said that the FOIA "is fundamentally designed to inform the public about agency action and not to benefit private litigants."

Chamberlin (1997) 57 *ALR Fed* 903 906 analysed the American case law. He indicates that parties in pending criminal proceedings can not use the FOIA for discovery of records and information compiled by government in the course of investigations, which records are not available under normal discovery procedures.

A similar position on the purpose of the Australian FOIA was taken in Australia in the leading case of *News Corporation v National Companies & Security Commission* 57 ALR 550 (Fed Ct 1984).

### 10.2.2 General duty to disclose

As the Criminal Code of Canada provides for pre-trial discovery for indictable offences, but not for summary conviction offences, both sets of principles are investigated.[10]

#### 10.2.2.1 Summary conviction offences

The question as to the accused's right to discovery of the Crown's case prior to a summary conviction trial came before the Alberta Court of Queen's Bench in the case of *Re Kristman and The Queen*.[11] McBaine J indicated that there was no right at common law, nor under the Canadian Charter, which obliged the courts to require the Crown to give full and complete pre-trial disclosure of all evidence available from police officers involved in a police investigation prior to the trial of a summary conviction offence. Production before trial is at the discretion of the Crown, while production at trial is at the discretion of the trial judge and not a right of the accused. The court concluded that while the Criminal Code entitled the accused to make full answer and defence at trial,[12] these provisions do not include a right to pre-trial discovery. While the Criminal Code provides for preliminary hearings in respect of indictable offences to be

---

10 The South African system has long since ceased to utilise a system premised on the existence of a preparatory examination (see footnote 47 of this chapter).

11 (1984) 12 DLR (4th) 283 (Alta CA).

12 The court referred to sections 577(3) and 737(1). Section 577(3) provided that an accused was entitled to make full answer and defence personally or by counsel after the close of the case for the prosecution. See Rodrigues (1981) 17 - 240. Section 737(1) stated in general that the defendant was entitled to make full answer and defence. See Rodrigues (1982) 24 - 119. These section numbers changed with the 1985 revision of the statutes of Canada.

held, no such vehicle for pre-trial discovery has been provided for by Parliament in relation to summary conviction offences.

10.2.2.2 Indictable offences

When the duty of disclosure by the Crown came before the Canadian Supreme Court in *R v Stinchcombe*,[13] the duty to disclose had not been settled. This was so even though a number of cases have addressed some aspects of this subject.[14]

Sophinka J discussed at length the duty of the Crown to disclose in the context of indictable offences.[15] He indicated that production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. Although this was similarly applied to criminal and civil proceedings, this aspect has long since disappeared from civil proceedings. Full discovery of documents, and oral examination of parties and even witnesses, are now familiar features of the practice in civil proceedings. The principle that justice was better served when the element of surprise was eliminated from the trial, and that the parties were better prepared for the issues on the basis

---

13 (1991) 68 CCC (3d) 1 (SCC).

14 See for example *Re Cunliffe and Law Society of British Columbia; Re Bledsoe and Law Society of British Columbia* (1984), 13 CCC (3d) 560, 40 CR (3d) 67, (1984) 4 WWR 451 (BCCA); *R v Savion and Mizrahi* (1980), 52 CCC (2d) 276, 13 CR (3d) 259, 4 WCB 239 (Ont CA); *R v Bourget* (1987), 35 CCC (3d) 371, 41 DLR (4th) 756, 56 CR (3d) 97 (Sask CA).

15 At 6 and further. Although the duty to disclose was discussed in the context of indictable offences, the gist of the judgment seem to be applicable to all criminal trials.

of complete information of the case that was to be met, resulted in this change.

The Supreme Court found it surprising that in a criminal case where the liberty of the accused was at stake, this aspect lingered on.[16] The court reminded that there had been considerable resistance to the enactment of comprehensive rules that would make the practice mandatory in criminal trials, but also pointed out that the prosecution had generally been co-operative in making disclosure on a voluntary basis. The court attributed the resistance to the fact that proposals for reform in this regard did not provide for a reciprocal disclosure by the defence.[17]

The court found the notion that the Crown had no legal duty to disclose all relevant information difficult to justify. The arguments in favour of such a duty were overwhelming and the arguments against the existence of such a duty were groundless. The court furthermore indicated that the argument that the duty should be reciprocal, may deserve consideration but that it was not a valid reason for absolving the Crown of its duty. The role of the prosecution and the defence is fundamentally different.[18]

---

16 At 6.

17 Also see the "1974 Working Paper" at 29 - 31; "1984 Report" at 13 - 5; Marshall Commission Report volume 2 at 242 - 4 (Royal Commission on the Donald Marshall, Jr, Prosecution) as cited by the court.

18 At 7. This difference was also referred to in *Boucher v The Queen* (1955), 110 CCC 263, [1955] SCR 16, 20 CR 1 270 (SCC). Rand J stated that it could not be overemphasised that the purpose of a criminal prosecution was not to obtain a conviction but rather

> to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is

The Supreme Court added that the fruits of investigation which are in the possession of counsel for the Crown, is not the property of the Crown for use in securing the conviction, but the property of the public to be used to ensure that justice is done. Against this, the court said, the defence had a purely adversarial role towards the prosecution and had no obligation to assist the prosecution. The absence of a duty to disclose by the defence was therefore consistent with this role.[19]

---

> a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justice of judicial proceedings.

19 At 7. Under South African law the courts have taken a similar view on the role of the prosecution and the defence. In *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) at 241i Myburgh J held that the prosecutor does not represent a client. He "stands in a special relation to the Court. His paramount duty is not to procure a conviction but to assist the Court in ascertaining the truth ...". In *S v Fani* 1994 (3) SA 619 (E) at 621i Jones J held that "[t]he duty of the prosecution is to present all the facts in an objective and fair manner so as to place the court in a position to arrive at the truth". The prosecutorial duty described in *Boucher v The Queen supra* was also approved in *S v Majavu* 1994 (2) SACR 265 (Ck) at 275i - j. In contradistinction to this role, the defence has a client to defend. It was accordingly held in *Khala* at 240 and further that it was undesirable to justify nondisclosure by drawing an analogy between legal professional privilege and docket privilege. Docket privilege is based on issues like the argument that witnesses may be tampered with. Legal professional privilege is based upon the necessity of confidentiality between attorney and client for the proper functioning of the legal system. This policy consideration does not apply to the unprivileged information in the police docket. If communications between client and attorney were subject to compulsory disclosure there would be a potentially serious restriction on which advice could be sought and given. If a client cannot seek advice confident that he is not acting to his disadvantage, then this lack of confidence will likely be reflected in the instructions he gives, the advice he is given, and ultimately the legal process of which the advice forms part. See also *S v Safatsa* 1988 (1) SA 868 (A) 886D - G. Under American law the supreme court in *Upjohn Co v United States* 449 US 383 (1980) at 389 explained that this privilege recognises that sound legal advice or advocacy serves public ends and that such advice or advocacy depends on the lawyer being fully informed by the client. Frank communications between attorneys and clients therefore promote the

Commenting on arguments raised against the general duty to disclose all relevant information,[20] the court said that it would be a matter of timing of the disclosure, rather than whether disclosure should be made at all. The discretion of the Crown included the timing of the disclosure, the exclusion of what is clearly irrelevant, the withholding of the identity of persons to protect them from harassment or injury, or the enforcement of the privilege relating to informers. The prosecutor has a discretion in respect of these matters that is subject to review by the court. The discretion also "extend[s] to the timing of disclosure in order to complete an investigation".[21]

The Supreme Court reviewed the advantages and disadvantages of disclosure by the Crown and found no practical reason to support non-disclosure. The court saw the overriding concern in the fact that failure to disclose might impede "the ability of the accused to make full answer and defence".[22] This was a common law right of an accused and was strengthened by virtue of its inclusion in section 7 of the Canadian Charter as one of the principles of

---

broader public interest in the observance of law and order.

On this rationale it is therefore highly unlikely, and correctly so, that any argument to relax this oldest of privileges on the basis that such relaxation may be a justified limitation to the right to freedom and security of either system, will be sustained.

20 At 7 and 8. The arguments are that:

- It would impose onerous new obligations on the Crown prosecutors resulting in increased delays in bringing accused persons to trial.
- The material will be used to enable the defence to tailor its evidence to conform with information in the Crown's possession.
- It may put at risk the security and safety of persons who have provided the prosecution with information.

21 At 9.

22 *Ibid*.

fundamental justice.[23] Sophinka J indicated that "the right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted".[24]

It is worthwhile to consider some of the other comments made by the Supreme Court in *R v Stinchcombe* in order to determine whether a duty to disclose for purpose of the bail hearing was not suggested.

The court explained that in some situations early disclosure may impede the completion of an investigation. However, delayed disclosure on this account should be avoided because the completion of an investigation before proceeding with the prosecution is largely within the control of the Crown. The court indicated that it was nevertheless not always possible to predict events which may require an investigation to be re-opened. The Crown must have some discretion to delay disclosure in these circumstances.

The court indicated that this discretion of the Crown was reviewable by the trial judge. The review could be initiated by counsel for the defence when an issue arose with regard to the exercise of the Crown's discretion. On review the Crown must justify its refusal to disclose. However, the court stated the general principle to be taken into account by the presiding officer on review: "[T]he information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence."[25]

---

23 *Ibid*. See also *Dersch v Canada (Attorney-General)* (1990), 60 CCC (3d) 132 140 - 1, 77 DLR (4th) 473, [1990] 2 SCR 1505 (SCC).

24 *Ibid*. See also *R v Chaplin* [1995], 1 SCR 727 742, 96 CCC (3d) 225 (SCC).

25 At 11.

As to exactly when the disclosure should be made, the court agreed with the recommendation of the *Law Reform Commission of Canada* in both of its reports. Initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead.[26] The court saw these steps which affect the accused's rights in a fundamental way, as crucial. It will assist the accused to a great extent to know the strengths and weaknesses of the Crown's case before committing on these issues. As it fosters the resolution of many charges without trial through an increased number of withdrawals and pleas of guilty, the system also profits from early disclosure.

The court furthermore indicated that the accused may request the information at any time after the charge. Where such request has been made timely, it should be complied with so as to enable the accused sufficient time before election or plea to consider the information. In the rare instance of an unrepresented accused, Crown counsel should advise the accused of the right to disclosure and a plea should not be taken unless the trial judge is satisfied that this has been done. Even if the Crown's brief is not complete at this stage disclosure must be made. The obligation to disclose is a continuing one and disclosure must be completed when additional information is received.[27]

From what has been held it is clear that the evidence has to be disclosed for trial purposes. It is to ensure that all relevant evidence is available to the defence and before the decision-maker(s) at trial, to ensure that justice is done. Even though it may be requested at any time after the charge has been made, the Crown is under a duty to provide the requested information before the

---

26 See also *R v Girimonte* (1997) 121 CCC (3d) 333 (Ont CA).

27 At 13.

decision by the accused whether a jury is going to be used, or before plea.[28] Even though this may be at an early stage of the process and long before the trial actually takes place, its purpose is to ensure that an accused's ability to make full answer and defence is not impeded. It ensures that the innocent is not convicted.[29]

The argument that the accused is only entitled to be informed of the contents of the police docket for trial purposes may be further strengthened by the statement in *R v Stinchcombe* that the Crown has an obligation only to disclose the *relevant* material in its possession. "Material is relevant if it could reasonably be used by the defence in meeting the case for the Crown."[30]

"Relevance" was described in *R v Egger*[31] as follows:

> One measure of relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed ... . This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may effect the conduct of the defence such as, for example, whether to call evidence.

Sopinka J, on behalf of the majority of the Supreme Court of Canada in *R v Carosella*[32] recently stated the following in this regard:

---

28 At 14.

29 At 9.

30 *R v Dixon* (1998) 122 CCC (3d) 1 (SCC).

31 [1993], 2 SCR 451 467, (1993) 82 CCC (3d) 193 (SCC).

32 [1997], 1 SCR 80 106, 112 CCC (3d) 289 (SCC).

> [T]he right to disclosure of material which meets the *Stinchcombe* threshold is one of the components of the right to make full answer and defence which in turn is the principle of fundamental justice embraced by s. 7 of the *Charter*. Breach of that obligation is a breach of the accused's constitutional rights without the requirement of an additional showing of prejudice.

Where there is therefore a reasonable possibility that the undisclosed information would have aided an accused in meeting the case of the Crown, or advancing a defence, or otherwise making a decision which could have the effected the conduct of the defence, he has also established the impairment of his right to disclosure in terms of the Canadian Charter.

### 10.2.3 Appraisal of duty to disclose for purposes of bail hearing

Although it is clear that the right to disclosure under present Canadian law is limited to the trial stage, it is submitted that an argument can be made for the disclosure of the evidence pertaining to the offence for purposes of the bail hearing, where the information is shown to be relevant.[33] In terms of section 7 of the Canadian Charter everyone has the right to liberty of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. Bearing in mind the affirmation of the Supreme Court of Canada that the fruits of the investigation in possession of the Crown are the property of the public to be used to ensure that justice is done, it can be argued that, if relevant, these facts must be supplied before the bail application so that justice can be done. One of the factors to be taken into account when granting bail is the strength of the Crown's case. The information may therefore be very relevant at that stage. Just as it is accepted that the information in the possession of the Crown is not there to ensure a conviction, but to see that justice is done, it can and must be argued that the information

---

33 Even for trial purposes the right is not absolute as only relevant information has to be disclosed.

at the stage of the bail proceedings is there not to ensure that the accused stays behind bars, but to ensure that justice is done.

This argument, in my view, is in line with the decision made by the Supreme Court of Canada in *United States of America v Dynar*[34] where it was decided that an extradition hearing must be conducted in accordance with the principles of fundamental justice.[35]

## 10.3 SOUTH AFRICAN LAW

### 10.3.1 General

Section 32 of the Final Constitution provides as follows:

> (1) Everyone has the right of access to –
>
> (a) any information held by the state; and
> (b) any information that is held by another person and that is required for the exercise or protection of any rights.[36]
>
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.[37]

---

34 (1997) 147 DLR (4th) 399 (SCC).

35 However, the court decided that at an extradition hearing the fugitive was not entitled to the highest possible level of disclosure because of the treaty and the statute that governed it. The court indicated that in deciding whether the information must be given it had to be remembered that the role of the extradition judge was limited and the level of procedural safeguards required, had to be considered. See also *United States of America v Kwok* (1998) 127 CCC (3d) 353 (Ont CA).

36 Subsection (1)(b) has no antecedent in foreign Constitutions.

37 The Interim Constitution also afforded a right to information by way of section 23:

Schedule 6 to the Final Constitution, which deals with transitional arrangements, provides that national legislation must be enacted within three years of the date upon which the Constitution took effect.[38] Until this is done, the right to information in the Interim Constitution will prevail.[39]

As at 30 June 1999 no comprehensive Act granting access to information or "freedom of information" had been introduced,[40] but the legislature has

---

> Every person shall have the right to access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of his or her rights.

38 Item 23.

39 See par 10.3.4 for a discussion whether section 32 (presently to be read with schedule 6) includes a right to information for purposes of litigation (and thus also for purposes of a bail application) or whether it serves some other public purpose.

40 However, a draft bill called the Draft Open Democracy Bill which provides for access to information from governmental bodies, was published for comment on 18 October 1997 in Government Gazette 18381 (General Notice 1514 of 1997). The objects of the Act are stated in part 1 par 3 of the Act. The objects are to:

- Provide for public access to information held by governmental bodies subject to certain exemptions.
- Make information in respect of the functions and operations of governmental bodies available to the public.
- Provide a mechanism for individuals to correct information about themselves held by government or private bodies.
- Provide for protection against abuse of information about individuals held by government or private bodies.
- Provide for protection of individuals who make known evidence disclosing contraventions of the law.
- Generally to provide for transparency of all organs of the state.

However, see now the Promotion of Access to Information Act, Act 2 of 2000 which was published on 3 February 2000 in Government Gazette 20852 (General Notice 95 of 2000). This Act which takes effect on a date yet to be determined by the president (see section 93) was not taken into

specifically denounced the right to information for purposes of a bail hearing by way of the Second Criminal Procedure Amendment Act 85 of 1997.

Section 60(14) of the Criminal Procedure Act 51 of 1977 now determines the following:

> Notwithstanding anything to the contrary contained in any law,[41] no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs:[42] Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial.[43]

---

account for this study. See also footnote 71.

In many other countries access to official information has been regulated by legislation for some time. See for example The United States Freedom of Information Act (5 USC s 552), the Canadian Access to Information Act of 1982, the Australian Freedom of Information Act of 1982 and the New Zealand Official Information Act of 1982. These statutes demarcate a range of exceptions and detailed procedures to obtain information.

41 Subject, of course, to the Constitution.

42 It seems that the legislature prefers this decision to lie with the prosecution and not the courts. This approach is in the first instance contrary to a fundamental rights culture where due process is to be protected by the courts. It certainly appears as if the legislature is of the opinion that an applicant is not entitled to a fair bail hearing. The legislature also seems to say that the courts may decide when the docket is to be supplied for purposes of trial, but they are not equipped to do so when bail is applied for.

43 It is not unreasonable to conclude that section 60(14) was put on the statute books to clear up any perception that might have existed after *Shabalala* 1995 (12) BCLR 1593 (CC) that the accused had a right to the police docket right from the outset of the prosecution. The prosecution in *Schietekat* 1999 (2) BCLR 240 (C), *Joubert* 1999 (2) BCLR 237 (C) and *Dladla* (Protea magistrate's court) argued that there was indeed such a wide perception. However, as will be indicated later on, *Shabalala* is no authority for the proposition that applicants for bail are entitled to the contents of the police docket.

### 10.3.2 General duty to disclose

The question as to the right to the information in the police docket for purposes of trial was the focus of many provincial and local divisions[44] before it ultimately came before the Constitutional Court in *Shabalala v Attorney-General of the Transvaal*.[45] Before the Interim Constitution the accused did not have access to the docket because there was a common law docket privilege as formulated in *R v Steyn*:[46]

> When statements are procured from witnesses for the purpose that what they say shall be given in a lawsuit that is contemplated, these statements are protected against disclosure until at least the conclusion of the proceedings, which would include any appeal after the decision of the court of first instance.

Immediately before the Interim Constitution the situation was as follows: The accused had the right to be furnished with particulars of matters alleged in the charge, and in the case of superior courts the right to have a summary of substantial facts and a list of the state witnesses.[47]

---

44 (Now high courts.) See for example *S v Smith* 1994 (3) SA 887 (SE), 1994 (1) BCLR 63 (SE); *Qozoleni v Minister of Law and Order* 1994 (1) BCLR 75 (E); *S v Sefadi* 1994 (2) BCLR 23 (D); *S v Majavu* 1994 (2) BCLR 56 (Ck); *Khala v Minister of Safety and Security* 1994 (2) BCLR 89 (W); *S v Botha* 1994 (3) BCLR 93 (W); *S v Lombard* 1994 (3) BCLR 126 (T); *Phato v Attorney- General Eastern Cape; Commissioner of the South African Police Services v Attorney-General-Eastern Cape* 1994 (5) BCLR 99 (E); *Nortje v Attorney-General, Cape* 1995 (2) BCLR 236 (C); *S v Dontas* 1995 (3) BCLR 292 (T); *S v De Klerk* 1995 (3) BCLR 385 (T).

45 1995 (12) BCLR 1593 (CC).

46 1954 (1) SA 324 (A) 335A - B.

47 A system of preparatory examinations had been in use in the superior courts. However, in 1963 section 152*bis* was introduced into the Criminal Procedure Act 56 of 1955 that allowed the attorney-general to direct a summary trial (by way of section 11 Act 37 of 1963). Although the section was enacted to

However, it is clear that the Constitutional Court in *Shabalala*,[48] when it declared the blanket docket privilege unconstitutional, decided the matter in the context of ensuring a fair trial. The test was therefore formulated as to whether the contents of the docket was necessary to enable the defence to prepare properly. Would the defence therefore be able to effectively exercise the constitutional right to properly "adduce and challenge evidence", without access to the docket?

Before the decision by the Constitutional Court there had been considerable debate as to whether or not section 23 of the Interim Constitution[49] applied when access to the police docket is required to advance an accused's defence. Some courts decided that section 23 was applicable.[50] Other courts indicated

---

cope with political subversion it conferred a generous discretion and led to the summary procedure becoming the rule for all cases. As an accused was supplied with a full set of particulars when he underwent a preparatory examination the accused lost the advantage of knowing what the state could prove at trial. As a concession the attorney-general started supplying accused who appeared before a superior court with a summary of facts and a list of witnesses. See Hiemstra (1977) 71 - 76; Dugard (1977) 50 - 51 and 82.

48 1995 (12) BCLR 1593 (CC).

49 And hence section 32 of the Final Constitution.

50 *S v Majavu* 1994 (4) SA 268 (Ck) 309D, 1994 (2) BCLR 56 (Ck) 76D - 77E; *S v Sefadi* 1995 (1) SA 433 438B - E, 1994 (2) BCLR (D) 23 28F - 1; *S v Botha* 1994 (4) SA 799 (W) 831G and 834F, 1994 (3) BCLR 93 (W) 121I - 124H; *Phato v Attorney-General, Eastern Cape; Commissioner of the South African Police Services v Attorney-General-Eastern Cape* 1994 (5) BCLR 99 (E) 112E - 114B; 1995 (1) SA 799 (E) 814D - 816B; *Khala v Minister of Safety and Security* 1994 (4) SA 218 (W) 226G - H, 1994 (2) BCLR 89 (W) 96F - G; 97A and 107G; *Qozoleni v Minister of Law and Order* 1994 (1) BCLR 75 (E) 89C - E; 1994 (3) SA 625 (E) 642G - H; *S v Smith* 1994 (3) SA 887 (SE) 895G - H, 1994 (1) BCLR 63 (SE) 70J - 71B; *Nortje v The Attorney-General, Cape* 1995 (2) BCLR 236 (C) 249J - 250E; 1995 (2) SA 460 (C) 473H - 474D; *S v Fani* 1994 (3) SA 619 621B - E, 1994 (1) BCLR 43 (E) 45D - G; *S v De Kock* 1995 (3) BCLR 385 (T) 391H and 392I - 393A; *S v Mtyuda*

that they were uncertain.[51] In some cases there were positive arguments that section 23 did not apply.[52]

The interaction between the right to information as provided for in section 23 and the right to a fair trial in terms of section 25(3) of the Interim Constitution was discussed in *Shabalala v Attorney-General of the Transvaal*.[53] The Constitutional Court found that the support for the contention that section 23 applied to trial proceedings was substantially placed on the unqualified language of section 23, and the increasing human rights jurisprudence concerning the right to official information.[54]

Support for the opposing contention was substantially founded on the maxim *generalia specialibus non derogant.* In this instance, this maxim contends that the rights of an accused person in a trial are regulated by the specific provisions of section 25(3), and not by the general provisions of section 23. It is furthermore contended that section 23 was not intended to be a "discovery"

---

1995 (5) BCLR 646 (E) 648B - 649D; *S v Khoza* 1994 (2) SACR 611 (W) 617F; *Shabalala v The Attorney-General of Transvaal* 1995 (1) SA 608 (T) 643A - C, 1994 (6) BCLR 85 (T) 119F - H.

51 *S v James* 1994(1) BCLR 57 (E) 61C - I; 1994 (3) SA 881 (E) 885C - I; *S v Dontas* 1995 (3) BCLR 292 (T) 300D.

52 *Nortje v Attorney-General, Cape* 1995 (2) BCLR 236 (C) 249J - 250B; SA 473H - J; *Shabalala v The Attorney-General of Transvaal* 1995 (1) SA 608 (T) 620F - I, 1994 (6) BCLR 85 (T) 97D - G.

53 In par 32 to 36 of the judgment.

54 Par 32 of the judgment. See for example *Khala v Minister of Safety and Security* 1994 (2) BCLR 89 (W) 95 and 96; 1994 (4) SA 218 (W) 225 and 226; *S v Majavu* 1994 (4) SA 268 (Ck) 308H - 309F, 1994 (2) BCLR 56 (Ck) 76J - 77H; *Phato v Attorney-General, Eastern Cape; Commissioner of the South African Police Services v Attorney-General-Eastern Cape* 1994 (5) BCLR 99(E) 112E - 114C; SA 814D - 816D; *S v Botha* 1994 (3) BCLR 93 (W) 121; 1994 (4) SA 799 830I - 831G.

mechanism in criminal trials. It is a right conferred on citizens to compel disclosure of information in the public interest.[55]

The court indicated that in the present case application was made for the discovery of the documents during the course of a criminal prosecution. The court found section 25(3) of the Constitution to be of direct application in considering the merits of that application and found it difficult to understand how section 23 could take the matter any further. The court held that if the accused were entitled to the documents sought in terms of section 25(3), nothing in section 23 could operate to deny that right. Conversely, if the accused could not legitimately contend that they were entitled to such documentation in terms of section 25(3), the court found it difficult to understand how they could, in such circumstances, succeed in an application based on section 23. The court saw the real enquiry as whether or not the accused were entitled to succeed in the application on the basis of a right to a fair trial asserted in terms of section 25(3).[56]

The court nevertheless added that section 25(3) should not be interpreted in isolation, but together with section 23, and in the broad context of a legal

---

55 Par 33 of the judgment. See for example *S v Botha* 1994 (3) BCLR 93 (W) 120H - I; 1994 (4) SA 799 830E - G; *Nortje v Attorney-General, Cape* 1995 (2) BCLR 236 (C) 249J - 250A; 1995 (2) SA 460 (C) 473H; *S v James* 1994(1) BCLR 57 (E) 61C - 61J; SA 885C - J; *Shabalala v The Attorney-General of Transvaal* 1995 (1) SA 608 (T) 620F - H, 1994 (6) BCLR 85 (T) 97D.

56 Par 34 of the judgment. The Constitutional Court referred to many cases to illustrate the application of the right to a fair trial: *R v Stinchcombe* 18 CRR (2d) 210 (SCC); *R v Egger* (1993) 103 DLR (4th) 678 (SCC); *R v Leyland Magistrates, ex parte Hawthorn* [1979] 1 All ER 209 (QB); *R v Maguire* [1992] 2 All ER 433 (CA); *R v Ward* [1993] 1 WLR 619 (CA); *R v Brown (Winston)* [1994] 1 WLR 1599 (CA); *S v Nasar* 1994 (5) BCLR 60 (Nm); *Bendenoun v France* (1994) 18 EHRR 54; *Hentrich v France* (1994) 18 EHRR 440.

culture of accountability and transparency manifested by both the preamble to the Constitution, and the detailed provisions of chapter 3.[57]

The court described the basic test as "whether the right to a fair trial in terms of section 25(3) included the right to have access to a police docket or the relevant part thereof".[58] However, the court indicated that the question could not be answered in the abstract. Regard must be had to the particular circumstances of each case.[59]

As to the exact moment when in the course of a criminal prosecution the information has to be supplied, Le Roux J in *S v Botha*[60] indicated that the information ought to be given after completion of the police investigation. Le Roux J referred with approval to the decision of Myburgh J in *Khala v Minister of Safety and Security*,[61] from which he quoted the following passage:

> If there is a right of an accused to access to the information in the police docket, that right should be exercised only after the matter has become 'ripe for hearing', i.e. after the investigation is complete, the charge sheet drawn, and the State is prepared to proceed to trial.

This also seems to be the position in the United States of America. LaFave states:[62]

---

57 Par 35 of the judgment. See also S v *Makwanyane* 1995 (6) BCLR 665 (CC) where the court enunciated the principles to be applied when interpreting fundamental rights.

58 Par 36 of the judgment.

59 *Ibid*.

60 1994 (2) SACR 541 (W) 569D - E and 577B.

61 1994 (2) SACR 361 (W) 379D.

62 (1992) 844.

> Ordinarily, discovery provisions do not take effect prior to the filing of charges in the court of general jurisdiction. Thus, those provisions are not available during the course of the preliminary proceedings in the magistrate's court, such as the preliminary hearing and the bail hearing.

But the question at hand is whether an applicant for bail has the right to the information mentioned, for purposes of the bail hearing.

### 10.3.3 Duty to disclose for purposes of bail hearing

When the constitutional validity of section 60(14) ultimately came before the Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[63] it was not argued that section 60(14) had to comply with section 32 or, if in violation of section 32, had to be saved by section 36. The argument was advanced that the combined effect of section 60(11)(a) and 60(14) was that the applicant incarcerated on a schedule 6 offence was denied bail in breach of the right protected by section 35(1)(f). This is so because the applicant in terms of section 60(11)(a) is faced with an uphill battle in proving exceptional circumstances. Apart from the fact that the applicant bears the burden of proof, he has the duty to begin. This, it was argued, cannot be done without knowledge of the contents of the docket.

The Constitutional Court noted that there was substance in these contentions. However, the court pointed out that the legislature did provide that an applicant falling under subsection (11)(a) be given a reasonable opportunity to prove the existence of "exceptional circumstances" which in the interests of justice permit his release. An applicant for bail in terms of

---

63 1999 (7) BCLR 771 (CC).

section 60(11)(a) must therefore be informed of the grounds against his being granted bail, in order to afford him a reasonable opportunity to prove "exceptional circumstances".

Although the worst case scenario created by subsection (11)(a) was at the centre of the discussion, it seems that the argument included subsection (11)(b) which also afforded the applicant a reasonable opportunity to adduce evidence which in the interests of justice permit his release. It is clear from the judgment that the prosecutor may in spite of subsection (14) be ordered to lift the veil to afford the applicant the reasonable chance prescribed in section 60(11). Where the grounds militating against bail have to be supplied to an applicant falling under section 60(11)(a) to enable him to prove "exceptional circumstances", it seems that an applicant falling under section 60(11)(b) is not always entitled to this information. He is only so entitled if it is needed to afford him a reasonable opportunity to adduce the necessary evidence to obtain bail. The court indicated that what was, or was not, a reasonable opportunity, depended on the facts of each case. The Act does not spell out what is reasonable either. However, the court quoted an excerpt by Schutz JA in *Naude v Frazer*[64] which indicates that it is fundamental that a party be apprised of the case which he faces. Does this mean that an applicant for bail who does not carry the burden of proof will also be entitled to be apprised of the case? He is after all a party to the proceedings.[65]

---

64 1998 (4) SA 539 (A) 563E - F.

65 If the state contends that sufficient information is supplied by way of the charge sheet it can be argued that the charge sheet deals with another issue. The charge sheet does to a large extent not provide the grounds against being granted bail and therefore does not provide information of the case to meet in the bail hearing.

The Constitutional Court did therefore not regard subsection (14) as sanctioning an absolute denial of information for purposes of a bail application. The court also proposed a less absolute interpretation of the words "have access to" in subsection (14) to bring the subsection in harmony with subsection (11). The court indicated that it should be interpreted as barring physical access to the contents of the docket in the sense of seeing or perusing the contents. But the court did not find any general right to the contents of the docket for purposes of a bail application.[66]

### 10.3.4 Appraisal of duty to disclose for purposes of bail hearing

The question arises whether section 32 of the Final Constitution does not afford the right to the information held by the state for purposes of the bail hearing.

It is clear that the scope of the right in section 32 of the Final Constitution is wider than that under the Interim Constitution. Under the Final Constitution everyone is entitled to information held by the state irrespective whether the information is required to protect a right or not.[67] Where the information is needed to protect a right, everyone is entitled to any information held by another person.[68] The right to information under section 32(1)(b) is no longer limited to information held by the state. The right to information for purposes

---

66 See par 80 - 84 of the judgment.

67 Section 32(1)(a).

68 Section 32(1)(b).

of litigation, be it criminal or civil, thus falls squarely within the ambit of paragraph (b).[69]

In terms of section 32(2) national legislation must be enacted to provide for subsection 32(1)(a) and (b) respectively. As has been indicated, no comprehensive legislation has as at 30 June 1999 been enacted to regulate subsection (1)(a).[70] It is also accepted that the legislation envisaged to give effect to subsection (1)(a) would not apply to litigation.[71] However, the right

---

69 It is suggested that the legislature took note of:

- the comments by, and the arguments in, the various courts on the right to information under the Interim Constitution, and
- the statutes granting access to official information in comparable societies when it structured section 32.

Because of the latter point the denial of information for purposes of a bail application by section 60(14) would not fall under legislation issued to provide for the right in section 32(1)(a).

Section 32(1)(b) cannot be equated with the various "Information Acts" where the public is given a general right of access to official information, subject to certain exemptions. In the first instance section 32(1)(b) is not subject to the limitations of those "Information Acts", but more importantly the right is narrower in its scope. The right is only conferred on an individual "in so far as that right is required for the exercise or protection of any of his or her rights". The purpose of section 32(1)(b) was thus not to provide for official information unnecessarily shielded from the public view and accordingly falling outside the scope of litigation.

However, it has been argued that the similar provision in section 23 of the Interim Constitution was introduced to ensure an accountable government in terms of Constitutional Principle IX. See Davis, Cheadle & Haysom (1997) 147.

70 See par 10.3.1.

71 See also the Draft Open Democracy Bill published in October 1997 which in part 3 chapter 1 par 11 excludes parties to court proceedings from access under the Bill. However, now see the about-turn in the Promotion of Access to Information Act, Act 2 of 2000 which was published on 3 February 2000. This Act gives effect to the constitutional right of access to information in terms of both sections 32(1)(a) and (b). See the long title to the Act, the

to information for purposes of the bail hearing has specifically been regulated in terms of national legislation by way of section 60(14) of the Criminal Procedure Act. If one accepts that section 32 does not apply when bail is sought, then section 60(14) was not enacted in line with section 32(2) and its purpose was not to give effect to the right in section 32(1)(b). If it does apply, an applicant would have a right to information that can only be limited in accordance with section 36. The first step is therefore to decide whether section 32 applies.

Because the rights of an arrested person have been specifically dealt with in section 35(1), the advocates for the exclusion of section 32 may argue that it does not apply when bail is sought, relying on the rule of interpretation *generalia specialibus non derogant*. The content of the rule was explained as follows by Goetsche J in *R v Gwantshu*:[72]

> The general maxim is *generalia specialibus non derogant*. When the legislature has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms. ... Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that special and earlier legislation is not to be held directly ... altered ... merely by force of such general words, without any indication of a particular intention to do so. In such cases it is presumed to have only general cases in view and not particular cases which have been already otherwise provided for by the special Act.

---

preamble and section 9. Section 11(1)(b) of the Act provides that access to requested material must only be given in terms of this Act if access is not refused in terms of chapter 4. Chapter 4 by way of section 39(1)(a) read with section 33(1)(a) specifically refuses access, if access is prohibited in terms of section 60(14) of the Criminal Procedure Act. It is therefore clear that this Act does not entitle an applicant for bail to the information held by the prosecution for purposes of the bail hearing.

72 1931 EDL 29 31.

This decision also indicated that the maxim applied equally if not with greater force to earlier and later provisions of the same enactment. However, in the situation under discussion the general provision is the earlier and the specific the later. From the judgment in *S v Coulter*[73] it seems that it does not matter whether the general provision is placed first or later in the Act.[74]

Bearing in mind that the purpose of the maxim *generalia specialibus non derogant* is to resolve conflict between provisions,[75] it would operate to resolve any conflict between section 32 and 35(1). However, there is no special provision in the Constitution dealing with the right to information for purposes of bail applications. I therefore submit that the rule of interpretation *generalia specialibus non derogant* cannot exclude section 32. There is also no principle of fairness in section 35(1) to cover this situation which can be said to be of direct application. Accordingly only section 32 (if not section 12)[76] can take the matter any further.

The supporters of the exclusion of section 32 may argue that it has been specifically provided that an arrested person does not have such a right

---

73 1971(1) SA 162 (RA).

74 The court in *Barry v Union Government* 1912 OPD 114 saw the situation somewhat differently by indicating that where there are both specific and general provisions in a statute, and the latter conflicts with the former, the specific provisions are read as exceptions to the rule.

75 See *Khumalo v Director-General of Co-operation and Development* 1991(1) SA 158 (A); *S v Coulter* 1971(1) SA 162 (RA) 163; *Miller v Zimmerman* 1957 (1) SA 44 (A); *S v Mhlungu* 1995 (7) BCLR 793 (CC) par 113 and further. See also Botha (1991) 69.

76 See chapter 6. Section 12 should provide protection where protection is not provided in specific terms. This allows for conceptual similarity in the analytical process.

because of its exclusion from the rights of an arrested. Even if this is accepted, which it is not, the judgments indicate that the presumption may be rebutted by a clear expression of intent in the general provision.[77] It is submitted to be the clear intent of section 32(1)(b) to provide for information in every case where information is needed to exercise or protect a right. The intention is therefore clearly to entitle an applicant in bail proceedings to information if it is needed to exercise the right to be released from custody. As has been indicated, one of the factors to be taken into account when granting bail is the strength of the state's case. The information may therefore be very relevant at that stage.[78] Is it not then manifestly the intention of the legislature that section 32(1)(b) must be applied?[79]

Of more concern is the reasoning by the Constitutional Court in erecting a conceptual wall between sections 11 and 25 IC.[80] Following the argument of the Constitutional Court in those cases, it seems that there will be a similar barrier between section 32 and 35. The Constitutional Court in *Shabalala*, on the same reasoning, chose to decide the right to information at trial in the context of the fair trial provision and not on the basis of section 23 of the Interim Constitution.[81] Yet, the court still indicated that section 25(3) should

---

77 See *New Modderdam Gold Mining Co v Transvaal Provincial Administration* 1919 AD 367 397; *S v Mseleku* 1968 (2) SA 704 (N).

78 See *Nieuwoudt v Prokureur-Generaal van die Oos-Kaap* 1996 (3) BCLR 340 (SE).

79 Because of its application section 12 will not in this instance have to act in a residual due process capacity.

80 And also section 12 and 35FC. See par 6.3.1.

81 In *Shabalala* because of its direct application and the fact that section 23 IC could not take the matter any further.

not be read in isolation, but together with section 23.[82]

Section 32 should apply when application is made for bail and the above-mentioned maxim is put to use. But even if the ordinary rules of interpretation do not rule out the application of the maxim, the principles of constitutional interpretation will arguably do so.

It is widely accepted in case law throughout the world that there is a marked difference between statutory and constitutional interpretation.[83] The rationale for this difference is perhaps best explained by the judgment of the South African supreme court in *Matiso v Commanding Officer, Port Elizabeth Prison.*[84] Froneman J held that in a system based on parliamentary supremacy the intention of the legislature had to be determined. Where the Constitution reigns supreme and not the legislature as in South Africa after 27 April 1994, the interpretation must be directed at ascertaining the foundational values inherent in the Constitution. This is so because the Constitution is supreme and not the legislature.[85] This purpose has an impact on the manner in which the Constitution is interpreted. Constitutional interpretation is therefore primarily concerned with the constitutional values and the search is not directed at finding the literal meaning of statutes.

---

82 Par 35 of the judgment. Statements like these certainly do not help to clear up the matter. It seems that the court subscribes to the *generalia specialibus non derogant* principle but remembering the principles of constitutional interpretation tries to incorporate it by deciding that regard should be had to section 23 IC.

83 See Kentridge and Spitz in Chaskalson *et al* (1996) 11 - 10 and Botha (1991) 143.

84 1994 (4) SA 592 (SE) 596F - 599C.

85 However, see my comments on the amending provision of the Constitution in par 11.3.1.

Under Canadian law the rationale for the difference in interpretation and function of a Constitution as a whole, was described by the Supreme Court in *Hunter v Southam Inc*:[86]

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A constitution by contrast, is drafted with an eye on the future. *Its function is to provide a continuing framework for the legitimate framework of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties.* Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind.

In *R v Big M Drug Mart Ltd*[87] the Supreme Court of Canada held that the interpretation of the Canadian Charter should rather be a generous than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing the full benefit of the Charter's protection.

In *Government of the Republic of South Africa v Cultura 2000*[88] the Supreme Court of Namibia took a similar approach:[89]

---

86 (1985) 11 DLR (4th) 641 649 (SCC) (the italics are mine). See also *S v Acheson* 1991 (2) SA 805 (Nm) where Mahomed AJ (as he then was) makes a similar statement; *Ntenteni v Chairman, Ciskei Council of State* 1993 (4) SA 546 (Ck); *The Attorney-General v Dow* 1994 (6) BCLR 1 (Botswana) 7B - 9D (per Amissah JP) and 40F - 41I (per Aguda JA); *Swart v Minister of Home Affairs, Namibia* 1998 (3) SA 338 (Nm) 343G - 344C.

87 (1985) 18 CCC (3d) 385 (SCC).

88 1994 (1) SA 407 (Nm).

89 At 418F and G per Mahomed AJ as he then was. See also *S v Zuma* 1995 (4) BCLR 401 (CC) par 14; *Attorney-General v Moagi* 1982 (2) (Botswana) LR 124 184; *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355

> A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis.* It must broadly, liberally and purposefully be interpreted 'so as to avoid the austerity of tabulated legalism', and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of values bonding its people and in disciplining its Government.

In *Minister of Home Affairs v Fisher*[90] the Privy Council had to decide whether an illegitimate child had the rights stated in terms of the 1968 Bermuda Constitution which benefited "a child of a citizen of Bermuda". If the ordinary rules of interpretation applied the presumption pertaining to statutes concerning property, succession and citizenship determined that only a legitimate child qualified as a "child". The Privy Council held that the presumption did not apply when interpreting the Constitution. The Privy Council explained that, as opposed to any other Act of Parliament, a constitution has special characteristics. The Bermuda Constitution was modelled on the bills of rights of other countries and on international human rights instruments especially for the protection of human rights. A constitution, especially a bill of rights, was drafted in broad and ample style which laid down principles of width and generality. A bill of rights therefore had to be given "a generous interpretation avoiding ... 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to".[91] The presumption of statutory

---

(Nm) 361 - 2.

90 [1980] AC 319, [1979] 3 All ER 21,[1979] 2 WLR 889 (PC). This decision has been cited with approval by the Constitutional Court in *S v Zuma* 1995 (2) SA 642 (CC) 651 par 14, the Appellate Division in *S v Marwane* 1982 (3) SA 717 (A) 748 - 9, the full bench of the Namibian Supreme Court in *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355 (Nm) 362 and it seems by about every court that dealt with the interpretation of a constitution containing a bill of rights.

91 At 328H.

interpretation was therefore found inappropriate in order to effect the purpose and full measure of the fundamental rights taken up in the 1968 Bermuda Constitution.

All of this bears on the role of the ordinary rules of interpretation in the interpretation of a constitution. Lord Wilberforce for the Privy Council in *Minister of Home Affairs v Fisher* explained that this does not mean that there are no rules of law that apply to the interpretation of a constitution:[92]

> A constitution is a legal instrument giving rise, amongst others things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the constitution commences.

In *Nyamakazi v President, Bophutatswana*[93] the Bophutatswana Provincial Division, after thorough investigation of foreign, international and local law, also suggested the rules of interpretation of a constitution containing a Bill of Rights.[94] The role of the ordinary rules of interpretation in constitutional interpretation can be seen from these suggestions.

Friedman J held that the method of interpretation or construction was an

---

92 At 329E - G.

93 1992 (4) SA 540 (B). This decision was with apparent approval referred to by the Constitutional Court in *S v Zuma* 1995 (2) SA 642 (CC) 650 and the Witwatersrand Local Division in *Khala v Minister of Safety and Security* 1994 (4) SA 218 222.

94 At 566.

open-ended process of clarification. It reads into, derives and attaches significance to every word, section or clause in relation to the whole context. Interpretation is not a conclusion but rather a process that searches for the exact meaning of words and the use of terms. But irrespective of how the language is construed, the ordinary meaning cannot be dismissed. The constitution must be interpreted liberally according to its terms and spirit to give effect to the intention of the framers, the principles of government contained therein, and to the reasons for and objectives of the legislation. The ordinary rules and principles must give way to a more liberal construction.[95] A broad construction must be given as far as language permits.[96] Provisions in a constitution, which may be regarded as far-reaching or absolute must be given a more extensive and humanitarian interpretation than when contained in an ordinary statute. As constitutions are expected to survive for long periods of time and are more difficult to amend, constitutions are not bound by the strict and confined interpretations applied to, for example, criminal statutes. The strict interpretation of contracts should also not be applied. A purposive interpretation is necessary to enable the court to take into account factors other than mere legal rules. These factors are the objectives of the rights contained therein, the circumstances at the time of interpretation, the impact on future generations, the future implications of the construction, and the taking into account of new developments and changes in society.[97]

Under South African law the role of the ordinary rules of interpretation in constitutional interpretation was discussed by the Constitutional Court in *S v*

---

95 *Ibid.*

96 At 567.

97 *Ibid*.

*Mhlungu.*[98] This decision is of special relevance as the role of statutory presumptions in constitutional interpretation came to be decided. The court had to decide on the proper construction of section 241(8) of the Interim Constitution which provided that proceedings pending immediately before the commencement of the Constitution "shall be dealt with as if this Constitution had not been passed". On a literary interpretation this meant that a person served with an indictment before 27 April 1994 could not in spite of the deeply entrenched and peremptory provisions of chapter 3 IC rely on these rights in any proceedings after 27 April. This lead to formidable difficulties.[99] It was argued that in terms of a well-established rule of construction, a new statute, in so far as it affects vested rights and obligations, is presumed not to affect matters which are the subject of pending legal proceedings.[100]

Mahomed J[101] pointed out that the presumption only operated if there was no contrary intention. As chapter 3 sought to expand and not to limit rights, the judge saw the chapter on fundamental rights as a basis for such an inference.[102] Kriegler J found the application of the interpretative presumption regarding retroactivity and retrospectivity not suitable for

---

98 1995 (7) BCLR 793 (CC). See also par 8 where the purposive and generous focus prescribed by *Minister of Home Affairs v Fisher* [1980] AC 319, [1979] 3 All ER 21,[1979] 2 WLR 889 (PC) and *Government of the Republic of South Africa v Cultura 2000* 1994 (1) SA 407 (Nm) is quoted with approval.

99 See par 3 and further of the judgment.

100 See also *Bell v Voorsitter van die Rasklassifikasieraad* 1968 (2) SA 678 (A); *Bellairs v Hodnett* 1978 (1) SA 1109 (A) 1148.

101 As he then was.

102 Par 37 - 38 of the judgment. Mahomed J expounded the majority view.

purposes of interpreting the Constitution.[103] Sachs J after having specifically referred to the presumption *generalia specialibus non derogant* as a possible interpretative aid, questioned the usefulness of the common law presumptions in interpreting the Constitution.[104] Sachs J referred with approval to the words of Wilson J in *Thomson Newspapers v Canada (Director of Investigation & Research Restictive Trade Practices Commission)*:[105]

> [Such presumptions can be] inconsistent with the purposive approach to Charter interpretation ... which focuses on the broad purposes for which the rights were designed and not on mechanical rules which have traditionally been employed in interpreting detailed provisions of ordinary statutes in order to discern legislative intent.

Confronted with two mutually contradictory provisions, Sachs J preferred the approach not to seek for what is general and what is specific, but rather to seek out the essential purposes and interests to be served by the two competing sets of provisions. By "using a species of proportionality" they should then be balanced against each other. The objective was to achieve appropriate weight for each other and to preserve as much as possible of both. Mahomed J indicated that chapter 3 rights should be given the construction most "beneficial to the widest possible amplitude".[106] Applied to the main issue under discussion where section 32 does not contradict section 35(1), the full extent of the rights contained in sections 32 and 35(1)

---

103 See par 99 of the judgment. Kriegler J gave a separate judgment agreeing with the interpretation placed on section 241(8) by the majority, but for different reasons.

104 Par 113 - 116 of the judgment. Sachs J gave a separate judgment agreeing with Mahomed J but for different reasons.

105 (1990) 67 DLR (4th) 161 192 (SCC) per Wilson J in a dissenting judgment.

106 Par 9 of the judgment.

must be preserved.

It is clear that constitutional interpretation seeks the purpose and fundamental values of a constitution. Where the ordinary rules of statutory interpretation detract from this purpose and the fundamental values of the Constitution, these rules are inappropriate and inapplicable. Where the Bill of Rights is interpreted the full benefit of protection must be afforded. In this instance the maxim *generalia specialibus non derogant* does not afford an interpretation that promotes the protection of fundamental rights in the Constitution. The maxim should therefore not apply. Accordingly section 32(1)(b) of the Final Constitution should afford an applicant for bail the right to access to information held by the police or state officials for purposes of the bail hearing.

However, taking note of the objections in making the contents of the police docket available at an earlier stage than trial, it is submitted that this right should be limited so as to ensure that the docket is available only once the investigation has been sufficiently completed to determine the merits of the case. The investigation would have been sufficiently completed if the case has been put down for plea. If it can be proven, or the state concedes that the merits have been determined at an earlier stage, the information must be made available at the earlier stage. If it has to be supplied earlier, the prosecution might not have had time to investigate properly, and of course the defence will argue that there is no case against the arrested, and that he should be released on bail. In practical terms this limitation might result in the arrested person not being entitled to the information at an earlier stage than where it is requested for trial purposes. The arrested person in any event has the choice to lodge his application for bail after he has received the contents of the docket for trial purposes.

Bearing in mind that the result of the investigation in possession of the prosecution is the property of the public, to be used to ensure that justice is done, the contents must be made available on request at the earliest moment after the merits have been investigated.

## 10.4 CONCLUSION

This is one area where an applicant for bail in South Africa might have a slight edge over his counterpart applying for bail under Canadian law. This is so, notwithstanding the fact that the South African legislature has expressly refused access to information for purposes of the bail application, and that there is no similar prohibition under Canadian law. While it is clear from the judgments by the Canadian courts that there was only a duty to disclose for purposes of trial,[107] the Constitutional Court has diluted the effect of the prohibiting legislation under South African law to allow for disclosure in certain instances.

The Constitutional Court has indicated that section 60(14) of the Criminal Procedure Act does not sanction an absolute denial. The court concluded that the prosecutor would sometimes have to inform the applicant of the grounds against bail being granted to afford an applicant burdened with an onus a reasonable opportunity in terms of subsection (11). The Constitutional Court also proposed a less absolute interpretation of the words "have access to" in subsection (14) to bring the subsection into harmony with section 60(11) of the Criminal Procedure Act.[108] Where

---

107 Before the accused is called upon to elect the mode of trial or plead.

108 It remains to be seen whether the courts will order the veil to be lifted in the instance of section 60(11)(b) of the CPA "where exceptional circumstances"

"exceptional circumstances" have to be proved in terms of section 60(11)(a), the principle clearly applies. The veil must be lifted to afford the applicant a reasonable opportunity to prove the "exceptional circumstances". An applicant falling under section 60(11)(b) would be entitled to the information held by the state for purposes of the bail application if the information is required to afford the applicant a reasonable opportunity to obtain bail. What is or is not a reasonable opportunity depends on the facts of each case. It is not clear whether an applicant for bail that does not carry the burden of proof, might under the correct circumstances, be entitled to be informed of the grounds against the granting of bail. It seems doubtful. Under Canadian law, an applicant for bail whether burdened with the onus or not, is not entitled to the information held by the Crown for purposes of the bail application.[109]

---

does not have to be proved.

109 It seems that South Africa is "ahead" in this regard primarily because of the interpretation by the Constitutional Court of the requirement of a "reasonable opportunity" in section 60(11). It is not because of the purposive and unremitting protection of the right to information in section 32 FC, the right to freedom and security in terms of section 12 FC, nor the right to bail in terms of section 35(1)(f) by the Constitutional Court. The Constitutional Court thus missed a golden opportunity to explore the fundamental basis for granting the information held by the state to an applicant for bail.

The interpretation does therefore not represent a break away from the indefensible erosion of the principle of disclosure that characterises the decades leading up to 1994 on the basis any of these sections or other provision in the Bill of Rights (see par 2.5.2.1 and further and 10.3.2 (including footnote 47) for the erosion of the principle of disclosure in criminal trials, and *S v Makwanyane* 1995 (3) SA 391 (CC) par 262 and *Shabalala v Attorney-General of the Transvaal* 1995 (12) BCLR 1593 (CC) par 26 for the new direction that the Constitution has heralded). Even if the Constitutional Court wanted to give effect to the new direction that the Bill of Rights has heralded it could not do so because of the conceptual wall that the court has erected between the criminal procedure rights and the other rights in the Bill of Rights. The misdirection by the Constitutional Court when it built the conceptual wall once again becomes evident. Because of the wall, the court could not rely on the aspirations to protect the freedom and security of the person and the legal culture of transparency and

accountability articulated in the Bill of Rights.

South Africa is also not "ahead" because the legislature wanted to give an applicant for bail the right to the information held by the state. The legislature seems to say that where the applicant for bail carries the burden of proof it is only for the prosecution to say if and when the information held by the state is needed to afford the reasonable opportunity prescribed in section 60(11). In instances where the state has the burden of proving, the state can also decide whether the applicant should have access to the information. It therefore seems that the result was probably coincidental.

# CHAPTER 11

# CONCLUSIONS AND RECOMMENDATIONS

11.1 INTRODUCTION

11.2 ARE THE CANADIAN CHARTER AND CHARTER JURISPRUDENCE SUITABLE SOURCES OF REFERENCE FOR HUMAN RIGHTS AND PARTICULARLY THE RIGHT TO BAIL IN SOUTH AFRICA?

11.3 HOW DOES THE RIGHT TO BAIL UNDER SOUTH AFRICAN LAW COMPARE WITH THE RIGHT UNDER CANADIAN LAW?

- 11.3.1 General
- 11.3.2 The scope of the right
- 11.3.3 The foundational basis and structure
  - 11.3.3.1 General
  - 11.3.3.2 The presumption of innocence
  - 11.3.3.3 The right to "freedom and security"
- 11.3.4 The principles in general
  - 11.3.4.1 General
  - 11.3.4.2 Arrest and appearance in court
  - 11.3.4.3 Remand in custody
  - 11.3.4.4 Onus
  - 11.3.4.5 Terms of release
  - 11.3.4.6 Role of presiding officer
  - 11.3.4.7 Authority to grant bail
  - 11.3.4.8 Constitutional standard
  - 11.3.4.9 Use at trial of evidence by an applicant for bail
  - 11.3.4.10 Discovery

## 11.1 INTRODUCTION

This chapter draws together the issues that have been pursued and the

conclusions that have been reached in this study.[1] This is effected by posing and answering three questions after which recommendations and concluding remarks are made.

Because this is mainly a comparative study, the question is first addressed whether the Canadian Charter and Charter jurisprudence are suitable sources of reference for human rights and particularly the right to bail in South Africa. In the second part a holistic overview of the right to bail under Canadian and South African law is given. This part also takes note of the principles that have been applied, and the balance that has been struck at different times in history. In the third part the question is addressed whether the correct balance has been achieved between the individual's right to freedom and security, and the interests of society under South African law. In this part the contemporary South African position is put under the magnifying glass and the lessons that have been learnt from this study are applied in answering the posed question. Finally, recommendations for an effective and equitable system of bail which are based on the correct interpretation and application of the principles which have been designed to ensure a fair contest, are made.

## 11.2 ARE THE CANADIAN CHARTER AND CHARTER JURISPRUDENCE SUITABLE SOURCES OF REFERENCE FOR HUMAN RIGHTS AND PARTICULARLY THE RIGHT TO BAIL IN SOUTH AFRICA?

The Canadian Charter and Charter jurisprudence are excellent sources for human rights and specifically the right to bail in South Africa. The Charter did not arrive suddenly or unexpectedly in Canada on 17 April 1982. Unlike the position in South Africa, the move away from the principle of parliamentary

---

[1] The conclusions are included in this chapter for easy reference and to facilitate the discussion.

supremacy inherited from the British Empire was incremental. This gradual process spanned across more than a century, rather than happening overnight. Under Canadian law tentative protection was first afforded to certain rights and eventually formal entrenched guarantees saw the light.

Some of the fundamental rights and liberties that Canadians enjoy have their roots as far back as manifestos like the Magna Carta, the English Bill of Rights, the Habeas Corpus Acts, and the Act of Settlement. In addition the need for and extent of constitutional rights that are immune to the lawmakers had been debated from as far back as 1865 at the "Confederation Debate". As a result of the management of relationships, the constitutional protection of a limited number of rights already appear in the Constitution Act of 1867. Since the formation of the Dominion in 1867, Canadians have also tried to manage relationships by way of federalism. The balancing of interests has therefore for a very long time formed part of Canadian law.[2]

However, the balancing of interests still proved to be problematic[3] and led to the development and protection of the interests of newly politicised categories relating for example to sex, ethnicity and, of special relevance for this study, persons confronted by the criminal justice system. As far back as 1960 the Canadian Bill of Rights already contained a declaration of fundamental rights and freedoms which contributed to the development of a human rights culture. Although the rights in the Bill, including the right to bail, were not

---

2 The English common law principles of bail that were adopted into Canadian law have been developing since the 7th century AD. At that time payment was made to the alleged victim to temporarily satisfy the accuser and to prevent a feud between the families. By the 11th century AD the accused was already allowed to pay a sum of money to the sheriff to avoid pre-trial incarceration.

3 Massive violations of individual's rights took place especially where race, religion and communism played a role.

constitutionally entrenched, the Bill ensured their scrutiny, especially by the courts, as both legislative and non-legislative matters had to be construed in light of the Bill. Some of these rights, including the right to bail, were duplicated in the Charter.

In the 1960s and 70s there were also many other legislative initiatives mainly dealing with discrimination that strengthened the rights of Canadians. However, it was the serious and sometimes frantic debate among members of the legal fraternity and especially politicians from the 1950s up to 1982, when the Charter commenced, which proved invaluable in shaping these new civil liberties. Since 1982 these liberties have been guaranteed by the Canadian Constitution and utilised along with federalism to fashion harmonious coexistence. Since 1994 South Africa has also been a federal state with a supreme constitution providing protection to civil liberties along similar lines.

Of utmost importance is the clarifying role that the Canadian courts have played after the adoption of the Canadian Charter. The Canadian courts in accepting their new socio-political role to reconcile the individual and the community, interpreted and applied the Charter responsibly, and thereby built up a huge body of judicially developed protections. The judgments by the Canadian courts not only show the experience that has been gained, but points to the kind of society that Canada is and wants to be.[4]

Of course the reference to foreign law will not be a safe guide unless the principles of comparative law are followed.[5] In the area of criminal procedure

---

4 There is a wide perception that as far as human rights are concerned, Canada is the country that is the best to live in.

5 See *S v Makwanyane* 1995 (3) SA 391 (CC) par 37 and *Bernstein v Bester NO* 1996 (4) BCLR 449 (CC) par 133. See also the *caveats* in par 1.1 and 1.5.5.3.

the comparison is extremely apposite in light of the fact that the law of criminal procedure and evidence in both Canada and South Africa is premised on the English common law of criminal procedure and evidence.[6] Both systems are therefore based on the same fundamental principles.[7] As with the Canadian Charter, the Bill of Rights in South Africa was superimposed on the English common law of criminal procedure and evidence.[8] As a result many of these English principles were taken up in both Constitutions.[9] The underlying rationale or reasoning for the existence of these principles are therefore similar and accordingly suitable for consideration.[10] As far as the principle of bail is concerned, the earliest roots of bail under Canadian law can be traced back to English common law. This beginning is also part of the South African common law heritage.[11]

The value of comparison for this study is further enhanced by the similarity in the constitutional structure within which the criminal procedure rights operate under Canadian and South African law. Particularly with regard to this study, both Constitutions provide for the "freedom and security" of the person[12] and

---

6 See chapter 1 footnote 3, par 2.5.1.2, Dugard (1977) 25, Schmidt (1989) 12 and further and Steytler (1998) 13.

7 For example the presumption of innocence which forms the cornerstone of the criminal justice system in both countries (see chapter 5) and the right against self-incrimination (see chapter 9).

8 See chapter 1 footnote 4 and Steytler (1998) 1 - 6 & 13.

9 See chapter 1 footnote 4.

10 See *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC) par 72.

11 See chapter 2.

12 See chapter 6. The underlying reasoning for this legal norm has steadily become more universal and can therefore fruitfully be used for comparative purposes. See *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) BCLR 1 (CC) par 72.

lodged together with other criminal procedure rights, the right to be presumed innocent, the right against self-incrimination and the right to bail. In addition both Constitutions provide for a general limitation clause.[13] The undeniable debt that the South African limitation clause, which is definitive to the method of fundamental rights analyses, owes to Canadian law, calls for an even closer scrutiny of these principles.[14] The Canadian example is therefore ideally suited to assist in the interpretation and application of these principles which are highly contentious under South African law. It would indeed be folly to not look at the Canadian example as the Supreme Court of Canada, and other courts to a lesser extent, have been particularly helpful in explaining the basis and structure of these similar fundamental rights.

Canada, to a lesser extent than South Africa, is also burdened with circumstances that frustrate the objectives and the proper functioning of the bail system (in some instances under Canadian law).[15] Charter jurisprudence can therefore provide solutions to troublesome provisions as the right to bail has proved to be in South Africa.

As the Canadian Charter and Charter jurisprudence are such an appropriate source of reference for human rights and the right to bail in South Africa, it is a pity that the South African courts and legislature did not take better cognisance of the substantial jurisprudence under Canadian law. With the insight provided from this jurisprudence, the imbalance[16] and many of the problems that now exist under South African law could have been avoided.[17]

---

13 Section 1 of the Charter and section 36 of the Final Constitution.

14 See chapter 1 footnote 15 & chapter 8 footnote 164.

15 See par 8.2.2.2.c.1.

16 See par 11.4.

## 11.3 HOW DOES THE RIGHT TO BAIL UNDER SOUTH AFRICAN LAW COMPARE WITH THE RIGHT UNDER CANADIAN LAW?

### 11.3.1 General

While both systems afford the right to bail constitutional protection by way of a fundamental rights provision, the future existence of this right, or continued existence in the same form, is not ultimately guaranteed by either the Canadian or South African Constitution. This is so because the Canadian Charter by way of section 33 provides that this right may be overridden by a "notwithstanding" clause under Canadian law and both Constitutions contain amending formulas.[18] Because of this there is an uneasy coexistence. The fundamental rights provisions, and the "notwithstanding" clause and amendment formulas, disagree on the fundamental purpose of the Constitution and for whose benefit it exists. This tension derives from the following syllogism:

- The Canadian Charter and Bill of Rights provide citizens with rights against their respective governments.
- The "notwithstanding" clause gives the Canadian legislature the power to override certain Charter rights[19] and the amending formulas under both

---

17 As an example, a reading of the Canadian Supreme Court decision in *R v Pearson* (1992), 12 CRR 1, 17 CR (4th) 1, 77 CCC (3d) 124, 3 SCR 665 (SCC) would have gone a long way towards explaining the function of the presumption of innocence as a substantive principle of fundamental justice in the criminal process.

18 See chapter 7 footnote 1.

19 However, this controversial provision has been used sparingly to date. The provision was only added to the Charter as late as 5 November 1981 as a

Constitutions give the governments a monopoly on formal constitutional change.[20]

- The fundamental rights are accordingly conditional on the Canadian government not abusing the monopoly power to override or on both governments not abusing their monopoly of the amending power.

The Constitutions therefore make two contradictory statements about sovereignty with all the symbolism which that involves. On the one hand the Canadian Charter and Bill of Rights indicate that the rights of people are more

---

political compromise to secure the consent of the seven provinces that had until then been opposed to the Charter on the ground that it limited the sovereignty of their legislatures (see also par 3.2.9). Quebec, the one province that did not give its assent to the Charter, by way of an Act entitled "An Act respecting the Constitution Act, 1982" added a standard-form "notwithstanding" clause to each of the statutes in force in Quebec on 16 April 1982. But as the Act did not override the Quebec Charter of Rights and Freedoms the purpose of the Act was clearly not to abridge civil liberties but to protest the imposed national charter. Outside Quebec the override has been used only once by the Saskatchewan government to protect the SGEU Dispute Settlement Act SS 1984 - 85 - 86 which ordered striking workers to return to work. See Hogg (1992) 891 and further, Funston & Meehan (1994) 192 - 193 and Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 597. Hogg (1992) 898 indicates that the governments are exceedingly reluctant to use section 33. This is so because of a principled commitment to the Charter and partly because of the political resistance that can be expected from opposition parties, the press, the organised bar and civil liberties groups. Powerful reasons of public policy would therefore have to be present to justify the use of section 33.

20 It might also not be that easy to secure an amendment by way of the amending formulas under both systems because of the high level of agreement required by the amending formulas. Under Canadian law the central government and at least seven of the ten provinces must agree to an amendment. In addition, the fifty percent requirement in the general amendment formula under Canadian law means that at least one of Ontario or Quebec must agree to the amendment since the combined population of these provinces comprises more than fifty percent of the population. Under South African law two thirds of the National Assembly, and the National Council of Provinces with at least a supporting vote of six of the nine provinces, must agree to an amendment of the Bill of Rights. See section 74. See also Hogg (1992) 74 and chapter 7 footnote 1.

important than those of governments. On the other hand the "notwithstanding" clause enables the Canadian government to remove a statute from the reach of the Charter, and the amending formulas under both systems provide that the governments can amend the Constitution in terms of their own self-interest and announce the result as a *fait accompli*.

But there does not seem to be any present or foreseeable need for, or danger of the Canadian government in overriding or either amending or removing this provision. The basic guidelines on which bail is granted under Canadian law have remained essentially intact since the early 1970s. Under South African law the right to bail has already been watered down in the Final Constitution.[21] Despite this, the Minister of Safety and Security, Mr Steve Tswete, in October 1999 indicated that he would change the Constitution to amend the laws "behind which criminals hide".[22] It seems that the continued existence of the right to bail under South African law is less safe than under Canadian law.

### 11.3.2 The scope of the right

Under Canadian and South African law the right to bail only applies to natural persons and includes all forms of release. Under Canadian law it applies from when a person is "charged" within the meaning of section 11 of the Charter when an information is sworn alleging an offence against him, or where a direct indictment is laid against him when no information is sworn. Under

---

21 See par 8.3.4.

22 See the *Pretoria News* of 15 October 1999 at page 5 under the heading "Thugs can't use 'rights" and *Beeld* of 16 October 1999 at page 5 under the heading "Regering gekritiseer oor menseregtekultuur in SA". The Minister made the remark before the National Council of Provinces on 14 October 1999. See par 11.4 where I discuss the remarks made by the Minister and the reaction thereto by the Human Rights Commission.

South African law a person has the right to bail once legally arrested. It may be on the mere suspicion of having committed an offence.

As a person is usually arrested, then detained, and then becomes an accused on being charged, it seems that the constitutional right to bail under South African law in this instance becomes available at an earlier stage. After arrest and before being charged a person under Canadian law does not have a right to bail. Under South African law application can be made for bail at that stage. On the other hand, if a person is charged under South African law, and attendance is secured by subpoena, the accused does not have the right to bail for he has not been arrested. If an information is sworn or a grand jury brings out an indictment under Canadian law, the charged person has a right to bail even if attendance is secured without arrest.

It seems that under both systems a person may in certain circumstances have the right to bail where there is no need for it. Where a person is charged under Canadian law and means other than arrest is used to secure attendance at court, the accused would have the right to bail. Where a person is arrested and released under South African law the accused retains the right to be released on bail.

Because one is not "charged with an offence" or "arrested for allegedly committing an offence" after conviction or acquittal it seems that these rights do not extend beyond the verdict of the court a quo.

The right to bail under Canadian law has wider application. It applies to all matters of a public nature, intended to promote public order and welfare within a public sphere of activity. If a person is charged with a private, domestic or disciplinary matter which is primarily intended to maintain discipline or integrity

or to regulate conduct within a limited private sphere of activity, the right to bail will exist if the proceedings involve the imposition of true penal consequences. Under South African law, the courts have limited the right to bail to the normal criminal process.

But certain South African tribunals or institutions other than criminal courts have the power to arrest, hear and sentence an individual for the alleged commission of an "offence". Common sense dictates that an individual who is subject to this severe deprivation of liberty should be entitled to the highest procedural protection in our law. It would furthermore be in line with the spirit of the Constitution.

### 11.3.3 The foundational basis and structure

#### 11.3.3.1 General

The position under Canadian law is complemented by the predominantly sound understanding of the foundational basis and structure of the rights of an individual confronted by the criminal justice system, including an applicant for bail. Under South African law there is little if any clarity on the foundational basis or interrelationship of these rights within the constitutional structure. Nevertheless many criminal procedure rights are granted under South African law.

#### 11.3.3.2 The presumption of innocence

Under Canadian law the role that the presumption of innocence plays before conviction is certain. Section 11(d) of the Charter ensures that the presumption of innocence operates at trial, where the guilt or innocence of the accused is to

be established. It is also accepted that this presumption protects the fundamental liberty of every person at each step of the criminal justice process prior to conviction. Section 11(e) entrenches the effect of the presumption at the stage of the bail hearing.

Yet, there is some disagreement as to whether it is this presumption that forms the substantive principle in section 7 of the Charter which affords protection in the criminal justice process after conviction. What is certain, is that the substantive principle in section 7 provides protection after conviction up to the end of the criminal process. The residual content of the substantive principle is determined by the particular step in the process.

Under South African law the presumption of innocence is entrenched by section 35(3)(h) of the FC. Section 35(3)(h) operates at trial where the guilt or innocence of the accused is to be established. However, even the extent of this presumption at trial has not always been altogether clear, and its operation outside the trial context if any, which is relevant for this study, has posed immense problems.

The Constitutional Court and some high courts have indicated an interrelationship between this presumption and some other rights in the Bill of Rights. However, these decisions do not seem to be authority to widen the scope of the presumption outside the narrow context at trial. At common law and at least one high court has indicated that the presumption operates at all pre-trial procedures and up to conviction. A number of high courts have indicated that the presumption applies at the bail hearing before trial.

In spite of it being certain that section 35(3)(h) only applies to trial, some courts have even held that this constitutional provision had to be considered

when bail was considered. On other occasions courts and academics have argued that the presumption of innocence had to be discounted when application is made for bail, without it being clear whether reference is made to the constitutional provision, or the common law presumption.

However, the South African authorities seem to agree that there is no right to bail, or a presumption that favours bail, after conviction. Notwithstanding, it seems that after conviction this presumption, in some respects is given greater effect than under Canadian law, where the application of the substantive principle in section 7 is accepted.[23]

When a new trial has been ordered, Canadian case law indicates that the accused is in the same position as a person confronted with a new trial. He has a conviction outstanding against him and is entitled to the same presumption of innocence. Under South African law no authority could be found dealing directly with this issue. It seems reasonable to accept that the same principles would apply as those principles which apply to one who is initially confronted by the criminal justice system.

11.3.3.3 The right to "freedom and security"

Under Canadian law section 7 of the Charter operates as a generic and residual due process right and assumes the character and status thereof. This due process right operates independently and informs the interpretation of all the rights contained in sections 8 to 14 of the Charter. Therefore also the right to bail in section 11(e). If none of the provisions in sections 8 to 14 is understood to apply to a particular fact scenario section 7 will be used to determine

---

[23] And it is accepted that the presumption of innocence is the substantive principle in section 7 of the Canadian Charter.

whether the law in question complies with the principles of fundamental justice.

This ensures structural and conceptual similarity in the analytical process that would allow for transplantation of persuasive doctrines and principles with relatively little scope for foundational confusion. The safeguards built into this conceptual structure could then be easily assimilated into analysis of constitutional criminal procedure rights.

Although this forms part of the Canadian "fundamental justice" jurisprudence it seems that the Constitutional Court has not approached the situation in the same way. The Constitutional Court has erected a conceptual wall between the right not to be deprived of liberty in terms of section 12 and the rights of persons once detained, arrested or accused. This prevents due process seepage from section 12 to section 35. However, remarks by Kriegler J on behalf of the unanimous Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[24] may indicate that there has been a change of heart.

### 11.3.4 The principles in general

#### 11.3.4.1 General

In spite of the disagreement as to the structure and foundation, the basic principles are very similar under the two systems. The similarities suggest that South Africa borrowed heavily from Canadian law when it constructed the constitutional right and guidelines to bail.

---

24 1999 (7) BCLR 771 (CC).

11.3.4.2 Arrest and appearance in court

In the normal process both systems provide that arrest without a warrant may only be made in certain circumstances by a peace officer. Even though the unlawful arrest can certainly be contested in court under both systems, the detainee under Canadian law is advantaged in that the Criminal Code directs the arresting officer to release such person, as soon as practicable hereafter. In certain instances of arrest without a warrant there is even in effect a review by a superior.

If an arrest is effected legally, the Criminal Code of Canada provides that an arrested person must be brought before a justice of the peace without delay, and in any event within a twenty-four hour period after arrest. Where a justice is not available in the time period the arrested person shall be taken before a justice as soon as possible. Under South African law an arrested person who is similarly not released by a police official or the attorney-general has to be brought before a lower court as soon as possible, but not later than forty-eight hours after arrest. If the forty-eight hours expires outside court hours or an ordinary court day, the accused must be brought before a lower court not later than the end of the first court day.

11.3.4.3 Remand in custody

The accused under Canadian law is further advantaged, in that the enquiry into whether the accused should be released on bail, or otherwise, may not be postponed for more than three clear days at a time without the permission of the accused. Under South African law, the court may postpone for not more than seven days at a time. While these postponements are most frequently used by the prosecution to gather information to contest a bail application, it

seems that the lengthier time frame under South African law points to the lesser capability to deliver on the part of the South African prosecution.

However, the idea that a person should only be entitled to bail once sufficient information has been gathered regarding the transgression is not new to our law. The principle was introduced by Ordinances 30 of 1928 and 72 of 1830 along with the introduction of the preliminary investigation. This was done by only conferring a right to bail once the preliminary investigation has been completed. However, the magistrate had the discretion to grant bail. After completion of the preliminary investigation, but before committal for trial, the attorney-general had to approve the release.

From this time period and into the Union we see the principle that once the case has been committed to trial an accused was entitled to bail. The Criminal Procedure and Evidence Act of 1917 again made the granting of bail possible before the facts of the case had been adequately looked at, except in the case of certain serious offences. But the entitlement to bail still only arose after committal for trial and then only the supreme court could grant bail in case of certain serious offences. However, bail could be granted by the supreme court at any stage of the proceedings.

Yet, one must appreciate that an accused was entitled to be brought before a court at his request to pursue his release in the previous era at any time, even after hours. There was also no provision enabling the state to postpone an application for bail in order to gather information. In this regard the individual's right to liberty has therefore diminished considerably under South African law with the advent of the fundamental rights era. It seems that the ability of the prosecution to deliver must have deteriorated markedly.

11.3.4.4 Onus

Under both systems there is a basic but prescribed entitlement to bail before conviction where the onus is on the state to justify continued incarceration, except in certain prescribed instances.[25] However, under South African law this may not be a true onus. Where the prescribed circumstances present themselves, the onus is on the applicant to convince the presiding officer that he should be released. While the onus is similarly reversed in case of some serious offences, 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, the South African legislator went one step further in that it expects something above the constitutional standard from the applicant in the case of the very serious offences mentioned in schedule 6 of the Criminal Procedure Act. It has been noted that the Canadian Committee on Corrections under Roger Quimet as far back as 1969, indicated that the principle that bail will be granted only in "exceptional circumstances", even pending appeal, was too restrictive.[26] The list of offences where the burden is reversed is also much more extensive under South African law.

11.3.4.5 Terms of release

In addition the applicant before a justice under Canadian law, will be released on the least restrictive terms if the prosecutor does not convince otherwise. This represents a marked difference in approach. The more onerous prescribed

---

25 Even if it is accepted that section 35(1)(f) does not confer a basic entitlement to bail under South African law, section 60(1)(a) of the CPA surely does so. Under Canadian law it is afforded by the CCC and by the Canadian Charter.

26 See par 5.2.2.3.

terms only come into play once the prosecution has proved that "lesser" terms are not adequate.

By whatever name it is called, it seems that Canadian and South African law provide for release on "warning" and "bail" with or without conditions. However, under Canadian law sureties are first considered under the less onerous conditions when a decision on bail is made. Money or other valuable security therefore only has to be deposited when the prosecution has proven sureties inadequate. As a last resort before refusing release, Canadian law in one prescribed instance even provides that sureties may be called for and money or other valuable security must be deposited. Both systems provide that excessive bail cannot be granted.

This approach under Canadian law clearly gives due regard to the liberty interests of an applicant for bail and accords with the structural and analytical similarity of the criminal justice process.

11.3.4.6 Role of presiding officer

Under Canadian law the presiding officer has the power to act inquisitorially, but the system is basically accusatorial. Under South African law a greater responsibility is cast upon the presiding officer in that he is obliged to act inquisitorially, also it seems where the reverse onus does apply. The Criminal Procedure Act expressly instructs the court not to act as a passive umpire. If neither side raises the question of bail, the court must do so.[27] If the party that bears the burden of proof does not on his own accord adduce the necessary evidence, the court must take the initiative.[28] Even where the prosecution does

---

27 Section 60(1)(c).

28 Section 60(3).

not contest bail, the court must still make up its own mind.[29] Even though these provisions were only enacted recently the idea is not new to South African law. We have already seen that the procedure to determine bail in the time period 1652 until 1806 was inquisitorial.

This difference in emphasis is probably justified by the lesser ability of the prosecution and applicant, depending on where the onus lies, in the majority of cases under South African law to present the court with the necessary facts. The added procedural safeguard under South African law is therefore necessary to ensure equitable criminal justice.

11.3.4.7 Authority to grant bail

Under Canadian law only the Supreme Court may grant bail for the serious offences listed in section 469 of the Criminal Code of Canada. Under South African law the regional court has been tasked to consider bail for the "most serious" offences mentioned in schedule 6. The high court in South Africa would only have to consider bail if the case has already been transferred to it, and a bail application is hereafter instituted. On the same principle the regional court would also have to consider the bail application for a "lesser" offence once the case has been transferred to it. While the granting of bail for certain serious offences was limited to the supreme court by the Criminal Procedure and Evidence Act of 1917, and thus has historical precedent, the sheer quantity of schedule 6 offences probably makes such a proposal impractical.

---

29 Section 60(10).

11.3.4.8 Constitutional standard

Under both systems a constitutional standard is imposed in terms of which bail is granted or denied. While these criteria, which set the normative pattern and are central to any discussion on bail, are described in different words, that is, "if the interests of justice permit" and "without just cause", the circumstances to be taken into account in terms of the respective legislation show great similarity. When appraising this standard, sight must not be lost of the fact that the liberty interests of the applicant are included in, and have to be given full value under both systems. The potential factors, broadly speaking, to be taken into account and which are common to both systems are attendance at trial, protection of the public and good administration of justice. While the propensity to commit crimes is to be taken into account under Canadian law, only the likelihood to commit a schedule 1 offence is indicated under South African law as justifying refusal of bail.

Even though objections have been raised under South African law against the propensity to commit crimes as being preventative detention, it has been shown to be mandated in the common law of both countries, along with the danger of the offender to society. The strength of the case, and the nature of the offence against the offender, have similarly been determining factors. However, the nature of the offence seems to have been incorrectly used in some instances as punishment. Even under Roman-Dutch law it was understood that an offender (or the surety) would be less willing to stand trial in view of the harsh punishment that could be imposed.

Of late a new ground was added under each of the legal systems. Under South African law the refusal will also be in the interests of justice "where in exceptional circumstances there is the likelihood that the release of the

accused will disturb the public order, or undermine the public peace or security". Under Canadian law refusal of bail is justified "on any other just cause being shown and, without limiting the generality of the foregoing" "in order to maintain confidence in the administration of justice". However, the ordinary factors mentioned in the subsection that would point to incarceration in order to ensure that confidence be maintained are in main not new factors to be taken into account when bail is adjudicated. Only the ground, that is, to maintain confidence in the administration of justice, is an innovation.

But it seems that an adverse opinion by the public is not enough to constitute the disturbance or undermining that the South African addition requires,[30] while the maintenance of confidence is expressly included under Canadian law. While public opinion may be helpful under Canadian law, it must be agreed that it should not be a determining factor under South African law. In general Canadian society is much more advanced than our's. Our courts have accordingly on numerous occasions stated that a large part of our population is ignorant of the law. This must surely be so to a much greater extent with regard to international accepted standards. It is therefore submitted that public opinion should not dictate the principles of the system in South Africa, but be a reminder to the government to improve the efficiency of the police and criminal court system so that we can make the accepted principles work. The accepted principles should therefore not be compromised to appease the uninformed majority.

It is clear under Canadian law that any other just cause may be shown that would invite incarceration. However, the finding by the Constitutional Court that the open-ended character of section 60(5) to (8A) of the Criminal

---

30 *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC) par 54 and further.

Procedure Act permits other factors than those in subsection (4) to be taken into account, is not convincing. What the final subsection in subsections (5) to (8A) says, is that any other relevant factor may be taken into account, to determine whether the factors in subsection (4) are present. However, it is clear that the Constitution does not allow for such a limitation on the power of the court to decide the matter. The Constitutional Court's finding that other factors may be taken in account is therefore in line with the Constitution and the position under Canadian law. However, the Constitutional Court should have concluded that the legislature offended the separation of powers doctrine.

While the circumstances only have to be *likely* to prevent release under South African law, incarceration has to be *necessary* under Canadian law to ensure attendance or to maintain confidence in the administration of justice. In addition, custody under Canadian law is justified where there is a *substantial likelihood* that the accused if released from custody will commit a criminal offence, or interfere with the administration of justice.

11.3.4.9 Use at trial of evidence by an applicant for bail

The prosecution under South African law is furthermore significantly favoured by the fact that the evidence by an applicant for bail, informed that his evidence will be admissible at his later trial, is admissible at the subsequent trial to incriminate or test the credibility of the accused. While the evidence may be excluded under South African law in the interests of justice, it seems not to be in the interests of justice where the applicant has thus been informed. In this situation Canadian law guarantees an accused that his prior testimony at the bail hearing may not be used to incriminate him at the trial. It is certain that answers to which an accused objected in his testimony at the bail hearing may not be used to test his credibility during cross-examination at

trial. However, it is uncertain under Canadian law whether the remaining testimony by the accused presented at the bail application, may be used to test the credibility of the accused at trial.

Where the use of evidence is prohibited under South African law, for example where the accused was unaware of his right against self-incrimination, the admissibility of derivative evidence at the subsequent criminal trial is on similar footing as under Canadian law. Here the courts under both systems have the discretion to exclude such evidence to ensure a fair trial.

11.3.4.10 Discovery

One area where an applicant for bail in South Africa might have a slight edge over his counterpart applying for bail under Canadian law, is where access is sought to information held by the prosecution. This is so, notwithstanding the fact that the South African legislature has expressly refused access to information for purposes of the bail application, and there is no similar prohibition under Canadian law. While it is clear from the judgments of the Canadian courts that there was only a duty to disclose for purposes of trial, the Constitutional Court has diluted the effect of the prohibiting legislation under South African law to allow for information in some instances.

The Constitutional Court has indicated that section 60(14) of the Criminal Procedure Act did not sanction an absolute denial to divulge information. The court concluded that the prosecutor would sometimes have to inform the applicant of the grounds against bail being granted to afford an applicant burdened with an onus a reasonable opportunity. The Constitutional Court also proposed a less absolute interpretation of the words "have access to" in subsection (14) to bring the subsection in harmony with subsection (11) of the

Criminal Procedure Act.[31] Where "exceptional circumstances" have to be proved in terms of section 60(11)(a), the principle clearly applies. The veil must be lifted to afford the applicant a reasonable opportunity to prove the "exceptional circumstances". An applicant resorting under section 60(11)(b) would be entitled to the information held by the state for purpose of the bail application if the information is required to afford the applicant a reasonable opportunity. What is or is not a reasonable opportunity depends on the facts of each case. It is not clear whether an applicant for bail that does not carry the burden of proof might under the appropriate circumstances be entitled to be informed of the grounds against the granting of bail. It seems doubtful. Under Canadian law, an applicant for bail whether burdened with the onus or not, is not entitled to the information held by the Crown for purposes of the bail application.

11.3.4.11 Bail pending sentence

An applicant for bail pending sentence under Canadian law would have to justify his post-conviction release. Under South African law the court must apply sections 60(11)(a) or (b) of the Criminal Procedure Act, as the case may be, pending sentence, where a person has been convicted of a schedule 6 or 5 offence. It seems that the court has the discretion to grant bail when a person has been convicted of some other offence. A perpetrator of one of the more serious offences mentioned in section 60(11)(a) would therefore in addition under South African law have to prove "exceptional circumstances" in order to secure release when compared to the position in Canada. For the offences mentioned in section 60(11)(b) the applicant for bail carries the burden of proof

---

31 It remains to be seen whether the courts will order the veil to be lifted in case of section 60(11)(b) of the CPA where exceptional circumstances does not have to be proved.

as under Canadian law. With regard to the other offences the applicant under South African law seems to be advantaged in that the court has the discretion to grant bail.

11.3.4.12 Bail pending appeal

Another example where an applicant for bail is advantaged under South African law is where bail is sought pending appeal. After conviction and sentence the applicant under Canadian law who appeals the conviction is burdened to satisfy the court on certain issues before bail may be granted. When only the sentence is appealed, bail may only be granted where leave to appeal has been given. Under South African law the sentencing court, and the court of appeal or review, is afforded the discretion to grant bail.

11.3.4.13 Review

The Criminal Code of Canada provides that the accused or the prosecutor may have any order made by a justice reviewed by a judge on two clear days notice at any time before the trial. While the hearing may be adjourned, the adjournment may not be for more than three clear days if the accused is in custody.[32] At such a hearing the judge will consider the record of proceedings before the justice and any additional evidence which may be presented by the accused or the Crown. The reviewing judge will not set aside the initial order simply on the basis that he would not have come to the same conclusion as the justice. Under South African law an aggrieved accused may appeal to a superior court against the refusal of bail by a lower court, or the imposition of any condition of bail, and also the amount of bail. Conversely the attorney-general may appeal to a superior court having jurisdiction against the decision

---

32 Unless the accused consents.

of a lower court to release the accused on bail, or against the imposition of a condition of bail. An appeal with regard to bail is analogous to an ordinary appeal despite the principle that a bail application should be heard as soon as possible. There is no provision that additional information be furnished to the high court hearing the appeal. The judge can therefore only intervene if he is satisfied that the magistrate was wrong. An appeal to the Supreme Court of Appeal is limited to a superior court's decision to release an accused on bail.

The Criminal Code of Canada furthermore provides for "automatic review" in those instances where the trial is delayed and accused is held on a detention order. The person who has custody of a accused charged with an offence, other than an offence listed in section 469,[33] for a period of ninety days, and which trial has not commenced, must fix a date for a hearing before a judge to determine whether release should be effected. At the hearing the judge will consider whether the accused or the prosecutor has been responsible for any unreasonable delay. In the case of summary conviction offences the period is thirty days. There is no such review under South African law.

On a theoretical analysis the liberty right in the context of the right to bail, to a considerable extent therefore favours the applicant under Canadian law, when compared to the South African situation.

---

[33] And where the accused is not in custody on any other matter.

## 11.4 HAS AN EQUITABLE BALANCE BEEN ACHIEVED BETWEEN THE INTERESTS OF SOCIETY AND THE INDIVIDUAL'S RIGHT TO LIBERTY UNDER SOUTH AFRICAN LAW?

The correct balance between the individual's right to liberty, and the interests of society will, at any given time, be determined by the prevailing circumstances. The limitation clause reminds us that the right to bail is not absolute and must be weighed against the legitimate needs of society.[34] Although the right to bail must be interpreted purposively, it cannot be done in a vacuum. To determine this balance, all relevant factors must be taken into account.[35] What is reasonable and justifiable in a specific open and democratic society based on human dignity, equality and freedom[36] today, may not be reasonable and justifiable in that society tomorrow, because circumstances have changed. In this sense the correct balance is a moving target. If there is a balance, bail will not be granted too easily nor will bail be too difficult to obtain.

The present circumstances in South Africa are not conducive to the "strong" right and principles of bail which many advocates of fundamental rights favour. The higher level of protection afforded to the right to bail under the Interim Constitution has fallen away under the Final Constitution. The infringement of the right to bail therefore does not need to be "necessary" any more.[37] It is furthermore fair to say that the right to bail was watered down in the Final Constitution and Parliament enacted certain sections of the Criminal Procedure

---

34 See section 36 FC.

35 *Ibid.*

36 *Ibid.*

37 See chapter 8 footnote 162.

Act, with the clear purpose of deterring and controlling especially serious crime. All of this in effect limited, to an appreciable extent, the right of an arrested person applying for bail. But how does this balance that has been achieved compare with the balance under Canadian law?

Under Canadian law the expansive and effective system of police and prosecutors gives the prosecution a powerful advantage over an accused. Inherent in this advantage is the advanced fact-finding capability of the prosecution and the ability to competently present the facts that would determine the granting of bail. The Canadian courts have furthermore indicated that it was not easy to abscond from justice in Canada.

It must immediately be said that South Africa is not blessed with the same situation. On the contrary, it is fair to say that the South African criminal justice system is not up to the task of effective law enforcement. Add to this the marked difference and impact of criminal activity between the two countries and it seems that provisions more intrusive on the right to liberty or freedom would be sustainable under South African law.

Is the answer then not to deny bail in certain circumstances? Advocates of this view will be quick to point out that the Constitutional Court in the first certification judgment indicated that the right to bail was not a universally accepted human right.[38] It can furthermore be said that a person's constitutional right to release in terms of section 35(1)(f) is dependent on a finding that the interests of justice permit, and consequently favours liberty less than section 60(1)(a) of the Criminal Procedure Act. An applicant for bail

---

38 *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.

did in addition not have a right to bail in any circumstance with the advent of the constitutional dispensation. In history there are many examples where bail could only be granted in respect of certain and usually less serious offences. Roman-Dutch and early South African law are cases in point. Early English law refused bail in the event of homicide and the list of non-bailable offences was expanded from time to time.[39]

However, the not too distant South African history has caused concern in that the attorney-general was empowered to prohibit the release of an accused on certain serious or "political offences", effectively removing that decision from the discretion of the court. The individual was thus effectively at the mercy of the state which led to government heavy-handedness that in some instances ran along political or racial lines.

Under Canadian law, legislation like the Public Order (Temporary Measures) Act of 1970[40] that was enacted in response to the October crisis, and empowered the Attorney-General to detain accused for prolonged periods, caused similar concern. These provisions became contentious and contributed towards the desire for a Bill of Rights with universal values that stood above the government of the day. These aspirations were to ensure that all citizens could lead their lives in safety and with security.

As history has taught us the value of the right to bail, the contention that bail should be denied in certain circumstances can therefore not be supported. Tomorrow, the refusal of bail may again be used on political lines. Due to these events the protection of the right to bail became an important part of the

---

39 See for example the Statute of Westminister I.

40 SC 1970 - 71 - 72, c 2.

interim constitutional scheme in South Africa. However, memories are fading. We must not relax the boundaries that keep out tyranny and oppression. He who does not resist in such cases betrays his own rights. We set a pattern of conduct that is dangerously expansive and is adaptable to the needs of any majority bent on suppressing opposition or dissension. In remembering that the primary purpose of bail has since its early roots been to assure attendance at trial, we must not allow panic to justify the loss of a valuable right.

It does seem that the policy makers have pushed the limits in tightening up the conditions under which bail will be granted under South African law, to such an extent that one would be hard-pressed to say that bail is granted too easily. I am of the opinion that the constitutional provision regarding bail has already been weakened to such an extent that it does not do justice to the doctrine and principles that a right to liberty and freedom mandates. Some may furthermore even say that the legislature has stopped short of denying the right to bail in certain circumstances. In addition the government in its quest to combat crime, has gone so far as to give an applicant a "choice" between receiving bail or forfeiting the right not to assist the state in its case. It does therefore seem that the policy makers have also neglected due process to some extent, and opted for a crime control approach.

Another worrying factor is the tendency by the legislature to bestow certain functions on the prosecution that should rest with the courts. It is especially questionable as the courts are the protectors of basic rights in a fundamental rights dispensation. The legislature should therefore have bestowed upon the courts the power to adjudicate bail outside hours for certain offences. They should also have been empowered to decide whether the contents of the docket is to be supplied to the accused for purposes of the bail application.

While being aware of the underlying problems and emotions created by the unprecedented wave of crime in the country, some provisions seem to indicate that the authorities have fallen back on the old way of thinking. Instead of creating new mechanisms to ensure human rights, they act in conflict with the requirements of our new culture. In doing so the government threatens rather than serves the values of an open and democratic society based on freedom and equality. It is especially disturbing to see remarks such as those by the Minister of Safety and Security Mr Steve Tshwete to the National Council of Provinces on 14 October 1999.[41] He was reported to have said that "[c]riminals should not believe that they could violate human rights guaranteed in the Constitution and yet at the same time hide behind those rights when caught". He also indicated that many people were beginning to seriously question the wisdom of legislatures who were "pretty shy to revisit those areas in our laws" that made it difficult to handle armed banditry and other violent crime. He indicated that he would change the Constitution to amend the laws behind which criminals hide.[42] These remarks only confirm my concerns. Does the Minister now say that criminals should not have protected rights? Not long ago many people were refused criminal procedure rights not only because they were in many instances deemed terrorists, but also criminals. The requirement of due process is not a fair-weather assurance only

---

41 See the *Pretoria News* of 15 October 1999 at 5 under the heading "Thugs can't use 'rights" and *Beeld* of 16 October 1999 at 5 under the heading "Regering gekritiseer oor menseregtekultuur in SA".

42 These remarks attracted sharp criticism from the chairman of the Human Rights Commission, Dr Barney Pityana, at a press conference held in Johannesburg on the next day (15 October). Dr Pityana criticised the role that the government has played in the deterioration of the human rights culture in South Africa. Dr Pityana voiced his concern about the impression that human rights were the biggest stumbling block in the fight against crime, adding that it was possible to fight crime within the existing framework. Any attempt to amend the Constitution would therefore be resisted by the Human Rights Commission. See *Beeld ibid.*

to be respected in times free from trouble. Has the new government now given up on trying to be different, or is the government acting in the same way as the previous one while trying to be different? If the government is the big teacher, it imparts an ominous lesson.

The Minister does not seem to share the hallowed appreciation for "due process" with many "proven" democracies. In these democracies the seeds of what has come to be known as "due process", were sown as far back as 1215, when an English nobleman exacted from King John the pledge that he would not deprive his subjects of life, liberty or property, except in accordance with "the law of the land".[43] Under American law Supreme Court justices with the most disparate views have nevertheless agreed on the vital role of due process in the preservation of democratic society. Warren CJ in *Coppedge v United States*[44] held that the methods employed in the enforcement of the criminal law have aptly been called the measures by which the quality of the civilisation may be judged. Frankfurter J, the classic judicial conservative, repeatedly noted that the history of American freedom was in no small measure the history of procedure.[45] He also noted that the history of liberty has largely been the history of observance of procedural safeguards.[46] Douglas J, the epitome of the judicial activist, indicated that it was not without significance that most of the provisions in the Bill of Rights are procedural. He added that it was procedure that spelt out the difference between rule by law and rule by whim or caprice.[47]

---

43 In the Magna Carta.

44 369 US 438 449 (1962).

45 *Malinski v New York* 324 US 401 414 (1945).

46 *McNabb v United States* 318 US 332 347 (1943).

47 *Joint Anti-Fascist Refugee Committee v McGrath* 341 US 123 179 (1951).

The American Supreme Court has also commented on the notion that due process must give way to the claimed need for governmental efficiency. The court indicated that prompt efficacious procedures, whether benevolently or malevolently inspired to achieve legitimate state ends, was a proper state interest worthy of cognisance in constitutional adjudication. However, the court indicated that the Constitution recognised higher values than speed and efficiency. The court added that the Bill of Rights and the due process clause "were designed to protect the fragile freedoms of a vulnerable citizenry from the overbearing concern for efficiency that may characterise praiseworthy governmental officials no less, and perhaps more, than mediocre ones".[48]

By reverting to outdated notions the South African authorities are treating the symptoms and not the cause of the malaise. This is not helpful. However, few people are aroused by injustice when they are certain of not being its victim. But when authority in any form bullies a person unfairly, all other people are guilty. It is their tacit assent that allows authority to commit such abuse.

I am therefore of the opinion that the policy makers have overstepped the mark in combating crime. This has caused the balance to shift in favour of the prosecution. It also seems to be true when compared to the situation in Canada.

While there is therefore without a doubt scope for legislation more intrusive of the individual's right to liberty concerning bail under South African law, the long-term answer, at least, does not lie in continuously tightening the conditions under which bail will be granted. It is crucial that the unhappy state

---

48 *Stanley v Illinois* 405 US 645 656 (1972).

of affairs be corrected without encroaching upon, let alone sacrificing, the very heart of the Constitution, namely the Bill of Rights. Our rights and freedoms are the product of years of struggle by individuals and groups. There is a need to set a threshold for the protection of the liberty and freedom rights of the individual, over which the state may not intrude.

However, an effective criminal justice system would go a long way in eradicating the necessity to weaken the individual's right to liberty in order to obtain a balance. It is not necessary to jeopardise this human right, at least in the long term, in order to try and stop the infringement of other human rights. An equitable modern-day dispensation based on fundamental human rights will only be able to function effectively, if in the first place the prosecution and the police service are at an acceptable standard. A police force where 30 000 of the approximately 130 000 police officers are functionally illiterate will certainly not cope.[49] Truths will have to be confronted and political agendas set aside. Without this step, I am afraid that the aspirations for suitable protection will be defeated. The key therefore lies with the better training and guidance of police officers and prosecutors and realistic employment policies.

However, the Bill of Rights and an effective police force and prosecution alone are no magical safeguard against the inherent massive exercise of power by a government dealing with criminal justice issues. The strength of the Bill of Rights also depends on the ideology, commitment and competence of those who interpret it. In interpreting the Bill, the courts determine the reach and scope of these rights. It is highly unlikely that the legislature will interfere where the courts have set the standard too low. The assessment of popular

---

[49] These statistics were reported in the *Pretoria News* of 12 October 1999 at page 7 under the heading "Chance for illiterate cops to make the grade" and the *Business Day* of 16 November 1999 at page 3 under the heading "Gauteng capital of commercial crime".

opinion, which is essentially a legislative function,[50] does not allow for this in South Africa. The courts must therefore stand firm otherwise law and order will in any event give way to repression.

## 11.5 RECOMMENDATIONS FOR AN EFFECTIVE AND EQUITABLE SYSTEM OF BAIL IN SOUTH AFRICA

### 11.5.1 General

My recommendations include the bringing about of an effective prosecution, conceptual clarification by the Constitutional Court, and an amendment of the constitutional guarantee to bail in the Bill of Rights. As part of a libertarian legislative dispensation certain amendments to existing provisions of the Criminal Procedure Act are proposed in combination with some new measures. These new measures should form part of the principles that govern release on bail in the Criminal Procedure Act.

My first recommendation relates to the ineffective South African criminal justice system. The first and probably the most crucial step in any reform programme is to bring the prosecution and the police service in South Africa up to a first-world standard. It will not only improve the efficiency of the existing dispensation but also forge a playing-field susceptible to principles affording better and proper protection. In this the government will have to play the leading role. As in Canada, proper protection can then be afforded to individuals confronted by the criminal justice system while the system still remains effective.

---

50 As opposed to a judicial function. See *Makwanyane* 1995 (3) SA 391 (CC) par 188; *Furman v Georgia* 408 US 238, 92 SCt 2726 (1972) 443; *West Virginia State Bd of Edu v Barnette* 319 US 624, 63 SCt 1178 (1943) 638.

In addition, the following recommendations are made in light of the prevailing circumstances:

### 11.5.2 The right to freedom and security

The foundational confusion in the interpretation and application of the right to freedom and security in section 12 must be corrected. More specifically, the operation of section 12 of the FC as a general and residual due process right must be substantiated. Section 7 of the Canadian Charter is an excellent example of the role that this right, which has become increasingly universal, fulfils in a criminal justice system based on a bill of rights.[51] This application will lend consistency to the analytical process. It informs the interpretation of the relevant principles.[52] Without this application, we will forever be plagued by dissimilarity in the approach by the criminal justice system towards those who come into contact with the system with resultant confusion. In the context of bail it will ensure that the government has to abide by the rules of fair play when adjudicating bail issues.

The Constitutional Court has made an about-turn in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[53] with regard to the application of section 12 and the section 35 rights. The court also indicated that there has to be due process at a bail application. However, when specifically dealing with section 11 of the

---

51 See chapter 6. The similarity in the constitutional structure in which this right and the criminal procedure rights in both systems function has been shown in par 11.2.

52 See chapter 6.

53 1999 (7) BCLR 771 (CC).

Interim Constitution and later section 12 of the Final Constitution, it erected a conceptual wall. This must be clarified by the Constitutional Court.

Because I am of the opinion that an understanding of the interaction between sections 12 and 35 goes hand in hand with an understanding of the presumption of innocence as an animating principle throughout the whole criminal process, this presumption would most probably also have to be dealt with. Again Canadian jurisprudence can lead the way. The Canadian courts have shown that the presumption of innocence is discounted in every provision impacting on the criminal justice process. This presumption is therefore the starting point for any interference with the freedom and security of an individual. Section 12, together with the criminal procedure rights, therefore safeguards the individual against abuse by the state when confronted by the criminal justice system.[54]

### 11.5.3 The constitutional right to bail

The constitutional right to bail must be corrected to provide at least a basic entitlement to bail.[55] I am of the opinion that the right to bail as provided for in section 35(1)(f) of the Final Constitution does not do justice to the freedom and security of the individual in a fundamental rights dispensation and the presumption of innocence. The Constitutional Court in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[56] indicated that unless the equilibrium is displaced, an arrested person is not entitled to be released in terms of section 35(1)(f). It

---

54 See chapter 5.

55 In par 8.3.4.2 I indicated that although section 35(1)(f) arguably does not provide an entitlement to bail, it was probably not the intention of the legislature to take away the basic entitlement under the Interim Constitution.

56 *Ibid*.

therefore seems that section 35(1)(f) is an inversion of the normal operative presumption in favour of liberty.[57] The existence of the right to bail must not be subject to the interests of justice, but must exist irrespective thereof and must only be taken away when the interests of justice dictate otherwise. Section 11(e) of the Canadian Charter sets such an example where there is a basic entitlement to bail. Bail can only be denied if there is just cause to do so.[58]

It is therefore recommended that section 35(1)(f) should provide that *everyone has the right to be released from detention subject to reasonable conditions, unless the interests of justice permit otherwise.*

If of course the prosecution (including the police service) is brought up to standard, it would not necessitate that the presiding officer carry such a heavy burden. Instead of section 35(1)(f) *permitting* otherwise, the interests of justice could then *require* otherwise, in effect placing the burden on the state in an essentially accusatorial system.[59] As under Canadian law the presiding officer can then instead of being obliged to act inquisitorially, be afforded the power

---

57 See chapter 8 footnote 135 - 136 for American, international and local authority that stresses this presumption and the necessity that the state must be required to prove the grounds for a denial of bail.

58 See par 7.2.4.

59 Under the Interim Constitution an applicant for bail 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 Criminal Procedure Second Amendment Act 85 of 1997 changed the operative part of section 60(11) of the CPA 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 or her release" (11(a)) and "adduces evidence which satisfies the court that the interests of justice *permit* his or her release" (11(b)). The italics are mine. See par 8.3.4 and further where these changes are discounted in the discussion.

to act inquisitorially.[60] Because the prosecution is now forced to convince the court that the applicant for bail must be detained pending trial, the prosecution will be encouraged to do a proper investigation. All the while the presiding officer has the authority to make such enquiries as he considers desirable. The state as the investigator of the crime will also be in a better position to answer these queries.

### 11.5.4 Terms of release

In accordance with the guarantee to freedom and security of the person in terms of section 12 of the FC, legislation must be enacted that would ensure that an arrested person is released on the least restrictive terms possible. Under Canadian law the "just cause" aspect of section 11(e) of the Charter and section 515 of the Criminal Code of Canada ensure that people charged with offences are released in the least restrictive manner possible.[61]

This is a logical aspect of the right to freedom and security of an applicant for bail. It could never be a reasonable and justifiable limitation of the freedom and security of an applicant for bail if such applicant is released on strict conditions, and lesser conditions of release comply with the interests of justice. Even if it is argued that presiding officers in deciding on interim judicial release in practice probably set the least onerous conditions anyhow, it must be made subject to judicial control.

The starting point must therefore be that an arrested person is entitled to be released on the least restrictive terms, and it is for the presiding officer in

---

60 See par 11.3.4.6.

61 See par 7.2.5 - 7.2.6.

South Africa to find why more restrictive terms have to be imposed. The starting point should therefore be that an applicant should be released on warning without conditions. If that is not feasible the presiding officer must find why the detainee should not be released on warning with conditions. If that is not feasible, bail without conditions must be considered and so forth. This process must of course also be subject to appeal at the instance of the accused or the prosecution. Similarly, if the prosecution is brought up to standard, the burden on the presiding officer could be lessened in that the prosecution could be made to carry the burden of proof in an essentially accusatorial system.

### 11.5.5 "Exceptional circumstances"

The legislature should do away with the burden on schedule 6 offenders in terms of section 60(11)(a) of the Criminal Procedure Act to prove "exceptional circumstances" in order to obtain bail. The same reverse onus that applies to schedule 5 offenders should also be made applicable to schedule 6 offenders.

Even taking into account that presiding officers in South Africa are obliged to act inquisitorially, and therefore should assist the many uneducated and indigent applicants for bail, it seems obvious that the reverse onus, and especially where "exceptional circumstances" have to be proven, is detrimental to the uneducated and indigent when compared to the informed and affluent. Statistics compiled in Canada have shown that there is a significant lesser percentage of underprivileged, when compared to the privileged, who secure bail when they are burdened with the onus than in the scenario where the state carries the burden.[62] In addition, the principle of exceptional

---

62 See the *Report on the Systemic Racism in the Ontario Criminal Justice System* (1996) referred to in chapter 8 footnote 41.

circumstances has been rejected under Canadian law as far back as 1969, as not providing enough guidance for even the presiding officer before whom the application is made.[63] In *R v Farrinacl*[64] the Ontario Court of Appeal found that the practice of only granting bail in exceptional circumstances before the reform in 1970 may have led to bail being unjustly denied.[65]

What chance does the uninformed have to comprehend his task when he has to prove "exceptionable circumstances", a principle that has also provided noted legal scholars under South African law with serious problems?[66] Is the idea not to try and provide all people with equal protection before the law, and in doing so, foster democracy? Was this not one of the disadvantages to the destitute applying for bail under the previous era? Again it is not the generals, politicians or judges that suffer, but the destitute.[67] It is submitted that the legal aid imported by the Bill of Rights simply does not get to benefit many applicants for bail. In the light of the serious problems and limitations that beset the provision of aid by the state, and the speculations of imminent collapse of the Legal Aid Board, it is not a safe premise on which to construct an efficient and equitable system.

---

63 The Canadian Committee on Corrections also found the principle that bail will be granted only in exceptional circumstances, even pending appeal, too restrictive of the liberty right of an applicant for bail in Canada. See par 5.2.2.3.

64 (1993) 18 CRR (2d) 303.

65 See par 5.2.2.3.

66 See par 7.3.5.

67 At least this disadvantage to the destitute has been done away with in respect of lesser crimes where the burden of proof now rests on the prosecution.

### 11.5.6 Self-incrimination

An applicant for bail should not be forced to forfeit his right against self-incrimination in order to exercise his right to obtain bail. The right against self-incrimination is the result of centuries of accumulated wisdom and has been designed to ensure a fair trial. The criminal process is not a relentless pursuit to obtain a conviction. There are certain boundaries which the prosecution may not cross in order to secure a conviction. This is a good example of where the inflamed and uneducated public should not dictate the principles of the system in South Africa. I therefore recommend that protection similar to section 13 of the Canadian Charter be afforded under South African law. In this way the prior testimony may still be used to test the credibility of the accused at trial, but not to incriminate him. In the absence of protection similar to that of section 13 of the Canadian Charter, section 60(11B)(c) of the Criminal Procedure Act must be amended to achieve this in the context of bail. To put this issue beyond dispute, section 60(11B)(c) should provide as follows:

*The testimony of an accused during bail proceedings, excluding the information in paragraph (a), may be used and becomes admissible to test his credibility in any subsequent proceeding against him, but the testimony so given may not be used to incriminate that accused in any subsequent proceeding.*

### 11.5.7 Disclosure

The contents of the police docket, or information in possession of the state, should be available to the accused as soon as the investigation has been sufficiently completed to put down the case for trial.[68] The fruits of the

---

68 See chapter 10 in general as to the position in Canada and South Africa and my appraisal of the duty to disclose for purposes of the bail hearing in par 10.3.4.

investigation in possession of the prosecution are after all the property of the public, to be used in order to ensure that justice is done.[69] Under the present South African law the information in the possession of the state will only be available to an applicant for bail under section 60(11)(a) who has to prove exceptional circumstances, and an applicant under section 60(11)(b), if the information is required to afford the applicant a reasonable opportunity to obtain bail.[70] Even though the majority of accused persons would have applied for bail by this stage, it is necessary to ensure that an applicant is informed of all the facts as soon as possible, so that if necessary, the acquired facts can be presented on higher review also in respect of bail. A new application for bail may even be brought on the new facts, which may have come to light. This would ensure that an accused is entitled to the information immediately after the investigation is sufficiently completed, even though the case may only be heard months later.

### 11.5.8 "Automatic review"

A refusal to release from detention, and the conditions of release by a lower court where the accused has not complied with the conditions, must be subject in the ordinary course to automatic review by a judge in open court.[71] This recommendation is driven by many factors. Some of these factors are:

---

69 See par 10.2.2.2 for Canadian authority and chapter 10 footnote 19, for South African authority.

70 The sections referred to are of the Criminal Procedure Act. See the discussion of the validity of section 60(14) of the same Act in par 10.3.3 and my conclusions in par 10.4.

71 "Automatic review" is not foreign to our criminal justice system. Such a system ensures the validity and fairness of convictions and sentences in certain categories of lower-court proceedings. Under the existing system the judge receives the trial record, together with any written remarks which the trial

- The high percentage of unrepresented applicants for bail who are also mostly unsophisticated. These people are mostly unable to press their rights because of ignorance or a lack of means.
- The little confidence that the criminal justice system as a whole generates.
- The long time it takes to start and finalise matters.
- The appalling and dangerous conditions under which people accused of crimes are incarcerated.

Under present South African law the appropriate legal redress is by way of an appeal.[72] Despite the principle that a bail application should be heard as soon as possible, the appeal is analogous to an ordinary appeal. The matter is determined on the material on record and there is no provision that additional information may be furnished to the court hearing the appeal. The court can therefore only intervene if it is satisfied that the magistrate was wrong. A high percentage of accused simply do not benefit from this system due to ignorance or the lack of means. Even if this redress is utilised, and as it usually happens, a date for the appeal can be secured much sooner than with an ordinary appeal, it still takes a week or two to get before court.

---

magistrate, or written statement which the convicted person, may wish to furnish. On the basis of these documents the reviewing judge decides whether the proceedings were in accordance with justice. If the judge concludes that the legal rules were complied with and an appropriate sentence was imposed, he certifies that the proceedings were in order. If the reviewing judge is uncertain whether the legal rules were complied with he may seek information from the magistrate that presided or the attorney-general. If the reviewing judge is still uncertain, he places the case before a court which considers the case as an appeal. See sections 302, 303 and 304 of the Criminal Procedure Act.

72 See par 2.6.3.3.e.

The purpose of this recommendation is to protect people from being warehoused in prisons while the prosecution or the system causes unreasonable delay in the prosecution of the person's trial. It is not proposed that such an extensive system of reviews as that which exists prior to trial under Canadian law, be implemented. In certain instances of arrest by a peace officer[73] under Canadian law there is in effect a review by the officer in charge.[74] The accused may have any order made by the justice reviewed by a judge on two clear days notice at any time before trial.[75] Where the commencement of the trial has been delayed, there is an "automatic review" every 90 days for certain indictable offences, and 30 days in the case of summary conviction offences where the accused is held on a detention order.[76]

A system of automatic review based on the Canadian model is proposed which makes the continued detention of an accused before conviction subject to review. The differences in the system that I propose have been influenced by the circumstances in South Africa including an understanding that an already struggling criminal justice system should be burdened as little as possible. It is important that the system puts an affirmative duty on the warden or keeper of the remand prison or cell to initiate the proceedings. The system should ensure that the person having custody of an accused pending his trial after 90 days' detention shall without delay, where bail has been denied by the district court, apply to a judge to fix a date for a hearing to determine whether he should be released from custody. Where bail has been denied in the case of the more serious offences in schedule 6 that have been allocated to the regional court,

---

73 Or where the accused has been delivered to the peace officer.

74 See par 4.3.3 - 4.3.4.

75 See par 4.3.6.

76 *Ibid.*

such application must be made after 180 days incarceration. Upon receipt of the application the judge must fix a date for the hearing. He must also direct that notice be given to the prosecutor and the accused.

At the hearing the judge must consider the record of the proceedings and any additional evidence which may be presented by the accused or the Crown. If the judge is satisfied that the interests of justice permit the accused's release, he must be released on the least restrictive terms possible. On hearing the application the judge may take into consideration whether the prosecution or the defence has been responsible for any unreasonable delay in concluding the trial. However, this provision should not apply where the accused has unsuccessfully taken his detention on appeal or review.

### 11.5.9 Bail after hours

A right to bail be must be conferred at all hours for individuals accused of "lesser offences". These offences should not include schedule 5 and 6 offences. This recommendation takes note of the appalling and frequently dangerous conditions under which individuals accused of "lesser crimes" are locked up and the resultant horror stories that flow from this.[77] Under the

---

[77] Reports of female and "male rape" of incarcerated individuals have not been uncommon in recent years. In the instance of "male rape", many who are apparently strangers, set upon individuals in what seems a race-related attacks. A chilling encounter of such an occurrence was given by one young man on the actuality program "Carte Blanche" on Channel M-net during 1999. He was arrested in KwaZulu-Natal on a traffic offence and while being held overnight he was "gang raped" and subsequently contracted AIDS. In addition Channel e-TV on 26 October 1999 by way of its main news bulletin reported that 753 people have died during 1999 while in police custody. A surprise inspection of police cells in Gauteng, the Western-Cape and Kwazulu-Natal by the Human Rights Commission during 1999 has revealed that many persons while being detained feared for their safety, were assaulted, were not informed of their rights, had difficulty in communicating with their family and legal representatives and found themselves in dirty and overcrowded cells. See the

previous government an arrested individual was not only incarcerated in relative safety but could appear before a court at his request at any time and pursue his release.[78]

If release is not secured in terms of sections 59 or 59A of the Criminal Procedure Act, the arrested person must on his request be brought before a magistrate where his release or further incarceration will be adjudicated. The argument that one will in any event be heard in the case of real urgency does not hold water. Experience has shown that if the system is not structured and prepared to hear these cases after hours, the necessary personnel will, in the first instance, not be available. The prosecution will furthermore most definitely not see the incarceration with dangerous criminals as a situation of real urgency, and bring the arrested person before a magistrate. Experience has also shown that horrendous crimes have even been committed against other detainees by the so-called lesser criminals whose true colours were not apparent at that stage. These are the facts that we have to deal with.

Due mostly to lack of facilities and the high incidence of crime, it will have to be accepted that joint incarceration is a fact for at least the foreseeable future. Neither is there any indication that the strained fabric of the South African society is going to improve.[79] The freedom and security of the individual should ultimately in this regard, as anywhere else, be guarded by the judiciary.

---

report in *Beeld* of 16 October 1999 at page 5 under the heading "Regering gekritiseer oor menseregtekultuur in SA".

78 See chapter 2 footnote 336.

79 The following sickening national statistic gives food for reflection. Channel e-TV on 25 October 1999 by way of its main news bulletin at 7 pm reported that one in five men are "raped" in South Africa at some time.

### 11.5.10 Remand in custody

Section 50(6)(d) of the Criminal Procedure Act must be amended to provide that "lesser offenders" may not be remanded in custody for more than three days, instead of 7 days, at a time.[80] Under Canadian law no accused may be remanded in custody for more than 3 clear days at a time without the permission of the accused.[81] In the previous era under South African law before the onset of rampant serious crime there was no such provision enabling the state to remand the accused in custody while gathering information.[82]

The purpose of the legislature to combat serious crime does not obviate this serious limitation of the liberty right of "lesser offenders". While the purpose of the limitation is ostensibly to ensure that serious offenders are not granted bail erroneously, this stringent provision also strikes at "lesser offenders" who have nothing to do with this purpose. The limitation is therefore "over broad" or "over inclusive".[83]

### 11.5.11 Sections 60(4), 60(9) and 60(10) of the Criminal Procedure Act

Sections 60(4), 60(9) and 60(10) of the Criminal Procedure Act must be amended to clearly reflect the meaning afforded to these provisions by the Constitutional Court. One hopes that the legislature would have taken note of

---

80 See par 2.6.3.2.

81 See par 4.3.5.2.

82 See par 11.3.4.3.

83 See *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer Port Elizabeth Prison* 1995 (4) SA 631 (CC), 1995 (10) BCLR 1382 (CC) par 12 & 13.

the problems in interpretation, and deliberations that have been caused by vague legislation. It is also fair to say that the Constitutional Court had been at great pains to merge the provisions of the Criminal Procedure Act with the constitutional requirements. It is therefore recommended that:

- The reference to the "the interests of justice" in sections 60(4), 60(9) and 60(10) be substituted with "the interests of society".[84] In deciding whether the interests of justice permit, the considerations in the interests of society in section 60(4)(a) - (e) will then clearly have to be weighed up against the liberty interests of the applicant for bail as directed by subsections (9) and (10).[85]
- Section 60(4) must be amended to show that other factors may also be taken into account to determine the interests of society.[86] In this way section 60(4) will not be a deeming provision that prescribes to the court what is, or what is not in the interests of society. It is therefore suggested that the following paragraph be added to subsection (4) as subsection (f): "on any other just ground being shown."

---

84 See my discussion in par 7.3.5.

85 My recommendation is based on the conventional way of referring to this equation. However, it has been suggested that it may be an oversimplification to draw a distinction between the interests of the accused on the one hand and the interests of society on the other (see chapter 1 footnote 29). If the suggestion that two competing community interests are at stake is accepted, it may be technically more sound to substitute the reference to "the interests of justice" in these provisions with something like "the interests of the state representing society". These interests will then have to be weighed against "the interests of society representing the accused". Accordingly sections 60(9) and 60(10) will have to be amended by expunging "the right of the accused to his or her personal freedom" in section 60(9) and "the personal interests of the accused" in section 60(10) and to instead include references to "the interests of society representing the accused".

86 *Ibid*.

## 11.6 CONCLUDING REMARKS

When society acts to deprive one of its members of his liberty, society takes one of its most intrusive steps. The deprivation of liberty inevitably leads to hardship and may have dire consequences for the individual concerned. A prison in modern-day South Africa is not a safe place. In many instances the loss of freedom leads to the disintegration of relationships, the loss of employment and the loss of housing. This state of affairs is detrimental to society in general and must be avoided where incarceration is not actually necessary. In turn, the fact that incarceration is only ordered when necessary will result in the prisons not being so overpopulated.

South Africans must be wary not to seek solutions to criminal justice issues on false criminological and social premises in the vain hope of accomplishing useful or beneficial results. We will never have a society where liberty and dignity is allowed to flourish if the real causes of the problems are not addressed. It is hoped that these recommendations will contribute to a system in respect of bail where the two salient features of "the worth and dignity of man, [and] a repugnance of authoritarianism"[87] will prevail while the system still remains effective. In this way the equilibrium between the right to liberty of the accused and the interests of society that has been skewed in favour of the prosecution will be restored.

---

87 Alan Paton envisaged these ideals for a future South Africa (as quoted by Mr Bobby Godsell in a memorial address in June 1994).

# ANNEXURES

A: SELECTED PROVISIONS OF THE CANADIAN BILL OF RIGHTS, 1960

B: SELECTED PROVISIONS OF THE CANADIAN CHARTER

C: SELECTED PROVISIONS OF THE SOUTH AFRICAN BILL OF RIGHTS

# ANNEXURE A

(Selected provisions of the Canadian Bill of Rights, 1960)

## PART I

## BILL OF RIGHTS

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

   (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
   (b) the right of the individual to equality before the law and the protection of the law; ...

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

   (a) authorize or effect the arbitrary detention, imprisonment or exile of any person; ...
   (c) deprive a person who has been arrested or detained
      (i) of the right to be informed promptly of the reason for his arrest or detention, ...

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self-incrimination or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause;

...

3. (1) Subject to subsection (2), the Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every regulation transmitted to the Clerk of the Privy Council for registration pursuant to the *Statutory Instruments Act* and every Bill introduced in or presented to the House of Commons by a Minister of the Crown, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity. ...

PART II

5. (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

5. (2) The expression 'Law of Canada' in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.[1] ...

---

[1] SC 1960, c 44. Section 3 has been re-enacted twice, most recently in 1985, c 26 section 105.

## ANNEXURE B

(Selected provisions of the Canadian Charter)

**Life, Liberty and security of person**

7. Everyone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice.

**Search or seizure**

8. Everyone has the right to be secure against unreasonable search or seizure.

**Detention or imprisonment**

9. Everyone has the right not to be arbitrarily detained or imprisoned.

**Arrest or detention**

10. Everyone has the right on arrest or detention

    (a) to be informed promptly of the reasons therefor;

    (b) to retain and instruct counsel without delay and to be informed of that right; and

    (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

**Proceedings in criminal and penal matters**

11. Any person charged with an offence has the right

    (a) to be informed without unreasonable delay of the specific offence;

    (b) to be tried within a reasonable time;

    (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable ball without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

**Treatment or punishment**

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

**Self-incrimination**

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

**Interpreter**

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

# ANNEXURE C

(Selected provisions of the South African Bill of Rights)

**Freedom and security of the person**

12(1) Everyone has the right to freedom and security of the person, which includes the right -

(a) not to be deprived of freedom arbitrarily or without just cause;

(b) not to be detained without trial;

**Arrested, detained and accused persons**

35(1) Everyone who is arrested for allegedly committing an offence has the right-

(a) to remain silent;

(b) to be informed promptly-

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against that person;

(d) to be brought before a court as reasonably possible, but not later than -

(i) 48 hours after the arrest; or

(ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours on a day which is not an ordinary court day;

(e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and

(f) to be released from detention if the interests of justice permit, subject to reasonable conditions.

(2) Everyone who is detained, including every sentenced prisoner, has the right -

(a) to be informed promptly of the reason for being detained;

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and

(f) to communicate with, and be visited by, that person's -

(i) spouse or partner;

(ii) next of kin;

(iii) chosen religious counsellor; and

(iv) chosen medical practitioner.

(3) Every accused person has the right to a fair trial, which includes the right -

(a) to be informed of the charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a defence;

(c) to a public trial before an ordinary court;

(d) to have their trial begin and conclude without unreasonable delay;

(e) to be present when being tried;

(f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;

(i) to adduce and challenge evidence;

(j) not to be compelled to give self incriminating evidence;

(k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;

(l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;

(m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;

(n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(o) of appeal to, or review by, a higher court.

(4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.

# SOURCES

A: TABLE OF CASES

B: TABLE OF SELECTED ENACTMENTS

C: SELECTED OTHER SOURCES

D: BIBLIOGRAPHY

## A: TABLE OF CASES

(The cases appear in alphabetical order)

### Canada

**South Africa**

**Other jurisdictions**

## B: TABLE OF SELECTED ENACTMENTS

(The enactments appear in alphabetical order)

### Canada

Access to Information Act 1980 - 81 - 82 - 83, c 111, Sch I

Alberta Bill of Rights, RSA, 1980, c A - 16

Bail Reform Act 1970 - 71 -72 (Can) c 37 (now Criminal Code RSC 1985, c C - 46 sections 515 - 526)

British North America Act 1867 (renamed the Constitution Act, 1867 in 1982; also referred to as the Constitution Act, 1982)

Canada Evidence Act RSC 1970, c E - 10

Canadian Bill of Rights SC 1960

Charter of Human Rights and Freedoms SQ 1975, c 6

Charter of Rights and Freedoms (Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11)

Criminal Code Amendment Act 1907 (IK) c 8

Criminal Code of Canada RSC 1970

Criminal Code of Canada RSC 1985

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

Federal Court Act, RSC 1985, c F - 7

Identification of Criminals Act 1985 c I - 1

Interpretation Act, RSC 1970, c 1 - 23

Judges Act RSC 1985, c J - 1

Manitoba Human Rights Act SM 1974 (c 65)

Narcotic Control Act RSC, c N- 1 (now RSC 1985, c N - 1)

National Defence Act of Canada RSC 1970, N - 4

Parole Act RSC 1970, c P - 2

Public Order (Temporary Measures) Act SC 1970 - 71 - 72, c 2

Public Schools Act SM 1980 c 33

Royal Canadian Mounted Police Act RSC 1970, c R - 9

Saskatchewan Bill of Rights Code SS 1979, c S - 24.1

Supreme Court Act, RSC 1985, c S - 26

Tax Court of Canada, RSC 1985, c T - 2

**South Africa**

Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971

Aliens Control Act 96 of 1991

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa, 1996 Act 108 of 1996

Criminal and Magistrates' Courts Procedure Amendment Act 39 of 1926

Criminal Procedure Act 56 of 1955

Criminal Procedure Amendment Act 9 of 1968

Criminal Procedure Amendment Act 96 of 1965

Criminal Procedure and Evidence Act 31 of 1917

Criminal Procedure and Evidence Amendment Act 29 of 1955

Criminal Procedure Second Amendment Act 75 of 1995

Criminal Procedure Second Amendment Act 85 of 1997

Defence Act 44 of 1957

General Amendment Act 39 of 1961

General Law Amendment Act 37 of 1963

General Law Amendment Act 62 of 1966

General Law Amendment Act 76 of 1962

General Law Amendment Act 80 of 1964

Internal Security Act 44 of 1950

Internal Security Act 74 of 1982

Internal Security Amendment Act 79 of 1976

Judicial Matters Amendment Act 34 of 1998

Magistrates' Courts Act 32 of 1917

Mental Health Act 18 of 1973

Natal Criminal Procedure Ordinance 18 of 1845

Ordinance 5 of 1864 *Regulerende de Wijze van Regtspleging in Criminele Zaken*

Ordinance 9 of 1866

Ordinance as to Criminal Procedure 12 of 1902

Ordinance as to Law of Evidence 72 of 1830

Ordinance for Regulating the Manner of Proceeding in Criminal Cases in the Cape Colony 40 of 1828

Ordinance of Philip II as to Criminal Procedure of year 1570

Ordinance to Establish a Code of Criminal Procedure 1 of 1903

*Ordonnantie, Wijzigende de Manier van Procederen in Crimineele Zaken in den Oranje-Vrijstaat* 4 *van* 1856

Terrorism Act 83 of 1967

The Criminal Procedure Act 51 of 1977

Unlawful Organizations Act 34 of 1960

**Other jurisdictions**

Australian Freedom of Information Act, 1982

Bail Act of 1976 (English)

(Immunity Statute) 18 US Code 6002

New Zealand Official Information Act, 1982

United States Constitution, Fifth Amendment

United States Constitution, Eighth Amendment

United States Freedom of Information Act (5 USC s 552)

## C: SELECTED OTHER SOURCES

(The sources are in alphabetical order)

### Canada

Law Reform Commission of Canada (1974): Study report on *Discovery in criminal cases*

Report of the Canadian Committee on Corrections (1969) *Towards unity: Criminal justice and corrections*

Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (1982) Toronto: The Carswell Company

**South Africa**

Beeld 16 October 1999

Beeld 20 September 1994

Business Day 16 November 1999

Explanatory Memorandum to the Early Draft Bill of Rights of 9 October 1995

Extraordinary Government Gazette No 960 of 30 November 1964

Government Gazette No 20036 dated 30 April 1999

Heads of argument by counsel for *Dladla & Others* in CCT 22/98

Heads of argument by Director of Public Prosecutions in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (7) BCLR 771 (CC)

House of Assembly debates Volume 87 col 1405 (21 February 1955)

House of Assembly debates Volume 88 col 7563 - 5 (13 June 1955)

House of Assembly debates, columns 3453 - 3457 (11 March 1977)

Pretoria News 12 October 1999

Pretoria News 15 October 1999

South African Law Commission (1994) *Report on bail reform in South Africa* Project 66 Pretoria

The Star 6 September 1994

**Other jurisdictions**

American Convention on Human Rights (1969)

Australian Bail Act (1978)

European Convention on Human Rights (1950)

European Convention on Human Rights (1975)

German Constitution/German Basic Law (1949)

International Covenant on Civil and Political Rights (1966)

United Nations Human Development Report 2000

Universal Declaration of Human Rights (1948)

## D: BIBLIOGRAPHY

(The authors appear in alphabetical order)

Basson D (1994) *South Africa's Interim Constitution: Text and notes* Kenwyn: Juta

Bayefsky AF (1992) *International human rights law: Use in Canadian Charter of Rights and Freedoms litigation* Toronto: Butterworths

Beaudoin GA & Ratushny E (editors), (1989) *The Canadian Charter of Rights and Freedoms* Toronto: Carswell

Bell P (editor), (1997) *The making of the Constitution: The story of South Africa's Constitutional Assembly, May 1994 to December 1996* Churchill Murray Publications

Bekker M, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS, Van der Merwe SE & Van Rooyen JH (1999) *Criminal procedure handbook* fourth edition Kenwyn: Juta

Black-Branch JL (1997) *Rights and realities* Aldershot: Dartmouth Publishing

Black HC (1979) (edited by the publishers editorial staff) contributing authors Nolan JR & Connolly MJ, *Black's law dictionary* fifth edition St Paul Minnesota: West Publishing Company

Black MA (1990) (edited by the publisher's editorial staff) co-authors Nolan JR & Nolan-Haley JM contributing authors Connolly MJ, Hicks SC & Alibrandi MN *Black's law dictionary* sixth edition St Paul Minnesota: West Publishing Company

Borkowski AB (1994) *Textbook on Roman law* London: Blackstone Press Limited

Botha CJ (1991) *Wetsuitleg: 'n Inleiding vir studente* Kenwyn: Juta

Botha G "The early influence of the English law upon the Roman-Dutch law in South Africa" (1923) 40 *SALJ* 396

Brown GP (1967) *The Judicial Committee and the British North America Act: An analysis of the interpretative scheme for the distribution of legislative powers* Toronto: University of Toronto Press

Buckland WW (1963) *A textbook of Roman law from Augustus to Justinian* Cambridge: Cambridge University Press

Burns Y (1999) *Administrative law under the 1996 Constitution* Durban: Butterworths

Cairns AC (1992) *Charter versus federalism: The dilemmas of constitutional reform* Montreal & Kingston: McGill-Queen's University Press

Cameron E "Rights, constitutionalism and the rule of law" (1997) 114 *SALJ* 504

Chamberlin GK "Use of Freedom of Information Act (5 USCS @ 552) as substitute for, or as means of, supplementing discovery procedures available to litigants in federal civil, criminal or administrative proceedings" (1997) 57 ALR Fed 903

Cote JE "Reception of English law" (1977) 15 *Alta L Rev* 29

Cowling MG "Law reform: Bail and the search for a new theoretical approach" (1991) 4 *SACJ* 65

Cowling MG "Bail reform: An assessment of the Criminal Procedure Second Amendment Act 75 of 1995" (1996) 9 *SACJ* 50

Currey I & Woolman S chapter 39 "Freedom and security of the person" in Chaskalson *et al*, (1996) *Constitutional law of South Africa* Kenwyn: Juta (loose-leaf updated to 30 September 1998)

Davis D, Cheadle H & Haysom N (1997) *Fundamental rights in the Constitution: Commentary and cases* Kenwyn: Juta

De Waal J "A comparative analysis of the provisions of German origin in the Interim Constitution" (1995) 11 *SAJHR* 18

De Waal J "Is there a general and residual right to procedural fairness in South Africa?" (1997) 13 *SAJHR* 229

De Waal J chapter 32 "Arrested, detained and accused persons" in De Waal J, Currie I & Erasmus G (1998) *The Bill of Rights handbook 1998* Kenwyn: Juta

De Waal J, Currie I & Erasmus G (1998) *The Bill of Rights handbook 1998* Kenwyn: Juta

De Zulueta F (1967) *The Institutes of Gaius: Part I: Text with critical notes and translations* Oxford: Clarendon Press

Donovan PHK (1981) *The law of bail practice, procedure and principles* Sydney: Legal Books

Dow PE (1981) *Discretionary justice: A critical inquiry* Cambridge, Massachusetts: Ballinger Publishing Company

Du Plessis JH (1990) *Aspekte van borgtog: 'n Regsvergelykende studie* unpublished LLD thesis Faculty of Law University of South Africa

Du Plessis L & Corder H (1994) *Understanding South Africa's transitional Bill of Rights* Kenwyn: Juta

Dugard J (1977) *South African criminal law and procedure* Volume IV Cape Town: Juta

Du Toit *et al* (1987) *Commentary on the Criminal Procedure Act* Kenwyn: Juta (loose-leaf updated to 30 September 1998)

Ebrahim H (1998) *The soul of a nation: Constitution making in South Africa* Cape Town: Oxford University Press

Forsyth CF (1982) *Caney's - The law of suretyship* Cape Town: Juta

Friedland ML & Roach K (1997) *Criminal law and procedure: Cases and materials* Toronto: Emond Montgomery Publications

Funston BW & Meehan E (1994) *Canada's constitutional law in a nutshell* Ontario: Carswell Thomson Professional Publishing

Gall GL (1983) *The Canadian legal system* Toronto: Carswell

Gall GL (1990) *The Canadian legal system* Toronto: Carswell

Gibson D (1980) *Aspects of privacy law: Essays in honour of John M Sharp* Toronto: Butterworths

Gibson D "Constitutional amendment and the Implied Bill of Rights" (1966) 12 *McGill LJ* 497

Gibson D "- And one step backward: The Supreme Court and constitutional law in the sixties" (1975) 53 *Can Bar Rev* 621

Gibson D "Charter or chimera? 'A comment on the proposed Charter of Rights and Freedoms'" (1979) 9 *Man LJ* 363

Gibson D (1986) *The law of the Charter: General principles* Toronto: Carswell

Girard PF *A short history of Roman law* Florida: Gaunt (translated by Lefroy AHF & Cameron JH 1994)

Gloppen S (1997) *South Africa: The battle over the Constitution* Aldershot: Ashgate Publishing

Gora JM (1978) *Due process of law* Skokie Illinois: National Textbook Company

Hale M (1736) *The history of the pleas of the Crown* Vol II London: Professional Books (1971)

Hampton C (1982) *Criminal procedure* London: Sweet & Maxwell

Hiemstra VG (1977) *Introduction to the law of criminal procedure* Durban: Butterworths

Hiemstra VG (1987) *Suid-Afrikaanse strafproses* Durban: Butterworths

Hiemstra VG (1993) *Suid-Afrikaanse strafproses* fifth edition by Kriegler J Durban: Butterworths

Hoffmann LH & Zeffertt DT (1992) *The South African law of evidence* Durban: Butterworths

Hogg PW (1985) *Constitutional law of Canada* Toronto: Carswell

Hogg PW (1992) *Constitutional law of Canada* (student edition) Toronto: Carswell

Holdsworth W (1937) *A history of English law* New York: Wiley

Jörg N, Field S & Brants C chapter 3 "Are inquisitorial and adversarial systems converging?" in Fennel P, Harding C, Jörg N & Swart B (1995) *Criminal justice in Europe: A comparative study* Oxford: Clarendon Press

Joubert JJ (editor), (1998) *Strafprosesreg-handboek* Kenwyn: Juta

Jowitt E & Walsh C second edition by Burke J (1977) *Jowitt's dictionary of English law* London: Sweet & Maxwell

Kerper HB (1979) revised by Israel JH *Introduction to the criminal justice system* St Paul: West Publishing Company

Klaaren J chapter 25 "Administrative justice" in Chaskalson *et al* (1996) *Constitutional law of South Africa* Kenwyn: Juta (loose-leaf updated to 30 September 1998)

Kotzé DJL "S v Jonas 1998 2 SASV (SOK); S v C 1998 2 SASV 721(K); S v Nompumza (ongeraporteer – Saakno CA + R57/98 (Ck) 1998-11-16)" (1999) 1 *De Jure* 188

Kentridge J & Spitz D chapter 11 "Interpretation" in Chaskalson *et al* (1996) *Constitutional law of South Africa* Kenwyn: Juta (loose-leaf updated to 30 September 1998)

Kunkel W (1973) *An introduction to Roman legal and constitutional history* Oxford: Clarendon Press (translated by Kelly JM)

LaFave WR & Israel JH (1992) *Criminal procedure* St Paul Minnesota: West Publishing

Lambard W (1581) *Eirenarcha or the office of Justices of Peace* reprinted 1972 London: Professional Books

Langa M "Under a new sun" in Bell P (editor), (1997) *The making of the Constitution: The story of South Africa's Constitutional Assembly, May 1994 to December 1996* Churchill Murray Publications

Lee RW (1953) *An introduction to Roman-Dutch law* Oxford: Clarendon Press

(reprinted 1961 Oxford: University Press)

Mackenzie (1991) *Studies in roman law* Florida: WMW Gaunt & Sons

MacIntosh DA (1995) *Fundamentals of the criminal justice system* Ontario: Carswell

Macklem P, Swinton KE, Risk RCB, Rogerson CJ, Weinrib LE & Whyte JD (1997) *Canadian constitutional law* Toronto: Emond Montgomery Publications

Maine HS (1861) *Ancient law. Its connection with the early history of society and its relation to modern ideas* London: John Murray

Maine HS (1890) *Early history of institutions* London: John Murray

Malan K (1996) *Fundamental rights: Themes and trends* Durban: Butterworths (loose-leaf updated to January 1998)

Mathews AS (1971) *Law, order and liberty in South Africa* Cape Town: Juta

Matthaeus AJC *De Criminibus* translated by Hewett and Stoop Vol III (1994) as *On crimes: A commentary on books XLVII and XLVIII of the Digest* Cape Town: University of Cape Town Press

May R (1990) *Criminal evidence* London: Sweet & Maxwell

McCall A (1979) *The medieval underworld* London: Hamish Hamilton

McDonald DC (1989) *Legal rights in the Canadian Charter of Rights and Freedoms* Toronto: Carswell

Mcleod RM, Takach JD, Morton HF & Segal MD (1993) *The Canadian Charter of Rights: The prosecution and defence of criminal and other statutory offences* Ontario: Carswell Thomson Professional Publishing (loose-leaf updated to release no 2, June 1999)

Meiklejohn JMD (1897) *A new history of England and Great Britain* London: Holden

Mewett AW & Manning M (1994) *On criminal law* Toronto: Butterworths

Mommsen T & Kreuger P (editors) translated by Watson A 1985 as *The Digest of Justinian* Vol IV xv Philadelphia: University of Pennsylvania Press

Mommsen T (1899) *Römisches Strafrecht* Leipsig: Verlag von Duncker & Humblot

Morton FL "Charting the Charter - year one: A statistical analysis" *2 CHRYB* (1984 - 85) 237 - 261

Morton WL (1969) *The Kingdom of Canada: A general history from earliest times* Toronto: McClelland & Stewart

Nel TJ (1985) *Borgtog in die Suid-Afrikaanse strafprosesreg* unpublished LLM thesis Faculty of Law University of Stellenbosch

Nel TJ (1987) *Borgtoghandleiding* Durban: Butterworths

Neveling J and Bezuidenhout JH chapter 20 "Bail" in Nel F & Bezuidenhout J (1997) *Policing and human rights* Kenwyn: Juta

Nicholas B (1962) *An Introduction to Roman law* Oxford: Clarendon Press

Packer HL (1968) *The limits of the criminal sanction* California: Stanford University Press

Pollock F "English law before the Norman Conquest" (1898) xiv *LQR* 291

Pound R (1957) *The development of constitutional guarantees of liberty* Westport: Greenwood Press

Rautenbach IM (1995) *General provisions of the South African Bill of Rights* Durban: Butterworths

Read JE "The early provincial constitutions" (1948) 26 *Can Bar Rev* 621

Roberts AA (1942) *A South African legal bibliography* Pretoria: Department of Justice

Rodrigues GP (general editor), (1981) *Crankshaw's Criminal Code* volume 4 Toronto: Carswell

Rodrigues GP (general editor), (1982) *Crankshaw's Criminal Code* volume 5 Toronto: Carswell

Romanow R, White J & Leeson H (1984) *Canada-notwithstanding: The making of the Constitution 1976 - 1982* Toronto: Carswell

Salhany RE (1968) *Canadian criminal procedure* Toronto: Canada Law Book Company

Salhany RE (1986) *The origin of rights* Toronto: Carswell

Salmon ET (1968) *A history of the Roman world* London: Methuen & Co Ltd

Samaha JB "The recognizance in Elizabethan law enforcement" (1981) 25 *AJLH* 190

Schmidt CWH (1989) *Bewysreg* Durban: Butterworths

Scholtemeyer JVDV "Vrylating op sogenaamde eie verantwoordelikheid" (1964) 27 *THRHR* 219

Schwikkard PJ "The presumption of innocence: What is it?" (1998) 11 *SACJ* 396

Schwikkard PJ (1998) *The scope, content and normative value of the presumption of innocence in the South African law of criminal procedure and evidence* unpublished LLD thesis Faculty of Law University of Stellenbosch

Scott FR (1977) *Essays on the Constitution. Aspects of Canadian law and politics* Toronto: University of Toronto Press

Scott FR "The Bill of Rights and Quebec law" (1959) 37 *Can Bar Rev* 135

Snyckers F chapter 27 "Criminal procedure" in Chaskalson *et al* (1996) *Constitutional law of South Africa* Kenwyn: Juta (loose-leaf updated to 30 September 1998)

Steytler N (1998) *Constitutional criminal procedure* Durban: Butterworths

Strachan-Davidson JL (1969) *Problems of the Roman criminal law* Vol 1 Oxford: Clarendon Press

Strauss SA "The development of the law of criminal procedure since Union" (1960) *Acta Juridica* 157

Strayer BL (1988) *The Canadian constitution and the courts: The function and scope of judicial review* Toronto: Butterworths

Stuart D (1987) *Canadian criminal law: A treatise* Toronto: Carswell

Stuart D "An entrenched Bill of Rights best protects against law and order expediency" (1998) 11 *SACJ* 325

Swinton K "Constitutional law - freedom of assembly - criminal law power" (1979) 57 *Can Bar Rev* 326

Tarnopolsky WS & Beaudoin GA (editors), (1982*) Canadian Charter of Rights and Freedoms* Toronto: Carswell

Tarnopolsky WS (1975) *The Canadian Bill of Rights* Toronto: Carswell

Tarnopolsky WS "The Supreme Court and the Canadian Bill of Rights" (1975) 53 *Can Bar Rev* 649

Teed EL & Shannon MA "Criminal law - bail - old and new legislation - Bail Reform Act - can a person not in custody be detained on first appearance before a justice?" (1982) 60 *Can Bar Rev* 720

Thomas EM "Vox temporum" (1969) 12 *Can Bar J* 234

Thomas JAC (1976) *Textbook of Roman law* Amsterdam: North-Holland Publishing Company

Tollefson EA "Freedom of the press" in Lang OE (editor), (1968) *Contemporary problems of public law in Canada: Essays in honour of Dean FC Cronkite* Toronto: University of Toronto Press

Trengove W chapter 26 "Evidence" in Chaskalson *et al*, (1996) *Constitutional law of South Africa* Kenwyn: Juta (loose-leaf updated to 30 September 1998)

Tribe LH (1988) *American constitutional law* New York: The Foundation Press

Turner RV (1985) *The English judiciary in the age of Glanvill and Bracton, c 1176 - 1239* Cambridge: Cambridge University Press

Uit Beijerse J (1998) *Op verdenking gevangengezet: Het voorarrest tussen beginselen en praktische behoeften* doctoral thesis Faculty of Law Erasmus University Rotterdam: Ars Aequi Libri

Van der Berg J (1986) *Bail-a practitioner's guide* Cape Town: Juta

Van Der Keessel DG *Praelectiones in Libros XLVII et XLVIII Digestorum exhibentes jurisprudentiam criminalem ad usum fori Batavi applicatum (duce*

Cornelio van Eck) *et in Novum Codicem Criminalem.* Wynberg: Juta (translated by Beinard & Van Warmelo Vol II 1972)

Van der Merwe S chapter 9 "Bail" in Du Toit *et al*, (1987) *Commentary on the Criminal Procedure Act* Kenwyn: Juta (loose-leaf updated to 30 September 1998)

Van der Vyver JD "The private sphere in constitutional litigation" (1994) 57 *THRHR* 378

Van Greunen JW "Own recognisance" (1969) 86 *SALJ* 93

Van Leeuwen S *Roomsch Hollandsch Recht* translated by Kotze (1886) as *Commentaries on Roman-Dutch law* Vol II 41 London: Stevens & Haynes

Van Warmelo P (1970) *Die oorsprong en betekenis van die Romeinse reg* Pretoria: Van Schaik

Van Wyk D, Dugard J, De Villiers B & Davis D (1994) *Rights and constitutionalism: The new South African order* Kenwyn: Juta

Van Zyl DH (1983) *History and principles of Roman private law* Durban: Butterworths

Van Zyl SJ & Van der Vyver JD (1982) *Inleiding tot die regswetenskap* Durban: Butterworths

Verrilli Jr D "The Eight Amendment and the right to bail: Historical perspectives" (1982) 82 *Colum L Rev* 328

Viljoen F chapter 5 "The law of criminal procedure and the Bill of Rights" in *Bill of Rights compendium* (1996) Durban: Butterworths (loose-leaf updated to 31 March 1999)

Voet J *Commentarius ad Pandectas* and *Supplementum* translated by Percival Gane Vol 1 1955, and 7 1957 as *The selective Voet* being the *Commentary on the Pandects* (Paris edition of 1829) and the *Supplement* to that work by Van Der Linden Johannes, (1756 - 1835) Durban: Butterworths

Walker DM (1980) *The Oxford companion to law* Oxford: Clarendon Press

Watson A "Consensual *societas* between Romans and the introduction of formulae" (1963) 9 *RIDA* 431

Whyte JD & Lederman WR (1992) *Canadian constitutional law. Cases, notes and materials* third edition by Bur DF Toronto: Butterworths

Whyte J (November 1993) "A Melbourne diary" *The literary review of Canada* vol 2:10

Wigmore JH (1940) *Evidence* third edition vol 9 Boston: Little, Brown and Company

Wigmore JH (1961) McNaughton revised, *Wigmore, evidence* Boston: Little Brown and Company

Williams G (1961) *Criminal law: The general part* London: Stevens

Wlassak M (1888 - 1891) *Romische Processgesetze: Ein Beitrag zur Geschichte des Formularverfahrens* Leipsig: Duncker & Humblot

Woolman S chapter 12 "Limitation" in Chaskalson *et al*, (1996) *Constitutional law of South Africa* Kenwyn: Juta (loose-leaf updated to 30 September 1998)

Zuckerman AAS (1989) *The principles of criminal evidence* Oxford: Clarendon Press