

CHAPTER 5

THE OPERATION OF THE PRESUMPTION OF INNOCENCE AND ITS ROLE IN BAIL PROCEEDINGS UNDER CANADIAN AND SOUTH AFRICAN LAW

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5.1 INTRODUCTION

The presumption of innocence has long been a feature of Canadian¹ 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 Charter⁵ 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 Taylor* (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 sample³¹ 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 primarily 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 Canadian⁴⁶ and English⁴⁷ 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 review⁵⁹

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 1969⁶⁹ 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 Act⁷³ 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 innocence⁸⁴ 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* decision¹⁰¹ 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 law¹¹¹ 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 9¹²³ 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 cornerstones 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 review¹³⁶

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) 426, 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 than 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.