

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

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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. 1(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 Code³⁷ 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 cited 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 Canada⁵⁸ 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 Taylor 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 United States can be contrasted to the dual aspects of section 11(e). In the United States the clause in the Constitution's eighth 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-trial 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 interest⁸⁹ 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 person¹⁰¹ 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 deprivation 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 accused¹⁰⁶ 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 arrested¹¹⁰ and accused¹¹¹ 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 Waal¹¹⁷ 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 voluntarily 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 quagmire 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 Vyver¹⁴¹ “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 authors¹⁴² 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 Merwe¹⁵² 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 Letoana* 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 consistently¹⁵³ 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 *Stöggemüller 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 contemplated 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 Act¹⁷⁵ 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 Rights¹⁸⁰ 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 law¹⁸² 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 addition²¹⁶ 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 conditions²¹⁹ as envisaged by chapter 9 before sentence²²⁰ and release on bail pending appeal or review without or with conditions²²¹ as envisaged by chapter 30²²²

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 supervision²³⁰

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 safety²³¹ 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 warning²³²

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 court²³⁴ respectively. It is meant for those cases where minor offences are at issue.²³⁵ There is no danger of the accused not attending his trial²³⁶ and no necessity for conditions.²³⁷ However, section 72²³⁸ 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.