

**THE CONSTITUTIONALITY OF SECTION 60(11B)(c) OF
THE CRIMINAL PROCEDURE ACT 51 of 1977 WHERE
AN APPLICANT FOR BAIL RELIES ON A WEAK
STATE'S CASE DURING A SECTION 60(11)(a)
APPLICATION**

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ABSTRACT

THE CONSTITUTIONALITY OF SECTION 60(11B)(c) OF THE CRIMINAL PROCEDURE ACT WHERE AN APPLICANT FOR BAIL RELIES ON A WEAK STATE'S CASE DURING A SECTION 60(11)(a) APPLICATION

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DEGREE: MASTERS LEGUM

In South Africa, as in most jurisdictions which profess to be based on an open and democratic society based on human dignity, equality and freedom, the right against compelled self-incrimination is a guaranteed Constitutional right.

This study is prompted by the realization that the right against self-incrimination is being undermined and eroded by an aspect of South Africa's bail laws.

The current study addresses the constitutional validity of section 60(11B)(c) of the Criminal Procedure Act 51 of 1977 in so far as it allows for the admission of incriminating evidence at trial, in contravention of the accused's right against self-incrimination, which incriminatory evidence was tendered by the applicant during a bail application in circumstances where the applicant was compelled to prove that he would be acquitted at trial where reliance is placed on a weak State's case in proving exceptional circumstances in compliance with section 60(11)(a) of the Criminal Procedure Act 51 of 1977.

Whilst section 60(11B)(c) of the Criminal Procedure Act 51 of 1977 is undoubtedly aimed at combatting crime, the pre-occupation with crime control measures threatens to undermine individual liberty and poses a threat to our Constitutional project of building a human rights culture.

I advance an argument which supports the view that section 60(11B)(c) of the Criminal Procedure Act 51 of 1977 is unconstitutional, in the above context, in that it infringes upon the accused's right against compelled self-incrimination at trial and does not amount to a justifiable limitation on the rights of an accused in an open and democratic society based on human dignity, equality and freedom.

I also advance an alternative legal remedy aimed at fulfilling the initial mischief which Section 60(11B)(c) of the Criminal Procedure Act 51 of 1977 was designed to prevent in order to bring the section in line with the Constitution and a rights-based society.

Key terms: *bail; right against self-incrimination; reverse onus; exceptional circumstances; admissibility; bail record; trial; evidence.*

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MODE OF CITATION AND REFERENCE TO SOURCES

In order to make the current thesis more user-friendly, I have elected to abide by the following mode of citation and reference to sources relied upon in support of this study:

- Footnotes will be used throughout the course of this study in order to provide the requisite recognition to the various authorities used and also to ensure that the various sources are more accessible to other authors;
- In every chapter the footnotes will continue in numerical order with the implicit aim of making the reading of the respective chapters easier and more user-friendly;
- A complete list of authorities used during the course of this study is supplied at the end of this thesis by means of a bibliography. The latter will assist in rendering the sources more accessible to the reader, especially where more than one source of the same author is utilised e.g. De Villiers W

TABLE OF CONTENTS

Declaration of originality.....	2
Abstract.....	3
Acknowledgements.....	5
Mode of citation and reference to sources	7
Table of contents	8
List of abbreviations	10

CHAPTER 1: INTRODUCTION

1.1 Background.....	11
1.2 In-roads to the right to Bail.....	12
1.3 The rationale underlying the watered down right to bail	13
1.4 The practical effect of Section 60(11)(a) and 60(11B)(c).....	15
1.5 The Constitutional Right against Self-Incrimination.....	16

CHAPTER 2: THE SOUTH AFRICAN LEGAL FRAMEWORK

2.1 Section 60(11)(a) of the Criminal Procedure Act: Proof of exceptional circumstances by relying on a weak State's case.....	19
2.2 The Right against Self-Incrimination.....	21
2.3 Section 60(11B)(c) of the Criminal Procedure Act.....	25

CHAPTER 3:
THE COMPARATIVE POSITION AT INTERNATIONAL AND FOREIGN LAW

3.1 General.....34

3.2 International law.....34

 3.2.1 The European Convention on Human Rights.....34.

 3.2.2 The International Covenant on Civil and Political Rights.....37

3.3 Canadian Law.....38

3.4 Australian law position: Queensland and New South Wales.....43

 3.4.1 Queensland.....44

 3.4.2 New South Wales.....46

CHAPTER 4:
THE CONSTITUTIONAL CHALLENGE TO SECTION 60 (11B)(c) OF THE
CRIMINAL PROCEDURE ACT

4.1 Bill of Rights litigation.....54

4.2 Infringement of the Right against self-incrimination.....56

4.3 Does the infringement of the Right against self-incrimination amount to a justifiable
limitation in terms of the Final Constitution.....57

 4.3.1 The nature of the right.....59

 4.3.2 The importance of the purpose of the limitation.....60

 4.3.3 The nature and extent of the limitation and the relation between the
 limitation and its purpose.....60

 4.3.4 Less restrictive means to achieve the purpose.....61

5. Proposed Remedy.....63

LIST OF ABBREVIATIONS

A	Appellate Division
AD	Appellate Division
ALR	Australian Law Reports
BCLR	Butterworths Consolidated Law Reports
CC	Constitutional Court
CLR	Canadian Law Reports
E	Eastern Cape Local Division of the High Court
ECP	Eastern Cape Provincial Division of the High Court
	European Human Rights
EHRR	Reports
GSJ	South Gauteng High Court
IJLCJ	International Journal of Law, Crime and Justice
N	Natal Provincial Division
NSWCA	New South Wales Court of Appeal
	Court of Criminal Appeal New South
NSWCCA	Wales
NSWLR	New South Wales Law Reports
	New South Wales Law Report
NSWLRC	Commission
S	State
SA	South African Law Reports
SACJ	South African Journal of Criminal Justice
SACR	South African Criminal Reports
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
V	Versus
W	Western Cape High Court

CHAPTER 1: INTRODUCTION

1.1 Background

The dismantling of the apartheid system and the subsequent advent of democracy in South Africa heralded the drafting and adoption of our Interim Constitution in 1993¹ and our Final Constitution in 1996.² For the biggest part, the constitutional principles embodied in both Constitutions were based on principles recognised as being universal and fundamental to democratic dispensations throughout the western civilised world and consistent with international law principles. Our law of criminal procedure saw important changes as the new constitutional dispensation recognised, *inter alia*, a constitutional right to bail. The recognition of the right to bail at a constitutional level in South Africa was due to, *inter alia*, the human rights abuses suffered during South Africa's political past which was in some circumstances characterised by detention without trial and the lack of timeous or non-existent judicial review of the detention status of arrested persons.³ In general though, an accused was entitled to apply for his release on bail.⁴

The Constitutional Court in the First Certification judgment⁵ held that right to bail was not a universally accepted fundamental right on the basis that various constitutions and conventions around the world treated the right to pre-trial release differently. Accordingly it was held that the circumscribed right to bail was not in conflict with the constitutional principle relating to the protection of universally accepted fundamental rights.⁶

¹ Constitution of the Republic of South Africa, Act 200 of 1993 (hereafter referred to as the "Interim Constitution").

² Constitution of the Republic of South Africa, Act 108 of 1996 (hereafter referred to as the "Final Constitution").

³ Section 61 of the Criminal Procedure Act 51 of 1977 (hereafter referred to as the "Criminal Procedure Act"); Section 30 of the Internal Security Act 74 of 1982 and section 12A of the Internal Security Act 44 of 1950 which have since been repealed.

⁴ Section 60 (1) of the Criminal Procedure Act provided that: An accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in a superior court, to that court, to be released on bail in respect of such offence, and any such court may, subject to the provisions of section 61, release the accused on bail...determined by the court in question.

⁵ *Ex parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

⁶ At para 88.

Be that as it may, the incorporation of the recognition of a constitutional right to bail heralded a new era and the potential for development of South Africa's bail jurisprudence.

1.2 In-roads to the right to Bail

Section 25(2)(d) of the Interim Constitution provided that: “[e]very 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.”

It is submitted that the Interim Constitution signified the high water mark of an arrested person's right to bail, in that, the default position was that the arrested person is fundamentally entitled to release, with or without bail, unless justice itself would not be served. Thus the point of departure for the adjudication of the release of an arrested and detained person pending the trial is that the person was entitled to be released. The *status quo*, by implication, could thus only be disturbed if and when the State in seeking to successfully oppose the release of the accused adduced evidence or otherwise convinced the court that the continued incarceration of the accused is supported by the interests of justice. The onus of proof thus rested with the State. This interpretation of the Interim Constitution's bail right was echoed by the previous section 60(1)(a) of the Criminal Procedure Act which provided that an accused “shall be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, unless the court finds that it is in the interests of justice that he or she be detained in custody.”

The Final Constitution, remarkably contains a less substantial version of the right to bail, in that, Section 35(1)(f) provided that “[e]veryone who is arrested has the right to be released from detention if the interests of justice permits, subject to reasonable conditions.” The default position is thus that the arrested person should be expected to remain incarcerated unless the interests of justice dictates otherwise. The *status quo*, by implication, could thus only be disturbed if and when the accused in seeking his release

on bail from detention adduced evidence or otherwise convinced the court that his pre-trial release on bail was supported by and was consistent with the interests of justice.

The Final Constitution's interpretation of the right to bail, it is submitted, represents a substantially watered down version of the right to bail as contemplated by South Africa's Interim Constitution. The Final Constitution's dilution of the right to bail is supported by the current section 60(1)(a) of the Criminal Procedure Act⁷ which provides that "[a]n accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit." It would thus appear that the onus of proof rested with the bail applicant.

It is submitted that the watered down right to bail was a precursor to other legislative impediments aimed at making it difficult to obtain bail in cases involving allegations of serious crime.

1.3 The rational underlying the watered down right to bail

It is submitted that the watered down version of the right to bail was the legislator's response to the high crime wave that South Africa experienced in the mid-1990s.⁸

⁷ Inserted by section 9(a) of Act 62 of 2000.

⁸ In *S v Prinsloo* 1996 (2) SA 464 (CC) the Constitutional Court held the following at para 18: "crimes of violence...have reached an intolerably high level...urgent corrective measures are warranted"; See also *S v Makwanyane* 1995 (3) SA 391 (CC) where the Constitutional Court held at para 117 that: "[t]he level of violent crime in our country has reached alarming proportions...It is of fundamental importance to the future of our country that respect for the law should be restored"; In *S v Williams* 1995 (3) SA 632 (CC) the Constitutional Court made the following remarks at para 80: "We live in a crime-ridden society; the courts and other relevant organs of the State have a duty to make crime unattractive to those who are inclined to embark on that course. The concerns which the provision seeks to address are indeed pressing and they are substantial." The sense that the courts had that serious and violent crime is on the increase is supported by official statistics published by the South Africa Police Services which indicate that between 1994 to 1997 the following crimes were reported: 78 312 Murders; 145 999 Rapes; 82 258 Attempted Murders; 731 837 House Break-ins. See *Crime in the RSA for the period April to March 1994/1995 to 2003/2004*, www.nicro.org.za/wp-content/uploads/2011/05/1994-2004-crime-stats.pdf (accessed on 9 November 2016). For a contrasting view see the paper commissioned by the Centre for the Study of Violence and Reconciliation carried out by the Department of Safety and Security, June 1999: Schönteich, M. & Louw, A. (1999). *Crime Trends in South Africa 1985-1998*.

Consistent with the watered down right to bail certain other legislative measures were introduced aimed at making it difficult to obtain release on bail in certain serious offences. For our purposes the following provisions warrant closer attention:

1. Section 60(11)(a) of the Criminal Procedure Act⁹ provided that:

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a) in Schedule 6¹⁰, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which permit his or her release.”

2. Section 60(11B)(c) of the Criminal Procedure Act¹¹ which provided that:

⁹ Substituted by section 4(f) of Act 85 of 1997.

¹⁰ Murder, when—(a) it was planned or premeditated; (b) the victim was— (i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or (ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1;(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences: (i) Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or (ii) robbery with aggravating circumstances; or (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy. Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively—(a) when committed— (i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice; (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy; (iii) by a person who is charged with having committed two or more offences of rape; or (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus; (b) where the victim— (i) is a person under the age of 16 years; (ii) is a physically disabled person who, due to his or her physical disability, is rendered particularly vulnerable; or (iii) is a person who is mentally disabled as contemplated in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007; (c) involving the infliction of grievous bodily harm. Offences as provided for in section[s] 4, 5 and 7 and involvement in these offences as provided for in section 10 of the Prevention and Combating of Trafficking in Persons Act, 2013. [Item substituted by s 48 of Act 7 of 2013.] Robbery, involving—(a) the use by the accused or any co-perpetrators or participants of a firearm; (b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or (c) the taking of a motor vehicle. An offence referred to in Schedule 5— (a) and the accused has previously been convicted of an offence referred to in Schedule 5 or this Schedule; or (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 5 or this Schedule. The offences referred to in section 2, 3(2)(a), 4(1), 5, 6, 7, 8, 9, 10 or 14 (in so far as it relates to the aforementioned sections) of the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, section 2(1) and (2) of the Civil Aviation Offences Act, 1972 (Act 10 of 1972), section 26(1)(j) of the Non-Proliferation of Weapons of Mass Destruction Act, 1993 (Act 87 of 1993) and section 56(1)(h) of the Nuclear Energy Act, 1999 (Act 46 of 1999).

¹¹ Inserted by section 4(g) of Act 85 of 1997.

“The record of the bail proceedings, excluding information in paragraph (a)¹², shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that the anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.”

1.4 The practical effect of Section 60(11)(a) and 60(11B)(c)

Section 60(11)(a) of the Criminal Procedure Act is a classic example of a reverse onus provision, in that, the bail applicant bears the onus of proving on a balance of probabilities that there are exceptional circumstances justifying his release on bail. It is trite law that one of the options available to the bail applicant in satisfying the legislative requirement of proving ‘exceptional circumstances’ is to mount a successful challenge to the strength of the State’s case against him.¹³ It is also trite law that the bail applicant would be required to proffer his version of events during his challenge to the strength of the State’s case.¹⁴ The bail applicant would therefore be required to prove on a balance of probabilities that he would be acquitted of the charge at trial in order to establish a weak State’s case justifying his release on bail.¹⁵

It is submitted that during this process of challenging the State’s case and submitting his version of the incident in response to the allegations, the bail applicant runs the risk of incriminating himself in the commission of an offence. In instances where the charge sheet contains multiple counts, the applicant runs the risk of incriminating himself in the commission of more than one offence. In instances where the charge sheet is silent on a particular offence, the accused runs the risk of incriminating himself in the commission of an offence which could later be added to the charge sheet by the State with a view

¹² Evidence of the accused’s previous convictions and pending cases adduced at the bail application is inadmissible at trial.

¹³ *S v van Wyk* 2005 (1) SACR 41 (SCA) at 45I-45C; *S v Jonas* 1998 (2) SACR 673 (SEC) at 679H-I.

¹⁴ *S v Mathebula* 2010 (1) SACR 55 (SCA) at 59E and 59G-H; *S v Rudolph* 2010 (1) SACR 262 (SCA) at 267C-D.

¹⁵ *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) at 230H; *S v Viljoen* 2002 (2) SACR 550 (SCA) at 556C.

towards the trial.¹⁶ The accused also runs the risk of alerting the State to the existence of information or evidence which, if investigated and procured by the State, could result in the accused facing a further charge at trial. The last of these examples are so-called derivative evidence which will not be the focus of this dissertation.

Section 60(11B)(c) entitles the State to use the evidence given by the accused during bail proceedings at the trial. The bail evidence is thus admissible against the accused at trial provided that the accused was warned by the bail court that his evidence may be used against him at trial. Inevitably this would mean that evidence of an incriminatory nature or statements made during the bail proceedings would ultimately be admissible at the trial against the accused. It is submitted that the aim of admitting such evidence would be for the State to secure the accused's conviction.

1.5 The Constitutional Right against Self-Incrimination

Against this background is the accused's right against self-incrimination contained in section 35(3)(j) of the Final Constitution which provided that '[e]very accused person has a right to a fair trial, which includes the right...not to be compelled to give self-incriminating evidence.' It is trite law that the accused enjoys the right against self-incrimination at trial. It is also trite law that any evidence tendered by the accused at the bail application is not limited for use exclusively by the bail court for purposes of determining the issue of bail, in that, section 60(11B)(c) of the Criminal Procedure Act authorises the use of the same evidence by the trial court for the purposes of determining the guilt of the accused. Therefore, any incriminatory evidence tendered by the accused during the bail proceedings can and often will be used by the State against the accused at the later trial. It is precisely for this reason that the bail applicant may refuse to answer incriminating questions during the bail proceedings as same may compromise his right against self-incrimination at the subsequent trial.

¹⁶ The accused also runs the risk of making statements, short of incriminating himself in the commissions of an offence, which statements could later be used by the State at trial to cross examine him and impeach his credibility in circumstances where the accused at trial contradicts or omits the earlier statements made during the bail proceedings.

However, the position of the bail applicant to simply elect to refuse to answer potentially incriminating questions during the bail application is not such a simple remedy in the case of an applicant who seeks to prove that the State has a weak case against him in order to establish exceptional circumstances justifying his release on bail. The applicant is compelled to delve into the merits of the case against him. The applicant is compelled to proffer his version of events. To this end, the applicant does not have the luxury of refusing to answer questions, incriminating or not, lest his chances for release on bail are jeopardised.

It would appear that on a prospectus of sections 60(11)(a) and 60(11B)(c) of the Criminal Procedure Act that a bail applicant faced with the onus of proof and who carries the risk of having the evidence adduced in support of his bail application being used by the State to further its case against him at trial, is in an unenviable position. *Prima facie*, it would appear that an applicant for bail is required to make an election between exercising his constitutional right to apply for release on bail at the risk of self-incrimination or not exercising his right to apply for bail with the aim of safe-guarding his right against self-incrimination. Should he elect the former, he runs the risk of a conviction and a deprivation of liberty. Should he elect the latter, he runs the risk of languishing in custody awaiting trial whilst being subject to the vagaries of South Africa's criminal justice system.

It is submitted that in the aforesaid context and on face-value section 60(11B)(c) limits the right against self-incrimination unreasonably and unjustifiably. The aim of this dissertation is to examine the constitutional validity of section 60(11B)(c) of the Criminal Procedure Act in the context of a bail application brought in terms of section 60(11)(a) where the applicant relies on proving that the State's case against him is weak. The examination of the said section's constitutionality will be done against the backdrop of contemporary South African law, foreign and international law.

To this end, the chapters which follow deals with the following aspects: Chapter two sets out the South African legal framework. Chapter three deals with the position at international law and the selected foreign law jurisdictions of Canada and the Australian

states of Queensland and New South Wales. The concluding chapter deals with an exercise in Bill of Rights litigation, the mechanics thereof in examining the constitutional validity of section 60(11B)(c) of the Criminal Procedure Act in the above context and whether or not the section amounts to a justifiable limitation on the applicant's right against self-incrimination in an open and democratic society based on human dignity, equality and freedom.

CHAPTER 2: THE SOUTH AFRICAN LEGAL FRAMEWORK

2.1 Section 60(11)(a) of the Criminal Procedure Act: Proof of exceptional circumstances by relying on a weak State's case

Section 60(11)(a) of the Criminal Procedure Act provided that:

“Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

- (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which permit his or her release.”

The effect hereof is that the bail applicant attracted a reverse onus to prove that his release on bail was permitted only in circumstances that were “exceptional”. In enacting Section 60(11)(a) of the Criminal Procedure Act, the legislature did not see fit to clearly define what exactly was meant by the term “exceptional circumstances” in requiring that the bail applicant should prove same. As a result, it was left to our courts to interpret the meaning of the term. Out of the many different meanings accorded to the term by our courts, of relevance for our purposes is the development of the notion that proof by the bail applicant of a weak State's case is sufficient to establish exceptional circumstances justifying his release on bail.

In *S v Jonas*¹⁷ the applicant was charged with the offences of attempted murder and robbery with aggravating circumstances. Bail had been refused in the Port Elizabeth Regional court on the basis that the applicant had failed to prove exceptional circumstances. The matter came before the South Eastern Cape High Court on appeal. It was common cause that during the bail application the State simply handed in the charge sheet to the presiding magistrate and tendered no evidence. The applicant tendered evidence during the bail application which amounted to an alibi defence. The State elected not to offer any evidence in opposing the bail application or in rebuttal of

¹⁷ 1998 (2) SACR 673 (SEC).

the applicant's assertion that he was innocent of the allegations levelled against him.¹⁸ The High Court held that "exceptional circumstances" was established when the applicant was able to adduce acceptable evidence that the prosecution's case against him was non-existent or subject to serious doubt. The court held that:

"To my mind, to incarcerate an innocent person for an offence which he did not commit could also be viewed as an exceptional circumstance. Where a man is charged with a commission of a Schedule 6 offence when everything points to the fact that he could not have committed the offence because, e.g. he has a cast-iron alibi, this would likewise constitute an exceptional circumstance. In this matter the State did not place any evidence before the court, either in opposing the application for bail or in rebuttal of the appellant's denial of the commission of the offences with which he had been charged...I do not believe that it could have been the intention of the Legislature, when it enacted the amending provisions of s 60(11) of the Act, to legitimise the random incarceration of persons who are suspected of having committed Schedule 6 offences, who, after all, must be regarded as innocent until proven guilty in a court of law."¹⁹

The court's decision in *Jonas* was followed by a number of subsequent courts in, *inter alia*, *S v Mauk*,²⁰ *S v Siwela*²¹, *S v Yanta*²², *S v Josephs*²³, *S v Hartlie*²⁴ and *S v Botha and another*.²⁵

It is submitted that State prosecutors initially adopted the approach that they were not required to adduce evidence in opposing the bail application or in rebutting evidence adduced by the applicant pointing towards his innocence in the hope that the applicant would simply fail to overcome the insurmountable burden that was required by the vague requirement of "exceptional circumstances". Logically and in line with the burden of proof required by section 60(11)(a) of the Criminal Procedure Act, the bail applicant needed to make out a *prima facie* case pointing towards his innocence before the State attracted a duty to rebut his version.²⁶ In circumstances where the State adduced evidence in

¹⁸ At 678B-679C.

¹⁹ At 678E-I.

²⁰ 1999 (2) SACR 479 (W).

²¹ 1999 (2) SACR 685 (W).

²² 2000 (1) SACR 237 (Tk).

²³ 2001 (1) SACR 659 (C).

²⁴ 2002 (1) SACR 7 (T).

²⁵ 2002 (1) SACR 222 (SCA).

²⁶ *S v Viljoen* 2002 (2) SACR 550 (SCA) at para 15.

rebuttal, the law required of the applicant to go further by proving on a balance of probabilities that he would be acquitted at trial where he relied on a weak State's case in an attempt at proving exceptional circumstances justifying his release on bail.²⁷ In *S v Mathebula* the applicant was charged with murder and the possession of unlicensed firearms and ammunition. The applicant's attempt at showing that the State's case against him was weak was blunted, in that, the applicant sought to rely on an alibi defence which was based solely on his *ipse dixit* in the absence of any corroboratory evidence in the form of an actual alibi witness or independent objective probabilities which favoured his innocence.²⁸

It is submitted that the applicant runs the risks of incriminating himself in the commission of an offence in his attempt at proving that he will be acquitted at trial. The logical effect of such an exercise is that the applicant is compelled to proffer his version of events in response to the State's allegations contained in the charge sheet. The applicant would be compelled to delve into the merits of case as a whole. Should the applicant fail in his quest at proving that he will in all probability be acquitted at trial, his bail application would be refused.

2.2 The Right against Self-Incrimination

It was a recognised rule at common law that a person was entitled to refuse to give evidence which tended to incriminate him in the commission of an offence.²⁹ Primarily, the common law privilege against self-incrimination related to the narrow context of protecting a witness during his testimony at trial.³⁰ Section 203 of the Criminal Procedure Act provided that:

“No witness in criminal proceedings shall, except as provided by this Act or any other law, be compelled to answer any question which he would not on the thirtieth day of

²⁷ *S v Mathebula* 2010 (1) SACR 55 (SCA) at 59E and 59G–H; *S v Rudolph* 2010 (1) SACR 262 SCA at 267C–D.

²⁸ At 59B–J.

²⁹ *R v Camane* 1925 AD 570 (hereafter referred to as “*Camane*”).

³⁰ *Park Ross and Another V Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C).

May, 1961, have been compelled to answer by reason that the answer may expose him to a criminal charge.”

In *Magmoed v Janse van Rensburg and Others* the Appellate Division described the privilege as “personal right to refuse to disclose admissible evidence”.³¹ In *S v Lwane*³² the accused had been charged with murder based on a self-incriminating statement he had made during his testimony at an earlier preparatory examination held under the old Criminal Procedure Act 56 of 1955 as the complainant in the matter. On appeal, the court held that the accused had not been warned of his privilege against self-incrimination and accordingly the appeal against the conviction was upheld.³³

In *S v Lungile and Another*³⁴, counsel for *Lungile* sought that his trial be separated from that of his co-accused.³⁵ *Lungile* wanted accused number two to be a compellable witness in favour of *Lungile’s* version at a separate trial. Accused number two would not have been a compellable witness in the event that the trial was not separated.³⁶ *Lungile* contended that his right to a fair trial to “adduce evidence” as envisaged by section 35(3)(i) of the Final Constitution would be infringed by a refusal of the court to order a separation of trials and the resultant incompellability of accused number 2 to testify as a witness in defence of *Lungile*. Accused number 2 had indicated that he was not willing to testify in the joint trial. The court refused *Lungile’s* application for a separation of trials, *inter alia*, on the basis that accused number two would not be a compellable witness at the trial as he could successfully raise his right against self-incrimination as envisaged in section 35(3)(j) of the Final Constitution, in that, he could contend that any self-incriminating

³¹ 1993 (1) SACR (A) at 104C.

³² 1966 (2) SA 433 (hereafter referred to as “*Lwane*”)

³³ *Lwane* at 445A-E

³⁴ 1999 (2) SACR 597 (SCA) (hereafter referred to as “*Lungile*”).

³⁵ Section 157(2) provided that: “Where two or more persons are charged jointly, whether with the same offence or with different offences, the court may at any time during the trial, upon the application of the prosecutor or of any of the accused, direct that the trial of any one or more of the accused shall be held separately from the trial of the other accused, and the court may abstain from giving judgment in respect of any of such accused.”

³⁶ Section 196(1)(a) of the Criminal Procedure Act provided that: “An accused...shall be a competent witness for the defence at every stage of criminal proceedings, whether or not the accused is charged jointly with any other person: Provided that... an accused shall not be called as a witness except upon his own application.”

answers he may give in the trial of accused number one, would be held against him at his own pending trial.³⁷

There also existed, at common law, a broad privilege which expounded that “no one can be compelled to give evidence incriminating himself...either, before the trial or during the trial.”³⁸ This overly broad protective mechanism was however curtailed by a number of sections in the Criminal Procedure Act.³⁹ It would also appear that the privilege was

³⁷ *Lungile* at 605 paras 22-24.

³⁸ *Camane* at 575; See also *S v Sheehama* 1991 SA 860 (A).

³⁹ Section 217 of the Criminal Procedure Act provided that: “(1) Evidence of any confession made by any person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided— (a) that a confession made to a peace officer, other than a magistrate or justice, or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorized to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or justice; and (b) that where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question— (i) be admissible in evidence against such person if it appears from the document in which the confession is contained that the confession is made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate; and (ii) be presumed, unless the contrary is proved, to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto. If it appears from the document in which the confession is contained that the confession is made freely and voluntarily by such person in his sound and sober senses and without having been unduly influenced thereto. (2) The prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under proviso (b) to subsection (1). (3) Any confession which is under subsection (1) inadmissible in evidence against the person who made it, shall become admissible against him—(a) if he adduces in the relevant proceedings any evidence, either directly or in cross-examining any witness, of any oral or written statement made by him either as part of or in connection with such confession; and (b) if such evidence, is in the opinion of the judge or the judicial officer presiding at such proceedings, favourable to such person.” Section 219A of the Criminal Procedure Act provides that: “(1) Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence: Provided that where the admission is made to a magistrate and reduced to writing by him or is confirmed and reduced to writing in the presence of a magistrate, the admission shall, upon the mere production at the proceedings in question of the document in which the admission is contained— (a) be admissible in evidence against such person if it appears from such document that the admission is made by a person whose name corresponds to that of such person and, in the case of an admission made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such document to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the admission and any question put to such person by the magistrate; and (b) be presumed, unless

curtailed by certain statutory mechanisms aimed at convening extra-curial administrative, investigatory or regulatory proceedings that occurred outside the scope of normal criminal proceedings.⁴⁰ The statutes empowered certain designated officials to compel a person to appear at an inquiry and to answer questions put to them. The subjects could not elect to refuse to answer incriminating questions. This left the door open for criminal prosecutions to later follow. The State could simply use the incriminating answers given by the person at the inquiry in its case against the accused at trial. In the absence of a Constitution and a Bill of Rights courts were largely powerless to rule the evidence as inadmissible where there had been compliance with the requirements of the statute. Clearly therefore, the system was open to abuse by the State.

The advent of a constitutional dispensation brought with it the recognition of the privilege against compelled self-incrimination as a Right at Constitutional level.⁴¹ The new constitutional dispensation heralded a different approach to the interpretation of legislation. The courts had to interpret legislation in a manner that promoted the spirit, purport and objects of the Bill of Rights.⁴² In circumstances where a statutory provision sought to exclude or limit a constitutional right, the courts were duty bound to determine whether the exclusion or limitation of the right was consistent with the constitution itself, in that, the said infringement of the right had to be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.⁴³

the contrary is proved, to have been voluntarily made by such person if it appears from the document in which the admission is contained that the admission is made voluntarily by such person. (2) the prosecution may lead evidence in rebuttal of evidence adduced by an accused in rebuttal of the presumption under subsection (1).”

⁴⁰ The following statutes, *inter alia*, governed these type of extra-curial administrative, proceedings: section 65 of the Insolvency Act 24 of 1936; sections 415 and 417 of the Companies Act 61 of 1973; section 66(1) of the Close Corporations Act 69 of 1984, sections 3, 4, 6, 8 and 9 of the Inspection of Financial Institutions Act 38 of 1984; sections 7, 9 and 17 of the Maintenance and Promotion of Competition Act 96 of 1979; sections 5, 7 and 14 of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988; section 6 of the Banks Act 94 of 1990; section 51 of the National Ports Act 12 of 2005.

⁴¹ Section 35(1)(c) of the Final Constitution provided that: “Everyone who is arrested for allegedly committing an offence has the right not to be compelled to make any confession or admission that could be used in evidence against that person”; Section 35(3)(j) of the Final Constitution.

⁴² In accordance with section 39(2) of the Final Constitution which provided that: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

⁴³ Section 36 of the Final Constitution.

It is against this background that the constitutionality of section 417(2)(b) of the Companies Act 61 of 1973 was decided upon by the Constitutional Court in relation to section 25(3)(d) of the Interim Constitution⁴⁴ in the matter of *Ferreira v Levin and Others; Vryenhoek and Others V Powell NO and Others*.⁴⁵ The Act sanctioned the use of an investigative inquiry empowering the liquidator of a company to investigate the whereabouts of assets for the benefit of the creditors. To this end, the liquidator could subpoena and subject any person to answer questions in relation to the whereabouts of company assets. Section 417(2)(b) required of the person being examined to answer any questions put to him whether or not the answers later subjected the examinee to criminal prosecution. The court held that the section violated the accused's right against compelled self-incrimination at trial and was accordingly declared invalid.⁴⁶ Importantly, the court held that the offending section could have been saved from a declaration of constitutional invalidity if the legislature had granted the examinee immunity from the later use of the compelled evidence at the trial.⁴⁷ The examinee would therefore still be compelled to answer self-incriminating questions during the inquiry but his right against compelled self-incrimination would have been safeguarded at any subsequent trial. The State would have been prohibited from attempting to admit the incriminatory inquiry evidence into evidence against the accused.⁴⁸

In the context of a bail application, section 60(11B)(c) of the Criminal Procedure Act does not provide the bail applicant with an immunity at trial to safeguard his constitutional right against self-incrimination.

2.3 Section 60(11B)(c) of the Criminal Procedure Act

Section 60(11B)(c) of the Criminal Procedure Act provided that:

⁴⁴ Section 25(3)(d) provided that “[e]very accused person has a right to a fair trial, which includes the right...not to be compelled to give self-incriminating evidence.”

⁴⁵ 1996 (1) SA 984 (CC) (hereafter referred to a “*Ferreira*”).

⁴⁶ At paras 158-159.

⁴⁷ At para 153.

⁴⁸ See the discussion on this aspect by Theophilopoulos C ‘Defining the limits of the common-law, South African and European privilege against self-incrimination’ (2014) *Stell LR* 160 at 174-175

“The record of the bail proceedings, excluding information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that the anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.”

This section provided the link or procedural law mechanism which the State often relied upon to seek to admit at trial evidence given by the accused during the bail application which was of an incriminatory nature. Prior to the enactment of section 60(11B)(c) of the Criminal Procedure Act, the State sought to rely on section 235 of the Criminal Procedure Act in admitting incriminatory evidence at trial given by the accused during bail proceedings. This section provided that:

“(1) It shall, at criminal proceedings, be sufficient to prove the original record of judicial proceedings if a copy of such record, certified or purporting to be certified by the registrar or clerk of the court or other officer having the custody of the record of such judicial proceedings or by the deputy of such registrar, clerk or other officer or, in the case where judicial proceedings are taken down in shorthand or by mechanical means, by the person who transcribed such proceedings, as a true copy of such record, is produced in evidence at such criminal proceedings, and such copy shall be prima facie proof that any matter purporting to be recorded thereon is correctly recorded.”

In *S v Nomzaza*⁴⁹ the Appellate Division was called upon to decide, *inter alia*, whether the evidence given by the accused at the bail hearing was admissible at the subsequent trial. Counsel for the respondents contended that bail proceedings did not amount to judicial proceedings as envisaged by section 235 of the Criminal Procedure Act. The rationale for the contention was that the Criminal Procedure Act contained a *numerus clausus* of proceedings which amounted to judicial proceedings. Chapter 19 of the Criminal Procedure Act referred to judicial proceedings which encompassed only those “proceedings” where the accused pleaded guilty or not guilty. Therefore, a bail application was excluded from the application of section 235 of the Criminal Procedure Act. The Appellate Division held that the wording of section 235 of the Criminal Procedure Act was wide enough to include recognizing bail proceedings as judicial proceedings.⁵⁰ The

⁴⁹ 1996 (2) SACR 14 (A) (hereafter referred to as “*Nomzaza*”).

⁵⁰ *Nomzaza* at 19G-I.

Appellate Division held that section 235 of the Criminal Procedure Act merely provided a mechanism for how the record of bail proceedings could be proved at criminal proceedings and not what evidence was admissible.⁵¹

In *Nomzaza* the court had alluded to the fact, albeit in *obiter dictum*, that in light of the Bill of Rights contained in the Interim Constitution, it might well be that the admission of the bail record, containing incriminatory statements by the accused, at trial would render the trial unfair.⁵²

The issue arose before the court in the matter of *In S v Botha*⁵³ under section 25(3)(d) of the Interim Constitution. The applicant was arrested at his home in the early hours of the morning. Following a brief consultation with his attorney and advocate later at court on the morning of his arrest, he was lead into court for the conduct of an opposed bail application. On appeal, the applicant averred that neither his legal representatives nor the court *a quo* advised him that he had the right, *inter alia*, not to answer self-incriminating questions. It was common cause that the applicant was not advised of his rights by the presiding magistrate at the bail hearing. The state prosecutor had engaged in protracted cross examination of the applicant mainly on the merits of the charges to the extent that it endured until approximately 16h00 the following court day. The High court re-iterated the principle that existed at common law that the bail applicant had the privilege against answering self-incriminating questions.⁵⁴ However, the question of admissibility of the bail record had to be considered in light of the accused's right to a fair trial as expounded by section 25(3)(d) of the Interim Constitution.⁵⁵ The right to "adduce and challenge

⁵¹ *Nomzaza* at 17A.

⁵² *Nomzaza* at 21C.

⁵³ 1995 (2) SACR 605 (W) (hereafter referred to as "*Botha*").

⁵⁴ *Botha* at 608I-610C.

⁵⁵ Section 25(3) of the Interim Constitution provided that: "Every accused person shall have the right to a fair trial, which shall include the right- (a) to a public trial before an ordinary court of law within a reasonable time after having been charged; (b) to be informed with sufficient particularity of the charge; (c) to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial; (d) to adduce and challenge evidence, and not to be a compellable witness against himself or herself; (e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights; (f) not to be convicted of an offence in respect of any act or omission which is not an offence at the time it is committed, and not to be sentenced to a more severe punishment

evidence, and not to be a compellable witness against himself or herself”, in particular, deserved attention. The court quoted with approval the *dictum* as contained in the Constitutional Court matter of *S v Zuma*⁵⁶ in support of its finding that the right against self-incrimination applied equally during pre-trial processes, which included an accused’s application for release on bail at the bail hearing as it applied to the accused as a witness at his or her subsequent trial:

“The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. . . . Since that date (27th April 1994) s 25(3) has required criminal trials to be conducted in accordance with just those options of basic fairness and justice. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions.”

The court highlighted a constitutional dilemma faced by the applicant for bail. The court postulated that the applicant had an untenable election to make in the context of the bail application with a view towards and in the context of the later trial. On the one hand, the accused had a right to bail, *albeit* a circumscribed one.⁵⁷ On the other hand the accused had the right to remain silent and the right to decline to answer questions which might incriminate him.⁵⁸ The following remark by the court bears on this aspect:

“If the evidence given by an accused at a bail application is admissible at trial, the accused faces a dilemma: if he fails to give evidence or refuses to answer incriminating questions, he may be refused bail, yet, if he does give evidence and answers incriminating questions in order to get bail, he foregoes his right to remain silent and the privilege against self-incrimination. In the interests of a fair trial, the accused should not have to choose.”⁵⁹

than that which is applicable when the offence is committed; (g) not to be tried again for any offence of which he or she has previously been convicted or acquitted; (h) to have recourse by way of appeal or review to a higher court than the court of first instance; (i) to be tried in a language which he or she understands or, failing this, to have the proceedings interpreted to him or her; and (j) to be sentenced within a reasonable time after conviction.”

⁵⁶ 1995 (2) SA 642 (CC) at para 16.

⁵⁷ Section 25(2)(d) of the Interim Constitution provides that: “[e]very 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.”

⁵⁸ Section 25 (3)(c) and section 25 (3)(d) of the Interim Constitution.

⁵⁹ *Botha* at 611 I-J.

The court's solution to the constitutional rights dilemma was that our courts should treat the evidence tendered at the bail application in the same manner as the courts treat evidence given by the accused at a trial-within-a-trial. The evidence lead during the trial-within-a-trial relating to the voluntariness of the confession was treated as separate and distinct from the issue of the accused's guilt. Therefore, by analogy, evidence tendered by the accused at the bail application should be kept separate and distinct from the issue of the accused's guilt. The court favoured the approach of treating the evidence tendered at the bail proceedings as a water tight compartment without any spill over into the main trial.⁶⁰

In *S v Nyengane*⁶¹ the two accused stood trial for murder and robbery in the High Court. Counsel for the State sort to obtain the admission into evidence of the transcript of the bail proceedings held in the Magistrates' court in terms of section 235 of the Criminal Procedure Act. It was clear from the bail transcripts that the evidence tendered by the applicants at the bail application was tantamount to a confession. The court refused to admit the record of the bail proceedings based on the following grounds. The court held, *inter alia*, that section 235 of the Criminal Procedure Act prescribed the manner in which judicial proceedings may be proved but did not specify what may be proved. There was no provision in the Criminal Procedure Act which expressly allowed for the admissibility against the accused at the trial of evidence tendered at the bail application.⁶² In contrast to the lack of such an express provision in the Criminal Procedure Act, chapter 19 of the Criminal Procedure Act expressly allowed for pre-trial admissions made by the accused during a plea in the Magistrates' court to form part of the trial proceedings in a superior

⁶⁰ *Botha* at 611J – 612 A-F; See also *S v De Vries* 1989 (1) SA 228 (A) at 233H-234A and *Sithebe* at 347A-C.

⁶¹ 1996 (2) SACR 520 (E) (hereafter referred to as "*Nyengane*").

⁶² *Nyengane* at 524B.

court.⁶³ Therefore there existed a reasonable presumption that the legislature did not intend for the record of bail proceedings to be admissible at trial.⁶⁴

It is submitted that the decisions of the court in *Botha* and *Nyengani* changed the common law approach regarding the admissibility of what was regarded as evidence relevant to a bail application and the subsequent trial, disallowed cross examination on a prior inconsistent statement made in the context of a bail application and negated the provisions of section 235 of the Criminal Procedure Act. It is submitted that the decision of the courts signified a new found judicial obsession with the novelty of the introduction of the Bill of Rights. The immediate beneficiary of this new found approach was, *inter alia*, the right against compelled self-incrimination. The wide ambit of the right against self-incrimination, in particular, was criticised by members of the judiciary who published articles cautioning against affording the right too prominent a role in our adversarial system.⁶⁵

In 1997 our legislature saw fit to introduce section 60(11B)(c) of the Criminal Procedure Act. It is submitted that the section was introduced in response to the finding of the courts in *Botha*, *Nyengane* and the criticism levelled by certain sectors of our judiciary. It was not long before the constitutionality of the section or the question of what effect the accused's rights at constitutional level had on the admissibility of the bail record at trial, came under judicial scrutiny in the matter of *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*.⁶⁶

⁶³ Section 119 of the Criminal Procedure Act provided that: "When an accused appears in a magistrate's court and the alleged offence may be tried by a superior court only or is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court, the prosecutor may, notwithstanding the provisions of section 75, on the instructions of the attorney-general, whether in general or in any particular case, put the charge, as well as any other charge which shall, in terms of section 82, be disposed of in a superior court, to the accused in the magistrate's court, and the accused shall, subject to the provisions of sections 77 and 85, be required by the magistrate to plead thereto forthwith."

⁶⁴ *Nyengane* at 524C.

⁶⁵ Nugent RW "Self-incrimination in Perspective" (1999) 116 SALJ 501; Van Dijkhorst K "The Right to Silence: Is the Game worth the Candle?" (2001) 118 SALJ 26; Hugo JH "A tale of two cases" (1999) 12 SACJ 204.

⁶⁶ 1999 (4) SA 623 (CC) (hereafter referred to as "*Dlamini*").

In *Dlamini*, the Constitutional Court held that the reasoning of the court in *Botha* was an inapplicable argument in determining the constitutionality of allowing the admissibility of the bail record at trial. The facts of *Botha* could be distinguished. In *Botha*, it was common cause that the presiding magistrate did not warn the accused of his right to refuse to answer incriminating questions and that same may later be used as evidence against him at trial. The court further held that the reasoning in *Botha* relating to treating the bail and trial evidence as two separate watertight compartments that did not allow for the permeation of evidence from the bail forum to the trial forum, was juridically unsound. The court disagreed with *Botha*'s analogy of evidence of a trial-within-a-trial which is kept separate from the merits of the main trial.⁶⁷ Importantly, the court recognised and accepted the tension that existed between the right to apply for bail in terms of section 35(1)(f) and the rights contained in section 35(1) to 35(3) of the Bill of Rights.⁶⁸ However, the court held that despite the tension, no constitutional alarm bells were sounded because the accused had a choice whether or not to apply for bail at the risk of damaging his case for trial. The court then proceeded to list numerous examples which ostensibly were aimed at highlighting the autonomous choices which the accused was called upon to make at various stages of the criminal justice process between arrest and the trial. It is important to note that the examples adumbrated by the court relate solely to an election by the accused whether or not to remain silent. On the strength of the examples quoted, the court held that the accused's right to silence was not impugned. The court reasoned as follows:

“Litigation in general, and defending a criminal charge in particular, can present a minefield of hard choices. That is an inevitable consequence of the high degree of autonomy afforded the prosecution and the defence in our largely adversarial system of criminal justice. An accused, ideally assisted by competent counsel, conducts the defence substantially independently and has to take many key decisions whether to speak or to keep silent: Does one volunteer a statement to the police or respond to police questions? If one applies for bail, does one adduce oral and/or written evidence and if so by whom? Does one for the purposes of obtaining bail disclose the defence (if any) and in what terms? Later, at the trial, does one disclose the basis of the defence under s 115 of the Criminal Procedure Act? Does one adduce evidence,

⁶⁷ *Dlamini* at para 96.

⁶⁸ *Dlamini* at para 96.

one's own or that of others? Each and every one of those choices can have decisive consequences and therefore poses difficult decisions.”⁶⁹

It is further submitted that the examples quoted do not envisage the scenario where the accused is placed in a position where he must choose to potentially forego his right to access bail in order to protect a later right at trial against self-incrimination.

The court held that the approach in *Botha* was to sanction a right by the accused to lie.⁷⁰ In effect, the accused could rely on one version at bail in order to secure release on bail and a completely different version at trial in order to subvert a conviction. The court held that the right to remain silent and the right not to be compelled to confess or make admissions “offers no blanket protection against the bail applicant having to make a choice” between potentially incriminating oneself during the course of submitting or adducing evidence in support of exercising the right to bail.⁷¹ The court held that the prosecution was tasked with proving its case against the accused at trial without the assistance of an accused being compelled to furnish supporting evidence. However, where the accused freely elected to testify after having been informed of the consequences of such a choice, the right to silence was not impaired at the bail application or later at trial where the evidence is retrospectively sought to be held against the accused by the State.⁷² The court held that the approach by the Court in *Botha* “went unnecessarily far in propounding a broad and radical remedy for an ill that could and should have been treated conservatively and selectively”.⁷³ The court held that *Botha* could and should have simply relied on the position as expounded by *Nomzaza*, in that, there was no general rule at common law excluding incriminatory or otherwise prejudicial evidence emanating from the bail proceeding at trial and that the said evidence could simply have been excluded on the basis that accused was not apprised of his right not to answer incriminatory evidence.⁷⁴ The court held that the record of the bail hearing was

⁶⁹ *Dlamini* at para 94.

⁷⁰ *Dlamini* at para 95.

⁷¹ *Dlamini* at para 95.

⁷² *Dlamini* at para 95.

⁷³ *Dlamini* at para 96.

⁷⁴ *Dlamini* at para 96.

not automatically included or excluded from the proceedings at trial. The inclusion of the whole or selected parts of the record, upon which evidentiary reliance was sought to be placed, was a question which related to whether or not the admission thereof would render the trial unfair.⁷⁵ The court then proceeded to endorse the ‘flexible approach’ to the admission of unconstitutionally obtained evidence as expounded in the matters of *Ferreira* and approved of by the court in *Bernstein v Bester*.⁷⁶ The cogent question to be answered was not whether the accused’s right to silence had been infringed upon by him having to submit or adduce evidence in support of his bail application but rather whether or not the admission of such evidence at trial would render the trial unfair. The trial court must remain alert to its duty to ensure a fair trial so that unfairly elicited evidence at the bail proceedings is excluded from admission at trial.⁷⁷ Where the trial court was mindful of its duty there was thus no conflict between section 60(11B)(c) of the Criminal Procedure Act and the any of the rights enshrined in the Bill of Rights.⁷⁸ The approach advocated by *Dlamini* has been followed by our court in a number of subsequent decisions of the Constitutional Court.⁷⁹

In the chapters which follow I examine the position at international law and the selected foreign jurisdictions of Canada and the Australian states of Queensland and New South Wales. I also examine the constitutionality of section 60(11B)(c) given the position at international and foreign law and revisit the underlying reasoning of the court in *Dlamini*, given the evolution of the requirement of exceptional circumstances which, *inter alia*, requires that the bail applicant must prove on a balance of probabilities that he would be acquitted at trial where he relies on a weak State’s case justifying his release on bail, to ascertain if *Dlamini*’s reasoning still endures and is relevant.

⁷⁵ *Dlamini* at para 96.

⁷⁶ 1996 (2) SA 751 (CC).

⁷⁷ *Dlamini* at para 99.

⁷⁸ *Dlamini* at paras 98 to 99.

⁷⁹ *S v Manamela and Another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) at 499; *S v Steyn* 2001 (1) BCLR 52 (CC) at 67; *Ex Parte Minister of Safety and Security and Others: In Re: S v Walters and Another* 2002 (7) BCLR 663 (CC) at 685; *Carmichele v Minister of Safety and Security and Another* 2001 (10) BCLR 995 (CC) at 1019; *S v Thebus and Another* 2003 (10) BCLR 1100 (CC) at 1131; *Mec, Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd* 2008 (2) SA 319 (CC) at 330.

CHAPTER 3: THE COMPARATIVE POSITION AT INTERNATIONAL AND FOREIGN LAW

3.1 General

South Africa professes to be an open and democratic society based on human dignity, equality and freedom. For purposes of evaluating the constitutional efficacy of section 60(11B)(c) of the Criminal Procedure Act, it is apposite to compare the South Africa position to standards set by international law and other jurisdictions whose criminal legal procedure and evidence is based on a joint English common law heritage and whose constitutions support the notion of an open and democratic society based on human dignity, equality and freedom. In terms of section 39 of the Final Constitution when a “court, tribunal or forum” interprets the scope and ambit of a right contained in the Bill of Rights, the interpretation process “must” involve the consideration of international law and “may” involve the consideration of foreign law.⁸⁰ To this end, this chapter deals with selected International instruments and the position in Canada and the Australian states of Queensland and New South Wales.

3.2 International law

3.2.1 The European Convention on Human Rights

Article 6 of the European Convention on Human Rights⁸¹ which deals with the right to a fair trial provided that:

⁸⁰ Section 39 of the Final Constitution provided that: “(1) When interpreting the Bill of Rights, a court, tribunal or forum- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law. (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence of any 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.”

⁸¹ The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 commonly known as the European Convention on Human Rights was opened for signature in Rome on 4 November 1950 and came into force in 1953. It is the first instrument to give effect to certain of the

- “1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.”⁸²

It is noteworthy that article 6 does not contain a specific reference to the accused’s right against self-incrimination or the right to silence. Although it is not clear why these rights are not incorporated, it is submitted that perhaps the omission is a consequence of the continental inquisitorial system which is characterised by the fact that the accused is compelled to testify and be questioned by the trier-of-fact. However, the right against self-incrimination and the right to silence were introduced as part of the right to a fair trial by the European Court of Human Rights in various matters. The first such matter was that of *Funke v France*⁸³. French customs officials raided the house of the accused and uncovered evidence which indicated that he held foreign bank accounts. *Funke* was issued with an administrative order to comply with a demand that he produced statements from the said bank accounts as a result of the inability of the French authorities to access

rights stated in the Universal Declaration of Human Rights and made them binding. It is an International Treaty which binds member States. A citizen of a member State may institute proceedings against the State in the European Court of Human Rights <http://www.echr.coe.int/pages/home.aspx?p=basictexts> (accessed on 19 October 2016).

⁸² Article 6(1) – (3) of the European Convention on Human Rights of 1950

⁸³ (1993) 16 EHRR 297 (hereafter referred to as “*Funke*”).

the bank accounts. *Funke* refused to comply with the administrative order on the basis that his right to a fair trial would be infringed. In effect, he was required to obtain evidence which might incriminate him. In so doing, the administrative order placed a burden on *Funke* to be conscripted against himself. The court held that article 6 had been infringed:

“Being unable or unwilling to procure [the bank statements] by some other means, they attempted to compel the applicant himself to provide the evidence of the offences he had allegedly committed. The special features of customs law . . . cannot justify such an infringement of the right of anyone “charged with a criminal offence” . . . to remain silent and not to contribute to incriminating himself. There has accordingly been a breach of Article 6.”⁸⁴

The matter of *John Murray v United Kingdom* dealt with the right to silence and the weather or not the trial court could draw an adverse inference from the accused’s silence during questioning by the police.⁸⁵ The court held that:

“Although not specifically mentioned in Article 6 of the Convention, there can be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6...By providing the accused with protection against improper compulsion by the authorities these immunities contribute to avoiding miscarriages of justice and securing the aim of Article 6.”⁸⁶

In *Saunders v United Kingdom* the right against self-incrimination came directly under the spotlight.⁸⁷ The court held that:

“The right not to incriminate oneself . . . presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention.”⁸⁸

In *Heany and McGuinness v Ireland*⁸⁹ the court held that the privilege against self-incrimination applied even at the pre-trial stage of proceedings i.e. at the investigative stage. The court relied on the *Funke* case in holding that ‘both cases concerned the threat

⁸⁴ *Funke* at para 44.

⁸⁵ (1996) 22 EHRR 29 (hereafter referred to as “*John Murray*”).

⁸⁶ *John Murray* at para 45.

⁸⁷ (1997) 23 EHRR 313 (hereafter referred to as “*Saunders*”).

⁸⁸ *Saunders* at para 68.

⁸⁹ (2001) 33 EHRR 264 (hereafter referred to as “*Heany and McGuinness*”).

or imposition of a criminal sanction on the applicants in question because they failed to supply information to the authorities investigating the alleged commission of criminal offences by them.⁹⁰ It would thus appear that at International law, an accused cannot be conscripted to give evidence against himself which can later be used against him at trial.

3.2.2 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights⁹¹ is also of relevance. Article 14.3 (g) provided that “in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... not to be compelled to testify against himself or to confess guilt.” It is submitted that in the sphere of international law the accused’s right to silence and right against compelled self-incrimination are recognised principles deserved of protection by jurisdictions that profess that they uphold the spirit and purport of a democratic society. It is submitted that these rights are not to be departed from easily or for flimsy reasons for the sake of investigative or prosecutorial expediency. It is further submitted that international law does not permit the admission of evidence at trial in circumstances where the accused is conscripted to tender evidence against himself.⁹² Although the European Court for Human Rights have not had occasion to specifically deal with the issue whether or not the admission at trial of incriminatory evidence contained in the bail record would amount to an infringement of article 6, it is submitted that the court would not tolerate the admission of evidence at trial where the accused was “compelled” to answer or submit evidence of an incriminatory nature in an effort to secure pre-trial release as envisaged in article 5(3) of the European Convention on Human Rights.⁹³ The article resides under the accused’s right to “liberty and security”

⁹⁰ *Heany and McGuinness* at para 48.

⁹¹ The International Covenant on Civil and Political Rights of 1966 is a multilateral treaty adopted by the United Nations General assembly in 1966. It has been in force since 23 March 1976. See International Covenant on Civil and Political Rights, Wikipedia, http://en.wikipedia.org/wiki/International_Convention_on_Civil_and_Political_Rights (accessed on 19 October 2016).

⁹² See *Funke and Murray*.

⁹³ Article 5(3) of the European Convention of Human Rights of 1950 provides: “Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

which is analogous to the accused's section 12 rights to "freedom and security of the person" in terms of the Bill of Rights Contained in the Final Constitution.

3.3. Canadian Law

It is trite that both Bills of Right contained in the Interim and Final Constitutions owe much of their existence⁹⁴ to the Canadian Charter of Rights and Freedoms.⁹⁵ Article 13 of the Canadian Charter of Rights and Freedoms provided that "[a] witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence." Section 5(2) of the Canada Evidence Act⁹⁶ contains a similar provision:

"Where with respect to any question a witness objects to answer on the ground that his answer may tend to incriminate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or any provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence."

Although it appears that the Canadian Charter of Rights and Freedoms and the Canada Evidence Act would protect the accused against cross examination at the trial on the evidence he tendered at the initial bail application, the only procedural difference in the protection mechanisms afforded was that in the case of the section 5(2) of the Canada Evidence Act the accused would need to claim the protection afforded by the section. In practical terms this would mean that the accused would have to object to a question during the bail proceedings which could tend to incriminate him. I am in agreement with the view of De Villiers that the protection afforded to the accused to refuse to answer a question that might incriminate him in terms of section 5(2) of the Canada Evidence Act,

⁹⁴ *S v Dlamini* 1998 (5) BCLR 552 (N) at 559 (hereafter referred to as "*Natal Dlamini*").

⁹⁵ Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11.

⁹⁶ RSC 1985, C c – 5.

can only be raised in objection to a question by the presiding officer or the legal representative acting for the crown.⁹⁷ The protective mechanism therefore does not apply where the accused answered questions emanating from own counsel or voluntarily submitted evidence in support of his bail application. On the other hand, it would appear that the accused would not have to specifically claim the protection afforded under article 13 of the Canadian Charter of Rights and Freedoms during the course of the bail application. It is submitted that the ambit of the article 13 protection is wider and covers the circumstances where an accused was required to adduce evidence during the bail application which might be of an incriminatory nature, particularly, in circumstances where the accused bore the onus of proving that his detention was not justified in terms of the Criminal Code of Canada.⁹⁸

In *Dubois v the Queen*⁹⁹ the Canadian Supreme court had an opportunity to pronounce on the ambit of the protection afforded under article 13 and the interconnectivity between it and article 11(c) and 11(d).¹⁰⁰ The accused appealed against a conviction which was overturned by the Alberta Court of Appeal. The court, *inter alia*, ordered that the trial against the accused start *de novo*. The crown prosecutors at the second trial sort to admit the evidence of the accused given at the first trial as part of their evidence-in-chief.¹⁰¹ The court held that admitting the record of the first trial would violate the accused's right to be presumed innocent under article 11(d) in that the article required of the Crown to discharge the burden of proving the guilt of the accused beyond a reasonable doubt.¹⁰² It is submitted that the burden of proof resting on the Crown required it to adduce sufficient evidence before a response or evidential burden of rebuttal could be required of the

⁹⁷ De Villiers W LLD thesis titled: Problematic aspects of the right to bail under South African law: A comparison with Canadian law and proposals for reform submitted at the University of Pretoria, 2000 at 424 footnote 20 <http://upetd.up.ac.za/thesis/available/etd-03202006-154631/> (accessed on 1 November 2016).

⁹⁸ RSC 1985, C c-46, amended by the Criminal Law Amendment Act 1974-75-76 (Can) c 93.

⁹⁹ (1985) 2 SCR 350, 18 CRR 1 (hereafter referred to as "*Dubois*").

¹⁰⁰ Article 11(c) of the Canadian Charter of Rights and Freedoms provides that: "Any person charged with an alleged offence has the right...not to be compelled to be a witness in proceedings against that person in respect of the offence." Article 11 (d) provides that: "Any person charged with an alleged offence has the right...to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal"

¹⁰¹ *Dubois* at 527.

¹⁰² *Dubois* at 504.

accused. The court also held that the admission of the first trial record violated the accused's right against compelled self-incrimination under 11(c).¹⁰³ It is submitted that the admission of the first trial record would unfairly assist the Crown in proving its case against the accused and also undermined the right of the accused not to be a compellable witness against himself. It is submitted that that section 60 (11B)(c) of the Criminal Procedure Act would not pass constitutional muster under Canadian law, in that, admitting the accused's bail evidence at trial it would similarly be a violation of the accused's right against self-incrimination under the Final Constitution. Interestingly, the court in *Dubois* did not pronounce on whether or not the accused could be cross examined by the Crown at the second trial on the content of his evidence given at the first trial.¹⁰⁴ Presumably the question related to the cross examination of the accused at the second trial based on evidence the accused had given in the first trial with the sole purpose of establishing of a lack of credibility regarding the 'truth' of the accused's testimony and not for the purpose of 'incriminating' the accused in the commission of an offence.

In *R v Mannion*¹⁰⁵ the Canadian Supreme court held that to cross-examine the accused on his prior testimony given at a first trial was a violation of the article 13 right of the accused. The fundamental purpose of cross examination was aimed at the incrimination of the accused.¹⁰⁶ In *R v Kuldip*¹⁰⁷ the Supreme Court disagreed with the court in *Mannion*. In *Kuldip* the court held that the use of such testimony in cross-examination in order to attack the accused's credibility was not contrary to article 13. In such a case the testimony was not specifically used to "incriminate" the accused, but only to undermine the truth of the accused's testimony.

It is submitted that the approach in *Mannion* should be preferred. In the South African context the purpose of cross examination is to elicit favourable facts, undermine the accuracy or reliability of the witnesses' testimony and/or attack the credibility of the

¹⁰³ *Dubois* at 521.

¹⁰⁴ *Dubois* at 528.

¹⁰⁵ [1986] 2 S.C.R. 272 (hereafter referred to as "*Mannion*").

¹⁰⁶ *Mannion* at pages 279 – 281.

¹⁰⁷ (1990) 3 CR (3d) 618 (Can).

witness' testimony.¹⁰⁸ It is submitted that in the context of a criminal trial the sole purpose of the State's cross examination of the accused was ultimately to achieve the successful conviction of the accused. The difference between a question which was aimed at attacking the credibility of the accused regarding the truth of his evidence and a question which was aimed at incriminating the accused in the commission of an offence is artificial. It stands to reason that where an accused was successfully challenged regarding his credibility, his version of events relating to his overall defence to the charge automatically becomes less persuasive to the court from a trial advocacy point of view. It would result in a finding that the version of the accused is not 'reasonably possibly true.'¹⁰⁹ The evidence relating to the lack of credibility of the accused was a building block aimed at incriminating the accused in the commission of an offence for which his conviction is sort. The same approach would apply to cross examination related to so-called *facta probantia*, that is, facts which support the facts in issue, should same emanate from the bail proceedings. It is submitted that any other issues for cross examination outside of incriminating the accused, whether directly or indirectly, in the commission of an offence would in any case be objected to on the basis of relevance. It is submitted that in light of, *inert alia*, the accused's right against self-incrimination, cross examination at trial on his testimony submitted at the bail application would amount to a violation of the said right whether or not the cross examination was aimed at his credibility or implicating him in the commission of an offence.

¹⁰⁸ *Caroll v Carnell* 1947 4 SA 37 (N); *S v Cele* 1965 (1) SA 82 (A).

¹⁰⁹ In *S v van der Meyden* 1999 (1) SACR 447 (W) at 448 F-I the Court held that: "The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, *R v Difford* 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true."

In *Natal Dlamini* Vahed AJ took cognizance of the fact that the framers of the Bill of Rights did not incorporate an equivalent provision to that of article 13.¹¹⁰ The implication thereof was that the legislature deliberately omitted an equivalent provision on the basis of upholding the common law principle which allowed the cross examination of the accused at trial on any prior inconsistent statement and on the basis that the South African policing and prosecutorial authorities needed the assistance of the accused in proving its case against him. It might well be argued that in the South African context given our high levels of crime and the struggle to achieve effective policing and successful prosecution in reducing the high levels of crime, that the record of the bail application should justifiably be used to incriminate the accused or impeach his credibility at trial as a mechanism aimed at ensuring convictions and effective crime control. This argument, however, is fundamentally flawed. At the time that the Final Constitution incorporating the Bill of Rights came into force, section 60 (11B)(c) was not part of the Criminal Procedure Act. The framers of the of the Constitution therefore did not foresee or could not reasonably have foreseen that the legislature would see fit to enact provisions which conscripted the accused to incriminate himself, whether directly or indirectly, in the commission of an offence in the process of exercising his right to access release on bail. The constitutional court's reliance in *Dlamini* on the decision in *Nomzaza* was misplaced because the common law did not require of the accused to be conscripted against himself in the implied compulsive manner required by the effect of the reverse onus provision as contained in section 60(11)(a) of the Criminal Procedure Act.¹¹¹

It may also be argued that the Canadian authorities do not need the 'assistance' of the accused in seeking his conviction on the same basis that South Africa does because Canada has a relatively low level of serious and violent crimes and as a so-called first world country have an effective and efficient policing and prosecutorial service to combat the incidence of crime. This argument aimed at justifying the use of the bail record at trial for the purpose of incriminating the accused or impeaching his credibility is likewise

¹¹⁰ *Natal Dlamini* at page 559.

¹¹¹ Sarkin J, Steyn E, Van Zyl Smit D & Paschke R "The Constitutional Court's bail decision: Individual liberty in crisis" 2000 (16) *SAJHR* 292 at 310.

flawed. This approach is disastrous to South Africa's young democracy as it is counterproductive to establishing and entrenching a rights-based society and counter intuitive to our constitutional project. This approach encourages the prosecution and police to set low investigative and prosecutorial standards. The State in the form of the police and prosecution may well be encouraged to rely on admissions made by the accused in his bail application which could later be used against him at trial, instead of focusing on uncovering independent facts which support a finding of guilt. This to my mind is a clear violation of the accused's right against self-incrimination.

3.4 Australian law position: Queensland and New South Wales

Australia is a former commonwealth country, shares a common English law heritage with South Africa and professes to be an open and democratic society based on freedom, equality and human dignity. Bail applications in serious cases are not dealt with by the Australian federal courts, instead each is dealt with by the various State courts. As a result, I will examine the position relating to the privilege against self-incrimination as it presents in the states of Queensland and New South Wales.

As a general point of departure it is worthwhile to note that the privilege against self-incrimination does not enjoy protection at a constitutional level in Australia. However, at common law the privilege against self-incrimination entitles a person to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person.¹¹² The privilege arose from the common law maxim *nemo tenetur prodere seipsum* which meant that "people should not be compelled to betray themselves."¹¹³ It has been held that the privilege against self-incrimination reflects "the long-standing antipathy of the common law to compulsory interrogations about criminal conduct".¹¹⁴ It has also been held that the privilege against self-incrimination is "more than

¹¹² *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335 (hereafter referred to as "Pyneboard")

¹¹³ Helmholtz RH, Gray CM, Langbein JH, Moglen E, Smith HE *The privilege against self-incrimination: its origins and development* (University of Chicago Press, 1997).

¹¹⁴ *Lee v New South Wales Crime Commission* (2013) 302 ALR 363 at para 1 (French CJ).

a mere rule of evidence” and deeply ingrained in the common law”.¹¹⁵ Furthermore it has been held that the privilege against self-incrimination is “fundamental to a civilised legal system”.¹¹⁶ It would appear that the privilege against self-incrimination continues to vest in the applicant during an application for bail on the basis that the Queensland and New South Wales Law Reform Commissions did not see fit to exclude the right in the context of bail proceedings.¹¹⁷

3.4.1 Queensland

In the Australian state of Queensland, the privilege is dealt with under section 10 of the Queensland Evidence Act 1997 which provided that:

“10 Privilege against self-incrimination

- (1) Nothing in this Act shall render any person compellable to answer any question tending to criminate the person.
- (2) However, in a criminal proceeding where a person charged gives evidence, the person’s liability to answer any such question shall be governed by section 15.”

Section 15 did not afford the accused similar protection where the potentially incriminating question was asked during criminal proceedings, subject to the self-contained exclusions in the section itself.¹¹⁸ Section 10 section begs the question as to what kind of question

¹¹⁵ *R v Hicks and another* 210 A CRim R 158 (2010 QSC) at para 7.

¹¹⁶ *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412 at para 420

¹¹⁷ The Abrogation of the Privilege against Self-Incrimination, Report 59 (OLRC Dec. 2004) and The Right to Silence, Report 95 (NSWLRC July 2000).

¹¹⁸ Section 15 of the Queensland Evidence Act of 1997 provided that: “(1) Where in a criminal proceeding a person charged gives evidence, the person shall not be entitled to refuse to answer a question or produce a document or thing on the ground that to do so would tend to prove the commission by the person of the offence with which the person is there charged. (2) Where in a criminal proceeding a person charged gives evidence, the person shall not be asked, and if asked shall not be required to answer, any question tending to show that the person has committed or been convicted of or been charged with any offence other than that with which the person is there charged, or is of bad character, unless—(a) the question is directed to showing a matter of which the proof is admissible evidence to show that the person is guilty of the offence with which the person is there charged; (b) the question is directed to showing a matter of which the proof is admissible evidence to show that any other person charged in that criminal proceeding is not guilty of the offence with which that other person is there charged; (c) the person has personally or by counsel asked questions of any witness with a view to establishing the person’s own good character, or has given evidence of the person’s good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution or of any other person charged in that criminal proceeding; (d) the person has given evidence against any other person charged in that criminal proceeding. (3) A question of a kind mentioned in subsection (2)(a), (b) or (c) may be asked only with

would “tend to incriminate” a person. In *Sorby v The Commonwealth*¹¹⁹ the court held that:

“The mere fact that the witness swears that he believes that the answer will incriminate him is not sufficient; ‘to entitle a party called as a witness to the privilege of silence, the Court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer.’”

The court then proceeded to quote with approval a dictum contained in the matter of *R v Boyes*¹²⁰ which stated that:

“Further than this, we are of the opinion that the danger to be apprehended must be real and appreciable with reference to the ordinary operation of law in the ordinary course of things, not a danger of an imaginary or unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice.”

It is submitted that the protection granted by section 10(1) only related to the right of a person i.e. a suspect in a criminal investigation or an accused in facing a criminal charge, against being compelled to answer a question the answer to which would tend to incriminate the accused in the commission of an offence. It is therefore unclear whether the accused can rely on the broader common law privilege against self-incrimination in the context of a bail application where he is compelled to potentially incriminate himself in the commission of an offence in pursuit of making submissions or adducing evidence in support of an application for release on bail. It is further unclear whether the incriminatory evidence would be admissible at the later trial of the matter. However, it would however that the section 10 protection could be argued to extend the aforementioned protection to the bail context based on the principle that the courts would be loathed to interpret legislation to have abrogated the privilege in the absence of an

the court’s permission. (4) If the proceeding is a trial by jury, an application for the court’s permission under subsection (3) must be made in the absence of the jury.”

¹¹⁹ (1983) 152 CLR 281 at pages 288-289 (hereafter referred to as “*Sorby*”).

¹²⁰ (1861) 1 B & S 311 at pages 329 – 330.

expressly or impliedly stated intention of the legislature to do so.¹²¹ In *Sorby* the Australian High Court held that the privilege against self-incrimination extended to non-judicial proceedings as well.¹²² By logical implication therefore, it is submitted that the common law protection and the un-abrogated section 10(1) protection extends to the applicant in the context of a bail application. Should the accused tender incriminatory evidence during the bail proceedings in his quest to obtain bail, the trial court has a discretion to exclude such evidence if the admission thereof would render the trial unfair in terms of section 130 of the Queensland Evidence Act 1977. This provision is similar to the approach in *Dlamini* which required that the trial court has the discretion to exclude the evidence of the bail application if the admission thereof would render the trial unfair.¹²³

It is unfortunate that section 10(1) and the wider common law privilege has not as yet been the subject of case law in the context of conscripted self-incrimination in bail proceedings and the question regarding the admissibility thereof at the later trial of the matter.

3.4.2 New South Wales

In the Australian state of New South Wales the privilege against self-incrimination in proceedings other than a trial is governed by section 128 of the Evidence Act of 1995.¹²⁴ The section contained a step-by-step legislative protocol which sought to protect the accused from being compelled to furnish self-incriminating evidence and where an answer was required, the protection extended to the trial proceedings. The protection mechanism was “activated”, as it were, if and when the witness in the proceedings “objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness has committed an offence against

¹²¹ In *Sorby* the Court held at pages 289-290 that: “The privilege against self-incrimination is deeply ingrained in the common law. The principle is that a statute will not be construed to take away a common law right, including the privilege against self-incrimination, unless a legislative intent to do so clearly emerges, whether by express words or necessary implication.”

¹²² *Sorby* at page 311.

¹²³ *Dlamini* at para 99.

¹²⁴ As amended by the Evidence Amendment Act of 2007 (NSW).

or arising under an Australian law or a law of a foreign country or is liable to a civil penalty.”¹²⁵

The question which arose is whether the objection can validly be raised to a question emanating during examination-in-chief (and as a corollary, re-examination) from the witness’ own counsel, during cross examination by opposing counsel or from the presiding officer. In *Song v Ying*¹²⁶ the New South Wales Court of Appeal had occasion to deal with the issue. The point of departure of the court was to consider whether or not the witness would otherwise be compelled to give an answer irrespective of whether or not the question emanated during evidence-in-chief or cross examination. The court considered that section 12 of the Evidence Act provided that a person who was competent to give evidence was also compellable to give it. The court considered that the compulsion could be exercised by the use of subpoenas to secure the attendance of the witness at court and ultimately ensure that the witness entered the witness box to testify. In circumstances where the witness failed and/or refused to answer compellable questions whether in chief or in cross-examination, such failure and/or refusal would result in imprisonment. The court held that the proper construction of the legal issue was not whether the objectionable question, in the meaning of section 128(1), arose during examination-in-chief or in cross-examination. The question to be addressed was whether an objection under s 128(1) was limited to an objection to evidence which the witness would otherwise be compellable to give.¹²⁷ However, the court held that the position was somewhat different when a witness was also a party to proceedings or a potential party to later proceedings such as criminal proceedings where the witness would stand trial as the accused in the matter. In the aforesaid circumstance the witness who was also an accused cannot be said to be compelled to answer questions emanating from his own counsel. In the event that the witness did not want to answer a question from his own counsel, he merely had to request that the question be retracted, hence, there was no compulsion on the witness to answer the question. The only time that a question

¹²⁵ Section 128 (1) of the Evidence Act of 1995.

¹²⁶ [2010] NSWCA 237 (hereafter referred to as “*Song*”).

¹²⁷ *Song* at paras 18 to 20.

emanating from the witness' own counsel could rightly be objected to within the meaning of section 128(1) was where, despite the retraction of the question by the party's own counsel, the presiding officer required an answer or opposing counsel on successful application to the presiding officer insisted upon an answer. The court held that the witness who was party to proceedings could only properly object within the meaning of section 128(1) to questions emanating from opposing counsel or the court because the witness would otherwise be compelled to answer such questions. The witness could not validly raise an objection to answering questions put in examination-in-chief because there was an absence of an element of compulsion present.¹²⁸

Once the witness had objected to the question as required by section 128(1) the court had to apply its judicial discretion in determining whether or not there were 'reasonable grounds' for the objection. The question which arose was what constituted these "reasonable grounds." The issue was addressed by the New South Wales Criminal Court of Appeal in the matter of *R v Bikic*.¹²⁹ A witness for the defence, one Mackic, objected to answering questions from the Crown on three aspects which the crown prosecutor identified for cross examination. The basis for the objection was the fact that the answers may tend to incriminate Mackic in the commission of offences in respect of which he had already been convicted and which conviction was the subject of an intended appeal yet to be prosecuted. The potentially incriminating answers would presumably have the effect of compromising the prospects of success of Mackic's appeal.¹³⁰ In deciding whether there existed "reasonable grounds" for the witness' objection as contemplated by section 128(2) the court confirmed the judicial test established by the common law. At common law the court "had to see that there are reasonable grounds to apprehend danger to the witness from his being compelled to answer."¹³¹ The court then held that "it seems to me to be a matter of common sense that reasonable grounds for an objection must pay regard to whether or not the witness can be placed in jeopardy by giving the particular

¹²⁸ *Song* at paras 24 to 29.

¹²⁹ [2001] NSWCCA 537 at para 15 (hereafter referred to as "*Bikic*").

¹³⁰ *Bikic* at para 11.

¹³¹ *Bikic* at para 13.

evidence.”¹³² The court overruled Mackic’s objection because according to Australian law his answers to the Crown’s questions, although incriminatory, may not be held against him in the determination of any subsequent appeal.¹³³ The approach of the Australian courts is therefore not to merely rely upon the mere *ipse dixit* of the witness that the answers to the questions would incriminate him. It would appear that the court must be convinced from the circumstances of the matter and the nature of the evidence that there was a reasonable basis to apprehend a danger of self-incrimination to the witness in circumstances where he was compelled to answer.¹³⁴

Once the court had determined that there were reasonable grounds for the witness’ objection, the court could follow one of a few subsequent options. The court could inform the witness that based on the finding that there were reasonable grounds for the objection, the witness was not required to answer to the question. In circumstances where the witness thereafter willingly wanted to give an answer to the question, the court was to issue the witness with a certificate. The court could alternatively, inform the witness that he would be required to answer the question on the basis that the answer would not incriminate him (where there are no reasonable grounds for the objection) and that the required answer was in the interests of justice. Similarly, the witness was once again issued with a certificate in this latter circumstance.¹³⁵ Interestingly the court could also issue a certificate in circumstances where the court *post facto* found that there were reasonable grounds for the initial objection.¹³⁶ The practical effect of the certificate issued was that the evidence given by the witness or any evidence of information, document or thing (real evidence) obtained as a direct or indirect result of the evidence given by the witness could not be used against the witness in any proceedings in an Australian court.¹³⁷ The evidence tendered by the witness could however be used against the witness in later proceedings aimed at a conviction of the witness related to the falsity of

¹³² *Bikic* at para15.

¹³³ *Bikic* at paras16 to 19.

¹³⁴ *Pyneboard* at para 9.

¹³⁵ Section 128 (2) - (5) of the Evidence Act of 1995.

¹³⁶ Section 128 (6)(b) of the Evidence Act of 1995.

¹³⁷ Section 128 (7) of the Evidence Act of 1995.

the evidence.¹³⁸ This approach is consistent with article 13 of the Canadian charter relating to perjury and giving contradictory evidence.¹³⁹

Interestingly the legislative protection of the witness' privilege against self-incrimination applied even when the decision by the court to issue the certificate was reviewed, quashed by a higher court or called into question by the crown or the opposing party to proceedings where the evidence was initially given.¹⁴⁰ This is a welcome protective mechanism that enables the witness to testify freely and frankly without the fear that the court's decision would later be overturned and thereby exposed the witness to self-incriminatory evidence at later proceedings.

The New South Wales court has not as yet had occasion to deal with an interpretation of section 128 in the context of a bail application with a view towards the admission of incriminating evidence at a later criminal trial. However, De Villiers has set out the envisaged procedure in the bail context by way of various practical examples.¹⁴¹ For our purposes it is sufficient to appreciate that based on an application of section 128 to the context of potentially incriminating evidence tendered at the bail application and its possible later use at trial, the accused as a witness is protected by the application of section 128 provided that the legislative pre-requisites are complied with. The net effect thereof is the protection of the accused's right against self-incrimination and the leeway to submit evidence or make submissions in the course of the exercise of his right to

¹³⁸ Section 128 (7) of the Evidence Act of 1995.

¹³⁹ See the discussion at para 3.3. above.

¹⁴⁰ Section 128 of the Evidence Act of 1995.

¹⁴¹ De Villiers W "Problematic aspects with regard to bail under South African law: The reverse onus provisions and the admissions of the evidence of the Applicant for Bail at the later criminal trial revisited" *IJLCJ* 2015 43(1) 17 at 31-32: "In the first example the court upholds the objection by determining that there are reasonable grounds for the objection. The court informs the applicant for bail that he can choose to give evidence but need not do so. The applicant answers the question because he wants to be released on bail. The court must give the applicant a certificate and explain its effect. The evidence, as well as any evidence derived from the evidence, cannot be used against the accused at trial. In the second example the court rejects the objection. The applicant must answer the question. A certificate is not issued and the applicant does not enjoy any protection. In the third example the court upholds the objection and finds that the evidence would not incriminate the applicant under foreign law and that the interests of justice require that the applicant give the evidence. The court may require the applicant to answer the question. If the court directs the applicant to answer the question the court must give the applicant a certificate which protects the applicant against the use, or derivative use, of the evidence at trial."

access release on bail. In circumstances where the accused tendered false evidence at the bail application, he would be subject to criminal prosecution for the falsity of the evidence given at the bail proceedings. The threat of possible later prosecution based on the falsity of evidence has been regarded as sufficient by both the Canadian and Australian jurisdictions to strike a balance between the protection of the accused's right against self-incrimination and society's interest in the control of serious crime.

Whilst I am of the opinion that section 128 provides a cogent and logical framework for protecting the accused's right against self-incrimination in Australia, I am not convinced that the application of a similar provision would be successful in the South African context. The reality for bail applicants in schedule 5 and 6 bail applications in South Africa is as follows: The majority of bail applications are conducted in the lower courts, most notably the Magistrates courts dealing with criminal matters or more commonly referred to as the 'district' courts. The majority of bail applicants are indigent and reliant on representation from the state funded legal aid system administered by Legal Aid South Africa. The policy of Legal Aid South Africa is to place candidate attorneys in the Magistrates' courts to provide legal representation, except where the court is covered by a satellite office of Legal Aid South Africa or where the court is a so-called channelization court.¹⁴² In the two latter instances the legal aid function is attended to by an admitted (qualified) attorney. South Africa's indigent accused are in most cases poorly educated, unsophisticated and would find difficulty in knowing when to raise an objection to a question which may tend to incriminate the witness in the commission of an offence. The indigent accused would thus have to place his trust in an attorney-in-training to raise the necessary objection. The dilemma for the candidate attorney is that he is not allowed to conduct the trial of a matter that resided under schedule 5 or 6 for bail purposes, in that, the policy of Legal Aid South Africa prohibits candidate attorneys from appearing in the Regional Criminal Courts where

¹⁴² <http://no-lasa-app-03.legal-aid.co.za/Departmental%20Sites/Human%20Resources/Career%20Possibilities/Documents/CAREER%20POSSIBILITIES%20-%20LEGAL%20%201%20-%202015.pdf> (accessed on 22 November 2016) Channelization courts deal with all preliminary issues in a matter, including the bail applications, before the matter is transferred to a trial court as a trial-ready matter.

schedule 6 trials are conducted by qualified and experienced attorneys.¹⁴³ It is submitted that the candidate attorney would be hard pressed to determine based on his level of inexperience in schedule 6 trial matters, whether or not a particular question or line of questioning from state prosecutor had the tendency to incriminate the bail applicant in the commission of a crime. The only solution, it is submitted, would be to apply section 128(1) in such a manner that the court could also *mero motu* raise the fact that the answer to the question might tend to incriminate the witness in addition to the witness having the option of raising the objection. This approach is consistent with the court's duty to determine whether or not there are reasonable grounds for the witness' objection in any case. In determining whether or not the witness may be compromised by an answer to the question, the court would naturally have regard to the "circumstances of the matter and the nature of the evidence that there is a reasonable basis to apprehend danger of self-incrimination to the witness in circumstances where he is compelled to answer."¹⁴⁴ The same approach as envisaged when determining the reasonableness of the grounds of the objection would thus be followed by the court in a pro-active inquisitorial manner during the cross examination of the bail applicant by the state prosecutor.

It is submitted that at International law, Canadian law and Australian law the privilege against self-incrimination is sacrosanct and not departed from or infringed upon lightly. Whereas, in South African law, the accused's right against self-incrimination is quite easily departed from provided that the applicant was merely informed by the court that by testifying or submitting an affidavit in support of the bail application, he was deemed to have waived his right self-incrimination for purposes of his later trial. In light of the fact that international and foreign jurisprudence points towards an improved method of protecting the right against self-incrimination, whilst ensuring proper crime control and the imposition of an appropriate prosecution and sanction for accused who tender false evidence at proceedings (bail proceedings for our purposes) it is worthwhile to re-examine

¹⁴³ The writer has been in the employ of Legal Aid South Africa since October 2002 and is familiar with the internal policies and customs of the organization.

¹⁴⁴ *Pyneboard* at para 9.

the constitutional validity of section 60 (11B)(c) of the Criminal Procedure in Act in the concluding chapter in the context of our discussion.

CHAPTER 4: THE CONSTITUTIONAL CHALLENGE TO SECTION 60 (11B)(c)

CRIMINAL PROCEDURE ACT

4.1 Bill of Rights litigation

The accused's constitutional right not to be compelled to incriminate himself stems from the Bill of Rights enshrined in the Final Constitution.¹⁴⁵ The crisp question which requires examination is whether or not this right is infringed by the application of the provisions of section 60(11B)(c) of the Criminal Procedure Act where the accused as an applicant for bail relies on a weak State's case during a section 60(11)(a) bail application of the Criminal Procedure Act. In examining this question, it is apposite to briefly discuss the stages or framework of Bill of Rights litigation in South African law. The first stage is concerned with procedural issues, namely, the application of the Bill of Rights to a legal dispute¹⁴⁶ and the principle of justiciability: which includes standing,¹⁴⁷ ripeness,¹⁴⁸ mootness¹⁴⁹ and jurisdiction.¹⁵⁰ The first stage relating to procedural compliance is not

¹⁴⁵ Section 35(3)(f) of the Final Constitution.

¹⁴⁶ Section 8 of the Final Constitution provides the following: “ (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).”

¹⁴⁷ Section 38 of the Final Constitution provides that: “Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are- (a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of, a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members.”

¹⁴⁸ *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 21 (hereafter referred to as “*National Coalition*”); See also the minority judgment of Kriegler J in *Ferreira* where he stated that “the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective: it deals with situations or problems that have already crystallized, and not with prospective or hypothetical ones”.

¹⁴⁹ In *National Coalition* the Court held at para 21 that: “A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court if the court is to avoid giving advisory opinions on abstract propositions of law”.

¹⁵⁰ Section 167 of the Final Constitution provides that : “ (1) The Constitutional Court consists of the Chief Justice of South Africa, the Deputy Chief Justice and nine other judges (2) A matter before the Constitutional Court must be heard by at least eight judges.(3) The Constitutional Court- (a) is the highest court of the Republic; and (b) may decide- (i) constitutional matters; and (ii) any other

the focus of our discussion. For the purposes of our discussion it will be assumed that the procedural aspects applicable to the Bill of Rights litigation have been complied with. The second stage of the Bill of Rights litigation is concerned with matters of a substantive nature. *Firstly*, an examination of whether or not there has been an infringement of one or more of the rights contained in the Bill of Rights is required.¹⁵¹ *Secondly*, where there has been an infringement, the focus of the inquiry shifts to determine whether or not, despite the infringement, the offending section can nevertheless be rescued by the limitations clause.¹⁵² The last stage of the bill of rights litigation is concerned with identifying an appropriate remedy aimed at correcting the unjustifiable breach of one or more of the rights contained in the Bill of Rights.¹⁵³

matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and (c) makes the final decision whether a matter is within its jurisdiction. (4) Only the Constitutional Court may- (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state; (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121; (c) decide applications envisaged in section 80 or 122; (d) decide on the constitutionality of any amendment to the Constitution; (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or (f) certify a provincial constitution in terms of section 144. (5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force. (6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court- (a) to bring a matter directly to the Constitutional Court; or (b) to appeal directly to the Constitutional Court from any other court. (7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.”

¹⁵¹ *Ferreira* at para 44.

¹⁵² Section 36 of the Final Constitution provides that : “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

¹⁵³ Sections of the Final Constitution having relevance: Section 38 provides that –“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights...”; Section 172 provides that (1) When deciding a constitutional matter within its power, a court- (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and (b) may make any order that is just and equitable, including- (i) an order limiting the retrospective effect of the declaration of invalidity; and (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect. (2)(a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by

4.2 Infringement of the Right against Self-Incrimination

The right under discussion for our purposes is contained in section 35(3)(j) of the Final Constitution which provided that “[e]very accused person has a right to a fair trial, which includes the right...not to be compelled to give self-incriminating evidence”.

It is submitted that Kriegler J in *Dlamini* construed the right against self-incrimination as a right not to testify i.e. *the right to remain silent*. It is submitted that none of the examples¹⁵⁴ quoted by Kriegler J offers a current solution nor does it adequately deal with the development in our law, that compels the bail applicant to prove on a balance of probabilities that he would be acquitted at trial where he relied on a weak State’s case in a section 60(11)(a) bail application. This exercise of proving a probable acquittal at a later trial logically entailed that the accused would be compelled to delve into the merits of the case and proffer his version in response to the State’s allegations. The accused thus ran the risk of adducing evidence which may be incriminatory during this robust exercise. In terms of section 60(11B)(c), the accused’s incriminatory evidence could be used by the State against him at the later trial. The section does not provide the accused with immunity against the use of the evidence. Were the accused to simply remain silent during the bail application, the result would be that he would simply not be released on bail. The accused in essence therefore had no choice in the matter in deciding whether or not to adduce evidence. He was simply “compelled” to adduce evidence. The accused was therefore in a position, not postulated by any of the other examples given by Kriegler J, wherein he

the Constitutional Court (b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct. (c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court. (d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.” Section 8 provides as follows: (3) “When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court- (a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).” Section 39 provides that: “(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

¹⁵⁴ *Dlamini* at para 94.

had to forego the right against self-incrimination in order to exercise his right to access bail.¹⁵⁵ Where an accused did not volunteer a statement to the police and elected to remain silent, the police were simply not assisted in their investigative enquiries. Where the accused did not tender a plea explanation during the arraignment stage of the trial, no adverse inference could be drawn from the exercise of his right to remain silent. Where the accused elected not to testify in support of his defence, no adverse inference aimed at a conviction could be drawn from his silence unless there existed incriminatory evidence against the accused which shifting the evidential burden of rebutting same to the accused.¹⁵⁶ The State still ultimately bore the burden of proof. However, where the accused elected not to adduce evidence or failed to convince the court that he would be acquitted at trial in a Schedule 6 bail application in circumstances where he sought to rely on a weak State's case as proof of exceptional circumstances, the accused was guaranteed that he would not be released on bail.

It is submitted that section 60(11B)(c) of the Criminal Procedure Act infringes the accused's right against compelled self-incrimination at trial as it allows the State to admit incriminatory evidence given by the accused at the bail application in circumstances where the accused was compelled to prove that he would be acquitted at trial in his reliance on proof of a weak State's case during a section 60(11)(a) bail application.

4.3 Does the infringement of the Right against Self-Incrimination amount to a justifiable limitation in terms of the Final Constitution

Although 60(11B)(c) of the Criminal Procedure Act infringes the accused's right against self-incrimination in the narrow context as explained above, the next stage of the constitutional enquiry involves dealing with whether or not the infringement constitutes a justifiable limitation of the right in an open and democratic society based on human

¹⁵⁵ I am in agreement with this view as expounded by De Villiers W in his LLD thesis titled: Problematic aspects of the right to bail under South African law: A comparison with Canadian law and proposals for reform submitted at the University of Pretoria, 2000 at 470.

¹⁵⁶ *S v Boesak* 2001 (1) SA 912 (CC) at para 24.

dignity, equality and freedom. Once the infringement of a right has been established, the onus is on the party relying on the justification of the law limiting the right to prove that the limitation is justified in terms of the limitations clause contained in section 36 of the Final Constitution.¹⁵⁷ For the purposes of our discussion that party would be the State.

Section 36 of the Final Constitution provided that:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

The above factors were derived from the matter of *S v Makwanyane*.¹⁵⁸ The factors enumerated are not necessarily to be applied as a standard formulaic test. The factors act as a guide to the application of a qualitative test involving the weighing-up of competing interests. ¹⁵⁹ In our case the right which is sort to be justifiably limited is the right of the accused not to be compelled to incriminate himself at trial in the context of the exercise of the accused’s right to access bail. As opposed to this, is the competing interest of the State at ensuring crime control relating to serious offences and offenders. The State seeks to achieve this by holding the accused accountable at trial for statements and submissions made and evidence led by the accused during the pre-trial bail application stage. The State’s aim would thus be to achieve the successful conviction of the offender of serious crimes. Central to the limitations inquiry are two issues. *Firstly*, whether the offending section constituted a proportional infringement of the accused’s right in relation to the interests which the section sought to protect. *Secondly*, whether there is a rational

¹⁵⁷ 1995 (3) SA 391 (CC) at para 102 (hereafter referred to as “*Makwanyane*”).

¹⁵⁸ *Makwanyane* at para104.

¹⁵⁹ Woolman S “Out of Order? Out of Balance? The Limitation Clause of the Final Constitution” (1997) 13 *SAJHR* 102 at 109-111.

connection between the infringements of the right and the aim that the said infringement seeks to achieve.¹⁶⁰

I now turn to the process of applying the limitations clause. The point of departure is that only a law of 'general application' can justify the limitation of a right. Section 60(11B)(c) of the Criminal Procedure Act constitutes legislation in its original form, therefore, logically qualifies as a 'law of general application.'¹⁶¹ In considering the proportionality of the harm caused by the offending section against the benefit which the offending section is deemed to extoll regard must be had to the factors enumerated in subsection (a) to (e) of section 36. I deal with each in turn.

4.3.1 The nature of the right

It is submitted that the right of the accused against self-incrimination is an intrinsic part of our criminal justice system. Our constitutional court has already held the right in high regard and accorded it particular importance in our Constitutional regime. In *Ferreira* the court held that the rule against self-incrimination is not a mere rule of evidence but a constitutional right which is "inextricably linked to the right of an accused to a fair trial" and it existed to protect the right to a fair trial.¹⁶² It is submitted that the said right carries substantial weight in the process of balancing any justifiable limitation of the right. It is submitted that in our context it is particularly important when one considers the nature of the right, to also consider that the right against self-incrimination is jeopardised in the context of the accused seeking to exercise another constitutional right, to wit, the right to access bail. The right to bail is a practical mechanism aimed at realising another important right, namely, the right to freedom and security of the person as envisaged in section 12 of the Final Constitution. It is my submission that given this context, the right against self-incrimination assumes even greater significance. The nature of the right against self-incrimination viewed in the context of bail and freedom and security of the person is thus

¹⁶⁰ *Makwanyane* at para 104.

¹⁶¹ See *Larbi-Odam v MEC FOE Education (North-West Province)* 1998 (1) SA 745 CC at para 72 where it was held that subordinate legislation qualifies as a "law of general application".

¹⁶² *Ferreira* at para 159.

overwhelmingly weighty and crucial to an open and democratic society based on human dignity, freedom and equality.

4.3.2 The importance of the purpose of the limitation

Section 60(11B)(c) of the Criminal Procedure Act was enacted at a time in our country's history when serious and violent crime seemed to be on the increase.¹⁶³ It is submitted that the overarching purpose of the legislative enactment of the section 60 of the Criminal Procedure Act as a whole was to assist in the 'fight against crime' by making it more difficult for the alleged offenders of serious crimes to be allowed out on bail. Viewed more narrowly, the purpose underlying specifically section 60(11B)(c) of the Criminal Procedure Act was expounded in by the court in *Dlamini*. Kriegler J approved of the reasoning of the court below in *Natal Dlamini*, that the privilege against self-incrimination did not afford the accused a right to lie or conceal the truth. It would appear that the primary purpose for the existence of section 60(11B)(c) of the Criminal Procedure Act was to prevent an accused from making statements or adducing evidence at the bail application which differ markedly from that which is said or adduced at trial. It is submitted that the purpose of the section was to ultimately protect the administration of justice. It is submitted that the protection of the administration of justice is an important and worthwhile interest which deserves protection in a constitutional democracy. However, as I argue below, the protection of the administration of justice can be adequately served by means which fall short of a constitutional infringement of a constitutional right.

4.3.3 The nature and extent of the limitation and the relation between the limitation and its purpose

These two factors together relate to the issue of proportionality. The point of departure is that the party seeking to rely on the limitations clause must show that the infringement of the right is proportional to the aim or purpose that such infringement seeks to achieve. This factor is perhaps better understood by the phrase that "a law that limits rights should

¹⁶³ *Dlamini* at para 67.

not use a sledgehammer to crack a nut”.¹⁶⁴ The State will therefore have the evidential duty to adduce empirical data or expert opinion to prove that the offending section achieves a reduction in the commission of serious crime.¹⁶⁵ It is submitted that the State will be hard pressed to adduce empirical data or expert evidence which shows that a high number of successful convictions were achieved based on the fact that the State used the bail transcript as evidence against the accused at trial in order to achieve a conviction. Such evidence may well be counter-productive as it may show that the State is reliant on the accused to assist it in proving its case against the accused in clear violation of the accused’s presumption of innocence.¹⁶⁶ To what extent the infringement of the right achieves the purpose of the section is the question which requires attention. It is submitted that the extent of the limitation on the accused’s right against self-incrimination is significant. It is submitted that the effect of the limitation of the right is twofold. *Firstly*, an accused might very well be apprehensive in applying for bail because of the fact that whatever evidential material he lays before the court could be used against him at trial. The accused would be hamstrung from being candid and frank with the court. *Secondly*, the effect of the limitation is that it could ultimately play a vital role in a later conviction of the accused where the accused’s own bail evidence is used against him to achieve a conviction followed by a lengthy term of imprisonment. It is submitted that the offending section is overbroad in trying to achieve its overarching purpose of crime control.

4.3.4 Less restrictive means to achieve the purpose

If a less restrictive but equally effective alternative method exists to achieve the purpose of the limitation, then such method should be preferred against the overbroad method infringing on the accused’s right against self-incrimination.¹⁶⁷ This principle of minimal intrusion on a constitutional right has been recognised by our Constitutional court.¹⁶⁸ It is submitted that lesser restrictive means exist in our context. The purpose of the legislature

¹⁶⁴ *S v Manamela* 2000 (3) SA 1 (CC) at para 34.

¹⁶⁵ *Ferreira* at para 92.

¹⁶⁶ Section 35(3)(h) of the Bill of Rights in the Final Constitution.

¹⁶⁷ Currie I and De Waal J *The Bill of Rights Handbook* 6th edition (Juta 2013) at 170.

¹⁶⁸ *Makwanyane* at paras 123–128; *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) at paras 17 - 20

could have been achieved by simply charging the accused with the offence of common law perjury¹⁶⁹ or the statutory crime of making conflicting statements under oath¹⁷⁰ where his evidence on the merits of the case at the bail and trial stage was mutually exclusive and where the evidence resulted in the accused obtaining bail and/or an acquittal at trial. This approach is in line with the Canadian and Queensland approach as discussed above.

Furthermore, the legislature could have incorporated certain procedural safeguards to militate against the “lies”, thus ensuring that the version was *bona fide* and reliable. These procedural safeguards would be applicable during the section 60(11)(a) proceedings of the Criminal Procedure Act where the applicant has signalled an intention to rely on proof of a weak State’s case. The safeguards could include, *inter alia*, that as a matter of evidence, the mere *ipse dixit* of the accused on its own would be insufficient to sustain proof of a weak State’s case and that the court should require of the accused to submit independent corroboratory evidence in support of his version of innocence. In matters where the bail applicant was unrepresented or unable to independently procure corroboratory evidence held by third parties, section 60(3) of the Criminal Procedure Act empowered the court to make an order that certain relevant and necessary information or evidence be placed before it, if it is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application.¹⁷¹

¹⁶⁹ Snyman CR *Criminal Law* 5th Edition (LexisNexis 2008) at 343 states that “Perjury consists in the unlawful and intentional making of a false statement in the course of a judicial proceeding by a person who has taken the oath or made an affirmation before, or who has been admonished by, somebody competent to administer or accept the oath, affirmation or admonition”.

¹⁷⁰ Section 319(3) of the Criminal Procedure Act provides that: “If a person has made any statement on oath whether orally or in writing, and he thereafter on another oath makes another statement as aforesaid, which is in conflict with such first-mentioned statement, he shall be guilty of an offence and may, on a charge alleging that he made the two conflicting statements, and upon proof of those two statements and without proof as to which of the said statements is false, be convicted of such offence and punished with the penalties prescribed by law for the crime of perjury, unless it is proved that when he made each statement he believed it to be true.”

¹⁷¹ Section 60(3) of the Criminal Procedure Act provided that: “If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.”

In instances where the accused submitted an affidavit and obtained bail on the strength of the lies told in the affidavit which is later uncovered by the State, but the matter does not proceed to trial for any number of reasons, such as the unavailability of witnesses or a key witness, the accused can simply be charged with a contravention of section 9 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 which provided that “any person who, in an affidavit, affirmation or solemn or attested declaration made before a person competent to administer an oath or affirmation or take the declaration in question, has made a false statement knowing it to be false, commits an offence.”

5. Proposed Remedy

The last aspect which deserves attention is the constitutional remedy which is applicable in circumstances where a right has been infringed by the offending section which cannot be saved in terms of the limitations clause. The point of departure is that once a court finds that a law or provision is inconsistent with the Constitution, the said law or provision should be declared invalid to the extent of its inconsistency in terms of section 172(1)(a) of the Final Constitution.¹⁷² It is a further requirement that the remedy must be just and equitable, thus courts are empowered to regulate the impact of the declaration of invalidity.¹⁷³ In an effort at controlling the effect of the declaration of invalidity the court has the options of severing the unconstitutional provision from the constitutional part, by reading-in or by controlling the retrospective effect of the declaration of invalidity or the application of a combination of the aforesaid.¹⁷⁴ The court also has the option of

¹⁷² *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) at para 71 wherein the court found that “section 172 contains an express duty to declare law inconsistent with the Constitution invalid”.

¹⁷³ *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) at para 107.

¹⁷⁴ *S v Shinga* 2007 (2) SACR 28 (CC) at paras 54–56 related to the declaration of the invalidity of sections 309B and 309C of the Criminal Procedure Act which the Court held was unconstitutional in only two respects and, apart from these aspects, was not inconsistent with the Constitution. The Court further held that it would not be in the interests of justice to declare the whole of these sections invalid and the appropriate remedy was severance in the case of s 309C(4)(c) and a combination of severance and reading-in in the case of s 309C(5)(a).

suspending the declaration of invalidity.¹⁷⁵ The purpose of suspending the order of invalidity is “to put Parliament on terms to correct the defect in an invalid law within a prescribed time. If exercised, this power has the effect of making the declaration of invalidity subject to a resolute condition. If the matter is rectified, the declaration falls away and what was done in terms of the law is given validity. If not, the declaration of invalidity takes place at the expiry of the prescribed period, and the normal consequences attaching to such a declaration ensue.”¹⁷⁶ In our discussion, it is submitted that the most appropriate course of action would be the reading in of appropriate words into section 60(11B)(c) of the Criminal procedure Act aimed at granting the accused immunity against the use of incriminatory evidence at the subsequent trial following a bail application residing under section 60(11)(a) of the Criminal Procedure Act in circumstances where the accused was compelled to prove on a balance of probabilities that he would be acquitted at trial where he relied on a weak State’s case. The purpose hereof would be to uphold the accused’s right against self-incrimination whilst at the same time ensuring that an accused who deliberately lies under oath in order to obtain release on bail is held accountable for his conduct in an effort at combatting serious crime and ensuring that the administration of justice does not fall into disrepute. Section 60(11B)(c) of the Criminal Procedure Act could read as follows:

“(11B) ...

(c) The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings except that the record of the bail proceedings shall not form part of the record of the trial of the accused following upon such proceedings where the bail application was brought in accordance with the

¹⁷⁵ Section 172(1)(b)(ii) of the Final Constitution provided that: “Powers of courts in constitutional matters (1) When deciding a constitutional matter within its power, a court...(b) may make any order that is just and equitable, including...(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect

¹⁷⁶ *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC) at para 107

provisions of section 60(11)(a) provided that the court hearing the bail application is satisfied that the bail applicant has adduced bona fide and reliable evidence in challenging the weakness of the State's case except where the State seeks to institute criminal proceedings against the bail applicant for perjury, a contravention of the provisions of section 319(3) of Act 56 of 1955 or section 9 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963: Provided that if the accused elects to testify or submit a written statement on affidavit in support of and during the course of the bail proceedings the court shall inform him or her of the fact that the anything he or she says during testimony or by way of a written statement on affidavit, may be used against him or her at his or her trial in relation to charges of perjury, a contravention of the provisions of section 319(3) of Act 56 of 1955 or section 9 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 and that such evidence becomes admissible in the said proceedings."

It is submitted that this construction is in keeping with our Constitutional project of ensuring the protection of individual liberty in the interests of an open and democratic society based on human dignity, equality and freedom against unjustified infringement by the State, whilst simultaneously, protecting the legitimate interests of the State in ensuring that serious crime is effectively combatted and the administration of justice is not brought into disrepute.

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