

**BAIL AND THE PRESUMPTION OF INNOCENCE:
A CRITICAL ANALYSIS OF SECTION 60(1-11) OF THE
CRIMINAL PROCEDURE ACT 51 of 1977 AS AMENDED.**

BY

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PRESENTED IN PARTIAL FULFILMENT FOR THE DEGREE

MAGISTER LEGUM AT THE FACULTY OF LAW,

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FEBRUARY 2012

DECLARATION

I, **Mzwandile Reuben Matshoba**, declare that the work presented in this mini-thesis is original. It has never been presented to any other University or Institution. Where other people's work has been used, references have been provided. It is in this regard that I declare this work as originally mine.

Signed.....

Date..2011.11.11.

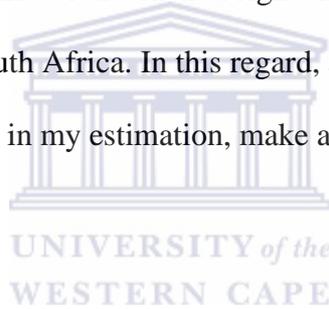


Supervisor: Dr Raymond Koen

ABSTRACT

In South Africa, as in most jurisdictions, the presumption of innocence is a guaranteed constitutional right. The rationale of the presumption lies in the protection which it offers, since a person charged with a criminal offence stands to lose dearly in personal liberty, in social life and psychological well-being. The presumption is, therefore, a pivotal element of a culture of democracy and human rights.

This study is prompted by the realisation that the presumption of innocence, which ought to constitute one of the most fundamental rights in any criminal justice system, is being eroded steadily in South Africa. In this regard, a significant area of concern is the current bail laws which, in my estimation, make a big dent into the right to be presumed innocent.



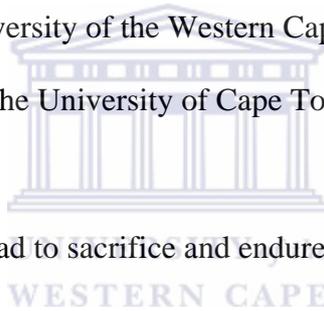
The bail laws are part of government's policies directed at fighting crime. However, the pre-occupation with crime control measures threatens to reverse the hard-won rights of the accused and threatens to undermine individual liberty. Also, these measures are incompatible with the constitutional commitment to a culture of human rights.

ACKNOWLEDGEMENTS

It has been said that a thesis is about one idea. Its process requires assistance from others. I happily take this opportunity to extend gratitude to the following people:

My promoter, Raymond Koen, for his competent, speedy guidance and meticulous attention to detail.

The friendly assistance of Sulaiman Tarkey, Mohamed Paleker and other personnel of the Law Library at the University of the Western Cape, Wynberg Library, Kuilsriver Court Library and the University of Cape Town Law Library.



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

My friends and colleagues, Andre Groenewald and Joe Blanckenberg, who contributed in different ways.

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CHAPTER ONE: INTRODUCTION AND BACKGROUND

1.1 Objectives of the study

The primary objective of this study is to assess critically the relationship between the new bail laws, contained in section 60 of the Criminal Procedure Act 51 of 1977, and the presumption of innocence. The study evaluates the implementation of the new bail laws in South African magistrates' courts and outlines problems that preceded these laws and that motivated their passage. It also highlights the challenges in the implementation process. At the conclusion of the study, recommendations are put forward that may stimulate critical thinking, leading to improvements to these laws.



1.2 Background of the study

Crime in South Africa is at high levels, especially violent crimes such as murder, attempted murder, rape and assault with intent to do grievous bodily harm.¹ The number of robberies with aggravating circumstances (this includes bank robberies, car and truck hijackings and cash-in-transit robberies) increased by 13.9% from 60 089 in 1993 to 68 416 in 1994.² The number of murders was reported in 1993 at 19 583, and in 1994 at 18 312. There was thus a drop of 6.5%.³

However, the drop was not significant. It did not affect the overall crime rate, which remained consistently high. The national crime figures in 1994/95

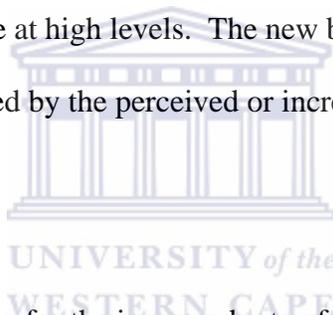
¹ Butler (2004: 141).

² Sidiropoulos *et al* (1996: 71).

³ Sidiropoulos *et al* (1996: 72).

gave 44 751 reported cases of rape (including attempts) per 100 000 people. On the one hand, this showed that rape had become a very serious offence because in 1990 the reported rape cases per 100 000 people was at 20 321 and, on the other, it showed that there were more people who came forward to report the offence.⁴ In 1994/95 assaults with intent to do grievous bodily harm were reported at 215 671.⁵

The state had to take action. It did so by means of legislation. The state was motivated by the reported figures that show that, even though murder had stabilised, reported cases of rape (including attempts) and robbery with aggravating circumstances were at high levels. The new bail laws were the legislative intervention prompted by the perceived or increased levels of violent crime.



Various reasons have been given for the increased rate of violent crime. Some writers attribute the increase to the government's failure to deal with high unemployment.⁶ Others argue that the police paid little attention to criminal activity. They focused instead on political violence.⁷

South Africa became a constitutional democracy when the 1993 Constitution was adopted. The Constitution included a Bill of Rights. The Constitution had

³ Sidiropoulos *et al* (1996: 71).

⁴ Sidiropoulos *et al* (1996: 66).

⁵ Frans *et al* (2006: 461).

⁶ Frans *et al* (2006: 461).

⁷ Frans *et al* (2006: 461).

ramifications for the Criminal Procedure Act, magistrates, arrested persons, investigating officers and members of the public.

The Criminal Procedure Act (CPA) and the 1993 Constitution differed in respect of bail. The former did not have interests of justice requirement nor did it provide a right to bail. The latter had both. Before the 1993 Constitution, the onus was on the accused to show that he was entitled to be released on payment of bail. The presiding officer had to determine whether or not the accused would stand trial. Furthermore, he had to balance the interests of the accused with those of the community. The presiding officer had to bear in mind also that there is a presumption of innocence which operates in favour of the accused. A consequence of the operation of the presumption of innocence was that the presiding officer ought not to infringe the accused's liberty before his guilt has been pronounced. The only condition of release from custody was that the interests of justice should not be prejudiced thereby.⁸

The 1993 Constitution provided no guidelines for presiding officers to follow. It also did not provide guidance to the investigating officers about opposing a bail application which was based on the interests of justice. The presiding officers took an approach that dictated that, where there was a right to bail, the state had a duty to show that there were grounds to keep the accused in custody. This meant that where the state did not discharge its onus, the accused would be released on bail.⁹

⁸ Dela Hunt & Combrinck (1999: 318).

⁹ Cowling (1996: 50).

Members of the public criticised this approach and developed a perception that presiding officers were too soft on criminals, and that bail was granted too easily.¹⁰ In view of the high crime rate, the public was concerned that criminals should be dealt with more effectively. People perceived due process as favouring criminals.

The state passed one amendment to the CPA in 1995 and another in 1997. The 1995 amendment made it difficult for suspects to be released on bail. The amendment was aimed at repeat offenders.

The 1997 amendment was passed in order to introduce a list of very serious offences, known as Schedule 6 Offences. Accused persons who had allegedly committed very serious offences found it difficult to be released on bail. Murder is at the top of this list. However, it is problematic to make it difficult for an accused to be admitted to bail for two reasons. Firstly, he has a right to bail and, secondly, there is a presumption of innocence which operates in his favour.

1.3 Problem statement

The study is prompted by the realisation that the presumption of innocence, which ought to constitute one of the most fundamental rights in any criminal justice system, is being eroded steadily in South Africa. A significant area of concern in this regard is the current bail laws which, in my estimation, make a big dent into

¹⁰ Cowling (1996: 51).

the right to be presumed innocent. The challenge lies in the implementation of the bail laws in South African courts. The presumption of innocence cannot be guaranteed easily during bail applications due to the amendments to the CPA referred to above. It is submitted that these amendments may have the effect that an accused is denied bail even though there is no strong case against him. It is thus crucial to investigate the relationship between the presumption of innocence and the legislative amendments in question.

1.4 Scope of the research

The study will be limited to the implementation of the bail laws in South African courts in pre-conviction matters. It thus will exclude bail applications which have been brought after conviction, pending the results of an appeal. The presumption of innocence has no substantial role in such bail applications.

1.5 Significance of the research

I shall examine critically the flaws in the implementation process of the bail laws. This will assist policy makers to propose amendments to the current laws.

The research will show that the success of anti-crime initiatives is to be found where the crime fighting agencies investigate with due regard to the presumption of innocence. The significance of the study is that it stimulates critical thinking with regard to the role of the presumption of innocence in bail applications.

1.6 Research methodology

Textbooks, journal articles, legislation and case law will be the main sources of information. These sources underpin the qualitative research which is undertaken in this study. The research paper uses a critical-analytical methodology.

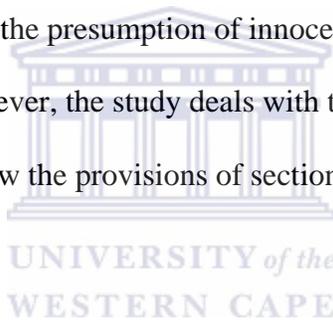
1.7 Review of related literature

In *Principles of Evidence*, Schwikkard and others have a section on the presumption of innocence. It identifies a number of infringements. However, the study does not engage the bail provisions. In the *Presumption of Innocence*, Schwikkard discusses the issue of the onus in bail hearings. The submission is that the standard of proof required now of the state is no longer proof beyond a reasonable doubt. Instead the state has to show that the interests of justice require that the accused should not be granted bail. However, the study does not consider the impact of the new standard upon the presumption of innocence.

There are two other recent studies which are relevant. In ‘The Constitutional Court bail decision: Individual liberty in crisis’, Sarkin and others argue that the Constitutional Court judged as constitutionally valid legislation that allows a breach of the presumption of innocence. They submit that in doing this the Court was merely responding to panic or hysteria about the levels of crime. However, this article has as its main focus the critical analysis of the decision in *S v Dlamini*, *S v Dladla*, *S v Joubert*, *S v Schietekat*. It does not deal with the impact of section 60 on the presumption of innocence.

In her article, 'If the interests of justice permit: Individual liberty, the limitations clause and the qualified constitutional right to bail', Axam argues that the courts have foreseen the potential damage of inroads into rights, especially the presumption of innocence. She notes that the courts thus far have been reluctant to uphold legislation which limits rights without good cause. She focuses on the limitations clause as an inroad into the presumption of innocence. She does not deal with section 60 as an assault upon the right to be presumed innocent.

In *Bail*, van der Berg discusses the presumption of innocence as well as several subsections of section 60. However, the study deals with the provisions separately. It makes no attempt to show how the provisions of section 60 affect the right to be presumed innocent.



Steytler's *Constitutional Criminal Procedure* has two relevant sections. One deals with the presumption of innocence. The other with the accused's right to be released on bail. The former focuses on the right to be presumed innocent insofar as it relates to the trial. The latter discusses section 60 and identifies certain infringements of rights of accused and detained persons. Again, however, the relationship between section 60 and the right to be presumed innocent is not analysed.

1.8 Outline of remaining chapters

Chapter 2 will contain an outline of the bail laws prior to the 1995 and 1997 amendments of the CPA. It will include discussions of both the 1993 and 1996 Constitutions as they relate to bail. The chapter will demonstrate the pivotal role of the presumption of innocence in the question of bail.

The focus of chapter 3 will be on the requirement of the interests of justice, as contained in section 60(1) to section 60(10) of the CPA. The chapter will include a discussion of how the implementation of the new bail laws affect the right to be presumed innocent.

Chapter 4 will focus on section 60(11) which contains the requirement relating to exceptional circumstances in bail hearings. It will be shown that this requirement undermines the right to be presumed innocent.

Chapter 5 will contain a comparative analysis of different models of the presumption of innocence. It will sum up the research findings and make certain recommendations with regard to how the presumption of innocence could be accommodated in a better and an equitable fashion in South African criminal justice.

CHAPTER 2: THE APARTHEID POSITION IN RESPECT OF BAIL

2.1 Introduction

This chapter contains an outline of the position in respect of bail prior to the advent of the new constitutional dispensation. It will be shown that courts upheld the presumption of innocence, despite the passage of legislation which violated the presumption, as with the Internal Security Act. The discussion will include both the 1993 and the 1996 Constitutions. The position during the apartheid era will be illustrated by both legislation and relevant reported cases.

2.2 Bail in the Criminal Procedure Act 51 of 1977

Prior to the 1995 and 1997 amendments, the Criminal Procedure Act (CPA) made provision for three bail scenarios. The first two concerned bail applications which were not opposed by the state, and the third dealt with opposed bail applications. Of the unopposed bail applications, one took place outside of court hours. It was provided for in terms of section 59 of the CPA:

An accused who is in custody in respect of any offence, other than an offence referred to in Part II or Part III of Schedule 2, or in the Schedule to the Internal Security Act, 1950 (Act 44 of 1950), may, before his first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, if the accused deposits at a police station the sum of money determined by such police official.

The application was regarded as informal and it took place in respect of lesser offences.¹¹

¹¹ Joubert (1978: 393).

The CPA also made provision for a formal bail application, which was not opposed by the state. In terms of section 60:

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 in respect of such offence on condition that the accused deposits with the clerk of the court or, as the case may be, the registrar, or with a member of the prisons service at the prison where the accused is in custody, or, in the case of a periodical court, if no clerk of the court is available with any police official at the place where the accused is in custody, the sum of money determined by the court in question.

It is submitted that section 60 was directed at serious offences. This submission is based on the fact that provision had already been made for the lesser offences in section 59. The section made provision for bail at the first appearance and at subsequent appearances. The court would determine the amount of money. The accused could pay the bail in court, in prison or at the police station. The capability to bring a bail application by the accused has been referred to traditionally as the right to apply for bail. It can be argued, thus, that bail was available for all offences, whether serious or not. Furthermore, bail applications could be heard in lower as well as in superior courts.

Section 61 provided for an opposed bail application:

If an accused who is in custody in respect of any offence referred to in Part III of Schedule 2 applies under section 60 to be released on bail in respect of such offence, and the Attorney-General, either by written notice or in person, informs the court before which the accused applies for bail that information is available to him-(a) which, in his opinion, cannot be disclosed without prejudice to the public interests or the administration of justice; and (b) which, in his opinion, shows that the release of the accused on bail is likely to affect the administration of justice adversely or to constitute a threat to the safety of the public or the maintenance of the public order, and that he on the ground of the likelihood of such adverse effect or of such threat objects to the granting of bail to the accused, the court shall refuse the application for bail.

The opposition to bail related to offences contained in Schedule 2 Part III. These were:

Arson, murder, kidnapping, child stealing, robbery, housebreaking, whether under the common law or statutory provision, with intent to commit an offence and any conspiracy, incitement or attempt to commit any offence referred to in this Part.

The case of *Bennett* illustrated the problems of the Attorney-General's role in section 61 bail applications.¹² The court compared the discretion of the court and the *ipse dixit* of the Attorney-General. Vos J said that the Attorney-General's attitude to bail was a factor to be considered in balancing the probabilities. The judge went on to say that the *ipse dixit* of the Attorney-General is not conclusive. He argued that the Attorney-General acted on information from his own officials or investigating officers. He did not consider the information of the applicant, and even if he did, he would not be able to give consideration to it to the same extent that the court did. The judge opined that the court is in a better position to assess the case as a whole, and concluded that the Attorney-General's *ipse dixit* cannot be substituted for the court's discretion.¹³

Masasanye is a further illustration of the problems of the power of the Attorney-General.¹⁴ The power had been exercised and the two accused were kept in custody. The allegation was that they made use of weapons to commit robbery. Release on bail had been denied. The trial began and one complainant could not recognise the two accused. The second witness came to testify and gave

¹² *S v Bennett* 1976 (3) SA 652 (C).

¹³ At 655A-B.

¹⁴ *S v Masasanye* 1966 (3) SA 593 (W).

an elaborate narration of the robbery. However, the witness could not link the two accused to the offence. This decision showed that section 61 of the CPA, where the Attorney-General was empowered to order that an accused should be denied bail, could be exercised even where there is no evidence which incriminates the accused.

2.3 Bail in other statutes

The CPA was not the only source of or authority for the apartheid bail position. There were other statutory provisions. The outstanding feature of these provisions was their disregard for the presumption of innocence. They allowed for the detention of people who were not accused or even charged. One of these was the Internal Security Act 44 of 1955. The Act preceded the Internal Security Act 74 of 1982. Section 12A (1) of Act 44 of 1955 provided that:

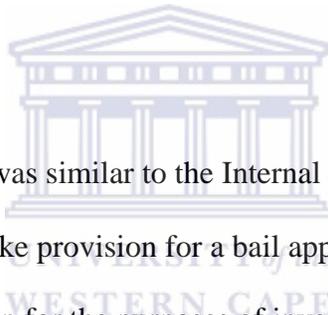
Whenever any person has been arrested on a charge of having committed any offence referred to in the Schedule, the Attorney-General may, if he considers it necessary in the interest of the safety of the State or the maintenance of public order, issue an order that such person shall not be released on bail or otherwise before sentence has been passed or he has been discharged.

In *Mbele*, Stegmann J analysed the latest version of the Internal Security Act, namely, Act 74 of 1982.¹⁵ He singled out section 30.¹⁶ He argued that the section interfered with the power of courts to grant bail. It infringed upon the ordinary power of the court to consider and decide whether or not to release a detained person on bail or on warning in certain circumstances. The judge argued that the Internal Security Act was an unjust piece of legislation, in that it removed from

¹⁵ *S v Mbele and Another* 1996 (1) SACR 212 (W).

¹⁶ By then section 30 had been repealed by Act 126 of 1992.

the courts the power of deciding whether the interests of justice would be served best by the continued detention of the accused person.¹⁷ Stegmann J went on to say that a provision was needed to restore to courts the power to decide in all circumstances where the best interests of justice resided, to resolve the conflict between the right of an individual to liberty and the desire of the executive to deprive him of his liberty. He said that such a restoration of the ordinary jurisdiction of the courts at the same time would restore the right of every detained individual to claim adjudication by a court on the question of whether the interests of justice would be served best by his continued detention or release, with or without bail.¹⁸



The Terrorism Act 83 of 1967 was similar to the Internal Security Act in certain respects. The statute did not make provision for a bail application. Also, it allowed for the arrest of a person for the purposes of investigation. Section 6(1) provided that:

Notwithstanding anything to the contrary in any law contained, any commissioned officer as defined in section 1 of the Police Act, 1958 (Act No 7 of 1958), of or above the rank of Lieutenant-Colonel may, if he has reason to believe that any person who happens to be at any place in the Republic, is a terrorist or is withholding from the South African Police any information relating to terrorists or to offences under this Act, arrest such person or cause him to be arrested, without warrant and detain or cause such person to be detained for interrogation at such place in the Republic and subject to such conditions as the Commissioner may, subject to the directions of the Minister, from time to time determine, until the Commissioner orders his release when satisfied that he has satisfactorily replied to all questions at the said interrogation or that no useful purpose will be served by his further detention, or until his release is ordered in terms of subsection (4).

¹⁷ The legislation vested the power so to decide in the executive.

¹⁸ At 233G-234B

The release of a person under this section depended on the Commissioner of Police or the Minister of Justice. The power of the court to adjudicate was excluded.¹⁹

2.4 The approach of the South African courts

South African reported cases played a major role in determining the principles of bail during the apartheid era. The courts set out certain principles by which they could come to a conclusion as to whether the interests of justice might or might not be prejudiced by granting bail to the accused.²⁰

According to Du Toit *et al*, the courts had one question which had to be answered, namely, whether the interests of justice would be prejudiced if the accused were released on bail.²¹ The answer would assist in deciding whether bail was to be granted or not. The authors posit that the question as to whether the interests of justice would be prejudiced when the accused was released on bail was subdivided by courts. There were four aspects, namely, would the accused stand trial upon release, would the accused interfere with witnesses, would he commit further crimes and would the release be prejudicial to the maintenance of law and order and the security of the state? The authors assert that when the court was busy with this inquiry, at the same time it should determine whether any objections to bail could be accommodated by bail conditions. It would appear that the courts started

¹⁹ Section 6 (5) of the Terrorism Act 83 of 1967 provided that: “No court of law shall pronounce upon the validity of any action taken under this section, or order the release of any detainee.”

²⁰ Du Toit *et al* (1993: 9).

²¹ At pg 9.

their analysis with the four considerations which are mentioned above. Once the court had had regard to the four considerations, it took cognisance of the objections to bail. The purpose of giving consideration to the objections to bail was to find out whether or not the objections might be accommodated by conditions. This inquiry gave courts a full picture and enabled them to make a finding.

The case of *Pineiro* is an illustration of the application of the principles which were developed in the apartheid era.²² Eleven accused approached the court with a bail application. The applicants were citizens of Spain. It was alleged that they were in contravention of the Sea Fisheries Act 58 of 1973. Frank J divided the 11 applicants into two groups. He distinguished the masters from the officers. The allegation was that the applicants were aboard three fishing vessels. It was averred also that they had been in custody since their apprehension. There were no crew members on any of the vessels. The state needed to do investigation on the vessels. Four members of the Namibian police were deployed on each vessel. There was no possibility of absconding by means of the vessels because they had been seized by the state. However, the state opposed the bail application. One of the grounds was that the applicants might abscond. Frank J outlined the principles which courts followed in a bail application at the time. These were whether the applicant would stand trial, would interfere with the witnesses or investigation, would commit further crimes and whether the release would be prejudicial to the

²² *S v Pineiro and Others* 1992 (1) SACR 580 (Nm).

maintenance of law and order and the security of the state. He added a fifth point, namely, whether any objections to bail might be accommodated by means of bail conditions.²³ The judge concluded that the applicants who were referred to as the masters of the vessels should be released on bail of R250 000,00 each and the officers on R2000,00 bail each with conditions.

The principles which were applied in *Pineiro* were set out in detail in the case of *Acheson*.²⁴ The state submitted that the accused would not stand trial if granted bail. The accused was Irish. He had no roots in Namibia or any other African country. Also, there was no extradition treaty between Namibia and Ireland.²⁵

Mahomed J remarked that an accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. He went on to say that the court ordinarily would grant bail unless there is likelihood that it would prejudice the interests of justice. The court identified three considerations which are taken into account in deciding whether there was prejudice to the interests of justice. The first consideration encompassed the following factors:

How deep are his emotional, occupational and family roots within the country where he is to stand trial; what are his assets in that country; what are the means that he has to flee from that country; how much can he afford the forfeiture of the bail money; what travel documents he has to enable him to leave the country; what arrangements exist or may later exist to extradite him if he flees to another country; how inherently serious is the offence in respect of which he is charged; how strong is the case against him and how much inducement there would therefore be for him to avoid standing trial; how severe is the punishment likely to be if he is found guilty; how stringent are the conditions of his bail and how difficult would it be for him to evade effective policing of his movements.

²³ At 580G. It is submitted that this point has now been adopted into section 35(1)(f) the Constitution.

²⁴ *S v Acheson* 1991 (2) SA 805 (Nm).

²⁵ At 821E-G.

The above factors focus on the bail applicant. Mahomed J went on to mention the second consideration. The paramount issue was a reasonable likelihood that the accused would tamper with witnesses or evidence if he were released. He argued that the following factors are involved in this examination:

whether or not he is aware of the identity of such witnesses or the nature of such evidence; whether or not the witnesses have made statements or whether it is a subject-matter of further investigation, what the accused's relationship is with such witnesses and whether or not they are likely to be intimidated or threatened by him, whether or not any condition preventing communication between such witnesses can effectively be policed.

The judge set out a third consideration. It concerned prejudice to the accused when bail is denied. He asserted that the following issues need to be examined:

the duration of the period for which he has already been incarcerated, if any, the duration of the period during which he will have to be in custody before his trial is completed, the cause of any delay in the completion of his trial and whether or not the accused is partially or wholly to be blamed for such a delay, the extent to which the accused needs to continue working in order to meet his financial obligations, the extent to which he might be prejudiced in engaging legal assistance for his defence if he remains in custody, the health of the accused.²⁶

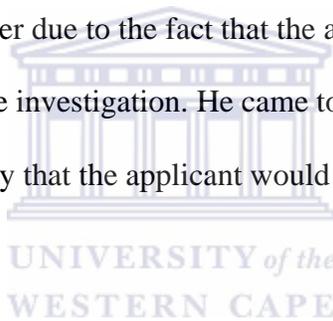
It should be observed that the factors which deal with the proper administration of justice were not part of the court's third consideration. The court did not inquire into whether the release of the applicant would affect adversely the proper functioning of the justice system. These factors were included in the first consideration.

The case of *Bennett* may be used to illustrate the operation of the second consideration, namely, that the accused might tamper with witnesses or evidence if he were released.²⁷ The prosecutor made it known to the court that the witnesses whom he intended to call were friends and relatives of the applicant. Furthermore,

²⁶ At 822B-823C.

²⁷ *S v Bennett* 1976 (3) SA 652 (C).

he brought to the attention of the court the fact that the applicant had interviewed people who had previously been questioned by the police. The applicant had been arrested before the investigation had been completed in order to prevent him from doing so. Vos J opined that the mere fact that the witnesses whom the state hoped to call are friends and family of the applicant is not enough. The judge went on to say that the prosecutor may not satisfy the court that the applicant has tampered with the witnesses by making use of a bare and hearsay statement. The judge asserted that the better approach would be to say that there is a risk that the applicant will interfere, and not merely that he may do so. The judge opined that the proceedings may be improper due to the fact that the applicant was arrested to prevent him from frustrating the investigation. He came to the conclusion that there is no reasonable possibility that the applicant would interfere with the investigation.



Du Toit *et al* illustrate the pivotal role played by the presumption of innocence with reference to the case of *Acheson*. It will be shown below that the court insisted on granting bail unless it would prejudice the interests of justice.

Furthermore, the authors insist that the presumption of innocence is not negated by facts or allegations that showed a strong case against the accused. They find support for this view in the case of *Essack*, which is discussed fully below.²⁸ The authors caution that the presumption of innocence should not be over-emphasised at the expense of prejudice to the administration of justice. They argue that the

²⁸ See page 22 below

interests of justice would not be served best if an accused who has been released on bail does not return to stand trial. It is a fundamental principle of the administration of justice that an accused person should stand trial, and if there is any doubt as to whether he would stand trial, he should be kept in custody.

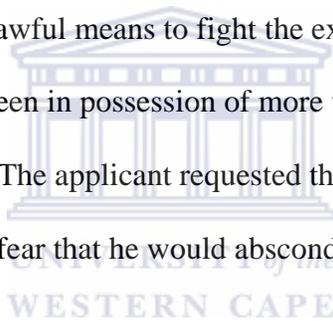
The authors argue that this should be done even though it would compromise the presumption of innocence and the liberty of the accused. However, they maintain that the presumption of innocence remains a cornerstone of a bail application.²⁹

In the case of *Thornhill*, the first consideration which was set out in *Acheson*, namely, whether the applicant would stand trial, was illustrated.³⁰ It is submitted that this case shows that courts adopted the same approach both prior to and after the advent of the new constitutional dispensation. The applicant in *Thornhill* was a British national who had emigrated to South Africa in July 1993. In the same month he was granted a permanent residence permit. He lived on a farm in Botrivier. The farm was owned by a close corporation of which he and his son were members. On 1 November 1996, the Thames Magistrates' Court in London issued a warrant of arrest for the applicant on charges of corruption and contravention of tax laws. In South Africa the applicant was arrested on the basis of a warrant issued by a Cape Town magistrate. The applicant was brought before the magistrate for the purpose of determining whether or not he should be

²⁹ Du Toit *et al* (1993: 9).

³⁰ *S v Thornhill* (2) 1998 (1) SACR 177 (C).

surrendered to the United Kingdom. The magistrate found that the applicant could be extradited. An appeal against this decision failed. The applicant remained in custody. He approached the court for a bail application. The state opposed the application. The investigating officer testified that the applicant was in possession of at least four passports, but that the British Customs Services knew of only two passports. The passports had shown that the applicant had entered the country on three different occasions. However, there was no record that the applicant had left the country. The applicant admitted that he took steps to avoid arrest. These included incorrect addresses which he supplied to the detective. However, he testified that he wanted to use lawful means to fight the extradition. He stated further that in the past he had been in possession of more than one passport. He had since destroyed the others. The applicant requested the court to prescribe bail conditions in order to allay the fear that he would abscond.



Ngcobo J reiterated the considerations which were established in *Acheson*. However, he did not canvas all of them. The consideration pertaining to tampering with witnesses or evidence was left out because it was not an important consideration, since the witnesses whom the state would call were in the United Kingdom. It is submitted that it was not going to be possible to have such a consideration even though they are factors which are often involved in the examination.

The judge examined the third consideration which was established in *Acheson*. It concerns prejudice to the accused when bail is denied. The judge conceded that the determination of whether the applicant would abscond or not involves an assessment of the applicant's future conduct. He went on to say that the statement of the applicant, which he made under oath, that he would not abscond, should be considered with the rest of the established factors. Ngcobo J examined the established factors. He concluded that the applicant would abscond if he were released on bail. He came to this conclusion despite the fact that he conceded that it would bring enormous prejudice to the applicant to remain in custody. He opined that the prejudice that the applicant might suffer if he stayed in custody should be weighed against other factors. The most important factor is the likelihood that the applicant would abscond if he were released on bail. The judge believed that bail conditions could not prevent abscondment in the present matter. It turned out that the applicant had no permanent residential address, since the farm on which he lived had been sold by the close corporation after his arrest. There was further damaging evidence against the applicant. The detective testified that at the time of the arrest of the applicant, the police found do-it-yourself fugitive survival books. Furthermore, it was revealed to court that both the applicant and his wife were able to move in and out of South Africa by evading immigration controls. The judge dismissed the application because he was satisfied that the applicant was likely to abscond and that such a consideration carried more weight than any other relevant consideration. Thus, the application had to fail and was dismissed.

The reported cases show that during the apartheid era the courts emphasised the importance of the presumption of innocence. South African courts recognised bail and they used it as a measure that balances two conflicting rights. There is, on the one hand, the right to freedom of person and, on the other, the interests of society that the person who is detained should stand trial. Bail is made necessary by the presumption of innocence and operates in favour of the accused. It does so by requiring that an accused person may not be deprived of his liberty in circumstances where no court of law has found him guilty.

In *Budlender*, Van Zyl JP emphasised the significant role which the presumption of innocence plays in South African law.³¹ He said that the courts do not like ever to deprive a man of his freedom while he waits for the trial. This is so because he might be found innocent and the detention could be wrong. He added that even where the accused is found guilty the court tries not to deprive him of his freedom until he has been convicted.

In *Essack*, Miller J confirmed the operation of the right to be presumed innocent.³² He said that the presumption operates in favour of the applicant even where it is said that there is a strong *prima facie* case against him. However, he asserted that if there are indications that the proper administration of justice may be defeated if bail is allowed, the court would be justified in refusing it. The judge dealt in detail

³¹ *S v Budlender and Another* 1973 (1) SA 264 (C) at 269.

³² *S v Essack* 1965 (2) SA 161 (D).

with situations where the interests of justice might be frustrated by the release of the applicant on bail. He said that there might be some evidence or indications that touch the applicant personally in regard to such likelihood. He added that general observations that are applicable to a group of persons are undoubtedly relevant and have a weight where the applicant is a member of the group. However, each case should be viewed according to its own merits and, *in casu*, bail was allowed because the opposition to it was based on general grounds and not specific grounds personal to the applicant.³³

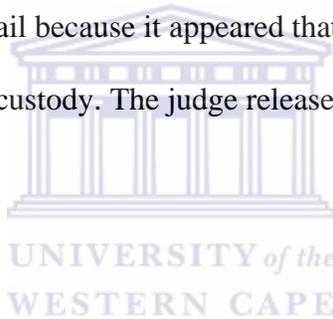
All in all, while the right to be presumed innocent is significant, the considerations of criminal justice policy also have a major role to play. Thus, while the South African courts preferred a release on bail, such release was subject to certain policy considerations. The court had to be satisfied that the accused would stand trial, and that the administration of justice would not be prejudiced by the release of the accused on bail.

In *Fourie*, the court dealt with the matter where a person who has been released on bail commits a similar offence.³⁴ The applicant had a long list of previous convictions. Originally he was charged with three counts of fraud. The state did not oppose his bail application and he was granted bail. In the same month he appeared again before the magistrate on charges of fraud. This time the state

³³ At 162D-F.

³⁴ *S v Fourie* 1973 (1) SA 100 (D). The matter of a pending case has since been inserted into the CPA by the Criminal Procedure Second Amendment Act 75 of 1995.

opposed his bail application. The detective alleged that the main ground for opposing bail was that the applicant had a propensity to commit fraud. There was no allegation that the applicant was likely to abscond. Miller J examined the ground of opposition by the state. He asserted that the propensity to commit a similar crime should have been established in the first bail application by looking at the previous convictions. He went on to say that despite the long list of previous convictions, the first bail application was not opposed. The judge concluded that the opposition to bail was based on the new charges which were simply allegations and were disputed by the applicant. He concluded further that the accused should not be denied bail because it appeared that he would commit further crimes if released from custody. The judge released the applicant on bail with conditions.³⁵



2.5 Bail before 1993

Before the 1993 Constitution came into operation, an arrested person who committed a minor offence might be brought before a lower court within a 48-hour period. This would allow him to bring an application for bail. During the application he had to show on a balance of probabilities that the application should be allowed. It meant two things. Firstly, the standard he had to satisfy to be released on bail was lower than the standard the court requires in a trial. The court has to be satisfied beyond a reasonable doubt in a trial. Secondly, it also meant that he had a right to apply for bail before the 1993 Constitution (and the

³⁵ At 103H.

1993 Constitution created a right to bail, as part of the Bill of Rights).³⁶ The bail position before the new constitutional dispensation could be summarised by saying that the bail applicant had an onus to show on a balance of probabilities that he would stand trial, would not interfere with the witnesses or investigation, would not commit further crimes and that the maintenance of law and order would not be prejudiced by the granting of bail.³⁷

2.6 Bail in the 1993 and 1996 Constitutions

It was mentioned in the beginning that this chapter is about the bail position in apartheid era. However, it would not be a reflection of the full picture if the bail position in the 1993 and 1996 Constitutions is left out. The inroads into the right to be presumed innocent occurred, in part, because of the outcries that the criminals were given too many rights by the current constitutional dispensation.

Both Constitutions played a major role in the development of our bail law.

However, the 1993 Constitution seems to stand out more than the 1996

Constitution. And the contribution of the latter was downgraded somewhat by the amendment of the CPA.

The bail provisions in the 1993 Constitution represented an attempt to restore to the courts the power to adjudicate on all matters pertaining to bail applications.

Section 25(2)(d) of said Constitution provided that:

³⁶ Van der Berg (2001: 57).

³⁷ Devenish (1998: 88).

Every person who is detained, including every sentenced prisoner, shall have the right to be released from detention with or without bail unless the interests of justice require otherwise.

It is submitted that the apartheid position, where the CPA made no express mention of onus, was altered by the 1993 Constitution. Be that as it may, it would seem that the courts in the apartheid era accepted that the applicant had an onus to show that he would stand trial and he would not interfere with witnesses.³⁸

However, the 1993 Constitution clarified both the issue of onus and the manner in which the Constitution has to be interpreted. Section 35(1) of the 1993 Constitution provided that:

In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

Section 35(3) continued:

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

In the *Magano* case, Van Blerk AJ ruled that Section 35(3) required that Section 25(2)(d) be interpreted in a manner which upholds the rights of the accused person to freedom until there is a finding of a court that establishes his guilt.³⁹ He added that the 1993 Constitution established the right to be released from detention with or without bail. And this right may not be denied unless the interests of justice so require. He argued that the use of the word 'unless' in section 25(2)(d) supports the argument that the onus rests on the State to show that the accused person

³⁸ Davis *et al* (1997: 178).

³⁹ *Magano and Another v District Magistrate Johannesburg and Others* 1994 (2) SACR 304 (W).

should be refused bail because the interests of justice would be served best by continued detention.⁴⁰

A further assessment of the role of the 1993 Constitution is made in *Mbele*, in which Stegmann J argued that he understood the intention of section 25(2)(d) as seeking to ensure that while the 1993 Constitution stands, every accused person in detention would have the right to approach a court to determine whether the interests of justice would be served best by his continued detention or by his release.⁴¹ Furthermore, the mischief which the 1993 Constitution sought to correct was to remove the powers of the legislature ever again to take away the liberty remaining to an accused and detained person to approach a court of law to adjudicate upon the best interests of justice pending his trial. And the legislature or executive should never again take away the jurisdiction of the courts to adjudicate on that question. He stated, further, that the 1993 Constitution aimed at removing the previously sovereign powers of the legislature by outlawing for the future legislation such as the Internal Security Act. It aimed at guaranteeing the fundamental right of the individual to the benefits of the ordinary law of bail as administered by courts. The judge said that all facts which argue against or in favour of the granting of bail should be examined carefully. He confirmed that

⁴⁰ At 304E-G.

⁴¹ *S v Mbele And Another* 1996 (1) SACR 234 (W).

there are numerous grounds upon which bail may be refused. However, he said that bail should be refused when bail conditions are not able to play a role and are not able to achieve the appropriate end results.⁴²

Section 35(1)(f) of the 1996 Constitution provides that:

Everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.

The significance of this provision is analysed by Kriegler J in the *Dlamini* case.⁴³

The judge noted that the provision distinguishes the 1993 from the 1996 Constitution. He asserted that the former constitution had created an entitlement, namely, to be released from detention if the interests of justice permit. The latter constitution is neutral. The judge went on to hold that the current position seems to be that unless there is sufficient evidence to establish that the interests of justice require that the detainee be released, the imprisonment continues.⁴⁴ He identified three functions of this provision. He asserted, firstly, that the provision is an acknowledgement that persons might be held in custody for an allegation. The judge went further to say that the arrest should be constitutional and its purpose to ensure that the detainee is duly and fairly tried.⁴⁵ The second function is to indicate that people who are held in custody have a right to be released, which

⁴² At 234.

⁴³ *S v Dlamini; S v Dladla And Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC).

⁴⁴ At 655F-G.

⁴⁵ At 658F.

right is dependent upon reasonable conditions. The third function is to set out criteria for releasing the detainees, namely, the interests of justice.⁴⁶

It is submitted that the debate concerning the impact of the 1996 Constitution on the bail law has now been overtaken by a further development, namely, the amendment of the CPA. The amended CPA reflects the position of the 1993 Constitution.⁴⁷

2.7 Conclusion

The apartheid era had been characterised by legislative measures which paid no respect to the rights of the persons who were awaiting trial. The most important of these is the right to be presumed innocent. Statutes such as the Internal Security Act 74 of 1982 and the Terrorism Act 83 of 1967 showed a disregard for both the presumption of innocence and the role of courts. The Criminal Procedure Act 51 of 1977 was the only statute which allowed the courts to play a role. However, the provision of the CPA which interferes with the adjudication of bail applications by courts still exists.⁴⁸

South African courts tried in the apartheid era to reinforce their jurisdiction to adjudicate issues of bail. In the case of *Bennett*, the role of the Attorney-General was regarded as one of the factors which courts take into account in a bail application. And the attitude of the Attorney-General was not included as one of

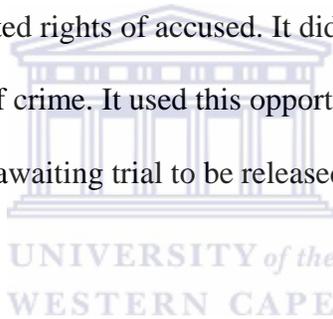
⁴⁶ At 636 D-F.

⁴⁷ De Waal (2001: 603).

⁴⁸ See, for example, section 60 (11A) (a)-(c) of the CPA.

the considerations in the case of *Acheson*. Both the cases of *Budlender* and *Essack* emphasised the pivotal role which the presumption of innocence plays.

The 1993 and 1996 Constitutions transformed the bail law. Awaiting-trial persons are accorded human rights which they never had, including the right to be presumed innocent. The rights of persons, including the right to be presumed innocent, were violated in the apartheid era. The new negotiated dispensation ought to respect human rights. However, it will be shown in the next chapter that violations of rights could still be identified. The new democratic parliament enacted provisions which violated rights of accused. It did so in response to outcries about the high levels of crime. It used this opportunity to amend the CPA to make it difficult for persons awaiting trial to be released on bail



CHAPTER 3: BAIL AND THE INTERESTS OF JUSTICE

3.1 Introduction

This chapter will show that the requirement that a bail applicant should satisfy the criterion of the interests of justice had long been applied by the courts as a common-law principle. They did so with due regard to the presumption of innocence and other rights of the accused. However, it is submitted that when the requirement of interests of justice was legislated, it was done in such a manner that its implementation would disregard the presumption of innocence. The chapter is divided into two parts. The first will show the inclusion of the interests of justice requirement in statutory law. The second will canvas the use of the interests of justice criterion by courts in bail applications.

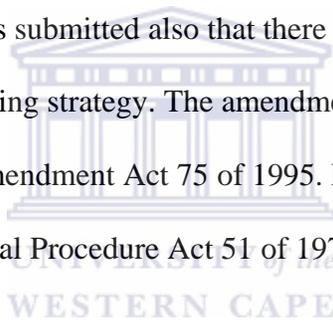
3.2 Inclusion of the interests of justice requirement in legislation

The requirement for bail applications to satisfy the interests of justice was included in both the 1993 and the current Constitutions, and in two amendments to the Criminal Procedure Act 51 of 1977, namely, Act 75 of 1995 and Act 85 of 1997. This chapter is concerned with the requirement of interests of justice in the Criminal Procedure Act, specifically the 1995 amendment, known as the Criminal Procedure Second Amendment Act 75 of 1995.

3.3 The aim of the amendment

The interests of justice requirement became a statutory provision when it was included in the 1993 and the present Constitution. The inclusion of the requirement in this manner ensured that it is part of the Bill of Rights.

When the CPA was enacted in 1977, it did not have the criterion of interests of justice as part of its bail provisions. The need for an amendment to the CPA arose with the dawn of the new constitutional dispensation. The major aim of the amendment was to introduce the interests of justice requirement into the bail provisions. The amendment was aimed at clarifying certain bail matters and giving guidance to courts.⁴⁹ It is submitted also that there was an attempt to use the amendment as a crime fighting strategy. The amendment was contained in the Criminal Procedure Second Amendment Act 75 of 1995. Its provisions now form part of section 60 of the Criminal Procedure Act 51 of 1977.



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

The Criminal Procedure Second Amendment Act 75 of 1995 is incorporated into section 60(1)(a) of the Criminal Procedure Act. It introduced the concept of interests of justice into the Act. It provides that:

An 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 is submitted that the above section confirms the right to bail, which was first entrenched in section 25(2)(d) of the 1993 Constitution. The state would have to

⁴⁹ Cowling (1996: 52).

adduce evidence in order to support the contention that it is in the interests of justice that the detention should continue.⁵⁰

3.5 Significance of section 60(1)(a)

The section covers five significant aspects. The first of these illustrates the position of the accused before the bail application, namely, that his right to freedom of movement already has been curtailed, since he is in custody. The second aspect is even more important. It introduces a manner in which the right to freedom of movement may be regained, namely, through a bail application. The third deals with the timing of the bail application. There is no cut-off point as long as the person has not been convicted. The fourth aspect is the introduction of the requirement that has to be met for a release from custody, namely, the interests of justice. The fifth aspect concerns the relevant offences to which the interests of justice requirement are applicable.

Section 60(1)(a) does not specify the offences. The offences are specified in section 14 of Act 75 of 1995 and inserted into Schedule 5 of the CPA. The provision deals with one group of offences, namely, the Schedule 5 offences.

They are:

Treason, murder, attempted murder involving the infliction of grievous bodily harm, rape, any offence referred to in section 13 (f) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992), if it is alleged that-(a) the value of the dependence-producing substance in question is more than R50 000, 00;or (b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy;or (c) the offence was committed by any

⁵⁰ Cowling (1996: 53).

law enforcement officer. Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament. Any offence in contravention of section 151 of the Arms and Ammunition Act, 2000 (Act 60 of 2000), on account of being in possession of more than 1000 rounds of ammunition intended for firing in an arm contemplated in section 39 (2) (a) (i) of that Act. Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft-(a) involving amounts of more than R500 000, 00;or (b) involving amounts of more than R100 000,00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or (c) if it is alleged that the offence was committed by any law enforcement officer-(i) involving amounts of more than R10 000,00;or (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy. Indecent assault on a child under the age of 16 years. An offence referred to in Schedule 1-(a) and the accused has previously been convicted of an offence referred to in Schedule 1; or (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1.

It is submitted that the provision is not limited to the Schedule 5 offences. In other words, it includes Schedule 1 offences as well. These are elevated into the same position as Schedule 5 offences if the accused has been convicted previously of the same offence or he has a pending matter in which he has been released on bail.

It is submitted that Schedule 1 offences become Schedule 5 offences when these qualifications are present. The Schedule 1 offences are:

Treason, sedition, public violence, murder, culpable homicide, rape, indecent assault, sodomy, bestiality, robbery, kidnapping, childstealing, assault, when a dangerous wound is inflicted, arson, malicious injury to property, breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence, theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, offences relating to the coinage, any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine, escaping from lawful custody, where the person concerned is in such custody in respect of any offence referred to in this schedule or is in such custody in respect of the offence of escaping from lawful custody, any conspiracy, incitement or attempt to commit any offence referred to in this schedule.

The most contentious provisions of section 60 are those which deal with serious offences. These include the offences which are listed above. The main problem with these so-called serious offences is that the accused's rights, including the

right to be presumed innocent and the right to freedom, already have been curtailed. It is submitted that it is a problem when the legislature has taken it upon itself to decide that certain offences should be serious. Furthermore, it decided that persons who are suspected of these offences should be brought to court by means of arrest. It is conceivable and practicable to give warnings to suspects to attend a bail application before they are arrested and leave it to courts to decide on the restriction of the rights of the accused. The legislature appears to be playing the role of the judiciary in so far as the decision to restrict rights is concerned. It is obvious that the intention of the legislature has been to arrest people and make it difficult for the accused to be released on bail. The apartheid legislature infringed the rights of individuals in the same manner. However, the post-apartheid legislature finds justifications for interfering with individual rights, such as the right to be presumed innocent. Section 60 of the CPA now appears to serve two functions, namely, to cater for bail applications and to serve as a mechanism by which the state responds to perceptions that it was weak on criminals and afforded their rights more protection than those of law abiding citizens.⁵¹

3.6 Defining the interests of justice requirement

The Criminal Procedure Second Amendment Act did not give a definition of interests of justice. It had never been necessary to do so in the past. The courts had always applied the requirement of interests of justice in bail applications. They did so without a need that the criterion should be defined. In *De Kock*, the court

⁵¹ Chaskalson & De Jong (2010: 89).

considered whether or not interests of justice should be defined.⁵² The court did not attempt to describe interests of justice in a manner which was different from what it had always been.⁵³ The *De Kock* case serves as an example where one of the grounds for refusing bail was reaffirmed, namely, that the bail applicant was not going to attend his trial. The appellant was arrested on various charges of murder. These were considered serious in terms of section 60 of the CPA. The bail application was heard by a regional court. Section 61 of the CPA gives the Attorney-General the power to intervene in cases of serious offences and oppose a bail application.⁵⁴ In *De Kock*, the Attorney-General objected. The case was adjourned for three months in order to hear the bail application. At the end of the bail application, the regional magistrate refused to grant bail. The accused appealed against this decision.



On appeal, the appellant submitted affidavits. These indicated that he used to be a colonel in the South African Police. He was in command of a special unit. It was stationed at Vlakplaas. The tasks of the unit were to prevent acts of terrorism, trace terrorists and identify them. In 1990 the unit was subdivided into three sub-units. The appellant was in charge of one of the sub-units. Its main task was to prevent illegal trade in weapons and explosives. The unit was dissolved at a later stage and the appellant resigned and received a pension package of R1, 2 million. The court described the appellant as an extra-ordinary man. He possessed two

⁵² *S v De Kock* 1995 (1) SACR 304 (T).

⁵³ *Cowling* (1996: 55).

⁵⁴ This power is now exercised by the Director of Public Prosecutions

passports, a genuine one and a false one. Southwood J submitted that the testimony of one witness indicated that the appellant lived at Julius Jeppe Street. He vacated the premises towards the end of the April 1994. Also, he made bookings on 8 April 1994 to fly from Johannesburg to Zurich and from there to Dublin. The appellant refused to explain how he obtained a passport under the name of Lourens Vosloo De Wet. It became clear that the appellant could obtain a false passport still, even though he was no longer a police officer.⁵⁵

In evaluating the application, Southwood J referred to the case of *Acheson*, since it contains the considerations which the court takes into account when deciding whether a release would prejudice the interests of justice. He noted that there had not been any argument to the effect that the interests of justice should be given a meaning which differs from the normal considerations in a bail application. He came to the conclusion that the appellant was planning not to stand trial.⁵⁶

It is submitted that the term ‘interests of justice’ is too wide. There is a great temptation to regard it as meaning everything which limits the rights of the accused. The term has to be narrowed down. This would help to stop associating it with the interests of state.⁵⁷

3.7 Grounds for refusing bail in the interests of justice

The amendment makes provision for five grounds of non-release. This means that

⁵⁵ At 320J.

⁵⁶ At 308E.

⁵⁷ Cowling (1996: 50).

when any of the grounds is established, the accused may not be released from detention. Section 60(4) (a)-(e) of the CPA provides for bail to be denied:

- (a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence;
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial;
- (c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence;
- (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system;
- (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

It is submitted that the apartheid era illustrated that the South African courts were capable of adjudicating bail applications. The criterion used by the courts is the same as contained in the amendment. However, the legislature found it necessary to set out grounds which, in the interests of justice, would justify the accused not being released on bail. Furthermore, it saw fit to set out factors which should be considered in order to establish the grounds. In all the five grounds which are provided by the amendment for the refusal to grant bail there are accompanying factors. None of these grounds adds anything new to the bail jurisprudence nor does any of the accompanying factors, since the courts are not bound to follow them. It is submitted that a comparison may be made of the language used in framing the grounds of non-release and the accompanying factors. The language used in the former case is peremptory. This is illustrated by the use of the word ‘will’. The language used in the latter case is directory. There is use of the word

‘may’. Thus the factors are directory and not peremptory. Also, the courts are not limited to the considerations or the factors which are listed. The reason is that the courts are allowed to take into account any other factor which is not listed by the amendment. Hence, it is not feasible to argue that the courts are limited by the listed factors.⁵⁸

The first ground listed, namely, the likelihood that the accused, were he to be released on bail, will endanger the safety of the public or commit a Schedule 1 offence is refined further and the refinements consist of factors which may be considered in order to establish whether or not the ground exists. These are:

- (a) the degree of violence towards others implicit in the charge against the accused;
- (b) any threat of violence which the accused may have made to any person;
- (c) any resentment the accused is alleged to harbour against any person;
- (d) any disposition to violence on the part of the accused, as is evident from his or her past conduct;
- (e) any disposition of the accused to commit offences referred to in Schedule 1, as is evident from his or her past conduct;
- (f) the prevalence of a particular type of offence;
- (g) any evidence that the accused previously committed an offence referred to in Schedule 1 while released on bail; or
- (h) any other factor which in the opinion of the court should be taken into account.⁵⁹

The second ground of non-release is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial. The factors which may be taken into account in evaluating this likelihood are:

- (a) the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried;
- (b) the assets held by the accused and where such assets are situated;
- (c) the means, and travel documents held by the accused, which may enable him or her to leave the country;
- (d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;

⁵⁸ Cowling (1996: 56).

⁵⁹ Section 60 (5)(a)-(h) of the CPA.

- (e) the question whether the extradition of the accused could readily be effected should he or she flee across the borders of the Republic in an attempt to evade his or her trial;
- (f) the nature and the gravity of the charge on which the accused is to be tried;
- (g) the strength of the case against the accused and the incentive that he or she may in consequence have to attempt to evade his or her trial;
- (h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
- (i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
- (j) any other factor which in the opinion of the court should be taken into account.⁶⁰

The third ground of non-release provided for by the amendment is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or conceal or destroy evidence. The following factors may be taken into account in respect of this ground:

- (a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
- (b) whether the witnesses have already made statements and agreed to testify;
- (c) whether the investigation against the accused has already been completed;
- (d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
- (e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
- (f) whether the accused has access to evidentiary material which is to be presented at his or her trial;
- (g) the ease with which evidentiary material could be concealed or destroyed; or
- (h) any other factor which in the opinion of the court should be taken into account.⁶¹

The problem highlighted by this ground seems to suggest that the police are quick to arrest people. This ground would be unnecessary where the police do their investigation first and proceed with arrest as a final step. There may be challenges where the arrest precedes the investigation. One of these is that an applicant's right to a speedy trial is infringed. It is submitted that arrest preceding investigation amounts to a violation of the following Standing Order which the police should follow:

⁶⁰ Section 60 (6)(a)-(j) of the CPA.

⁶¹ Section 60(7)(a)-(h) of CPA.

There are various methods by which an accused's attendance at a trial may be secured. Although arrest is one of these methods, it constitutes one of the most drastic infringements of the rights of an individual and a member should therefore regard it as a last resort.⁶²

The fourth ground of non-release is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system. The CPA provides that to establish this ground the court may have regard to the following factors:

- (a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
- (b) whether the accused is in custody on another charge or whether the accused is on parole;
- (c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
- (d) any other factor which in the opinion of the court should be taken into account.⁶³

There are two challenges that pertain to this ground. Firstly, there is an implicit acknowledgement that certain of the rights of the accused might be deliberately infringed. This includes the right to silence. Secondly, it could be submitted that this ground has lost its significance because most of the factors it enumerates take place on a daily basis in courts. For example, some accused have numerous false names and surnames or even nicknames which they provide to the investigator.

The final ground of non-release is the likelihood, in exceptional circumstances, that the release of the accused will disturb the public order or undermine the public peace or security. The final ground at first sight seems silent about codifying public opinion. It is when the factors that refine it are examined that this becomes clearer. These are:

⁶² Standing Order (G) 341.

⁶³ Section 60 (8)(a)-(d) of the CPA

- (a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
- (b) whether the shock or outrage of the community might lead to public disorder if the accused is released;
- (c) whether the safety of the accused might be jeopardized by his or her release;
- (d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;
- (e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system; or
- (f) any other factor which in the opinion of the court should be taken into account.⁶⁴

The fourth and the fifth grounds are different from the first to the third grounds.

The latter grounds need no introduction. They were formulated by courts at common law. The legislature has codified a long standing curial practice. They are, thus, unproblematic. However, the first three grounds are contentious. It is submitted that they interfere more than the latter grounds with the rights of the accused. The infringements are deliberate because the courts at common law functioned well without the first three grounds. The legislature used these grounds to respond to public outcries about the high rate of crime.

In *Dlamini*, Kriegler J commented that, for the first time in the history of the bail regime, this section shifted attention away from the accused to the community.⁶⁵

The section has a narrow application. This means that it can be applied in rare circumstances. The judge poured out his criticisms of the section by pointing out that the factors which have been used to refine the ground are not relevant in establishing whether the interests of justice permit the release of the accused.

Kriegler J found it disturbing that the individual's legitimate interests are subjected to societal interests. However, the Constitutional Court found that the

⁶⁴ Section 60(8A)(a)-(f).

⁶⁵ *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat* 1999 (4) SA 623 (CC).

amendment was consistent with the Constitution. The court found that its limitation of rights was justified by the high rate of crime.⁶⁶

3.8 Approach of the courts to interests of justice

This section deals with the way in which the courts have approached the notion of satisfying the interests of justice. It is submitted that the courts approached the concept in the same manner as giving effect to the right to be presumed innocent.

In the case of *Die Afrikaanse Pers Beperk v Nesor*, the word ‘satisfies’ in the phrase ‘to satisfy the interests of justice’ was considered.⁶⁷ The plaintiff lent the defendant a sum of money for the purchase of a motor-car. The loan agreement was oral between the parties. The defendant failed to return the money in terms of the contract. The plaintiff applied for summary judgment under Rule 22 of the Rules of Court. There was a further claim pertaining to the motor-car which was still in the defendant’s possession. Newton-Thompson J submitted that under Rule 22(4) it is the defendant who must satisfy the court that he has a defence. The judge submitted further that such an onus was not a heavy one. He argued that ‘satisfy’ did not mean ‘prove’. He went on to say that ‘satisfy’ should be understood to mean that the court must feel that there is a fair probability that the defence is a good one and that it is *bona fide*. The judge argued that he had the

⁶⁶ At 14G &55D-G.

⁶⁷ *Die Afrikaanse Pers Beperk v Nesor* 1948 (2) SA 295 (C).

prima facie impression that the defence was not *bona fide*, and that it was made up.⁶⁸

In the case of *Blyth v Blyth*, Lord Denning dealt with the meaning which should be accorded to the same term 'satisfied'.⁶⁹ In this case the parties were married on 23 March 1940. In 1954 and 1955 the wife committed adultery and left the husband. In 1958 the husband had sexual intercourse with the wife on one occasion. He had no intention of condoning her past adultery, though he always hoped there would be some way in which they could reconcile. They never did. The legal position at the time was confirmed by *Henderson v Henderson*,⁷⁰ namely, that his act of sexual intercourse was conclusive evidence that he had condoned the adultery of his wife. In July 1964 Parliament enacted section 1 of the Matrimonial Causes Act which provided that any presumption of condonation which arises out of continuance or resumption of marital intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative such intent. The husband made his petition in 1964, after the Act had been passed. The commissioner of the Queen's Court argued that the evidence of the husband to negative an intention to condone was not admissible. The commissioner added that if he were to find that the evidence were admissible he would find that the husband did not have the intention to condone the adultery.

Lord Denning, on appeal, disagreed with the decision of the commissioner. He

⁶⁸ At 297.

⁶⁹ *Blyth v Blyth* 1966 (1) AER 534 HL.

⁷⁰ *Henderson v Henderson* [1944] 1 All E.R. 44.

argued that the court had to be ‘satisfied’ on the evidence that the case for the petition had been proved and the petitioner had not in any way been accessory to or connived at or condoned the adultery. He expressed his disagreement with Lords-Justices Willmer and Harman who held that the word ‘satisfied’ means satisfied beyond a reasonable doubt. He argued that the Lords-Justices were influenced by a decision of Lord Mcdermont in 1950, who expressed the view that, in respect of a ground for dissolution of marriage, the word ‘satisfied’ was not capable of connoting something less than proof beyond a reasonable doubt. Lord Denning argued that this was an error. He supported his argument by saying that the word ‘satisfied’ deals only with the incidence of proof, not with the standard of proof. It shows on whom the burden of proof lies to satisfy the court, and not the degree of proof required. He went on to argue that there are certain occasions, even in criminal matters, where the burden of proof lies on the accused to prove his innocence. However, the accused is never bound to prove it beyond a reasonable doubt. He argued that it is sufficient if the balance of probabilities is in the favour of the accused. He held, therefore, that the word ‘satisfied’ does not mean satisfied beyond a reasonable doubt. He argued that the legislature is capable of inserting the words ‘beyond a reasonable doubt’ if it so wished. And it did not do so.⁷¹

Lichtenberg JA, in the case of *Makoula*, illustrated a contrast between the words

⁷¹ At 534H-536C.

‘convince’ and ‘satisfy’.⁷² He argued that in order to convince a person of the existence of a certain fact or state of affairs, there is more evidential material required. He argued that such proof is more than merely to ‘satisfy’ him of the existence of a certain state of affairs. He held that the presiding officer who is about to exercise his discretion to declare a recalcitrant offender a habitual criminal must be convinced that such a person is one who habitually commits offences and that the community should be protected against him, before such a declaration can be made. It was not sufficient if the presiding officer merely were satisfied that such was the case. He argued that the declaration was founded upon the exercise of a judicial discretion and it was not, therefore, dependent upon any proof. He went on to say that there was thus no onus which arose.⁷³ It is submitted that the term ‘convince’ may not be equated with ‘satisfy’. This is because the latter accords with the right to be presumed innocent, while the same cannot be said of the former.

The case of *Botha* illustrated further that the word ‘satisfy’ in the phrase ‘satisfy the interests of justice’ is consistent with the right to be presumed innocent.⁷⁴ The accused was charged with six counts of fraud. She was not represented by an attorney. She pleaded guilty to all counts. The magistrate questioned her, and was satisfied that she had admitted all the allegations. She was convicted on all counts. The court was adjourned for sentencing. In the meantime, she sought and found

⁷² *S v Makoula* 1978 (4) SA 768 (SWA).

⁷³ At 764H.

⁷⁴ *Attorney-General v Botha* 1994 (1) SA 306 (A).

legal representation. When the hearing resumed, the legal representative brought an application on her behalf to retract the pleas of guilty. She testified in support of the application and claimed that there was duress brought to bear on her to plead guilty. The court dismissed the application. The magistrate argued that there was an onus on her to prove her allegations on a balance of probabilities. She appealed and her appeal succeeded. Smalberger J ruled that where a person brings an application to retract a plea of guilty, the right to be presumed innocent should apply. He went on to say that in criminal matters, as a principle, the operative test is one of reasonable doubt. He differed with decision of the magistrate and asserted that since there is no onus on the accused, a test of proof on a balance of probabilities was inappropriate. He went on to say that the proper approach to a plea correction is in *favorem innocentiae*, which guards against putting an onus on the accused.⁷⁵ The meaning of the word ‘satisfy’ as it has been applied by courts before the amendment contained in section 60(1)(a) of the CPA accords with the presumption of innocence.

The interests of justice criterion had always been the test that a bail applicant had to satisfy in order for the applicant to be released from custody. The test had been in use since 1906. In the case of *McCarthy* there was an inquest, in order to determine if anyone might be liable for the death of the deceased.⁷⁶ The suspect was arrested at the end of the inquest. He brought an application for bail. The majority judgment was delivered by Innes CJ. He noted that the court is always

⁷⁵ At 326J-327G.

⁷⁶ *McCarthy v R* 1906 TS 659.

‘desirous’ that an accused should be allowed bail if it is clear that the interests of justice will not be prejudiced. The judge went on to say that bail should be allowed more particularly if the court thinks that upon the facts before it that the accused will stand trial. He added that in cases of murder great ‘caution’ should be exercised. He concluded by saying that the facts which had been disclosed satisfy him that the applicant will stand trial.

The case of *Kaspersen* was also decided by Innes CJ.⁷⁷ The applicant had been charged with murder. He had a wife and children. He had lived in Johannesburg for nineteen years. He possessed a fixed property and had an interest in a stone quarry. He was also a joint owner of a gold mine. He contended that he had a good defence. He offered to pay £2000,00 for his bail and undertook to report daily to the police. The Attorney-General opposed the application. The facts of the case showed that there was a deliberate killing. And the evidence against the accused was very strong. Innes CJ repeated that the court is unwilling that accused persons be detained in jail where it is reasonably clear that they will appear to stand trial in due course. However, he asserted that one of the elements which must be weighed by the court is the gravity of the offence. He held that a person is not likely to return to his trial where the charge against him involves a risk to his life.

Innes CJ compared *McCarthy* with *Kaspersen* and argued that in the former case the facts were not very strong, and it was not probable that the accused was going

⁷⁷ *Kaspersen v R* 1909 TS 639.

to be convicted of a serious crime. However, in the latter case, even though he did not want to prejudge the case, there were weighty factors against the application, including the Attorney-General's attitude, namely, that the interests of justice required that the accused be kept in custody. The application was refused.⁷⁸

It is submitted that the approach followed in *Kaspersen* paved the way for the legislature to make a further amendment to section 60 of the CPA.

In the case of *Ali Ahmed*, the court criticised the approach adopted in the above-mentioned decision, namely, where the possible penalty is a severe one, bail should be denied.⁷⁹ The court should not presume that the accused would not stand trial. In this case the accused was arrested on 11 November 1920. He was charged with three counts of rape of white girls. The offences took place in November, January and March. Gregorowski J said that in rape cases the accused is brought to court as a matter of urgency. However, there was a delay in this matter. The judge argued that in rape matters it is expected that the victim will not hesitate in bringing the complaint. The delay occurred because it was alleged that the victims were hypnotised. The rapes took place when they were unconscious. The judge said that there was no evidence of the effects of hypnotism. The facts of the case revealed that the accused was an Indian doctor. The victims were his clients. They went to consult him. The state opposed the bail application. The opposition was based on the seriousness of the penalty, namely, death, which might be imposed. The Attorney-General opposed the application. The basis of

⁷⁸ At 639-641.

⁷⁹ *Ali Ahmed v Attorney-General* 1921 TPD 462.

the opposition was that the accused might abscond to a Portuguese territory. In these territories a person who might be sentenced to death might not be extradited. The court said that bail should always be granted, regardless of the nature of the offence. *In casu*, the application was refused. The court was not prepared to interfere with the proposition that bail should be refused.⁸⁰ The *Ali Ahmed* and the *Karspersen* cases took a similar decision in refusing bail. There were two important grounds on which bail was refused, namely, the Attorney-General's attitude to oppose bail and the gravity of the offence.

In the case of *Mtatsala*, the court took a different view.⁸¹ The Attorney-General opposed the bail application. The case against the accused appeared strong, and a severe sentence was possible. There were two accused who were about 23 years of age. They were arrested on the 17 January 1948. Their petition was dated 12 February and they asserted that due to the congestion of court roll, the trial could only take place in March. Lewis J held that the opposition from the Attorney-General was not similar to those cases where there was information in his possession. The judge went on to say that there was nothing on the papers to suggest that the accused intended to abscond if they were granted bail. The contention was simply that they faced serious charges. The judge stated that such consideration, namely, of facing a serious charge, may be an element to be considered with others. It cannot itself be conclusive. The judge said that if such an element were to be conclusive on its own, it would mean that where a person

⁸⁰ At 464.

⁸¹ *R v Matsala and Another* 1948 (2) SA 585 (E).

had been accused of murder and there was a *prima facie* case against him, he could never hope for bail. And hence, the cases where there was strong evidence against the accused, but bail was nonetheless granted, must have been wrongly decided.

In the case of *Smith*, the court rejected the presumption that where the applicants faced very serious charges they might not return to stand trial, if released on bail.⁸²

Two accused were arrested and charged with two counts of robbery and one of housebreaking with intent to steal and attempted theft. The matter was remanded on four occasions. The record showed that they appointed an attorney, who tried unsuccessfully to apply for bail. The applicants filed notices of appeal against the refusal of their bail application. The appeal was successful. Harcourt J gave reasons for the decision. He set out the principles which govern the granting of bail. He said that the Court must be governed by the foundational principles, which are to uphold the interests of justice.⁸³

3.9 Conclusion

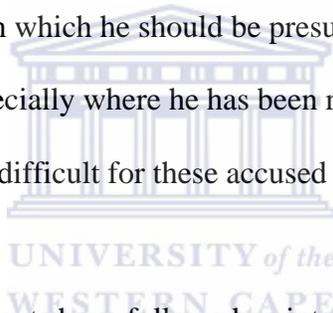
It has been shown that the amendment Act 75 of 1995 had introduced into the Criminal Procedure Act 51 of 1977 the requirement of the interests of justice. It is submitted further that the legislature saw an opportunity to reverse some of the hard-won human rights which were entrenched in 1993 Constitution. Amongst

⁸² *S v Smith and Another* 1969 (4) SA 175 (N).

⁸³ At 177E

these rights is the right to be presumed innocent.

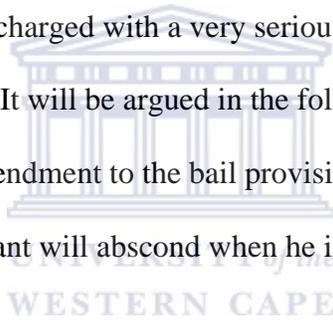
An analysis of the amendment has revealed that it created grounds and factors which may guide the court in a bail application. When these grounds are evaluated, it becomes clear that these are similar to the considerations which the courts had been using before the amendment came into being. However, there are changes which are brought about by the amendment. It creates a category of serious offences. The legislature came to the conclusion that an accused, who should be presumed innocent, should have his rights limited on account of having a previous conviction of a Schedule 1 offence. Where the accused has no record, the Act looks at other matters in which he should be presumed innocent also, namely, the pending cases, especially where he has been released on bail. The Act requires that it should be made difficult for these accused to be released on bail.



In the past the South African courts have followed an interpretation of the requirement of the interests of justice which accords with the right to be presumed innocent. They have refused vehemently and consistently to interpret the requirement in a manner which would suggest that a bail applicant has an onus. The cases which dealt with the meaning to be accorded to the term are all *ad idem* that the term cannot be interpreted to mean that a bail applicant should prove a case on a balance of probabilities. The courts emphasised that the interests of justice were the foundation of bail applications.

However, the interests of justice were also used by the Attorney-General in order to argue for a refusal of bail. The courts regarded this attitude of the Attorney-General as one of the factors to be weighed with others. The interests of justice may be used by both parties in a bail application. It accommodates both the accused and the state. It is submitted that this is a problem, because the interests of justice requirement may be perceived as strengthening the powers of the state.

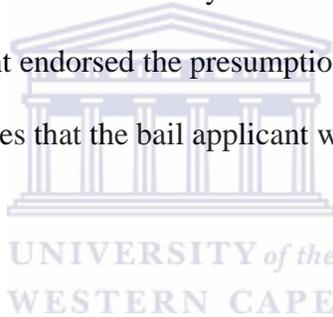
It should be conceded that the courts did not appear to be consistent in the application of the interests of justice criterion. Some decisions favoured the presumption of innocence, while others favoured the presumption that the applicant might abscond when charged with a very serious offence and there was a *prima facie* case against him. It will be argued in the following chapter that legislature framed a further amendment to the bail provisions along the lines of the presumption that the applicant will abscond when he is charged with a very serious offence.



CHAPTER 4: BAIL AND THE REQUIREMENT OF EXCEPTIONAL CIRCUMSTANCES

4.1 Introduction

In 1997 the legislature made a further amendment to the CPA. This amendment made a distinction between serious and very serious offences, and had an impact on the right to bail. The 1997 amendment is similar to the Criminal Procedure Second Amendment Act 75 of 1995, which was discussed in the preceding chapter. In both, the right to be presumed innocent is violated. However, unlike the preceding chapter, this chapter concerns very serious offences. It will be shown that the 1997 amendment endorsed the presumption that the more serious the charges, the more the chances that the bail applicant will abscond and not stand trial.



4.2 Background

The *McCarthy* decision signalled a change in the treatment of bail applicants who were charged with serious offences.⁸⁴ The court conceded that it always wants to grant bail. However, in bail applications involving serious offences such as murder, it should exercise caution. It is submitted that a presumption that the bail applicant would not stand trial in cases of serious offences began to raise its ugly head. This presumption became the pillar of the Criminal Procedure Second Amendment Act 85 of 1997.

⁸⁴*McCarthy v R* 1906 TS 657.

In *Kaspersen*, Innes CJ singled out one consideration for a bail application involving serious offences. He called it ‘the gravity of the offence’.⁸⁵ It is submitted that this case began to advocate the presumption that the accused would not stand trial when he is charged with a serious offence.

Mtatsala is an example of a decision where the prosecutor opposed the bail application on the basis of the nature of the offence.⁸⁶ He argued that it was probable that the accused was going to be convicted of a serious crime and that a capital sentence was the likelihood. The court held that the applicants had discharged their onus. They were released on bail.

The *Leibman* decision was similar to *Mtatsala*.⁸⁷ In both cases the bail applicants were charged with murder and the Attorney-General opposed the applications. However, in the *Leibman* case there was no *prima facie* evidence case against the applicant. A girl called Jacoba Schroeder disappeared. It was not established with certainty when she disappeared. It was thought that it could have been on the night of 15 or 16 August 1949. Before her disappearance, the applicant, the deceased and one Polliack left the applicant’s house on 15 August. They drove with the applicant’s motor-car. The girl was never seen alive again. It was not known when she died, except that the death might have been violent. The deceased’s body was

⁸⁵ *Kaspersen v R* 1909 TS 639.

⁸⁶ *R v Mtatsala and Another* 1948 (2) SA 585 (E).

⁸⁷ *Leibman v Attorney-General* 1950 (1) SA 607 (W).

found on the morning of 17 August. It was the investigating officer who gave the reason for opposing the bail application, namely, the nature of the offence and the possible heavy sentence. He argued that these considerations might cause the applicant to abscond. The court held the applicant was entitled to bail unless there were grounds which were put before court to refuse bail.

The presumption that a possible heavy sentence might induce a bail applicant to flee and avoid standing his trial was used in *Hudson*.⁸⁸ However, the bail applicant was not charged with murder. The first bail application was heard before a magistrate. The applicant was unsuccessful. He appealed against this decision. The matter came before Thirion J on appeal. The appellant was a British national. He had married a South African, and thereby acquired South African citizenship. He had a daughter and fixed property. He worked as an interior decorator. The appeal was dismissed because the court found that he might consider leaving the country before he had served his sentence.⁸⁹

4.3 Exceptional circumstances at common law

The case law suggests that the presumption of innocence was overtaken by the presumption that a bail applicant might abscond when charged with a serious offence. However, the court still had the discretion to grant or refuse a bail

⁸⁸ *S v Hudson* 1980 (4) SA 145 (N).

⁸⁹ At 148 F-G.

application. In *Lee*, the bail applicant was charged with murder.⁹⁰ In her application for bail she submitted that her health was deteriorating as a result of her incarceration. Further, she wanted to be released so that she would be able to prepare for trial. The state opposed her application. The testimony of the investigating officer showed that she had suffered from severe cold and that a medical officer had visited her and would continue to do so in future. It became clear that she was able to consult with her legal adviser while in custody. There was further damaging testimony from the investigator, namely, that she had interfered with the state witnesses. He indicated further that there were rumours that the applicant intended to abscond. In evaluating the application Newton-Thompson J held that:

Where an accused is charged with murder, bail will be granted only in exceptional circumstances and the onus of establishing such circumstances is on the accused.

The bail was denied because the judge found that she had not shown the existence of exceptional circumstances.⁹¹

In *Kaspersen*, Innes CJ had made indirect reference to exceptional circumstances. He used the expression ‘very special facts’. In this case the Chief Justice argued that the nature of the offence was one element to be considered in a bail application.⁹² Others included the existence of a *prima facie* case against the applicant and the attitude of the Attorney-General towards the application.

⁹⁰ *R v Lee* 1948 (1) PH H30 (CPD).

⁹¹ At H30.

⁹² *Kaspersen v R* 1909 TS 639.

In *Perkins*, the applicant was arrested on 2 June 1934 on a charge of murder. He was brought before a magistrate on 4 June and the matter was adjourned for trial to 19 June.⁹³ The evidence which was taken at the preparatory examination showed that the deceased died from the injuries sustained from a gunshot.

A *prima facie* case of murder had been made against the applicant. It was shown further that the applicant was of good character, financially stable and a man of substance. He had a permanent home in Natal, and was the owner of immovable property. It turned out that when he realised the consequences of his actions, he gave himself up to the police. The application was opposed by the Attorney-General. He submitted that there was information that the applicant was not going to stand trial if he were released on bail. Matthews JP stated that the decision to grant bail is within the absolute discretion of the court. He added that in serious offences such as murder, treason and rape, the discretion was placed on the superior courts. He went on to say that the accused had to satisfy the court that he would stand trial, and that the probability of his not doing so was remote. The learned judge quoted from the judgment of Innes CJ in *Kaspersen*, where it was said that:

a man is always not likely to stand his trial where the charge against him involves a risk on his life.⁹⁴

⁹³*Perkins v R* 1934 NPD 276.

⁹⁴*Kaspersen v R* 1909 TS 278.

Mathews JP ruled that bail often was not granted where an accused was charged with murder. The circumstances had to be exceptional for bail to be granted. The judge rejected the submission that the fact that the applicant handed himself over to the police constituted an exceptional circumstance. He said that it was an indication of the state of mind of the applicant after the occurrence of the event. Furthermore, the judge said that there is the *ipse dixit* of the Attorney-General that bail should not be granted. The application failed.

Grobler emphasised also the three considerations which are listed above.⁹⁵

However, the offence was not murder. The applicant was accused of high treason.

It was a serious offence because the sentence could be the death penalty.

The applicant sought bail on two grounds. Firstly, he argued that there was no

prima facie case against him. Secondly, he wanted to attend parliamentary proceedings because he was a member of Parliament for the Rustenberg division.

He developed the first ground by conceding that he was arrested by soldiers. The

arrest took place after he had attended meetings with rebel soldiers. However, he

argued that it was unlikely that he might receive a heavy sentence. He said that

there was no evidence of his active involvement in the rebellion. According to him

there was no evidence which could show that he was in command of the rebellion.

The court did not agree with the argument that there was no evidence against the

⁹⁵ *Grobler v Attorney-General* 1915 TPD 9.

applicant simply because he did not take up arms. The court argued that the applicant, contrary to his belief, was facing a severe sentence.⁹⁶ The court refused to grant bail.

4.4 Criticism of the common law approach

The courts were not consistent in the application of the criterion of exceptional circumstances. Some applied it while others refused to do so. In *Alexander*, the court refused to apply it and the applicant was released on bail.⁹⁷ He was charged with one count of murder and one of attempted murder. There were two complainants who were injured by the accused. One passed on and the other survived. The facts of the case showed that the two complainants were the aggressors. The applicant was crippled in one arm. The deceased had assaulted the applicant and his wife. The surviving complainant was getting ready to assist the deceased. When the applicant saw an attack on his wife he drew a knife and assaulted the two complainants. Dove-Wilson JP held that the court had discretion to admit the applicant to bail even though he had been charged with murder.⁹⁸

*Mtatsala*⁹⁹ is another example where use was made of exceptional circumstances. However, the court refused to rubber stamp the attitude of the Attorney-General. There were in fact two confusing views from the state, namely, that of the district

⁹⁶ At 15.

⁹⁷ *Alexander v R* 1920 NPD 33.

⁹⁸ At 34.

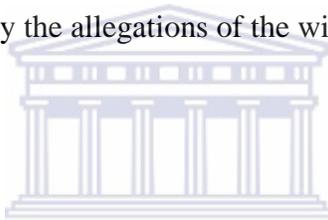
⁹⁹ *R v Mtatsala and Another* 1948 (2) SA 585 (E).

and that of the division. The local prosecutor did not oppose the bail while the Attorney-General did. It would appear that the court was prepared to accept the view of the local prosecutor. Lewis J focused his objection on the submission of the Attorney-General, who argued that in view of the sentence which might be passed, there was a possibility that the applicants might fail to stand trial. He concluded that there was a need to show exceptional circumstances in order to justify the application. The applicants conceded that it was required of them to show special facts or exceptional circumstances. The court held that it was in the better position to decide of its own accord on the considerations on which the Attorney-General based his opposition to bail. Finally, the judge attacked sharply the idea, which some courts have elevated it into the position of a presumption of law, namely, that a man who is likely to be found guilty of murder and face execution would not wish to stand trial. The court found that the onus had not been discharged.

In *Gcora* the court similarly criticised the *ipse dixit* of the Attorney-General.¹⁰⁰ It was alleged that the applicant had caused the death of a woman. Two of the accomplices of the applicant had already been granted bail. It appeared that the Attorney-General opposed his application. The applicant had accepted short service. He was arrested in July and accepted a trial date the following month. In his application, he relied heavily on his acceptance of short service. He argued that that indicated that he would not abscond or tamper with the witnesses. There

¹⁰⁰ *R v Gcora* 1943 EDL 74.

were three grounds on which the application was opposed, namely, that the accused would abscond, that he would influence the witnesses, and the witnesses might abscond. The court spent a considerable time in evaluating the ground that the applicant would tamper with the witnesses. The prospective witnesses for the state had indicated that the applicant would influence them. They asserted that he had already made threats. They made affidavits in which they swore that he had threatened them about divulging details of what they had seen. The applicant countered these allegations by showing that some of these witnesses had personal interests in the matter. The court held that it would be unfair on the applicant if it allowed itself to be persuaded by the allegations of the witnesses. Therefore, the application was granted.¹⁰¹



In the case of *Ali Ahmed*, the court criticised the approach that where the possible penalty is a severe one, bail should be denied.¹⁰² The court should not presume that the accused would not stand trial. In this case, the accused was arrested on 11 July 1921. He was charged with six counts of contravention of the Medical and Dental Ordinance 29 of 1904, two charges of rape and one of attempt to procure an abortion. The accused alleged that the trial would be held in November and he wanted to be in continuous consultation with his attorney. He was prepared to pay bail in cash and promised to comply with any conditions that the court imposed. Wessels JP submitted that some courts have gone so far as to say that where the penalty may be a very severe one, such as a penalty of death or a long term of

¹⁰¹ At 77.

¹⁰² *Ali Ahmed v Attorney-General* 1921TPD 587.

imprisonment, that they will presume that a person would prefer to flee beyond the borders of the country rather than to stand trial. Wessels JP did not want to comment on whether the presumption was justified or not. He submitted further that courts tendered to scan the evidence in order to determine what penalty might be imposed. He argued that where the court came to the conclusion that a severe penalty was not likely, the court would grant bail as a rule. When the court is uncertain about the penalty which it might impose for crimes of murder, rape and treason, it would refuse to grant bail. *In casu*, the application was refused. The accused was Portuguese, and it was probable that he would attempt to escape.¹⁰³

4.5 Exceptional circumstances and the Constitutional Court

The decisions which opposed the above approach were vindicated by the Constitutional Court judgment in *Makwanyane*.¹⁰⁴ The death penalty was declared unconstitutional. The declaration had the effect that the criterion which was applied in bail applications involving serious offences became suspect. When the death penalty disappeared, it became almost impossible to sustain a criterion of exceptional circumstances.

Chaskalson P asserted that the death penalty was not even applied uniformly in the past. He singled out one example in South Africa where it was abolished, namely, in the Ciskei.¹⁰⁵ It is submitted that it was untenable to require of bail

¹⁰³ *Ali Ahmed v Attorney-General* 1921 TPD 589.

¹⁰⁴ *S v Makwanyane and Another* 1995 (3) SA 392 (CC).

¹⁰⁵ At 411.

applicants to show exceptional circumstances because the death sentence might be imposed, since the same applicant might not be subjected to the same criterion in another part of the country. The abolition of the death penalty signalled the inevitable demise of the criterion of exceptional circumstances. This is because the two were intrinsically linked. Kriegler J conceded in *Dlamini* that a bail application which requires that the applicant should satisfy the court that exceptional circumstances exist violates the liberty rights of a person and other rights such as the presumption of innocence.¹⁰⁶ However, the judge found that it is a justifiable limitation due to the increased levels of violence in the country.

4.6 Exceptional circumstances in statutory law

It is submitted that the legislature resolved to enact the criterion of exceptional circumstances into the bail jurisprudence in the same manner as the interests of justice had been enacted. The preamble to the 1997 amendment of the CPA provides that the purpose of the Act is:

to detain an accused in custody unless the accused satisfies the court that exceptional circumstances exist why he or she should be released.

The purpose of the amendment was to correct the similarity which existed between Schedule 1 and Schedule 5 offences. The latter offences are meant to be more serious than the former. However, both schedules contain the same offences, except that Schedule 5 includes attempted murder, offences in chapter 2 of the Prevention and Combating of Corrupt Activities Act and offences which relate to terrorism. The use of the requirement of ‘exceptional circumstances’ distinguished

¹⁰⁶ *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC).

the 1997 amendment from the previous one, which had the requirement of interests of justice. The legislature did not define the criterion of exceptional circumstances. Section 60(11)(a) which, contains the requirements of exceptional circumstances in bail hearings, provides that:

Notwithstanding any provision of this Act, where an accused is charged with an offence referred to 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 in the interests of justice permit his or her release.

Parliament passed section 10 of Act 85 of 1997. It introduced a list of very serious offences known as Schedule 6 offences into the Criminal Procedure Act. Murder is at the top of this list. This schedule consists of the same offences which were regarded as very serious at common law or in Schedule 1 and Schedule 5.

However, there is a distinction. The legislature singled out three offences. These are murder, rape and robbery. These are listed Schedule 6 offences. They stand out as very serious for two reasons. Firstly, the legislature has qualified the circumstances under which they occur. Secondly, the same offences have once more been selected for inclusion in the Schedule for the purposes of minimum sentences. The following is an example of the manner in which these offences

have been qualified. Murder is qualified as follows:

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, (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.

Murder will fall under Schedule 1 or Schedule 5 where these qualifications are absent. Similar qualifications have been created for rape and robbery.

It submitted that these offences appear additional to offences which the state, in the apartheid era, regarded as very serious. In truth, they are not. The courts developed an approach at the time to distinguish serious and less serious offences. In the following passages it will be shown that three offences were singled out and regarded as very serious. These were murder, treason and rape. There were clear indications where an accused faced a serious offence. Firstly, the bail application was heard only in a superior court. Secondly, the court which heard the bail application would scan the strength of the case in order to see whether a severe sentence might be imposed. Thirdly, most of these offences were grouped under Part II or III of Schedule 2 of the CPA. This included Schedule 3 of the Internal Security Act.¹⁰⁷ Finally, the Attorney-General would oppose such bail applications.¹⁰⁸ It will be shown further that the courts paid lip-service to the presumption of innocence, especially in a bail application. Instead, the courts emphasised the presumption that a man always is not likely to stand trial where the charge against him involves a risk to his life. This presumption took the place of the presumption of innocence. In addition, the bail applicant was required to give affidavits on the merits of the case. This was allowed despite the understanding that the presiding officer hearing the bail application was going to be the same who hears the trial.

¹⁰⁷ Section 59(i)(a) of the CPA.

¹⁰⁸ Section 61 of the CPA.

Moreover, the bail applicant was required to provide exceptional circumstances for his release. The position of the presumption of innocence has been improved by the adoption of the negotiated dispensation. The improvement came as a result of the Bill of Rights, which is an integral part of the Constitution. The Bill of Rights is indispensable insofar as the presumption of innocence is concerned. It provides that:

Every accused person has a right to fair trial, which includes the right-
to be presumed innocent, to remain silent and not to testify during the proceedings...¹⁰⁹

The list of Schedule 6 offences is not exhaustive. The last part of the Schedule makes this abundantly clear. The Schedule includes Schedule 5 offences. This happens when certain requirements have been met. One requirement is that the bail applicant must have been convicted of an offence which is listed in Schedule 5. The other is that he must have been released on bail for an offence listed in Schedule 5. This means that a Schedule 6 bail applicant may fall under any of three classes, namely, that he had a previous conviction of a Schedule 5 offence, that he has a pending matter which is listed in Schedule 5 or that he is a first offender in a matter which is listed in Schedule 6. The requirement of exceptional circumstances makes no distinction between the bail applicant who is a first offender and the one who has a previous conviction or even has a pending case. This failure to distinguish between different applicants makes a Schedule 6 bail application similar to the bail applications which were held in the apartheid era insofar as the disregard of the presumption of innocence is concerned.

¹⁰⁹ Section 35(3) (h) of the 1996 Constitution.

Various attempts have been made to give a description of exceptional circumstances. It is submitted that in the past courts never seemed to struggle with the definition of exceptional circumstances. The concept was first defined in 1909, in the case of *Kaspersen*, in which Innes CJ made mention of two considerations. The first was the strength of the case against the accused. This was evident from the papers, which the attorney of the accused had submitted to the court. The second consideration was the *ipse dixit* of the Attorney-General who wanted the accused to remain in custody. In this case the words ‘exceptional circumstances’ appeared in the head note as follows:

Where the records of a preliminary examination on a charge of murder raise a strong presumption of the guilt of the accused, the Court will not, save under exceptional circumstances, release him on bail, especially when the Attorney-General opposes the application.

The Chief Justice said that it would require the applicant to present very special facts to rebut the circumstances that required that he should be kept in custody. He held that in the present application those facts were not present. The Chief Justice added that there is a further consideration, namely, the *ipse dixit* of the Attorney-General, which opposed bail.¹¹⁰ It can be seen that the court did not seem to have problems with what exceptional circumstances were.

The latest decisions confirm that the strength of the case against the bail applicant is still considered as one of the exceptional circumstances. An example of such decision is *Viljoen*.¹¹¹ The case is important for another reason, namely, that the

¹¹⁰ *Kaspersen v R* 1909 TS 641.

¹¹¹ *S v Viljoen* 2002 (2) SACR 550 (SCA).

appellant was required in a bail application to prove his innocence.¹¹² The appellant was 28 years old. He lived in Pretoria with his wife. It appeared that the wife was five months pregnant. He was arrested on 29 August 2001 and charged with the murder of his wife. There were two different proceedings before the same magistrate. One was the questioning of the appellant by the presiding officer in order to establish whether he admits all the elements of the charge. The second was the bail application. It is crucial to illustrate the questioning and answering proceedings because it would show not only the strength of the case, but also the chances of success of his impending bail application. It proceeded as follows:

V. (Die landdros) Erken u dat die oorledene dood is as gevolg van die wonde wat u haar toegedien het?

A. Ja

V. Hoekom het u die oorledene gedood?

A. Ek het dit vooraf beplan dat ek haar gaan dood maak. Ek het 'n venster gebreek en in die huis ingeklim. Terwyl die oorledene slaap het ek haar wakker gemaak en vir haar gesê staan op. Ek het haar mond toegedruk tot by die kamerdeur geloop met 'n mes in my hand dit was 'n nutmes gewees en ek het toe haar keel afgesny. Ek het toe weer deur die venster geklim en toe werk toe gery. Ek weet nie hoekom het ek dit gedoen nie.

V. Het u geweet die oorledene is swanger?

A. Ja Ek het dit geweet.

V. Het u geweet u tree verkeerd op toe u so opgetree het?

A. Ja.

V. Het u inderdaad geweet toe u die daad pleeg dat u misdryf pleeg ?

A. Ja.

V. Het die voorval plaasgevind op 10/04/2001 en te of naby Plot 40 Haakdoringboom in die distrik van Wonderboom?

A. Ja.

Hof is dan oortuig dat die beskuldigde al die elemente van die misdryf en die bewerings in die klagstaat erken.

The questioning and answering proceedings were completed. However, the court records indicated that section 112(1)(b) of the CPA proceedings were stopped to allow the Director of Public Prosecutions to intervene. The appellant wanted to bring a bail application in the meantime. The first bail application failed. The

¹¹² Cowling (2003: 221)

matter, for some unexplained reason, was adjourned for trial and a bail application in the High Court. The second bail application was unsuccessful. There was an appeal against the High Court decision to refuse bail. On appeal, Olivier JA said that he would consider an exceptional circumstance to be same as was decided by Comrie J in *Mohamed*. He said that in the present matter an exceptional circumstance would be:

sterk, onafhanklike getuienis aanduidend van die beskuldigde se onskuld (in casu 'n gestaafde alibi) is in *S v Mohamed* 1999 (2) SASV507 (K) deur Comrie R in 'n beredeneerde beslissing as buitengewone omstandighede soos bedoel in art 60(11)(a) van die Wet aanvaar.¹¹³

The appeal judge simply required that the bail applicant should prove his innocence. It followed that the court no longer presumed him to be innocent.

When the matter appeared in the High Court, the appellant had changed his mind about his earlier admissions in the district court. The new version of his story went as follows:

Op 29 Augustus 2001 het ek 'n oproep by my werk ontvang vanaf die ondersoekbeampte. Hy was by die hoofhek van my werk en het my versoek om daarheen te gaan. Ek is toe versoek om hulle te vergesel na sy kantoor. Ek is in sy kantoor deur 'n aantal mans aangerand en met die dood gedreig om te erken dat ek my vrou vermoor het. Hulle het my vasgemaak en 'n rubber handskoen oor my kop getrek so dat ek nie kon asem kry nie. Hulle wou van my weet wat ek met die moordwapen en my klere gedoen het. Ek het vir my lewe gevrees en het bloot om hierdie marteling vry te spring erken dat ek my vrou vermoor het. Ek het aangedui dat ek vir hulle sou gaan wys het waar ek die goed weggegooi het. Ek het 'n polisiebeampte na 'n oop veld oorkant my werksperseel geneem alhoewel ek geweet het dat daar niks gevind sou word nie...Nadat ek hierdie sogenoemde erkennings gemaak het, het die ondersoekbeampte my beveel om in die hof skuldig te pleit. Hy het my duidelik laat verstaan dat indien ek iets anders in die hof sou sê, ek weer gemartel sou word soos die dag tydens my arrestasie.¹¹⁴

Olivier JA came to the conclusion that the appellant failed to show the existence of exceptional circumstances.

¹¹³ *S v Viljoen* 2002 (2) SACR 14 (SCA).

¹¹⁴ At 16.

Some attempt to define exceptional circumstances was made in *H*.¹¹⁵ The appeal judge asserted that the legislature does not give examples of exceptional circumstances. He made use of the Concise Oxford Dictionary as an aid to define exceptional circumstances, as envisaged in section 60(11)(a), to mean unusual or not typical. The appeal judge went on to say that the dictionary defines ‘special case’ as exceptional or out of the ordinary. Another attempt to define exceptional circumstances was made by Kriegler J in *Dlamini*. He asserted that exceptional circumstances are broad enough to accommodate any relevant circumstance of the applicant. He went on to say that the applicant may decide to refer to her personal circumstances or anything which she deems suitable.¹¹⁶

It is submitted that the plausible way to deal with exceptional circumstances is to explain it in conjunction with section 51 of the Criminal Law Amendment Act 105 of 1997. This means that the exceptional circumstances may be explained by making reference to the forum and the type of sentence which might be imposed on the applicant. The legislation provides for minimum sentences for certain serious offences and the relevant forum for adjudicating these serious offences. The section provides that in respect of a serious offence, a convicted person may be sentenced only in a regional court or High Court. In this respect Schedule 2 will be important because the minimum sentence relates to these offences. The Schedule 2 offences are essentially a repetition of the Schedule 6 offences. Murder is once more selected in order to illustrate the similarity between the two

¹¹⁵ *S v H* 1999 (1) SACR 77 (WLD).

¹¹⁶ *S v Dlamini S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC).

schedules. The only striking distinction between the Schedule 6 offences and the Schedule 2 offences is the subdivision of the offences into four parts. Murder, for example, is contained in part 1 as follows:

- PART 1 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
 - (ii) robbery with aggravating circumstances or
 - (d) the offence was committed by a person, or group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Schedule 2 of Act 105 of 1997 is exactly the same as Schedule 6 of the Criminal Procedure Second Amendment Act 85 of 1997. The only difference is that Schedule 2 is subdivided into four parts and it consists of offences which are contained both in Schedule 5 and Schedule 6. This structure is an indication that the intervention by the state in court proceedings is felt throughout. This means that the state interferes at the beginning of the proceedings and continues to do so until the sentencing stage. It is submitted that it becomes unnecessary for a bail applicant to show the existence of exceptional circumstances because, in actual fact, the applicant is required to prove his innocence. It is submitted, further, that persons whose bail applications resort under exceptional circumstances are expected to prove their innocence both in the bail application and in the trial. This attitude disrespects human rights and the right to be presumed innocent.

4.7 Conclusion

It has been shown that in bail applications involving serious offences there is no distinction between the apartheid era and the present. In the former era, no regard had been paid to the presumption of innocence in respect of the serious offences. It was a presumption which applied in less serious offences. There was a separate presumption for serious offences. The latter was applied even though it had no legal foundation. There is no case law from where it could be shown to have originated. All the reported cases focused on the gut feeling that a serious allegation might lead to a severe penalty, and that led courts to conclude that the applicant would abscond. The serious offences which courts were concerned about were offences which could lead to death penalty.

Some reported cases in the apartheid era dealt with serious cases by examining the nature of the offence. This allowed them to make a deduction that a severe penalty such as the capital punishment would follow inevitably. Hence, they regarded a bail application as an attempt to escape impending punishment by the applicant. Therefore, they did not want to place the applicant in a position whereby he obtained an escape route through the courts. A bail application frequently would include other considerations, such as the *ipse dixit* of the Attorney-General. These cases required that under such circumstances the applicant should show the existence of exceptional circumstances in order to rebut the presumption that the bail application was brought as a measure to avoid a trial. When the courts

required this criterion they knew full well that bail would be denied. The 1997 amendment of the CPA may be regarded as a vindication of and a victory for these cases.

The latest decisions are clear about the requirement of exceptional circumstances. The bail applicant is simply required to prove his innocence. The success of the applicant in doing so would lead to the success of the bail application. And the contrary also holds true.

Others criticised the application of the exceptional circumstances criterion and refused to apply it. It is submitted that the seriousness of the sentence was not a plausible standard. This is because in some parts of the country, capital punishment applied. In others it was abolished. Therefore, an applicant charged with murder did not always face the risk of losing his life. Thus, a criterion which did not enjoy uniform application should not have been used as a basis for refusing a bail application.

In the next chapter it will be recommended that a better model of a bail application should focus on respect for rights, especially the right to be presumed innocent.

CHAPTER 5: MODELS OF THE PRESUMPTION OF INNOCENCE

5.1 Introduction

This chapter comprises a comparative analysis of different models of the presumption of innocence. Each of the models is distinguished from the others by the extent to which it infringes upon the right to be presumed innocent. The comparison covers South Africa, Namibia, Botswana and Nigeria. At the end of this chapter, it will be recommended that a desirable model of the right to be presumed innocent should accommodate a speedy trial. In modern societies one of the violations of the right to be presumed innocent manifests itself in long periods of pre-trial detention. This amounts to a punishment because long imprisonment causes hardships, which are not justified because the suspects have not been sentenced or even convicted.¹¹⁷ The comparison will deal also with the extent to which the state intervenes in court proceedings in order to frustrate the right to be presumed innocent. This takes the form of an automatic denial of bail or a qualified right to bail in respect of certain scheduled offences.

5.2 The South African model

The right to be presumed innocent in South Africa forms part of a larger fair trial guarantee. A bail application is considered as part of a trial.¹¹⁸ The right forms part of the fair trial constitutional provision, according to which:

¹¹⁷ Amoo (2008: 9).

¹¹⁸ Section 35 (3) of the Constitution.

Every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it; to have adequate time and facilities to prepare a defence; to a public trial before an ordinary court; to have their trial begin and conclude without unreasonable delay; to be present when being tried; to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly; to be presumed innocent, to remain silent,...

The provision gives regard not only to the right to be presumed innocent, but also to have a trial without unreasonable delay. These two rights are connected because an accused whose trial is delayed might have to remain in custody, despite the fact that he should be presumed innocent.

The Constitutional Court has struck down a provision which conflicted with the right to be presumed innocent.¹¹⁹ There were two cases which were brought to court by way of an automatic review. The first was *Bhulwana* and the second was *Gwadiso*. In *Gwadiso* the accused was found in possession of 850g of dagga. He was not charged with possession of dagga but with dealing in dagga. He was found guilty and convicted. And in *Bhulwana*, the accused was found in possession of 444,7g of dagga. He, too, was charged with dealing. He was subsequently convicted. In both cases the state did not have evidence which proved that the accused dealt in dagga, for example, the evidence of a trap which often is used to prove dealing in illicit drugs.

O'Regan J prepared the judgment in both cases. She said that the matter before the court concerns section 21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of

¹¹⁹ *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC) at 393.

1992. The section provided that where a person is found in possession of dagga in excess of 115g, it would be proper to presume that the accused dealt in drugs 'until the contrary is proved'. The judge examined the presumption contained in this provision. She gave its background history. It has been part of South African law since 1954, and was first used in the Medical Dental and Pharmacy Act. She went on to say that the possession of, as well as dealing in, dagga was and is still not allowed. The effect of the presumption was that the prosecution did not have to prove dealing in illicit drugs. It was enough to prove possession. However, the accused would have been convicted for dealing in dagga. The state wanted a severe penalty to be imposed on a person who was found in possession of illicit drugs. The judge referred to the construction of the provision, namely, 'until the contrary is proved'. She argued that it was consistent with a legal burden. She supported her argument by citing a string of cases which had classified similar provisions as a legal burden.

There were two contradictory possibilities to the meaning of the clause. One is that it might refer to an evidentiary burden and the other is that it might impose a legal burden. The state favoured the former meaning. The accused would have preferred the court to regard the provision as imposing a legal burden. O'Regan J analysed the past and the current legislation. She found that the difference pertained to the words 'unless' and 'until'. In the past, legislation made use of the former word and the current legislation of the latter. She submitted that the earlier

decisions, as well as the present matter in the trial court, had found that the construction refers to a legal burden. She agreed.

Once the judge was satisfied that the provision may be classified as a legal burden, she went on to show how it would affect the accused. She argued that the state would have to show that the accused were in possession of dagga in excess of 115g. The accused would be required to do two things, namely, to adduce evidence which creates a reasonable doubt and, secondly, to do so on a balance of probabilities.

The judge came to the most important aspect. She wondered whether the provision violated the right to be presumed innocent. She gave a historical outline of the presumption of innocence. It has English origins. However, it is not in conflict with Roman-Dutch law. She showed, further, that the presumption had been accepted as part of South African law. In the past, reported decisions recognised the presumption. At present, both case law and the Constitution give respect to it. She went on to show that there is also case law which allows for an exception to the right to be presumed innocent.

O'Regan J singled out the decision of Kentridge AJ in *Zuma*¹²⁰ because it dealt with the constitutionality of a provision of the Criminal Procedure Act. Also, it set a precedent in respect of the presumption of innocence and the legal burden. In

¹²⁰ *S v Zuma and others 1995 (2) SA 642 (CC)*.

that case Kentridge AJ found a similarity between the South African and the Canadian Bill of Rights. He asserted that the inquiry into the constitutionality of a provision in the two Bills of Rights is the same. There are two inquiries, namely, a preliminary inquiry and a second inquiry. The preliminary enquiry serves to establish whether in fact there has been a breach of a constitutional right. And the second enquiry is meant to establish whether the breach could be justified by means of a limitations clause. Kentridge AJ illustrated that both the Canadian and the South African Supreme Court upheld the right to be presumed innocent.

O'Regan J compared the matter before her with the *Zuma* case. They were similar with respect to the presumption of innocence. The *Zuma* matter had a presumption which relieved the prosecution of its duty to prove its case beyond a reasonable doubt. However, the Constitution had entrenched the right to be presumed innocent.¹²¹ Therefore, it was inconceivable to have an entrenched right as well as the breach of the same right. A choice had to be made. O'Regan J said that a presumption which assists the prosecution cannot be chosen above the presumption of innocence because it would mean that a person might be convicted despite the existence of reasonable doubt. She argued that the first inquiry was concluded because it was established that there was indeed a breach of a constitutional right. She said that the second inquiry deals with the limitations clause of the Constitution. And it is required that a presumption which might result in a conviction of a person despite the existence of reasonable doubt has to

¹²¹ At the time the right was entrenched in the 1993 Constitution.

be justified in terms of the limitations clause. It has its own requirements which have to be met, namely, the offending provision should be reasonable, necessary and justifiable in the present dispensation. And it should not diminish the right which it limits.

The judge cited *Makwanyane*, where the second stage was referred to as the proportionality test and another consideration, namely, a less invasive alternative was added.¹²² The inquiry was simplified by comparing the importance of the offending provision and the effects of its breach. An imaginary balancing scale is used. One side contains the offending provision and the other contains the impact of its breach. She assessed the submission of the state, namely, that the provision served a good social purpose. This was to control trafficking in illicit drugs. The state submitted that the provision ensured that offenders were convicted and given heavy penalties. The judge conceded that it is a good initiative to take steps to control trafficking in illicit drugs.

However, she could not find a connection between the purpose and the heavy sentencing discretion which the courts were given. She said that penalties for possession of drugs were more severe than for dealing, although the sentencing discretion for dealing in dagga is greater. She noted further that in the two cases before the court, the presumption had been used and the accused were convicted of dealing. However, lesser sentences were imposed. The judge was

¹²² *S v Makwanyane and Another* 1995 (3) SA 392 (CC).

convinced that the presumption did not affect the sentences. It was not necessary. She doubted also if the other requirements of the proportionality test, which are listed above, would be met. She declared section 21(1)(a)(i) of Act 140 of 1992 to be an infringement of the right to be presumed innocent, which infringement is unreasonable, unjustifiable and unnecessary.

The South African Constitution does not guarantee an absolute right to bail. It provides that:

Everyone who is arrested for allegedly committing an offence has a right to be released from detention if the interests of justice permit, subject to reasonable conditions.¹²³

It is submitted that the once glorified right to bail, which is guaranteed in the Constitution, has been diminished by two important amendments to the CPA. The impact of these is so extensive that in certain scheduled offences, there is both a conditional right to bail and an automatic denial of bail, despite the constitutional guarantee. The first amendment came into effect in 1995 and the second in 1997. The 1995 amendment is based on the Constitution. It will be recalled that this requirement is contained in section 35(1) (f). The Constitution makes a release from custody dependent on the requirement of the interests of justice. The 1997 amendment is based upon the requirement of exceptional circumstances. This amendment has no similar constitutional origins. However, it can be traced to the past decisions in bail applications involving serious crimes such as murder.

¹²³ Section 35(1) (f) of the Constitution.

An analysis of the interests of justice requirement, which is contained in the first amendment, shows a strong intervention by the legislature in court processes. The CPA provides for five grounds on which a bail application may be refused by a court. It says, further, that when any of those grounds is present, the decision of the presiding officer should be that the requirement of the interests of justice is not met by the bail applicant.¹²⁴ In other words, the Act requires that the state should allege any of the listed grounds. The Act goes further and gives a list of factors for each ground.

Further intervention by the legislature in bail applications may be observed through the provisions relating to the Attorney-General. The CPA gives power to the Attorney-General to appeal a decision which grants bail to an accused.

It is submitted that the first amendment does not diminish completely the right to bail. However, the second amendment takes away altogether the right to bail in respect of certain scheduled offences. The CPA provides that the applicant should satisfy the court that exceptional circumstances exist for bail to be granted. Both amendments attack the presumption of innocence, because they prolong the detention of people who should be considered innocent. And they are an unnecessary burden upon the courts. The amendments are a manifestation of excessive legislative intrusions in the judicial sphere.

¹²⁴ Section 60 (4) of the CPA.

Human rights and the right to be presumed innocent have been disregarded in the process. Moreover, the amendments have the effect that a trial is delayed unreasonably. The Constitution guarantees that an accused would make a first appearance in court within 48 hours.¹²⁵ However, unreasonable delays take place owing to the amendments. They have the effect that the bail applicant may be released by a court only. The court would have to find a suitable day to hear the application. And in this respect, the CPA provides that the case may be postponed for 7 days in order to hear the application.¹²⁶ Further postponements are possible due to congested court rolls.

The South African model of the presumption of innocence entails an automatic denial of the right to bail in certain circumstances. The ground of denial is based on the seriousness of the offence. The motivation for this is security and not concerns to protect human rights.¹²⁷ It will be shown that the Namibian model is superior to the South African model.

5.3 The Namibian model

The Namibian Constitution protects the liberty of the individual and provides that:

No persons shall be deprived of personal liberty except according to procedures established by law.¹²⁸

¹²⁵ Section 35(1)(d)(i) of the Constitution.

¹²⁶ Section 50(6)(d)(i) of the CPA.

¹²⁷ Amoo (2008: 3).

¹²⁸ Article 7 of the Namibian Constitution.

The right to be presumed innocent is contained in article 12 of the Namibian Constitution. It deals with fair trial provisions. Namibia and South Africa make a good comparison because both use the same Criminal Procedure Act, namely, Act 51 of 1977. This is because Namibia was part of South Africa. Now it is independent. It is interesting to note that the case that marked a difference between the models of South Africa and of Namibia dealt with the powers of the Attorney-General. It has been argued above that in the South African model the intrusion upon the presumption of innocence has been by means of both the Attorney-General's office and legislation. The Namibian model is based on the case which outlawed the intervention of the Attorney-General's office.

In *Smith*, Hiemstra CJ declared Act 33 of 1980 (B) 'null and void and of no force and effect'. The appellant was charged with fraud and theft of money. The value of the money, which was allegedly stolen from the state, was R240 000, 00. The appellant brought a bail application in the magistrates' court. Bail was denied. The damaging evidence against his bail application was adduced in terms of Act 33 of 1980. This law had been inserted into the CPA.¹²⁹ It empowered the Attorney-General to oppose a bail application. The grounds for opposing the application were that the appellant would not stand trial. It was contended, further, that the appellant lived outside the jurisdiction of the Supreme Court of Bophuthatswana. On appeal, the Act was attacked by the appellant. He argued that it was a violation of the right to liberty and security of the person. Hiemstra CJ held that:

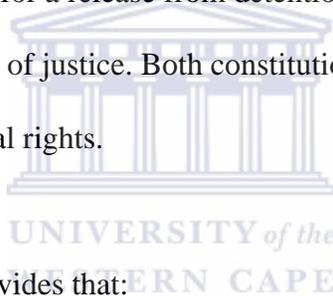
¹²⁹ *Smith v Attorney-General* 1984 (1) SA 182 (A) at 196.

The universal method of safeguarding individual liberty is to entrust it to an independent judiciary operating in public and compelled to give reasons... The magistrate is not only compelled to accept the Attorney-General's ex parte statements of fact, not supported by any evidence, but the statute also tells him what order to give, namely, a refusal of bail. A statute which eliminates the judicial process in matters of personal liberty is plainly unconstitutional.¹³⁰

The Namibian Constitution provides that:

- (1) No persons shall be subject to arbitrary arrest or detention.
- (2) No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest.
- (3) All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer...¹³¹

Unlike the South African Constitution, there is no condition which the Namibian Constitution requires to be met for a release from detention. In South Africa a release depends on the interests of justice. Both constitutional dispensations allow for the limitation of fundamental rights.



The Namibian Constitution provides that:

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:

- (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
- (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

The limitation materialised in the form of an amendment to the Criminal Procedure Act. It became known as the Criminal Procedure Amendment Act 5 of 1991. The purpose is expressed in its preamble and concerns direct intervention in court proceedings. It provides that its object is:

¹³⁰ At 200.

¹³¹ Article 11 of the Namibian CPA.

To amend the Criminal Procedure Act, 1977, so as to further regulate the authority of the courts, magistrates and other judicial officers in relation to bail and to effect a certain adjustment relating to bail in consequence of the Namibian Constitution; and to provide for matters incidental thereto.

The Namibian CPA has now the interests of the public or the administration of justice as a requirement upon which a person might be denied bail.¹³² It provides that:

If an accused that is in custody in respect of any offence referred to in Part IV of Schedule 2 applies under section 60 to be released on bail in respect of such offence, the court may, notwithstanding that it is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police investigation, refuse the application for bail if in the opinion of the court, after such inquiry as it deems necessary, it is in the interest of the public or the administration of justice that the accused be retained in custody pending his or her trial...

It is submitted that the Namibian model of the presumption of innocence does not infringe on the right to be presumed innocent to the same extent as the South African model. The right to be presumed innocent in Namibia is contained in the fair trial constitutional provision.¹³³ It will be shown that the Botswana model is even more favourable to the protection of human rights, including the presumption of innocence.

5.4 Botswana model

The Botswana Constitution guarantees a right to be presumed innocent. It forms part of the provisions which secure protection of the law. Section 10 provides that:

- (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognized by law.
- (2) Every person who is charged with a criminal offence—
 - (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
 - (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;
 - (c) shall be given adequate time and facilities for the preparation of his defence

¹³² Section 61 of the Namibian CPA.

¹³³ Article 12(1) (d) of the Namibian Constitution.

- (d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice;
- (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution...

The provision makes an important guarantee, namely, that a person who has been charged would be brought before court within a reasonable time. This provision is an important aspect of the right to be presumed innocent. However, the Botswana Criminal Procedure Act regulates this aspect further. The CPA provides that:

No person arrested without warrant shall be detained in custody for a longer period than in all the circumstances of the case is reasonable; and such period shall not (subject to the provisions of subsection (2)) unless a warrant has been obtained for the further detention upon a charge of an offence, exceed 48 hours, exclusive of the time necessary for the journey from the place of arrest to the magistrates' court having jurisdiction in the matter.¹³⁴

The Botswana model is different from both the South African and Namibian Constitutions. All three protect the right to personal liberty. The Botswana model provides for a limited list of circumstances which constitute the exceptions to the guarantee of personal liberty. It provides that:

- No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say—
- (a) in execution of the sentence or order of a court, whether established for Botswana or some other country, in respect of a criminal offence of which he has been convicted;
 - (b) in execution of the order of a court of record punishing him for contempt of that or another court;
 - (c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;
 - (d) for the purpose of bringing him before a court in execution of the order of a court;
 - (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Botswana;
 - (f) under the order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of 18 years;
 - (g) for the purpose of preventing the spread of an infectious or contagious disease;
 - (h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

¹³⁴ Section 36 of Botswana CPA.

- (i) for the purpose of preventing the unlawful entry of that person into Botswana, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Botswana, or for the purpose of restricting that person while he is being conveyed through Botswana in the course of his extradition or removal as a convicted prisoner from one country to another;
- (j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Botswana or such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Botswana in which, in consequence of any such order, his presence would otherwise be unlawful; or
- (k) for the purpose of ensuring the safety of aircraft in flight.¹³⁵

Also, the position of arrested and detained persons is contained in this constitutional provision. The next provision outlines the aspects of a fair trial in respect of arrested and detained persons. Subsections (2)-(4) provide that:

- (2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.
- (3) Any person who is arrested or detained—
 - (a) for the purpose of bringing him before a court in execution of the order of a court; or
 - (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Botswana, and who is not released, shall be brought as soon as is reasonably practicable before a court; and if any person arrested or detained as mentioned in paragraph (b) of this subsection is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.
- (4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person.

The provision attempts to follow the provisions of article 5 of the European Convention on Human Rights.¹³⁶ The article allows for an infringement of the right to liberty. It accommodates the invasions on condition that the detained person is brought before judicial proceedings within a reasonable time. The requirement to bring the accused to trial within a reasonable time is refined by the Botswana Criminal Procedure Act. It creates two positions, namely, where the accused is in custody and where he is not. Section 111(1)-(2) provides that:

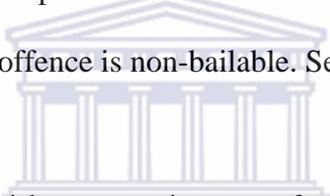
¹³⁵ Chapter 2(5)(1) of the Botswana Constitution.

¹³⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5, Article 5 para2.

(1) When a criminal case before a magistrate's court is adjourned or postponed and the accused remanded, the magistrate may in his discretion, admit the accused to bail in manner herein provided: Provided that the accused shall not be remanded for more than one month if not in custody, or for more than 15 days if in custody.

(2) When a magistrate decides to admit an accused person to bail under this section, a recognizance shall be taken from the accused alone or from the accused and one or more sureties, as the magistrate may determine, regard being had to the nature and circumstances of the case. The conditions of the recognizance shall be that the accused shall appear at a time and place to be specified in writing and as often as and at such intervals not exceeding one month as may be necessary thereafter within a period of six months, until final judgment in his case has been given, to answer the charge of the offence alleged against him or the charge of any other offence which may appear to the Director of Public Prosecutions or the local public prosecutor to have been committed by the accused.

The Botswana model does not easily lend itself to the classification which is premised on the distinction between bailable and non-bailable offences. The Botswana Criminal Procedure Act provides for bailable offences. However, bail may be granted even where the offence is non-bailable. Section 104 of the Botswana CPA provides that:



Every person committed for trial or sentence in respect of any offence except treason or murder may be admitted to bail in the discretion of the magistrate: Provided that-

- (i) the refusal by the magistrate who has committed any person for trial, to grant such person bail shall be without prejudice to such person's rights under section 113, and
- (ii) the magistrate may admit to bail a person under the age of 18 committed for trial on a charge of murder.

This provision is not the only provision where bail may be granted for a non-bailable offence. The High Court of Botswana is empowered, in terms of section 114 of the Botswana CPA, to grant bail for all offences.

The South African model allows for intervention in the judicial processes in two ways. One of the means is legislation. The other is by means of the office of the Attorney-General. The powers are derived from the CPA. The Botswana model provides also for powers of the Director of Public Prosecutions. However, there is

no interference in the court proceedings by the Director of Public Prosecutions in Botswana. Section 81(1)-(2) of the CPA provides that:

(1) Where a magistrate has discharged an accused under section 77, any recognizances taken in respect of the charge shall become void unless, within 28 days, the Director of Public Prosecutions as hereinafter provided orders that the accused be committed for trial or that a further examination shall take place.

(2) Notwithstanding that the accused has, after a preparatory examination, been so discharged, a warrant for his arrest may upon information on oath (other than that recorded at his examination), be issued on the specific instructions of the Director of Public Prosecutions by a person empowered under Part VI to issue warrants of arrest; and upon his being brought before a magistrate, the preparatory examination shall be re-opened in accordance with such instruction as the Director of Public Prosecutions may give.

The Director of Public Prosecutions in Botswana interferes with the decision of the magistrate after a ruling has been made. Also, the interference is not concerned with the decision whether or not to grant bail. It is concerned with the preparatory examination. The interference has no effect on human rights or even the right to be presumed innocent. It is concerned with the decision whether or not to prosecute. This power is limited also to matters which will be tried in the High Court. Section 97 of the CPA provides that:

No person shall be tried in the High Court for any offence unless he has been previously committed for trial by a magistrate, whether or not the committal was on the direction of the Director of Public Prosecutions in exercise of the powers conferred upon him by section 94(1)(c) or in accordance with the provisions of section 96 for or in respect of the offence charged in the indictment: Provided that-

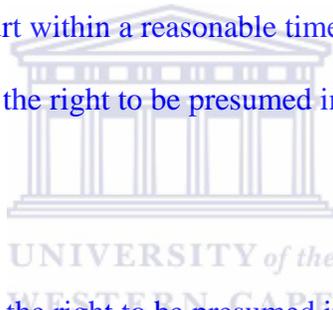
(i) in any case in which the Director of Public Prosecutions has declined to prosecute, the High Court may, upon the application of any such private party as is described in sections 14 and 15, direct any magistrate to take a preparatory examination against the person accused;

(ii) an accused person shall be deemed to have been committed for trial for or in respect of the offence charged in the indictment, if the depositions taken before the committing magistrate contain an allegation of any fact or facts upon which the accused might have been committed upon the charge named in the indictment although the committing magistrate may, when committing the accused upon such depositions, have committed him for some offence other than that charged in the indictment or for some other offence not known to the law;

(iii) an accused person who is in actual custody when brought to trial, or who appears to take his trial in pursuance of any recognizance entered into before any magistrate, shall be deemed to have been duly committed for trial upon the charge stated in the indictment unless he proves the contrary.

The provision shows further that the decision of the Director of Public Prosecutions not to prosecute may be challenged in the High Court. It is conceded that the last part of the provision contains what the Constitutional Court in South Africa has referred to as a legal burden. And it offends against the right to be presumed innocent. It created a presumption which assisted the state. However, in Botswana the provision does no harm to the presumption of innocence or the accused because it brings an end to the prosecution.

The Nigerian model is similar to the Botswana model. It begins by giving respect to the right to be brought to court within a reasonable time. And in the same provision it gives due regard to the right to be presumed innocent.



5.5 The Nigerian model

The Nigerian model guarantees the right to be presumed innocent. This is an attempt to conform to the Universal Declaration of Human Rights. Article 11.1 of the (UDHR) provides that:

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence.¹³⁷

The right to be presumed innocent in the Nigerian Constitution is to be found within the fair trial provisions. This has the effect that the right to be presumed innocent is coupled with the right to be brought to court within a reasonable time. Section 36 of the Nigerian Constitution provides that:

¹³⁷ Amoo (2008: 3).

(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

(2) Without prejudice to the foregoing provisions of this section, a law shall not be invalidated by reason only that it confers on any government or authority power to determine questions arising in the administration of a law that affects or may affect the civil rights and obligations of any person if such law –

(a) provides for an opportunity for the persons whose rights and obligations may be affected to make representations to the administering authority before that authority makes the decision affecting that person; and

(b) contains no provision making the determination of the administering authority final and conclusive.

(3) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public.

(4) Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal: Provided that –

(a) a court or such a tribunal may exclude from its proceedings persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice;

(b) if in any proceedings before a court or such a tribunal, a Minister of the Government of the Federation or a commissioner of the government of a State satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.

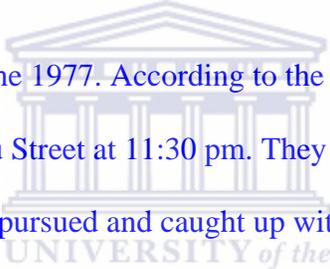
(5) Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty...

The Supreme Court of Nigeria has confirmed the pivotal role which the right to be presumed innocent plays. In *Audu Aruna*, Obaseki JSC asserted that in criminal proceedings a person is presumed innocent until guilt is proved.¹³⁸ The appellants were charged with armed robbery. They were tried and convicted of the contravention of the Armed Robbery and Firearms

¹³⁸ *Audu Aruna and Another v the State* 1990 11 NILR 4 (SC).

Decree. They were sentenced to death. The Court of Appeal rejected their appeal.

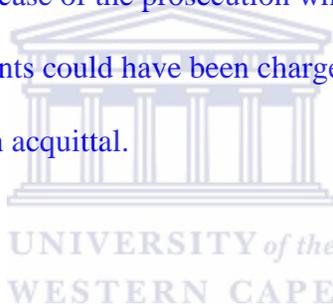
Consequently, they approached the Supreme Court. It became clear that the trial judge was persuaded by the prosecution. And this caused him to ignore the case which the appellants made. The appellants' case was based on utter denial of all knowledge of the charge. Obaseki JSC discussed the basis of the criminal proceedings by referring to the burden of proof. He said that this is always on the state. He used three authorities for this position, namely, the Evidence Act, case law which was reported in 1959, and the Nigerian Constitution, which guarantees the right to be presumed innocent.



The incident took place on 4 June 1977. According to the complainant, the appellants and two others approached him at Idowu Street at 11:30 pm. They asked for his consent to search him. He fled to a nearby hotel. They pursued and caught up with him at the hotel. The hotel manager saw that the men wanted to assault the complainant. He intervened and pleaded with them not to harm him. He was unsuccessful because the first appellant stabbed the complainant on the eyebrow with a dagger and the second hit him with an empty bottle on the neck. The bottle broke and cut him. One of the appellants searched the complainant and took from him N5.00 (about 4 cents) and a raincoat. All the men ran away. The complainant went to look for help and met the police, who were on patrol. They managed to arrest one of the appellants on the same evening, and the other the next day. It appeared that the tale which the complainant narrated was not corroborated by the manager of the hotel. He told a different story, namely, that there was a fight for payments that was due to the four men. It seemed, according to him, that the complainant refused to give to them what they considered their own shares. It turned out also that the N5.00 had been offered by the hotel manager. The four men took it from the

waiter, and they left the building. There was a fabrication of robbery in order to incriminate the accused in a serious offence, which was punishable by death. This is because there was no theft which the appellants committed. And there was also no force which was exerted on the complainant. These are the elements of robbery. The raincoat and the N5.00 which were allegedly taken by force from the complainant were part of this fabrication.

The assessment of Obaseki JSC was that there was doubt created by the evidence of the hotel manager. He argued that the trial judge should have analysed this evidence, because it created both a doubt and destroyed the case of the prosecution which was based on robbery. He argued, further, that the appellants could have been charged with assault. And on the charge of robbery they were entitled to an acquittal.



Naemeka-Angu JSC agreed with Obaseki JSC.¹³⁹ He argued that the prosecution could not be allowed to decide which of the two versions should be accepted. In other words, the prosecution could not be allowed to decide that the evidence of the complainant should override the evidence of the hotel manager. He argued, further, that the court also may not decide to believe the evidence of the complainant and discredit the evidence of the hotel

¹³⁹ *Audu Aruna and Another v the State* 1990 11 NILR 4 (SC).

manager. He went on to say that the discrediting of evidence of one witness against the other may occur when there was a basis for doing so. And in the absence of such basis the court could not do it of its own accord. He based his opinion on the *Onubogu* case.¹⁴⁰ It was held in that case that the basis has to be laid in order to enable the court to choose or prefer the testimony of one witness above that of another. The basis has to be that the witness is hostile. Furthermore, he accepted that the inconsistency might be explained. However, it is not the function of the court to provide the explanation, but that of witnesses. This would allow the defence to cross-examine on the explanation. He went on to say that the trial court should have seen that the evidence of the two witnesses raised a doubt. And it should have been resolved in favour of the appellants. Karibi-Whyte JSC agreed with the judgment of Naemeka-Angu JSC. There were thus three of the five judges who upheld the appeal.

The Constitution provides for the right to personal liberty in a manner which is different from all the other models. However, the limitation of this right is similar to the limitation in Botswana. The limitation may occur only on specified limited grounds. This is consistent with the presumption of innocence. Section 35(1) provides that:

Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law –

- (a) in execution of the sentence or order of a court in respect of a criminal offence of which he has been found guilty;
- (b) by reason of his failure to comply with the order of a court or in order to secure the fulfilment of any obligation imposed upon him by law;
- (c) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence, or to such extent as may be reasonably necessary to prevent his committing a criminal offence;
- (d) in the case of a person who has not attained the age of eighteen years for the purpose of his education or welfare;

¹⁴⁰ *Onubogu v The State* 1974 9 S.C. 1.

(e) in the case of persons suffering from infectious or contagious disease, persons of unsound mind, persons addicted to drugs or alcohol or vagrants, for the purpose of their care or treatment or the protection of the community; or
(f) for the purpose of preventing the unlawful entry of any person into Nigeria or of effecting the expulsion, extradition or other lawful removal from Nigeria of any person or the taking of proceedings relating thereto: Provided that a person who is charged with an offence and who has been detained in lawful custody awaiting trial shall not continue to be kept in such detention for a period longer than the maximum period of imprisonment prescribed for the offence.

The Nigerian Constitution takes the right to be tried within a reasonable time very seriously.

This forms part of the right to personal liberty and provides for two positions, namely, where bail has been denied and where it has been granted.

Section 35(2)-(4) provides that:

- (2) Any person who is arrested or detained shall have the right to remain silent or avoid answering any question until after consultation with a legal practitioner or any other person of his own choice.
- (3) Any person who is arrested or detained shall be informed in writing within twenty-four hours (and in a language that he understands) of the facts and grounds for his arrest or detention.
- (4) Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of -
 - (a) two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or
 - (b) three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

The protection of the right to liberty is formulated in such a manner that it should uphold the presumption of innocence. The limitation of the liberty right often leads to detention of suspected people. This is not consistent with the presumption of innocence. Section 35(4) allows for detentions which are both reasonable and consistent with the right to be presumed innocent. The Criminal Code of Nigeria refined the appearance in court 'within reasonable time' which is provided in the Constitution. Section 17 provides that:

When any person has been taken into custody without a warrant for an offence other than an offence punishable with death, any officer in charge of a police station may, in any case, and shall, if it will not be practicable to bring such person before a magistrate or justice of the peace having

jurisdiction with respect to the offence charged within twenty-four hours after he was so taken into custody, inquire into the case, and, unless the offence appears to such officer to be of a serious nature, discharge the person upon his entering into a recognisance with or without sureties for a reasonable amount to appear before a court at the time and place named in the recognisance but where such person is retained in custody he shall be brought before a court or justice of the peace having jurisdiction with respect to the offence or empowered to deal with such person by section 484 of this Act as soon as practicable whether or not the police inquiries are completed.

In Nigeria the office of the Attorney-General performs its functions in a manner which does not undermine the right to be presumed innocent. There are jurisdictions where the office of the Attorney-General may be used for an automatic refusal of bail. Often this is based on the seriousness of the crime. Such an approach is not concerned with the protection of human rights but with the concerns of state security.¹⁴¹ The Nigerian model may be compared with Botswana as far as non-interference in court proceedings by the Attorney-General is concerned. Sections 72-73 of the Nigerian Criminal Code provide that:

Notwithstanding anything in this Act contained, the Attorney-General in each State may exhibit to the High Court informations for all purposes for which the Attorney-General for England may exhibit informations in the High Court of Justice in England. Such proceedings may be taken upon every such information as may lawfully be taken in the case of similar informations filed by the Attorney-General for England so far as the circumstances of the case and the practice and procedure of the High Court will admit. In any criminal proceedings for an offence against a law of the State and at any stage thereof before judgment, the Attorney-General of the State may enter a *nolle prosequi* either by stating in court or informing the court in writing that the State intends that the proceedings shall not continue and thereupon the accused shall be at once discharged in respect of the charge or information for which the *nolle prosequi* is entered. If the accused has been committed to prison he shall be released, or if on bail the recognisance shall be discharged, and, where the accused is not before the court when such *nolle prosequi* is entered, the registrar or other proper officer of the court shall forthwith cause notice in writing of the entry of such *nolle prosequi* to be given to the officer in charge of the prison or other place in which the accused may be detained and such notice shall be sufficient authority to discharge the accused or if the accused be not in custody shall forthwith cause such notice in writing to be given to the accused and his sureties and shall in either case cause a similar notice in writing to be given to any witnesses bound over to prosecute. Where a *nolle prosequi* is entered in accordance with the provisions of

¹⁴¹ Amoo (2008: 3).

this section, the discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

There are clear similarities between the Botswana and the Nigerian models. Both uphold the right to be presumed innocent. The right is upheld to such an extent that it could be submitted that both models do not allow for an automatic denial of bail. This includes bail in respect of serious offences which are punishable by death.

In Nigeria, serious offences are distinguished from the less serious in two ways. One of the ways is by the sentence which might be imposed, such as the death penalty. The second way pertains to the forum in which a bail application might be held, such as the High Court.

Section 118 of the Nigerian Criminal Code provides that:

- (1) A person charged with any offence punishable with death shall not be admitted to bail, except by a judge of the High Court
- (2) Where a person is charged with any felony other than a felony punishable with death, the court may, if it thinks fit, admit him to bail.
- (3) When a person is charged with any offence other than those referred to in the two last preceding subsections, the court shall admit him to bail, unless it sees good reason to the contrary.

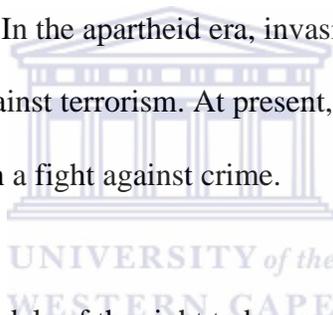
The Nigerian Criminal Code has provisions that may be considered offensive to the right to be presumed innocent. Section 401 provides that:

- (1) When any person is ordered to be detained during the pleasure of the President he shall notwithstanding anything in this Act or in any other written law contained be liable to be detained in such place and under such conditions as the President may direct and whilst so detained shall be deemed to be in legal custody.
- (2) A person detained during the pleasure of the President may at any time be discharged by the President on licence.
- (3) A licence may be in such form and may contain such conditions as the President may direct.
- (4) A licence may at any time be revoked or varied by the President and where a licence has been revoked the person to whom the licence relates shall proceed to such place as the President may direct and if he fails to do so may be arrested without warrant and taken to such place.

Prima facie it might appear that this provision could be challenged on grounds that it is not consistent with the Nigerian Constitution. However, it is a listed ground upon which personal liberty may be infringed.

5.6 Concluding recommendations

It has been shown that there may be many models of the right to be presumed innocent. However, there are only a few that truly protect the rights of the individual, including the right to be presumed innocent. The concern to remain in power by governments, which is often referred to as a security concern, motivates states to infringe human rights. In the apartheid era, invasive legislative measures had been justified by a fight against terrorism. At present, justification for these legislative measures is based on a fight against crime.



The Nigerian and Botswana models of the right to be presumed innocent are more favourable to the protection of the presumption of innocence and other rights than the Namibian and South African models. Both models illustrate that a constitutional guarantee of the right to be presumed innocent is only the beginning, and that it may not have any lasting significance, unless it is accompanied by a serious commitment to uphold the right to a fair trial. The Nigerian model has illustrated that a fair trial begins at the time of arrest. It uses the time of arrest as a measure of its fair trial provisions. The first appearance in court contributes to giving respect to the presumption of innocence. The Nigerian model is structured in such a way that the first appearance of a person in court has

the same deadline as the giving of the information about the arrest. And it is worked out from the time of arrest. It is the shortest deadline of all the models which were evaluated, namely, a 24-hour period after arrest. Other models have a 48-hour period.

Detention without bail cannot contribute to the right to be presumed innocent. The refusal of bail makes an assumption that the justice system is perfect, and persons who are held in custody on allegations of committing offences will be charged within a reasonable time.¹⁴² The Nigerian and Botswana models recognise that the state might not be able to prosecute within a reasonable time. Nigeria allows only two months to prosecute people who are in custody and three for those who are out on bail. In Botswana, the case may not be remanded for more than a month where a person is on bail, and not more than 15 days where the person is in custody. The significance of this is that an individual is not unjustly inconvenienced by delays with investigations. These delays have the effect that people who are presumed innocent are kept in custody.

Most models have provisions that allow for interventions in court proceedings. It has been shown that where the presumption of innocent is upheld, these are kept at a minimum.

The Namibian, Botswana and Nigerian models are excellent models from which to learn. They show that the new South African dispensation is on the right track. The concerns about the violations of the right to be presumed innocent showed

that the policymakers overstepped the borders between protection of human rights and the fight against crime.

There are positive and negative lessons to be learnt from all the models. The negative lessons come from the South African model. It failed to make a clear break from its apartheid past. The democratic dispensation finds legislative means to interfere in court proceedings in the same way that the past legislature interfered with the judiciary. It is conceded that the legislature has to make laws to regulate all sectors of society. However, it should not overstep its powers. The bail laws are an indication of where the policy-makers have done so. The result is that there seems to be a disrespect for the separation of powers, a distrust of the judiciary and a lack of respect for the Bill of Rights, in particular the right to be presumed innocent. The South African model may be used as a positive lesson for Namibia. The policy-makers in Namibia will have to steer the bail laws in a manner which would uphold the right to be presumed innocent.

The Botswana and Nigerian models have contributed to a more equitable and fair treatment of the right to be presumed innocent. This has been achieved by discouraging a culture of custodial remand.

The model of presumption of innocence in South Africa is inconsistent. At one point legislation which infringed on the presumption of innocence was outlawed. And at the other such legislation was upheld as consistent with the

¹⁴² Amoo (2008: 1).

Constitution. The Constitutional Court declared a drug related provision unconstitutional because it relieved the state of its duty to prove its case beyond a reasonable doubt. However, the most invasive amendments in the history of the democratic South Africa were upheld as consistent with the Constitution.

An amendment is required which would allow for a preparatory examination in all serious cases. It would accommodate for a fair and equitable treatment of the right to be presumed innocent. And it would establish whether or not a *prima facie* case exists against the accused.



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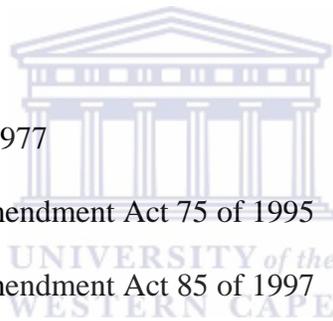
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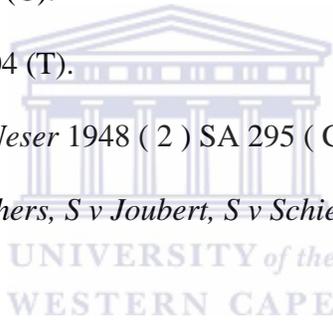
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