

Bail and the presumption of innocence: A comparative legal study

by

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DECLARATION

This research is submitted in accordance with the requirements for the degree of Master of Laws (LLM) in the subject Criminal and Procedural Law at the University of South Africa.

I declare that **BAIL AND THE PRESUMPTION OF INNOCENCE: A COMPARATIVE LEGAL STUDY** is my own work, and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution.

Signature:



Adriaan Gissing

Date: 30 November 2022

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DEDICATION

I dedicate this thesis to my beautiful wife, Tanya Gissing, who had to endure with me and supported me unconditionally throughout the process.

SUMMARY

Every person arrested for allegedly having committed a crime, has a constitutional right to be released on bail if the interests of justice permit and subject to reasonable conditions. Every accused has a constitutional right to be presumed innocent until proven guilty.

The focus of the research is on the consideration of bail be granted to an accused, charged with offences, falling within the ambit of the various schedules of the Criminal Procedure Act, and the effect thereof on the presumption of innocence and an accused's constitutional rights, with a critical comparison to the Canadian law and its Constitution.

The research investigates the origin and historical background of bail with specific comparison to our current South African bail legislation.

The evidentiary rules in bail applications are explored and discussed. The reverse onus in schedule 5 and 6 bail applications and the effect on the presumption of innocence is meticulously assessed and analysed.

The discussion of bail pending appeal, after leave to appeal having been granted against conviction, explores the reality of the restoration of the presumption of innocence, post-conviction.

The conclusions reached in this research indicate that the Canadian bail legislation is more liberal and sensitive to the rights of an accused and, as such, the South African legislation should align itself with the Canadian legislation. The final recommendations propose particular amendments to the current legislation, which will address the criticisms identified in the research.

Key words: bail; accused person; presumption of innocence; constitutional rights; evidentiary rules; reverse onus

CHAPTER 1

INTRODUCTION

1.1 Background information

South Africa is a country plagued by high rates of violent crime, which has the natural consequence of an increased arrest rate. This has had a domino effect in that the prisons are overcrowded beyond their capacities.¹ This overcrowding often leads to the direct infringement of basic human rights; an infringement which is suffered largely by persons who have been arrested and detained on the ‘allegation’ of having committed an offence, but who have yet to be convicted by a court.

A key factor which directly impacts on both the aforementioned concerns is the issue of bail. Simply put, bail deals with the liberty of an accused person who has been arrested for allegedly committing an offence, for the period between the arrest of the alleged offender and the conclusion of his or her subsequent trial. The purpose of bail is to ensure that “accused persons released on bail return to court to answer to the charges against them”.²

Bail proceedings are *sui generis* in nature,³ and different rules of evidence are applicable. The rules regulating bail are found in the Criminal Procedure Act⁴ (hereinafter referred to as the CPA). Bail not only deals with the liberty of an accused during his or her trial, but also concerns the period after conviction, prior to the imposition of sentence.

¹ See in this regard, e.g., Mollema and Terblanche 2017 SACJ 221-222.

² Marumoagae and Tshehla 2019 SAJHR 262.

³ Mokoena *A guide to bail applications* 27.

⁴ 51 of 1977.

Section 58⁵ of the CPA regulates when and under which circumstances a convicted person may bring such an application. This section provides that an accused person's bail can be extended after having been convicted on the charges preferred, pending the imposition of sentence.⁶ The application of section 58 is subject to the Schedule of the offence on which an accused has been convicted. These offences are contained in Schedule 5 and 6 of the CPA, and include, amongst others, treason, murder, rape, human trafficking, et cetera.

The principle of the presumption of innocence can be described as the cornerstone of an adversarial criminal-justice system based on notions of basic fairness, and constitutional and legislative compliance. This principle constitutes the soul of both South African and Canadian criminal law, and the application thereof. One of the reasons why a comparative study with Canadian jurisprudence will be undertaken is to investigate the interpretation and application of the presumption of innocence as it relates to bail, in both jurisdictions.

Sections 60(11)(a) and (b)⁷ of the CPA place a reverse onus on an accused applying for bail having been arrested for an offence(s) falling within the ambit of Schedule 5 and 6 of the CPA. According to this provision, an accused person is required to present evidence during bail proceedings, which may be used against him or her in

⁵ CPA s 58 states: " 'Effect of bail' The effect of bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of, or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentence is imposed: Provided that where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether the accused's bail should be extended, apply the provisions of section 60(11)(a) or (b), as the case may be, and the court shall take into account- (a) the fact that the accused has been convicted of that offence; and (b) the likely sentence which the court might impose.

⁶ See, e.g., *S v DD NCD* Case No K/S 46/2012 25 April 2014 (unreported) para 5.

⁷ CPA s 60(11)(a), (b) declare: "Notwithstanding any provision of this Act, where an accused is charged with an offence referred to- (a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release; (b) in Schedule 5, but not 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 the interests of justice permit his or her release".

the subsequent trial. This clearly undermines the accused's right to remain silent and, ultimately, to be granted bail. Section 50(6)(d)⁸ of the CPA entitles a court hearing a bail application to remand the application for seven days at a time, which, arguably, unjustifiably increases the accused's time spent awaiting trial.

This study analyses the conformity, workability, and practical effectiveness of sections 50(6)(d), 60(11)(a) and (b) of the CPA, as well as section 35(3)(h) of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), against the background of comparable provisions in Canadian law. Section 11(d) of the Canadian Charter of Rights and Freedoms, 1982 (hereinafter referred to as the Charter) which deals with the right of any person charged for allegedly having committed an offence to be presumed innocent until proven guilty.⁹ The presumption of innocence is further protected by section 7¹⁰ and section 11(e)¹¹ of the Charter. The research furthermore includes an analysis of whether the right to a fair trial can be extended to include pre-trial proceedings, such as bail and access to the docket.

1.2 Research aims and problems

The main research aim of this study is to ascertain whether the accused person's right to be presumed innocent until proven guilty is respected in a bail application. As pointed out above, certain bail provisions in South African law, as regulated by the CPA, limit the accused's right to be presumed innocent — a right which is

⁸ According to CPA s 50(6)(d): "The lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if— (i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application; (ii) the prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60 (11A); (iii) ... (iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to— (aa) procure material evidence that may be lost if bail is granted; or (bb) perform the functions referred to in section 37; or (v) it appears to the court that it is necessary in the interests of justice to do so".

⁹ Section 11(d) of the Charter states: "Any person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".

¹⁰ According to s 7 of the Charter: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

¹¹ Charter s 11(e): "Any person charged with an offence has the right ... not to be denied reasonable bail without just cause".

constitutionally guaranteed. This limitation must be tested as to whether it passes constitutional muster, as all laws are subject to the Constitution, the supreme law of the country, and this includes the bail system. Kriegler J in *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* confirms this perspective:

...the application of constitutional norms to the law and practice of bail does not complicate the task of judicial officers but clarifies it. ...it will be shown how recent amendments to the relevant statutory provisions are to be harmonised with those constitutional norms.¹²

It is reasoned in this study that the amended bail provisions are not harmonised with the rights' standards set out in the Constitution. The presumption of innocence places on the prosecution the burden of proving the accused's charges beyond reasonable doubt. Until this is achieved, no guilt may be presumed. It is submitted that the rights of arrestees and accused persons, who are in the absence of a conviction presumed to be innocent, must be recognised.

Further to this, it is clear that this benchmark flies in the face of the presumption of innocence, it is an oxymoron – if the presumption exists, why then should an accused show that he or she will in all probability be acquitted upon the conclusion of the trial, as is expected in a Schedule 6 bail application? It appears that an accused is expected to confirm the presumption from the very outset of the criminal prosecution.

An accused, having been convicted and sentenced to a term of direct imprisonment, has the right to apply for bail pending appeal. After the imposition of sentence, the accused has a right to apply for leave to appeal his or her conviction, sentence, or both. In the event that an accused has been granted leave to appeal, bail should be considered against the background of a reasonable prospect that exists that the accused's conviction and/or sentence might be set aside by a court of appeal.¹³ The accused also has the right to apply for bail pending the application for leave to appeal and/or certain applications lodged to a court of appeal.¹⁴ Should the

¹² *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) para [4] (hereinafter *Dlamini*).

¹³ *S v Williams* 1981 (1) SA 1170 (ZA) paras 1171H–172B.

¹⁴ *S v Essop* 2018 (1) SACR 99.

application be dismissed, there are avenues available which may be used to escalate the decision.

The application of sections 60(11)(a) and (b)¹⁵ of the CPA on the presumption of innocence during an application for bail pending the finalisation of his or her appeal, is juxtaposed to the application thereof pre-conviction. The accused is entitled to bail, where a determination on reasonable prospects of a successful appeal has been made, by virtue of leave to appeal having been granted to him or her. The appellant, by succeeding in the application has proven that there is reasonable prospect that he or she will be found innocent. Therefore, it is argued that as a natural consequence, the presumption of innocence should once again come into play. The question that begs asking is simply, does the mere fact that leave to appeal was granted to the appellant not restore the presumption of innocence? This appears to be a rather controversial topic with little or no judicial harmony as seen in the following case law.

In *Crossberg v S*,¹⁶ the Supreme Court of Appeal stated — in dealing with the appellant's application for bail pending appeal — that the emphasis shifts after conviction as the presumption of innocence no longer operates in favour of the accused. In *Rohde v The State*,¹⁷ the Supreme Court of Appeal held that by virtue of the fact that leave to appeal was granted to the appellant that a real prospect of success on appeal existed, and that his convictions and sentences may well be set aside. Bail was subsequently granted to the appellant. This is an ideal example illustrating that the presumption of innocence must find application once an accused has been granted leave to appeal, thus he or she is once again able to apply for bail. This issue will be considered in this study, and remedial measures to prevent the abuse of accused persons' right to bail, as well as various other solutions, are furthermore identified in this research for practical implementation. This includes a proposal to possibly amend the South African legislation and/or to supplement domestic law with specific guidelines in respect to the application of the aforesaid.

¹⁵ See footnote 8 above.

¹⁶ *Crossberg v S* [2007] SCA 93 (RSA) para [13].

¹⁷ Unreported decision of *Rohde v The State* (1007/2019) [2019] ZASCA 193 (18 December 2019).

As evidenced above, the purpose of this study is, firstly, to identify and analyse certain grey areas in bail legislation, and to subsequently investigate these bail laws against the background of the Constitution, following a critical comparison with Canadian law. These provisions are meticulously researched as to their application in case law in both South African and Canadian jurisprudence. Arrestees and accused persons' rights as provided for in the Constitution are compared to the Canadian perspective and weighed against the interests of justice in a democratic society. A comprehensive discussion, comparison and critical analysis are accomplished in the literature review.

Proposed solutions, compatible with general legislation and the Constitutions of both jurisdictions are considered and documented. The study provides valuable knowledge on local and Canadian law and efforts to give effect to the Constitutional rights of arrestees and accused persons with the emphasis on bail and the presumption of innocence. The dissertation finally attempts to provide insight into the question as to whether the South African law on bail meets the required human-rights standards, as stipulated in sections 35(1)(a),¹⁸ 35(3)(a),¹⁹ (h)²⁰ and (i)²¹ of the Constitution, and, if not, whether further development is required.

1.3 Research questions and hypothesis of the study

The aim of this study is to investigate whether the right to presumption of innocence is not violated by bail proceedings. This research includes the initial presumption of innocence prior to the commencement of the criminal prosecution as well as the lesser-considered possibility that this presumption may, under certain circumstances, extend beyond the conviction of an accused. The premise of this hypothesis is that an innocent person could be erroneously convicted of a crime. It is this principle that has birthed the appeal process in South Africa. The appeal process is necessary to safeguard against the unnecessary incarceration of an innocent citizen, therefore, the 'innocence presumption' ought to be included, and

¹⁸ Constitution s 35(1)(a) maintains that: "Everyone who is arrested for allegedly committing an offence has the right ... to remain silent".

¹⁹ Section 35(3)(a) holds: "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".

²⁰ See footnote 7 above.

²¹ Section 35(3)(i): "Every accused person has a right to a fair trial, which includes the right— to adduce and challenge evidence".

as a natural consequence, the principles regulating bail are also applicable should a convicted person choose to exercise his or her right to apply to have his or her bail extended post-conviction.

This research also focuses on the existing law in both South Africa and Canada and includes a critical comparison between the two legal systems in respect of bail proceedings pre- and post-conviction. Relevant cases which have applied the legislation regulating the release of an accused person on bail as well as the extension of bail after the finalisation of a criminal trial are also discussed.

The main research question of this study is:

- Is the accused person's right to be presumed innocent until proven guilty respected in a bail application?

Further subsequent research questions are:

- How do each of the legal systems deal with the concept of bail? Comparatively, do either or both legal systems adequately consider the rights of accused persons, more specifically the concept of innocent until proven guilty?
- Is South Africa on par with Canada in its compatibility of the bail process, and the protection of fundamental human rights?
- Would the disclosure of information available to the state at the time of bail proceedings assist with the alignment of the rights of the accused and the application of principles which regulate bail? Is there a conflict between the provisions of section 60(14) of the CPA and section 35(3)(a) of the Constitution? What is the Canadian approach to disclosure of information for bail purposes?
- What is the effect of section 50(6)(d) of the CPA on the presumption of innocence?
- What is the effect of the admissibility of bail proceedings during the trial on the presumption of innocence especially in the scheduled offences where the onus is upon the accused (presumably innocent during these proceedings) to justify his or her release on bail?

- Do the provisions of CPA sections 60(11)(a) and (b) *prima facie* constitute a breach of the presumption of innocence?
- It would appear at face value that the presumption of innocence finds no application after a person has been convicted, however, does the fact that an accused has been granted leave to appeal not equate to the continuance of the presumption?
- With specific reference to the two issues raised above, does the Canadian bail process and/or legislation surpass the South African approach?

The hypotheses underlying the research in this study are the following:

- Bail proceedings are complex processes which are governed by a unique set of legal principles which vary from country to country.
- The South African approach to bail needs to encompass the recognition of the fundamental rights contained in the Constitution whilst protecting the underlying interests of justice — a seemingly colossal task, but one that has been mastered around the world, and, in this case, Canada is used as the benchmark.
- Rules of evidence, lack of disclosure of information, the shift in onus during bail proceedings are but a few of the flawed bail processes which erode the importance of an accused's fundamental (and protected) rights, including, but not limited, to the presumption of innocence.
- The consequence of the aforementioned bail process on the presumption of innocence in the subsequent criminal trial has caused dissent amongst legal experts, and a comparative inspection of the Canadian principles to regulating bail might assist in bringing about a more uniform perspective as to the accused's ability to maintain the presumption of innocence.
- The Canadian approach to bail as well as its legislation may provide a more liberal perspective to the South African methodology in dealing with bail, both pre- and post-conviction.

1.4 Research methodology

This study employs a qualitative and comparative research method. According to Maruster and Gijsenberg, qualitative research consists of the application of observational techniques and/or an analysis of documents as the primary means of gaining knowledge on selected subjects or topics.²² In this research, case studies are one of the qualitative research methods utilised. This type of research strategy involves an in-depth investigation of phenomena and performing a detailed examination of particular case law. A qualitative approach consequently involves the gathering, interpreting, and reporting of information.²³ In this study, the qualitative research approach is presented in the form of a comprehensive and comparative literature study.

The existing knowledge base on the selected research topic proves to be sufficient in order to provide a sound conceptual framework and hypotheses. Literature that are reviewed include the CPA, the Constitution, case law (of the various South African High Courts, Supreme Court of Appeal as well as the Constitutional Court), the Canadian Constitution and Criminal Code, the Canadian case law, textbooks, other relevant legislation, journal articles and common law. As such, this study involves the collection of both primary and secondary data.

1.5 Outline of research

Chapter 1 is an introductory chapter that briefly introduces the topic that is being discussed. Research problems are set out, and an explanation of the concepts that relate to the research problems are explored. The aims and methodology of the research are explained and clarified. The chapter further provides a general background to the identification and analysis of bail procedures which are open to systemic abuse by the authorities, and in terms of which the rights of arrestees and accused persons are violated.

In chapter 2, the South African legislation focussing on precedents, law reports and views of South African legal writers are analysed whilst also conducting a

²² Maruster and Gijsenberg (eds) *Qualitative research methods* 201.

²³ Gravetter and Forzano *Research methods* 158.

comparison with the Canadian legislation. This chapter consists of a critical analysis of the compliance of the South African law to its Constitution, and compares the relevant sections to the Canadian Constitution, on which the South African Constitution is based. There is a clear emphasis on the right to be presumed innocent, and the effectiveness of the bail system.

Chapter 3 discusses the South African bail legislation in its current form and determines if it is practical, workable and in compliance with the Constitution and the Canadian legislation. The last phase provides further commentary and suggestions on the improvement of the South African bail system.

Chapter 4 concludes the research by evaluating the workability and practical effectiveness of current sections 50(6)(d), 60(11)(a) and (b) of the CPA, as conforming to section 35(3)(h) of the Constitution. The possible contributions and impact made by Canadian law on improving South African bail legislation are also submitted. Recommendations are made in this regard that may be useful in further research conducted on the topic.

1.6 Summary

Bail is an extraordinary and necessary cog in the wheels of procedure which allow the justice system to turn. This introductory chapter has provided the necessary background to the research on which this study is based. It is submitted that South Africa's bail system has evolved and expanded to include the most salient aspects of a democratic society. That having been said, the research also shows that there are still many challenges within the system and that there is much room for improvement to ensure that the fundamental rights (including the right to be presumed innocent) are applied and protected. This is also the main research aim of the study, as explained in paragraph 1.2. One of the key research hypotheses is consequently also that the amended bail provisions are not harmonised with the rights' standards set out in the Constitution. It is proposed that the South African bail system may be improved by researching and comparing other countries' approach to bail. In the dissertation, Canada is used as the sounding board for the South African approach as both systems share many similar characteristics. Lastly, this chapter provides a short synopsis of each of the dissertation's chapters. In the

following chapter, a historical overview on the origins of bail in South Africa and Canada will be presented.

CHAPTER 2

A HISTORICAL OVERVIEW ON THE ORIGINS OF BAIL IN CANADA AND SOUTH AFRICA

2.1 Introduction

This chapter discusses the history and origins of the fundamental right to bail. The right to pre-trial release, which is enshrined in the South African Constitution, is also recognised in other jurisdictions around the world.²⁴ This right ensures that detained persons are not unnecessarily deprived of their liberty whilst awaiting a verdict by a court of law. As a rule, every person who is arrested is presumed innocent until proven guilty. Pre-trial release entails that upon being arrested, the arrestee enters a ‘contractual agreement’²⁵ in respect of which he or she is released from custody, pending the finalisation of the case against him or her. The process of pre-trial release is an attempt to balance the rights of the accused (who is charged with an alleged offence) and the interests of society (who are aggrieved by the suspected wrongdoing of the accused).²⁶ This pre-trial stage between arrest and the conclusion of the pre-trial proceedings is described as a “dubious interval”.²⁷

The discussion which follows outlines the origins of bail with specific reference to the Canadian and South African legal systems, with the intention of illustrating the fundamentals of each of the legislative processes. Additionally, the main sources of the two bail systems are briefly looked at. For Canada, the Charter, the Canadian Criminal Code, and the Canadian Bill of Rights are examined. In South Africa, the CPA²⁸ and the Constitution²⁹ contain important provisions in this regard, which consequently are analysed and discussed below. When comparing two legal

²⁴ De Ruiter and Hardy Study on the use of bail in South Africa 15–16.

²⁵ *Lansdown and Campbell South African criminal law and procedure* 311.

²⁶ Mokoena *A guide to bail applications* 1.

²⁷ Mokoena *A guide to bail applications* 1.

²⁸ Sections 59, 59A, 50(6)(d), 60(4)(a–e), 60(11)(a), (b), 60(11B)(c), 60(14).

²⁹ Section 35 (3)(a), (h), (i).

systems, it is important to remember that the two jurisdictions may be very different,³⁰ even though both emanate from the same common-law traditions.³¹

Bail ensures the liberty of a person during any proceedings which may be instituted on behalf of the accused. However, bail may also be extended to the post-conviction phase of criminal proceedings, which includes appeal. During pre-trial incarceration, the accused are deprived of their liberty under circumstances where a court has not pronounced a verdict on their guilt, and where the presumption of innocence still operates in their favour.³² This is indeed a precarious situation. In order to shed more light on this predicament, this chapter commences with an investigation into the concept and origin of bail.

2.1.1 The concept of bail

For purpose of this research, the concept of bail refers to a system whereby a person who has been suspected or accused of having committed a crime, is conditionally released from detention upon paying a sum of money.³³ Release on bail may be attached to a variety of conditions. Ordinarily, bail serves two purposes: first, it ensures that an accused person retains his/her freedom pending the trial, and secondly, that he/she attends the trial. One of the most fundamental principles underlying bail is the presumption of innocence, which entails that every accused person is presumed innocent until found guilty. For that reason, every accused person must be allowed to retain his/her freedom so that he/she continues with his/her lives until such time as he/she is found guilty of having committed the offence.

Bail also applies to those persons who may have been convicted of a crime and to whom the presumption of innocence may still apply. As will be demonstrated below, the granting of bail after conviction is also underpinned by the same concept of presumption of innocence, though in this context the presumption is that the

³⁰ De Villiers 2003a *THRHR* 2.

³¹ South Africa furthermore has a Roman-Dutch tradition. See para 2.2. below.

³² Van den Berg *Bail, a practitioner's guide* 19.

³³ Paterson *Understanding bail in Britain* 1. See also Chapter 1.

convicted may have good prospects of having their conviction set aside by another court.³⁴

The system of bail (and its attendant adjuncts like the *interdictum de homine libero exhibendo*) is also meant to provide a mechanism for preventing unlawful detention. At the centre of these legal remedies is the need to protect personal liberty. The Constitution of South Africa entrenches these rights in the Bill of Rights.³⁵

In South Africa, bail can be administered to a person held in legal custody while awaiting trial or appealing against a criminal conviction and/or sentence by the police or by a magistrates' court. The release of such person may be subject to the imposition of certain conditions.³⁶ Presiding officers have wide discretionary powers in respect to whether bail should be granted or not.³⁷ For purposes of this study, the definition of bail is measured against the presumption of innocence, burden of proof and the Bill of Rights. A comparison and analogy will furthermore be made between the concept in South African and Canadian law.

2.2 The origin of bail

The origins of bail are “obscured in the mists of Anglo-Saxon history”³⁸ and its modern dimensions remain “an incoherent amalgam of old and new ideas serving more to defeat than to achieve the aims of the criminal process”.³⁹

The principles of bail in South Africa are a product of Roman, Roman-Dutch, and English legal systems.⁴⁰ It is because of the specific history of South Africa, that one

³⁴ See, e.g., *Jacobs and Others v S* [2018] ZACC 4 paras 11, 82, 86; *Molaudzi v S* [2015] ZACC 20 paras 43, 48. In *S v Essack* 1965 (2) SA161 (D) paras 162D-E, it was held that the presumption of innocence operates in favour of the applicant, even in the face of a strong *prima facie* case against him or her. In *Willi v The State* (CA & R 14/2018) [2018] ZAECBHC 1 (1 June 2018), the Court of Appeal held that the magistrate had misdirected herself in the application of the law, when she found that the presumption of innocence does not apply to bail proceedings. The Court of Appeal, however, held that the court *a quo* had correctly found that exceptional circumstances had not been established, and subsequently correctly refused the appellant's bail.

³⁵ See s 35(1)(f) of the Constitution of the Republic of South Africa, 1996.

³⁶ Law and Martin (eds) *Oxford dictionary of law* 43. In the UK, the Crown Court may also administer bail.

³⁷ Ntontela 2020 *De Rebus* 18–19; Law and Martin (eds) *Oxford dictionary of law* 43.

³⁸ Metzmeier 1996 *Pace Int LR* 399.

³⁹ As per Kriegler J in *Dlamini and Others v The State* CCT 21/98 para 3.

⁴⁰ De Villiers *Problematic aspects of the right to bail under South African law* 32.

considers it prudent to explore the historical origins and development of bail's legal principles.

2.2.1 Roman law

The development of Roman law can be traced back to 450 BC, being the earliest date of recorded origin of Roman society.⁴¹ What can be stated is that this legal system started as a cultural practice of self-help within the society.⁴² With self-help, members of a community took the law into their own hands and exacted revenge for a wrong that may have been committed.⁴³ What is clear is that resolution of these disputes had nothing to do with the involvement of any existing state institutions.

Over time as the state institutions developed, the state began to play an active role in the resolution of private disputes.⁴⁴ This resulted in the promulgation of the Twelve Tables in 449, which the Romans considered as the beginning of their legal history. They consolidated earlier traditions into public laws that were now regulated and enforced by the state. The focus of the Twelve Table was to regulate and arbitrate disputes between private persons.⁴⁵ The disputes were arbitrated by the *iudex*, being Roman citizens of high social standing who did not possess any legal qualifications.⁴⁶

What is noteworthy is that there was no clear-cut distinction between private and public law. The distinction between private law and public law evolved as the Roman legal system developed and thus, the modern concept of bail as we understand it did not exist.⁴⁷

⁴¹ O'Brien 2007 *Hearsay* DOI: <https://www.hearsay.org.au/article-16/> (Date of use: 25 September 2021).

⁴² Law Explorer <https://lawexplores.com/the-sources-of-roman-law/#Fn14> (Date of use: 25 September 2021) observes that self-help penalties sometimes consisted of private redress against the wrongdoer; e.g. retaliation (*talio*) as satisfaction for certain forms of personal injury.

⁴³ Law Explorer <https://lawexplores.com/the-sources-of-roman-law/#Fn14> (Date of use: 25 September 2021).

⁴⁴ Williamson *The evolution of law and legal procedures in the Roman participatory context* 188.

⁴⁵ Williamson *The evolution of law and legal procedures in the Roman participatory context* 180.

⁴⁶ Williamson *The evolution of law and legal procedures in the Roman participatory context* 180 states that Roman law formally began with the compilation of the Twelve Tables. The Twelve Tables were compiled by a select committee of ten men, the *decemviri*, who were charged with collecting and writing down the rules and prohibitions that governed the socio-economic relations among Romans of differing ranks and gender, foreigners, slaves, and gods.

⁴⁷ De Villiers *Problematic aspects of the right to bail under South African law* 33, 50.

Three stages of the development of the Roman legal procedure have been identified. These are the *legis actiones*, the formulary system, and the *cognitio extraordinaria*.⁴⁸ These developmental stages will be further explained below.

2.2.1.1 *Legis actiones*

The earliest forms of bail can be traced back to this procedure, where the state took an active part in resolving private disputes. For example, the Third Table provided that if persons were summoned to court, they had to go to court or someone had to stand as surety (*vindex*) that the summonsed person would appear.⁴⁹ If they did not appear, a witness would be called (to confirm that they had not come).⁵⁰ Thereafter, they could be seized and brought to court by force, unless the person was incapacitated, for example, suffering from a serious illness (*morbis soticus*). In that case, the person would be excused from attending.⁵¹

Once the hearing had commenced but not completed and subsequently remanded to a future date, the defendant again had to provide surety to ensure a re-appearance.⁵² This surety was known as *vadimonium*.⁵³ According to Metzger, *vadimonium* was utilised by magistrates to secure defendants' return to court.⁵⁴ *Vadimonium* could be in the form of a mere promise, or a commitment under oath or even in the form of surety.⁵⁵

It can thus be argued that the earliest forms of bail systems evolved from the necessity to ensure that defendants guaranteed their appearance before a

⁴⁸ Buckland *A textbook of Roman law* 607; Thomas *Textbook of Roman law* 119.

⁴⁹ Buckland *A textbook of Roman law* 613.

⁵⁰ Sanders (ed) *The Institutes of Justinian* xv states: "They might then be brought before a magistrate, and unless payment was made or a surety (*vindex*) found, the creditor might put them in irons, but not of more than fifteen pounds' weight, and must give them a pound of flour a day".

⁵¹ Sanders (ed) *The Institutes of Justinian* xv.

⁵² Buckland *A textbook of Roman law* 613.

²² Metzger 2000 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 139.

⁵⁴ Metzger 2000 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 139.

⁵⁵ Sanders (ed) *The Institutes of Justinian* xiii states: "When before the magistrate the parties had to give security for their further appearance (*vadimonium*) and called witnesses to testify that the litigation had duly begun (*litis contestatio*)".

magistrate. These appearances with reference to the beginning of a hearing by providing *vindex*, or for future re-appearances by providing *vadimonium*.⁵⁶

2.2.1.2 *Formulae procedure*

The *formulae* were introduced as a modification of the *legis actiones*.⁵⁷ The old procedures of using a *vindex*, providing *vadimonium*, or arresting a defendant to secure their attendance at the subsequent hearing were still retained.⁵⁸ However, one of the major changes was that the magistrate (*iudex*) now assumed greater powers than before, for example, actions had to be commenced following a specific formula that was specified by the magistrate.⁵⁹ Once an action has commenced, a defendant was obliged to appear in person, or provide a *vindex*.⁶⁰ The *vindex* could be sued if they did not produce the defendant.⁶¹

The system of securing the defendant's attendance in the event that a defendant failed to appear or provide a *vindex*, still remained.⁶² *Vadimonium* could still be used, though in a modified form, with incorporated new elements.⁶³ Gaius summarised the elements as follows:

In the first place, as we have seen, bail might be exacted when a man entered into a *vadimonium*; but it might also be entered into without any bail or surety and then it was termed *parum*; again the defendant might be called to swear to the faithful discharge of his own promise or *recuparatores* might be named with authority to condemn the defendant to the full amount of *vadimonium*, in case of no appearance.⁶⁴

What we see at this very early stage of the development of the Roman legal system, is something similar to the present concept of forfeiture of bail taking shape. It must be borne in mind that with the *formulae* procedures, criminal conduct was

⁵⁶ Metzger 2000 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 134-135 states that the *vadimonium* was a contract in which the defendant made a formal promise to appear before a magistrate, and it was consequently used by magistrates as a means of bringing the defendant back before the court.

⁵⁷ Buckland *A textbook of Roman law* 276.

⁵⁸ Buckland *A textbook of Roman law* 631.

⁵⁹ De Villiers *Problematic aspects of the right to bail under South African law* 42.

⁶⁰ De Villiers *Problematic aspects of the right to bail under South African law* 43.

⁶¹ De Villiers *Problematic aspects of the right to bail under South African law* 43; Buckland *A textbook of Roman law* 631.

⁶² De Villiers *Problematic aspects of the right to bail under South African law* 41.

⁶³ De Villiers *Problematic aspects of the right to bail under South African law* 43; Buckland *A textbook of Roman law* 631.

⁶⁴ Gaius *The commentaries of Gaius and rules of Ulpian* 481.

considered as a civil wrong that was sued at the instance of the plaintiff in their private capacity.

2.2.1.3 *Cognitio procedure*

It has been asserted that the *cognitio extraordinaria*⁶⁵ evolved to reflect the development of imperial rule in Rome and beyond. It reflected the growing bureaucracy under imperial rule and one of those developments was the principle that the administration of justice should be provided by the emperor, and the proceedings should be under the control of imperial officials.⁶⁶ The result was that the resolution of legal disputes was now based on the power of the imperial authorities to receive complaints, investigate, arbitrate, and execute the decision.⁶⁷ A clear distinction was now made between civil matters and criminal matters. Criminal matters became the exclusive domain of the imperial authority to regulate and enforce.⁶⁸ The accuser was no longer the plaintiff as was the case under the *actio legis* and the *formulae* procedures. The magistrate took over the responsibility of the accuser on behalf of imperial authority, the equivalent of what we now call the state as represented by prosecutors.⁶⁹

Over time, the applicable procedures under this system were codified in the *Corpus Iuris Civilis*, which was a compilation of all the laws that applied in Rome at the time

⁶⁵ According to Domingo 2017 *SSRN Electronic J* 1, the *cognitio extraordinaria* (extraordinary cognition) was one of the three different systems of procedure in which Roman civil trials were conducted. In time, the *cognitio extraordinaria* succeeded the other two systems, but there was still some overlap. Prevailing in the post-classical period, this new administrative procedure “rested on the idea that the administration of justice should be provided by the emperor, and therefore, all proceedings should be under the control of public imperial officers. The *cognitio* was closer to modern procedures than the formulary system was”. See Domingo 2017 *SSRN Electronic J* 1.

⁶⁶ Sanders (ed) *The Institutes of Justinian* xxx makes the following observation about the *cognitio* procedure: “The practice grew more frequent as the empire went on, and in AD 294, Diocletian ordered the presidents of the provinces themselves to try all cases. The formulary system and the exposition of the law by the praetors became a thing of the past, and the law was altered by the enactments of the emperor and administered directly by the magistrates”.

⁶⁷ De Villiers *Problematic aspects of the right to bail under South African law* 33; Van Zyl *History and principles of Roman private law* 384.

⁶⁸ According to Kunkel *An introduction to Roman legal and constitutional history* 143: “All civil and criminal proceedings came under the official *cognitio*, a procedural system which, in the unitary course which it took as well as in the official character of its judges, displays a much closer similarity to a modern system of justice than do the procedural forms of the later Republic or the early Empire”.

⁶⁹ Buckland *A textbook of Roman law* 665 suggests that a complaint or accusations from the magistrate had to be in writing.

of AD 530.⁷⁰ A key of this procedure in so far as it applied to bail processes was that sureties now had to be given to the court, and could be enforced by the imperial officials.⁷¹ Where an accused failed to provide surety to the magistrate to guarantee their future appearances, they would be ordered to be detained in prison:⁷²

...unless he found persons to give security for his appearance, (*sponsores eum in iudicio ad diem dictam sistendi, aut mulctam, qua damnatus esset, solvendi*).

The aforesaid would be referred to as *vades* and for a fine, *paredes*.⁷³

The importance of sureties is furthermore touched on by Kant, who thus confirmed that 'bail existed' in early Roman law.⁷⁴ It was the duty of the Proconsul to determine whether accused persons "should be sent to prison, delivered to a soldier, or committed to the care of their sureties, or to that of themselves".⁷⁵ In arriving at his determination, the Proconsul had to consider each defendant's rank, wealth, presumed innocence, reputation as well as the nature of the crime of which they were accused.⁷⁶ The Proconsul was therefore vested with discretionary powers to decide whether to release accused persons on their own sureties.⁷⁷

What is even more remarkable is that despite their very low status in society, even slaves were regarded as candidates to be released on bail. The law provided that if slaves were accused of a capital offence, they could provide security for their appearance in court.⁷⁸ There was also provisions that where persons could provide their own surety but were accused of serious crimes, such persons were supposed to be kept in prison.⁷⁹ What can be seen is that by the time of Justinian, Roman law had a clearly defined system of pre-trial release and this right applied to all persons in Rome.⁸⁰

⁷⁰ Dingley 2016 *William & Mary LSP* 1.

⁷¹ Thomas *Textbook of Roman law* 120.

⁷² Adam *Roman antiquities* 218.

⁷³ Adam *Roman antiquities* 218.

⁷⁴ Kant *The philosophy of law* 21, quoting Ulpanius Title III.1.

⁷⁵ Kant *The philosophy of law* 21, quoting Ulpanius Title III.1.

⁷⁶ Kant *The philosophy of law* 21, quoting Ulpanius Title III.1.

⁷⁷ Kant *The philosophy of law* 22, quoting Ulpanius Title III.3.

⁷⁸ Kant *The philosophy of law* 21, quoting Papinianus Title III.2.

⁷⁹ Kant *The philosophy of law* 22, quoting Ulpanius Title III.3.

⁸⁰ Kant *The philosophy of law* 22; Ulpanius Vol 16.1.

2.2.2 English law

The concept of bail in Britain can be traced back to the collapse of the Roman Empire around the middle of the fifth century.⁸¹ As Anglo-Saxons settled in Britain, they brought with them 'blood feuds'⁸² between families. It must be noted that during that time, similar to what had been the situation in Rome 500 years earlier with *legis actiones* and *formulae* procedure, criminal conduct was considered as private affairs and was settled between private parties.⁸³

The Anglo-Saxon legal systems thus developed to address the problem of the 'blood feuds'.⁸⁴ 'Blood feuds' were subsequently replaced by a payment system that was known as '*wergild*' (which meant the price set upon the life and bodily faculties of someone according to their rank).⁸⁵ According to Duker, bail originated as a way to guarantee the payment of '*wergild*' which had to be paid as compensation for injury or death.⁸⁶ When a centralised political system evolved and started regulating criminal conduct, the system also developed into "a mechanism of freeing untried prisoners".⁸⁷

On the other hand, Metzmeier maintains that the roots of bail can be traced back to the laws of the Anglo-Saxon kings Hlothaere (673–685 AD) and Eadric (685–687 AD), whose laws provided that persons accused of a crime, as in a civil wrong, pay '*borh*', which was a form of blood price which was paid to the family of the victim.⁸⁸

⁸¹ Note 1961 *Yale LJ* 966.

⁸² Turner *The history of the Anglo-Saxons* 258. This was known as 'borh'.

⁸³ Own opinion based on an evaluation of the comparative systems.

⁸⁴ La Roi *Blood feud or wergild* 6–8.

⁸⁵ Duker 1977 *Albany LR* 35. La Roi *Blood feud or wergild* 3 describes wergild as "a typically Germanic concept whereby a family could demand a pecuniary compensation for the homicide of a family member ... wergild was the value set by law upon a man's life".

⁸⁶ Schnacke, Jones and Brooker *The history of bail and pre-trial release* 2 observe: "Nevertheless, the Anglo-Saxons were concerned that the accused might flee to avoid paying the 'bot', or penalty, to the injured (as well as a 'wite', or payment to the king). Prisons were 'costly and troublesome', so an arrestee was usually 'replevied (*replegiatus*) or mainprised (*manucaptus*)', that is, 'he was set free so soon as some sureties (*plegii*) undertook (*manuceperunt*) or became bound for his appearance in court". See also Pollock and Maitland *The history of English law before the time of Edward I* 613.

⁸⁷ Duker 1977 *Albany LR* 36.

⁸⁸ Metzmeier 1996 *Pace Int LR* 401. Bosworth <https://bosworthtoller.com/4870> (Date of access: 10 November 2021) describes a 'borh' as "a security, pledge, loan, bail" or "a person who gives security, a surety, bondsman, debtor; fidejussor, debtor. Bail was taken by the Saxons from every person guilty of theft, homicide, witchcraft, etc.: indeed, every person was under bail for his neighbour. It is generally thought, that the 'borh' originated with King Alfred, but the first time we find it clearly expressed, is in the Laws of Ine, v Turner's History of AS Book vi Appendix 3, chapter 6, vol. ii. 499".

The money was returned if the accused was not found guilty.⁸⁹ The local sheriff was tasked with the responsibility of arresting and detaining any accused persons pending their trial. Some of the arrested persons were detained at the sheriff's house and could be detained for long periods of time whilst waiting for the commencement of their trials before visiting the magistrate.⁹⁰

In order to avoid lengthy detainment periods, the accused persons were allowed to pay an amount of money to the sheriff, in the alternative, their relatives could give surety that they will attend the trial.⁹¹ This arrangement was a variation on the system of paying '*borh*'. The purpose of the payment was to avoid the accused being detained pending the completion of their trial.⁹²

Thus, the legal system evolved putting measures in place to balance the competing interest of society; allowing the accused persons to maintain their freedom, whilst ensuring that they will attend their trial. It must be emphasised that at this early stage, the primary purpose of the payment was to ensure that aggrieved persons were compensated for the wrong done to them. As such, the payment had less to do with ensuring that the accused person attended the trial but rather that the victim was compensated.⁹³

Following the Norman conquest in 1066, the then existing rudimentary bail system was adopted by the monarchy, and applied across the Anglo-Saxon territories.⁹⁴ The inefficiencies of the systems were, however, manifested in how the system came to be abused by the sheriffs.⁹⁵ Metzmeier expresses the view that the levels of corruption were particularly concerning in that corrupt sheriffs were taking bribes to release felons while denying bail to deserving persons who could not pay both the bribe and the surety.⁹⁶ In response to these abuses, the Magna Carta was

⁸⁹ Metzmeier 1996 *Pace Int LR* 401.

⁹⁰ Metzmeier 1996 *Pace Int LR* 401.

⁹¹ Metzmeier 1996 *Pace Int LR* 401.

⁹² Metzmeier 1996 *Pace Int LR* 401.

⁹³ This principle applied during the 'bail phase' could be viewed as forming part of modern-day restorative justice processes, where compensation is provided to the victim as part of an empowering process and giving victims a voice. See Dept of Justice and Constitutional Development *Restorative justice: the road to healing* 10.

⁹⁴ Metzmeier 1996 *Pace Int LR* 402.

⁹⁵ Metzmeier 1996 *Pace Int LR* 402.

⁹⁶ Metzmeier 1996 *Pace Int LR* 402.

signed into law in 1215.⁹⁷ It guaranteed certain fundamental rights, similar to the South African Bill of Rights.⁹⁸ One of its major declarations was that: “No free man shall be seized or imprisoned except by the lawful judgement of his equals or by the law of the land.”⁹⁹

Further developments in the bail system resulted in the promulgation of the First Statute of Westminster, 1275. This Statute regulated what were to beailable and non-bailable transgressions.¹⁰⁰ The focus of this legislation was to better protect the liberty of persons by ensuring that they were not arbitrarily kept in prison. It therefore can be argued that this was the first attempt to regulate the exercise of discretion by those that were tasked with adjudicating the release on bail, on those accused of crimes. The crimes of murder, treason, and escape from custody were among those offences that were non-bailable offences.¹⁰¹ This legislation is very similar to the South African Schedule 5 and 6 offences under the CPA as regardsailable and non-bailable offences, where bail is to be denied unless the accused shows that it is in the interest of justice that it be granted.

Further developments in protecting the liberty of the individual resulted in the promulgation of the Habeas Corpus Act, in 1679.¹⁰² The Act had a provision that allowed any detained person to petition the Lord Chancellor to decide whether the offence with which the person was detained wasailable or not.¹⁰³ The *habeas corpus* is similar to the *interdictum de homine libero exhibendo*, with its roots in ancient Rome and Roman-Dutch law, which allows persons deprived of their freedom to challenge the legality of their detention, particularly pre-trial detention.¹⁰⁴

Habeas corpus evolved as a direct result of the lengthy delay between an accused person’s arrest and subsequent trial into the more recognisable process of paying an authoritarian money in order to avoid pre-trial incarceration.¹⁰⁵ As with most legal

⁹⁷ Metzmeier 1996 *Pace Int LR* 402.

⁹⁸ Metzmeier 1996 *Pace Int LR* 402.

⁹⁹ Clark *Habeas corpus: Its importance, history, and possible current threats* 5.

¹⁰⁰ Metzmeier 1996 *Pace Int LR* 402.

¹⁰¹ Metzmeier 1996 *Pace Int LR* 402.

¹⁰² Habeas Corpus Act of 1679 31 Charles II c 2 (1679).

¹⁰³ Habeas Corpus Act clause II.

¹⁰⁴ Okpaluba and Nwafor 2019 *Int Journal of HR* 1594.

¹⁰⁵ According to McFeeley 1976 *Southwestern LJ* 586: “*habeas corpus* literally means ‘have the body’”. The principle underlying *habeas corpus* is to produce the accused in court, and it also

principles, the premise of bail continued to change to suit the prevailing legal requirements and by medieval England, the focus of bail was to ensure that an accused would attend trial.¹⁰⁶ This led to the practice of accused being placed in the custody of friends or relatives who would ensure that they attended the subsequent court proceedings.¹⁰⁷ The practice was adopted by countries which had been colonised by the United Kingdom primarily to avoid the injustice of pre-trial incarceration.¹⁰⁸ This historical concern in respect of the detention of persons who had yet to be found guilty of any wrongdoing is indicative that every society had been mindful that an innocent person's liberty should not be unjustly infringed upon. Roman-Dutch law only ratified the aforementioned concepts of bail at a much later stage.¹⁰⁹ *Habeas corpus* became a normal pre-trial process in South Africa. The approach to bail developed over time with many common principles being solidified through legislation and case law. These principles impacted directly on statutory provisions which are encapsulated in the CPA and the Constitution.

For the purpose of the discussion which follows, it is unnecessary to detail every development of the law in respect of bail in South Africa. The most relevant developments include the recognition of certain human rights, more specifically, the right to freedom and the presumption of innocence.

2.3. The history and sources of bail in South Africa

South Africa has a legion of challenges to deal with when attempting to apply bail law correctly and efficiently, such as systemic and infrastructure difficulties, inexperienced prosecutors, attorneys, and magistrates, just to mention a few. Hereunder, the history and development of the South African legal system with specific reference to the bail system will be discussed.

protects against unlawful and indefinite imprisonment. It seems that this modern challenge stems as far back as 1066, according to historical accounts.

¹⁰⁶ Van der Berg *Bail: a practitioner's guide* 2.

¹⁰⁷ Duker 1977 *Albany LR* 33.

¹⁰⁸ See *Nkwentsha v Minister of Law and Order, Republic of South Africa and Another* (554/86) [1988] ZASCA 33; [1988] 2 All SA 420 (A) (30 March 1988) para 30.

¹⁰⁹ Nathan *The common law of South Africa* 508.

The reception of Roman-Dutch law and English law took place over two separate periods that are linked to the occupation of land that now constitutes South Africa.¹¹⁰ Roman-Dutch law was imposed at the Cape following the occupation of that territory by the Dutch East India Company in 1652.¹¹¹ The charter of the company obliged it to maintain law and order in its occupied territories.¹¹² The system of criminal procedure that was imposed at the Cape was based on the Phillip II Ordinance of 1570.¹¹³

Roman Dutch law continued to be applied at the Cape until after the second British Occupation of 1806.¹¹⁴ Thereafter followed a series of changes that were made that resulted in the promulgation of Ordinance 40 (on criminal procedure) in 1828 and Ordinance 70 (on evidence) in 1830, which did away with Roman-Dutch legal principles in criminal procedure and evidence.¹¹⁵ With the anglicisation of the criminal procedure, the Roman-Dutch inquisitorial system was replaced with the accusatorial system.¹¹⁶ The impact on the bail system was that accused persons were now entitled to apply for and be released on bail for all crimes, unlike under the Roman-Dutch inquisitorial system where only those accused of minor crimes were entitled to be released on bail.¹¹⁷

Dugard observes that Ordinance 40 made clear provision for the release of an awaiting trial prisoner on bail and subsequently served as a model for similar statutes in Natal and the two Boer Republics.¹¹⁸ A comprehensive criminal procedure code was introduced in the Transvaal Colony in 1903, which replaced Ordinance 5.¹¹⁹ In terms of Ordinance 5, the Attorney General had the discretion to grant bail.¹²⁰ The more comprehensive Ordinance 1 of 1903 went on to form the basis of the first national criminal code, the Criminal Procedure and Evidence Act

¹¹⁰ Fine *The administration of criminal justice at the Cape of Good Hope 1795–1828* 436.

¹¹¹ Fine *The administration of criminal justice at the Cape of Good Hope 1795–1828* 437–438.

¹¹² Fine *The administration of criminal justice at the Cape of Good Hope 1795–1828* 437–438.

¹¹³ Bekker et al *Criminal procedure handbook* 22; Fine *The administration of criminal justice at the Cape of Good Hope 1795–1828* 455.

¹¹⁴ Fine *The administration of criminal justice at the Cape of Good Hope 1795–1828* 467–468.

¹¹⁵ Bekker et al *Criminal procedure handbook* 23.

¹¹⁶ Fine *The administration of criminal justice at the Cape of Good Hope 1795–1828* 582–584.

¹¹⁷ Fine *The administration of criminal justice at the Cape of Good Hope 1795–1828* 585.

¹¹⁸ Dugard *South African criminal law and procedure Vol IV* 18–25.

¹¹⁹ Ordinance 5 of 1864.

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

31 of 1917, and its successor, the Criminal Procedure Act 56 of 1955 in which the granting of bail was further regulated.

2.3.1 Sources of the bail system in South Africa

2.3.1.1 *The Constitution*

The Constitution is the supreme law of the country. Therefore, any law or conduct which is inconsistent with the Constitution is invalid. The obligations imposed by the Constitution must be fulfilled.¹²¹ The Constitution provides that an arrested person must be released from detention if permitted in the interests of justice.¹²² Release in this context refers to pre-trial freedom. It can be accepted that all bail laws, be it pending trial or pending appeal post-conviction, are subject to the Constitution.

The Constitution does not provide for or regulate the release of a convicted person pending an appeal against conviction or sentence. This aspect of the law is regulated by the common law as developed by judicial decisions over the years.¹²³ However, section 35(2)(d) allows a detained person, including a sentenced prisoner, to challenge the lawfulness of the detention. Bail is non-penal in character.¹²⁴ Therefore, bail should not be denied in anticipation of a possible conviction and sentence based on the seriousness of the offence.¹²⁵

The Constitution confirms the fundamental rights of all persons. Arguably, the right to liberty is the most fundamental right which can be exercised with very few limitations. In *S v Dlamini*,¹²⁶ the Constitutional Court underlined the importance of personal liberty in the context of section 35(1)(f). The Constitution¹²⁷ furthermore protects the right of every accused person to be presumed innocent until convicted

¹²¹ Constitution s 2.

¹²² Constitution s 35(1)(f).

¹²³ Whether or not these decisions meet the constitutionally infused values in the Constitution is a contentious aspect.

¹²⁴ In *S v Acheson* 1991 (2) SA 805 (Nm) paras 822A–B: “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. The Court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.” The principles propounded in *S v Acheson* were restated by the Supreme Court of Appeal in the unreported matter of *Wilkinson v S* 2014 ZASCA 192 para 6.

¹²⁵ CPA s 60(4), as supplemented by sub-ss (5) to (8A), read with sub-ss (9) and (10). See also *S v Acheson* 1991 (2) SA 805 (Nm) paras 822A–B; *Dlamini* para [39].

¹²⁶ *Dlamini* para [6].

¹²⁷ Section 35(3)(h).

by a competent court. The presumption of innocence, as expressed in the maxim *libertatis et innocentiae omnia praesumuntur*, operates in favour of all applicants even where there is a strong *prima facie* case against them.¹²⁸

When a comparison is made between the rights enshrined within the Constitution and the applicable provisions of the CPA, it becomes apparent that certain aspects which regulate the bail process are in contradiction with section 35 of the Constitution. Firstly, section 60(14) of the CPA¹²⁹ seems to be directly in conflict with section 35(3)(a). Section 60(14), which refers to the access of information contained in the case docket, has been declared constitutionally sound.¹³⁰ However, the provision must be applied with discretion, and not merely used to justify blatant disregard for the application of section 35(3)(a) in bail proceedings.

Moreover, the disclosure of information by the state may be the only information which the accused or applicants have at their disposal to discharge the onus placed on them in terms of section 60(11). In the same vein, where the prosecution relies on the strength of its own case as a basis for objecting to bail, the accused can only attack the strength of the state's case if they are privy to the contents of the docket.

Section 35(h) of the Constitution ensures that the presumption of innocence, the right to remain silent and the right not to testify during proceedings are upheld. Although these are general principles which find application in the criminal trial, it is submitted that these vital rights should not be disregarded during the bail proceedings. Thus, in *S v Ramgobin*,¹³¹ a full bench of the Natal Supreme Court referred with approval to the recognition of the presumption of innocence in bail applications. The court pointed out that at the bail stage, the presumption of the law is that a person is innocent until guilt has been established in court.¹³²

¹²⁸ *S v Essack* 1965 (2) SA 161 (D) para 162C; *S v Thornhill* (2) 1998 (1) SACR 177 (C) paras 181d–e; *S v Bennett* 2000 (1) SACR 406 (W) paras 40g–h.

¹²⁹ CPA s 60(14): “Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the prosecutor otherwise directs: Provided that this subsection shall not be construed as denying an accused access to any information, record or document to which he or she may be entitled for purposes of his or her trial.”

¹³⁰ See, e.g., *S v Schietekat* 1999 (2) SACR 51 (CC).

¹³¹ *S v Ramgobin* 1985 (3) SA 587 (N), 1985 (4) SA 130 (N).

¹³² *S v Ramgobin* 1985 (3) SA 587 (N) paras 588C, 589B.

In terms of section 60(11)(c), bail proceedings may form part of the trial proceedings. This position appears to be in contradiction to the constitutionally protected right to remain silent and to elect not to testify during the criminal trial. Whilst the court must warn an accused who elects to testify that such testimony may be used in any subsequent proceedings, this places the accused in a precarious situation at the beginning of the criminal proceedings. Firstly, accused persons may have no option but to present evidence to the court in support of their application for bail, more especially if they bear the onus to prove that they ought to be released. This is a catch-22 scenario for accused who may wish to exercise their right to remain silent, but in so doing do not refute the allegations made by the state or do not discharge the onus placed upon them. This may lead to the highly undesirable situation where the state is able to supplement what would be considered a weak case with the version provided (under duress) by an accused. The difficulty is compounded by the fact that in terms of Schedule 5 and 6 bail applications, the accused has a general duty to present evidence in a bail application, and this directly impacts on the right to remain silent.¹³³ A solution for accused persons might be to reserve their right to re-open their case, upon conclusion of the state's case, and to then respond to the allegations the state alluded to. An accused has a duty to disclose previous convictions or pending matters at the outset of the application.¹³⁴ This aspect combined with the fact that the court hears (in most cases untested hearsay evidence) in respect of the merits for the relevant criminal matter seems to erode the presumption of innocence.

2.3.1.2 The Criminal Procedure Act 51 of 1977

The CPA regulates pre-trial release of accused and convicted persons. Application of any provision in this Act, is subject to the over-riding provisions of the Constitution.¹³⁵ Sections 50 and 59 of the CPA are interlinked in the pursuit of the balancing of the rights of individual during the pre-trial process. An arrested person must be brought into custody as soon as possible.¹³⁶ After detention, arrested persons must be informed of their right to apply for bail.¹³⁷ Suspects may not be

¹³³ Section 35(1)(a) of the Constitution.

¹³⁴ Section 60(11B)(a).

¹³⁵ See s 2 of the Constitution.

¹³⁶ Section 50(1)(a) of the CPA.

¹³⁷ Section 50(1)(b) of the CPA.

detained indefinitely without the intervention or knowledge of a lower court.¹³⁸ The timelines for detention are specified, and any violation or infringement of the said specified times would constitute unlawful detention.¹³⁹

An arrested person must be brought before a lower court within 48 hours after arrest.¹⁴⁰ The statutory provisions serve as a machinery to empower the courts to guard against an unlawful violation of the individual's freedom. An accused may only bring a bail application before a magistrate within ordinary court hours.

The court may postpone bail proceedings to any date or court, for a period not exceeding seven days at a time. The provisions and effect of this section is open to abuse as lower courts generally grant such a postponement upon the application of the prosecutor, which is under normal circumstances brought from the bar, without any evidence adduced in support of such application.¹⁴¹ If the prosecutor's application is successful, the court grants the order and postpones the matter for seven days resulting in the accused's further incarceration. Although the seven-day remand period is the maximum time allowed in terms of statute, the magistrate has a discretion to grant a postponement for a lesser time.¹⁴² Under these circumstances, accused are denied the opportunity to have their application heard, and will thus remain in custody, in the face of untested allegations deposed to in the docket, and despite their constitutional right to be presumed innocent until proven guilty. It is submitted that lower courts should consider applications in terms of this section cautiously and should only uphold such applications once the state has proven its necessity to postpone proceedings substantively by adducing evidence.¹⁴³ It is clear that the provisions such as section 50(6)(d) have the ability

¹³⁸ Section 50(1)(a) of the CPA.

¹³⁹ Section 50(1) of the CPA.

¹⁴⁰ Section 50(1)(c)(ii) of the CPA.

¹⁴¹ Karth *'Between a rock and a hard place': Bail decisions in three South African courts* 8.

¹⁴² Karth *'Between a rock and a hard place': Bail decisions in three South African courts* 8.

¹⁴³ The researcher worked as a Senior Public Prosecutor at the Johannesburg Magistrate's Court during the period 2002–2006 and thereafter in the capacity of Senior State Advocate at the Johannesburg High Court. The researcher has been practising as an advocate in private practise, with specialization in criminal law since May 2007. From the researcher's experience, the common practise in the Johannesburg lower courts is that magistrates grant the state postponements for seven days whilst the accused is kept in custody, to afford the state an opportunity to verify that the accused has a residential address. These orders are made with no consideration of the accused's personal circumstances or the merits of the allegations against the accused. When available court records are perused, it appears that these postponements are granted to the state solely because it was requested. This trend is apparent even in instances where the onus rests on the state to prove whether the further detention of the

to violate the accused's right to bail. It is important for the lower courts to apply the provision with caution and discretion.

In terms of section 59, a police official may grant bail to accused persons before their first appearance. Bail by a police official may only be granted in respect of offences referred to in Part II or Part III of Schedule 2. Police bail may only be granted by a police official of or above the rank of non-commissioned officer, in consultation with the investigating officer.

The CPA also provides so-called prosecutorial bail before the accused's first appearance.¹⁴⁴ In terms of section 59A, a prosecutor may, in consultation with the investigating officer, authorise the release of an accused on bail.¹⁴⁵ Bail in this regard may only be granted in respect of offences referred to in Schedule 7.¹⁴⁶

The aforementioned provisions obviate an intention by the legislature to alleviate the unnecessary incarceration of persons before they appear in court for the first time. The motivation for the shying away of the detention of the accused varies greatly and includes the avoidance of over-crowding prisons, the avoidance of severe prejudice which is suffered by accused persons, and the strain to the country's infrastructure in general.¹⁴⁷ The above-mentioned provisions demonstrate the relevance of the presumption of innocence in bail proceedings, in that the legislature deemed it necessary to provide for the release of an accused person prior to even having appeared in court on the alleged charges. It is submitted that these provisions are, nonetheless, severely under-utilised by the courts.¹⁴⁸

The provisions of section 59 and 59A of the CPA apply to a limited category of offences.¹⁴⁹ The privilege is reserved for what is considered to be 'lessor'

accused person is in the interest of justice, for example, offences falling within the ambit of Schedule 1 of the CPA. This malpractice, in this researcher's view, has the ability to frustrate the right to bail as entrenched in section 35 of the Constitution. This dereliction results in bail applications not being approached with the required urgency as cases are simply being postponed without the lower court launching an active enquiry in terms of s 50(6)(d) of the CPA.

¹⁴⁴ Section 59A.

¹⁴⁵ Section 59A(1).

¹⁴⁶ Section 59A(1).

¹⁴⁷ National Prosecuting Authority *Awaiting Trial Detainee Guidelines*.

¹⁴⁸ Mokoena *A guide to bail applications* 48; vide *Dlamini*.

¹⁴⁹ Part II and part III of Schedule 2 of the CPA vide s 59A only applies to offences listed in Schedule 7 of the CPA.

offences.¹⁵⁰ In principle, the presumption of innocence is not exclusionary, and should be applied to all accused persons irrespective of the nature of the offence of which they have been accused. With the current bail dispensation, the legislator has set a platform whereby the emphasis of the presumption of innocence is tantamount to the nature of the offence the alleged offender is charged with. This supposition will be elaborated on hereunder.

Although bail proceedings cannot be equated with the criminal trial, the aspect of the accused's guilt does impact on whether the accused will be released on bail, especially when applying the provisions of sections 60(4)(a-e), 60(11)(a) and (b), 60(11B0(c) and 60(14).¹⁵¹ In bail applications which include Schedule 5 and 6 offences, the court, *inter alia*, makes a provisional finding on the strength and weaknesses of the state's case which will be fully discussed in chapter 3. It is for the trial court to make a finding in respect to the guilt or innocence of the accused. The findings of the bail court should, however, be blended with the principle of presumption of innocence, as the yard stick.¹⁵² Section 60(4)(a)–(e) sets out the grounds which must be considered by the court when adjudicating the accused's release.¹⁵³ These grounds include the likelihood that the accused will endanger the public safety or a specific person's safety if released on bail; or the accused will attempt to flee in order not to go to trial; or the possibility that the accused will intimate witnesses or destroy evidence if out on bail; or if released on bail, the accused will put at risk the criminal justice system's objectives; and lastly, where there is a possibility that the accused's release on bail will threaten the public peace

¹⁵⁰ Lessor offences are, e.g., theft, assault common, malicious injury to property, housebreaking, to name a few.

¹⁵¹ The strength or weakness of the state's case — which in many ways is the flipside of guilt or innocence — therefore continues to play a crucial and decisive role in the granting or refusal of bail. Also see Mokoena *A guide to bail applications* 36.

¹⁵² *Willi v S* (C.A&R 14/2018) [2018] ZAECBHC 1 (1 June 2018)

¹⁵³ CPA s 60(4)(a)–(e): “The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established: (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; or (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; or (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; or (d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; (e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security”.

or security.¹⁵⁴ There should be a likelihood that these factors will occur, the operative word is thus likelihood and not merely a suspicion or possibility.¹⁵⁵ The accused is still encumbered with the rebuttal of these circumstances. In bail applications involving Schedule 5 offences, the onus is on the applicant or accused to persuade the court on a balance of probabilities that these the interests of justice warrant release on bail.

During applications which fall within the ambit of Schedule 6, accused must prove that exceptional circumstances¹⁵⁶ exist, permitting their release on bail in the interest of justice.¹⁵⁷ In bail applications involving Schedule 5 offences, it is incumbent upon accused persons to prove on a balance of probabilities that the interests of justice permit their release.¹⁵⁸ It has been conceded by the court when applying the provisions of this section that the onus is an arduous one.¹⁵⁹

¹⁵⁴ Karth *'Between a rock and a hard place': Bail decisions in three South African courts* 47.

¹⁵⁵ In *Prokureur Generaal van die Vrystaat v Ramokhosi* 1997 (1) SACLR 127 Orange Free State Division para 150B, the court remarked as follows: "Die hof beslis voorts dat die Landdros nie borg bloot kan weier omdat daar 'n risiko is dat een of meer van die gevolge sal intree by vrylating nie". The court held that bail cannot be refused merely on the basis that a risk of one or more of the grounds might occur. A likelihood must exist. Still, accused persons may be deprived of their freedom if there is a just cause for the deprivation, such as the suspicion that the accused had committed a crime. See Marumoagae and Tshehla 2019 *SAJHR* 261; Ballard *Research report on remand detention in South Africa* 10.

¹⁵⁶ The word 'exceptional' carries the following meanings: "1. extremely good or impressive in a way that is unusual; 2. much more or greater than usual; 3. unusual and not likely to happen or exist very often". See Macmillan dictionary <https://www.macmillandictionary.com/dictionary/british/exceptional> (Date of use: 10 January 2020). The word 'circumstances' denotes: "1. a fact or condition that affects a situation; 2. conditions in which you live, especially how much money you have; 3. events and situations that cannot be controlled". See Macmillan dictionary <http://macmillandictionary.com/dictionary/british/circumstance> (Date of use: 10 January 2020). There seems not to be any absolute legal or dictionary definition of the phrase 'exceptional circumstances', however. In law, the meaning must be determined on a case-by-case basis. In *S v H* 1999 (1) SACR 72 (W) paras 77e–f, Labe J concluded that exceptional circumstances are those circumstances that are not found in the ordinary bail application, thus out of the ordinary or unusual. In *S v Mauk* 1999 (2) SACR 479 (W), the court held that it would be a misdirection to adopt the approach that insofar as the strength of the state's case arises for consideration, to require that the state's case must be exceptionally weak before 'exceptional circumstances' can be found to exist, i.e., to equate an exceptionally weak state case with 'exceptional circumstances'.

¹⁵⁷ Section 60(11)(a). As there is no definitive explanation for the phrase 'interest of justice' in the CPA, various sources and authorities are employed to solidify the concept. A definition which may find practical application is that the 'interest of justice' may "mean overall evaluation of all the interests involved in the case, or simply interests of society". See Marumoagae and Tshehla 2019 *SAJHR* 261. The court held in *Dlamini* that the CPA Second Amendment Act 75 of 1995 failed to distinguish between the two separate and distinct meanings of this phrase and attached different meanings to the subsections where the phrase is utilised. These varied meanings are considered during the discussion of how this ambiguity impacts on the presumption of innocence.

¹⁵⁸ Section 60(11)(b).

¹⁵⁹ *S v Vanqa* 2000 (2) SACR 371 (Tk) paras 376h–j.

Section 60(11B)(c)¹⁶⁰ states that the record of the bail proceedings will be included in the accused's trial record. However, the fact that the accused has previously been convicted of any offence, or that there are pending charges against him or her; and he or she has been released on bail in respect of those charges, will not form part of such trial record. If, during the bail proceedings, the accused choose to testify, the accused must immediately be informed that anything they say may be used against them in a subsequent trial and serve as evidence in such proceedings.

An accused (or his or her legal advisor) is obliged in terms of section 60(11B)(a) of the CPA to inform the court of any previous convictions or pending charges against him or her. If, however, the accused person does not provide this information, or intentionally gives false information in this regard, he or she commits an offence in terms of section 60(11B)(d) and may, upon conviction, be liable to a fine or the maximum of two years' imprisonment. Accused persons applying for bail in Schedule 5 and 6 applications might have to divulge into the merits of the matter, disclosing their defence on the allegations proffered by the state. The accused will disclose their defence without having had access to the contents of the docket. The version disclosed is admissible during the trial of the accused.

Furthermore, section 60(14) states that an accused who is launching a bail application is not entitled to information which is contained in the docket unless the prosecutor provides the requisite authority to affect such disclosure. The section further reads that this limitation does not apply to the trial proceedings. Thus, an accused may be given access to the docket contents only if the prosecutor is of the opinion that such disclosure is permissible.

The subsequent portion of the discussion focuses on the Canadian principles and legislation which govern the Canadian bail system as well as the application by the Canadian judiciary.

¹⁶⁰ CPA s 60(11B)(c): "The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings."

2.4 The history and sources of bail in Canada

Like South Africa, the history of Canada's bail legislation can be traced back to English law heritage. In 1867, the English Parliament passed the British North America Act. At the same time, the Constitution of Canada was promulgated which gave the Canadian government jurisdiction over criminal law and criminal procedure.¹⁶¹ What is significant about the then bail laws as inherited from England, was that it was designed to ensure that accused persons who were released on bail would attend their trial.¹⁶² In 1869, legislation was approved by the Canadian Parliament that made it possible for bail to be granted for all offences at the discretion of a judicial officer.¹⁶³ No further significant legislation on bail was initiated until the introduction of the Bail Reform Act of 1966, wherein a change in attitude towards pre-trial incarceration was revealed.

The purpose of the Bail Reform Act¹⁶⁴ was to address previous challenges that were identified in the administration of the bail system.¹⁶⁵ The Bail Reform Act contained a principle that provided that an accused person that ought to be released on bail should be released on less strict conditions.¹⁶⁶ In the event that the Crown was of the view that less stringent conditions are not appropriate, the Crown was saddled with an onus to persuade the court accordingly.¹⁶⁷

Along with other significant changes, this principle was amended by the recommendations of the Canadian Committee on Corrections in their *Report of the Canadian Committee on Corrections — Toward unity: Criminal justice and corrections* (1969).¹⁶⁸ The changes were to the effect that an accused person was entitled to be released on bail at the earliest possible time. This constituted a presumption in favour of pre-trial release. Bail could, however, still be denied under

¹⁶¹ Justice Laws Website <https://laws-lois.justice.gc.ca/eng/Const/section-91.html> (Date of access: 10 October 2021).

¹⁶² *R v Antic* 2017 SCC 27 (CanLII) [2017] 1 SCR 509 (hereafter *R v Antic*) para 22.

¹⁶³ *R v Antic* para 23.

¹⁶⁴ Bail Reform Act of 1966.

¹⁶⁵ Wald and Freed 1966 *American Bar Ass J* 940–945. E.g., arrested persons could not be released until after their appearance before a justice of the peace – this led to a substantial number of accused in pre-trial detention.

¹⁶⁶ Coady *Assessments and analyses of Canada's bail system* 2.

¹⁶⁷ *R v Antic* para 29.

¹⁶⁸ Ouimet *Report of the Canadian Committee on Corrections* 99–130. This Committee had been set up to carry out the extensive examination of the criminal justice system in Canada.

circumstances where the state was able to prove that refusal to grant release was justified.¹⁶⁹ The second significant change was that depositing of cash was no longer a requirement for the granting of bail. The payment of cash as part of bail was restricted to very limited circumstances¹⁷⁰ as prescribed by statute.¹⁷¹ This development was meant to address the circumstances where requiring payment of cash in advance to secure pre-trial release could operate “harshly against poor people”.¹⁷²

In 1982, the Charter was passed into law as part of the Constitution of Canada. It incorporated the right to bail into the Constitution and made it a constitutional right. Section 11(e) of the Charter provides that a person charged with an offence is ‘not to be denied reasonable bail without just cause’. The provision created a fundamental right to be released on bail that is like section 35(1)(f) of the Constitution of South Africa.

When the Canadian Supreme Court first interpreted the right to bail under the Charter it held, amongst other issues, that the right to be released on bail also incorporated the right to ‘reasonable bail.’¹⁷³ It is argued that this approach accords with the ladder principle,¹⁷⁴ of releasing an accused person on the most favourable conditions unless the prosecution proves the contrary. Underlying the principle is that bail must be considered with regard to the unique circumstances of the accused having regard to the nature of the charges and their personal circumstances.

¹⁶⁹ *R v Antic* para 21 where the Court expressed the position as follows: “Although release is the default position in most cases, a judge or a justice also has the authority to deny the release of an accused or to impose conditions on the accused when he or she is released, provided that the Crown justifies the detention or the conditions.”

¹⁷⁰ When an accused is charged with an indictable offence in terms of 469 of the Criminal Code which includes treason and murder

¹⁷¹ *R v Antic* para 28. In *R v Anoussis* 2008 QCCQ 8100 (CanLII) para 1, the Court stated the legal position as follows: “Cash, either by deposit or a recognizance, should be exceptional”.

¹⁷² *R v Antic* para 28; *R v Anoussis* 2008 QCCQ 8100 (CanLII) para 1.

¹⁷³ *R v Antic* para 36.

¹⁷⁴ The ladder principle is used by courts to determine how much supervision arrested persons should have if they are released. The bottom of the ladder is the least amount of supervision, and the top of the ladder is the most. With each step up the ladder, the person’s freedom is more restricted.

2.4.1 Sources of the bail system in Canada

The Charter¹⁷⁵ sets out the rights and freedoms thought necessary to regulate a free and democratic society while the Canadian Criminal Code specifically regulates bail procedures in criminal trials. The two sources are subsequently discussed below.

2.4.1.1 *The Canadian Charter*

Section 7 in the Charter guarantees the life, liberty, and personal security of all Canadians. It also requires that governments respect the basic principles of justice whenever the necessity arises to limit those rights. Section 7 finds application in criminal matters. Section 9 regulates the detention or arrest of persons in criminal matters. The section declares that “government officials cannot take individuals into custody or detain them without good reason”. The importance and crux of the presumption of innocence, even at the bail stage, is reflected in the decision in *Antic* where the Canadian Supreme Court categorically stated the following:

Accused persons are constitutionally presumed innocent, and the corollary to the presumption of innocence is the constitutional right to bail. Since a person that applies for bail will have been charged with an offence, it follows that they are also entitled to the constitutionally entrenched right to presumption of innocence.¹⁷⁶ (own emphasis added)

The Court utilised the opportunity to provide guidance in that bail provisions in the Charter had to be applied fairly and consistently to give substance to the presumption of innocence.¹⁷⁷ The Court’s greatest concern was the risk of a refusal of bail being used as a form of penal punishment of a person that is still innocent and/or presumed to be innocent. The Charter is very much geared towards ensuring that until accused persons have been found guilty, they must be granted their freedom. In this regard, the Charter provides a 24-hour time limitation¹⁷⁸ in which a

¹⁷⁵ Charter s 15, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK) c 11.

¹⁷⁶ *R v Antic* para 67.

¹⁷⁷ *R v Antic* para 66.

¹⁷⁸ Charter s 503(1): “Subject to the other provisions of this section, a peace officer who arrests a person with or without warrant and who has not released the person under any other provision under this Part shall, in accordance with the following paragraphs, cause the person to be taken before a justice to be dealt with according to law:

(a) if a justice is available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period; and

peace officer must present an arrested person to a justice to be dealt with according to the law. This time limitation includes the time that a person is incarcerated during non-court hours. The result is an automatic right to bail over weekends and outside court hours. Section 503(1.1)¹⁷⁹ in the Charter also stipulates that where a justice is not available during the allotted time, an accused must be released by the peace officer. Bail proceedings are not meant to prematurely pronounce a verdict of guilt, but rather to govern future anticipated conduct during the period of awaiting trial. The criterion, pursuant to the Charter, is referred to as just cause. This would involve a weighing up of the reason for continued incarceration and whether such incarceration is justified.¹⁸⁰

When reading the rationale as generally applied by the Canadian judiciary in its approach to bail, it is clear that the significant difference between the South African bail system and the Canadian bail system is the liberal 'interpretation' which is applied. It is apparent that the denial of bail is considered to be the most extreme measure to be utilised to ensure that an accused faces the criminal allegations in a court of law.

A form of release on bail applied by the Canadian courts is an undertaking by the accused to attend the proceedings.¹⁸¹ This procedure is similar to having an accused being released on warning in South African courts, in which instance the court will warn the accused to attend court on the next appearance.¹⁸² The imposition of bail conditions is discretionary in proportion to the statutory grounds for detention pursuant to section 515(10)¹⁸³ of the Criminal Code. The important

(b) if a justice is not available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice as soon as possible."

¹⁷⁹ Charter s 503(1.1): "At any time before the expiry of the time referred to in paragraph (1)(a) or (b), a peace officer who is satisfied that the continued detention of the person in custody for an offence that is not listed in section 469 is no longer necessary shall release the person..."

¹⁸⁰ *R v Morales* [1992] 3 SCR 711.

¹⁸¹ Section 515 of the Criminal Code.

¹⁸² Section 50 (3) of the CPA.

¹⁸³ Section 515(10) of the Canadian Criminal Code states: "Justification for detention in custody' For the purposes of this section, the detention of an accused in custody is justified only on one or more of the following grounds:

- (a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;
- (b) where the detention is necessary for the protection or safety of the public, including any victim of or witness to the offence, or any person under the age of 18 years, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice; and

considerations are to secure the accused's attendance at court, ensuring the protection or safety of the public and maintaining confidence in the administration of justice.¹⁸⁴ These principles are well illustrated in the case discussed below.

The Canadian case of *R v Zora* revolved around an accused who had been charged with violating his bail conditions. The accused in the matter was convicted of failure to comply with conditions of undertaking or recognisance after failing to answer the door when police attended his residence. The legal question that served before the court was whether the required *mens rea* for an offence of failure to comply with conditions of undertaking or recognisance is to be assessed on a subjective or objective standard. The Supreme Court of Canada upheld the appeal on the basis that an objective *mens rea* is required, and not a subjective one. The Supreme Court of Canada found that those charges should be quashed, and Martin J rationalised that: "In many cases, an accused person faces criminal sanctions for conduct which, but for the stipulated bail condition, would be a lawful exercise of personal freedom".¹⁸⁵ The Court further held that:

...bail conditions can be imposed, but only if they are clearly articulated, minimal in number, necessary, reasonable, the least onerous in the circumstances, and sufficiently linked to the accused's risks regarding the statutory grounds for detention in s. 515(10): securing the accused's attendance in court, ensuring the protection or safety of the public, or maintaining confidence in the administration of justice. The setting of bail conditions must be consistent with the presumption of innocence and the right not to be denied reasonable bail without just cause.¹⁸⁶

This liberal approach reinforces that the Canadian style of application is a more liberal approach which focuses on the balancing of rights and interests of justice

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- (c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including
 - (i) the apparent strength of the prosecution's case,
 - (ii) the gravity of the offence,
 - (iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and
 - (iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more".

¹⁸⁴ *R v Zora* 2020 SCC 14.

¹⁸⁵ *R v Zora* 2020 SCC 14 para [2].

¹⁸⁶ *R v Zora* 2020 SCC 14 Summary, para [94].

rather than erring on the side of caution by unnecessarily restricting an accused's freedom of movement.

2.4.1.2 The Canadian Criminal Code

Section 515(10) of the Canadian Criminal Code details under what circumstances a person may be detained whilst awaiting the finalisation of the criminal trial. The section states that an accused may only be detained if such detention is necessary to ensure the accused's attendance at court if the detention is necessary for the protection of the public in preventing the accused from committing further offences whilst on release and/or interfering with the administration of justice. Furthermore, an accused may be detained to maintain confidence in the administration of justice.

2.5 Conclusion

This chapter presented a historical overview on the concept of bail and the development thereof in Roman and English law. It was evidenced that the historic development of the South African bail system is largely based on the Roman, Roman-Dutch, and English legal systems. The development of the South African bail legislation naturally followed the trend of the South African history with the Roman-Dutch law as starting point. The Canadian bail legislation is based on English law heritage.

As the Canadian bail system is historically more mature than the South African principles, their courts have had an opportunity to refine the application of the principles, thus providing a more comprehensive balance. That being said, the South African legislation is certainly not lacking in its attempt to govern the bail process. In the researcher's view, the South African Constitution and bail legislation, which are largely based on the Canadian Constitution and influenced by Canadian principles, are sensitive to the rights of the individual. The application of the provisions of the Constitution on the bail legislation might, however, in certain circumstances be seen as insufficient and erroneous.

The chapter identified several aspects in practises and legislation which overlap and find application in both the South African and the Canadian legal systems. When reading the applicable bail legislation and its practical application to the cases in

Canadian courts (as in paragraph 2.5.1.1 above), it is apparent that the Canadian legislation is a good example of the way a balance can be struck when limiting a person's right to freedom. The fundamental difference between the two seemingly similar systems is the application of the relevant principles. Furthermore, as mentioned in paragraph 2.5.1.1. above, section 503(1.1) in the Charter stipulates that if a justice is not available during the allotted time, an accused must be released by the peace officer. This is not a possibility provided for in the South African legislation.

Also, whereas the Canadian Criminal Code allows for the adjournment of the hearing of bail applications for no more than three days, section 50(6)(d) of the CPA allows a postponement of the bail proceedings for a period of seven days, as discussed in paragraph 2.4.1.2. Once again, the rules governing the bail process seem to be more equitable in balancing the rights of a detained person and the interests of society. By curtailing the time allowed for the adjournment of the proceedings, the rights of all parties are protected. It is evident that the Canadian approach to bail is more mindful of the abuse which may result from not properly monitoring the time frames within which the state may prepare for an opposed bail application. This controls that there is a minimal amount of unjustified incarceration suffered by an accused.

Having considered both systems' legislation which govern the bail system, it is apparent that both recognise the fundamental rights that accused have after having been detained and during the bail process. Each system has detailed a variety provisions and sections to ensure that these rights are not unnecessarily limited.

It is clear that the most challenging aspect is the balancing of the accused's rights and the protection of the interests of society. Therefore, it seems that the pitfall within the South African bail system is not the theoretical ideas encompassed within the legislation and Constitution, but rather the practical application of the ideologies. In this regard, the evidentiary principles of bail applications are of the utmost important to consider, which are discussed in the following chapter.

CHAPTER 3

EVIDENTIARY PRINCIPLES OF BAIL APPLICATIONS

3.1 Introduction

This chapter details the evidentiary aspects of bail applications, focusing specifically on the comparison between South African and Canadian law. The core emphasis of the analysis revolves around the question of evidentiary onus. In other words, the chapter discusses how the onus shifts from the state to the accused, depending on the unique circumstances and facts of each case.

Factors which directly impact on the bail proceedings, the interests of justice, exceptional circumstances, the manner in which the evidence is presented to the court as well as the various rules of evidence which are applicable will also be discussed. The crux of the submissions will be the impact that the aforementioned factors have on the presumption of innocence during bail applications in the South African and Canadian legal systems.

3.2 Onus of proof and evidential burden

In South African jurisprudence and legal practice, the terms ‘burden of proof’ and ‘onus of proof’ are generally used as synonyms. Both terms refer to the party which bears the burden or the legal duty to prove its case. For example, in criminal matters, the prosecution bears the burden of proving an accused’s guilt beyond reasonable doubt.¹⁸⁷ In other words, the prosecution must establish the guilt of the accused through evidence. There is no burden on the accused to prove his innocence.¹⁸⁸ The implication of the burden is that the prosecution must prove each and every allegation, and element of the offence proffered in the indictment.¹⁸⁹ The accused

¹⁸⁷ *S v Van der Meyden* 1999 (1) SACR 447 (W) para 448f; *S v Van Aswegen* 2001 (2) SACR 97 (SCA) para 101a; *S v Chabalala* 2003 (1) SACR 134 (SCA) para 140h; *S v Trainor* 2003 (1) SACR 35 (SCA) para 41a; *S v Mafiri* 2003 (2) SACR 121 (SCA) 128; *S v Mavinini* 2009 (1) SACR 523 (SCA) para 531c.

¹⁸⁸ *Wodage* 2014 *Mizan LR* 260.

¹⁸⁹ *R v Ndhlovu* 1945 AD 368 386. See also *Woolmington v DPP* [1935] AC 462; *R v Hlongwane* 1959 (3) SA 337 (A); *R v Pethla* 1956 (4) SA 606 (A).

is, however, saddled with the burden of rebuttal, especially in the face of a *prima facie* case having been established upon closing of the state's case.¹⁹⁰ Stated differently, it refers to the duty that is placed on a litigant to lead evidence so as to satisfy a court that it ought to grant the relief the litigant is seeking. The onus of proof generally vests with a particular party *id est* the question of who carries the onus in any given situation, which is a question of substantive law.¹⁹¹ For purposes of this discussion, the term onus of proof will be preferred and as such utilised.

The onus of proof, in the true sense as it has been referred to, must be distinguished from the evidential burden. An evidential burden refers to the duty on a party to lead evidence that proves the existence or non-existence of a factual issue.¹⁹² In the context of a Schedule 5 or 6 bail application, applicants must prove that they have a fixed residential address due to the onus that they bear. Once *prima facie* evidence to that effect has been led, the evidential burden shifts to the prosecution to disprove such fact. The evidential burden has now shifted but not the onus of proof. The onus of proof is set out in section 60(11) of the CPA.

In *South Cape Corporation (Pty) Ltd*,¹⁹³ Corbett JA described the difference between the onus of proof and the evidential burden as follows:

...onus has often been used to denote, *inter alia*, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a *prima facie* case made by his opponent. Only the first of these concepts represents onus in its true and original sense. In *Brand v Minister of Justice and Another* 1959 (4) SA 712 (AD) at p.715, OGILVIE THOMPSON, J.A., called it 'the overall onus'. In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ('weerleggingslas'). This may shift or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other.¹⁹⁴

¹⁹⁰ *R v Difford* 1937 AD 370 373 and further.

¹⁹¹ *S v Zuma and Others* (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568; [1996] 2 CHRLD 244 (5 April 1995).

¹⁹² Wodage 2014 *Mizan LR* 256–257.

¹⁹³ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (AD).

¹⁹⁴ *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (AD) 715.

There is no reason to believe or anything indicating to the contrary that the distinction that is drawn between onus of proof and evidentiary burden does not apply to general criminal litigation, which includes bail applications.¹⁹⁵

In *S v Jonas*,¹⁹⁶ the court had to deal with a situation where the prosecution had not led any evidence to answer the *prima facie* facts that had been established by the bail applicant. In highlighting the shifting of the evidential burden, the court held that it was incumbent upon the prosecution to have rebutted the evidence that had been adduced by the applicant. Failure to do so meant that the applicant's evidence stood unchallenged, and the court had to proceed on the premise that the applicant had discharged the onus of proof that it was in the interest of justice that he be released on bail.¹⁹⁷ The evidence adduced by the applicant was thus deemed to be conclusive in the absence of any challenging or rebutting evidence adduced by the state. The principle underlined was that once *prima facie* evidence has been advanced by the applicant, a reversed onus has been established, which ought to be discharged by the state. The evidential burden has thus shifted to the state to

¹⁹⁵ See also *Elish en Anderson v Prokureur-Generaal* 1994 (2) SACR 579 (W) paras 596d–576a where Southwood J, in his minority judgment, referred with approval to the judgment in *Pillay v Krishna and Another* 1949 AD 946 in explaining the incidence of onus in bail proceedings, by confirming its applicability. The learned Judge stated: “By onus I mean onus in its true and original sense namely the duty which is cast on the particular litigant, in order to be successful, of satisfying the Court that he is entitled to succeed in his claim or defence, as the case may be, and in the sense merely of his duty to adduce evidence to combat a *prima facie* case made by his opponent.” The case of *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) 711 also gives a broad explanation of what the phrase ‘onus of adducing evidence’ entails: “The general principle governing the determination of the incidence of onus is the *Corpus juris: semper necessitas probandi incumbit illi qui agit* (D. 22.3.21). In other words, he who seeks a remedy must prove the grounds therefor. There is, however, also another rule, namely, *ei incumbit probatio qui dicit non qui negat* (D22.3.2.) That is to say, the party who alleges, or as it is sometimes stated, the party who makes the positive allegation, must prove. (cf. *Kriegler v Minizter and Another* 1949 (4) SA 821 (AD) at p. 828). Together with these two rules must be read the following principle, namely: *agere etiam is videtur, qui exceptione utitur name reus in exceptione actor est*, (D. 44.1.1). This principle is stated thus by DAVIS, A.J.A, in *Pillay v Krishna and Another*, 1946 AD 946 at p. 952: ‘where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded, quoad that defence, as being the claimant; for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it.’”

¹⁹⁶ See *S v Jonas* 1998 (2) SACR 677 paras 679d–680e where the court held: “Where the appellant’s evidence stands alone as it does here, then the suggestion the State’s case is non-existent or doubtful becomes almost a foregone conclusion. If the State does not lead evidence in rebuttal, then I fail to see how it can be said that the appellant had not succeeded in discharging the onus.”

¹⁹⁷ In *S v Viljoen* 2002 (2) SACR 550 (SCA) paras 561f–g, the court declared that there is no need on a prosecution to present any rebutting evidence unless the bail applicant has made a *prima facie* case for his release. In other words, the evidential burden will shift only in certain circumstances.

rebut the *prima facie* evidence adduced by the applicant. Despite the evidential burden having shifted to the state, the onus of proof remains with the applicant. It can, however, in the researcher's view be argued that the applicant has discharged himself from the onus of proof, in instance, where the state has not discharged itself from the reverse onus. The burden of a reverse onus having been established by the applicant adducing a *prima facie* case.¹⁹⁸ As rightly stated by Masopa J in the unreported bail appeal of *Naiker v S*,¹⁹⁹ which researcher had the privilege to argue:

Now the question is what the legal position is if the State fails to present evidence in rebuttal such as in casu. *S v Hartslief supra* says that in such event other consideration applies, without any further elaborating.²⁰⁰

It seems that in cases where the state has a reverse onus established by the evidence adduced by the applicant, but which the state did not discharge, the question remains unanswered.

3.3. The onus of proof and the presumption of innocence

The Constitution stipulates that an accused person has the right to be presumed innocent, until the contrary is proven.²⁰¹ The presumption of innocence is generally referred to as the "golden thread"²⁰² woven throughout the web of the criminal law.²⁰³ In *Mbaleki v S*,²⁰⁴ the court unambiguously affirmed the status of the presumption of innocence as iterated by the Constitutional Court in *S v Dlamini*.

Section 35(3)(h) did not introduce the presumption of innocence as a new concept to the South African legal system.²⁰⁵ The concept of the presumption of innocence had always been part of the South African criminal law. The Constitutional Court in

¹⁹⁸ See *S v Siwela* 1999 (2) SACR 685 (W), the court of appeal held that where the court *a quo* was tasked to assess whether 'exceptional circumstances' as contemplated in s 60(11)(a) of the CPA have been established, the state has a duty to adduce rebutting evidence. It is intolerable that the state should adopt a passive attitude, in confident expectation that accused is unable to discharge the s 60(11)(a) onus. Also see *S v Hartslief* 2002 (1) SACR 7 (T).

¹⁹⁹ *Naiker v S* Case no A32/2020 High Court, Gauteng Local Division, Pretoria (5 March 2020).

²⁰⁰ *Naiker v S* Case no A32/2020 High Court, Gauteng Local Division, Pretoria (5 March 2020) para [28].

²⁰¹ Section 35(3)(h) of the Constitution.

²⁰² See *Woolmington v DPP* [1935] AC (HL) 481 and Naldi *Constitutional rights in Namibia* 68–69.

²⁰³ *R v Pearson* (1972) 77 CCC (3d) 124 (SCC) 135. See also *S v Acheson* 1991 (2) SA (NmHC) 822.

²⁰⁴ *Mbaleki and Another v S* (2853/2011) [2011] ZAKZDHC 68; 2013 (1) SACR 165 (KZD) (1 April 2011) para 14.

²⁰⁵ See *S v Zuma* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) para 33, where the Constitutional Court held that the presumption of innocence is not new to our legal system.

*S v Bhulwana, S v Gwadiso*²⁰⁶ stated that the presumption was a fundamental principle of South African common law that came to this country through the English law and was not inconsistent with the Roman-Dutch law.²⁰⁷

It must be noted that what has been overlooked with regard to the views that were expressed by Steyn J in the *Mbaleki*-case,²⁰⁸ was the presumption of innocence as embodied in the context of section 35(3)(h) of the Constitution. The court did not express any view about the presumption being founded in common law, nor did it seek to change the law in that regard.

For these reasons, it is argued that the view that was expressed by the learned Kriegler J in *Dlamini* must be viewed within the broader context of the presumption being founded in common law. It is an integral part of the South African law and has been solidified in section 35(3)(h) of the Constitution in respect of a right to a fair trial. The entrenched right does not limit the broader application of the presumption of innocence. It is argued that nothing can be found in the judgment of Kriegler J that limits the broader application of the common law presumption from other areas of the criminal process, including bail applications. Furthermore, it is precisely because an accused has not been found guilty that the law stipulates, as a fundamental human right, that such an accused should ordinarily be granted his or her liberty.²⁰⁹

It is worth bearing in mind that the common law is a source of law which includes the criminal law, and as such forms part of the South African legal system. Section 39(2) of the Constitution directs that every court “when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.” Thus, it stands to reason that when interpreting section 60(11) of the CPA, in relation to the common law presumption of innocence in pre-trial procedures, the court ought to have regard to the spirit and purpose of section 12(1) of the Constitution which

²⁰⁶ *S v Bhulwana, S v Gwadiso* (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (29 November 1995) para 10.

²⁰⁷ See Chapter 2 para 2.2.

²⁰⁸ *Mbaleki and Another v S* (2853/2011) [2011] ZAKZDHC 68; 2013 (1) SACR 165 (KZD) (1 April 2011).

²⁰⁹ See *S Acheson* 1991 (2) SA 805 (Nm) paras 822A–B. See also *S v Crossberg* (2007) SCA 93 where the Supreme Court approved the approach in *Acheson*.

favours the liberty of the individual.

Section 39(3) of the Constitution further provides that the Bill of Rights does not deny the existence and therefore enjoyment of “any other rights or freedoms which are recognised or conferred by common law, to the extent that they are consistent with the Bill.” Here is simply no provision that limits the presumption of innocence in pre-trial procedures. The presumption is consistent with the right to be released from detention if the interests of justice permit the same in terms of section 35(1)(f) as read with sections 12(1)(a) in the Bill of Rights. Therefore, the presumption must find application in pre-trial procedures (including bail applications) as section 35(1)(a) and (c)²¹⁰ of the Constitution is not excluded from these procedures.

Moreover, the following unique incongruity has developed in the South African bail system: bail deals with the liberty of a person during the criminal trial which might be extended to the post-conviction phase and possibly bail pending the outcome of an appeal. During pre-trial incarceration, where bail is not granted to the accused persons, they are deprived of their liberty under circumstances where a court has not pronounced a verdict on their guilt, and where the presumption of innocence still operates in their favour.²¹¹

3.3.1 *Who carries the onus in bail proceedings?*

Section 35(1)(f) of the Constitution stipulates that any arrested, detained or accused person has a right “to be released from detention if the interests of justice permit”. The provision does not directly make any specific reference to bail proceedings; however, it is accepted that the provision is wide and general enough to incorporate release on bail.²¹² In *Dlamini*, on the question of deciding which party carried the onus under section 35(1)(f), Kriegler J stated that:

For the present it is unnecessary to resolve the question whether there is an onus in bail proceedings and, if so, its incidence. The current cases are governed by subsection 11 where there is undoubtedly a burden cast upon an

²¹⁰ This provision protects the right of an arrested person to remain silent and to not be compelled to make any confession or admission.

²¹¹ Van den Berg *Bail, a practitioner's guide* 26.

²¹² *Dlamini* para 101.

applicant for bail.²¹³

It could be argued that the court provided a verdict on whom the onus rested, however, it must be borne in mind that this decision was specific to the facts of the cases before the court at that time.²¹⁴

The Court also stated that the position under the Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution)²¹⁵ was that an accused was entitled to be released on bail. As such, the norm was that the state carried the onus of proving that the accused should not be released on bail.²¹⁶ The learned judge characterised the position under section 35(1)(f) as more neutral²¹⁷ and unless the accused established that it was in the interests of justice, the accused could not be released on bail.²¹⁸

It is argued that there is nothing neutral about section 35(1)(f). Section 35(1)(f) must be read in conjunction with section 60(1)(a) of the CPA which replicates the wording in section 35(1)(f). It provides that an accused has the right to be released at any time prior to conviction “if the court is satisfied that the interests of justice so permit.” These provisions are in stark contrast to the clear right to be released that was enshrined by section 25(2)(d) of the Interim Constitution.²¹⁹ Under the current provisions, there is no entitlement to bail without having established the interests of justice favouring the release. To that extent it is contended that the default position is that the accused must be detained in custody unless they have established that their release is in the interests of justice.²²⁰ As it is currently stated, the accused that would be seeking release would be tasked with discharging the onus as a natural consequence.²²¹

²¹³ *Dlamini* para 45 (and footnote referred therein) where the learned judge consciously declined to be involved in the debate of whether there was an onus or not. He opted to focus on the narrow question that was before the Constitutional Court.

²¹⁴ *Dlamini* para 46. The current cases are governed by sub-s 11 where there is undoubtedly a burden cast upon an applicant for bail.

²¹⁵ Section 25(2)(d).

²¹⁶ See also *Magano and Another v Magistrate Johannesburg and Others* 1994 (2) SACR 304 (W), *Elish en Anderson v Prokureur-Generaal* 1994 (2) SACR 469 (W).

²¹⁷ It is submitted that the term ‘neutral’ in this context would refer to a consideration to the norm but that this may not be the prevailing approach to follow.

²¹⁸ *Dlamini* para [45].

²¹⁹ 200 of 1993.

²²⁰ Section 35(1)(f) of the Constitution.

²²¹ *Dlamini* para [101].

It is, therefore, submitted that there is a distinction as to who bears the onus during bail applications.²²² Section 60(11) specifies that the applicant must discharge the onus during the application whilst section 60(1) is silent on this aspect, however, the common law position has been that the onus rests upon the prosecution to prove that the interests of justice does not permit an accused's release on bail.

Section 60(11) is a recently enacted provision that was promulgated to make the granting of bail more onerous in what is considered more serious offences. Although the evidentiary burden may shift, the accused would have to discharge the onus that release would be justified in bail applications falling within the ambit of section 60(11)(a) and (b) of the CPA. In respect to any bail application falling outside the ambit of section 60(11)(a) and (b), the onus rests on the state to prove, on a balance of probabilities, that the interests of justice do not permit the applicant's release on bail. As in *S v Miselo*,²²³ where the Court of Appeal found that the appellant was not charged with a Schedule 5 offence, and that the onus rested upon the state to satisfy the court that, pending the appellant's trial, he must be detained in custody.²²⁴ According to the judge:

...the State discharged the onus that the refusal to grant bail and the detention of the appellant, pending his trial, was in the interests of justice.²²⁵

The determination of the Schedule before the commencement of the bail application is of utmost importance. The court hearing the application must determine the sequence in which evidence has to be presented as well as which party is burdened with the onus. This was evidenced in the matter of *S v Lin and Another*.²²⁶ In this case, the Court of Appeal clarified that in Schedule 5 bail applications, the Schedule places the onus or burden of proof on the appellant to show that his or her release from custody is in the interest of justice, and that the Schedule "also determines the sequence of presenting evidence".²²⁷ In detailing the sequence of presenting evidence, the Court explained:

²²² Regulated by the provisions of the CPA as well as the common law and case law.

²²³ *S v Miselo* 2002 (1) SACR 649 (C) paras [15], [30].

²²⁴ *S v Miselo* 2002 (1) SACR 649 (C) para [15].

²²⁵ *S v Miselo* 2002 (1) SACR 649 (C) para [30].

^{218.} *S v Lin and Another* 2021 (2) SACR 505 (WCC). See also *S v Tshabalala* 1998 (2) SACR 259 (C) where it was held that where s 60(11) of CPA is not applicable, s 60 casts a practical burden on the state to adduce evidence or information going to show that 'likelihood' of one or more of factors contemplated in s 60(4)(a)—(d) exists.

²²⁷ *S v Lin and Another* 2021 (2) SACR 505 (WCC) para [25].

The application of the wrong schedule during the bail proceedings had the effect of changing the sequence of presenting evidence and resulted in shifting the entire burden of proof in respect of the first appellant. During the bail-application hearing, though the first appellant had an onus to lay his case bare by presenting his case first, so that the state could be alerted to what case it had to meet, the evidence was presented in contrast to the expected sequence applicable to sch 5. Consequently, the first appellant had the advantage of being privy to the state case against him, before presenting his case.²²⁸

The Court further explicated that, as regards the bail hearing for the second appellant, the Schedule applied was accurate. This appellant's bail application fell within the ambit of Schedule 1 offences where the state bore the onus to establish that the appellant could not be admitted on bail as this was not in the interests of justice.²²⁹ This is in direct contrast to the situation of the first appellant where the magistrate's incorrect decision evidently resulted in an arbitrarily shift of onus onto the state, even though the appellant had the onus to prove — on a balance of probabilities — that his release on bail was in the interests of justice.²³⁰

3.4 Special nature of bail proceedings

Bail applications are regarded as proceedings *sui generis* and inquisitorial during which different procedural rules apply compared to criminal proceedings.²³¹ Bail proceedings are a special type of "interlocutory proceeding not geared to arriving at factual conclusions but designed to make informed prognoses"²³² where the court is expected to play an active role in the proceedings. In criminal and civil trials, the proceedings are adversarial in nature and the litigants are responsible for presenting their respective cases with little or no interference from the presiding officer. The presiding officer is expected to play the classic role of independent umpire that had to decide primarily based on what the parties have presented to the court.²³³

²²⁸ *S v Lin and Another* 2021 (2) SACR 505 (WCC) para [26].

²²⁹ *S v Lin and Another* 2021 (2) SACR 505 (WCC) para [28].

²³⁰ *S v Lin and Another* 2021 (2) SACR 505 (WCC) para [28].

²³¹ *Elish en Anderson v Prokureur-Generaal* 1994 (2) SACR 578 (W) 596 and *Dlamini* para [45]. See also Chapter 2 para 3.2.4.

²³² *Dlamini* para [78].

²³³ *Dlamini* para [10]; *R v Hepworth* 1928 (AD) 265 277.

3.4.1 Section 60(3) of Criminal Procedure Act

The South African legal system can be described as being a hybrid system in the sense that it is for the most part accusatorial, however, it does have an inquisitorial hue to it. This simply means that for the most part the court will adjudicate on the proceedings passively but are simultaneously expected to intervene when necessary to ensure that the proceedings remain just and fair. An example of this is reflected in sections 167 and 186 of the CPA which authorise the court to subpoena and question witnesses in criminal trials should this be necessary.

Section 60(3) of the CPA is an extension of this authority as it gives a court the power to call for additional evidence if the court believes it does not have sufficient information to decide on a bail application before it.²³⁴ Section 60(3) has the effect of diluting the strict application of the question of onus in bail proceedings as it places an obligation on the court to ask for more information. Practically, this may result in the onus shifting between the applicant and the state, depending on who would be at liberty to provide the court with further information during the application. That the court is obliged to play this active inquisitorial role is reflected in *S v Mpošana*,²³⁵ where a bail appeal was remitted to the magistrate to allow her to reconsider whether she should not have relied on section 60(3) of the CPA before making her decision. The court should ultimately be placed in a position where an informed and just decision can be taken on the evidence adduced.

It is noteworthy that section 60(3) is couched in peremptory terms.²³⁶ Once the court forms an opinion that it does not have sufficient or reliable information, then it is obligatory that the court must order that such other additional information or evidence should be placed before it. A reading of section 60(3) shows that this process consists of two stages. The first stage is for the court to assess the information which the prosecution and an accused have placed before it. If the court

²³⁴ Section 60(3) of the CPA provides as follows: "If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court."

²³⁵ *S v Mpošana* 1998 (1) SACR 40 (Tk)

²³⁶ Section 60(3) reads as follows: "If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court" (own emphasis added).

is satisfied with the information, that is the end of matter, and the court may proceed to make its decision. On the other hand, if the court is not satisfied, it must order that additional information be placed before it.

3.4.2 *Admissibility of hearsay evidence*

The Law of Evidence Amendment Act 45 of 1988 rendered the common-law rules applicable to hearsay obsolete²³⁷ and redefined hearsay to mean “evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence”.²³⁸ Hearsay evidence is generally inadmissible.²³⁹ Hearsay can, however, be admitted by consent, provisional and by exception in terms of section 3(1)(c) of the above Act.²⁴⁰

It is trite that hearsay evidence is admissible during bail applications²⁴¹ and the probative value to be argued. The admission of hearsay evidence exposes the applicant to flimsy, unreliable and untested evidence which is, as a general rule, strictly inadmissible due to the nature and quality of the evidence.

The applicant is prejudiced by the admission of such evidence, which is adduced in support of the contention that bail should be declined. The applicant is unable, due to the nature of such evidence, to test the credibility of hearsay evidence. The applicant is effectively bombarded with hearsay evidence from which certain conclusions ought to be drawn, moreover, to establish the strength of the state’s case against the applicant. It is required from the court hearing the bail application to draw certain inferences, which effectively violates the applicant’s right to be presumed innocent until proven guilty. The court, by considering hearsay evidence, permits the state to speculate on whether such evidence implicates the applicant in

²³⁷ *Mnyama v Gxalaba and Another* 1990 (1) SA 650 (C).

²³⁸ Law of Evidence Amendment Act 45 of 1988 s 3(4).

²³⁹ Schwikkard and Van der Merwe *Principles of evidence* 287

²⁴⁰ Schwikkard and Van der Merwe *Principles of evidence* 294–296.

²⁴¹ *S v Yanta* 2000 (1) SACR 237 (Tk) wherein it was held that: “Because bail applications are neither civil nor criminal proceedings, but a unique judicial function, the rules of evidence in trial actions are not strictly adhered to. Therefore, hearsay evidence is admissible at bail applications (in casu hearsay evidence by the police investigation officer, about the content of witness statements implicating the accused in the commission of the offence with which she was charged).”

the commission of other offences.²⁴²

In bail applications falling within the ambit of section 60(11)(a) and (b) of the CPA, wherein the applicant bears the onus, the applicant has great difficulty to rebut and/or to discredit such hearsay evidence. The admittance of hearsay evidence can thus, to a certain extent, be described as procedurally unfair, moreover, where an applicant's liberty is dependent on the nature and quality of the evidence that is adduced.

3.4.3 *Admissibility of previous convictions*

It is trite that the evidence of an applicant's previous convictions is admissible and deemed to be relevant during a bail application. Previous convictions and/or pending cases are relevant in determining the Schedule and subsequent onus of an application, moreover, whether the application falls within the ambit of Schedule 5 or 6 of the CPA. The admission of previous convictions perversely exposes the applicant to 'judgment' against previous behaviour, the efficacy of which is questionable at best, and irrelevant at worst. The admission of previous convictions is aimed at anticipating the applicant's future conduct by observing his past conduct.²⁴³ Evidence of previous convictions will be relevant to determine the likelihood of grounds referred to in section 60(4)(a) read with section 60(5) of the CPA.

3.5 **Onus in bail applications generally**

As demonstrated earlier, the right to be released on bail and the attendant burden of proof is largely determined by section 60(1) of the CPA and, in the researcher's view, the provision generally places the onus on the accused and not the prosecution. That having been said, if the accused does not bring a bail application, the court is obliged to ascertain from the accused whether they wish that the court

⁴⁸ *S v Nyakambi* [2005] JOL 14883 (Tk) 11, see also Mokoena *A guide to bail applications* 40.

⁴⁹ In *S v Muggel* 1998 (2) SACR 414 (C), Ngcobo J stated the following: "The tendency of taking everything that appears on the form SAP 69 into consideration, regardless of the passage of time, must be avoided. It must be born in mind that even a criminal is entitled to ask that the lid on a distant past should be kept tightly closed."

considers the question of release on bail.²⁴⁴ It is submitted that this approach is consistent with the view that because of the presumption of innocence, the liberty of the accused should be the norm.

Bail can be separated into two categories of applications, each with its own set of legal principles. The first category relates to those offences which fall outside of Schedule 5 and 6. The second category are the Schedule 5 and 6 offences (the offences which are deemed to be 'more serious offences'). The discussion which follows will focus on the onus in respect of Schedule 5 and 6 offences and will be analysed on how it impacts on the presumption of innocence.

3.5.1 *Schedule 5 and 6 offences*

Schedule 6 offences are those categories of offences listed in the CPA in which accused persons are to be denied bail unless they establish exceptional circumstances and that it is in the interest of justice that they be granted bail.²⁴⁵ Section 60(11)(a) clearly places the onus on the accused to establish that they ought to be released on bail. This is not just an evidential burden but rather a formal onus. This fact was confirmed by Kriegler J in *Dlamini*,²⁴⁶ where the learned judge stated in respect of 60(11)(a), which is similar in intent to section 60(11)(b), that the subsection saddled an accused with an onus based on their knowledge as to the relevant factors on which they could seek to establish that they should be admitted on bail. The judge went on to say that the provision described how the onus was to be discharged.²⁴⁷ This process will be subsequently discussed.

3.5.1.1 Difficulties in respect to discharging the onus under section 60(11)(a) and (b)

In *Dlamini*, the Constitutional Court accepted that these subsections placed a heavy burden on an accused. The burden did not mean or result in an outright denial of bail, because of the obligation to establish exceptional circumstances and/or the

²⁴⁴ See s 60(1)(c) which provides as follows: "If the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court."

²⁴⁵ Section 60(11)(a).

²⁴⁶ *Dlamini* para [78].

²⁴⁷ *Dlamini* para [79].

interests of justice. Whilst the Court held that an accused is given a broad scope to establish the exceptional circumstances,²⁴⁸ the reality is that the scope is rather limited to factors²⁴⁹ that impact on an accused's right to silence and presumption of innocence. In the event that factors referred to in section 60(4)-(9) are unlikely to occur to an exceptional degree, it can very well be argued that exceptional circumstances have been established. In the matter of *S v Rudolph*, Snyders JA remarked as follows:

The section places an onus on the appellant to produce proof, on a balance of probability, that 'exceptional circumstances exist which in the interests of justice permit his' release. It 'contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society denying the accused bail, will be resolved in favour of the denial of bail, unless "exceptional circumstances" are shown by the accused to exist'. Exceptional circumstances do not mean that 'they must be circumstances above and beyond, and generally different from those enumerated' in ss 60(4)-(9). In fact, ordinary circumstances present to an exceptional degree, may lead to a finding that release on bail is justified.²⁵⁰

Challenging the strength of the state's case, in respect of Schedule 6 offences, is an important, if not the single most important consideration, in establishing exceptional circumstances. In *Nkambule v S*,²⁵¹ the court observed that without

²⁴⁸ *Dlamini* para [74].

²⁴⁹ Such factors include the factors referred to section 60(4)(a) read with section 60(5)–60(8) and 60(8A) of the CPA. According to CPA s 60(8A): "In considering whether the ground in subsection (4)(e) has been established, the court may, where applicable, take into account the following factors, namely— (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.

²⁵⁰ *S v Rudolph* 2010 (1) SACR 262 SCA 266 para [9]. See also *Dlamini* para [76]; *Hendriks v The State* Case A714/98 (1 October 1998) Cape of Good Hope High Court (Unreported); as cited in *Dlamini*.

²⁵¹ See *Nkambule v S* (A134/2013) [2013] ZAGPJHC 112 (2 May 2013) para 20 where Mudau AJ said: "It is clear from the magistrate's judgment that he paid very scant regard to the totality of the facts before him. In the second bail application on new facts, he held that it was of little concern to him whether the state's case was strong or not. In this regard, he obviously erred. The strength or otherwise of the state's case is of relevance; if it were not, a person accused of a Schedule 5 or 6 offence, would very seldom be able to discharge the onus that he or she has, of proving that the interests of justice required his or her release on bail. As it was stated in *S v Yonas*, 'mere accusations are not enough'. Whilst the accused was detained on the basis of a prima facie case, section 60(11)(a) 'does not contain an outright ban on bail in relation to certain offences' (*Dlamini*; *S v Siwela*), an approach that the magistrate seems to have adopted. The fact that an accused is facing a Schedule 6 offence does not, on its own, preclude the granting of bail in appropriate circumstances."

challenging the strength of the state's alleged case, it is difficult to think of how an accused charged with a Schedule 6 offence would be able to show a justified release on bail.²⁵²

In *S v Mathebula*,²⁵³ the court held that applicants must demonstrate that they will in all probability be acquitted upon the conclusion of the trial.²⁵⁴ The court specifically mentioned that the presumption of innocence applies even before the trial.²⁵⁵ This specification by the court results in accused persons not being forced to incriminate themselves before the trial. It is argued that the presumption must find application during the 'period before the trial' which includes the period immediately following an arrest and includes the bail process.²⁵⁶ Thus, these are processes that are intrinsically linked to the criminal process.

The fact that the accused are expected to prove that they are likely to be acquitted, strikes at the heart of and offends the presumption of innocence. This raises the question whether the onus in section 60(11)(a) of the CPA infringes upon the right of accused person in bail proceedings to be presumed innocent. In order to discharge this onus, accused persons are required to address the strength of the state's case without having insight into the docket contents. It is submitted that this

²⁵² *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (AD) 715.

²⁵³ *S v Mathebula* 2010 (1) SACR 55 (SCA).

²⁵⁴ In *S v Mathebula* 2010 (1) SACR 55 (SCA) para [12], it was held: "But a state case supposed in advance to be frail may nevertheless sustain proof beyond a reasonable doubt when put to the test. In order successfully to challenge the merits of such a case in bail proceedings an applicant needs to go further: he must prove on a balance of probability that he will be acquitted of the charge: *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) (2002 (2) SA 680; [2002] 2 All SA 577) at 230h, 232c; *S v Viljoen* 2002 (2) SACR 550 (SCA) ([2002] 4 All SA 10) at 556c. That is no mean task, the more especially as an innocent person cannot be expected to have insight into matters in which he was involved only on the periphery or perhaps not at all. But the state is not obliged to show its hand in advance, at least not before the time when the contents of the docket must be made available to the defence; as to which see *Shabalala and Others v Attorney-General, Transvaal, and Another* 1995 (2) SACR 761 (CC) (1996 (1) SA 725; 1995 (12) BCLR 1593). Nor is an attack on the prosecution case at all necessary to discharge the onus; the applicant who chooses to follow that route must make his own way and not expect to have it cleared before him. Thus, it has been held that until an applicant has set up a prima facie case of the prosecution failing there is no call on the state to rebut his evidence to that effect: *S v Viljoen* at 561f–g." The judge continues at para [13]: "As will be apparent from the paucity of facts in support of his case, the appellant fell substantially short of the target. Despite the weak riposte of the state, the magistrate was left, after hearing both sides, no wiser as to the strength or weakness of the state case than he had been when the application commenced. It follows that the case for the appellant on this aspect did not contribute anything to establishing the existence of exceptional circumstances."

²⁵⁵ *Nkambule v S* (A134/2013) [2013] ZAGPJHC 112 (2 May 2013).

²⁵⁶ Karth '*Between a rock and a hard place*': *Bail decisions in three South African courts* 7.

is an unreasonable and insurmountable onus.

In *S v Panayioutou*,²⁵⁷ it was held that unless the accused directly challenges the admissibility of the state's evidence, the court will proceed on the basis that any such evidence is admissible, where during the actual trial, the prosecution is duty bound to prove the admissibility of the evidence which it presents to the court. A further travesty is that the accused, during the bail proceedings is required to disclose a defence. Ordinarily, such an obligation only arises once the prosecution has established a *prima facie* case during the trial. Van der Berg, *inter alia*, interestingly remarks as follows about this procedure:

Saddest of all is the fact that numerous judicial officers in both lower and superior courts appear to be oblivious of the fact that ordinarily circumstances may meet the challenge of s 60(11)(a).²⁵⁸

3.5.1.2 The evidential burden placed on an accused in Schedule 5 and 6 offences

Accused persons charged with Schedule 5 or 6 offences and who challenge the weakness of the state's case are expected to lead evidence about their defence that establishes on a balance of probabilities that they are likely to be acquitted.²⁵⁹ The strength of the state's case is approached within the context of section 60(4)(b) as read with section 60(6)(f), (g) and (h) of the CPA. These provisions direct that in determining whether the accused will likely evade their trial, the bail courts may consider the gravity of the charge, (at this stage, these may be draft charges of alleged criminality), the strength of the state's case and the likely sentence that may be imposed if found guilty. Effectively, as stated by Mudau AJ in *Nkambule*, if accused persons in Schedule 5 and 6 bail applications are to succeed, the accused must address all these factors as well as demonstrate that they are likely to be

²⁵⁷ *S v Panayioutou* (unreported ECG case no CA&R 06/2015) para 53.

⁵⁶ Van der Berg *Bail, a practitioner's guide* 104. Also see *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA) para [19] where the court stated: "Artikel 60(11)(a) meld nie die aard van die vereiste 'buitengewone omstandighede' nie. Dit word nie vereis dat 'buitengewone omstandighede' verskillend van aard, of andersoortig moet wees as die omstandighede wat in subarts (4)–(9) genoem word nie. Gewoonlik, maar nie noodwendig nie, sal dit omstandighede wees wat daarop gemik is om die onwaarskynlikheid van die gebeure genoem in art 60(4)(a)–(e) te bewys. Met betrekking tot daardie gebeure, of andersins, moet die aangevoerde omstandighede, in die konteks van die besondere saak, van so 'n aard wees dat dit as buitengewoon aangemerkt kan word (*S v Vanqa* 2000 (2) SASV 371 (Tk) op 376b–d)."

²⁵⁹ *S v Mazubuko and Another* 2010 (1) SACR 433 (KZP) para 23.

acquitted.²⁶⁰

The full implication of this is that should the court conclude that the accused are facing serious charges, they are likely to be convicted and will face a long prison sentence, the accused will simply be denied release — this before the admissibility, strength and veracity of the allegations have been determined. These conclusions are arrived at on the strength of charges that are still mere allegations, that have yet to be proven which may well be changed or even be withdrawn before the actual trial. There is no doubt that this entire approach conflicts with the presumption of innocence.

Whilst it has been argued that bail processes are not part of the trial,²⁶¹ this is an argument that loses sight of the fact that the bail proceedings itself is part of the criminal process that is directed at ensuring that an accused person attends the subsequent criminal trial. Furthermore, such arguments ignore the fact that in terms of section 60(11B)(c) of the CPA,²⁶² the record of the bail proceedings subsequently forms part of the trial of the accused.

The procedure in bail applications, which requires the accused to break their silence, negates the right to silence in section 35(1)(a) of the Constitution. These persons are forced to reveal their defence in circumstances where the evidence that they give at the bail hearing may be used in the subsequent trial in terms of 60(11B)(c) of CPA. This exposes the accused to providing evidence that may be used by the state during the trial.²⁶³ Thus, in Schedule 5 and 6 offences, accused persons find

²⁶⁰ *Nkambule v S* (A134/2013) [2013] ZAGPJHC 112 (2 May 2013) para 20.

²⁶¹ I.e., bail forms part of the pre-trial processes. See, e.g., De Ruiter and Hardy *Study on the use of bail in South Africa* 9.

²⁶² Section 60(11B)(c) stipulates as follows: “The record of the bail proceedings, excluding the information in paragraph (a), shall form part of the record of the trial of the accused following upon such bail proceedings: Provided that if the accused elects to testify during the course of the bail proceedings the court must inform him or her of the fact that anything he or she says, may be used against him or her at his or her trial and such evidence becomes admissible in any subsequent proceedings.”

²⁶³ An accused must be warned during a bail application that everything he or she states might be used against him or her during the trial. It is of great significance to note that the court must warn the accused of his or her rights irrespective of whether he or she tenders *viva voce* evidence and/or launch the application by way of an affidavit. See *S v Snyman and Another* 1992 (2) SACR 169 (C), *S v Madlala* 2015 (2) SACR 247 (GJ). In *S v Agliotti* 2012 (1) SACR 559 (GSJ), the court excluded the contents of the bail proceedings, and found that: “The warning must be issued before the accused makes an election whether to testify *viva voce* or through an affidavit. That would in my view remove the possibility of any absurd interpretation of the section and also ensure a fair trial for an accused.”

themselves in the unenviable situation where in order to fight for their right to be released, in circumstances where they are essentially still presumed innocent, they must engage in a mini-trial in which they must prove that they are likely to be acquitted. The accused persons are forced to break their silence in circumstances where, within the broader parameters of the criminal proceedings, they are not supposed to do so until such time as the state has formally presented all its evidence in open court.

A more fundamental question that arises is whether this approach as sanctioned by section 60(11)(a) and (b) of the CPA can be considered to be in alliance with the Constitution, specifically the right to a fair trial as contained in the Bill of Rights. Furthermore, it is submitted that the violation of the right to remain silent as applied in the above provisions is not in the interests of justice at all and does not accord with the spirit and “values that underlie an open and democratic society based on human dignity, equality and freedom”.²⁶⁴

Although the bail court is only encumbered with deciding on the strengths or weaknesses of the state’s case, it could be argued that there is an inevitability that as a natural consequence the bail application results in a pseudo pre-determination of the applicant’s guilt. In other words, an accused charged with a Schedule 5 or 6 offence could likely be found guilty of the alleged offences on the strength of the state’s case, in the absence of the accused demonstrating the existence of exceptional circumstances to wit a weak state’s case.²⁶⁵ Such an accused is basically treated, prematurely so, as guilty before he or she has been found guilty. That finding undermines one’s dignity.²⁶⁶ To deny such persons their freedom because of unproved charges certainly violates their right not to be deprived of their freedom without just cause.

There is a basis for the opinion that certain circumstances justify a court finding that the state has an iron-clad case,²⁶⁷ and this would most certainly impact on the applicant’s ability to prove exceptional circumstances. However, the courts ought to

²⁶⁴ Section 39(1)(a) of the Constitution.

²⁶⁵ De Ruiter and Hardy *Study on the use of bail in South Africa* 9, 23.

²⁶⁶ As guaranteed by the Constitution s 10.

²⁶⁷ E.g., in a case of murder where the accused is linked with video footage showing the murder, the applicant in the bail proceedings would have an exceedingly onerous task in proving exceptional circumstances.

be cautious of not exceeding the realm into a finding of guilt prematurely and treating a Schedule 5 and 6 accused unequally as compared to everyone else who is entitled to the benefit of the presumption of innocence.

It is argued that such a limitation is not justifiable in an open and democratic society that places a premium on liberty. The premium that is placed on individual liberty is such that the Constitutional Court in *Zealand v Minister of Police*²⁶⁸ held that every deprivation of liberty is *prima facie* unlawful, and it is for the state to justify such deprivation.

3.5.1.3 The duty to disclose information and docket contents during bail proceedings

Ordinarily the state is under no obligation to disclose the contents of the docket during a bail application. In *Mathebula*, the Supreme Court of Appeal held that unless the accused in a Schedule 6 bail application has laid out a *prima facie* case in respect to the weaknesses in the state's case, there is no obligation on the state to present any evidence in this regard.²⁶⁹ This approach runs counter to the public-law duty that is imposed on the state to disclose information that may be beneficial to an accused person though harmful to its case. This principle was recently restated by the Constitutional Court in *Mahlangu v Minister of Police*,²⁷⁰ in which Tshiqi J observed that there is a public-law duty on state functionaries like the police and prosecutors to protect the Constitutional rights of accused persons as members of society by not withholding relevant information during a bail application.²⁷¹ A breach

²⁶⁸ *Zealand v Minister for Justice and Constitutional Development and Another* (CCT54/07) [2008] ZACC 3; 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC) (11 March 2008) para 25 where the Court held that: "This is not something new in our law. It has long been firmly established in our common law that every interference with physical liberty is *prima facie* unlawful. Thus, once the claimant establishes that an interference has occurred, the burden falls upon the person causing that interference to establish a ground of justification."

²⁶⁹ See footnote 184 above.

²⁷⁰ *Mahlangu and Another v Minister of Police* 2021 ZACC 10.

²⁷¹ See *Mahlangu and Another v Minister of Police* 2021 ZACC 10 para [38] where Tshiqi J stated: "In *Woji*, the Supreme Court of Appeal reminded us that the police, as state officials, have a public law duty to safeguard the constitutional rights of the members of society. It said: 'The Constitution imposes a duty on the state and all of its organs not to perform any act that infringes the entrenched rights, such as the right to life, human dignity and freedom and security of the person.' This is termed a public law duty. On the facts of this case, Inspector Kuhn, a policeman in the employ of the state, had a public law duty not to violate Mr. Wojji's right to freedom, either by not opposing his application for bail, or by placing all relevant and readily available facts before the Magistrate. A breach of this public law duty gives rise to a private law breach of Mr. Wojji's right not to be unlawfully detained, which may be compensated by an award of damages. There can be no reason to depart from the general law of accountability, that the state is liable

of this duty is viewed in such a serious light that it gives rise to a delictual claim for damages against the prosecution and police that may have withheld such material information.²⁷²

It is, therefore, difficult to reconcile this public-law right with the apparent *carte blanche* right to silence in respect to the weaknesses of the state's case that is provided to the prosecution in *Mathebula*. This is done on the basis of the onus that is placed on an accused in Schedule 5 and 6 offences. This is such a grave fundamental contradiction that it cannot be reconciled nor justified under any circumstances. The decision in *Mathebula* must be read in context with section 60(14) as found within the decision in *Dlamini*²⁷³ where the Constitutional Court stated that there was nothing in its decision in *Shabalala and Others v Attorney General*²⁷⁴ that entitled the defence or an accused to access the contents of the police docket. In other words, the Constitutional Court has had the last word on this subject: an accused has no right of access to the contents of the docket. Kriegler J was at pains to emphasise that the right to the contents of the docket was only related to the trial and an accused having a fair trial.²⁷⁵ The judge further reasoned that during bail proceedings there was no question of the fairness of a trial but the right to be released on bail if permitted in the interests of justice.

It may be argued that the issue of the fairness of the bail application itself was not at issue in the case of *Dlamini*. It is contended that it must have been an over-riding issue which the Constitutional Court must have been aware of because the administration of justice and the very interests of justice demand that all judicial hearings must be fair.²⁷⁶ Sections 60(11)(a) and (b)²⁷⁷ of the CPA clearly stipulate that accused persons must be given a reasonable opportunity to argue their case to

for the failure to perform the duties imposed upon it by the Constitution, unless there is a compelling reason to deviate from the norm. Mr. Woji was entitled to have his right to freedom protected by the state. In consequence, Inspector Kuhn's omission to perform his public duty was wrongful in private law terms."

²⁷² *Mahlangu and Another v Minister of Police* 2021 ZACC 10 paras [44], [45].

²⁷³ *Dlamini* para [82].

²⁷⁴ *Shabalala and Others v Attorney General* 1995 (2) SACR 761 (CC).

²⁷⁵ See in this regard the matter of *S v Mustagh Sayed and Two Others* (reported case number CC 317/2007 North Gauteng High Court Pretoria), where Louw J set aside the convictions of all three accused, not having received a fair trial. Also see *S v Mathabathe* 2003 (2) SACR 28 (T) paras 33 d–g.

²⁷⁶ See s 34 of the Constitution.

²⁷⁷ See footnote 7 in Chapter 1.

be released on bail. It is contended that such reasonable opportunity must be read in conjunction with section 34 of the Constitution.²⁷⁸ As much as bail proceedings are special interlocutory proceedings, these proceedings cannot be excluded from the idea of judicial proceedings and, as such, must be conducted within the spirit, purport of the objects of the Bill of Rights.²⁷⁹

The reasoning by Kriegler J cannot be reconciled with his other observations in the same judgment where the learned judge observed that Schedule 5 and 6 bail applicants must be given a reasonable opportunity to make their case in justifying their release on bail. The Court held that the requirement to be given a reasonable opportunity is peremptory.²⁸⁰ If this right is peremptory, it should follow that the state should be obliged to disclose the merits of its charges from the onset, as a result of the provisions of section 60(11)(a) and (b) of the CPA. Such accused cannot be expected to discharge their burden by being kept in the dark. If this cannot be the case, why would the state be permitted to wait for an accused to bring an application to be given details on which the charges are based? It is the state that has arrested the accused and brought him or her to court to stand trial. The state is, therefore, in the researcher's opinion obliged to justify the arrest of the accused and the preferred charges. Such justification can be discharged by the state being obliged to disclose the evidence on which the charges are based. It is argued that this approach would be consistent with the viewpoint in *Dlamini*, where Kriegler J stated the following:

In this context it would be salutary to note the clear exposition by Schultz JA in *Naude and Another v Fraser*: 'It is one of the fundamentals of a fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be apprised of the case which he faces.'²⁸¹

In light of this principle, it is submitted that a Schedule 5 or 6 bail applicant ought to be furnished with the outline of the evidence on which the charges are based. Furthermore, the state cannot be permitted to take advantage of Schedule 5 or 6 applicants by keeping silent regarding the weakness of its case. In *Dlamini*, the Court held that the state can be ordered to disclose the contents of the docket in

²⁷⁸ Section 34: Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

²⁷⁹ *Majali v S* (41210/2010) [2011] ZAGPJHC 74 (19 July 2011) para 3 as per Mokgoatlang.

²⁸⁰ See *Dlamini* para [80].

²⁸¹ *Dlamini* para [80].

order to allow or give a bail applicant under section 60(11)(a) a “reasonable opportunity”²⁸² to prepare the application. It is argued that a reasonable opportunity must be premised on the obligation or onus to prove that a charge in terms of Schedule 5 or 6 is justified with credible and admissible evidence.

Bearing in mind that the state has a public-law duty to disclose the facts on which it will rely, it should follow that the state ought to not wait to be compelled to disclose or for a bail applicant under section 60(11)(a) and (b) to request such information as this passive approach undermines the substantive exercise of that duty. It is argued that the discharge of that public-law duty is not dependent on whether a request has been made or not. It exists on its own as an obligation that is placed on the state, independent of any request for any relevant information by a Schedule 5 or 6 applicant. Such a duty is imposed as a result of the power that the state exercises for the proper administration of justice. It is for that reason that a breach of the duty gives rise to a private law delictual claim. By the same token, a breach of the duty can also give rise to a charge of fraudulent misrepresentation by omission.²⁸³

It is suggested that an appropriate approach is to retain the onus of proof with the state. What this would entail is that at the very least, the state would be able to substantiate the strength of its case by adducing evidence that establishes the existence of reliable evidence on which a conclusion may be reached that the accused is indeed facing serious charges. Once this has been done, an evidential burden would then shift to the accused to *inter alia* address the strength of the state’s case and the likelihood of an acquittal. This approach will fall within the parameters of sections 60(11)(a) and (b) that require a Schedule 5 and 6 applicants be given a

²⁸² *Dlamini* paras [7]; [59]; [80].

²⁸³ See *Firstrand Bank Ltd t/a Rand Merchant Bank and Another v Master of the High Court, Cape Town and Others* [2014] 1 All SA 489 (WCC); 2014 (2) SA 527 (WCC) (11 November 2013) para 16: “It is trite law that a misrepresentation can be made by way of a positive statement (*commissio*) or by a failure to disclose material facts (*omissio*). In the present case, one is dealing with the latter form of misrepresentation. There are two requirements for misrepresentation in the form of a fraudulent non-disclosure. The first is the existence of a duty to make the disclosure. See *Meskin NO v Anglo-American Corporation of SA Ltd and Another* 1968 (4) SA 793 (W). The second is intention (*dolus*) on the part of the representor. See LAWSA Vol 17(2) second edition (2008) para 311. As long ago as 1880 Lord Blackburn formulated the principle as follows in *Brownlie v Campbell* (1880) 5 App Cas 925, 950: “where there is a duty or an obligation to speak, and a man in breach of that duty or obligation holds his tongue and does not speak, and does not say the thing he was bound to say, if that was done with the intention of inducing the other party to act upon the belief that the reason why he did not speak was because he had nothing to say, I should be inclined myself to hold that that was fraud also.”

reasonable opportunity to be heard. The reasonable opportunity relates to bringing a bail application based on credible information in respect to the charges which the applicant is facing. The credibility of such charges can only be determined on the basis of details that the state is in any case obliged to produce and prove within the broader context of the presumption of innocence. This includes the right not to compel an accused to make an admission or confession, the right to silence, the duty falls on the state to prove its case, and the public-law duty not to hide any information that may be beneficial to an accused at any stage of the criminal proceedings.

3.6 The Canadian approach to the presumption of innocence in bail applications

As previously discussed,²⁸⁴ the Canadian bail applications are regulated under section 11(e) of the Charter which stipulates that any person charged with an offence has the right, not to be denied reasonable bail without just cause.²⁸⁵ Section 11(d) of the Charter stipulates that a person charged with an offence has a right to be presumed innocent until proven guilty.²⁸⁶ In *R v Morales*, the Supreme Court has held that the presumption does not have a direct application to bail proceedings because the question of the guilt or innocence of the accused is not in issue at this stage of the criminal proceedings.²⁸⁷ The Court immediately proceeded to qualify its view which would have, on first reading of this reasoning, excluded the presumption from bail proceedings. The Court stated the following:

The presumption of innocence is a principle of fundamental justice which applies at all stages of the criminal process, but its procedural requirements at the bail stage are satisfied whenever the requirements of section 11(e) are satisfied. This section creates a basic entitlement to be granted reasonable bail unless there is 'just cause' to do otherwise.²⁸⁸

²⁸⁴ Chapter 2 para 2.4.

²⁸⁵ Charter s 11(e).

²⁸⁶ Charter s 11(d).

²⁸⁷ See *R v Morales* [1992] 3 SCR 711 para 1 where the Supreme Court held that: "Section 11(d) of the Charter creates a procedural and evidentiary rule which operates at the trial requiring the prosecution to prove the guilt of the accused beyond a reasonable doubt. It has no application at the bail stage where guilt or innocence is not determined and where punishment is not imposed."

²⁸⁸ *R v Morales* [1992] 3 SCR 711 para 1.

More recently, the Supreme Court of Canada, in *R v Antic*,²⁸⁹ again had occasion to revisit the subject and expressed itself in more categorical terms by emphasising that the right to be released on bail “entrenched the effect of the presumption of innocence at pre-trial stage”.²⁹⁰ In principle, the accused person must be regarded as legally and factually innocent. As an innocent person, freedom is an entitlement and must not be denied as a result of a criminal allegation that has not yet been proven.²⁹¹

The Supreme Court in *R v Pearson*²⁹² highlighted the fact that the presumption of innocence was a fundamental principle of justice which is crucial to the protection of, *inter alia*, the right to liberty as stipulated in section 7 of the Charter. The Court went on to conclude that the presumption strictly applied to the trial stage, however, this did not take anything away from the very important principle of justice that the deprivation of liberty of an accused must proceed from the starting point that the accused person was innocent.²⁹³

The Supreme Court of Canada was tacit in its acceptance that the presumption of innocence does not directly apply in bail proceedings. However, the Court did acknowledge that the presumption of innocence is a fundamental procedural principle that applies to every stage of the criminal process. The presumption of innocence so applies because the accused must, strictly speaking, still be regarded as innocent and, therefore, entitled to have his or her rights protected as such. The protection of this right must thus be manifested in pre-trial release being the norm rather than detention.

The Canadian bail reforms have been universally lauded because of it having been premised on the presumption of innocence, however, as McLennan argues the bail

²⁸⁹ *R v Antic* 2017 SCC 27, [2017] 1 SCR 509.

²⁹⁰ In *R v Antic* 2017 SCC 27, [2017] 1 SCR 509 para 1, it is stated: “The right not to be denied reasonable bail without just cause is an essential element of an enlightened criminal justice system. It entrenches the effect of the presumption of innocence at the pre-trial stage of the criminal trial process and safeguards the liberty of accused persons.”

²⁹¹ McLellan 2010 *Canadian Criminal LR* 58.

²⁹² *R v Pearson* [1992] 3 SCR 665 683.

²⁹³ *R v Pearson* [1992] 3 SCR 665 683, where Lamer CJ stated: “The fact that it comes to be applied in its strict evidentiary sense at trial pursuant to s. 11(d) of the Charter, in no way diminishes the broader principle of fundamental justice that the starting point for any proposed deprivation of life, liberty or security of the person of anyone charged with or suspected of an offence must be that the person is innocent.”

laws in Canada today present an accused with more challenges to be released on bail than was the case prior to 1972, when the bail reforms were initiated,²⁹⁴ and that the reality was now that the presumption in “the bail process has become an illusory concept, at best”.²⁹⁵

3.6.1 *Onus during bail proceedings*

The right to be released on bail in terms of section 11(e) of the Charter places the onus on the prosecution to persuade the court that an accused should not be released on bail. Section 515(1) and (2) of the Canadian Criminal Code entrenches this onus by stating that the court is obliged to release every accused on bail except those charged in terms of section 469²⁹⁶ and unless the accused has pleaded guilty. The court may detain an accused if the prosecution has established reasons why the accused should not be released.²⁹⁷

Where the prosecution opposes the release on bail, it must do so based on any one of three grounds that are set out in section 515(10) of the Criminal Code. These justifications are established on where it is necessary to ensure that an accused will attend court, for the protecting of public safety and to maintain confidence in the justice system.

3.6.2 *Reverse onus*

There are situations where, instead of requiring that the prosecution prove that the accused should not be released on bail, the law obliges an accused to establish that bail should not be denied. These situations are regulated by section 515(6)(a)(i) of the Criminal Code. This provision imposes a reverse onus in respect of certain offences,²⁹⁸ which is not the norm as set out in section 11(e) of the Charter.

²⁹⁴ McLellan 2010 *Canadian Criminal LR* 74.

²⁹⁵ McLellan 2010 *Canadian Criminal LR* 74.

²⁹⁶ Section 469 refers to offences in respect of which the criminal courts do not have jurisdiction.

²⁹⁷ See s 515(1), (2) of the Criminal Code.

²⁹⁸ Criminal Code (RSC, 1985, c C-46) s 515(6): “‘Order of detention’ Unless the accused, having been given a reasonable opportunity to do so, shows cause why the accused’s detention in custody is not justified, the justice shall order, despite any provision of this section, that the accused be detained in custody until the accused is dealt with according to law, if the accused is charged (a) with an indictable offence, other than an offence listed in section 469,

The Supreme Court has held in *Pearson* that the reverse onus is constitutional and justified for the proper functioning of the bail system.²⁹⁹ Lamer CJ reasoned that the reverse onus did not result in an outright denial of bail. It only resulted in bail being denied if the accused failed to establish that they were entitled to be released on bail after having been given an opportunity to discharge that onus. Lamer CJ went on to explain how an accused faced with a reverse situation could go about discharging that onus, stating the following:

Moreover, the onus which it imposes is reasonable in the sense that it requires the accused to provide information which he or she is most capable of providing. If a person accused of trafficking or importing is "small fry" or a "generous smoker", then the accused is in the best position to demonstrate at a bail hearing that he or she is not part of a criminal organization engaged in distributing narcotics.³⁰⁰

The difficulty with the approach that was adopted by the majority was highlighted in the minority judgment, where McLachlan J, made the following observations:

-
- (i) that is alleged to have been committed while at large after being released in respect of another indictable offence pursuant to the provisions of this Part or section 679 or 680,
 - (ii) that is an offence under section 467.11, 467.111, 467.12 or 467.13, or a serious offence alleged to have been committed for the benefit of, at the direction of, or in association with, a criminal organization,
 - (iii) that is an offence under any of sections 83.02 to 83.04 and 83.18 to 83.23 or otherwise is alleged to be a terrorism offence,
 - (iv) that is an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the Security of Information Act,
 - (v) that is an offence under subsection 21(1) or 22(1) or section 23 of the Security of Information Act committed in relation to an offence referred to in subparagraph (iv),
 - (vi) that is an offence under section 99, 100 or 103,
 - (vii) that is an offence under section 244 or 244.2, or an offence under section 239, 272 or 273, subsection 279(1) or section 279.1, 344 or 346 that is alleged to have been committed with a firearm, or
 - (viii) that is alleged to involve, or whose subject-matter is alleged to be, a firearm, a cross-bow, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or prohibited ammunition or an explosive substance, and that is alleged to have been committed while the accused was under a prohibition order within the meaning of subsection 84(1);
 - (b) with an indictable offence, other than an offence listed in section 469 and is not ordinarily resident in Canada,
 - (b.1) with an offence in the commission of which violence was allegedly used, threatened or attempted against their intimate partner, and the accused has been previously convicted of an offence in the commission of which violence was used, threatened or attempted against any intimate partner of theirs;
 - (c) with an offence under any of subsections 145(2) to (5) that is alleged to have been committed while they were at large after being released in respect of another offence under the provisions of this Part or section 679, 680 or 816; or
 - (d) with having committed an offence punishable by imprisonment for life under any of sections 5 to 7 of the Controlled Drugs and Substances Act or the offence of conspiring to commit such an offence.

²⁹⁹ See *R v Pearson* [1992] 3 SCR 665 paras 693f–h.

³⁰⁰ *R v Pearson* [1992] 3 SCR 665 paras 698g–i.

The first difficulty with this proposition is that it is far from clear that a person charged with a more minor trafficking offence will be able to convince the judge that he or she is not connected to a drug organization. The argument would require the accused, presumed to be innocent, to prove the negative proposition that he or she is not part of a criminal organization. Criminal organizations, unlike unions and service organizations, do not distribute lists of their members. How does one prove that one is not a member?" (own emphasis).³⁰¹

Reverse onus situations have been held to be lawful within the context of section 11(e) because such statutory provisions are subject to judicial review.³⁰² The judicial review will evaluate the reverse onus provision to determine whether the provision permits for denial of bail with 'just cause'.³⁰³ The court in *Pearson*³⁰⁴ held that such denial will be with just cause if two requirements are met: firstly, the denial of bail must occur only in a narrow set of circumstances; and secondly, the denial must be necessary to promote the proper functioning of the bail system and not undertaken for any purpose extraneous to the bail system.³⁰⁵

3.6.3 *Duty to disclose information*

There is no specific provision that relates to disclosure for bail purposes. Except for the provisions of section 603 of the Criminal Code, enacted in the 1953-54 overhaul of the Code, legislators have left the development of legislation in this area to the courts and subsequent case law.³⁰⁶

The Supreme Court in *R v Stinchcombe*³⁰⁷ set out the duties on the prosecution to

³⁰¹ *R v Pearson* [1992] 3 SCR 665 paras 708g–i.

³⁰² *R v Pearson* [1992] 3 SCR 666 paras 668e–g.

³⁰³ See *R v Pearson* [1992] 3 SCR 665 paras 45–46; *R v Antic* 2017 SCC 27, [2017] 1 SCR 509 paras 39, 61–62.

³⁰⁴ See *R v Pearson* [1992] 3 SCR 665 para 48.

³⁰⁵ See also *R v Antic* 2017 SCC 27, [2017] 1 SCR 509 para 40; *R v Morales* [1992] 3 SCR 711 para 33; *R v Hall* [2002] 3 SCR 309 paras 16, 22 per majority, and para 56 per dissent.

³⁰⁶ Section 603 of the Criminal Code, R.S.C., 1985, c. C-46 reads:

An accused is entitled, after he has been ordered to stand trial or at his trial,

- (a) to inspect without charge the indictment, his own statement, the evidence, and the exhibits, if any; and
- (b) to receive, on payment of a reasonable fee determined in accordance with a tariff of fees fixed or approved by the Attorney General of the province, a copy
 - (i) of the evidence,
 - (ii) of his own statement, if any, and
 - (iii) of the indictment;

but the trial shall not be postponed to enable the accused to secure copies unless the court is satisfied that the failure of the accused to secure them before the trial is not attributable to lack of diligence on the part of the accused.

³⁰⁷ *R v Stinchcombe* 1991 45 (SCC) [1991] 3 SCR 326.

disclose information to an accused. As a starting point, the Court acknowledged that before its judgment, the law relating to disclosure was not settled.³⁰⁸ The Court then settled the law as follows:

Initial disclosure should occur before the accused is called upon to elect the mode of trial or plead. Subject to the Crown's discretion, all relevant information must be disclosed, both that which the Crown intends to introduce into evidence and that which it does not, and whether the evidence is inculpatory or exculpatory. All statements obtained from persons who have provided relevant information to the authorities should be produced, even if they are not proposed as Crown witnesses. Where statements are not in existence, other information such as notes should be produced. If there are no notes, all information in the prosecution's possession relating to any relevant evidence the person could give should be supplied.³⁰⁹

The Supreme Court further held that all the information that is gathered in the course of the investigation is not the property of the prosecution. It is the property of the public to be used to ensure that justice is done.³¹⁰ In making this definitive statement, the court dismissed as groundless the prosecution's arguments that it had no legal duty to disclose all relevant information.³¹¹

Even though the duty to disclose seems to be broad, the court held that it was not absolute.³¹² The duty was subject to the discretion of the prosecutor with regard to what information to disclose and the timing of such disclosure. The court held that the prosecution must err on the side of caution when deciding on what is relevant to disclose. As a safeguard, the exercise of the discretion is subject to review by a court.

On the question of the timing of the disclosure, the court agreed with the Canadian Law Reform Commission's recommendation in that the initial disclosure must take place before the accused pleads or selects the mode of trial. The court emphasised the fact that these steps that the accused persons must take are essential as it concerns their rights in a fundamental manner. The court concluded that the accused will be greatly assisted if the strengths and weaknesses of state's case

³⁰⁸ *R v Stinchcombe* 1991 45 (SCC) [1991] 3 SCR para 331i.

³⁰⁹ *R v Stinchcombe* 1991 45 (SCC) [1991] 3 SCR para 326j.

³¹⁰ *R v Stinchcombe* 1991 45 (SCC) [1991] 3 SCR para 333h.

³¹¹ *R v Stinchcombe* 1991 45 (SCC) [1991] 3 SCR paras 333a–c.

³¹² *R v Stinchcombe* 1991 45 (SCC) [1991] 3 SCR paras 338a–h.

were known to them before any crucial steps are taken.³¹³

On the question of what to disclose the Court stated that the general principle is that all relevant information to the case must be disclosed. This information includes all the material the state will introduce into evidence, but also that data which the state does not intend to utilise. There should furthermore be no distinction between either inculpatory or exculpatory evidence in this regard.³¹⁴ In settling the law as it did, the court referred³¹⁵ to the importance of giving effect to the rights in section 7 of the Charter, which states that:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

For present purposes, section 7 has relevance because it impacts on accused persons' right to their liberty which is protected through the presumptive right to be released on bail.

What is noteworthy about the *Stinchcombe*³¹⁶ judgment is that it does not draw a distinction between pre-trial, trial, and post-trial disclosures. It is submitted that the duty to disclose information applies to the entirety of the criminal process, which includes the pre-trial bail purposes, though the focus may be for the trial. The generality of the duty as stated in *Stinchcombe* leads one to argue that there is no reason why the accused may not request information from the prosecution to support their bail application with the hope of discharging the onus in the reverse

³¹³ *R v Stinchcombe* 1991 45 (SCC) [1991] 3 SCR paras 342i–j, 343a.

³¹⁴ *R v Stinchcombe* 1991 45 (SCC) [1991] 3 SCR paras 343f–l.

³¹⁵ *R v Stinchcombe* 1991 45 (SCC) [1991] 3 SCR paras 336c–l, where the court declared: "Apart from the practical advantages to which I have referred, there is the overriding concern that failure to disclose impedes the ability of the accused to make full answer and defence. This common law right has acquired new vigour by virtue of its inclusion in s. 7 of the Canadian Charter of Rights and Freedoms as one of the principles of fundamental justice. (See *Dersch v. Canada (Attorney General)* 1990 CanLII 3820 (SCC), [1990] 2 S.C.R. 1505, at p. 1514.) The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the Royal Commission on the Donald Marshall, Jr., Prosecution, Vol. 1: Findings and Recommendations (1989) (the "Marshall Commission Report"), the Commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the Commission to state that 'anything less than complete disclosure by the Crown falls short of decency and fair play' (Vol. 1 at p. 238). The Commission recommended an extensive regime of disclosure of which the key provisions are as follows (Vol. 1 at p. 243)."

³¹⁶ Public Prosecution Service of Canada *Deskbook* 2.5 'Principles of Disclosure' 2.5 3.

onus situations.

In response to the *Stinchcombe* judgment, the Public Prosecution Services of Canada issued directives in which it adopted and interpreted the judgment for operational purposes. In its Statement of Policy, the directive acknowledges the broad duty on the prosecution to disclose all material it proposes to use at trial and especially all evidence which may assist the accused.³¹⁷

3.7 Conclusion

The fact that the applicant in bail proceedings is expected to challenge the strength of the case which will be presented by the state in later proceedings is an absolute incongruity in the South African legal system and appears to be a challenge on an international level. As illustrated above, the evidentiary aspects of both the South African and the Canadian legal systems, specifically the onus which the applicant bears directly impacts on the presumption of innocence. One is inclined to agree with the view expressed by McLennan as regards Canadian bail reform (in paragraph 3.6 above), because the moment a court allows for the strength of the evidence that the prosecution will be relying on to be addressed by an accused, then the presumption of innocence is immediately undermined. His views can be applied equally to the South African criminal law.

Each of the factors (as contained in section 60(4)(a)–(e) of the CPA) which the court must consider during the adjudication of the application, the manner in which the evidence is presented, and the rules of evidence collectively create an anomaly in which the presumption of innocence is eroded to a certain extent. Furthermore, this anomaly appears in almost all bail applications and is not merely limited to Schedule 5 and 6 offences due to the unique burden which an applicant bears. Therefore, it is submitted that the presumption of innocence is impacted by the shift of onus to the applicant. This swing from state to applicant places into question whether the applicant enjoys fully the presumption of innocence. Ultimately, the Canadian approach is far more liberal, and the South African application could benefit from such an approach.

³¹⁷ Public Prosecution Service of Canada *Deskbook* 2.5 'Principles of Disclosure' 2.5.

The following chapter details how the presumption of innocence finds application post-conviction, a unique scenario in which an accused is entitled to bring an application for the extension of bail after a finding of guilty beyond reasonable doubt. This situation will be juxtaposed to the pre-conviction circumstance in which the applicant is in essence expected to justify release with a limited presumption of innocence being applied.

CHAPTER 4

BAIL PENDING APPEAL

4.1 Introduction

While the previous chapter examined the evidentiary principles required of bail applications, this chapter deals with bail pending appeal, focusing specifically on the comparison between South African and Canadian law. The essential emphasis of the analysis focuses on the presumption of innocence during especially the post-convictions phase of an accused's trial.

The chapter also discusses the impact of the various bail schedules on an application for bail pending appeal, including leave to appeal after bail has been granted to the applicant with specific reference to the interests of justice, exceptional circumstances, and the presumption of innocence. A critical comparison between the South African and Canadian legal systems will be incorporated into the arguments advanced.

4.2 Presumption of innocence during the pre-conviction phase

As stated in Chapter 3, an accused person is guaranteed a constitutional right to be presumed innocent (until the contrary is proven)³¹⁸ In this sub-section, the applicability of the presumption of innocence to the pre- and post-sentencing stages of the proceedings will be further elaborated on. The presumption of innocence operates in favour of an accused until a verdict of guilt has been delivered by the trial court. It is contended that a verdict of guilt has effectively somewhat removes the presumption of innocence. These aspects have been comprehensively discussed in Chapter 3³¹⁹ and will, as such, not be repeated. The following paragraphs closer examine bail extensions and applications during the post-convictions phase of an accused's trial.

³¹⁸ Section 35(3(h) of the Constitution; see also Chapter 3 para 3.3 and further.

³¹⁹ See Chapter 3 paras 3.3, 3.6.

4.3 Extension of bail after conviction pending imposition of sentence

The release of an accused on bail is in the ordinary course of events valid until a verdict of guilt is given.³²⁰ The trial court may extend the already convicted accused's bail at its discretion.³²¹ Where an accused was convicted of an offence falling within the ambit of schedule 5 or 6 of the CPA, the provisions of section 60(11)(a) and (b) will find application.³²² An accused will thus have to adduce evidence in order to discharge himself from the onus of proof and in order to persuade the court in respect to the existence of exceptional circumstances and/or the interests of justice permitting his release on bail.³²³

The issue of the seriousness of the offence the accused has been convicted of as well as the likely sentence to be imposed was held to be relevant considerations on whether bail should be granted or extended.³²⁴ It is, however, contended that the likely sentence to be imposed can only be considered to a limited extent as the trial court is not privy to the evidence that will be adduced in mitigation. Evidence on mitigation is of utmost importance to assist the court in arriving at a just and informed sentence. Evidence adduced in mitigation might very well be of such nature that a non-custodial sentence might be imposed.

In *S v Porritt and Another*,³²⁵ Spilg J stated that section 58 of the CPA is an 'umbrella' or 'overarching provision'.³²⁶ The legislature has required that all sections of Chapter 9 of the CPA should be read as if it is incorporated in section 58 of the CPA.³²⁷ It is contended that in considering whether bail should be extended or granted, the provisions of section 58 should thus not be seen and considered in isolation. Relying on the provisions of section 58 of the CPA, the appellant in *S v Bader*³²⁸ appealed against the decision of the court *a quo* to refuse him bail pending the imposition of sentence. The court held that the provisions of section 58 of CPA were not

^{128.} *S v Brown and Another* 2019 (1) SACR 691 (ECP) para [15]. Also see *S v Bader* 2020 (2) SACR 444 (GP) para [10].

^{321.} Section 58 of the CPA.

^{322.} Section 58 of the CPA.

^{323.} See footnote 188 above and para 3.3 of Chapter 4.

^{324.} Section 58 of the CPA.

^{325.} *S v Porritt and Another* Unreported, GJ case no SS 40/2006, 21 July 2017.

^{326.} *S v Porritt and Another* Unreported, GJ case no SS 40/2006, 21 July 2017 para 36.

^{327.} *S v Porritt and Another* Unreported, GJ case no SS 40/2006, 21 July 2017 para 37.

^{328.} 2020 (2) SACR 444 (GP).

applicable. The refusal of bail by the court *a quo* was upheld on appeal. The researcher respectfully disagrees with the principle followed in *Bader*. It is clear from *Porrit* as well as other precedents³²⁹ that section 58 finds application in the request for the bail to be extended post-conviction. Section 58 provides clear guidelines as to how the court should approach such an application by detailing the considerations which should be considered, namely the seriousness of the offence and the possible sentence which may be imposed.³³⁰ The section goes further to include the factors as per section 60(11)(a) or (b) in instances where a conviction has emanated from a Schedule 5 or 6 offence. Therefore, it is researcher's opinion that section 58 may not be excluded when considering bail and as such, respectfully so, it ought to have been given consideration in the *Bader* matter. A court considering the extension of an already convicted accused is required to consider whether any suitable bail conditions can be imposed in order to meet any real risk or valid objection to the release on bail.³³¹ The discretion to allow or refuse bail may never be influenced by punitive notions.³³²

In the subsequent sub-paragraph — before addressing specific issues pertaining to bail pending appeal against conviction or sentence — a brief general background to leave to appeal will be embarked on.

4.4 Leave to appeal

Convicted and sentenced accused are entitled to apply for leave to appeal their conviction and/or sentence.³³³ Leave to appeal from the lower court (as the court of first instance) to the High Court is regulated by section 309B of the CPA.³³⁴ Leave to appeal from the High Court (as the court of first instance) is regulated by section

³²⁹ See also *S v Brown and Another* 2019 (1) SACR 691 para [15].

³³⁰ Section 58 (a) and (b)

³³¹ *S v Faquir* 2014 JDR 1351 (GP).

³³² *R v Rose* 18 Cox CC 717 719.

³³³ See Chapters 30, 31 of the CPA, especially s 316 (as in footnote 327 below).

³³⁴ Section 309B of the CPA reads as follows: "(1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any accused, other than a person referred to in the first proviso to section 309(1)(a), who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order. (b) An application referred to in paragraph (a) must be made – (i) within 14 days after the passing of the sentence or order following on the conviction; or (ii) within such extended period as the court may on application and for good cause shown, allow."

316 of the CPA.³³⁵ Special leave to appeal must be obtained from the Supreme Court of Appeal and is regulated in terms of sections 16(1)(b) and 17(2)(b) of the Superior Courts Act.³³⁶

Presiding officers considering an application for leave to appeal should carefully consider whether another court ‘may’ reach a different conclusion.³³⁷ The question of whether another court may reach a different conclusion has to be approached with:

...intellectual humility and integrity, neither over-zealously endorsing the ineluctable correctness of the decision that has been reached, nor over-anxiously referring decisions that are indubitably correct to an Appellate Court.³³⁸

A court hearing such an application should be able to find that there is a ‘reasonable prospect’ of a successful prosecution of the appeal before leave to appeal is granted.³³⁹ This aspect was elaborated on in the matter of *S v Smith*,³⁴⁰ where the test for leave to appeal to be granted was postulated as one concerning “a

³³⁵ Section 316 of the CPA reads as follows: “(1)(a) Subject to section 84 of the Child Justice Act, 2008, any accused convicted of any offence by a High Court may apply to that court for leave to appeal against such conviction or against any resultant sentence or order. (b) An application referred to in paragraph (a) must be made – (i) within 14 days after the passing of the sentence or order following on the conviction; or (ii) within such extended period as the court may on application and for good cause shown, allow.”

³³⁶ Superior Courts Act 10 of 2013.

³³⁷ CPA ss 304, 316.

³³⁸ *S v O’Connell and Others* 2007 (2) SACR 28 (CC), *S v Mabena and Another* 2007 (1) SACR 482 (SCA).

³³⁹ As to what the term ‘reasonable prospect of success’ means, as reiterated in *R v Boya* 1952 (3) SA 574 (C) para 577B: “It seems to me that a reasonable prospect of success means that the judge who has to deal with an application for leave to appeal must be satisfied that on the findings of fact or conclusions of law involved the Court of Appeal may well take a different view from that arrived at by a jury or by himself and arrive at a different conclusion”. See also *R v Muller* 1957 (4) SA 642 (A) para 645D where the court referred to the case of *R v Baloi* 1949 (1) SA 523 (AD) 524: “The mere circumstance that a case is ‘arguable’ is insufficient; unless the term ‘arguable’ be used ‘in the sense that there is substance in the argument advanced on behalf of the applicant’”. See also *S v Shaduka* (CC 1/2009) [2011] NAHC 88 (22 March 2011) para [5]. The court in *R v Muller* 1957 (4) SA 642 (A) para 645 also emphasized the fact that “...it is always somewhat invidious for a judge to have to determine whether a judgment which he has himself given may be considered by a higher Court to be wrong; but that is a duty imposed by the Legislature upon Judges in both civil and criminal matters”. This is especially a difficult task in a criminal case where the trial judge has found the state’s case to be proved beyond reasonable doubt, however, this judge must still direct himself to the question of whether there is a reasonable prospect that appeal judges may take a different view, considering all questions of fact and of law. See also *R v Kuzwayo* 1949 (3) SA 761 (AD) 765. The court in *R v Muller* 1957 (4) SA 642 (A) para 645F pointed out that in borderline cases, “the gravity of the crime and the consequences to the applicant are doubtless elements to be taken into account but, even in capital cases, the primary consideration for decision is whether or not there is a reasonable prospect of success”.

³⁴⁰ *S v Smith* 2012 (1) SACR 567 (SCA).

dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court”.³⁴¹ For a court to be convinced that a different conclusion may be reached, the task falls upon the appellant to sway the court on proper grounds that there are reasonable prospects of success on appeal.³⁴² The court emphasised that these prospects should not have a remote chance of succeeding, but should be realistic, which means that:

More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.³⁴³

Where the applicant has been granted leave to appeal, it puts any prospective application for bail in a different category. Prospects of success, *inter alia*, having been determined is of utmost importance and a very relevant factor for consideration when a court hears an application for bail pending appeal.³⁴⁴ It is of significance to note that prospects of success must be considered holistically, in conjunction with the interests of justice and the existence of exceptional circumstances where applicable.

The next section deals with bail pending appeal against conviction, followed by bail pending appeal against sentence.

4.5 Bail pending appeal against conviction

The general principle followed by South African courts is that the presumption of innocence no longer operates in favour of the accused, where he or she has been convicted and sentenced.³⁴⁵

The subsequent submissions advanced are made from the premise and relevant to an accused to whom leave to appeal is granted. The accused is now referred to as

³⁴¹ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

³⁴² *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

³⁴³ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

³⁴⁴ *S v Menyuka* 2021 (2) SACR 316 (GJ) paras 30, 33–36.

³⁴⁵ The above passage was cited with approval by the Supreme Court of Appeal in *Crossberg v S* [2007] SCA 93 (RSA) para [13] where it was also said: “It is so that there is a different emphasis in respect of bail pending finalization of a trial as against bail pending finalization of an appeal. The presumption of innocence operates in favour of an accused until his guilt has been established in court”.

the appellant, upon leave to appeal having been granted to him or her. An appellant having been granted leave to appeal against conviction is effectively informed that a reasonable prospect exist that another court would arrive at a different conclusion.³⁴⁶

The question that inevitably arises is what effect the conviction has on the presumption of innocence. It is submitted that the granting of leave to appeal essentially restores the appellant's presumption of innocence and places the conviction in abeyance pending the finalisation of the appeal. The conviction is immersed in a cloud of doubt in respect to the correctness thereof. It is contended that the appellant's presumption of innocence is restored by leave to appeal having been granted against conviction.

The appellant is entitled to apply for and to be permitted to bail pending the outcome of the appeal. An appellant's application for bail may be lodged either in the court of first instance, that is, the lower court which adjudicated the trial, or in a High Court.³⁴⁷ The test and criteria to be considered before the accused on bail pending are, firstly, whether the granting or refusing of bail would prejudice the administration of justice, and, also, whether there are reasonable prospects of success on appeal.³⁴⁸

Appellants can be granted bail pending the outcome of the appeal where they have been convicted and sentenced of any offence, inclusive of those offences falling within the ambit of Schedule 5 and 6 of the CPA.³⁴⁹ However, the appellant must

³⁴⁶ Superior Courts Act 10 of 2013 s 17; *Rohde v S* (SS43/2017) [2021] ZAWCHC 221; [2022] 1 All SA 504 (WCC); 2022 (2) SACR 134 (WCC) (4 November 2021) para 17; *Doorewaard and Another v S* (CC33/2017) [2019] ZANWHC 25 (23 May 2019) paras [6], [7].

³⁴⁷ CPA ss 309, 316; Mokoena *A guide to bail applications* 173; *S v Richardson* 1992 (2) SACR 169 (E) 170.

³⁴⁸ *Rohde v S* 2020 (1) SACR 329 (SCA). See also *S v Hudson* 1996 (1) SACR 431 (W) wherein it was held that that weight should be attached to the consideration of prospects of success on appeal. The question is not whether the appeal will succeed but whether the appeal is free from predictable failure and whether the appeal is indeed arguable. The Honourable Petition Judges found that there is in fact a reasonable prospect on a successful prosecution of the appellant's appeal. Also see *S v Anderson* 1991 (1) SACR 525 (C) wherein it was held that where there is no risk of the applicant absconding and refusal of bail may result in a successful appeal being rendered futile by such refusal, bail should be granted.

³⁴⁹ CPA s 58.

convince the court that exceptional circumstances exist, which warrant release on bail.³⁵⁰ In the matter of *S v Bruintjies*,³⁵¹ the court held that:

Although s 60(11) of Criminal Procedure Act 51 of 1977 deals with unconvicted persons, it must follow that person who has been found guilty of Schedule 6 offence cannot claim benefit of lighter test.³⁵²

If an appellant's appeal on conviction succeeds, the appellant's criminal record is cleared, and he or she does not subsequently serve one day's imprisonment. If the appellant is not granted bail, and the appeal succeeds, the appellant would have served the period incarcerated as an innocent person. Where appellants were already serving their sentence and bail granted whilst being a sentenced prisoner, their prejudice would be limited upon bail being granted in the face of a successful appeal. The term of imprisonment served will be considered and reduced upon an unsuccessful appeal. The counter argument would be that bail could be granted in instances where the presumption of innocence no longer operates in favour of the appellants/applicants, but their release serves the interests of justice as they have established that the appeal will be successful, and the possibility exists that their guilt has not been proven beyond a reasonable doubt. Most certainly, it cannot be said that detaining a person who may be considered innocent on appeal is in the interests of justice.

In *Rohde*,³⁵³ the appellant was convicted on charges of murder and obstructing the administration of justice. He was sentenced to 20 years' direct imprisonment. He

³⁵⁰ *S v Menyuka* 2021 (2) SACR 316 (GJ); *S v Scott-Crossley* 2007 (2) SACR 407 SCA. See also *S v Ngqeleni* 2005 (2) SACR 572 (TkH) where the court held that the effect of CPA s 60(11)(a) is that an applicant charged with a Schedule 6 offence must prove that the existence of exceptional circumstances exist that justify his release on bail in the interests of justice. An applicant convicted of a Schedule 6 offence carries the same burden, if not a higher one, than his counterpart not yet convicted. It is insufficient in such cases for counsel to apply from Bar for bail pending appeal without leading evidence. See, e.g., *Zondi v S* (SS15/2017) [2020] ZAGPJHC 82; 2020 (2) SACR 436 (GJ) (8 April 2020) where the accused was granted leave to appeal by Supreme Court of Appeal. The accused was convicted and sentenced to life imprisonment for a Schedule 6 offence. In such instance, the accused must show exceptional circumstances, however, the prospect of success does not in itself amount to exceptional circumstance. The court held at para [32] that considering the evidence in the case, "it cannot be concluded that the case of the State is so hopeless that on a balance of probabilities the conviction would be set aside", and consequently dismissed the appeal. Also see *S v Oosthuizen and Another* 2018 (2) SACR 237 (SCA) para [44].

³⁵¹ *S v Bruintjies* 2003 (2) SACR 575 (SCA).

³⁵² *S v Bruintjies* 2003 (2) SACR 575 (SCA) para 5.

³⁵³ *Rohde v S* (SS43/2017) [2021] ZAWCHC 221; [2022] 1 All SA 504 (WCC); 2022 (2) SACR 134 (WCC) (4 November 2021) – see footnote 338 above. Also see *S v Beyer* 2014 JDR 0176 (Nm), where it was held that courts should grant bail pending appeal even where reasonable prospects

was granted leave to appeal his conviction and sentence by the SCA. The court referred to the decision of *S v Smith*.³⁵⁴ The court *a quo* refused him bail pending the finalisation of his appeal. He was granted bail on appeal by the SCA. The essence of leave to appeal having been granted to an applicant applying for bail pending appeal, has yet again been discussed and emphasised. The court held that by virtue of the fact that leave to appeal was granted to him as a real prospect of success on appeal existed, and that his convictions and sentences may well be set aside. The court further held that the respondent made no attempt to demonstrate that he was a flight risk. In this particular matter, the application resorted within the ambit of schedule 5 of the CPA, and the appellant was saddled with the onus. The appellant adduced *prima facie* evidence resulting in the shift of the evidential burden. The state did not discharge itself from the onus to rebut the averments of the appellant. The mere fact that an appellant was granted leave to appeal does not *per se* mean that the appellant would be entitled to be released on bail and as such in the interest in justice. The normal considerations as per *S v Pataka* are still of paramount importance.³⁵⁵

4.6 Bail pending appeal against sentence

The discussion in this section proceeds from the premise that leave to appeal against sentence has been granted, and that the appellant has, therefore, established that a reasonable prospect exist that a court of appeal might interfere with the sentence imposed by the court *a quo*. The correctness of the merits upon which the accused has been convicted will not be discussed in this section, and will, as such not an issue during the appeal procedure.

The appellant's status for the duration of the appeal procedures under circumstances where his sentence involves a term of direct imprisonment is of utmost importance. The fact that the presumption of innocence no longer operates in favour of the appellant,³⁵⁶ is an important consideration in the subsequent bail

of success were absent for as long as appeal was not doomed to failure and was, therefore, arguable. Courts should furthermore grant bail to avoid prejudice to the appellant.

³⁵⁴ See footnote 332 above.

³⁵⁵ See para 4.4 above. In *S v Pataka* 2018 (2) SACR 135 (GJ), the court held that: "The mere fact that the court considers that the appellant has reasonable prospects on appeal does not *per se* mean that interests of justice dictate release on bail." The appeal was subsequently dismissed.

³⁵⁶ See para 4.5 above.

application. The CPA allows for an applicant to whom leave to appeal has been granted against sentence to be released on bail and not warning.³⁵⁷ In *S v Leo*,³⁵⁸ the applicant adduced further evidence to the court *a quo*, after which leave to appeal was granted to the applicant. In the subsequent bail application, the appellant was released on warning pending the outcome of his appeal. It is contended that such order was invalid in the face of the non-existence of a provision in the CPA allowing for an appellant to be released on warning pending the outcome of his appeal.³⁵⁹ The *lacuna* in the Act appears to be the direct cause of the incorrect decisions referred to above. Also, in *S v Mpetha and Others*,³⁶⁰ a ludicrous amount of ZAR 1,00 was granted to the applicant pending appeal. The amount granted by the court is a direct consequence of the limitations set by legislation.

The prospect of success of an applicant's appeal is of paramount importance.³⁶¹ In *S v Ndlangamandla*,³⁶² the court discussed the factors that a court of appeal must consider in deciding whether bail was correctly refused. One such factor was whether the appellant has any prospects of success on appeal and whether the appellant is likely to avail himself for serving sentence, in which case bail should be granted. In addition, the interests of justice should permit the appellant's release on bail. The likelihood of an applicant to be sentenced to a term of imprisonment, if the appeal is upheld, is also a relevant factor to whether an applicant should be released on bail or not.³⁶³ In *S v Mabapa*,³⁶⁴ however, the court followed a slightly different and more lenient approach. The court held that there is in principle no difference between cases where a prison sentence would possibly be served, and where this

³⁵⁷ Sections 307, 309(4)(b) and 309(5) of the CPA. See also para 4.7 below.

³⁵⁸ *S v Leo* CPD case no 297/84, 19 November 1985 (unreported).

³⁵⁹ *S v Leo* CPD case no 297/84, 19 November 1985 (unreported).

³⁶⁰ *S v Mpetha and Others* CPD case no 3/81, 30 May 1985 (unreported on this aspect).

³⁶¹ In the matter of *S v Essop* 2018 (1) SACR 99 (GP), the court held that the prospect of success is of importance. The magistrate in the court *a quo* misdirected himself as to the nature of the offences. Bail pending the outcome of appeal against sentence was granted.

³⁶² *S v Ndlangamandla* 2011 JDR 0442 (GNP).

³⁶³ In the matter of *S v Oosthuizen and Another* 2018 (2) SACR 237 (SCA), the court held that the fact that an applicant has been granted leave to appeal does not per se entitle him to be released on bail. It is incumbent that a real prospect, in relation to success on conviction and that a non-custodial sentence would be imposed on appeal, exist. Also, see *S v Rawat* 1999 (2) SACR 398 (W), where the court held that where the appeal lies against sentence of imprisonment only, the appellant is required to show reasonable prospects of success on appeal, to the extent that he may not have to go to prison. It was further held that a mere possibility of success was simply not sufficient.

³⁶⁴ *S v Mabapa* 2003 (2) SACR 579 (T).

would not be the position.³⁶⁵ At the heart of a bail application lies the right to be released from detention if the interests of justice so permit.³⁶⁶ The interests of society should be weighed up against that of the applicant.³⁶⁷ Concerns about risks of prison life should be also considered. The court further held that even before the prospects of success is scrutinised, the hurdle of the interests of society must have been crossed.³⁶⁸ Upon concluding that there is no concern about whether the applicant will abscond and where criteria in section 60 of the CPA has been met, there is no reason not to apply a lesser standard on a question of the reasonable prospects of success.³⁶⁹ If the appeal is reasonably arguable, and not manifestly doomed to failure, bail should be granted. If the grounds for appeal are frivolous, it may be deduced that appellant is simply seeking to delay imprisonment and bail should be denied.³⁷⁰ It is the researcher's view that a reasonable prospect of success on appeal is supported by case law and the relevant authorities and should as such be the criteria to be met.

The fact that an applicant was convicted and sentenced on offences falling within the ambit of Schedule 5 and 6 of the CPA is no bar against the granting of bail pending the outcome of appeal. The applicant must comply with the provisions of sections 60(11)(a) and (b) of the CPA.³⁷¹ In a Schedule 5 application, the applicant must prove that the interests of justice permit the applicant's release on bail pending the finalisation of his or her appeal against sentence.³⁷² In a Schedule 6 application, the applicant must prove the existence of exceptional circumstances permitting the applicant's release on bail in the interests of justice pending the finalisation of his or her appeal against sentence.³⁷³ The prospects of success have to be established by the applicant. The applicant will most certainly not be subjected to a lighter test,

³⁶⁵ *S v Mabapa* 2003 (2) SACR 579 (T) 587.

³⁶⁶ *S v Mabapa* 2003 (2) SACR 579 (T) 587.

³⁶⁷ See footnote 25 above as well *Dlamini* para [48], where the difference between the interests of society and the interests of justice was expatiated upon.

³⁶⁸ In this regard. In *S v Mabapa* 2003 (2) SACR 579 (T) para 8, Van Rooyen AJ observed as follows with reference to the convicted person posing a danger to society: "Although the opportunity for interfering with evidence is not that real at this stage, the possibility that a convicted person may abscond when on bail pending the appeal, is increased."

³⁶⁹ *S v Mabapa* 2003 (2) SACR 579 (T) 588; *Lungisa v S* (CA&R 159/2018) [2020] ZAECGHC 110 (25 September 2020) paras [12]–[17].

³⁷⁰ See *S v Smith* 2012 (1) SACR 567 (SCA) para 7; footnotes 332–335 above.

³⁷¹ Section 58 of the CPA. Also see para 3.5.1 for further explanation of these sections.

³⁷² See para 3.5.1 above for further elaboration on Schedule 5 offences and requirements.

³⁷³ *S v Menyuka* 2007 (2) SACR 407 SCA.

but rather the opposite. Section 51(1) and (2) of the Criminal Law Amendment Act is peremptory in nature and prescribes a variety of minimum direct imprisonment sentences.³⁷⁴

Any deviation from the imposition of the minimum sentence must be justified by the existence of ‘substantial and compelling’ circumstances.³⁷⁵ On the same token, the court hearing an application for bail will investigate the existence of substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence.³⁷⁶ Even if a deviation from the imposition of the requisite minimum sentence is justified, whether such deviation will result in a non-custodial sentence will be decided by the court of appeal. This is held to be a relevant factor for consideration whether bail pending appeal should be granted or not.³⁷⁷

4.7 Bail conditions

The release of an accused on bail may be ordered to be subject to certain conditions.³⁷⁸ There are four basic principles which govern bail conditions. In the first place, a bail condition may not be *contra bonos mores*.³⁷⁹ In the second place,

³⁷⁴ Section 51 reads: “ (1) Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall if it has convicted a person of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life. (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall if it has convicted a person of an offence referred to in Part II of Schedule 2, sentence the person in the case of – (i) a first offender to imprisonment for a period not less than 15 years; (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years; (b) if it has convicted a person of an offence referred to in Part 1 of Schedule 2 sentence the person in the case of – (i) a first offender to imprisonment for a period not less than 10 years; (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and (c) if it has convicted a person of an offence referred to in Part IV of Schedule 2 sentence the person in the case of – (i) a first offender to imprisonment for a period not less than 5 years; (ii) a second offender of any such offence to imprisonment for a period not less than 7 years; and (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years: Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.”

³⁷⁵ Criminal Law Amendment Act s 51(3).

³⁷⁶ Criminal Law Amendment Act s 51(3)(a).

³⁷⁷ See *S v Oosthuizen and Another* 2018 (2) SACR 237 (SCA) footnotes 21, 31. See also *S v Maifala* 1991 (1) SACR 95 (A); *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA); *S v Kgosimore* 1999 (2) SACR 238 (SCA) para 241E.

^{189.} Section 60(12) of the CPA reads as follows: “The court may make the release of an accused on bail subject to conditions which, in the court’s opinion, are in the interest of justice.”

⁵⁹ See *S v Louw* 2000 (2) SACR 714 (T); *De Jager v Attorney-General, Natal* 1967 SA 143 (D).

a bail condition should neither be vague nor ambiguous.³⁸⁰ Thirdly, a bail condition should not be *ultra vires*, a condition outside the of what is permitted by law.³⁸¹ Fourthly, a bail condition should be practically achievable.³⁸² The court may add further bail conditions to the conditions on which the accused has been released on bail upon the application of the prosecutor.³⁸³ The application of sections 60(12) and 62 of the CPA find *mutatis mutandis* application if the extension of bail pending the imposition of sentence as well as bail pending appeal.

Bail conditions generally serve to remedy any concern that the state may have against the release of the applicant on bail.³⁸⁴ The bail conditions set for an appellant's release on bail, pending the outcome of his appeal, might be somewhat different from the bail conditions generally set for accused persons pending the outcome of their trial. The aforesaid against the background of no risk of interference with state witnesses exist and in the face of an appeal that requires to be prosecuted. In *S v Ndaba*,³⁸⁵ Mavundla J granted bail to the appellant pending the outcome of his appeal against his conviction. He set two bail conditions — that the appellant executes the appeal against his conviction, and, in the event of his appeal not being successful, that the appellant surrenders himself to the nearest police station or the registrar of this court within seven days of being informed thereof.³⁸⁶ In *S v Malgas and Others*,³⁸⁷ Willis AJA stated that an appellant should not “adopt the attitude of a nightjar in the veld: do as little as possible, hope that nobody will notice and expect that the problem will go away”.³⁸⁸

Bail pending appeal is regulated by section 307 of the CPA. The section is peremptory on certain conditions to be set to the release of an appellant on bail pending appeal.³⁸⁹ The court hearing such an application may add any condition to

⁶⁰ *S v Russel* 1978 (1) SA 223 (C) 226E. Also see Mokoena *A guide to bail applications* 135.

³⁸¹ *R v Smith* 1947 (1) PH H9 (C).

³⁸² *R v Fourie* 1947 (2) SA 574 (O) 577.

³⁸³ Section 62 of the CPA.

³⁸⁴ *S v DV and Others* 2012 (2) SACR 492 (GNP) para [54].

³⁸⁵ *S v Ndaba* GP case no A650/17 Unreported (5 February 2018).

³⁸⁶ *S v Ndaba* GP case no A650/17 Unreported (5 February 2018) para 14.

³⁸⁷ *S v Malgas and Others* 2013 (2) SACR 343 (SCA).

³⁸⁸ *S v Malgas and Others* 2013 (2) SACR 343 (SCA) para [20].

³⁸⁹ Section 307(3) of the CPA reads: “(3) It shall be a condition of the release of the person convicted that he shall— (a) at a time and place specified by the court; and (b) upon service, in the manner prescribed by the rules of court, of a written order upon him or at a place specified by the court, surrender himself in order that effect may be given to any sentence in respect to the proceedings in question.”

the release of the appellant on bail that it deem necessary in the interests of justice.³⁹⁰ A presiding officer hearing an application for bail has an independent duty to investigate the imposition of suitable bail conditions as an alternative to the refusal of bail. A failure to do so, may constitute a misdirection.³⁹¹

The next paragraph will discuss bail pending petition or application for leave to appeal.

4.8 Bail pending petition/application for leave to appeal

The fact that an applicant who has been granted leave to appeal a conviction is of paramount importance for the consideration of a subsequent bail application pending the outcome of an appeal. A court having granted leave has effectively found that an appellant's appeal has a reasonable prospect of success, irrespective of whether same was granted against conviction and/or sentence.

If a lower court has refused an accused leave to appeal in terms of section 309B³⁹² of the CPA, such an accused's remedy would be to petition the relevant High Court Local Division for leave to appeal in terms of section 309C.³⁹³ If the High Court

³⁹⁰ Section 307(4) of the CPA.

^{202.} In *S v Branco* 2002 (1) SACR 531 (W) paras 537a-b, Cachalia AJ observed as follows: "A court should always consider suitable bail conditions as an alternative to the denial of bail. Conversely, where no consideration is given to the application of suitable conditions as an alternative to incarceration, this may lead to a failure to exercise a proper discretion" Also see *S v Nel and Others* 2018 (1) SACR 576 (GJ) para [19].

³⁹² Section 309B of the CPA reads as follows: "(1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any accused, other than a person referred to in the first proviso to section 309(1)(a), who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order. [Para. (a) substituted by s. 99 (1) of Act 75 of 2008 and by s. 11 of Act 42 of 2013.] (b) An application referred to in paragraph (a) must be made— (i) within 14 days after the passing of the sentence or order following on the conviction; or (ii) within such extended period as the court may on application and for good cause shown, allow."

³⁹³ Section 309C of the CPA reads as follows: "(1) In this section— (a) 'application for condonation' means an application referred to in the proviso to section 309(2), or referred to in section 309B(1)(b)(ii); (b) 'application for leave to appeal' means an application referred to in section 309B(1)(a); (c) 'application for further evidence' means an application to adduce further evidence referred to in section 309B(5)(a); and (d) 'petition', unless the context otherwise indicates, includes an application referred to in subsection (2)(b)(ii). (2)(a) If any application— (i) for condonation; (ii) for further evidence; or (iii) for leave to appeal, is refused by a lower court, the accused may by petition apply to the Judge President of the High Court having jurisdiction to grant any one or more of the applications in question. (b) Any petition referred to in paragraph (a) must be made— (i) within 21 days after the application in question was refused; or (ii) within such extended period as may on an application accompanying that petition, for good cause shown, be allowed."

refuses such application, an applicant has the right to apply for special leave to appeal³⁹⁴ to the SCA. If such application to the SCA is refused, the applicant is entitled to petition the Judge President in terms of section 17(2)(f) of the Superior Courts Act³⁹⁵ for special leave to appeal and/or a reconsideration by two different judges sitting at the SCA.³⁹⁶ If such application is unsuccessful, the applicant may launch an application to the Constitutional Court on constitutional aspects only.

The question that ultimately arises is what the applicant's status and rights in respect to bail are pending such petition and/or applications for leave to appeal. It is of paramount importance that leave to appeal has not yet been granted and, as such, a reasonable prospect of success of the appeal has not yet been established. It is also crucial to bear in mind that post-conviction, the objective of the criminal proceedings has been achieved and has resulted in a conviction. As a natural consequence, an accused is expected to start serving the sentence which has been imposed.³⁹⁷

Where an applicant launches an appeal against a refusal by a magistrate to grant leave to appeal with reference to conviction and/or sentence, it was held in *S v*

³⁹⁴ Section 16 of the Superior Courts Act reads as follow: "(1) Subject to section 15(1), the Constitution, and any other law— (b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal."

³⁹⁵ 10 of 2013.

⁴⁰ Section 17(2)(f) of the Superior Courts Act reads as follows: "The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation."

³⁹⁷ In *S v Madlala* 2020 (2) SACR 120 (GP), the court held at paras [25]-[26] that: "The test for bail pending a petition for leave to appeal is based on the radical change of circumstances after a person has been tried and convicted and has been sentenced. The primary purpose of the criminal trial has been achieved, i.e., to give an accused the chance to reply to the charges against him and to test the evidence the state brings to court. A bail application is allowed along the way at each step of arrest and trial (and application for leave to appeal and petition), but the closer the accused comes to conviction, the lower, generally speaking, are the chances that an accused will be permitted to bail because once convicted and sentenced he must start serving his sentence. That fact is echoed in the CPA in s 307, in that, the legislation demands that execution of a sentence is not suspended unless bail is granted. The default position in the CPA is, therefore, that, once a sentence is imposed, sentence must be implemented, and the accused must start serving his sentence unless bail is granted. At para [30], the court referred to *S v Coetzee* (unreported) GP Case No A 5/2017 (27 February 2017) para [40] where the test for appeal to be applied is described as: "...two interconnected relevant factors: prospects of success on appeal and the likelihood of the applicant to abscond".

*Potgieter*³⁹⁸ that the magistrate was empowered by the provisions of section 309(4)(b) read with section 307 of the CPA to grant bail to the applicant once the grounds of appeal had been filed.³⁹⁹ It has been held that (although this is not a requirement in respect of when the bail application pending appeal should be brought) it would be desirable to hear both the application for leave to appeal and the bail application pending the outcome of the appeal simultaneously.⁴⁰⁰ This approach as to when the bail application should be launched circumvents the uncertain aspect regarding the prospect of the success of the appeal.

Again, in *S v Liebenberg*,⁴⁰¹ the court found that the applicant was entitled to bail pending her application for special leave to appeal to the Supreme Court of Appeal against conviction and sentence.⁴⁰² In considering the merits of the application, O'Brien AJ remarked on the order of the court of appeal which appeared to be problematic,⁴⁰³ and found that "a reasonable prospect that a higher court would interfere with the sentence, albeit on technical issues".⁴⁰⁴ The significance of the judgment is that an applicant is entitled to apply for bail pending appeal in circumstances where leave to appeal has not yet been granted and, moreover, that the High Court Local Division has jurisdiction to deal with such an application. In *S v Egling*,⁴⁰⁵ Stegmann J dealt extensively with the difference between the test for leave to appeal on the merits, and the test for bail pending appeal. The court hearing such an application is required to exercise a discretion whether to release the applicant on bail or not. Bail should not be refused for insufficient reasons, despite the starting point being that the trial court's decision is correct.⁴⁰⁶

³⁹⁸ *S v Potgieter* 2000 (1) SACR 578 (W).

³⁹⁹ *S v Potgieter* 2000 (1) SACR 578 (W) 578C.

⁴⁰⁰ *S v Potgieter* 2000 (1) SACR 578 (W) 579D–E.

⁴⁰¹ *S v Liebenberg* 2022 (1) SACR 59 (NCK).

⁴⁰² *S v Liebenberg* 2022 (1) SACR 59 (NCK) para [20].

⁴⁰³ The order of the court of appeal appeared to be problematic as the conviction and sentence succeeded in part on appeal, yet the order does not say on what charges the applicant was successful, or which sentences were set aside, and which sentences were substituted. The order furthermore does not state whether the court took together the charges for the purpose of sentence, or whether the sentence is antedated. See *S v Liebenberg* 2022 (1) SACR 59 (NCK) para [21].

⁴⁰⁴ O'Brien AJ rejected the state's argument that the applicant was a flight risk, and in the interest of justice, and an individual's right to liberty, grant the applicant bail. See *S v Liebenberg* 2022 (1) SACR 59 (NCK) paras [21]–[25].

⁴⁰⁵ *S v Egling* [2003] JOL 11005 (W).

⁴⁰⁶ *S v Egling* [2003] JOL 11005 (W) 29.

The court in *Van der Walt v Director of Public Prosecutions, Mpumalanga*⁴⁰⁷ held that bail pending an application for special leave to appeal to the SCA requires a consideration of the “prospects of success” on appeal. This function was solely preserved for the SCA. As such, a High Court does not have jurisdiction. The application was dismissed on the basis that the High Court had no competence to deal with the application for extension of bail and to consider the reasonable prospects of success on appeal. The researcher respectfully disagrees with this decision, because the SCA cannot be approached as a court of first instance, which will leave an applicant remediless. If the SCA could be approached as a court of first instance for bail pending an application for special leave to appeal and bail is subsequently refused, the aggrieved appellant will not have a higher court to appeal to.

This decision is also in stark contrast with the decision underlined in *S v Liebenberg*⁴⁰⁸ and *S v Banger*.⁴⁰⁹ Both these cases confirm that the SCA is not the correct forum for the hearing of such applications as the court of the first instance. In the *Banger*-case,⁴¹⁰ the court *a quo*, the regional court in this instance, had granted the bail pending the outcome of the appeal which was heard in the High Court. Once the appeal was dismissed, the bail accordingly lapsed. The accused elected to apply for an extension of bail pending the outcome of the application for leave to appeal in the SCA and it was ruled that the application was a new application heard by the High Court as a court of the first instance.⁴¹¹ This situation (the lapsing of bail pending appeal) will be interrogated in detail in the subsequent paragraph.

4.9 Lapse of bail pending appeal

An accused’s release on bail pending the finalisation of trial lapses upon conviction and/or sentence where his or her bail has been extended pending the imposition of his or her sentence. Bail pending appeal lapses when the appeal is concluded or struck off the roll. Applicants who intend to further pursue their appeal must bring an

⁴⁰⁷ *Van der Walt v DPP, Mpumalanga* 2020 (2) SACR 132 (MM).

⁴⁰⁸ *S v Liebenberg* 2016 (1) SACR 115 (SCA) para 6; see footnotes 393–396 above.

⁴⁰⁹ *S v Liebenberg* 2016 (1) SACR 115 (SCA) para 6.

⁴¹⁰ *S v Banger* 2016 (1) SACR 115 (SCA).

⁴¹¹ *S v Banger* 2016 (1) SACR 115 (SCA) para 4.

application *de novo* which will be considered afresh.⁴¹² The normal considerations⁴¹³ will again be applicable and considered in conjunction with the reason for the appeal to have been struck off the roll.

4.10 The Canadian approach to bail pending appeal

In this section, the Canadian appeal process, bail pending appeal and the presumption of innocence during the bail pending appeal period will be examined more closely.

4.10.1 Appeal process in Canada

Much like the South African position, the Canadian appeal process is a measure to ensure that an accused has been correctly convicted of a criminal offence, it is not a method to have the matter re-tried.⁴¹⁴ The grounds on which an appeal can be heard are set out in the Criminal Code,⁴¹⁵ and are restrictive in respect of when a convicted person may launch an appeal.

The grounds for an appeal distinguish between an appeal on conviction⁴¹⁶ and an appeal on sentence.⁴¹⁷ For an appeal to be launched against conviction, one of the following circumstances must be met: an appeal may be brought which is based on a question of law; an appeal may be brought on a question of fact and law, or on any grounds which is considered to be a sufficient ground of appeal.⁴¹⁸ An appeal on sentence may only be heard with the leave of the court of appeal but only if it is not a prescribed sentence in terms of the law.⁴¹⁹

In terms of the Criminal Code, there are categories of convicted persons who may appeal, however, the same requirements as set out in subsection 1 of the rules

⁴¹² In the matter of *S v Ramakolo* 1997 (2) SACR 749 (T), the appellant's appeal was struck off the roll which resulted in the appellant's bail being lapsed. The court entertaining an application for the reinstatement of the appellant's bail will be exercising the discretion afresh.

⁴¹³ See para 4.4 above.

⁴¹⁴ Legal Services Society *How to appeal your conviction* 3.

⁴¹⁵ Section 675.

⁴¹⁶ Section 675 subs (a).

⁴¹⁷ Section 675 subs (b).

⁴¹⁸ Section 675 subs (a)(i)–(iii).

⁴¹⁹ Section 675 subs (b).

remains applicable.⁴²⁰

4.10.2 *Bail pending appeal*

The bail pending appeal process is detailed in section 679 of the Criminal Code and sets out when a presiding officer may release a person who has been convicted of an offence whilst awaiting the outcome of the appeal. Section 679(1)⁴²¹ draws a distinction between an appeal on conviction and sentence. Subsection (1)(a) canvasses an appeal against conviction and states that an appellant may be released from custody pending the outcome of his or her appeal if the appellant has given notice of appeal or, if leave is required, notice for the leave to appeal in terms of section 678.⁴²² Subsection (1)(b) regulates an appeal against sentence and requires that the appellant submits the successful leave to appeal. Subsection (c) makes provision for cases of appeal to be heard by the Supreme Court of Canada and stipulates that the appellant must file and serve the notice of appeal or, where leave is required, the application for leave to appeal.

Subsection 3 details the circumstances that an appellant may be released and provides the requirements which must be met by the appellant. The appellant must show that the appeal or application for leave to appeal is not frivolous, that the appellant will surrender into custody with the terms of the order and that the detention is not necessary in the public interest.⁴²³

Subsection 4 makes provision for an appeal brought in terms of subsection (1)(b)⁴²⁴ and allows for a judge to release the appellant pending the determination of the appeal (or until otherwise ordered by the judge of the court of appeal) if it has been

⁴²⁰ Section 675 sub-ss (2), (3), (4).

⁴²¹ Criminal Code s 679(1): “A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if, (a) in the case of an appeal to the court of appeal against conviction, the appellant has given notice of appeal or, where leave is required, notice of his application for leave to appeal pursuant to section 678; (b) in the case of an appeal to the court of appeal against sentence only, the appellant has been granted leave to appeal; or (c) in the case of an appeal or an application for leave to appeal to the Supreme Court of Canada, the appellant has filed and served his notice of appeal or, where leave is required, his application for leave to appeal.”

⁴²² Criminal Cod s 678(1): “An appellant who proposes to appeal to the court of appeal or to obtain the leave of that court to appeal shall give notice of appeal or notice of his application for leave to appeal in such manner and within such period as may be directed by rules of court.”

⁴²³ Section 679(3)(a), (b) and (c).

⁴²⁴ Section 679.

established that the appeal has sufficient merit and that the continued detention would cause unnecessary hardship, that the appellant will surrender into custody in terms of the order and that the detention is not necessary in the public interest.⁴²⁵

There are similarities within the Canadian appeal process to the South African approach. Both systems provide the release of a convicted accused on bail subject to certain requirements being met with the fundamental principle being that the criminal justice system will not be undermined or prejudiced whilst ensuring that potentially innocent accused are not unnecessarily detained. Although this avenue is available to all accused who have been convicted, this process is strictly regulated and cannot be entertained lightly.

One of the more stringent requirements is that the application for bail pending appeal can only succeed if the detention is not necessary in the public interest. This requirement was discussed by the Supreme Court of Canada in *R v Oland*⁴²⁶ in which the appellant approached the Supreme Court after his application for bail pending appeal was denied on the grounds that his detention was not necessary for the public interest, however, his release would result in the eroding of public confidence. The Supreme Court upheld the application on the basis that the judge (who had initially dismissed the application) had found that the appellant was not a flight risk, nor did he pose a threat to public safety, therefore, the application was not frivolous. Moreover, it was found that the appellant had not committed as serious an offence as the one he was initially convicted on. The combination of these considerations showed that the appellant's detention was not justified. The principle followed by the Supreme Court is indicative thereof that the granting of bail to a convicted person pending the outcome of an appeal is a decision of great significance and should as such be appropriately considered.

The case of *R v Farinacci*⁴²⁷ explicates that the court should weigh up the competing interests of the conviction of a person of a serious crime and a strong candidate for bail pending appeal. In the *Farinacci* matter, the court emphasised that public confidence in the justice system relied on the enforcement of judgments, especially

⁴²⁵ Section 679 (4) (a), (b) and (c).

⁴²⁶ *R v Oland* 2017 SCC 17, [2017] 1 SCR 250.

⁴²⁷ *R v Farinacci* (1993), 86 CCC (3d) 32.

those convicted of serious offences or repeat offenders.⁴²⁸ Juxtaposed to this, the scenario where an accused has been mistakenly convicted and is incarcerated. The court reiterated that confidence in the justice system hinged around the balancing of these two important principles. The judge went on to clarify that a crucial aspect to be considered when balancing the scales of the justice system is to determine whether the grounds which have been advanced by the convicted accused not only arguable but sufficient in establishing the success of the subsequent appeal.

This delicate balancing is as challenging in Canadian law as it is within the South African judicial process and illustrates that the presumption of innocence may be extended post-conviction.

4.10.3 Presumption of innocence — bail pending appeal

It was argued in *R v Farinacci*⁴²⁹ that the court should accept that the presumption of innocence as per section 11 of the Criminal Code finds application post-conviction in an application for bail pending the outcome of the appeal. This stance was rejected by the court. However, it is submitted that the presumption of innocence is not a principle which is eradicated by a finding of guilt, but still finds application post-conviction and extended as such, moreover, in the face of leave to appeal having been granted to an applicant.

This submission is justified by the fact that a person cannot be detained pre-trial without just cause, due to the application of the presumption of innocence. In the same vein, the fact that a convicted person can be released on bail when the legal requirements are met is indicative that the presumption can and should be extended, although it may be limited in its application.

The aforementioned submission does not, however, appear to be supported by the Canadian courts. In *R v Baltovich*,⁴³⁰ the court dealt with the application for bail pending appeal as if the presumption no longer applied post-conviction. The court considered that the applicant had been convicted by a jury who had found that the state had met the onus placed on it. Thus, the applicant could no longer be

⁴²⁸ *R v Farinacci* (1993), 86 CCC (3d) 32 47–48.

⁴²⁹ *R v Farinacci* (1993), 86 CCC (3d) 32 para 21.

⁴³⁰ *R v Baltovich* 2004 73 OR (3d) 481.

presumed innocent, as he had, in fact, been found guilty beyond reasonable doubt.

Although, in theory, a convicted accused can no longer be presumed innocent, it is researcher's submission that the presumption can be extended post-conviction. The submissions as above-mentioned provide substantiation for this as in both the South African and Canadian precedent the courts have conceded that errors in convictions are a reality, hence the need for an appeal process. These erroneous convictions create the circumstances that allows for the presumption of innocence to be applicable to a measure.

4.11 Conclusion

The need for the release on bail pending the outcome of an appeal is well established and manages the risk of innocent persons being incarcerated. Ultimately, this would result in the most severe travesty of justice. When the courts are tasked with bail pending appeal applications, it is vital that the varying interests of a convicted accused and the community are meticulously balanced.

The aspect of reasonable prospects on success of the appeal, and the right to be released from custody are of paramount importance when an application for bail pending appeal is considered. Applicants may be released on bail even where leave to appeal has not yet been granted and, as such, a reasonable prospect has not yet been established.

It is contended that the South African and Canadian law have great similarities in procedure and law in respect to bail post-conviction and pending appeal. Both legal systems allow for a convicted accused to be released on bail but only if the stringent requirements are met. Both legal systems have established these requirements through the practical application of the legislative principles to applications which have been launched in their respective courts. It is submitted that through this practical application of the theoretical legislative principles, the courts have assisted in providing a framework for the balancing exercise involved in the hearing of bail pending appeal applications.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

5.1 Summary

5.1.1 *Chapter 1*

Chapter 1 consists of background information to the research, the research aims and problems, the identified research questions, the research methodology utilised, and layout of the study. The right to and need for bail is introduced against the background of waves of, amongst other, violent crimes in South Africa. Bail is briefly defined and the significance of bail at various stages of the proceedings, such as pre-trial, post-conviction pending sentence, post-sentence pending appeal and even pending applications for leave to appeal, are discussed. Focus is placed on whether the existing bail provisions limit an accused's right to be presumed innocent until proven guilty. The application of Schedules applicable to bail as well as the subsequent reverse onus placed on an accused during Schedule 5 and 6 applications is briefly presented. Here, the reverse onus placed on the accused by the provisions of section 60(11)(a) and (b) of the CPA as well as section 50(6)(d) of the CPA may impact negatively on the presumption of innocence principle. The presumption of innocence lies at the core of the South African and Canadian criminal law, hence the study and subsequent respective comparison.

5.1.2 *Chapter 2*

This chapter deals with the historical overview on the origins of bail in Canada and South Africa. The concept of bail is succinctly considered in paragraph 2.1.1. Bail is defined as the conditional release of a person upon payment of a sum of money after having been arrested for allegedly having committed a crime. Bail ensures the liberty of a person, from arrest until conclusion of the trial and even appeal proceedings, where relevant and applicable.

To provide a holistic background to the concept of bail, its origin in the common-law tradition is investigated. In this regard, bail as found in Roman law and English law

is extensively examined. In Roman law, three relevant stages of procedure have been identified to wit the *legis actiones*, the formulary system and the *cognitio extraordinaria*. It was disclosed that Roman law made a clear provision for pre-trial release on bail. In England, criminal conduct was initially considered to be private affairs to be settled by the relevant parties involved (similar to Rome). This 'blood feuds' between families was replaced with a compensation payment known as 'wergild', which was refunded should the accused be found not guilty. This was the humble beginnings of bail. To avoid the accused being kept in custody pending the outcome of their trials, an amount of money could be paid to the sheriff. This system was, however, abused by the sheriffs. To prevent further abuse, the Magna Carta was introduced in 1215 which regulated bailable and non-bailable offences. The practise of releasing persons into the custody of friends and families emanated from the principle of bail which was to ensure that the accused will attend their trials. These and other principles such as the *habeas corpus* directly impacted on the development of the South African bail legislation and Constitution.

The history and main sources relevant to bail legislation in Canada and South Africa are outlined in paragraphs 2.3 and 2.4. South Africa has its bail origins from the Roman, Roman-Dutch, and English legal systems. The sources of bail in South Africa highlight not only the regulations which govern the bail system but also the challenges in applying these principles in a manner which upholds the rights enshrined within the Constitution. As regards the development of the Canadian bail system, a significant impact on the Canadian approach to bail was the Bail Reform Act wherein accused persons could be released on bail without stringent conditions, which had the implication of favouring pre-trial release. Secondly, the payment of cash was no longer the only way an accused could be released which made release on bail an option to all persons and not only to those who could afford to pay for their pre-trial freedom. Although the Canadian system has similar challenges to the South African system, the case law illustrates that the application of the law by the Canadian courts has evolved in a manner that protects the rights of accused persons. The discussion focuses on the fact that the Canadian judiciary is able to balance the rights of the accused with those of the general community.

5.1.3 Chapter 3

Chapter 3 focuses on the evidentiary principles of bail applications with reference to both the South African and Canadian bail systems. The main aspect of the discussion is the reverse onus which may become applicable and the impact which this has on the presumption of innocence. The precedent and rules discussed in Chapter 3 confirm that in essence, the principle dictates that once *prima facie* evidence has been advanced by the applicant, the state is required to adduce evidence in rebuttal thereof. This gives rise to the reverse onus to be discharged by the state. Despite this, the applicant remains burdened with the onus of proof.

The facts of each case will determine who bears the onus during bail applications. Section 60(11)(a) and (b) of the CPA specifies that the applicant bears the onus when charged with more serious offences which fall within the ambit of Schedule 5 and 6. In terms of the common law, the state is responsible for establishing that the interests of justice do not permit the accused's release on bail. This has the implication that the determination of which Schedule the offence falls within, is of utmost importance before the application is heard.

The unique nature of bail applications in South Africa is thoroughly discussed in paragraph 3.4. Although the South African legal system is accusatorial, section 60(3) of the CPA is an example of when the court is expected to remain passive but to intervene when the interests of justice require such involvement. The authority which this section confers on the court may result in a shift of onus between the state and the applicant pending on whom is required to provide the court with further information. An important aspect raised in chapter 3 is the admissibility of hearsay evidence during the application, which has a direct impact on the presumption of innocence in that the applicant might be exposed to flimsy, unreliable and untested evidence, which is generally, during the actual criminal trial, strictly inadmissible due to the nature and quality of the evidence. In addition to the admission of hearsay evidence, an accused's previous convictions are allowed to be presented during a bail application and ultimately form part of the court proceedings in its entirety.

In certain circumstances the applicant is expected to challenge the strength of the case which will be presented by the state in the subsequent trial. In a Schedule 6 application, it is expected that the accused challenge the state's case to such an

extent that it is demonstrated that they will probably be acquitted upon the conclusion of the trial. It is submitted that this is in stark contrast to both the presumption of innocence and the fundamental rights of an accused person. It is lastly argued that South African courts could benefit from adopting the more liberal approach of the Canadian courts.

5.1.4 *Chapter 4*

Chapter 4 deliberates on the exceptional situation where an accused can be released on bail post-conviction. As a general rule, an accused's right to be released on bail expires on conviction, however, under certain circumstances a court may extend the bail of an already convicted accused. Where an accused was convicted of an offence falling within the ambit of Schedule 5 or 6 of the CPA, the provisions of section 60(11)(a) and (b) will find application and accused persons will have to prove that exceptional circumstances exist and/or that the interests of justice permit their release on bail.

The chapter details the importance of the reasonable prospects of the success of the appeal as well as the right to be released from custody when launching an application for bail pending the outcome of an appeal. In addition, it is argued that the presumption of innocence is effectively restored by a competent court having granted leave to appeal to the accused, moreover against conviction. It is noteworthy that applicants may be released on bail even where leave to appeal has not yet been granted and, as such, a reasonable prospect has not yet been established.

The chapter further addresses the need for the bail pending appeal system as it minimises the risk that wrongly convicted persons remain incarcerated. The manner in which the risk can be managed is to ensure that the interest of the convicted accused and the community are balanced (as pronounced in Canadian case law). In approaching the aspect of bail post-conviction and pending appeal, South Africa and Canada are alike in that both legal systems allow for a convicted accused to be released on bail but only if the stringent requirements are met. Both legal systems have established these requirements through the practical application of the legislative principles to applications which have been launched in their respective

courts. It is submitted that through this practical application of the theoretical legislative principles, the courts have assisted in providing a framework for the balancing exercise involved in the hearing of bail pending appeal applications.

5.2 Recommendations and conclusion

After researching the principle of legality and the nature and character of judicial law-making with reference to common-law crimes in South Africa, and comparing how this principle developed historically in jurisdictions such as Rome, England and the Netherlands, the following recommendations can be made:

5.2.1 Amend/augment section 50(6)(d) of the CPA

The provisions and practical application of section 50(6)(d) of the CPA have the ability to violate an accused's right to bail. Accused are readily remanded in custody for seven days at a time, following a request from the state, which request is merely brought from the bar, without any evidence having been adduced. According to the researcher's personal experience as Senior Public Prosecutor and upon perusing available court records, it appears that postponements are granted to the state solely because it was requested. This trend is apparent even in instances where the onus rests on the state to prove whether the further detention of the accused person is in the interest of justice, for example, offences falling within the ambit of Schedule 1 of the CPA. Lower courts' decisions are set aside by the relevant High Courts, having jurisdiction, as demonstrated by the *Bavisa* case, which confirm the abovementioned assertion. It is contended that the provisions of the section should be extended to compel the state to demonstrate, upon evidence adduced, that such an application is merited and justified. Applications from the bar should be prohibited, as same lacks merit and devoid of any evidential weight. Such procedures would ensure that the state and courts are sensitive to the accused' rights and the presumption of innocence, moreover that a person that is presumed to be innocent should not be unnecessarily detained. The Canadian Criminal Code allows for the adjournment of bail applications for a period not more than three days, as opposed to the seven days at a time, allowed for by the CPA. It appears that the

Canadian approach is more sensitive to possible abuse and violation of rights, comparing to the South African bail legislation.

5.2.2 *Amend section 60(14) of the CPA*

There appears to be a conflict between the provisions of section 60(14) of the CPA and section 35(3)(a) of the Constitution. It is recommended that the provisions of section 60(14) of the CPA should be amended to include that an accused would be entitled to the contents of the police docket for bail purposes, subject to the interests of justice permitting. It is further recommended that certain factors should be included for consideration as to whether the interests of justice have been demonstrated. Such onus to proof should rest on the applicant, to persuade the court on a balance of probabilities. The Canadian law has no specific provision regulating the disclosure of the police docket neither is there any provision prohibiting the relevant disclosure for bail purposes. Pursuant to the principle followed and held in the *Stinchcombe case*, it appears that an accused may successfully apply for copies of the police docket and/or relevant information for bail purposes.

The reverse onus placed on an accused during Schedule 5 and 6 applications puts the accused in a rather peculiar position of not having access to the contents of the docket. In the *Mathebula*-case, the Supreme Court of Appeal held that it is incumbent upon accused persons to demonstrate to the court hearing the bail application that they would in all probability be acquitted upon the conclusion of the trial. The principle appears to be a flagrant violation of the accused's right to be presumed innocent until proven guilty. Differently argued, the accused must demonstrate his or her innocence before the commencement of the trial. An accused has an exceptional high criterion to achieve, moreover, as a result of, amongst other, not having access to the police docket. It is contended that the recommended modification of section 60(14) of the CPA might resolve the obvious infringement of an accused's rights.

5.2.3 *Amend section 60(11)(a) and (b) of the CPA*

A Schedule 6 applicant, in order to establish the existence of exceptional circumstances, more often than not, has to address and subsequently expose the weaknesses in the state's case. The onus of proof is on the applicant to commence to adduce evidence and disclose a version of events. This appears to be in stark conflict with the right to silence and not to incriminate pursuant to section 35(1)(a) and (c) of the Constitution. It is trite that the bail proceedings, pursuant to the provisions of section 60(11B)(c) of the CPA, are admissible in the subsequent trial and if the version is disclosed, will be admissible against the accused during subsequent proceedings. It appears that a solution might be for the state to retain the onus, irrespective of what Schedule the application resorts within. This recommendation would entail an amendment of section 60(11)(a) and (b) of the CPA. In Canadian bail legislation, it appears that the presumption of innocence does not have a direct application to bail proceedings as the question pertaining to guilt or innocence does not find application at this stage of the proceedings. Freedom is regarded as a right every person is entitled to and should not be limited in the face of untested allegations. The bail legislation is regulated by section 11(e) of the Charter where the state bears the onus. There are instances where a reverse onus is placed on an accused by section 515(6)(a)(i) of the Criminal Code. It is contended that this section is like section 60(11)(a) and (b) of the CPA, although not as stringent. The Canadian approach is certainly more sensitive towards the protection of the right to freedom of a person that has not yet been convicted, opposed to the South African bail system.

5.2.4 *Augment section 35(3)(h) of the Constitution*

The presumption of innocence operates in favour of the accused until a verdict of guilty has been delivered, after which the presumption of innocence no longer finds application. The appellant, having been granted leave to appeal on conviction, has subsequently established a prospect of successfully prosecuting his appeal. A prospect of success has been established by virtue of a competent court having made a finding to that effect. The conviction, effectively being the reason for the presumption of innocence no longer operating in favour of the accused, is now found

to be immersed in a cloud of doubt. If the appeal against conviction is upheld, the conviction will be set aside, and the accused will be found not guilty and held to be innocent. If any form of direct imprisonment was imposed, the sentence will be set aside, and the accused will subsequently be released with immediate effect. It is contended that the granting of leave to appeal against conviction effectively restores the presumption of innocence. It is respectfully recommended that section 35(3)(h) of the Constitution be amplified to include the appeal procedures, subject thereto, that leave to appeal has been granted against conviction. It can be argued that the Canadian law supports the application of the presumption of innocence post-conviction, moreover in the face of leave to appeal having been granted. The argument was, however, rejected in the *Farinacci* and *Baltovich* cases, respectively. It is humbly contended that the Canadian law in respect to the post-conviction application of the presumption of innocence should be reviewed.

5.2.5 *Adoption of Canadian bail legislation approach*

It is contended that the Canadian approach is substantially more liberal opposed to the more conservative application of the presumption of innocence in bail proceedings which the South African legislation and courts have adopted. This can possibly be attributed to the prevalence of serious and violent crimes prevailing in South Africa opposed to the relatively low crime rate in Canada. Opposed to the South African bail legislation, the Canadian bail legislation is more sensitive to possible infringement and violation of rights. It is asserted that the two systems have somewhat comparable challenges, however, the case law illustrates that the application of the law by the Canadian courts are aimed at protecting the rights of accused persons. It is further maintained that the applicant in bail proceedings should fully enjoy the advantage of the presumption of innocence. The South African application of the presumption of innocence could benefit from the more liberal Canadian approach.

It is submitted that the above recommendations will improve South African bail legislation considerably. In conclusion, it can be stated that the research questions of this thesis have been answered, and the theories proved.

BIBLIOGRAPHY

Books

Adam *Roman antiquities*

Adam A *Roman antiquities: Or, an account of the manners and customs of the Romans* 9 ed (A Strahan London 1835)

Bekker et al *Criminal procedure handbook*

Bekker PM, Geldenhuys T, Joubert JJ, Swanepoel JP, Terblanche SS and Van der Merwe SS *Criminal procedure handbook* 9 ed (Juta Claremont 2009)

Buckland *A textbook of Roman law*

Buckland WW *A textbook of Roman law* 3 ed (Cambridge University Press Cambridge 1964)

Du Toit et al *Commentary on the Criminal Procedure Act*

Du Toit E, De Jager FJ, Paizes A, Skeen A and Van der Merwe SE *Commentary on the Criminal Procedure Act* (Juta Cape Town 2012)

Dugard *South African criminal law and procedure Vol IV*

Dugard J *South African criminal law and procedure Vol IV* (Juta Cape Town 1977)

Gaius *The commentaries of Gaius and rules of Ulpian*

Gaius DU *The commentaries of Gaius and rules of Ulpian* (transl. by JT Abdy and B Walker) 3 ed (Lawbook Exchange Ltd New Jersey 2005)

Gravetter and Forzano *Research methods*

Gravetter FJ and Forzano LB *Research methods for the behavioural sciences* 6 ed (Wadsworth Cengage Learning Belmont 2019)

Kant *The philosophy of law*

Kant I *The philosophy of law; an exposition of the fundamental principles of jurisprudence as the science of right* (transl. SP Scott) (The Lawbook Exchange Ltd New Jersey 2001)

Kunkel *An introduction to Roman legal and constitutional history*

Kunkel W *An introduction to Roman legal and constitutional history* 2 ed (Clarendon Press Oxford 1973)

Lansdown and Campbell *South African criminal law and procedure*

Lansdown AV and Campbell J *South African criminal law and procedure* (Juta Cape Town 1982)

- Law and Martin (eds) *Oxford dictionary of law*
 Law J and Martin EA (eds) *Oxford dictionary of law* 6 ed (Oxford University Publishers Oxford 2007)
- Maruster and Gijsenberg (eds) *Qualitative research methods*
 Maruster L and Gijsenberg MJ (eds) *Qualitative research methods* (Sage Publications London 2012)
- Mokoena *A guide to bail applications*
 Mokoena MT *A guide to bail applications* 2 ed (Juta Cape Town 2018)
- Nathan *The common law of South Africa*
 Nathan M *The common law of South Africa. A treatise based on Voet's Commentaries on the Pandects, with references to the leading Roman-Dutch authorities, South African decisions, and statutory enactments in South Africa Vol iv* (African Book Co Grahamstown 1904)
- Naldi *Constitutional rights in Namibia*
 Naldi GJ *Constitutional rights in Namibia: A comparative analysis with international human rights* (Juta Cape Town 1995)
- Paterson *Understanding bail in Britain*
 Paterson FMS *Understanding bail in Britain* (HMSO Edinburgh 1996)
- Pollock and Maitland *The history of English law before the time of Edward I*
 Pollock F and Maitland FW *The history of English law before the time of Edward I Vol II* 2 ed (Liberty Fund Indianapolis 1898)
- Sanders (ed) *The Institutes of Justinian*
 Sanders TC (ed) *The Institutes of Justinian* 14 ed (The Lawbook Exchange Ltd New Jersey 2007)
- Schärf and Tshehla *Stumbling at the first step?*
 Schärf W and Tshehla B “Stumbling at the first step? Lost opportunity in the transformation of the South African justice system” in Burchell J and Erasmus A (eds) *Criminal justice in a new society: Essays in honour of Solly Leeman* (Juta and Co Ltd Cape Town 2003)160–174
- Schwikkard and Van der Merwe *Principles of evidence*
 Schwikkard PJ and Van der Merwe SE *Principles of evidence* 4 ed (Juta Cape Town 2016)
- Thomas *Textbook of Roman law*
 Thomas JAC *Textbook of Roman law* (North-Holland Publishing Company Amsterdam 1976)
- Turner *The history of the Anglo-Saxons*
 Turner S *The history of the Anglo-Saxons Vol 11* 2 ed (Longman London 1807)

Van der Berg *Bail: a practitioner's guide*

Van der Berg J *Bail: a practitioner's guide* 3 ed (Juta Cape Town 2012)

Van Zyl *History and principles of Roman private law*

Van Zyl DH *History and principles of Roman private law* (Butterworths Durban 1983)

Williamson *The evolution of law and legal procedures in the Roman participatory context*

Williamson C "The evolution of law and legal procedures in the Roman participatory context" in Hammer D (ed) *A companion to Greek democracy and the Roman Republic* (Wiley Blackwell Malden 2014) 179–192

Articles

Braun 1987 *Univ of Western Ontario LR*

Braun S "Judicial apprehension of violation of legal rights under the Canadian Charter of Rights and Freedoms: Towards framework of analysis" 1987 24(2) *University of Western Ontario Law Review* 27–62

Combrinck 2001 *Law, Democracy & Development*

Combrinck H "He's out again': The role of the prosecutor in bail for persons accused of sexual offences" 2001 5(1) *Law, Democracy & Development* 31–44

De Villiers 2002a *De Jure*

De Villiers W "The operation of the presumption of innocence and its role in bail proceedings under Canadian and South African law (part 1)" 2002 35(1) *De Jure* 92–108

De Villiers 2002b *De Jure*

De Villiers W "The operation of the presumption of innocence and its role in bail proceedings under Canadian and South African law (part 2)" 2002 35(2) *De Jure* 195–206

De Villiers 2003a *THRHR*

De Villiers W "Bail: A discussion of the Canadian principles and comparison with South African law" 2003 66(1) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 1–18

De Villiers 2003b *THRHR*

De Villiers W "An appraisal of the right to access to information held by police or state officials for purposes of a bail application under Canadian and South African law (1)" 2003 66(2) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 175–184

- De Villiers 2015 *Int J of Law, Crime and Just*
 De Villiers W “Problematic aspects with regard to bail under South African law: The reverse onus provisions and the admission of the evidence of the applicant at the later trial revisited” (2015) 43 *International Journal of Law, Crime and Justice* 17–35
- Dingledy 2016 *William & Mary LSP*
 Dingledy FW “The Corpus Juris Civilis: A guide to its history and use” 2016 *William & Mary Law School Publications* 1–41
- Domingo 2017 *SSRN Electronic J*
 Domingo R “Civil litigation in Roman law. An overview” 2017 *SSRN Electronic Journal* doi: <http://dx.doi.org/10.2139/ssrn.2942875> 1–13
- Duker 1977 *Albany LR*
 Duker WF “Right to bail — A historical inquiry” 1977 42(1) *Albany Law Review* 33–120
- McFeeley 1976 *Southwestern LJ*
 McFeeley ND “The historical development of *habeas corpus*” 1976 30(3) *Southwestern Law Journal* 585–600
- McLellan 2010 *Canadian Criminal LR*
 McLellan MF “Bail and the diminishing presumption of innocence” 2010 15(1) *Canadian Criminal Law Review* 57–74
- Metzger 2000 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte*
 Metzger E “The current view of the extra-judicial *vadimonium*” 2000 117 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* 133–178
- Metzmeier 1996 *Pace Int LR*
 Metzmeier KX “Preventive detention: A comparison of bail refusal practices in the United States, England, Canada and other common law nations” 1996 8(2) *Pace International Law Review* 399–438
- Mollema and Terblanche 2017 *SACJ*
 Mollema N and Terblanche SS “The effectiveness of sentencing as a measure to combat human trafficking” 2017 2 *South African Journal of Criminal Justice* 198–223
- Marumoagae and Tshehla 2019 *SAJHR*
 Marumoagae C and Tshehla B “Right to bail? Odds stacked against the accused person in South African bail law” 2019 35(3) *South African Journal on Human Rights* 257–273

Note 1961 *Yale LJ*

Note "Bail: An ancient practice re-examined" 1961 70(6) *Yale Law Journal* 966–977

Ntontela 2020 *De Rebus*

Ntontela M "Striking a balance in bail proceedings — how does a court determine bail in the interest of justice?" 2020 *De Rebus* 18–19

O'Brien 2007 *Hearsay*

O'Brien A "Ancient Roman precedent for the taking of bail" 2007 18 *Hearsay*
DOI: <https://www.hearsay.org.au/article-16/> (Date of use: 25 September 2021)

Okpaluba and Nwafor 2019 *Int Journal of HR*

Okpaluba C and Nwafor AO "Habeas corpus as a remedy for deprivation of the right to personal liberty: contemporary developments in Canada and South Africa" 2019 23(10) *International Journal of Human Rights* 1594–1614

Raifeartaigh 1997 *Oxford JLS*

Raifeartaigh UN "Reconciling bail law with the presumption of innocence" 1997 17(1) *Oxford Journal of Legal Studies* 1–21

Shrestha 2015 *Sydney LR*

Shrestha P "Two steps back: the presumption of innocence and changes to the *Bail Act 2013 (NSW)*" 2015 37(147) *Sydney Law Review* 147–154

Wald and Freed 1966 *American Bar Ass J*

Wald PM and Freed DJ "The Bail Reform Act of 1966: A practitioner's primer" 1966 52(10) *American Bar Association Journal* 940–945

Wodage 2014 *Mizan LR*

Wodage WY "Burdens of proof, presumptions and standards of proof in criminal cases" 2014 8(1) *Mizan Law Review* 252–270

Research papers and reports

Ballard *Research report on remand detention in South Africa*

Ballard C *Research report on remand detention in South Africa: An overview of the current law and proposals for reform* (Civil Society Prison Reform Initiative Cape Town 2011)

Clark *Habeas corpus: Its importance, history, and possible current threats*

Clark JW *Habeas corpus: Its importance, history, and possible current threats* (Unpublished honours project University of Tennessee 2007)

- Coady *Assessments and analyses of Canada's bail system*
 Coady K *Assessments and analyses of Canada's bail system* (Dept of Justice Research in Brief Ottawa 2018)
- De Ruiter and Hardy *Study on the use of bail in South Africa*
 De Ruiter N and Hardy K *Study on the use of bail in South Africa* (APCOF Research Paper 23 APCOF 2018)
- De Villiers *Problematic aspects of the right to bail under South African law*
 De Villiers WP *Problematic aspects of the right to bail under South African law: A comparison with Canadian law and proposals for reform* (Unpublished LLD thesis University of Pretoria 2000)
- Dept of Justice and Constitutional Development *Restorative justice: the road to healing*
 Department of Justice and Constitutional Development *Restorative justice: the road to healing* (Government Printers Pretoria 2011)
- Fine *The administration of criminal justice at the Cape of Good Hope 1795–1828*
 Fine HB *The administration of criminal justice at the Cape of Good Hope 1795–1828* (Unpublished LLD thesis University of Cape Town 1991)
- Karth *'Between a rock and a hard place': Bail decisions in three South African courts*
 Karth V *'Between a rock and a hard place': Bail decisions in three South African courts* (Open Society Foundation for South Africa Cape Town 2008)
- La Roi *Blood feud or wergild*
 La Roi DJA *Blood feud or wergild: The practice of pecuniary compensation in Anglo-Saxon society in Wer and Edmund's Bloodfeud Laws* (Unpublished BA thesis Utrecht University 2015)
- Matshoba *Bail and the presumption of innocence*
 Matshoba MR *Bail and the presumption of innocence: a critical analysis of section 60(1–11) of the Criminal Procedure Act 51 of 1977 as amended* (Unpublished LLM dissertation University of Western Cape Cape Town 2012)
- Ouimet *Report of the Canadian Committee on Corrections*
 Ouimet R *Report of the Canadian Committee on Corrections — Toward unity: Criminal justice and corrections* (Queen's Printer Ottawa 1969)
- Paschke *Accused, their charges and bail decisions in three South African magistrates' courts*
 Paschke R *Accused, their charges and bail decisions in three South African magistrates' courts: Pre-trial Services Project* (Bureau of Justice Assistance Pretoria 1998)

Public Prosecution Service of Canada *Deskbook*
Public Prosecution Service of Canada *Public Prosecution Service of Canada Deskbook* (Attorney General of Canada Ottawa 2020)

Schnacke, Jones and Brooker *The history of bail and pre-trial release*
Schnacke TR, Jones MR and Brooker CMB *The history of bail and pre-trial release* (Pre-trial Justice Institute Maryland 2010)

Internet sources

Bosworth <https://bosworthtoller.com/4870> (Date of access: 10 November 2021)

Bosworth J "An Anglo-Saxon Dictionary Online" <https://bosworthtoller.com/4870> (Date of access: 10 November 2021)

Justice Laws Website <https://laws-lois.justice.gc.ca/eng/Const/section-91.html>
(Date of access: 10 October 2021)

Justice Laws Website "The Constitution Acts, 1867 to 1982" <https://laws-lois.justice.gc.ca/eng/Const/section-91.html> (Date of access: 10 October 2021)

Law Explorer <https://lawexplores.com/the-sources-of-roman-law/#Fn14> (Date of use: 25 September 2021)

Law Explorer "The sources of Roman law" <https://lawexplores.com/the-sources-of-roman-law/#Fn14> (Date of use: 25 September 2021)

Macmillan dictionary <http://macmillandictionary.com/dictionary/british/circumstance>
(Date of use: 10 January 2020)

Macmillan dictionary "Circumstances" <http://macmillandictionary.com/dictionary/british/circumstance> (Date of use: 10 January 2020)

Macmillan dictionary <https://www.macmillandictionary.com/dictionary/british/exceptional>
(Date of use: 10 January 2020)

Macmillan dictionary "Exceptional" <https://www.macmillandictionary.com/dictionary/british/exceptional> (Date of use: 10 January 2020)

Constitutions

Constitution of the Republic of South Africa Act 200 of 1993

Constitution of the Republic of South Africa, 1996

Canadian Constitution Act 1982

Legislation

Act 7 of 1896

Bail Reform Act of 1966

Bail Reform Act 1972

British North America Act of 1867

Canadian Charter of Rights and Freedoms Constitution Act, 1982

Canadian Bill of Rights 1960 c 44

Criminal Code of Canada RSC 1985

Criminal Law Amendment Act 105 of 1977

Criminal Procedure Act 56 of 1955

Criminal Procedure Act 51 of 1977

Criminal Procedure and Evidence Act 31 of 1917

First Statute of Westminster, 1275

Habeas Corpus Act of 1679 31 Charles II c 2 (1679)

Law of Evidence Amendment Act 45 of 1988

Ordinance 40 of 1828

Ordinance 70 of 1830

Ordinance 5 of 1864

Ordinance 1 of 1903

Phillip II Ordinance of 1570

Superior Courts Act 10 of 2013

Case law

Brownlie v Campbell (1880) 5 App Cas 925, 950

Crossberg v S [2007] SCA 93 (RSA)

De Jager v Attorney-General, Natal 1967 SA 143 (D)

Doorewaard and Another v S (CC33/2017) [2019] ZANWHC 25 (23 May 2019)

Dubois v The Queen (1985) 2 SCR 350
Elish en Anderson v Prokureur-Generaal 1994 (2) SACR 579 (W)

Firststrand Bank Ltd t/a Rand Merchant Bank and Another v Master of the High Court, Cape Town and Others [2014] 1 All SA 489 (WCC); 2014 (2) SA 527 (WCC) (11 November 2013)

Hendriks v The State Case A714/98 1 October 1998 Cape of Good Hope High Court (Unreported)

Jacobs and Others v S [2018] ZACC

Jacobus and Another v S (CA&R156/2016) [2016] ZAECGHC 65 (22 August 2016)

Hildebrand v The Attorney-General 1897 (4) OR 120

Kriegler v Minister and Another 1949 (4) SA 821 (AD)

Lungisa v S (CA&R 159/2018) [2020] ZAECGHC 110 (25 September 2020)

Magano and Another v Magistrate Johannesburg and Others 1994 (2) SACR 304 (W)

Mahlangu and Another v Minister of Police (CCT 88/20) [2021] ZACC 10; 2021 (7) BCLR 698 (CC); 2021 (2) SACR 595 (CC) (14 May 2021)

Majali v S (41210/2010) [2011] ZAGPJHC 74 (19 July 2011)

Mathebula v S (431/2009) [2009] ZASCA 91; 2010 (1) SACR 55 (SCA) ; [2010] 1 All SA 121 (SCA) (11 September 2009)

Mbaleki and Another v S (2853/2011) [2011] ZAKZDHC 68; 2013 (1) SACR 165 (KZD) (1 April 2011)

Meskin NO v Anglo-American Corporation of SA Ltd and Another 1968 (4) SA 793 (W)

Minelli v Switzerland Series A, Vol 62 (1983) para 37-8 (ECHR)

Mnyama v Gxalaba and Another 1990 (1) SA 650 (C)

Mobil Oil Southern Africa (Pty) Ltd v Mechin 1965 (2) SA 706 (A)

Molaudzi v S [2015] ZACC 20

Naiker v S Case no A32/2020 High Court, Gauteng Local Division, Pretoria (5 March 2020)

Nkambule v S (A134/2013) [2013] ZAGPJHC 112 (2 May 2013)

Nkwentsha v Minister of Law and Order, Republic of South Africa and Another (554/86) [1988] ZASCA 33; [1988] 2 All SA 420 (A) (30 March 1988)

Pillay v Krishna and Another 1946 AD

Prokureur Generaal van die Vrystaat v Ramokhosi 1997 (1) SACL 127 OFS Division

R v Anoussis 2008 QCCQ 8100 (CanLII)

R v Antic 2017 SCC 27 (CanLII) [2017] 1 SCR 509

R v Baloi 1949 (1) SA 523 (AD)

R v Baltovich 2004 73 OR (3d) 481

R v Boya 1952 (3) SA 574 (C)

R v Camane 1925 AD 570

R v Difford 1937 AD 370

R v Farinacci (1993) 86 CCC (3d) 32

R v Fourie 1947 (2) SA 574 (O) 577

R v Hall [2002] 3 SCR 309, 2002 SCC 64

R v Hepworth 1928 (AD) 265

R v Hlongwane 1959 (3) SA 337 (A)

R v Kuzwayo 1949 (3) SA 761 (AD)

R v Morales [1992] 3 SCR 711

R v Muller 1957 (4) SA 642 (A)

R v Myers 2019 SCC 18 [2019] 2 SCR 105

R v Ndhlovu 1945 AD 368

R v Oakes (1986) 50 CR (3d) 1 26 DLR (4th) 200 [1986] 1 SCR 103 132 (SCC)

R v Oland 2017 SCC 17, [2017] 1 SCR 250

R v Pearson (1972) 77 CCC (3d) 124 (SCC) 135

R v Pearson (1992) 12 CRR (2d) 1, 17 CR (4th) 1, 77 CCC (3d) 124, 3 SCR 655 (SCC)

R v Pethla 1956 (4) SA 606 (A)

R v Rose 18 Cox CC 717

R v Smith 1947 (1) PH H9 (C)

R v St-Cloud 2015 SCC 27 [2015] 2 SCR 328

R v Stinchcombe 1991 CanLII 45 (SCC), [1991] 3 SCR 326

R v Zora 2020 SCC 14

Rohde v The State (1007/2019) [2019] ZASCA 193 (18 December 2019)

Rohde v S (SS43/2017) [2021] ZAWCHC 221; [2022] 1 All SA 504 (WCC); 2022 (2) SACR 134 (WCC) (4 November 2021)

S v Acheson 1991 (2) SA 805 (Nm)

S v Agliotti 2012 (1) SACR 559 (GSJ)

S v Anderson 1991 (1) SACR 525 (C)

S v Bader 2020 (2) SACR 444 (GP)

S v Banger 2016 (1) SACR 115 (SCA)

S v Bennett 2000 (1) SACR 406 (W)

S v Beyer 2014 JDR 0176 (Nm)

S v Bhulwana, S v Gwadiso (CCT12/95, CCT11/95) [1995] ZACC 11; 1996 (1) SA 388; 1995 (12) BCLR 1579 (29 November 1995)

S v Botha en 'n Ander 2002 (1) SACR 222 (SCA)

S v Branco 2002 (1) SACR 532

S v Brown and Another 2019 (1) SACR 691 (ECP)

S v Bruintjies 2003 (2) SACR 575 (SCA)

S v Chabalala 2003 (1) SACR 134 (SCA)

S v Coetzee (unreported) GP Case No A 5/2017 (27 February 2017)

S v Crossberg (439/2007) [2007] ZASCA 93; [2007] SCA 93 (RSA) (22 August 2007)

S v DD NCD Case No K/S 46/2012 25 April 2014 (unreported)

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

S v Du Plessis and Another 1993 (2) SACR 379 (T)

S v DV and Others 2012 (2) SACR 492 (GNP)

S v Egling [2003] JOL 11005 (W)

S v Essack 1965 (2) SA 161 (D)

S v Essop 2018 (1) SACR 99

S v Faquir 2014 JDR 1351 (GP)

S v H 1999 (1) SACR 72 (W)

S v Hartslief 2002 (1) SACR 7 (T)

S v Hudson 1996 (1) SACR 431 (W)

S v Jonas 1998 (2) SACR 677

S v Kgosimore 1999 (2) SACR 238 (SCA)

S v Leo CPD case no 297/84, 19 November 1985 (unreported)

S v Liebenberg 2022 (1) SACR 59 (NCK)

S v Lin and Another 2021 (2) SACR 505 (WCC)

S v Louw 2000 (2) SACR 714 (T)

S v Mabapa 2003 (2) SACR 579 (T)

S v Mabena and Another 2007 (1) SACR 482 (SCA).

S v Madlala 2015 (2) SACR 247 (GJ)

S v Mafiri 2003 (2) SACR 121 (SCA)

S v Maifala 1991 (1) SACR 95 (A)

S v Malgas and Others 2013 (2) SACR 343 (SCA)
S v Mathabathe 2003 (2) SACR 28 (T)

S v Mathebula 2010 (1) SACR 55 (SCA)

S v Mauk 1999 (2) SACR 479 (W)

S v Mavinini 2009 (1) SACR 523 (SCA)

S v Mazubuko and Another 2010 (1) SACR 433 (KZP)

S v Menyuka 2007 (2) SACR 407 SCA

S v Miselo 2002 (1) SACR 649 (C)

S v Mpetha and Others CPD case no 3/81, 30 May 1985 (unreported)

S v Mpfana 1998 (1) SACR 40 (Tk)

S v Muggel 1998 (2) SACR 414 (C)

S v Mustagh Sayed and Two Others (reported case number CC 317/2007 North Gauteng High Court Pretoria)

S v Ndaba GP case no A650/17 Unreported (5 February 2018)

S v Ndlangamandla 2011 JDR 0442 (GNP)

S v Nel and Others 2018 (1) SACR 576 (GJ)

S v Ngqeleni 2005 (2) SACR 572 (TkH)

S v Nyakambi [2005] JOL 14883 (Tk)

S v O'Connell and Others 2007 (2) SACR 28 (CC)

S v Oosthuizen and Another 2018 (2) SACR 237 (SCA)

S v Panayioutou (unreported ECG case no CA&R 06/2015)

S v Pataka 2018 (2) SACR 135 (GJ)

S v Petersen 2008 (2) SACR 355 (C)

S v Porritt and Another GJ Case no SS 40/2006 21 July 2017 (Unreported)

S v Potgieter 2000 (1) SACR 578 (W)

S v Ramakolo 1997 (2) SACR 749 (T)

S v Ramgobin 1985 (3) SA 587 (N); 1985 (4) SA 130 (N)

S v Rawat 1999 (2) SACR 398 (W)

S v Richardson 1992 (2) SACR 169 (E)

S v Rudolph 2010 (1) SACR 262 SCA

S v Russel 1978 (1) SA 223 (C)

S v Salzwedel and Others 1999 (2) SACR 586 (SCA)

S v Scott-Crossley (677 of 2006) [2007] ZASCA 127 (28 September 2007)

S v Shaduka (CC 1/2009) [2011] NAHC 88 (22 March 2011)

S v Siwela 1999 (2) SACR 685 (W)

S v Smith 2012 (1) SACR 567 (SCA)

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

S v Snyman and Another 1992 (2) SACR 169 (C)

S v Thornhill (2) 1998 (1) SACR 177 (C)

S v Trainor 2003 (1) SACR 35 (SCA)

S v Tshabalala 1998 (2) SACR 259 (C)

S v Van Aswegen 2001 (2) SACR 97 (SCA)

S v Van der Meyden 1999 (1) SACR 447 (W)

S v Vanqa 2000 (2) SACR 371 (Tk)

S v Viljoen 2002 (2) SACR 550 (SCA)

S v Williams 1981 (1) SA 1170 (ZA)

S v Yanta 2000 (1) SACR 237 (Tk)

S v Zondi 2020 (2) SACR 436 (GJ)

S v Zuma and Others (CCT5/94) [1995] ZACC 1; 1995 (2) SA 642; 1995 (4) BCLR 401 (SA); 1995 (1) SACR 568; [1996] 2 CHRLD 244 (5 April 1995)

Setlapelo v Minister of Police and Another GP Case no 45031/2012 20 May 2015
(Unreported)

Shabalala and Others v Attorney General 1995 (2) SACR 761 (CC)

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd
1977 (3) SA 534 (AD)

Van der Walt v DPP, Mpumalanga 2020 (2) SACR 132 (MM)

Wili v The State (CA & R 14/2018) [2018] ZAECBHC 1 (1 June 2018)

Wilkinson v S 2014 ZASCA 192

Woolmington v DPP [1935] AC 462

Zealand v Minister for Justice and Constitutional Development and Another
(CCT54/07) [2008] ZACC 3; 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC);
2008 (4) SA 458 (CC) (11 March 2008)

Zondi v S (SS15/2017) [2020] ZAGPJHC 82; 2020 (2) SACR 436 (GJ) (8 April 2020)