THE ONUS OF PROOF AND PRESUMPTION OF INNOCENCE IN SOUTH AFRICAN BAIL JURISPRUDENCE

by

VELILE MAKASANA

Submitted in partial fulfilment of the requirements for the degree of

MAGISTER LEGUM (CRIMINAL JUSTICE)

in the Faculty of Law at the

NELSON MANDELA METROPOLITAN UNIVERSITY

SUPERVISOR: PROF DEON ERASMUS
SUBMISSION DATE: MARCH 2014
DECLARATION

FULL NAME : VELILE MAKASANA
STUDENT NUMBER : 211215406
QUALIFICATION : LLM

In accordance with Rule G4.6.3, I hereby declare that The Onus of Proof and Presumption of Innocence in the South African Bail Jurisprudence is my own work and that it has not been submitted for any degree or examination in any other university. All the sources used or quoted have been duly acknowledged.

SIGNED .............................................

DATE ..................................................
ACKNOWLEDGEMENT

I am grateful to my supervisor Prof D Erasmus for his efforts and patience in supervising this thesis. He made himself available despite his busy schedule.

I give all the glory to my Lord Jesus Christ for giving me strength and health to accomplish this thesis. I have no qualms whatsoever that without him, it would not be a success.

I am grateful to my lovely wife Ntombethongo for her encouragement, moral support and belief in me.

I wish to thank my church leader Mrs NB Masebe and my parents Sicelo and Nomakhosi Makasana for their constant prayers and encouragements.

I dedicate this thesis to my beautiful children Oyisa and Nolitha for allowing me to sacrifice the prime time of their lives.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>SUMMARY</th>
<th>iii</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHAPTER 1: INTRODUCTION AND OVERVIEW OF STUDY</td>
<td>1</td>
</tr>
<tr>
<td>1.1 Introduction</td>
<td>1</td>
</tr>
<tr>
<td>1.2 Aims of the study</td>
<td>3</td>
</tr>
<tr>
<td>1.3 Methodology</td>
<td>3</td>
</tr>
<tr>
<td>1.4 Outline of the study</td>
<td>3</td>
</tr>
<tr>
<td>CHAPTER 2: RIGHT TO BAIL AND THE NATURE THEREOF IN VIEW OF THE PRESUMPTION OF INNOCENCE</td>
<td>5</td>
</tr>
<tr>
<td>2.1 Introduction</td>
<td>5</td>
</tr>
<tr>
<td>2.1.1 The right to bail</td>
<td>5</td>
</tr>
<tr>
<td>2.1.2 The nature of bail</td>
<td>8</td>
</tr>
<tr>
<td>2.1.3 The procedure of bail applications</td>
<td>9</td>
</tr>
<tr>
<td>2.2 The presumption of innocence in bail applications</td>
<td>10</td>
</tr>
<tr>
<td>2.3 Conclusion</td>
<td>15</td>
</tr>
<tr>
<td>CHAPTER 3: THE ONUS AND STANDARD OF PROOF IN BAIL APPLICATIONS</td>
<td>17</td>
</tr>
<tr>
<td>3.1 Introduction</td>
<td>17</td>
</tr>
<tr>
<td>3.2 The onus of proof in bail applications</td>
<td>17</td>
</tr>
<tr>
<td>3.2.1 The onus of proof in the pre-Constitution era</td>
<td>17</td>
</tr>
<tr>
<td>3.2.2 The onus of proof during the Interim Constitution era before the Criminal Procedure Second Amendment Act 75 of 1995</td>
<td>19</td>
</tr>
<tr>
<td>3.2.3 The Interim Constitution and the effect of the Criminal Procedure Second Amendment Act 75 of 1995</td>
<td>22</td>
</tr>
<tr>
<td>3.2.4 The onus of proof in bail proceedings and the Final Constitution</td>
<td>25</td>
</tr>
<tr>
<td>3.3 The standard of proof in bail applications</td>
<td>28</td>
</tr>
<tr>
<td>3.4 Conclusion</td>
<td>29</td>
</tr>
<tr>
<td>CHAPTER 4: THE NATURE OF ONUS OF PROOF IN SCHEDULE 5 AND 6</td>
<td>30</td>
</tr>
<tr>
<td>4.1 Introduction</td>
<td>30</td>
</tr>
<tr>
<td>4.2 The determination of Schedule 5 and 6 offences in bail applications</td>
<td>30</td>
</tr>
<tr>
<td>4.3 Section 60(11)(b) of the Criminal Procedure Act</td>
<td>31</td>
</tr>
<tr>
<td>4.3.1 The interests of justice</td>
<td>32</td>
</tr>
<tr>
<td>4.4 The nature of onus in terms of section 60(11)(a) of the Criminal Procedure Act</td>
<td>34</td>
</tr>
<tr>
<td>4.4.1 Exceptional circumstances</td>
<td>35</td>
</tr>
<tr>
<td>4.5 Conclusion</td>
<td>41</td>
</tr>
</tbody>
</table>
SUMMARY

The South African criminal justice process is such that there is an inevitable lapse of time between the arrest of the offender and his or her subsequent trial. The pre-trial incarceration presents a special problem. Between the arrest of the accused and release, the accused is being deprived of his or her liberty in circumstances where no court of law has pronounced him or her guilty.

The right to bail is well entrenched in South African criminal justice system both in the Constitution Act and Criminal Procedure Act. Bail is always in the form of contract between the State and the accused, even though at times it may be opposed by the State.

In the past the legal position based on the case law was that the presumption of innocence in bail proceedings operated in favour of the applicant even where it was said that there was a strong *prima facie* case against him or her. This position has slightly changed in that the courts in bail applications are not concerned with guilt, but that of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail.

The *onus* of proof in bail applications, other than Schedule 5 and 6 offences is borne by the State. Where Schedule 5 or 6 is applicable the *onus* is on the applicant. There are different requirements between schedule 5 and 6 that must be met by the applicant before release on bail is granted.

In Schedule 5 offences the bail applicant must satisfy the court that the interests of justice permit his or her release. In determining whether the interests of justice permit the release of a particular applicant on bail, the courts are guided by the provisions of section 60(4) to (9) inclusive of section (11B)(c) of the Criminal Procedure Act. In such determination the courts must also take into account of section 60(60)(a) to (g) of the Criminal Procedure Act.
In Schedule 6 offences there are two requirements namely: the exceptional circumstances and the interests of justice. The term “exceptional circumstances” does not have a closed definition. Both requirements must be established by means of written or oral evidence to the satisfaction of the court before bail may be granted. As pointed out above, the State may still oppose the release on bail of the applicant. It is now accepted in bail applications that ordinary circumstances may in particular context be blended with exceptional or unusual elements. In such cases the court is expected to apply its independent evaluation of evidence in order to determine whether the exceptional circumstances in the interests of justice permit the release on bail.

Similarly to the South African bail jurisprudence the Rome Statute of the International Criminal Court recognises a right of the arrested person to apply for the interim release. It also recognises the need to establish exceptional circumstances for such release.

The South African bail jurisprudence recognises the right to bail, and places reasonable and procedural limitations founded on the constitutional values and interests of justice.

There are still practical challenges that need to be addressed as a results of the stringent requirements in section 60(11)(a) and (b) of the Criminal Procedure Act that relate to Schedule 5 and 6.

It is therefore recommended that there is a need for the following:

1. Legislative intervention that will regulate and limit the time spent on investigations where bail has been refused.
2. Legislative intervention that will provide for an automatic review procedures in Schedule 5 or 6 offences where bail is refused on grounds that the interests of justice do not permit the release of the applicant on bail or for failure to prove exceptional circumstances.
It is submitted that this may assist in reducing refusals of bail based on mistaken understanding of the law or facts or irregularities that may be prejudicial to the applicant or the administration of justice; or

3. Legislative intervention that will make it mandatory for a court that refuses to grant bail to reconsider its decision after a certain period in future provided that the trial has not been commenced with, in order to determine whether further incarceration is necessary or proportionate to the offence.

It is submitted that this may assist the court to enquire into unreasonable delays on investigations or changed circumstances of the applicant in order to enable the court to reconsider its previous decision if necessary. This may further assist in offences where it is foreseeable that the trial court is likely to pass a partly or wholly suspended sentence in case of conviction. For example some cases fall within the scope of Schedule 5 by virtue of a previous conviction on Schedule 1 or release on bail on a Schedule 1 offence.

The above recommendations may directly or indirectly contribute in balancing the scales of justice during the bail proceedings and its aftermath. These may contribute to the reduction of high numbers of the in custody awaiting trial prisoners while not compromising the current bail procedures.
CHAPTER 1
INTRODUCTION AND OVERVIEW OF STUDY

1.1 INTRODUCTION

The effect of the Bill of Rights on the South Africa criminal Justice system has been significant. It provides grounds for reviewing both the substantive and procedural content of the laws that form the South African criminal justice system while providing remedies for the breaches of the Constitution. In doing so it has impacted on the content of the law in addition to influencing the conduct of those who participate in the criminal Justice system.¹

Section 2 of the Constitution encapsulates a supremacy clause which introduces a new constitutional dispensation. This provision establishes an entirely new constitutional dispensation which requires a pragmatic shift in jurisprudential theory in South Africa. In terms of section 2, the Constitution² is the highest law of the land.³

Section 35 of the Constitution makes provision for a number of rights aimed at defining, protecting and promoting the rights of the arrested, detained and accused persons. In terms of section 35(1)(f) of the Constitution everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.

On the other hand section 36 of the Constitution is designed to limit the rights in the Bill of Rights including section 35(1)(f) of the Constitution. This has to be done in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The limitation has to take into account all relevant factors including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation and its purpose and less restrictive means to achieve the

² Act 108 of 1996, hereinafter referred to as “the Constitution”.
purpose. 4 When a person is arrested in South Africa for committing an offence in the Republic or outside the Republic, the South African constitutional, substantive and procedural laws become applicable. In terms of section 39(1)(b) of the Constitution, when interpreting the Bill of Rights, a court, tribunal or forum must consider the international law. In cases of arrest the provisions of Chapter 9 of the Criminal Procedure Act, 5 which relates to bail and Child Justice Act, 6 where a child is involved are of paramount importance.

Similarly to section 35(1)(f) of the Constitution, the provisions of section 60(1)(a) of the Criminal Procedure Act make it clear that an accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such an offence, if the court is satisfied that the interests of justice so permit.

When a person is arrested for offences referred to in section 60(11)(a) and (b) of the Criminal Procedure Act, the court is required to order that such a person be kept in custody, until he or she is dealt with in accordance with the law, unless having been given a reasonable opportunity to do so, he or she adduces evidence which satisfies the court that the interests of justice permit his or her release and in Schedule 6 offences to prove that exceptional circumstances exist.

In the case of Schedule 5 and 6 offences the onus to prove exceptional circumstances or interests of justice, or both, is placed on the applicant seeking release on bail. Relevant to the onus of proof in bail applications is the presumption of innocence. The presumption of innocence in bail proceedings is viewed in light of the fact that bail application is an enquiry, not really concerned with the question of guilt as that is the task of the trial court. The court hearing a bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. 7

4 S 36(1) of Act 108 of 1996.
5 51 of 1977, hereinafter referred to as “the Criminal Procedure Act.”
6 75 of 2008.
7 S v Dlamini 1999 (2) SACR 51 (CC) 63 11.
1.2 AIMS OF THE STUDY

The aim of this study is to investigate, analyse and establish whether the South African bail jurisprudence protects the rights of the arrested, detainted and accused persons in relation to their right to liberty. The focus will be on the key legal and procedural principles relevant to the onus of proof and presumption of innocence in bail proceedings. The study will also examine the relevant sections of the Constitution Act; Criminal Procedure Act and Child Justice Act in light of the decided South African case law.

The secondary aim will be to examine the nature of the onus borne by bail applicants and challenges facing such applicants when charged with Schedule 5 and 6 offences of the Criminal Procedure Act.

1.3 METHODOLOGY

Firstly, this research takes the form of a literature study. The legislative framework that was in place before and after 31 May 1961, which governed bail proceedings in South Africa will be set out. In examining this, case law, both before and after introduction of the Constitution, articles in law journals and text books were consulted.

Secondly, the researcher will investigate the legal position set out in international instruments such as the Rome Statute of the International Criminal Court to which South Africa is a party.

1.4 OUTLINE OF THE STUDY

Chapter one sets out the background of the study, its aims, methodology and scope.

Chapter two entails a discussion of the right to bail, nature of bail and the presumption of innocence in South African criminal justice system.

---

8 75 of 2008.
Chapter three deals with the question of onus of proof in all bail applications including Schedule 5 and 6.

Chapter four deals with the nature of onus of proof in Schedule 5 and 6 offences.

Chapter five considers a comparison of the South African bail law with the international law principles applicable.

The above chapters will include a discussion of the bail legal principles relevant to each of them prior to and after the introduction of the Constitution. This will also include a discussion of the Criminal Procedure Act prior to its current amendments. Chapter 6 summarises the research and draws conclusions based on the discussion of other chapters.
CHAPTER 2
THE RIGHT TO BAIL AND THE NATURE THEREOF IN VIEW OF THE PRESUMPTION OF INNOCENCE

2.1 INTRODUCTION

In the previous chapter it was pointed out that once a person is arrested in the Republic of South Africa for allegedly committing an offence, certain constitutional and legislative provisions become applicable. The relevant legislative provisions are contained in Chapter 2 of the Constitution and Chapter 9 of the Criminal Procedure Act. This chapter focuses on the concept of bail in the pre and post Constitution era. The principle of the presumption of innocence will be analysed with a view of establishing whether it is applicable in bail proceedings or not and if so to what extent.

2.1.1 THE RIGHT TO BAIL

The South African criminal Justice process is such that there is an inevitable lapse of time between the arrest of the offender and his or her subsequent trial. The pre trial incarceration presents a special problem. Between the arrest of the accused and release, the accused is being deprived of his or her liberty in circumstances where no court of law has pronounced him or her guilty.\(^9\)

The right to bail was long recognised in South Africa even before the current Criminal Procedure Act became operative. In *McCarthy v Rex*,\(^10\) it was expressed that the court is always desirous that an applicant should be allowed bail if it is clear that the interests of justice will not be prejudiced thereby, more particularly if it is of the opinion that he or she will appear to stand his or her trial in due course. In cases of murder, however, great caution was always exercised in deciding upon an application for bail. The *McCarthy* decision was approved and applied in numerous


\(^10\) 1906 TS 657 659.
important decisions that followed, such as *Smith and Another*,¹¹ *Liebman v Attorney General*,¹² *S v Visser*¹³ and *S v Acheson*.¹⁴

In *Minister van Wet en Orde en Andere v Dipper*,¹⁵ the court held that an accused who is in custody, is entitled to make application for his or her release on bail before the expiry of the period of 48 hours referred to in section 50(1) of the Criminal Procedure Act, that is before his or her compulsory first appearance in a lower court in terms of section 50(1). The expression “at his or her first appearance in a lower court” in section 60 of the Criminal Procedure Act does not only refer to the first compulsory appearance in terms of section 50(1) but also includes a first appearance at the applicant’s own request. The above decision approved the legal principle in *Twayie en ‘n Ander v Minister van Justisie en ‘n Ander*¹⁶ which held that a lower court was competent and obliged, to hear and decide bail applications outside normal hours and on non court days. The *Tweyie* decision however was short-lived.¹⁷

In 1997 section 50(6)(b) of the Criminal Procedure Second Amendment Act¹⁸ changed the position. It provides that an arrested person contemplated in section 50(6)(a)(i) is not entitled to be brought to court outside ordinary court hours.

In terms of section 60(1)(a) of the Criminal Procedure Act an accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.

The Constitution entrenches the same right in section 35(1)(f) where it states that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.

¹¹ 1969 (4) SA 175 (NPD) 177F.
¹² 1949 SA 607 (CPD) 609.
¹³ 1975(2) SA 342 (KPA) 342H.
¹⁴ 1991 (2) SA 805 (Nm) 822A.
¹⁵ 1993 (2) SACR 225 (A).
¹⁶ 1986 (2) SA 101 (O).
¹⁷ Van Der Berg *Bail A Practitioner’s Guide* 3ed 15.
¹⁸ 85 of 1997.
In *Dlamini*\(^9\) the court pointed out three things as far as the provisions of section 35(1)(f) of the Constitution are concerned, namely:-:

(a) That the Constitution expressly acknowledges and sanctions that people may be arrested for allegedly having committed offences, and may for that reason be detained in custody. The Constitution itself therefore places a limitation on the liberty interest protected by section 12 of the Bill of Rights.

(b) That notwithstanding lawful arrest, the person concerned has a right, but a circumscribed one, to be released from custody subject to reasonable conditions.

(c) That the criterion for release is whether the interests of justice permit it.

In *S v Visser*\(^20\) it was held that bail is not a means which should be employed in order to deter offenders, indeed the court’s approach is always to grant bail where it is at all possible. The court will lean in favour of the liberty of the citizen rather than the deprivation thereof, provided the interests of sound criminal law administration are not prejudiced thereby.

The theoretical basis for the right to bail in our law is, in the first instance, to be found in the provisions of section 12 of the Constitution, which guarantees the right to liberty. That right is, however, subject to the reasonable limitation that individuals may be arrested in the public interest. The limitation, in turn, is circumscribed, in that the detained individual is entitled to be released on bail coupled with reasonable conditions prior to conviction; while this latter right is again limited by the requirements of the interests of justice.\(^{21}\)

---

\(^{19}\) 1999 (2) SACR 51 (CC).

\(^{20}\) 1975 (2) SA 342 (CPD) H.

2.1.2 THE NATURE OF BAIL

The granting of bail is in the nature of a contract in terms of which the state commits itself to the applicant’s continued interim freedom, once the court has authorised his or her release, while the applicant commits himself or herself to standing trial.\(^{22}\)

Where the prosecution and the applicant reach consensus regarding the grant of bail, the prosecution is still under a duty to disclose all relevant information to the court. This remains important throughout bail proceedings as it is the ultimate responsibility of the court to see to it that the interests of justice are not prejudiced.\(^{23}\) The duty on prosecution to bring all relevant information to the court’s attention was confirmed by Constitutional Court in *Carmichele v Minister of Safety and Security*\(^{24}\) where the court held that there seems to be no reason in principle why a prosecutor who has reliable information, for example, that an applicant is violent, has a grudge against the complainant and has threatened to do violence to her if released on bail should not be held liable for the consequences of a negligent failure to bring such information to the attention of the court.

In *Dlamini*\(^{25}\) the court pointed out that bail hearing is a unique judicial function and interlocutory in nature. In *S v Maki en Andere*,\(^{26}\) the court pointed out that bail applications are not “criminal proceedings” as they are not proceedings directed by the State against an accused in order to secure his or her conviction and punishment. It was further pointed that in a bail application there is a real dispute between the subject and the State concerning the subject’s freedom, pending adjudication of the criminal trial and direct relief is sought against the State, namely that the subject be released by the relevant State organ.

In *S v Viljoen*\(^{27}\) the court held that caution must be taken not to turn every bail application into a drawn out trial before the criminal trial. The court further

\(^{22}\) Van Der Berg *Bail A Practitioner’s Guide* 3ed.

\(^{23}\) Van Der Berg *Bail A Practitioner’s Guide* 3ed 10.

\(^{24}\) 2002 (1) SACR 79 (CC) 74.

\(^{25}\) 1999 (2) SACR 51 (CC) 63 par 11.

\(^{26}\) 1994 (1) SACR 630 (OK).

\(^{27}\) 2002 (2) SACR 550 (SCA) 552.
emphasised that it could not have been the intention of the legislature that bail applications would be a full dress-rehearsal of the trial. The hearing of a bail application has to be kept within reasonable limits, subject to the provisions of the legislation and the rights of the applicant.

2.1.3 THE PROCEDURE OF BAIL APPLICATIONS

An applicant for bail has two methods to employ when applying for release on bail. In *S v De Kock* the accused in bail proceedings submitted a sworn affidavit in *lieu* of giving *viva voce* evidence. The court, following the dictum in *S v Pienaar*, held that the use of affidavit was not impermissible and nor would it automatically count against an applicant.

It is argued that the above course of action must be seen as a means of preventing abuses that could arise from subjecting an accused to wide ranging of cross-examination after testifying in support of a bail application. On the other hand, it should also be borne in mind that an affidavit will have less probative value than evidence which is subject to the test of cross examination. Where an affidavit is used in bail application, an applicant’s right to silence can be protected in the sense that he can avoid cross examination on incriminating matters.

It is therefore incumbent on the bail applicant to be careful in choosing the method of presenting his or her evidence as the offences listed in Criminal Procedure Act differ in schedules.

In *S v Najoe* a bail applicant who bore the *onus*, filed an affidavit about his personal information and criticised the strength of the state’s case against him. On the other hand the state presented oral evidence in opposition of bail. The court accepted the oral evidence of the state and rejected that of the applicant as contained in the

---

28 1995 (1) SACR 299 (T).
29 1992 (1) SACR 178 (W).
31 2012 (2) SACR 395 (ECP) 398.
affidavit on the basis that the state evidence was tested under cross-examination whilst the applicant’s evidence remained untested.

2.2  THE PRESUMPTION OF INNOCENCE IN BAIL APPLICATIONS

There is no definitional unanimity about the contents and scope of the term “presumption of innocence”. In essence the presumption of innocence implies that no person shall be punished until such time as the presumption has been rebutted by proof beyond reasonable doubt of his or her guilt.32

A distinction has to be made between the presumption of innocence as a rule regulating the burden of proof and as a policy directive as to how persons should be treated prior to conviction. Whilst the limitation of the right of presumption of innocence as the foundation of a policy directive might be frequently justified in denying bail applications, it should not be allowed to undermine the normative value of presumption of innocence as a rule regulating the burden of proof.33 There is an obvious area of tension between the presumption of innocence and deprivation of liberty pending the verdict of a court of law. Bail is viewed as a method of securing a compromise.34

In Leibman v Attorney General35 the court was of the view that the principles on which the court acts in deciding whether or not to grant bail to a person charged with treason or murder are well settled. The court further recognised that the main object of detaining in custody a person presumed by law to be innocent until he or she is convicted, is to safeguard the due administration of justice to ensure that the person will appear to stand his or her trial and that he or she will not do anything to prejudice the interests of justice in any way.

In S v Acheson,36 the court emphasised that the bail applicant cannot be kept in detention pending his or her trial as a form of anticipatory punishment. The court

---

35 1949 SA 607 (CPD) 609.
36 1991 (2) SA 805 (Nm) 822A–B.
pointed out that at the bail stage the presumption of the law is that he or she is innocent until guilt has been established in court. It was held then that, the court will therefore ordinarily grant bail to an applicant person unless this is likely to prejudice the ends of justice.

A person may be in the public's subjective view factually or morally guilty of a crime, but that does not say that he or she will or can be proved to be legally guilty. In a state under the rule of law, only legal guilt counts, to convict a person in any other way may amount to vigilantism, mob trials and even anarchy.37

The courts, in dealing with bail applications, have to be more cautious. In such applications it is necessary to strike a balance as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice.38

The pre-Constitution courts’ decisions indicate that the presumption of innocence operates in favour of the applicant even where it is said that there is a strong prima facie case against him or her, but if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he or she is allowed out on bail, courts are justified in refusing bail.39 This principle was referred in acknowledgement in the case of Essack,40 where the court held that in bail applications it is necessary to strike a balance as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice.

In S v Fourie41 it was pointed out that it was of paramount importance to guard against overemphasising the presumption of innocence when it comes to a consideration of the merits of a bail application. A court may in fact serve the

---

38 S v Essack 1965 (2) SA 161 (D) 162.
39 S v Mhlawuli 1963 (3) SA 795 (C) 796.
40 1969 (2) SA 161 (D) 162-D-E.
41 S v Fourie 1973 (1) SA 100 (D).
interests of justice by refusing bail if there is any cognizable indication that the accused will not stand trial if released on bail.

It is clear that, before it can be said that there is any likelihood of justice being frustrated through an accused person resorting to the known devices to evade standing trial, there should be some evidence or some indication which touches the applicant personally in regard to such likelihood.42

The principle of striking a balance in the case of Essack referred to above, was approved in S v Smith and Another43 and in S v Bennett.44

In S v Ramgobin (1)45 a Full Bench of the Natal Supreme Court referred with approval to the recognition of the presumption of innocence in bail applications; and this approach was echoed by in S v Ramgobin (2).46

The presumption of innocence should not be over-emphasised when it comes to a consideration of the merits of a bail application, for the court may in fact serve the needs of justice by refusing bail if there is any cognizable indication that the accused will not stand trial if released on bail.47

It is argued that the objective of the right to bail is to minimise the interference with an applicant’s freedom and to avoid anticipatory punishment before conviction and sentence. In this sense, the right reflects the same concern as the presumption of innocence. The applicant should not be punished for an offence for which he or she has not been convicted. However, the right should not be seen as a consequence or expression of the right to be presumed innocent contained in section 35(3)(h) of the Constitution.48

42 S v Fourie 1973 (1) SA100 (D).
43 1969 (4) SA 175 (N) 177H.
44 1976 (3) SA 652 (CPD) 654G.
45 1985 (3) SA 587 (N).
46 1985 (4) SA 130 (N).
47 S v Fourie supra 101.
The presumption of innocence is confined to procedural and evidential issues, burdening the state with the onus of proving an accused guilty beyond reasonable doubt. The bail decision, on the other hand, is made with reference to the interests of justice where the likely guilt of an applicant is a relevant factor. Thus, prior to the trial on the merits, the court may take into account that there is a strong case against an accused and that if he or she were released, there would be a real incentive to evade trial or destroy evidence. The right to be released on bail and the right to be presumed innocent are thus to be viewed as “parallel rights” giving effect to the same principle at different stages of the proceedings and in different forms.49

The reference to “parallel rights” is derived from the judgment of the Canadian Supreme court in *R v Pearson*,50 where that court was called upon to decide the constitutional validity of certain sections of the Canadian Criminal Code.51

The above approach was followed in the case of *Dlamini*52 where the Constitutional court pointed out an important point about bail proceedings. It was pointed out that there is a fundamental difference between the objective of bail proceedings and that of the trial. It was further noted that in a bail application the judicial enquiry is not really concerned with the question of guilt. That is the duty of the trial court.53

It is imperative at this stage to refer again to the case of *S v Essack*54 where the court held:

“The presumption of innocence operates in favour of the applicant even where it is said that there is a strong *prima facie* case against him, but if there are indications that the proper administration of justice and safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the court would be fully justified in refusing to allow him bail.”

Schwikkard55 argued that the presumption of innocence as a rule requiring proof of guilt beyond reasonable doubt cannot be applied at bail proceedings as these
proceedings are not concerned with the determination of guilt. Schwikkard, argued further that in *Essack* reference to the presumption of innocence would appear to conflate the doctrine of legal guilt and the presumption of innocence.

With reference to the above citation from *Essack* she argued that the presumption of innocence must be read as a direction to authorities to ignore indicators of guilt until there has been an adjudication of guilt by an authority legally competent to make such an adjudication. It has to be taken into account that the article referred to above was written and published before the Constitutional court’s decision in *Dlamini*. As pointed out above, the court held further that bail application is not concerned with the question of guilt, but that the court hearing bail application is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail.⁵⁶

In *S v Mbaleki & another⁶⁷* the court stated that in dealing with the perception that the presumption of innocence have a role to play in the consideration of bail reference must be made to the *Dlamini* case. The court stated that the Constitutional court unanimously decided that the right to be presumed innocent is not a pre-trial right, but a trial right.

When considering the *Dlamin⁵⁸* case, it is argued with respect that it is doubtful whether the Constitutional court actually decided this point.⁵⁹

The main reason for this argument is that the court did not end there, but went further to the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail. The *Mbaleki* case on the point referred to above may lead to confusion as it does not emphasise the question of possible guilt as articulated in *Dlamini*.

---

⁵⁵ Schwikkard 1998 SACJ 396 402.
⁵⁶ *S v Dlamini* 1999 (2) SACR 51 (CC) 63 par 11.
⁵⁷ 2013 (1) SACR 165 (KZN) 169e.
⁵⁸ 1999 (2) SACR 51 (CC) 63 par 11.
What is important at this stage is for the state to show that there is a *prima facie* case against the accused. The bail court is not called upon to determine whether the applicant is guilty or not, but to evaluate evidence presented by the state in order to decide whether there is a possibility of guilt during the trial.

### 2.3 CONCLUSION

In this chapter, the right to bail, which is available to all persons arrested and detained, was analysed. It was shown that an accused is entitled to have his or her bail application considered within 48 hours of arrest.\(^{60}\) There are exceptions applicable. The period of 48 hours can be extended as “a court day” means a day on which the court in question normally sits as a court and “ordinary court hours” means the hours from 9:00 until 16:00 on a court day.\(^{61}\) This was discussed with reference to decided case law. The nature of bail applications was discussed with reference to the paramount interests of justice.

The presumption of innocence was defined, a distinction between the right to bail and right to be presumed innocent was made and the relevant case law was also discussed. The cases decided before and after the Constitution were discussed. It was shown that the cases decided before the introduction of the constitution took the view that the presumption of innocence was a relevant issue in bail applications and it had to be considered in favour of the accused provided that the interests of justice are safeguarded. The views of the academic writers on the topic were also considered. It also became apparent that the right to be presumed innocent is a trial right than a pre-trial right, but the court conducting bail enquiry is concerned with the question of possible guilt only to the extent that it may bear on where the interests of justice lie in regard to bail.

It is argued that the post Constitution case law recognises the right to presumption of innocence at bail stage, but a different approach is adopted. The bail court preserves the right to presumption of innocence, while enquiring about the possible guilt on the part of the applicant which will be determined in during the trial in future.

---

\(^{60}\) S 50(1)(d) of the Criminal Procedure Act.

\(^{61}\) S 50(2)(a) and (b) of the Criminal Procedure Act.
In the next chapter the *onus* and standard of proof in bail applications will be discussed.
CHAPTER 3
THE ONUS AND STANDARD OF PROOF IN BAIL APPLICATIONS

3.1 INTRODUCTION

The previous chapter showed that bail proceedings are not criminal in nature, but they are a unique judicial function. In this chapter the onus of proof in bail applications falling outside schedule 5 and 6 of the Criminal Procedure Act will be discussed with reference to legislation and case law.

The bail law regulating the question of onus of proof before the introduction of the Interim Constitution, during the Interim Constitution and after the adoption of the Constitution will also be discussed. Case law and legal opinions will be discussed. The onus of proof in bail applications falling within the ambit of Schedule 5 or 6 will also be discussed with reference to their governing legislations under the Interim Constitution and the final Constitution Act.

The standard of proof required in discharging the onus in all scheduled offences including schedule 5 and 6 will be analysed.

3.2 THE ONUS OF PROOF IN BAIL APPLICATIONS

3.2.1 THE ONUS OF PROOF IN THE PRE CONSTITUTION ERA

In the early part of the last century the criminal procedure statutes made no reference to the onus of proof in bail proceedings. The courts acted in accordance with the principle that bail could be granted in all cases, provided that great caution was always exercised.  

---

62 Act 200 of 1993 hereinafter referred to as "the interim Constitution".
63 Van Der Berg Bail A Practitioner's Guide 2ed 57.
Under section 99 of the Criminal Procedure and Evidence Act\textsuperscript{64} every person committed for trial or sentence in respect of any offence except treason or murder, was entitled, as soon as the warrant of commitment was made out, to be admitted to bail. It is notable that the Act did not contain provisions on \textit{onus}.

Prior to the 1917 Act referred to above, it appears from the remarks of Innes CJ in \textit{McCarthy v R}\textsuperscript{65} that bail could be granted where the charge was murder, but great caution even then had to be exercised.

In the case of \textit{Rex v Mtatsala and Another},\textsuperscript{66} the court held that where the Crown opposed an application for bail, the \textit{onus} was cast upon the applicant to satisfy the court that, if bail was granted, he or she would not abscond or tamper with the Crown witnesses. In \textit{Leibman v Attorney General}\textsuperscript{67} the court interpreted section 99 to mean that bail had to be granted by the committing magistrate. It was not clear as to who had \textit{onus} to raise the question of bail.

There was no material change with the introduction of the Criminal Procedure Act. The argument that before the enactment of Criminal Procedure Second Amendment Act,\textsuperscript{68} the Criminal Procedure Act was silent on the procedure which had to be followed in bail applications is supported.\textsuperscript{69}

The absence of clear guidelines that existed regarding bail procedures resulted in a number of possibilities that could present themselves:

(a) The procedure might be rigidly formal along the lines of applications in civil matters;

(b) The procedure might be informal, but not entirely so, with the result that aspects such as \textit{onus} of proof, the right to legal representation, the right to

\textsuperscript{64} 31 of 1917.
\textsuperscript{65} 1906 TS 657 659.
\textsuperscript{66} 1948 (2) SA 585 (E).
\textsuperscript{67} 1949 (1) SA 607 (W) 608.
\textsuperscript{68} 75 of 1995.
\textsuperscript{69} Van Der Berg \textit{Bail A Practitioner’s Guide} 3ed 64.
lead *viva voce* evidence, the right to cross examination etcetera, were recognised;

(c) The procedure might be entirely informal and independent of any of the usual rules of procedure, as in administrative proceedings.\textsuperscript{70}

The position in our law in the pre Constitution era was that the *onus* was placed on the accused in his or her capacity as applicant, to persuade the court to exercise its discretion in favour of granting bail and in discharging this *onus*, to show that the interests of justice would not be prejudiced.\textsuperscript{71} The above approach of the courts was without the enactment of legislative directions.\textsuperscript{72} This *onus* had to be discharged by the accused on balance of probabilities.\textsuperscript{73}

### 3.2.2 THE ONUS OF PROOF DURING THE INTERIM CONSTITUTION ERA BEFORE THE CRIMINAL PROCEDURE SECOND AMENDMENT ACT\textsuperscript{74}

In terms of section 25(2)(d) of the Interim Constitution, every arrested person had the right to be released with or without bail, unless the interests of justice required otherwise.\textsuperscript{75}

After coming into operation of the Interim Constitution, The courts were criticised for granting bail too readily. On the other hand, it could be argued that the courts were merely responding to the fact that, according to section 25(2)(d) of the Interim Constitution referred to above, the applicant persons enjoyed a constitutionally entrenched right to be released on bail and the State bore the burden of proving that the applicant should not be so released.\textsuperscript{76}

\textsuperscript{70} Van Der Berg *Bail A Practitioner’s Guide* 3ed 64.
\textsuperscript{71} Van Der Berg *Bail A Practitioner’s Guide* 2ed 55.
\textsuperscript{72} *S v Mbele and Another* 1996 (1) SACR 212 (W) 215d.
\textsuperscript{73} Landsdown *South African Criminal Law and Procedure* (1982) Vol V.
\textsuperscript{74} 75 of 1995.
\textsuperscript{75} Van Der Berg *Bail A Practitioner’s Guide* 2ed 57.
\textsuperscript{76} Cowling “The incidence and nature of an *onus* in bail applications” 2002 SACJ 176.
The following cases decided in the Witwatersrand Local Division are used to illustrate the challenges brought about by the need to interpret the provisions of section 25(2)(d) of the Interim Constitution.

In the case of *Magano and Another v Magistrate Johannesburg and Others*\(^{77}\) the applicant approached the high court on the grounds of urgency contending that their rights to bail, as was stipulated in section 25(2)(d) of the Interim Constitution had been affected by a postponement granted by the magistrate. In granting rule *nisi* the high court held that the applicant did not bear the *onus* to prove that he or she should be released from detention, but that the State is required to show that he or she should be refused such bail because the interests of justice require it.\(^{78}\)

On the return day, the high court held that the *onus* in bail applications had been reversed since the coming into operation of the Interim Constitution, and that now the *onus* rests with the State in bail applications.

In *Prokureur-Generaal van die Witwatersrandse Plaaslike Afdeling v Van Heerden en Andere*,\(^{79}\) the State appealed to the High Court against the decision of the Regional Court in a bail application where it was decided that the State bore the *onus* of showing that the applicant should not be released on bail and that the State had to prove that on a balance of probabilities.

The court, in interpreting the provisions of section 25(2)(d) of the Interim Constitution, was of the view that when an arrested person appeared in court, he or she had to be released unless fairness stood in his or her way. It further held that this required that the state had to take the initiative to place indications before the court why justice demanded that the person in question ought not to be released, but it did not indicate that the State had to be saddled with the whole burden of showing that the interests of justice were stronger than the claims of the person in question.\(^{80}\)

---

\(^{77}\) 1994 (2) SACR 304 (W).

\(^{78}\) 1994 (2) SACR 469 (W) 306 g-j.

\(^{79}\) 1994 (2) SACR 469 (W).

\(^{80}\) 1994 (2) SACR 469 (W) 471 a-b.
In *Ellish en Andere v Prokureur-Generaal WPA*, the appellants were charged with 20 counts of murder and 190 counts of attempted murder. The appellants noted an appeal against the refusal of bail.

It is of great importance to note that this case was decided before the enactment of the Criminal Procedure Second Amendment Act. It terms of such amendment the offences would fall squarely within the ambit of Schedule 5.

The point in *limine* was whether the regional magistrate had erred in placing the burden of proof on the State in the bail application. The court held that at bail application proceedings there could be no question of a burden of proof. In its interpretation of section 25(2)(d) of the Interim Constitution, the court held that it was required of the State to commence with the presentation of evidence.

On the other hand it is imperative to refer to the dissenting minority views of Southwood J on the question of *onus* in bail applications. He disagreed with the majority on the point that section 25(2)(d) of the Interim Constitution did not create an *onus*. He was of the view that the *onus* is on the State. He was further of the view that it could not be expected of the arrested person who has a right to be released from detention with or without bail to prove that his or her release is not contrary to the interests of justice or that the interests of justice do not require his or her release. In his view this has to be shown by the person who, or authority which seeks his or her continued detention in the face of such right.

The above three cases from the same High Court division illustrate inconsistence that existed with regard the correct interpretation of the section. The legislature intervened by inserting section 60(11) into the Criminal Procedure Act as it will be indicated below.

---

81 1994 (2) SACR 579 (W) 580i-j.
82 75 of 1995.
83 1994 (2) SACR 579 (W) 595b-j.
3.2.3 THE INTERIM CONSTITUTION AND THE EFFECT OF THE CRIMINAL PROCEDURE SECOND AMENDMENT ACT\textsuperscript{84}

The Criminal Procedure Second Amendment Act included a new section 60(11) which provided as follows:

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

(a) in Schedule 5;
(b) in Schedule 1, which was allegedly committed whilst he or she was released on bail in respect of a Schedule 1 offence, 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, satisfies the court that the interests of justice do not require his or her detention in custody.”

In \textit{S v Mbele}\textsuperscript{85} the court was required to consider an appeal from the Magistrate’s court where bail was refused. The consideration of such an appeal had to take into account, for the first time, the effect of section 60(11) as introduced by the Criminal Procedure Second Amendment Act. The consideration had to be done in the light of the provisions of section 25(2)(d) of the Interim Constitution. The appellant was charged with murder and robbery with aggravating circumstances. In its approach the court also considered the Magano\textsuperscript{86} the \textit{Prokureur-generaal van die Witwatersrandse Plaaslike Afdeling}\textsuperscript{87} and the Ellish\textsuperscript{88} cases that were decided before the enactment of the Criminal Procedure Second Amendment Act.\textsuperscript{89}

The word “unless” as was used in section 25(2)(d) of the Interim Constitution came under scrutiny. It was held that in interpreting a statutory provision the court is to have regard to the spirit, purport and objects of Chapter 3 of the Interim Constitution. The court described section 25(2)(d) of the Interim Constitution as “neutral”.

The court came to the conclusion that section 25(2)(d) of the Interim Constitution did not deal with the question of \textit{onus} at all. It was of the view that section 25(2)(d) by

\begin{footnotesize}
\begin{itemize}
\item[84] 75 of 1995.
\item[85] 1996 (1) SACR 212 (W).
\item[86] 1994 (2) SACR 304 (W) 215.
\item[87] 1994 (2) SACR 469 (W) 216.
\item[88] 1994 (4) SA 835 (W) 216.
\item[89] 75 of 1995.
\end{itemize}
\end{footnotesize}
implication meant that every person arrested for the alleged commission of the
offence had a fundamental right to approach a court to determine, in accordance with
the laws relating to bail, whether pending the trial, the interests of justice will be
served by the continued detention or by the release of the applicant.90

The court held that there was no conflict between section 25(2)(d) of the Interim
Constitution and section 60(11) of Criminal Procedure Act. It further held that where
section 60(11) was applicable, the matter had to be adjudicated on the question
whether the applicant had discharged the onus placed on him by section 60(11).

The court concluded that the Magano case was wrongly decided hence it was not
followed in the two Witwatersrand Local Division cases.91

In S v Shezi92 the court made a distinction between a duty to begin in bail
applications and an onus of proof in bail applications. It held that before there could
be an onus on an accused in terms of section 60 to satisfy the court, the State had to
show that the applicant was charged with an offence mentioned in Schedule 5, or in
Schedule 1 which had allegedly been committed whilst he or she was on bail in
respect of a Schedule 1 offence. Where the bail applicant was charged with an
offence mentioned in Schedule 5, the onus was accordingly on the applicant to
satisfy the court that the interests of did not require his or her detention.

Section 4(g) of the Criminal Procedure Second Amendment Act93 inserted a provision
which is now contained in section 60(11A)(c) of the Criminal Procedure Act. It states
that whenever a question arises in a bail application or during bail proceedings
whether any person is charged or is to be charged with an offence referred to in
Schedule 5 or 6, a written confirmation issued by an Director of Public Prosecutions
under paragraph (a) of the same section shall, upon its mere production at such bail
application or proceedings, be prima facie proof of the charge to be brought against
that person.

90  S v Mbele and Another 1996 (1) SACR 2012 (W) 234c-d.
91  S v Mbele and Another 1996 (1) SACR 2012 (W) 216a-b.
92  1996 (1) SACR 715 (T).
93  85 of 1997.
The above section 60(11A)(c) gave section 60(11) of the Criminal Procedure Act procedural power by providing for a mechanism to establish when a Schedule 5 or 6 is at stake. A further discussion of these two Schedules will be dealt with in the next chapter.

It is apparent from the decided case law that after the insertion of section 60(11) into the Criminal Procedure Act, the onus is still on the applicant, as it was the case before the introduction of the Interim Constitution, to satisfy the court that the interests of justice permit the applicant’s release.

The question that had to be answered for clarity as far as onus was concerned, related to the offences falling outside the ambit of section 60(11) of the Criminal Procedure Act.

In S v Vermaas, the court referred to the provisions of section 60(1)(a) of the Criminal Procedure Act which provides any bail applicant in custody with an entitlement to be released on bail if the court is satisfied that the interests of justice permit, subject to the provisions of section 50(6) of the same Act. The court interpreted the words to create an onus upon the party that asserts that the applicant should not be released on bail, and that is the State.

There is no clear or implied provision in the Criminal Procedure Act that the applicant should bear the burden of proof in cases falling outside the ambit of section 60(11) of the same Act. The approach adopted in the Vermaas case is supported.

Most of offences not referred to Schedule 5 and 6 are less serious offences, the lack of direct or implied provision in the Criminal Procedure Act that the applicant bears the onus must be interpreted for the benefit of the applicant in bail proceedings. This will be in line with the principle that he or she who alleges must prove. If the state

---

94 Dlamini and Others 1999 (2) SACR 51 (CC) 65 15.
95 1996 (1) SACR 528 (T).
alleges that a particular applicant is not suitable for the release on bail for an offence not referred to in Schedule 5 and 6 of the Criminal Procedure Act, the state must prove why such refusal will be in the interests of justice.

3.2.4 THE ONUS OF PROOF IN BAIL PROCEEDINGS AND THE FINAL CONSTITUTION

The Constitution commenced on 4 February 1997. Section 35(1)(f) of the Constitution provides that everyone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit subject to reasonable conditions.

The Criminal Procedure Second Amendment Act, in section 4(f) brought some changes that divided section 60(11) of the Criminal Procedure Act into two paragraphs. It is important to note that section 60(11)(a) of the Criminal Procedure Act relates to Schedule 6 offences while section 60(11)(b) relates to Schedule 5 offences. Each of the paragraphs has a different effect on the onus of proof borne by the applicant in bail applications and each effect will be discussed separately in the next Chapter.

Section 60(11) of the Criminal Procedure Act provides as follows:

“Nowithstanding 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.”

97 85 of 1997.
In *S v Tshabalala*\textsuperscript{98} the full bench held that it was difficult to avoid the conclusion that section 60 of the Criminal Procedure Act cast some kind of *onus* or burden of proof on the State or the applicant for bail especially in opposed matters. It was concluded that in cases not covered by section 60(11), there had to be a practical burden on the prosecution to adduce evidence or furnish information to show that a “likelihood” as envisaged in section 60(4) existed.

It is submitted that the *Tshabalala* principle echoed the approach adopted in the *Vermaas* case in the interpretation of section 60(1)(a) of the Criminal Procedure Act as discussed above.

The constitutional validity of section 60(11)(a) and (b) of the Criminal Procedure Act was challenged in *S v Dlamini*\textsuperscript{99} where among others it was contended that it constituted an infringement of the liberty right protected under section 35(1)(f) of the Constitution. The court in *Dlamini*\textsuperscript{100} stated that the lawgiver makes it plain that a formal *onus* rests on the applicant in custody to satisfy the court and the predetermined starting point that continued detention is the norm.

When the court dealt with the question of *onus* it held that the *onus* in bail applications did not carry the risk of conviction. All the section does is to place on the applicant, in whose knowledge the relevant factors lie, an *onus* to establish them in a special kind of interlocutory proceedings which are designed to make an informed prognoses.

Cowling\textsuperscript{101} argued that in context of bail applications, the *onus* could well become a shield behind which the courts could hide in order to avoid having to make correct decisions. He argued that where the applicant bears the *onus*, instances are likely to arise where he or she should have been released but was not purely on the basis of having failed to discharge the *onus*. With reference to where the *onus* is borne by the State he regarded the case of *Carmichelle v Minister of Safety and Security*\textsuperscript{102} as

\textsuperscript{98} 1998 (2) SACR 259 (C).
\textsuperscript{99} 1999 (2) SACR 51 (CC) 82 58.
\textsuperscript{100} 1999 (2) SACR 51 (CC) 85 61.
\textsuperscript{101} Cowling 2002 SACJ 176 205-206.
\textsuperscript{102} 2001 (1) SA 489 (SCA).
evidence of the dire consequences that might follow when it was perceived that the onus rested on the State. He concluded that there is no need in bail applications to superimpose a series of onuses in order to effectively embrace the advent of constitutionalism. In his view, any reference to onus in bail proceedings should be deleted and that will eliminate all the confusion around the issue of bail. The question of onus is not merely academic, it impacts on bail applications on daily basis.

On the other hand, Ballard argued that the present system places the onus on the applicant to bring a fresh application for bail on additional facts. In S v Petersen the court pointed out that in a second application for bail, the applicant relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, first, that such facts are indeed new and, secondly, that they are relevant for purposes of the new bail application. They must not constitute a reshuffling of old evidence or embroidering upon it. The court went further to state that the purpose of adducing new facts is not to address problems encountered in the previous application or to fill gaps in the previously presented evidence.

This approach fails to acknowledge the limited information available to the applicant and the general duty on the State to show that detention is, at all times, proportional to the reasons it can provide to support it. It is argued that a system of mandatory review is not only a check on unnecessary delays, but reduces to some extent the burden on the applicant of finding “new facts” with which to present a new bail application. The European court of Human Rights (ECHR) states that a prosecuting authority cannot simply rely on formulaic reasons. The State must be transparent and additional reasons must be supplied to the court should the State seek to argue in favour of continued detention. He is supportive of the view that mandatory review procedures and custody time limits are necessary.

103 Cowling 2002 SACJ 176 205.
104 Ballard “A statute of liberty? The right to bail and a case for legislative reform” 2012 SACJ 24.
105 2008 (2) SACR 355 (CPD).
106 Ballard 2012 SACJ 24 36.
107 Ballard 2012 SACJ 24 36-37.
The Correctional Services Amendment Act\textsuperscript{108} in section 49G is a commendable effort on the part of the Department of Correctional Services to prevent the lengthy detention of the remand detainees.\textsuperscript{109} This section places a legal duty on the head of a remand facility to report to the relevant Director of Public Prosecutions at six months intervals for those who have been in custody for more than two years.

It is argued that the section may be a useful tool for the applicant in cases where bail was refused in the initial bail application. The lengthy period of incarceration without commencing with trials, may in certain circumstances, especially where the state cannot justify delays, be viewed as exceptional or against the interests of justice.

Despite some criticism of the provisions of section 60(11)(a) and (b) of the Criminal Procedure Act and the decision of the Constitutional court in \textit{Dlamini}, it is now settled law\textsuperscript{110} that the section burdens the applicant with \textit{onus} of proof in applications and renewed applications of such Schedules.

3.3 THE STANDARD OF PROOF IN BAIL APPLICATIONS

In the past the \textit{onus} was upon the applicant for bail to show that he or she should be released and that had to be done on a balance of probabilities.\textsuperscript{111} The same legal principle was echoed in \textit{S v Viljoen}.\textsuperscript{112}

The balance of probabilities is a standard of proof applicable in civil proceedings as opposed to the criminal proceedings. The application of a civil standard of proof in bail proceedings is in line with the principle in \textit{Dlamini} that bail hearing is a unique judicial function and interlocutory. The standard of balance of probabilities applies both to the applicant and the State.

\textsuperscript{108} 5 of 2011.
\textsuperscript{109} Ballard 2012 \textit{SACJ} 24.
\textsuperscript{110} Van Der Berg \textit{Bail A Practitioner’s Guide} 3ed 92.
\textsuperscript{111} Lansdown \textit{South African Criminal Law and Procedure} Vol V 324.
\textsuperscript{112} 2002 (2) \textit{SACR} 550 (SCA).
3.4 CONCLUSION

In this Chapter the historical background of the *onus* of proof in bail proceedings was analysed. It has been shown through case law that the question of *onus* of proof in bail applications had been long recognised in South Africa before introduction of the Interim Constitution. The *onus* of proof in bail proceedings was not provided for in the statute book, but the case law recognised such *onus* of satisfying the court that the interests of justice permitted the applicant’s release.

After the introduction of the Interim Constitution, some courts in interpreting section 25(2)(d) of the Interim Constitution took the view that the *onus* of proof in bail proceedings was placed on the State. Different divisions of the High courts could not reach unanimous interpretation of the section. This became explicit from the three cases referred to above from the same division of the High court, that is, Witwatersrand Local Division.

In 1995 a new sub-section (11) was inserted by Criminal Procedure Second Amendment Act\(^{113}\) into section 60 of the Criminal Procedure Act which placed the *onus* on the applicant to satisfy the court that it is in the interests of justice to be released on bail. The case law discussed showed that the accused, based on the new section, bears the *onus* of proof in bail applications. The same position was confirmed by the Constitutional court in the *Dlamini* case where section 60(11)(a) and (b) of the Criminal Procedure was challenged.

The current legislation and the case law place the *onus* on the applicant in Schedule 5 and 6 offences. In cases falling outside the ambit of Schedule 5 and 6 even though there is no direct statutory provision, the case law point out that the state bears such *onus*. All courts are unanimous that in South Africa the standard of proof in all bail applications is the balance of probabilities.

In the next chapter the nature of *onus* of proof in Schedule 5 and 6 will be examined.

\(^{113}\) 75 of 1995.
CHAPTER 4
THE NATURE OF ONUS OF PROOF IN SCHEDULE 5 AND 6 OFFENCES

4.1 INTRODUCTION

In the previous chapter it was established that in all bail applications falling within the ambit of Schedule 5 and 6 the onus is on the applicant. In this Chapter the requirements for release on bail set out in section 60(11)(a) and (b) of the Criminal Procedure Act will be discussed. The concepts “interests of justice” and “exceptional circumstances” in the context of bail will be discussed. The statutory provisions will be discussed in the light of case law. The critical opinions of writers on section 60(11) of the Criminal Procedure Act will be considered. For purposes of convenience, section 60(11)(b) that relates to Schedule 5 offences will be discussed first.

4.2 THE DETERMINATION OF SCHEDULE 5 AND 6 OFFENCES IN BAIL APPLICATIONS

It is now settled law that the section saddles the applicant with the onus of proof where he or she is charged with offences listed under Schedule 5 or 6.\textsuperscript{114}

It is clear that Schedule 5 includes offences referred to in Schedule 1 where the applicant has been previously convicted of an offence referred to in Schedule 1 or where an applicant is charged with an offence referred to in Schedule 1 which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1.

Schedule 1 previous conviction and a current charge on Schedule 1 equals to Schedule 5 offence. A release on bail on a Schedule 1 offence and a current charge on Schedule 1 offence equals to Schedule 5 offence. In practical terms the above means Schedule 1 + 1 = 5 offence.

\textsuperscript{114} Van Der Berg \textit{Bail A Practitioner’s Guide} 3ed 92.
Schedule 5 previous conviction and a current charge on Schedule 5 equals to Schedule 6. Release on bail on a Schedule 5 or 6 offence and current charge on Schedule 5 or 6 equals to Schedule 6. In practical terms the above means Schedule 5 + 5 = 6; Schedule 5 + 6 = 6 and Schedule 6 + 6 = 6 offence.

In terms of section 60 the State has to show that the applicant is charged with an offence referred to in Schedule 5 or 6. It was also pointed out that the provisions of section 60(11A)(c) of the Criminal Procedure Act state that a written confirmation issued by the Director of Public Prosecutions becomes a *prima facie* proof of the charge concerned which helps in determining the relevant Schedule.

Apart from the above, the provisions of section 60(11B)(a) of the Criminal Procedure Act places a legal duty on the applicant and his or her legal adviser by compelling them to inform the court whether the applicant has previous convictions and if there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges. This section saddles both the accused and the attorney with a positive duty to disclose and that assists in the determination of the Schedule to be faced by the applicant.

In terms of section 60(11B)(d) of the Criminal Procedure Act applicant who wilfully fails or refuses to comply with the provisions of paragraph (a) or furnishes false information to the court shall be guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding two years.

**4.3 SECTION 60(11)(b) OF THE CRIMINAL PROCEDURE ACT**

In terms of the above section, the court must order that the accused be detained in custody until he or she is dealt with in accordance with the law. It is to be noted that the section goes further to put an exception by using the word “unless”. It requires that the accused should be given a reasonable opportunity to adduce evidence which satisfies the court that the interests of justice permit his or her release. What the section requires of the accused is to establish that the interests of justice permit his

---

115 S v Shezi 1996 (1) SACR 715 (T).
or her release. The interests of justice that must be established by the accused are discussed below.

4.3.1 THE INTERESTS OF JUSTICE

In *S v Dlamini*116 the Constitutional court described the term “the interests of justice” as a useful tool denoting in broad and evocative language a value judgment of what would be fair and just to all concerned. The court pointed out that while its strength lies in its success, it is also its potential weakness. The court further stated that its content depends on the context and applied interpretation.

In the context of bail proceedings the provisions of section 60(4)(a) to (e) of the Criminal Procedure Act are of paramount importance relating to the *onus* on the applicant. They provide for grounds upon which the interests of justice do not permit the release from detention of an applicant.

Where it is established that there is a likelihood that if the applicant were released he or she will endanger the safety of the public or any particular person or will commit a Schedule1 offence; or

Where there is the likelihood that the applicant, if he or she were released on bail will attempt to evade his or her trial; or

Where there is the likelihood that the applicant, if he or she were released on bail, will attempt to influence; or intimidate witnesses or to conceal or destroy evidence; or

Where there is the likelihood that the applicant, 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.

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.

116 1999 (2) SACR 51 (CC) 46.
It is submitted that the above provisions are similar to the bail principles set out in the case of *Acheson*. With regard to section 60(4)(a) above a person who commits same or similar offence to the one with which he or she is charged while on bail shows not only disregard for the rule of law, but contempt for the administration of justice as well. In such cases the onus is on the accused to satisfy the court that there is no likelihood of any repetition if granted bail.

In *Schietekat* the court declared section 60(4) to (9) inclusive of subsection (11B)(c) of the Criminal Procedure Act invalid to the extent of their inconsistency with the Constitution. When the Constitutional court considered various appeals in *Dlamini* including *Schietekat*, the court described section 60(4)(a) to (e) as a conveniently tabulated form of a check list of the main criteria to be considered against the grant of bail. The court then proceeded to describe section 60(5) to (8A) of the Criminal Procedure Act as itemised considerations that may be taken into account when section 60(4)(a) to (e) are considered.

Section 60(9)(a) to (g) of the Criminal Procedure Act provides a criteria that must be adopted by the court in weighing the interests of justice towards the grant of bail.

The court is required to consider the prejudice the applicant is likely to suffer, if he or she were to be detained in custody, taking into account where applicable, the following factors: the period already spent in detention since his or her arrest; the period of incarceration before the finalisation of the case; the reasons for the delay in the disposal of the trial and any faults attributed to the accused for such delays; financial loss to be suffered by the applicant as a results of such incarceration; any impediments in his or her preparation for defence or delays in obtaining legal representatives; the applicant’s state of health or any other factor which in the opinion of the court should be taken into account.

---

117 1991 (2) SA 805 (NmHC) 822-823.
118 Attorney General, Zimbabwe v Phiri 1988 (2) SA 696 (ZH).
119 1998 (2) SACR 707 (C).
120 1999 (4) SACR 51 (CC) 76.
121 *Dlamini* 1999 (2) SACR 51 (CC) 76.
The court in *Dlamini*\(^{122}\) interpreted section 60(9) as providing a list of personal criteria pointing towards the grant of bail.

It is argued that section 60(3) of the Criminal Procedure Act becomes of great importance in the bail proceedings falling under section 60(11). It empowers the court, if it is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, to order that such information or evidence be placed before it.

In *S v Mpofana*\(^{123}\) the magistrate failed to obtain the relevant information in terms of section 60(3) of the Criminal Procedure Act. On appeal the High court held that the magistrate’s failure to obtain such relevant information meant that the decision to refuse bail was arrived at on the strength of insufficient information. The court pointed out that the magistrate erred in its approach and ordered that the case be remitted to the magistrate to enable her to consider invoking the provisions of section 60(3) of the Criminal Procedure Act. It is clear that despite the *onus* on the applicant, the court is also under a legal duty to call for information where it is lacking.

In *S v Mabena*\(^{124}\) the court stated that in a bail enquiry a court is afforded greater inquisitorial powers, but those powers are afforded so as to ensure that all material factors are brought to account, even when they are not presented by the parties, and not to enable a court to disregard such factors.

### 4.4 THE NATURE OF ONUS IN TERMS OF SECTION 60(11)(a) OF THE CRIMINAL PROCEDURE ACT

The provisions of section 60(11)(a) of the Criminal Procedure Act were quoted in the previous chapter and will not be repeated. Where the court deals with a Schedule 6 offence it must make an order that the applicant 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

---

\(^{122}\) 1999 (2) SACR 51 (CC) 76 43.
\(^{123}\) 1998 (1) SACR 40 (Tk).
\(^{124}\) 2007 (1) SACR 482 (SCA) 487b-c.
exceptional circumstances exist which in the interests of justice permit his or her release.

In *S v C*\(^{125}\) it was emphasised that a court that is seized of a matter involving a Schedule 6 offence, must exercise exceptional care when considering the usual circumstances.

It is argued that the burden of proof under section 60(11)(a) of the Criminal Procedure Act is ostensibly no different from that which applies in terms of section 60(11)(b) of the Criminal Procedure Act save that the nature of the evidence presented should show exceptional circumstances.\(^{126}\)

After the Criminal Procedure Second Amendment Act\(^{127}\) became operational, various divisions of the High court dealt with numerous appeals relating to the term exceptional circumstances. Even though various attempts were made to define the term, little harmony exists with regard to the meaning of the phrase “exceptional circumstances”.\(^{128}\)

Accused persons throughout South Africa are still saddled with the *onus* of proof in bail proceedings to prove that exceptional circumstances exists in their individual applications which justify their release in the interests of justice. It is still a challenge for many bail applicants in the Republic to understand what is meant by exceptional circumstances.

### 4.4.1 EXCEPTIONAL CIRCUMSTANCES

In *S v Mokgoje*\(^{129}\) the court held that “exceptional circumstances” could not be precisely defined and that it depended on the facts of each case, however the concept referred to circumstances which were unique, unusual, rare, and peculiar. Everyday or general occurring circumstances could never be described as

---

125. 1998 (2) SACR 721 (C) 722.
126. Van Der Berg *Bail A Practitioner’s Guide* 3ed 97.
129. 1999 (1) SACR 233 (NC).
exceptional. In this case the fact that the appellant’s business was being prejudiced by the reason of his detention could not be regarded as exceptional. It should to be kept in mind that this case was decided before the Dlamini case.

The case of S v Jonas\(^{130}\) is one of the most followed decisions for its approach on the issue of exceptional circumstances.\(^{131}\) The court stated that the term “exceptional circumstances” is not defined and therefore there can be as many circumstances which are exceptional as the term in essence implies. An urgent serious medical operation, terminal illness or cast-iron alibi pointing to the fact that the applicant could not have committed the offence may be regarded as exceptional circumstances in certain cases.\(^{132}\)

In S v Mauk\(^{133}\) the court pointed out that it is a misdirection to adopt one or more of the following approaches in considering whether or not the applicant has succeeded in proving the exceptional circumstances:

(a) To require that the State’s case must be exceptionally weak before exceptional circumstances can be found to exist;

(b) To require a higher degree of proof of the applicant than proof on a balance of probabilities;

(c) To give no consideration to the need for the State to adduce rebutting evidence.\(^{134}\)

The court went on to state that the applicant will succeed in proving exceptional circumstances if he or she is able to show, by adducing acceptable evidence, that the State’s case against him was non-existent or subject to serious doubt. Where the

\(^{130}\) 1998 (2) SACR 677 (SEC).

\(^{131}\) S v Mauk 1999 (2) SACR 479 (WPA); Van Wyk 2005 (1) SACR 41 (SCA); S v Yanta 2000 (1) SACR 237 (TkH); S v Mabena and Another 2007 (1) SACR 482 (SCA); S v Viljoen 2002 (2) SACR 550 (SCA); S v Vanqa 2000 (2) SACR 371 (TkHC); S v DV and Others 2012 (2) SACR 492 (GNP); S v Mohammed 1999 (2) SACR 507 (CPD).

\(^{132}\) 1999 (2) SACR 479 (WPA).

\(^{133}\) 1999 (2) SACR 479 (WPA).

\(^{134}\) 1999 (2) SACR 479 (WPA) 482B.
applicant’s evidence stands alone, then the suggestion that the State’s case is non-existent or doubtful becomes almost a foregone conclusion. The fact that the evidence before court is infused with probabilities indicating that the applicant may have been falsely implicated, especially where the State has adduced no significant rebutting evidence can scarcely be regarded as anything other than exceptional.\textsuperscript{135}

It is important that the \textit{Mauk}’s decision be considered in the light of \textit{Mathebula v S}\textsuperscript{136} where the Supreme Court of Appeal pointed out that the State’s case that is supposed in advance to be frail, may nevertheless sustain proof beyond reasonable doubt. The court emphasised that in order to successfully challenge the merits of such a case in bail proceedings an applicant needs to go further: he or she must prove on a balance of probability that he or she will be acquitted of the charge. An attack on the State’s case does not amount to the discharge of the onus. The court confirmed the decision of \textit{S v Viljoen}\textsuperscript{137} and held that until an applicant has set up a \textit{prima facie} case of the prosecution failing, there is no call on the State to rebut his or her evidence to that effect.

It is argued that where the applicant relies on \textit{alibi} defence in bail proceedings, as pointed out in \textit{Mauk} above, it must be supplemented by evidence or other objective probabilities to strengthen it. The applicant’s unsupported \textit{alibi} defence is vulnerable.\textsuperscript{138}

The fact that a sentenced person has been granted a leave to appeal does not constitute an exceptional circumstance. What is exceptional cannot be defined in isolation from the relevant facts, save that the legislature clearly had in mind circumstances which remove the bail applicant from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the legislature has attached to the commission of Schedule 6 offences.\textsuperscript{139}

\textsuperscript{135} 1999 (2) SACR 479 (WPA) 482C.
\textsuperscript{136} 2010 (1) SACR 55 (SCA) 11-12.
\textsuperscript{137} 2002 (2) SACR 550 (SCA) 561f-g.
\textsuperscript{138} \textit{Mathebula v S} 2010 (1) SACR 55 (SCA) 11.
\textsuperscript{139} \textit{S v Bruintjies} 2003 (2) SACR 575 (SCA) 577e-f.
In *Dlamini*\(^{140}\) the court stated that in requiring that the circumstances proved must be exceptional, subsection 60(11)(a) does not determine that they must be circumstances above and beyond and generally different from those enumerated in section 60(4) to (9) of the Criminal Procedure Act.

In *S v Vanqa*\(^{141}\) circumstances which are of an ordinary nature to bail applications may in the context of a particular case be exceptional or unusual. The applicant for bail in such cases is not required to prove the existence of factors different to the normal considerations listed in section 60(4) to (9) as discussed above. What is required of applicant is to show that such usual or common factors are in his or her case blended with an element of exception or difference.

Importantly in *Vanqa* the court held further that the approach by the applicant to establishing whether exceptional circumstances had been proven involves two fold enquiry:

(a) The first one enjoins the applicant to establish that his or her circumstances are exceptional in the sense envisaged in section 60(11)(a) of the Criminal Procedure Act.

(b) The second is that he or she was required to prove that such circumstances justify, in the interests of justice, that bail be granted.

The approach adopted in *S v Vanqa* in determining whether exceptional circumstances were proven is supported and it reflects a correct understanding of the *Dlamini* judgment.\(^{142}\)

In *S v Peterson*\(^{143}\) the court held that when, in an application for bail, the special circumstances relied on by the applicant include the constitutionally protected interests of a minor child, the court must, in terms of section 28(1)(b) of the

\(^{140}\) 1999 (2) SACR 51 (CC) 89 76.

\(^{141}\) 2000 (2) SACR 371 (Tk).

\(^{142}\) Van Der Berg *Bail A Practitioner's Guide* 3ed.

\(^{143}\) 2008 (2) SACR 355 (CPD).
Constitution take cognisance of the child’s right to family care or parental or appropriate alternative care when removed from the family environment. The court emphasised however that that does not mean that such interests will simply override all other legitimate interests, such as the interests of justice or the public interests.

In *S v Mazibuko and Another* the court stated that for a circumstance to qualify as sufficiently exceptional to justify the applicant’s release on bail, it must be one which weighs exceptionally and heavily in favour of the applicant, thereby rendering the case for the release on bail exceptionally strong or compelling.

The court above proceeded to question and reject the notion that the “ordinary circumstances” may constitute “exceptional circumstances”. In doing so it is argued that the court erred in its reading of *S v Dlamini* by the Constitutional Court.

It is argued that the use of the words “heavily in favour of the accused” adds unnecessary weight to the *onus* already placed on the applicant by section 60(11) of the Criminal Procedure Act. In *S v C* the court pointed out that when a statute imposes a restriction or a burden upon an individual, the common law requires that the words of the legislature must be interpreted so that the person to whom they apply is minimally burdened. It is submitted that the guidelines provided by the legislature in section 60(4) to (8) provide a useful reference, particularly when it is borne in mind that those reflect the “ordinary circumstances” to which the court referred to in *S v C*.

It is further argued that in *Dlamini* the court pointed out that a bail applicant is given a broad scope to establish the requisite circumstance, whether they relate to the nature of the crime, the personal circumstances of the applicant or anything else that is particularly cogent. Each case may show its peculiar circumstance which may vary from the ordinary or general to the unique.

---

144 2010 (1) SACR 433 (KZP).
145 Van Der Berg *Bail A Practitioner’s Guide* 3ed 100.
146 1998 (2) SACR 721 (C).
147 Van Der Berg *Bail A Practitioner’s Guide* 3ed 100.
148 1999 (2) SACR 51 (CC) 89 75.
149 Van Der Berg *Bail A Practitioner’s Guide* 3ed 101.
After the decision of *Mathebula v S*\(^{150}\) there has been a lot of confusion regarding the *onus* borne by the applicants in bail applications. Some courts harbour under the misconception that in each case where Schedule 6 is applicable, the applicant must prove on a balance of probabilities that he or she will be acquitted at trial.\(^{151}\) It is argued that the proof of acquittal becomes relevant when the accused attacks the strength of the state case in his or her bail application.

As pointed out in *S v Vanqa*,\(^{152}\) that once the exceptional circumstances are proven, the applicant must further prove that such circumstances justify in the interests of justice, that bail be granted in his or her favour. It is submitted that in proving the second leg of the enquiry under section 60(11)(a) of the Criminal Procedure Act, that is, the interests of justice, under section 60 (11) (b) of the Criminal Procedure Act, the discussion in 4.3.1 above applies and will not be repeated.

In cases where a child in conflict with the law has been arrested for an offence falling within Schedule 5 or 6, the provisions of the Child Justice Act\(^{153}\) must be considered. In terms of section 25(1) of Child Justice Act, Chapter 9 of the Criminal Procedure Act applies to an application for the release on bail of a child in conflict with the law, except for section 59 and section 59A of the Criminal Procedure Act, to the extent set out in section 21(2)(b) of the Child Justice Act.

It is submitted that in its deliberations the Child Justice Court, particularly with regard to the question whether the interests of justice permit the release of the applicant on bail, is enjoined to individuate its approach to the particular applicant before it in the same way it would be expected to do when sentencing a child in conflict with the law and to observe the principles and the true meaning of detention as a last resort and for the shortest time appropriate.\(^{154}\)

\(^{150}\) 2010 (1) SACR 55 (SCA).
\(^{151}\) Van Der Berg *Bail A Practitioner’s Guide* 3ed 105.
\(^{152}\) 2000 (2) SACR 371 (Tk)
\(^{153}\) 75 of 2008.
\(^{154}\) Van Der Berg *Bail A Practitioner’s Guide* 3ed 279.
It must be borne in mind that even where the offence allegedly committed by the child falls within the scope of Schedule 5 or 6, detention must be a last, and not a first, or even intermediate resort. When the child in conflict with the law is detained, detention must be only for the shortest appropriate period of time.\textsuperscript{155} This is line with the provisions of section 28(1)(g) of the Constitution and must be borne in mind even in Schedule 5 or 6 offences, where the child in conflict with the law applies for bail.

4.5 CONCLUSION

In this chapter it was shown that the applicant charged with a Schedule 5 offence must be given a reasonable opportunity to place evidence before court which will prove that the interests of justice permit his release on bail. The \textit{onus} rests on the applicant, once the State has proven that the offence falls within Schedule 5 or 6 offence. The relevant statutory provisions that must be considered in deciding whether the interests of justice permit release of the applicant were discussed. The relevant case law on the question of the interests of justice were considered.

The term exceptional circumstance was discussed. It was pointed out that it is not defined in the Criminal Procedure Act and no unanimous definition exists in the South African case law. This remains the case even though some endeavours were made by different jurisdictions of the High Courts, the Supreme Court of Appeal and the Constitutional Court to define the indefinable. It seems clear that the view of the Constitutional Court in \textit{Dlamini} that section 60(11)(a) of the Criminal Procedure Act does not say exceptional circumstances must be circumstances above and beyond and generally different from those enumerated in section 60(4) to (9) of the Criminal Procedure Act is a good precedent. It is submitted that the approach in \textit{S v Jonas},\textsuperscript{156} \textit{S v Vanqa},\textsuperscript{157} and \textit{Mathebula v S}\textsuperscript{158} is also correct if properly interpreted in light of the \textit{Dlamini}\textsuperscript{159} judgment.

\textsuperscript{155} Centre for Child Law v Minister of Justice and Constitutional Development 2009 (2) SACR 477 (CC) 31.
\textsuperscript{156} 1998 (2) SACR 677 (SEC).
\textsuperscript{157} 2000 (2) SACR 371 (Tk).
\textsuperscript{158} 2010 (1) SACR 55 (SCA).
\textsuperscript{159} 1999 (2) SACR 51 (CC).
In the following chapter the South African Bail law compared with the international law will be discussed.
CHAPTER 5
THE SOUTH AFRICAN BAIL LAW COMPARED WITH
INTERNATIONAL LAW

5.1 INTRODUCTION

South Africa was readmitted to the United Nations after its adoption of the Constitutional democracy in 1994. International law comes before our national courts in disputes between individuals or between individuals and the state. South African presiding officers are therefore required to apply principles of international law while sitting as a municipal court.\(^{160}\)

South Africa became a signatory to a number of international treaties, such as the UDHR and ICCPR. It also ratified a number of regional treaties under the auspice of the then Organisation of African Unity, now known as “African Unity”.

The emergence of an International system for the protection of human rights has some important substantive and normative implications to the field of international cooperation. For instance, it is argued that internationally protected human rights are directly applicable in all national legal systems that have ratified the United Nations Charter. Consequently, there should be no doubt that individuals are subjects as opposed to mere objects of the international law.\(^{161}\)

In this chapter important international treaties that informed and influenced the South African Bill of rights pertaining the right to liberty of the arrested, bail applicants and detained persons will be discussed. The importance accorded to the domestic laws where some of the international laws are applicable, for example, in cases of extraditions.


5.2 UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE USE BY THE INTERNATIONAL COMMUNITY

The UDHR provides that everyone has the right to life, liberty and the security of person. It provides further that everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has all the guarantees necessary for his defence.

5.3 ARREST AND DETENTION UNDER INTERNATIONAL LAW

Incidences of arbitrary arrest and detention have long been a matter of concern for the international community. Under international law there are a number of grounds upon which a person may be deprived of his or her liberty. These grounds include detention following conviction by a competent court; extradition, expulsion, or deportation; detention for medical reasons and detention on suspicion of a criminal offence.

It is argued that for the promotion and preservation of the rights of others, State authorities may elect to detain a suspect. This can be in order to prevent further offences being committed or in order to prevent flight or interference with material evidence or witnesses. Applicants for bail should normally be released on condition for the appearance in a specified court of law at a specified time. There is a clear need for substantial evidence to justify the detention in these circumstances. The provisions of the Rome Statute of the International Criminal Court become relevant.

5.4 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT AND SOUTH AFRICAN BAIL PROCEDURES

The Rome Statute of the International Criminal Court (ICC) came to force on 1 July 2002. Article 58, deals with the process of issuing of warrant of arrest or a summons.

---

162 Art 3 of the Universal Declaration of Human Rights of 1948.
163 Art 11(1) of the Universal Declaration of Human Rights of 1948.
165 Smith International Human Rights 242.
166 Smith International Human Rights 240.
to appear by the Pre Trial Chamber. It sets out all the relevant procedures concerning the authorisation of a warrant of arrest.

Article 59(3),\textsuperscript{167} provides that an arrested person shall have the right to apply to the competent authority in the custodial State for interim release pending surrender. In South Africa this is in line with the provisions of section 35(1)(f) of the Constitution\textsuperscript{168} read with the provisions of section 60(1)(a) of the Criminal Procedure Act\textsuperscript{169} which has been discussed in the previous chapters.

Article 59(4),\textsuperscript{170} goes on to state that in reaching a decision on any such application the competent authority in the custodial State shall consider whether, given the gravity of the alleged crimes, there are urgent and exceptional circumstances to justify interim release and whether necessary safeguards exist to ensure that the custodial State can fulfil its duty to surrender the person to the court.

The provisions of Article 59(4) relate to the provisions of section 60(11)(a) and (b) of the Criminal Procedure Act as discussed above. In terms of Article 59(4) of the ICC exceptional circumstances must exist to justify release as it is the case under section 60(11)(a) and (b) of the Criminal Procedure Act.\textsuperscript{171}

It is not open to the competent authority of the custodial State to consider whether the warrant of arrest was properly issued in accordance with article 58(1)(a) and (b).

The Pre Trial Chamber must be notified of any request for the interim release of a detained person and shall make recommendations to the competent authority in the custodial State. The competent authority in the custodial State shall give full consideration to such recommendations, including any recommendations on measures to prevent the escape of the person, before rendering its decision.\textsuperscript{172}

\textsuperscript{167} Rome Statute of the International Criminal Court.  
\textsuperscript{168} Act 108 of 1996.  
\textsuperscript{169} 51 of 1977.  
\textsuperscript{170} Rome Statute of the International Criminal Court.  
\textsuperscript{171} 51 of 1977.  
\textsuperscript{172} Art 59(5) of Rome Statute.
if the person is granted interim release, the Pre Trial Chamber may request periodic reports on the status of the interim release.\textsuperscript{173}

Article 66(1)\textsuperscript{174} provides that everyone shall be presumed innocent until proven guilty before the court in accordance with the applicable law, while article 66 (2),\textsuperscript{175} places the \textit{onus} on the Prosecutor to prove the guilt of the accused. Like the South African law position article 66(2) deals with the \textit{onus} to prove guilt and is more relevant to the trial stage than the bail stage.

In \textit{Prosecutor v Laurent Gbagbo},\textsuperscript{176} Mr Gbagbo (the applicant) applied for the interim release pursuant to article 60(2) of the Statute,\textsuperscript{177} which was refused on 19 July 2012. The applicant applied for review pursuant to article 60(3) of the Statute,\textsuperscript{178} where he submitted that his circumstances have changed since the decision on interim release and that, as a consequence, the conditions under article 58(1) of the Statute,\textsuperscript{179} were no longer fulfilled. In the alternative, he argued that the conditional release pursuant to rule 119 of the Rules,\textsuperscript{180} should be ordered. The decision on the review was made and the applicant was ordered to remain in detention.

The case of the \textit{Prosecutor v Charles Ghankay Taylor},\textsuperscript{181} is another example of the limitation of liberty of an accused by the International Criminal Court in The Hague.\textsuperscript{182}

It is submitted that the above ICC cases indicate that the \textit{onus} of proof in an application for interim release before the International Criminal Court is borne by the applicant. This is in line with South African position in bail proceedings.

\begin{footnotesize}
\vspace{1em}
\begin{tabular}{l}
\textsuperscript{173} Art 59(6) of Rome Statute. \\
\textsuperscript{174} Rome Statute of the International Criminal Court. \\
\textsuperscript{175} Ibid. \\
\textsuperscript{176} No. ICC-02/11-01/11 \\
\textsuperscript{177} Rome Statute of the International Criminal Court. \\
\textsuperscript{178} Ibid. \\
\textsuperscript{179} Ibid. \\
\textsuperscript{180} Rules of Procedure and Evidence to the Rome Statute of the International Criminal Court. \\
\textsuperscript{181} Case No.: SCSL-03-01-T. \\
\textsuperscript{182} Ibid. \\
\end{tabular}
\end{footnotesize}
5.5 EXTRADITION ACT\textsuperscript{183} AND BAIL

When someone who is wanted for a crime allegedly committed in a foreign country has fled to South Africa, the foreign State can ensure the appearance of the suspect before its own courts by the process of extradition.\textsuperscript{184} In South Africa the extradition process is governed by the Extradition Act. The amendment of the Extradition Act in 1996 introduced the right to apply for bail pending appeal against an extradition order. The right is contained in section 13(3) and (4) of the Extradition Act.

An extradition procedure works both on an international and domestic level. On the international level, a request from one foreign State to another, in this case South Africa, for the extradition of a particular individual and the response will be governed by the rules of public international law. Before the requested State may surrender the requested individual, there must be compliance with its own domestic laws.\textsuperscript{185} It is submitted that the South African domestic laws are subject to the supremacy of the Constitution.

Section 35(1)(f) provides everyone of the Constitution who is arrested for allegedly committing an offence with a right to be released from detention if the interests of justice permit subject to reasonable conditions. The domestic laws include the provisions of Chapter 9 which relates to bail proceedings and Chapter 20 which deals with preparatory examinations as envisaged in the Extradition Act of the Criminal Procedure Act.

It is submitted therefore that even in cases where the individual to be extradited applies for bail, the same principles regulating the presumption of innocence, determination of Schedules and \textit{onus} of proof in Schedule 5 or 6 offences are applicable as if the offence was committed in the Republic.

\begin{footnotesize}
\begin{enumerate}
\item[183] 67 of 1962 hereinafter referred to as “Extradition Act.”
\item[184] Van Der Berg \textit{Bail A Practitioner’s Guide} 3ed 286.
\item[185] \textit{Harksen v President of the RSA and Others} 2000 (1) SACR 300 (CC) 303.
\end{enumerate}
\end{footnotesize}
5.6 CONCLUSION

The international law recognises that a person’s freedom may be limited. The right to bail, the presumption of innocence and *onus* of showing exceptional circumstances for the interim release is well known under the Rome Statute of the International Criminal Court. This is in line with the South African bail jurisprudence as entrenched in the Constitution, Criminal Procedure Act and Child Justice Act.

In cases where an individual is to be extradited, the domestic laws must first be complied with. These include the right to apply for the release on bail. It is clear that even though the offences may have been committed elsewhere once a person is arrested in the Republic, he or she must be treated in terms of the domestic laws taking into consideration the international laws in place.

The South African bail jurisprudence, in line with international law, recognises and protects the right to bail where a person is arrested, it sets out procedures to be followed. It recognises the right to be presumed innocent until proven guilty by a court of law, and places the *onus* of proof on the bail applicant.

In the following chapter the conclusion will be made with reference to the previous chapters of this research.
CHAPTER 6
CONCLUSION

The research sets out the bail laws which were in place in the South African criminal justice system before the current provisions in the Criminal Procedure Act 51 of 1977. It sets out the approach of the courts where the issue of bail was brought before courts. There was no clear legislative framework that governed the grant or refusal of bail, the courts were largely guided by the decided case law. Even the provisions of section 99 of the Criminal Procedure and Evidence Act 31 of 1917 did not provide specific bail procedures for the release of the applicant on bail. Upon evaluating the decided case law that existed before the introduction of the Criminal Procedure Act 51 of 1977 and the Constitution Act 200 of 1994, it is clear that the right to liberty of a detained person was of paramount importance when the issue of bail was considered.

The internationally recognised presumption of innocence was and is still recognised in bail applications. Whenever the question of bail was considered, the presumption of innocence was always balanced with the interests of justice that encompassed a number of factors which had to be taken into account. The majority of cases decided before the Constitution maintained a similar standard that the presumption of innocence operated in favour of the applicant, even in cases where it was said that there was a strong *prima facie* case against him or her, but all cases emphasised the safeguarding of the interests of justice.

The current position with regard to the practice of presumption of innocence in bail proceedings is different. The courts in bail proceedings are not concerned with the question of guilt or innocence, but that of possible guilt. The Constitutional Court thus held in the *Dlamini* case that the right to be presumed innocent is not a pre trial right, but a trial right.

The issue of *onus* of proof in bail proceedings is also set out in this research. Before the introduction of the Bill of Rights as contained in interim Constitution, it was an accepted practice that in bail applications the applicant bore the *onus* of proving that
it was in the interests of justice to release him or her on bail. There was no
distinction in terms of Schedules as it is the case under the current Criminal
Procedure Act. The enactment of the interim Constitution brought about a new
challenge of interpreting the phrase of *onus* of proof, as it relates to bail proceedings.

The majority of courts interpreted section 25(2)(d) of the interim Constitution as
placing the *onus* on the State. Some courts decided that no *onus* was applicable in
bail proceedings. The lack of unanimity in the interpretation of the section was
cleared up by the enactment of the Criminal Procedure Second Amendment Act 75
of 1995, which squarely placed the *onus* in Schedule 5 offences on the accused.
The question of *onus* was further dealt with through the Criminal Procedure Second
Amendment Act 85 of 1997 which divided section 60 into subsection (11)(a) and (b)
of the Criminal Procedure Act 51 of 1977 and split them into Schedule 5 and 6. It is
the 1997 amendment that brought about the stringent requirements by introducing
section 60(11)(a) of the Criminal Procedure Act. Currently the case law confirms that
in all schedule 5 or 6 offences the applicant bears the *onus* of proof referred to
section 60(11)(a) and (b) of the Criminal Procedure Act of 1977.

In determining whether the interests of justice permit the release of a particular
applicant on bail the courts are guided by the provisions of section 60(4) to (9)
including subsection (11B)(c) of the Criminal Procedure Act 51 of 1977. This
approach passed the constitutionality test in *Dlamini*. Section 60(9)(a) to (g) are also
of paramount importance.

The term “exceptional circumstance” as envisaged in section 60(11)(a) of the
Criminal Procedure Act 51 of 1977 does not have a closed definition. It is accepted
that ordinary circumstances may in a particular context of bail application be
exceptional or unusual. Where the applicant in a bail application challenges the
strength of the state’s case, he or she is expected to prove on a balance of
probabilities that he or she will be acquitted of the charge.

South African bail jurisprudence as discussed in this research is in line with
international law and is constitutionally accepted as far as procedural fairness is
concerned, however there are still practical challenges that need to be addressed as
a results of the stringent requirements in section 60(11)(a) and (b) of the Criminal Procedure Act which relate to offences in Schedule 5 and 6.

It is therefore recommended that there is a need for the following:

1. Legislative intervention that will regulate and limit the time spent on investigation where bail has been refused;

2. Legislative intervention that will provide for an automatic review procedures in Schedule 5 or 6 offences where bail is refused on grounds that the interests of justice do not permit the release of the applicant on bail or for failure to prove exceptional circumstances;

   It is submitted that this may assist in reducing the refusals of bail based on mistaken understanding of the law or facts by lower courts or irregularities that may be prejudicial to the applicant or administration of justice; or

3. Legislative intervention that will make it mandatory for a court that refuses to grant bail to reconsider its decision after a certain period in future provided that the trial has not been commenced with. This will help the court to determine whether further incarceration is still necessary or proportionate to the offence alleged.

   It is submitted that this may assist the court to enquire into unreasonable delays on investigations or changed circumstances of the applicant in order to enable the court to reconsider its previous decision if necessary.

   This may further assist in offences where it is foreseeable that the trial court is likely to pass a partly or wholly suspended sentence in case of conviction. For example there are cases that fall within Schedule 5 by virtue of a previous conviction on Schedule 1 and current charge on Schedule 1 offences.

   It is submitted that the above recommendations may directly or indirectly contribute in balancing the scales of justice during the bail proceedings and afterwards. They may
contribute in the reduction of high numbers of in custody awaiting trial prisoners while not compromising the current bail procedures.
BIBLIOGRAPHY

BOOKS

Bekker, PM; Geldenhuys, T; Joubert, JJ; Swanepoel, JP; Terblanche, SS; Merwe SE and Van Rooyen JH Criminal Procedure Handbook 5th ed (by Joubert JJ) (2001) Juta: Cape Town


Du Toit, De Jager, Paizes, Skeen & Van Der Merwe Commentary on the Criminal Procedure Act Service 50 (2012)


ARTICLES

Ballard, C “A statute of liberty? The right to bail and a case for legislative reform” 2012 SACJ 21
Cowling, M “Bail *viva voce* evidence in support of application” 1995 *SACJ* 238

Cowling, M “The incidence and nature of an *onus* in bail applications” 2002 *SACJ* 176

Kemp, G “Foreign relations, international co-operation in criminal matters and the position of the individual” 2003 *SACJ* 370

Schwikkard, PJ “The presumption of innocence: what is it?” 1998 *SACJ* 398
TABLE OF STATUTES

INTERNATIONAL INSTRUMENTS
International Covenant on Civil and Political Rights
Universal Declaration of Human Rights of 1948
Rome Statute of the International Criminal Court

NATIONAL ACTS
Constitution Act 200 of 1994
Constitution Act 108 of 1996
Child Justice Act 75 of 2008
Correctional Services Amendment Act 5 of 2011
Criminal Procedure Act 51 of 1977
Criminal Procedure and Evidence Act 31 of 1917
Criminal Procedure Second Amendment Act 75 of 1995
Criminal Procedure Second Amendment Act 85 of 1997
TABLE OF CASES

Attorney General, Zimbabwe v Phiri 1988 (2) SA 696 (ZH)

Carmichelle v Minister of Minister of Safety and Security 2001 (1) 489 (SCA)
Centre for Child Law v Minister of Justice and Constitutional Development 2009 (2) SACR 477 (CC)

Director of Public Prosecutions Transkei v Nkalweni NO and Another 2009 (2) SACR 243 (Tk)

Ellish en Andere v Prokureur-Generaal WPA 1994 (2) SASV 579 (W)

Liebman v Attorney General 1949 SA 607 (CPD)

McCarthy v Rex 1906 TS 657
Magano and Another v District Magistrate, Johannesburg and Others 1994 (2) SACR 304 (W)
Minister van Wet en Orde en Andere v Dipper 1993 (2) SACR 225 (A)

Prokureur-Generaal van die Witwatersrandse Plaaslike Afdeling v Van Heerden en Andere 1994 (2) SASV 469 (W)

Rex v Matsala and Another 1948 (2) SA (E)

Twayie ’n Ander v Minister Van Justisie en ‘n Ander 1986 (2) SA 101 (O)

S v Acheson 1991 (2) SA 805 (Nm)
S v Bennett 1976 (3) SA 652 (CPD)
S v Bruintjies 2003 (2) SACR 575 (SCA)
S v C 1998 (2) SACR 721 (C)
S v De Kock 1995 (1) SACR 299 (T)
S v Dlamini 1999 (2) SACR 51 (CC)
S v Essack 1965 (2) SA 161 (D)
S v Fourie 1973 (1) SA 100 (D)
S v Jonas 1998 (2) SACR 677 (SEC)
S v Maki en Andere 1994 (1) SASV 630 (OK)
S v Mathebula 2010 (1) SACR 55 (SCA)
S v Mauk 1999 (2) SASV 479 (WPA)
S v Mazibuko and Another 2010 (1) SACR 433 (KZP)
S v Mbaleki and Another 2013 (1) SACR 165 (KZN)
S v Mbele and Another 1996 (1) SACR 212 (W)
S v Mhlawuli and Others 1963 (3) SA 795 (C)
S v Mohammed 1999 (2) SACR 507 (CPD)
S v Mokgoje 1999 (1) SACR 233 (NC)
S v Mpofana 1998 (1) SACR 40 (Tk)
S v Najoe 2012 SACR 395 (ECP)
S v Peterson 2008 (2) SACR 355 (CPD)
S v Pienaar 1992 (1) SACR 178 (W)
S v Ramgobin and Others 1985 (3) 587 (NPD)
S v Ramgobin and Others 1985 (4) 130 (NPD)
S v Schietekat 1998 (2) SACR 707 (C)
S v Smith and Another 1969 (4) 175 (NPD)
S v Shezi 1996 (1) SASV 715 (T)
S v Tshabalala 1998 (2) SACR 259 (C)
S v Vanqa 2000 (2) SACR 371 (Tk)
S v Vermaas 1996 (1) SACR 528 (T)
S v Viljoen 2002 (2) SACR 550 (SCA)
S v Visser 1975 (2) SA 342 (KPA)

INTERNATIONAL CASES
Prosecutor v Charles Ghankay Taylor No.: SCSL-03-01-T
Prosecutor v Laurent Gbagbo No. 1CC-02/11-01/11

FOREIGN CASES
CANADA
R v Pearson 1992 77 CCC (3d) 124 (SCC)