CONSTITUTIONAL COURT OF SOUTH AFRICA

Case (1) CCT 21/98

BONGANI DLAMINI
Appellant

versus

THE STATE Respondent

and

Case (2) CCT 22/98

VUSI DLADLA First Applicant
ANGEL KHUMALO Second Applicant
WILLY SINDANE Third Applicant
JOHN SIBONYONI Fourth Applicant
PHILLIP MOGABUDI Fifth Applicant

versus

THE STATE Respondent

and

Case (3) CCT 2/99

THE STATE Appellant

versus

MARK DAVID JOUBERT Respondent

and

Case (4) CCT 4/99

THE STATE
Appellant

versus

JAN JOHANNES SCHIETEKAT Respondent

Heard on : (1) 18 February 1999
(2)-(4) 10 March 1999

Delivered on : 3 June 1999

JUDGMENT

KRIEGLER J:

Introduction

[1] Each of the four cases considered in this judgment is concerned with the constitutional validity of one or more provisions of the South African law relating to bail. These provisions relate to the admissibility of the record of bail proceedings at trial, the test in the grant of bail particularly where serious offences are concerned, and access to the police docket for purposes of a bail application. Some provisions are challenged in more than one of the cases; several of the challenges rely on more than one constitutional ground and many of the provisions being challenged are interrelated. It is therefore sensible to examine the various constitutional challenges together rather than on a case-by-case approach.

[2] Although the transition to the new dispensation kept the general body of South

African law[1] and the machinery of state[2] intact, the advent of the Bill of Rights[3] exposed all existing legal provisions, whether statutory or derived from the common law, to reappraisal in the light of the new constitutional norms heralded by that transition.[4] The retention of the existing legal and administrative structures facilitated a reasonably smooth transition from the old order to the new. But the transition did have an effect on the country's criminal justice system. People who had acquired specialised knowledge of the system, and had become skilled and sure-footed in its practice, were confronted with a new environment and lost their confidence. Particularly in the lower courts, where the bulk of the country's criminal cases is decided, judicial officers, prosecutors, practitioners and investigating officers were uncertain about the effect of superimposing

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1 As explained in *In re: Certification of the Constitution of the Republic of South Africa 1996,* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 13, the country adopted a two-stage approach to its transition to a constitutional democracy. Both the (interim) Constitution of the Republic of South Africa Act 200 of 1993 ("the interim Constitution") and the Constitution of the Republic of South Africa, 1996 ("the Constitution") expressly kept in place all legislation existing at their respective dates of inception. That is provided by s 229 of the former and s 241 read with item 2 of sch 6 (comprising 28 sections and 4 annexures, each containing a number of sections) of the latter.

2 Chapter 15 of the interim Constitution, in ss 229 to 247, and sch 6 to the Constitution make detailed provision for the continuation of the business of state during the transition. The complexity of that exercise and the difficulties it entailed are outlined in *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at para 7.

3 Now contained in chapter 2 of the Constitution and previously in chapter 3 of the interim Constitution (effective from 27 April 1994 to 3 February 1997). Section 39(2) of the Constitution provides as follows:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

4 In terms of ss 7(2) and 35(3) of the interim Constitution (echoed and reinforced in ss 8(1) and 39(2) of the Constitution) the Bill of Rights had an immediate and pervasive impact. They provide as follows:

> 7(2): "This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution."
>
> 35(3): "In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit purport and objects of this Chapter."

the norms of a rights culture on a system that had evolved under a wholly different regime; and about the effect of that superimposition in a given case.[5] Bail was no exception. On the contrary, much of the public debate,[6] and much of the concern in official circles about law enforcement has been directed at the granting or refusal of bail.[7]

[3] The origins of bail are "obscured in the mists of Anglo-Saxon history"[8] and its

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5 Mr d'Oliviera SC, who has often represented the state in cases before this Court and is the Deputy National Director of Public Prosecutions and a former attorney-general, speaks with the voice of authority and experience. He argued the prosecution's case in the current matter of *Dladla and Others* and in doing so graphically described how profoundly the Bill of Rights has affected the day-to-day administration of criminal justice and pleaded for understanding for the plight of law enforcement agencies. He and other representatives of the prosecution services have in the past made similar representations.

6 There has been ongoing debate among politicians, the police and the general public about the criminal justice system. Some judges and a number of spokespersons of provincial attorneys-general, police liaison offices and unions as well as influential national non-governmental organisations publicly expressed concern about perceived laxness in the granting of bail. Indeed, a rise in the rate of crime in general and of violent crime in particular became the subject of ongoing public debate and political contention both in and outside Parliament. Regrettably the product was often heat rather than light.
Although there was a steady stream of new and stimulating insights from legal academics, their views were inherently prospective, sometimes speculative and seldom harmonious. At the same time, judicial pronouncements by the high courts on the interaction between constitutionality and criminal justice were relatively few and uncoordinated, arising as they do on a case-by-case basis. For historical and jurisdictional reasons, judgments of the high courts were seldom constitutionally based. Under both constitutions cases are resolved on constitutional grounds only where it is necessary to do so and, under the interim Constitution, provincial and local divisions of the Supreme Court had limited constitutional jurisdiction while the Appellate Division had none at all.

7 Indeed, early in 1988 and long before the interim Constitution introduced its particular uncertainties, there were sufficient questions concerning bail law for the South African Law Commission to start an investigation of the topic. See South African Law Commission Report, *Project 66: Bail Reform in South Africa*, December 1994, par 1.3.

8 Per Kurt X Metzmeier in an article: "Preventive Detention: A Comparison of Bail Refusal Practices in the United States, England, Canada and other Common Law Countries", *8 Pace International Law Review*, 399. Seventh century Anglo-Saxon laws provided for a form a blood money, called "borh" (cf the Afrikaans word for both bail and suretyship, viz "borg"), which was deposited pending trial. By the 9th or 10th century, says Metzmeier, relying on Stephen *A History of the Criminal Law of England* (1883), a practice seems to have evolved for an arrestee or his family to pay or promise money to the sheriff as security for the arrestee's release pending trial. See also J van der Berg: *Bail: A Practitioner's Guide*, (1986) (Juta & Co) paras 1-2.
Bail's South African roots can be traced back to (Cape) Ordinance 40 (1828) which laid the foundation of, among others, criminal procedure in this country and first made clear provision for the release of an

modern dimensions remain "an incoherent amalgam of old and new ideas serving more to defeat than to achieve the aims of the criminal process".[9] In South Africa, judicial pronouncements on the topic have been called "labyrinthine".[10] There is murkiness even at the elemental level of the source(s) of South African judicial power to grant bail, i.e. whether the power derives exclusively from - and is circumscribed by - chapter 9 of the Criminal Procedure Act[11] (the CPA) or whether there is a parallel reservoir of "inherent" or "common law" power on which a judge can draw.[12]

[4] An important aim of this judgment is to show that the application of constitutional norms to the law and practice of bail does not complicate the task of judicial officers but clarifies it. At the same time it will be shown how recent amendments to the relevant

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awaiting trial prisoner on bail. (See generally: Dugard, The History of South African Criminal Procedure, in Vol IV of *South African Criminal Law and Procedure*, (1977) (Juta & Co), pp 18-25, and the authorities there cited.) Subsequently the Cape Ordinance served as a model for similar statutes in Natal and the two Boer Republics. Shortly after the South African War a comprehensive criminal procedure code (Ordinance 1 of 1903) was introduced in the Transvaal Colony, which was to form the basis of the first national criminal code, Act 31 of 1917, and its successor, Act 56 of 1955.

9 In "Bail: An Ancient Practice Reexamined", Vol 70 *The Yale Law Journal* [1961] 966, (anon).

10 Terblanche, "Borgtog: `n labarintiese doolhof?" 1988 (2) *South African Journal of Criminal Justice* 280. Whether the epithet is apt, can be judged from a survey of the Butterworths Consolidated Index and Noter-Up (1947-1995), which contains many dozens of reported judgments on bail dealing with a variety of principles and innumerable instances of their application.

11 Act 51 of 1977.

12 In *S v Hlongwane* 1989 (4) SA 79 (T) the court thoroughly examined the question, identifying a number of dissonant decisions, and at 95D to 97E identified ten basic propositions, one of which (no 3) was that from lawful arrest to sentence chapter 9 alone governs. See also *Beehari v Attorney-General, Natal* 1956 (2) SA 598 (N); *Ex parte Graham: In re United States of America v Graham* 1987 (1) SA 368 (T). Lansdown and Campbell: *South African Criminal Law and Procedure*, Vol V, (Juta & Co) (1982) at 311 opine that ". . . bail is now the only remaining machinery for the protection of the liberty of the subject against unnecessary or avoidable pre-trial detention . . ." and proceed to cite *Beehari's* case as authority for the proposition that the ". . . complete and exhaustive statement regarding bail is now set out in Chapter 9 . . ."

statutory provisions are to be harmonised with those constitutional norms.

[5] The starting point of the exercise is s 35(1)(f) of the Constitution which provides the principal template against which Chapter 9 of the CPA must be measured. It reads as follows:[13]

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

The context of that provision is the rest of s 35(1) and s 35(2), which protect the rights of arrested and detained persons. Section 35(1) spells out the rights of arrested persons: the right to remain silent; to be informed of the right and of the consequences of waiving it; and the right not to be compelled to make an admission or confession. Then, particularly relevant to the present context, s 35(1) affords an arrestee the right to be brought before a court as soon as reasonably possible, but within 48 hours of arrest, and at that first appearance to be charged, or told the reason for further detention, or released. Section 35(2) likewise makes detailed provision for the protection of the interests of detainees, assuming that detention is constitutionally acceptable.

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[13] The corresponding provision of the interim Constitution is s 25(2)(d), which reads:

> "Every person arrested for the alleged commission of an offence shall, in addition to the rights which he or she has as a detained person, have the right . . . (d) to be released from detention with or without bail, unless the interests of justice require otherwise."

There is a difference between the two constitutional provisions which becomes relevant when examining the wording of s 60(1) of the CPA below. Under the interim Constitution, an arrestee was entitled to bail unless the interests of justice required otherwise. Under s 35(1)(f), of course, there is no release unless the interests of justice permit it.

[6] Section 35(1)(f) in its context, makes three things plain. The first is 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 s 12.[14] The second is that notwithstanding lawful arrest, the person concerned has a right, but a circumscribed one, to be released from custody subject to reasonable conditions. The third basic proposition flows from the second, and really sets the normative pattern for the law of bail. It is that the criterion for release is whether the interests of justice permit it. What that term means, both in the Constitution and in s 60 of the CPA, is central to much of this judgment, and will be thrashed out later. All that need be said at this stage is that s 35(1)(f) postulates a judicial evaluation of different factors that make up the criterion of the interests of justice, and that the basic objective traditionally ascribed to the institution of bail, namely to maximise personal liberty,[15] fits snugly into the normative system of the Bill of Rights. It is accordingly important that the rules of that institution, which are said by some to be at odds with those values, be scrutinised systematically. The four cases before us offer an appropriate framework to do so.

[7] The next point of reference is chapter 9 of the CPA. That is where the effect, rules

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14 This, of course, is permissible by the terms of s 7(3):

> "The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill."

15 Expressed nearly a century ago by Innes CJ in *McCarthy v Rex* 1906 TS 657 at 659 and repeatedly articulated since, eg. by Hoexter JA in *Minister van Wet en Orde v Dipper* 1993 (3) SA 591 (A) at 595G.

and consequences of bail are primarily to be found. Chapter 9 of the CPA is therefore not only an invaluable point of reference in any general enquiry into the law of bail, and a primary source to be consulted in looking for an answer to any specific bail question, but provides a comprehensive framework in which any answers can be judged. Tiresome though it may be, it is therefore necessary to outline the basic provisions of the whole of chapter 9.[16]

> "**58. Effect of bail**
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> [A]n accused who is in custody shall be released from custody upon payment of . . . the sum of money determined . . . and . . . the release shall . . . endure until a verdict is given . . . or . . . sentence is imposed . . .
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> **59. Bail before first appearance. . .**
>
> (1) (a) An accused . . . in custody in respect of any [specified minor] offence ... may . . . be released on bail . . . by any police official of . . . the rank of non-commissioned officer . . .
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> . . . .
>
> [Sub-s (2) affords such "police bail" the same effect as ordinary bail.]
>
> **59A. Attorney-general may authorise release on bail**
>
> (1) [An attorney-general or an authorised prosecutor may, in consultation with the investigating officer and in respect of sch 7 offences, grant bail.]
>
> . . . .
>
> (4) [Such release then endures until the accused's first appearance in court.]
>
> (5) [The court then extends, amends or considers bail afresh in terms of s 60.]
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> . . . .
>
> (7) [This bail is tantamount to ordinary bail under s 60.]
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> **60. Bail application . . . in court**

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[16] The key words of s 60 have been italicised for convenience; subsections directly impugned are quoted in full. The other subsections are paraphrased to afford an overview. It does not purport to be an accurate or authoritative summary.

(1) (a) An *accused* who is *in custody* in respect of an offence shall, subject to the provisions of section 50 (6) and (7), be *entitled* to be released on bail at any stage preceding his or her conviction in respect of such offence, *unless* the court finds that it is *in the interests of justice* that he or she be *detained* in custody.

. . . .

(c) If . . . bail is not raised by the accused or the prosecutor, the *court shall ascertain from* the *accused whether* he or she wishes [bail] *to be considered . . .*

(2) In bail proceedings the court -

(a) *may postpone . . .* such proceedings . . .;

(b) [*may acquire undisputed information informally*];

(c) may . . . *require . . .* the prosecutor or the accused [*to adduce evidence*];

(d) *shall . . . require . . . the prosecutor to place on record the reasons for not opposing . . . bail . . .*

(3) [If *reliable or sufficient information or evidence* is *lacking the court shall order* its *production*.]

(4) The *refusal* to grant bail and the detention of an accused in custody *shall be in the interests of justice* where one or more of the following grounds are *established*:

(a) Where there is the *likelihood* that the accused, if he or she were released on bail, will *endanger the safety of the public* or any *particular person* or will *commit a Schedule 1 offence*; or

(b) where there is the *likelihood* that the accused, if he or she were released on bail, will *attempt to evade his or her trial*; or

(c) where there is the *likelihood* that the accused, if he or she were released on bail, will *attempt to influence or intimidate witnesses or to conceal or destroy evidence*; or

(d) where there is the *likelihood* that the accused, if he or she were released on bail, will *undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system*;

(e) where *in exceptional circumstances* there is the *likelihood* that the

release of the accused will *disturb the public order or undermine the public peace or security*; or [sic]

(5) In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely -

(a) the *degree of violence* towards others *implicit in the charge* against the accused;

(b) any *threat of violence* which the accused may have made to any person;

(c) any *resentment* the accused is alleged to harbour against any person;

(d) any *disposition to violence* on the part of the accused, as is evident from his or her past conduct;

(e) any *disposition* of the accused to commit offences referred to *in Schedule 1*, as is evident from his or her past conduct;

(f) the *prevalence* of a particular *type* of offence;

(g) any evidence that the accused previously committed an offence referred to in Schedule 1 *while released on bail*; or

(h) *any other factor* which in the opinion of the court should be taken into account.

(6) In considering [the ss (4)(b) grounds (evasion of trial)], the *court may take into account* -

(a) [Any *ties* of the accused *to the place of trial*]

(b) [The existence and location of *assets held by the accused*]

(c) [The accused's *means of travel* and *travel documents*]

(d) [Could the accused *afford to forfeit* bail]

(e) [The prospects of possible *extradition*]

(f) [The *nature and gravity of the offence*]

(g) [The *strength of* the state *case* and the *incentive to flee]*

(h) [The nature and gravity of the *likely penalty*]

(i) [The *efficacy of bail and enforcibility* of bail *conditions*]

(j) [Any *other* factor.]

(7) In considering [the ss 4(c) ground (interfering with witnesses or evidence)] the court may . . . take into account -

(a) [Whether the accused is familiar with *witness or the evidence*]

(b) [Whether witnesses have made *statements*]

(c) [Whether the *investigation* is *completed*]

(d) [The accused's *relationship with witnesses* and the extent to which they can be influenced]

(e) [The *efficacy* or *enforcibility* of bail *conditions*]

(f) [The accused's *access* to *evidence* to be presented at the trial.]

(g) [The ease with which evidence can be *concealed or destroyed*]

(h) [Any *other* factor]

(8) In considering [the ss 4(d) ground (undermining the system of justice)] the court may take into account

(a) [Whether the *accused supplied false information* at arrest/during bail proceedings]

(b) [Whether the accused is in *custody* on *another charge or on parole*

(c) [Any *previous failure* by the accused *to comply with bail* conditions]

(d) Any *other* factor

(8A) In considering whether the ground in subsection (4) (e) has been established, the court *may*, where applicable, take into account the following factors, namely-

(a) whether the nature of the offence or the circumstances under which the offence was committed *is likely to* induce a sense of *shock or outrage in the community where the offence was committed*;

(b) whether the shock or outrage of the community *might* lead to *public disorder* if the accused is released;

(c) whether the *safety of the accused* might be jeopardized by his or her release;

(d) whether the *sense of peace and security* among members of the public will be undermined or jeopardized by the release of the accused;

(e) whether the release of the accused will *undermine or jeopardize the public confidence in the criminal justice system*; or

(f) *any other factor* which in the opinion of the court should be taken into account.

(9) In considering the question in subsection (4) the *court shall decide* the matter by *weighing the interests of justice against the right of the accused to his or her*

personal freedom and in particular the prejudice he or she is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely-

(a) the *period* for which the accused has *already been in custody* since his or her arrest;

(b) the probable *period* of detention *until the disposal or conclusion of the trial* if the accused is not released on bail;

(c) the *reason for any delay* in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;

(d) any *financial loss* which the accused may suffer owing to his or her detention;

(e) any impediment to the *preparation of the accused's defence* or any delay in obtaining *legal representation* which may be brought about by the detention of the accused;

(f) the *state of health* of the accused; or

(g) *any other factor* which in the opinion of the court should be taken into account.

(10) *Notwithstanding the fact* that the prosecution does *not oppose* the granting of bail, the court *has the duty*, contemplated in subsection (9), *to weigh up the personal interests of the accused against the interests of justice*.

(11) Notwithstanding any provision of this Act, *where* an *accused* is *charged with an offence* referred to-

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

(b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the

interests of justice permit his or her release.

(11A) (a) If the attorney-general intends charging any person with an offence . . . in Schedule 5 or 6 the attorney-general may . . . issue a written confirmation . . . that he or she intends to charge the accused with an offence . . . in Schedule 5 or 6.

(b) The written confirmation shall be handed in . . . by the prosecutor . . . and forms part of the record . . .

(c) Whenever the question arises in . . . [or] during bail proceedings whether any person is charged . . . with an offence . . . in Schedule 5 or 6, a written confirmation issued by an attorney-general under paragraph (a) shall, upon its mere production . . . be prima facie proof of the charge ...

(11B) (a) In bail proceedings the accused . . . is compelled to inform the court whether-

(i) the accused has previously been convicted of any offence; and

(ii) there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges.

(b) Where the legal adviser of an accused . . . submits the information . . . the accused shall be required by the court to declare whether he or she confirms such information . . .

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

(d) An accused who wilfully-

(i) fails or refuses to comply with the provisions of paragraph (a); or

(ii) furnishes the court with false information required in terms of paragraph (a),

shall be guilty of an offence and liable on conviction to a fine or to

imprisonment for a period not exceeding two years.

(12) The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice.

(13) The court releasing an accused on bail . . . may order that the accused-

(a) deposit with the clerk of the court [etc] the sum of money determined by the court . . .; or

(b) shall furnish a guarantee . . .

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

[8] In relation to the remaining provisions of chapter 9, little need be noted here. In general, they deal with the amendment of bail conditions (s 63), the recording of bail proceedings (s 64), appeals (s 65), breach, forfeiture, cancellation and remission of bail (ss 66 - 70) and, lastly, with juvenile detention in lieu of bail (s 71).

[9] Mere perusal of the compendium in chapter 9 highlights a number of basic propositions about our law of bail that are relevant in the cases currently under scrutiny. The first and most obvious observation is that the chapter creates a complex and interlocking mechanism that is clearly designed to govern the whole procedure whereby an arrested person may be conditionally released from custody, prescribing the

components of that mechanism in minute and sequential detail.[17] Manifestly the lawgiver, both in its initial formulation of the chapter and more pertinently by means of the extensive supplementation recently added to s 60,[18] intended to provide a comprehensive - if not exhaustive - set of prescripts governing the whole procedural terrain of bail.

[10] The second general observation to be made about chapter 9 arising from the overview is that the grant or refusal of bail is unmistakably a judicial function.[19] In that respect it ties up with chapters 4 and 5 of the CPA, dealing respectively with the various methods of securing the attendance of an accused person in court and with the most invasive of those methods, namely arrest. The underlying policy is plain. Although societal interests may demand that persons suspected of having committed crimes forfeit their personal freedom pending the determination of their guilt, such deprivation is subject to judicial supervision and control. Moreover, in exercising such oversight in regard to bail the court is expressly not to act as a passive umpire. If neither side raises the question of bail, the court must do so.[20] If the parties do not of their own accord

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17 The primary purpose of bail is to minimise the prejudice suffered by awaiting trial prisoners, and chapter 9 deals in the main with the conditional release of persons pending the hearing of charges against them. However, release on bail can extend beyond conviction and sentence. Thus s 321(1)(b) of the CPA makes provision for bail to be granted pending an appeal to the Supreme Court of Appeal. In practice bail is even allowed where leave to appeal to the Supreme Court of Appeal has been refused by the high court but an application to the Chief Justice for special leave to appeal is pending - or is still being prepared. See eg *S v Hlongwane*, n12 above at 99A-F. This judgment is concerned only with bail pending trial.

18 By means of amendments in 1995 and 1997. See n 24 and 25 below.

19 That is so notwithstanding so-called "police bail" under s 59 and "prosecutor's bail" under the new s 59A. Those provisions are clearly prefatory and incidental to bail under s 60.

20 See s 60(1)(c).

adduce evidence or otherwise produce data regarded by the court to be essential, it must itself take the initiative.[21] Even where the prosecution concedes bail, the court must still make up its own mind.[22] In principle, that policy of the CPA, and the consequential provisions mentioned, are in complete harmony with the Constitution. The potential problems lie elsewhere.

[11] Furthermore, a bail hearing is a unique judicial function. It is obvious that the peculiar requirements of bail as an interlocutory and inherently urgent step were kept in mind when the statute was drafted. Although it is intended to be a formal court procedure,[23] it is considerably less formal than a trial. Thus the evidentiary material proffered need not comply with the strict rules of oral or written evidence. Also, although bail, like the trial, is essentially adversarial, the inquisitorial powers of the presiding officer are greater. An important point to note here about bail proceedings is so self evident that it is often overlooked. It is that there is a fundamental difference between the objective of bail proceedings and that of the trial. In a bail application the enquiry is not really concerned with the question of guilt. That is the task of the trial court. The court hearing the 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. The focus

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21 See s 60(3).

22 See s 60(10).

23 In terms of s 64 a full record has to be kept, there is provision for appeal under ss 65 and 65A and generally it is an adversarial procedure with a full right of audience for all parties.

at the bail stage is to decide whether the interests of justice permit the release of the accused pending trial; and that entails in the main protecting the investigation and prosecution of the case against hindrance.

[12] The third observation relates to the seriousness with which the legislature views bail and is underscored by the fact that there were major amendments to the relevant legislation in 1995[24] and another in 1997.[25] The 1995 amendment substituted a brand new and radically different section for the principal provision relating to bail, namely s 60 of the CPA. That section, which had stood unamended since its adoption in 1977, used to be a simple and prosaic companion to ss 58 and 59. As we have seen above,[26] the three sections formed the introduction to chapter 9 of the CPA, and between them governed the effect of bail generally; police bail; and bail for an accused in custody at or after the first appearance in a lower court. Section 60 did no more than to state the principle that such an accused could apply for bail and to prescribe the requisite procedure.

[13] By contrast, the new section[27] contained no less than 11 subsections dealing in considerable detail with both substantive and procedural matters. In the main, the 1995

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24 The Criminal Procedure Second Amendment Act 75 of 1995 ('the 1995 amendment"), which came into operation on 21 September 1995.

25 The Criminal Procedure Second Amendment Act 85 of 1997 ("the 1997 amendment"), which came into operation on 1 August 1998.

26 At para 7.

27 Introduced by s 3 of the 1995 amendment.

amendment brought about three important changes in s 60. First, the new paragraph (1)(a) proclaimed the right to bail unless it is in the interests of justice that the accused be detained. That was an echo of the right contained in s 25(2)(d) of the interim Constitution.[28] Second, sub-ss (4) to (9) provided a compendium of criteria that had to be considered and weighed; and, in the third place, sub-s (11) singled out for special and more stringent treatment persons awaiting trial on certain very serious offences (listed in sch 5) or who had allegedly committed certain less serious offences (listed in sch 1). For the rest, the provisions of the 1995 amendment relating to s 60 were of an ancillary and procedural nature. The changes clearly constituted an attempt on the part of the Legislature to align the principle of bail with the constitutional norm of s 25(2)(d) of the interim Constitution and to tighten up and clarify the whole bail system.

[14] Barely two years later the 1997 amendment was adopted.[29] It, too, was aimed at generally stiffening bail requirements and procedures. The amendments to s 60 that are germane to the current enquiry were, in the first instance, that the criterion of "the public interest" in paragraph (4)(a) was expanded into "the public order" and "public peace or security" and enacted as a new paragraph, (4)(e).[30] Concomitantly a new sub-s (8A) was

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28 See note 13 above.

29 By s 4 of Act 85 of 1997.

30 In terms of the 1995 amendment para (4)(a) read as follows:

> "Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or the public interest, or will commit a Schedule 1 offence . . ."

added. An important feature of the new sub-ss (4)(e) and (8A) is that, for the first time in South African bail legislation, attention is focused, not on the accused, but on the community. The constitutional propriety of this shift will be discussed later.

[15] Clearly the legislative intention remained to curtail bail for suspects in very serious cases. To that end sub-s (11), which had been introduced in 1995, was replaced by an even more stringent provision relating to bail for persons facing serious charges, which differentiates between serious cases (listed in sch 5) and extremely serious cases (listed in a new sch 6). In a new sub-s (11A) Parliament also gave sub-s (11) procedural teeth by providing for a mechanism to establish when a sch 5 or 6 offence was at stake. Further, in a new sub-s (11B), another legislative innovation was introduced: an applicant for bail became obliged to furnish information to the court (upon pain of imprisonment for withholding it or furnishing it untruthfully) and the record of bail proceedings was made part of the trial record. To round off the innovations, the 1997 amendment brought in a special provision restricting an accused's access to the police docket, namely sub-s (14).[31]

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[31] It seems reasonably clear that this innovation was triggered by the interpretation given by many judicial officers to the right of access to information afforded by s 23 of the interim Constitution, which provided:

> "Every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights."

In the course of argument in the case of *Dladla and Others* Mr d'Oliviera submitted that, despite the judgment of this Court in *Shabalala and Others v Attorney-General, Transvaal, and Another* 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC), the perception persisted that the defence had extensive rights of access even at the bail stage.

Facts of the cases

[16] Having sketched the background, we can now turn to an outline of each case, identifying the particular aspects of the system it seeks to impugn and detailing the challenges it presents. In summary the cases raise the following challenges:

a. *Dlamini*: the rule of evidence relating to the admissibility at the main trial of statements made during the bail application;

b. *Schietekat / Joubert*: sub-ss 60(4) - (9) offend the separation of powers doctrine generally, and, sub-ss (4)(a) and (5) list factors unrelated to trial, as well as sub-ss (4)(e) and (8A) frustrate the right to bail; s 60(11B)(c) unfairly makes the bail record part of the trial record; and s 60(11)(a) effectively denies bail to persons charged with certain very serious offences;

c. *Dladla*: s 60(11)(a); s 60(11B)(c); and s 60(14) which limits, for the purpose of bail proceedings, an arrestee's right of access to information contained in the police docket.

Dlamini[32]

[17] This is an appeal against a judgment handed down in a criminal trial in the Natal High Court. The crisp question it raises is whether the Constitution automatically and

[32] It is reported as *S v Dlamini and Another* 1998 (5) BCLR 552 (N).

without more renders statements made by an accused person when applying for bail inadmissible at that person's subsequent trial. If it does, it would be a material departure from our existing law: it is a well-recognised rule of evidence that a cross-examiner may use an inconsistent statement made by a witness on a previous occasion to discredit or controvert the testimony of that witness;[33] and our criminal procedure allows otherwise admissible utterances made by or on behalf of an accused person during bail proceedings to be used against that person at a subsequent trial.[34] The prosecution is entitled to prove the record of the bail application in the course of its case,[35] or it can put the record (or the relevant passage(s) thereof) to the accused in cross-examination. The former is often done when a plea explanation[36] proffered at the arraignment stage of the trial conflicts with what the accused contended earlier in the course of bail proceedings, and the latter when a prosecutor seeks to impugn an accused's credibility by probing in cross-examination for self-contradictions by contrasting evidence at trial with previous statements. Records of bail applications are fruitful sources of such conflicting previous statements by an accused.

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33 See eg. *Salzmann v Holmes* 1914 AD 471; *Oosthuizen v Stanley* 1938 AD 322.

34 See eg. *S v Nomzaza and another* 1996 (2) SACR 14 (A) and the cases cited at 16h.

35 This is a simple matter. Section 235 of the CPA provides for proof of the record by the mere production of a certified copy thereof at the trial.

36 Subsections 115(1) and (2) of the CPA make provision for an accused who pleads not guilty, to be invited by the presiding judicial officer to indicate "the basis of [the] defence", and can be asked elucidatory and supplementary questions by the court. The purpose is, as Rumpff CJ said in *S v Seleke en `n Ander* 1980 (3) SA 745 (A) at 753G, to ascertain what exactly the accused is putting in issue with the plea of not guilty in order to avoid unnecessary evidence being adduced. The accused is free to decide whether or not to respond to the invitation or to reply to the questions, and the record must reflect that this was explained to an unrepresented accused (per Viviers J in *S v Evans* 1981 (4) SA 52 (C) and approved in *S v Daniëls en `n Ander* 1983 (3) SA 275 (A) at 299, 309 and 315).

[18] *Dlamini's* case is a good example. At his arraignment the appellant pleaded not guilty to charges of murder and robbery, intimating through his counsel that his defence was an alibi. The prosecution adduced no direct evidence linking the appellant with the crimes, but his alibi was dealt a body blow when the prosecution proved that, shortly after his arrest and while asking for bail in the magistrates' court, the appellant had told the presiding magistrate that he had been present when the crimes were committed by his co-accused, but had acted under compulsion by the latter.

[19] At the trial the admissibility of the record of the bail proceedings was challenged on behalf of the appellant.[37] The thrust of the objection was that under the Constitution statements by an accused person at a bail application are in principle never admissible against him or her at trial.[38] The challenge failed. After a trial-within-a-trial the record of the bail proceedings was ruled admissible and duly proved as part of the prosecution case. The appellant did not testify in his defence. He was convicted and successfully applied to the learned trial judge for a certificate preparatory to an application for leave to appeal directly to this Court against his conviction.[39] We, in turn, granted leave so to

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37 His counsel was Mr Blomkamp, who also appeared for the appellant in this Court and in an abortive appeal to the Natal High Court.

38 The constitutional argument advanced is detailed in paras 86 - 100.

39 In terms of s 167(6)(b) of the Constitution read with rule 18 of the Constitutional Court Rules a party wishing to appeal directly to this Court must first apply to the court of first instance for a certificate relating to the substance and merits of the constitutional point in issue and the sufficiency of the evidence on record to determine it. Although the trial judge granted such a certificate, certain procedural hitches delayed the due enrolment of the case before us. They are no longer of consequence.

appeal.[40]

Schietekat

[20] This case raises questions that overlap with *Dlamini*, and for that reason it is convenient to outline it next. It is an appeal by the state against an order in the Cape of Good Hope High Court striking down as unconstitutional several of the new provisions of s 60 of the CPA outlined above.[41] The validity of that constitutional condemnation will be considered later together with the evaluation of similar challenges in the cases of *Joubert* and *Dladla*. What should be highlighted at this stage regarding *Schietekat* is an additional and peripheral constitutional question that overlaps with *Dlamini*. It relates to the constitutional propriety of exposing an applicant for bail to cross-examination that may later prove to have impaired that person's immunity against self-incrimination. The circumstances in which those questions arise in *Schietekat's* case are unusual.

[21] Schietekat is a middle-aged man with a long history of paedophilia, including an effective 14½ years imprisonment on counts of rape, attempted rape and indecent assault.

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40 After leave to appeal had been granted and a date for hearing allocated but before the case was argued, the points at issue in the other three cases came to our attention. Because of the similarity of the issues and for the reasons outlined above, it was decided to hold over the judgment in *Dlamini's* case pending the hearing of the remaining three.

41 The case is reported as *S v Schietekat* 1999 (2) BCLR 240 (C). In essence the learned judge held that sub-ss (4) to (9) of s 60 were constitutionally bad because they purported to prescribe to a court, in whom the sole adjudicative power vests, what is or is not in the interests of justice (at 248G - 249A of the report), while sub-s (11B)(c) "malevolently" requires an applicant for bail to provide potentially self-incriminating evidence (at 248D - E).

The complainants were girls ranging from three to fourteen years in age. A year after his release in May 1997, he was acquitted on a child molesting charge and two months later he was again arrested on a charge of having indecently assaulted a three year old girl.

[22] A hotly contested bail application in the magistrates' court ensued. The magistrate eventually refused bail. He accepted that (a) there was no risk that Schietekat would abscond, (b) there was likely to be a long delay before the trial, and that (c) there would be serious financial harm to Schietekat as well as his business partner and their employees. He found, however, that there were important considerations against the grant of bail, the most important of which was that Schietekat's record of previous convictions, his poor parole record and his lack of insight into his problem, rendered his release on bail a serious risk to the community.[42] He also found that, apart from public shock and anger that would be generated by Schietekat's release, confidence in the administration of justice would be shaken.

[23] The judgment of the court below[43] correctly castigates the bail hearing as "a mockery of judicial behaviour" because the prosecutor was allowed to exceed the bounds of proper cross-examination by bullying, badgering and humiliating Schietekat. The real problem with the evidence in the context of this case lies elsewhere, however, and that

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42 Notwithstanding a record marred by frequent - and strategically located - transcriber's notes reading "onhoorbaar" (illegible), it is possible to follow the magistrate's reasoning well enough.

43 Above n 41 at 250C.

is where it ties up with *Dlamini*'s case. Indeed, the events in *Schietekat*'s case show more vividly than *Dlamini* that evidence can prejudice an accused person.

[24] Schietekat's attorney, accepting that the application was governed by s 60(11)(a) of the CPA, read with sch 6 thereto,[44] briefly led his client on his personal circumstances and his previous convictions and then proceeded to get him to put on record a long and detailed explanation of his defence to the charge. Schietekat's evidence in the bail hearing, if admitted at the trial, could possibly corroborate the evidence of a single identifying witness. Therefore, in *Schietekat*'s case, no less than that of *Dlamini*, the admission at trial of what was said by the accused at preceding bail proceedings could be prejudicial to the accused.

[25] Reverting to the history of the matter: an appeal was noted to the High Court on purely factual grounds but when the matter came to be argued in the High Court, the focus had shifted from factual to constitutional considerations. The learned judge dismissed the appeal there and then on the facts.[45] Despite having thus dismissed the bail

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44 A charge of indecent assault on a child under the age of 16 years against a person with a previous conviction for that offence, is listed in sch 6, quoted in n 89 below.

45 Section 65 makes provision for an appeal to a superior court against the refusal of bail in a lower court. The test on appeal is whether the lower court had exercised its discretion to refuse bail incorrectly. A written judgment handed down some weeks later gives only one terse reason for the dismissal of the appeal at 249H - I:

> "Having read the magistrate's reasons I am satisfied that he did misdirect himself. I do not, however, believe that his ultimate conclusion was wrong. The risk of injury to the community is too great until the facts have been ground fine."

appeal, the learned judge devoted the rest of his judgment[46] to an analysis of the statutory and constitutional aspects of the law relating to bail and concluded:

> "In the result I make the following further order:
> 1. In terms of section 172(1) of the Constitution I declare that subsections (4) to (9) inclusive and subsection (11B)(c) of Act 51 of 1977 as amended by Act 85 of 1997 are invalid to the extent of their inconsistency with the Constitution.
> 2. In particular I declare that they are invalid in their entirety.
> 3. The Attorney-General or any other organ of State is free to appeal or apply directly to the Constitutional Court to vary or confirm this order of constitutional invalidity."

The Director of Public Prosecutions, Cape of Good Hope, was confronted with a curious situation: notwithstanding the successful opposition to Schietekat's appeal to the High Court against the magistrate's refusal to grant him bail, a vital part of the statutory foundation on which the whole system of bail rested, had been struck down as constitutionally invalid. He had won the bail battle but had lost a constitutional war.

[26] The Director noted an appeal to this Court,[47] challenging the striking down as a gross irregularity because constitutional invalidity had not been in issue in the magistrates' court nor in the notice of appeal and, when it had been raised in the heads

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46 The judgment also briefly deals with the manner and tone of the cross-examination referred in para 23 above.

47 In terms of s 172(2)(d) of the Constitution (read with rule 15(2) of the Constitutional Court Rules, 1998), which provides:

> "Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection."

Manifestly a director of public prosecutions is such an "organ of state".

of argument filed on behalf of Schietekat, the state had sought an opportunity to adduce evidence justifying the impugned statutory provisions, should the court be inclined to entertain the new angle of attack. Without having afforded the prosecution such an opportunity, the court below had then struck down the provisions in question. Although the state did not expressly abandon the irregularity point, the argument (both written and oral) submitted in this Court challenged the striking down on its constitutional merits only.

[27] The state did not challenge the validity or appropriateness of the striking down on the basis that it had been irrelevant to the issues before the court below once the bail appeal had been disposed of on the facts. Accordingly, no argument was addressed to this Court on the question of the possible mootness of a constitutional issue in such circumstances; nor is it necessary for the determination of this case to resolve it. It would therefore be inadvisable to express any firm views on the topic. Nevertheless it should be emphasised that such silence does not signify approval of an order of constitutional invalidity being made in the absence of any remaining triable issue. Indeed, this Court has long since held that as a matter of judicial policy, constitutional issues are generally to be considered only if and when it is necessary to do so.[48]

[28] The question of possible mootness - and a related question of standing - arises in

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[48] See *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC); *S v Bequinot* 1997 (2) SA 887 (CC); 1996 (12) BCLR 1588 (CC).

another way in this case. While the appeal was pending and after written argument had been filed by the state, the charge against Schietekat was withdrawn and he was discharged from custody. However, counsel who had already been briefed on behalf of Schietekat[49] were prepared to continue to represent him and appeared at the hearing. We still had to deal with *Joubert's* case, in which an identical order of constitutional invalidity had been made by the same judge, but where there was no appearance on behalf of Joubert. We accordingly invited counsel for Schietekat to present their argument and wish to record our indebtedness to them for their most helpful contribution to the forensic debate.

[29] There is another unusual feature about *Schietekat's* case. Before the state had lodged its notice of appeal to this Court against the order of constitutional invalidity of sub-ss 60(4) to (9) and (11B)(c) of the CPA, Schietekat applied to the Court below for leave to appeal against the dismissal of his bail appeal on the merits. In that application the learned judge subsequently handed down a written judgment, not only refusing leave for stated reasons, but elucidating the effect of the earlier judgment.

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[49] Messrs AM Breitenbach and GH Rossouw of the Cape Bar.

Joubert[50]

[30] The judgment in this case was handed down together with that in *Schietekat* and the two expressly have to be read together.[51] In this instance, too, there had been an urgent appeal against a refusal of bail in the magistrates' court, an extemporaneous order by the judge on appeal and a reserved judgment. Joubert was charged with having murdered his wife by shooting her in the head with his handgun.[52] Joubert's counsel handed in a brief and guardedly worded affidavit by his client, contending that the fatal shot had gone off accidentally in the context of "an excessive intake of alcohol and dagga" and stating that, acting on legal advice, he was exercising his right to refuse to disclose the full extent of his defence at that stage. However, other evidence was led by both sides.

[31] The magistrate approached the application on the basis that Joubert bore an onus to establish that his release was in the interests of justice. Remarking in passing that there was no evidence as to the events of the fatal evening, the magistrate refused bail for a

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50 Reported as *S v Joubert* 1999 (2) BCLR 237 (C).

51 Above n 50 at 239A. The judgment, having referred to *Schietekat*, continues:
> "I expressly incorporate the reasons given by me in that judgment into this one. The two must be read together."

52 Murder is an offence covered by either sch 5 or sch 6 to the CPA, depending upon the circumstances. A charge of murder falls under sch 6 if there was planning or premeditation, or if the deceased was a law enforcement officer killed in the line of duty, or a material witness to a sch 1 offence. The learned judge rejected a contention by counsel for the state that there had been premeditation and dealt with the case under sch 5 (quoted in n 90 below).

number of factual reasons.[53] That decision was taken on appeal on the basis that the magistrate should have held that Joubert "had satisfied the requirements of s 60(11)(b) of Act 51 of 1977" and had shown "that the interests of justice permitted his release on bail."[54] The magistrate intimated that he had nothing to add to his oral judgment and the case was argued on appeal purely on the facts. The learned judge issued an order for Joubert's conditional release forthwith, the reasons to be furnished later. Those reasons base the reversal both on a rejection of the magistrate's factual findings[55] and on a ruling that sub-ss (4) to (9) of s 60 of the CPA are unconstitutional.[56] The judgment concludes with the following observation and orders:

> "Unlike the position that obtained in the *Schietekat* matter I find however that I am obliged to exercise the powers conferred on me in terms of the Constitution. Pursuant to section 172 of Act 108 of 1996 I accordingly make the following order:
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> 1. In terms of section 172(1) of the Constitution I declare that subsections (4) to (9) inclusive and subsection (11B)(c) of Act 51 of 1977 as amended by Act 85 of 1997 are invalid to the extent of their inconsistency with the Constitution.
> 2. In particular I declare that they are invalid in their entirety.
> 3. The Attorney-General or any organ of State is free to appeal or apply directly to the

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53 (i) The investigation was incomplete; (ii) the firearm was missing; (iii) Joubert's instability and emotional state; (iv) the difficulty of keeping him under continual supervision; (v) the safety of the community and (vi) Joubert's own safety.

54 Although the notice of appeal contains three paragraphs, there is really only the one point that is raised.

55 The grounds upon which the magistrate's detailed reasons for refusing bail (outlined in n 53 above) were rejected, do not appear clearly from the judgment of the court below. The only reason directly addressed appears to be the adequacy of measures to keep Joubert under supervision (at 238H and 239C). At 239C the discussion of the facts then concludes with the general observation:

> "This is by no means a case where the interests of justice require continued incarceration. Those interests are best served by setting him at liberty pending his trial."

56 At 239A. For the reasons, one is referred to the judgment in *Schietekat*.

Constitutional Court to vary or confirm this order of constitutional invalidity.

4. By reason of the exercise by me of the powers conferred by section 65 of the Criminal Procedure Act 51 of 1977 as amended I make no order as contemplated by section 172(2)(b) of the Constitution.

5. My order, Annexure "X" hereto, stands."

[32] As in *Schietekat*, it is not entirely clear why it was found necessary,[57] once a dispositive finding on the facts had been made, to consider and rule on the constitutionality of sub-ss 60(4) to (9) of the CPA. Even if that question had been raised in the appeal (which it had not), the validity of those subsections had been rendered irrelevant once the appeal had been disposed of on the facts. It is even more difficult to understand why the order of invalidation swept up sub-s (11B)(c) of s 60 as well. That subsection was at no stage in issue in Joubert's application for bail, nor did it feature in the appeal, save tangentially.[58] But that is largely water under the bridge. As remarked earlier,[59] the jurisprudential status of such a hypothetical order of constitutional invalidity or, to put it differently, the question whether a court has jurisdiction to strike down a statute in the absence of a live constitutional issue warranting such conduct, was not argued in these proceedings and should stand for examination and resolution at an appropriate time. For the present, this Court is called upon to confirm, vary or set aside

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57 Or, indeed, competent. See para 25 above.

58 The learned judge (at 238J - 239A) held that the magistrate had wrongly stressed that Joubert had not testified because, had Joubert indeed given evidence, the subsection, bearing the taint ascribed to it in *Schietekat*, would have come into operation. But Joubert did *not* testify and the criticism of sub-s (11B)(c) therefore remained wholly hypothetical.

59 In paras 27 - 28 above.

the order of invalidation made by the court below in respect of each of the subsections affected.[60] One of them, sub-s 60(11B)(c), comes up for consideration again in the fourth case being considered conjunctly here, namely that of Dladla, to which I now turn.

Dladla and Others

[33] Apart from sub-s 60(11B)(c) of the CPA, this case challenges sub-ss 60(11)(a) and (14). The case comes before this Court in the following way. Dladla and his four co-applicants appeared in the Protea magistrates' court, Soweto, during October 1998 on nine counts of murder and five of attempted murder. The state alleged that they had committed the crimes in the course of an organised campaign of violence relating to a so-called taxi war.[61] Consequently they were struck by the provisions of sub-s (11)(a), read with sch 6, which meant that their prospects of being admitted to bail pending trial were

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60 See ss 167(5) and 172(2)(a) of the Constitution, which provide as follows:

> 167(5): "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."
>
> 172(2)(a): "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

61 In an affidavit filed by the state in this Court, the police officer in charge of the investigation of the charges against Dladla and his co-accused outlines the bloody history of competition between rival operators, associations and umbrella groupings engaged in the mini-bus taxi industry. Territorial battles for routes, ranks or areas of operation often spill over into violence; at times "hit-squads" are employed to terrorise opposition drivers and their passengers. The prosecution case is that it was in this context that Dladla and his co-accused formed part of a group that conspired to commit the series of drive-past shootings in March/April 1998 that resulted in the charges.

materially diminished.[62] This they found out when their legal representatives applied (unsuccessfully), first to the prosecutor and then to the court, for copies of the statements in the police docket relevant to the charges against them. The refusal of docket access was based on the provisions of sub-s (14), which give the prosecutor the right to bar access by the defence to the police docket for the purposes of a bail application.

[34] This setback prompted an application to this Court for direct access[63] to test the constitutional validity of not only sub-ss (11B)(c) and (14), but also of sub-s (11)(a), and the proceedings in the magistrates' court were postponed. Although the application for direct access went procedurally astray, it was eventually enrolled for hearing together with the appeals in *Schietekat* and *Joubert*. At the hearing we invited counsel to address argument on both the merits as well the question of condonation. Mr d'Oliviera, who spoke not only as counsel for the respondent in the *Dladla* case but with the authority of his office as the Deputy National Director of Public Prosecutions, abandoned the state's original opposition to the grant of condonation and actively supported the application for

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62 Section 60(11)(a), quoted in para 7 above, obliges a person charged with syndicated murder to adduce "evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release".

63 In terms of s 167(6)(a) of the Constitution, read with rule 17(2)(a) of the Constitutional Court Rules, which provisions read as follows:

> 167(6): "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court - (a) to bring a matter directly to the Constitutional Court".
> Rule 17(2): "An application [for direct access] shall be lodged with the registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out - (a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted".

direct access.

[35] We have decided that it would indeed be in the interests of justice to grant direct access in *Dladla* and to consider the constitutional challenges the case presents, despite the various procedural shortcomings in its presentation. In doing so, we put substance above form and follow the precedent of *S v Zuma and Others*,[64] where, for much the same reasons as are apparent here, we accepted an abortive referral as a case for direct access. This case crisply raises most of the constitutional issues mentioned at the outset of this judgment, issues involving the fundamental rights of many thousands of arrested persons and having an important bearing on the day-to-day administration of the criminal justice system. It is manifestly in the interests of justice that widespread uncertainty about the constitutional validity of important elements of an institution as important and ubiquitous as bail be laid to rest.[65]

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64 1995 (4) BCLR 401 (CC); 1995 (2) SA 642 (CC) at para 11. See also *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and others* 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC) at paras 15 - 17*; Ferreira v Levin and others; Vryenhoek and others v Powell and others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 10*; S v Mbatha; S v Prinsloo* 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC) at para 29; *Luitingh v Minister of Defence* 1996 (2) SA 909 (CC); 1996 (4) BCLR 581 at para 15; *Besserglik v Minister of Trade, Industry and Tourism and Others; Minister of Justice* 1996 (4) SA 331 (CC); 1996 (6) BCLR 745 (CC) at paras 6 - 7.

65 The need to come to grips with the uncertainty was borne out by the submissions made on behalf of the state in *Schietekat* and *Joubert.* The representative of the Cape Director of Public Prosecutions in those two cases (a senior staff member of that office) forcefully made the point that there was not only uncertainty but also resultant inconsistency in the application of the relevant CPA provisions, and made a strong plea for clear guidelines to be laid down.

Constitutionality of the impugned sections

Section 60(4) - (9)

[36] It is appropriate now to consider the cogency of the various challenges brought against the constitutionality of the impugned subsections of s 60. I deal first with the contention that sub-ss 60(4) to (9) offends against the separation of powers principle. Thereafter I address separately the self-contained and specific attack against, first, paragraph (a) of s 60(4) on the ground that it is repugnant to the rule of law and inconsistent with s 12(1) of the Constitution and, second, paragraph (e) of s 60(4) on the ground that it frustrates the right to bail.

Separation of powers

[37] Subsections (4) to (9) were introduced by the 1995 amendment and then amplified by the 1997 amendment. Patently the intention was not only to provide in meticulous detail how bail proceedings are to be conducted, but to provide judicial officers with clearly demarcated guidelines to be observed in the exercise of their adjudicative functions in relation to bail. Previously there had been only s 58, saying tersely what the effect of bail was, and s 60, which empowered a court to order the conditional release on bail of an accused in custody, without elaborating on the criteria to be taken into account,

or the procedure to be followed. As remarked at the outset,[66] even before the advent of the constitutional era in South Africa the case law on the topic had been disharmonious. In addition, the advent of a constitutionally based human rights culture and specifically the demands of s 25(2)(d) of the interim Constitution required acknowledgment. It was in that context that the 1995 amendment aimed at giving a theoretical foundation for adjudicating bail cases and superimposing a practical framework.

[38] The theoretical basis was established by transplanting into s 60(1) the principle established by s 25(2)(d) of the interim Constitution that every arrestee has the right "to be released from detention . . . unless the interests of justice require otherwise."[67] The relevant part of the new s 60(1)(a) is a faithful reproduction: "An accused . . . in custody ... shall be entitled to be released on bail . . . unless . . . it is in the interests of justice that he or she be detained . . .". After the Constitution came into operation and s 25(2)(d) was replaced by s 35(1)(f), s 60(1)(a) was not correspondingly amended. It therefore still echoes the former provision, although a person's constitutional right to release from custody is now dependent on a finding that the interests of justice permit it. Consequently, s 60(1)(a) favours liberty more than the minimum required by the Constitution.

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66 See paras 2 and 3 above.

67 Above n 13.

[39] The practical superstructure was provided in s 60(4), as supplemented by sub-ss (5) to (8A), read with sub-ss (9) and (10). Here the legislature, drawing on the case law as collated in *S v Acheson*,[68] tabulated the various criteria that ordinarily bear on the question whether or not bail should be granted in a particular case and, if it should, what conditions should be imposed.[69] This, so it was held in *Schietekat* and *Joubert*, offended the separation of powers doctrine.[70]

[40] Inasmuch as sub-ss (5) to (8A) do no more than flesh out the criteria identified as crucial in paragraphs (a) to (e) of sub-s (4) respectively, it is unnecessary to look beyond the list of factors in paragraphs (a) to (e).[71] There is nothing really new in the criteria set out in those paragraphs. The factors listed there can in the main be traced to our case law, and were identified by the South African Law Commission.[72] On its recommendation statutory guidelines were provided for the guidance of courts considering bail applications. But that is not where the learned judge in *Schietekat* saw the snag. His objection relates to the way the legislature went about providing the guidance in the opening sentence of s 60(4), namely, by saying: "The refusal to grant bail

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68 1991 (2) SA 805 (Nm HC), per Mahomed AJ.

69 There is precedent for providing courts with such guidelines in comparable democracies where the English criminal procedure system applies. See, e.g., s 32 of the Australian Bail Act, 1978, and para 9 of Sch 1 to the English Bail Act, 1976.

70 See *Schietekat*, above n 41 at 248G - 249A.

71 Paragraphs (a) and (e) of sub-s (4) and sub-ss (5) and (8A) are discussed separately in paras 51 - 57 below, as they present their own particular problems. Factors (b) to (d) are mentioned in *Acheson*.

72 See para 4.33.2 of the Report on Project 66, referred to in n 7 above.

. . . shall be in the interests of justice where one or more of the following are established . . .". That, so the judge held, was a deeming provision under the guise of which Parliament prescribed to the courts what is and what is not in the interests of justice, thus usurping the judiciary's constitutionally entrenched power to decide that question.

[41] One must endorse the objection to a deeming provision in a statute which has the effect of obliging a court to come to an unjust factual conclusion conflicting with that to which an objective evaluation would lead and which might also conflict with a provision of the Bill of Rights. This Court has on several occasions struck down such enactments.[73] But the question here is whether the impeached subsection is indeed such a provision. If one were to read the opening sentence of sub-s (4) without regard to the provisions of sub-ss 60(1)(a) and 60(9) of the CPA and s 25(2)(d) of the interim Constitution, it could possibly be understood as a mandatory injunction to a judicial officer to conclude that something is or is not in the interests of justice, irrespective of the officer's own conclusion. That certainly would constitute an objectionable deeming provision. But one must read the provisions together. Section 60(1) was designedly reworded by the 1995 amendment so as to bring it into conformity with s 25(2)(d) of the interim Constitution. At the same time the words "the refusal to grant bail and the detention of the accused in custody shall be in the interests of justice", were used in the opening sentence of sub-s (4) to preface the factors adverse to bail in paragraphs (a) to (d) of that subsection. That

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[73] *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC), *Mello and Another v The State* 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC), and the cases cited therein.

made perfectly good sense at the time, where the governing constitutional provision contemplated release unless adverse factors tilted the scale against release. When, however, s 35(1)(f) came into the place of s 25(2)(d), and required something positive to permit release, the wording of s 60(1) and the preamble to sub-s (4) no longer fitted. The attention will shortly be focused on the consequences of this loss of fit, and the use of criterion of the interests of justice. For the moment, it is necessary to complete the challenge to the correctness of the finding in the court below that sub-ss (4) to (9) offend the separation of powers principle.

[42] Making allowance for the substitution of one constitutional formulation of the right to bail for another, it can be seen that sub-ss (4) to (9) are not intended as deeming provisions at all. What those subsections do, is to list, respectively, the potential factors for and against the grant of bail, to which a court must pay regard. Admittedly the drafting is by no means perfect, and can give rise to misunderstanding in other respects which will be considered shortly; but it is clear that neither sub-s (4) nor sub-s (9) commands a court to come to an artificial conclusion of fact. On the contrary, courts are told that if they find one or more of the factors listed in paragraphs (a) to (d) of sub-s (4) to have been established, a finding that continued detention is in the interests of justice will be justified. Put differently, judicial officers are pointed towards categories of factual findings that could ground a conclusion that bail should be refused. By like token a court is not enjoined to accord decisive weight to the one or other or all the personal

factors mentioned in sub-s (9). In short, the legislature was providing guidelines as to what are factors for, and what are factors against the grant of bail. Whether and to what extent any one or more of such pros or cons are found to exist and what weight each should be afforded, is left to the good judgment of the presiding judicial officer.

[43] Such guidelines are no interference by the legislature in the exercise of the judiciary's adjudicative function; they are a proper exercise by the legislature of its functions, including the power and responsibility to afford the judiciary guidance where it regards it as necessary. What is more, it is not only a proper exercise of legislative power, but a very welcome one. Here, in conveniently tabulated form, the CPA now first provides (in s 60(4)(a) to (e)) a checklist of the main criteria to be considered against the grant of bail and then proceeds (in sub-ss (5) to (8A)) to itemise considerations that may go to make up those criteria. Then, in sub-s (9) it provides a list of personal criteria pointing towards the grant of bail.

[44] Because we are dealing with optional criteria, it is logical that each of sub-ss (5) to (8A), in spelling out the components of the criteria, appends at the end of its list of specific factors a deliberately vague hold-all provision permitting *any other factor* to be taken into account. A court is thus told it may look beyond the listed factors and, even if it does find criteria (listed and/or unlisted) which could tilt the scales against bail, it must ultimately make its own evaluation. A permissive interpretation of sub-s (4) is

therefore borne out by the very fact that the succeeding subsections are open-ended. For it would be pointless to lay down factors that *have* to be considered, and then to tail off lamely with "any other factor". Even if there were doubt as to the meaning of the preamble in s 60(4), it should, if reasonably possible, be given a meaning which does not conflict with the Constitution. The learned judge was therefore not correct in concluding that Parliament overstepped the mark in enacting sub-ss (4) to (9) of the CPA.

"The interests of justice"

[45] The conclusion that sub-ss (4) to (9) are not constitutionally objectionable on separation of powers grounds, is unfortunately not an end to the enquiry whether they pass constitutional muster. There remain the problems adumbrated earlier arising from the non-fit between their wording and the provisions of s 35(1)(f). And it is not only that s 35(1)(f) replaced the right under the former s 25(2)(d) with the "right ... to be released from detention if the interests of justice permit", and rendered the wording of sub-s 60(1)(a) and the preamble to sub-s (4) somewhat inapposite, but more because the default position changed: whereas previously the starting point was that an arrestee was entitled to be released, the position under s 35(1)(f) is more neutral. Now, unless there is sufficient material to establish that the interests of justice do permit the detainee's release, his or her detention continues.[74]

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[74] I avoid using the word "onus" in order not to get involved in the debate (see eg *Ellish en Andere v Prokureur-Generaal, Witwatersrandse Plaaslike Afdeleing* 1994 (4) SA 835 (W); 1994 (2) SACR 579

[46] The separate yet associated problem with sub-ss (4) to (9) arises from the use of criterion of the interests of justice. The term "the interests of justice" is of course well known to lawyers, especially students of South African constitutional law.[75] It is a useful term denoting in broad and evocative language a value judgment of what would be fair and just to all concerned. But while its strength lies in its sweep, that is also its potential weakness. Its content depends on the context and applied interpretation. It is also, because of its breadth and adaptability, prone to imprecise understanding and inapposite use.

[47] Section 60 is a good example of what the consequences of such misapplication can be. In sub-s (1)(a) the term is used to mirror the criterion of the governing constitutional provision.[76] There the words bear the relatively broad meaning of a value judgment taking into account the arrested person's right to liberty, as qualified by the lawful arrest. In other words, it is the overall evaluation of all the interests involved. Where the words are used in sub-ss (4), (9) and (10) that meaning does not make sense, however. For instance, in sub-s (9) the court is ordered to weigh "the interests of justice, against the

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(W); *S v Vermaas* 1996 (1) SACR 528 (T); *S v Tshabalala* 1998 (2) SACR 259 (C); *S v Mbele and Another* 1996 (1) SACR 212 (W); *S v Shezi* 1996 (1) SACR 715 (T)) mentioned at 246A-B of the judgment in *Schietekat*. For the present it is unnecessary to resolve the question whether there is an onus in bail proceedings and, if so, its incidence. The current cases are governed by sub-s (11), where there is undoubtedly a burden cast upon an applicant for bail.

75 It is for instance not only used in s 25(2)(d) of the interim Constitution and s 35(1)(f) of the Constitution, but also in ss 100(2) and 102(1) of the former and in ss 167(6) and 173 of the latter. It is also used often in s 60 of the CPA which, it will be recalled, was amended in 1995 among others to fit the constitutional norm in s 25(2)(d). The term appears in sub-ss 60(1), (4), (9), (10), (11) and (12).

76 Which was first s 25(2)(d) of the interim Constitution and then s 35(1)(f) of the Constitution.

right of the accused to his or her personal freedom". Obviously there the interests of justice cannot signify the final evaluation of what is best all round, because that would include consideration of the liberty interests of the accused. Likewise, in sub-s (10) where one is told "to weigh up the personal interests of the accused against the interests of justice", the latter term cannot logically embrace the former. It seems reasonably clear that in those two subsections the drafters of the 1995 amendment had in mind a narrower meaning than the constitutional one used in sub-ss (1), (11) and (12). It is of course most unusual to find one and the same expression used in one and the same statute but not bearing a consistent meaning. In our law, the legislature is presumed to use language consistently,[77] and one would deviate from the presumption with great hesitation and only if driven to do so, for example, because to do otherwise would lead to manifest absurdity, or would clearly frustrate the manifest intention of the lawgiver.[78] The present seems to be one of those rare instances where one is compelled to deviate from the presumption of legislative consistency. Here it is plain that the drafters of the 1995 amendment failed to distinguish between two separate and distinct meanings of the phrase "the interests of justice". In three of the six subsections that were inserted at that stage, the phrase was used synonymously with the interim Constitution's criterion for bail; but in the case of three of the subsections - (4), (9), and (10) - something different must have been intended. In those subsections the drafters must have contemplating something closer to the

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77 See e.g., *South African Transport Services v Olgar and Another* 1986 (2) SA 684 (A) at 688 and the authorities there cited.

78 See e.g., *Venter v R* 1907 TS 910 at 915; *Bevray Investments (Edms) Bpk v Boland Bank Bpk en Andere* 1993 (3) SA 597 (A) at 622D - I.

conventional "interests of society" concept or the interests of the state representing society.[79]

[48] That must also be the sense in which "the interests of justice" concept is used in sub-s (4). That subsection actually forms part of a functional unit with sub-ss (9) and (10). Between them they provide the heart of the evaluation process in a bail application, sub-s (9) being predominant. If it is read first and "the interests of justice" bears the same narrow meaning akin to "the interests of society" (or the interests of justice minus the interests of the accused), the interpretation of the three subsections falls neatly into place. The opening words of sub-s (9) ("in considering the question in sub-s (4)") refer to the question whether bail should be refused. That question, so the presiding officer is told, is to be answered by weighing up the societal interests listed in sub-s (4) and detailed in sub-ss (5) to (8A) against the personal interests adverted to in sub-s (9). And whatever the parties may contend, sub-s (10) obliges the presiding officer to ultimately assume responsibility for that evaluation.

[49] One can therefore confidently conclude that although the wording of sub-s (1)(a) no longer replicates the governing constitutional norm, and although the term "the interests of justice" is used with variable content, the nature of the exercise under chapter

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[79] See e.g. *S v Zinn* 1969 (2) SA 537 (A), explaining the triad of sentencing interests to be observed, the third of which is "the interests of society". Whether it is still appropriate to draw a line between an accused person on the one side and society on the other, need not be resolved here. Suffice it to say that it may be an oversimplification of a much more complex equation where not only the prisoner has an interest in his liberation.

9 of the CPA, and the manner in which a court enquiry into bail is to be conducted, remain substantially unaltered. It remains a unique interlocutory proceeding where the rules of formal proof can be relaxed and where the court is obliged to take the initiative if the parties are silent; and the court still has to be pro-active in establishing the relevant factors. More pertinently, the basic enquiry remains to ascertain where the interests of justice lie. In deciding whether the interests of justice permit the release on bail of an awaiting trial prisoner, the court is advised to look to the five broad considerations mentioned in paragraphs (a) to (e) of sub-s (4), as detailed in the succeeding subsections. And it then has to do the final weighing up of factors for and against bail as required by sub-s (9) and (10).[80]

[50] Sub-ss (4), (9) and (10) of s 60 should therefore be read as requiring of a court hearing a bail application to do what courts have always had to do, namely to bring a reasoned and balanced judgment to bear in an evaluation, where the liberty interests of the arrestee are given the full value accorded by the Constitution. In this regard it is well to remember that s 35(1)(f) itself places a limitation on the rights of liberty, dignity and freedom of movement of the individual. In making the evaluation, the arrestee therefore does not have, a totally untrammelled right to be set free. More pertinently than in the past, a court is now obliged by s 60(2)(c), (3) and (10) to play a pro-active role and is helped by sub-ss (4) to (9) to apply its mind to a whole panoply of factors potentially in

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[80] It goes without saying that these observations relate to bail applications in general and are not intended to apply to applications struck by the provisions of sub-s (11).

favour of or against the grant of bail.

Subsections (4)(a) and (5): Factors unrelated to trial

[51] The validity of these sections was challenged on the basis that they allow preventive detention which is constitutionally impermissible. Such a challenge could succeed only if the factors listed in sub-ss (4)(a) and (5) could never be relevant to determining whether the interests of justice permit release: we are not concerned here with the factual question whether the factors in a given case are sufficient, but with the constitutional question whether factors in the category mentioned in sub-s 4(a) measure up to the norm in s 35(1)(f) of the Constitution.

[52] It is true that paragraph (a) of sub-s (4) (particularised in sub-s (5)) differs in principle from paragraphs (b) to (d). Paragraphs (b), (c) and (d) in contra-distinction to paragraph (a), are directed at protecting and promoting the integrity of the investigation and presentation of the case in respect of which the detainee has been arrested. Those are undoubtedly the primary and most commonly expressed objectives of the pre-trial detention. The interests of justice in regard to the grant or refusal of bail therefore do focus primarily on securing the attendance of the accused at trial and on preventing the accused from interfering with the proper investigation and prosecution of the case. But paragraph (a), although not falling within the ambit of the trial-focused objectives of pre-

trial detention, does have a legitimate objective recognised at common law[81] and sanctioned by the Constitution.

[53] Section 35(1)(f) presupposes a deprivation of freedom - by arrest - that is constitutional. This deprivation is for the limited purpose of ensuring that the arrestee is duly and fairly tried. But s 35(1)(f) neither expressly nor impliedly requires that in considering whether the interests of justice permit the release of that detainee pending trial, only trial related factors are to be taken into account. The broad policy considerations contemplated by the "interests of justice" test, in that context, can legitimately include the risk that the detainee will endanger a particular individual or the public at large. Less obviously, but nonetheless constitutionally acceptably, a risk that the detainee will commit a fairly serious offence can be taken into account. The important proviso throughout is that there has to be a likelihood, i.e. a probability, that such risk will materialise. A possibility or suspicion will not suffice. At the same time, a finding that there is indeed such a likelihood is no more than a factor, to be weighed with all others, in deciding what the interests of justice are. That is not constitutionally offensive. Nor does it resemble detention without trial, the reprehensible institution really targeted when one speaks of preventive detention. Absent a proper basis for the original arrest, it will be set aside. But if there was a proper cause, one cannot justify release solely on the absence of trial-related grounds.

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81 See e.g. *S v Ramgobin* 1985 (3) SA 587 (N); 1985 (4) SA 130 (N).

Subsections (4)(e) and (8A): frustrating the right to bail

[54] It would be appropriate next to focus on sub-ss 60(4)(e) and (8A), which were struck down in *Schietekat* and *Joubert* not only because they were held to constitute an unconstitutional deeming provision, but also because, as it was termed, they constituted "lynch law". Counsel for the accused in *Dladla* and *Schietekat* urged the Court to uphold the invalidation of sub-ss (4)(e) and (8A) on substantially the same ground, albeit more prosaically couched. The two subsections, so the argument ran, deviate from the established principle that in considering bail the court focuses on the accused and on the charge against him or her, his or her record, his or her likely behaviour if released, etc., whereas these two provisions turn the attention away from the accused. Looking at public opinion and taking into account the likely behaviour of persons other than the detainee, so counsel suggested, smack of preventive detention and infringe a detainee's liberty interest protected by s 35(1)(f) of the Constitution. Elevating the sentiments of the community above the interests of the detainee is constitutionally impermissible.[82]

[55] There is force in the argument. Ordinarily, the factors identified in s 60(4)(e) and (8A) would not be relevant in establishing whether the interests of justice permit the release of the accused. It would be disturbing that an individual's legitimate interests should so invasively be subjected to societal interests. It is indeed even more disturbing

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[82] Counsel concentrated on para (8A)(b): "whether the shock or outrage of the community might lead to public disorder if the accused is released".

where the two provisions do not postulate that the likelihood of public disorder should in any way be laid at the door of the accused. The mere likelihood of such disorder independently of any influence on the part of the accused, would suffice. Nevertheless, albeit reluctantly and subject to express qualifications to be mentioned shortly, I believe the provisions pass constitutional muster. I do so on the basis that although they do infringe the s 35(1)(f) right to be released on reasonable conditions, they are saved by s 36 of the Constitution.[83] It would be irresponsible to ignore the harsh reality of the society in which the Constitution is to operate. Crime is a serious national concern, and a worrying feature for some time has been public eruptions of violence related to court proceedings. In the present context we are not so much concerned with violent public reaction to unpopular verdicts or sentences, but with such reactions to unpopular grants of bail.[84] There is widespread misunderstanding regarding the purpose and effect of bail. Manifestly, much must still be done to instil in the community a proper understanding of the presumption of innocence and the qualified right to freedom pending trial under s

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83 That section, containing a general limitations clause, reads as follows:

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

84 A particularly disturbing feature of the trend has been a tendency on the part of the media, special interest groups and public figures to exceed the bounds of legitimate criticism by imputing improper motives to the judicial officers who make unpopular decisions.

35(1)(f). The ugly fact remains, however, that public peace and security are at times endangered by the release of persons charged with offences that incite public outrage. *Schietekat* is a good example. *Dladla* again exemplifies a different type of situation where continued detention is in the interests of the public peace. Experience has shown that organised community violence, be it instigated by quasi-political motives or by territorial battles for control of communities for commercial purposes, does subside while ringleaders are in custody. Their arrest and detention on serious charges does instil confidence in the criminal justice system and does tend to settle disquiet, whether the arrestees are war-lords or drug-lords. In my view, open and democratic societies based on human dignity equality and freedom, after weighing the factors enumerated in paragraphs (a) to (e) of s 36(1) of the Constitution, would find sub-ss 60(4)(e) and (8A) reasonable and justifiable in the prevailing climate in our country.[85]

[56] That conclusion is based, first, on the inherently temporary nature of awaiting trial detention when weighed against the compelling interest in maintaining public peace. In the second place, there is a close relationship and appropriate fit between the temporary withholding of liberty and the disruption that release would unleash. I do not wish to be understood as saying anything in favour of detention without trial. We are concerned here with detention or release in anticipation of a proper trial. We are moreover and more importantly concerned with possible detention following upon a proper and public

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85 See the discussion at paras 67 - 74.

hearing before a judicial officer. And in that judicial process we know that the scheme introduced by the 1995 amendment was not to prescribe but to guide, substantially ameliorating its bite. If a court, or certain courts, elevate this particular factor to a pre-eminence it should not have, that is not a constitutional issue to be resolved in this Court. Courts will no doubt be alive to the danger of public sentiment being orchestrated by pressure groups to serve their own ends. The constitutional principle is clear: a court *may*, not *must*, take the factors enumerated in sub-s (8A) into account, and must do so judicially; and the ordinary appeal and review mechanisms can remedy any undue deference that may be afforded to public sentiment.

[57] It is important to note that sub-s (4)(e) expressly postulates that it is to come into play only "in exceptional circumstances". This is a clear pointer that this unusual category of factors is to be taken into account only in those rare cases where it is really justified. What is more, sub-s (4)(e) also expressly stipulates that a finding of such exceptional circumstances has to be established on a preponderance of probabilities ("likelihood"). Lastly, once the existence of such circumstances has been established, paragraph (e) must still be weighed against the considerations enumerated in sub-s (9) before a decision to refuse bail can be taken. Having regard to these jurisdictional prerequisites, the field of application for sub-ss (4)(e) and (8A) will be extremely limited. Judicial officers will therefore rely on this ground with great circumspection in the knowledge that the Constitution protects the liberty interests of all. Incorrect application

of the criteria listed in sub-s (4) by elevating one of them unduly, is a matter for the criminal justice system to remedy. It must do so by applying s 60(4) - (9) in the balanced manner prescribed and in accord with "the spirit, purport and objects of the Bill of Rights."[86] The limitation of the right is therefore as narrowly tailored as possible to achieve the compelling interests in maintaining public peace, and meets the requirement of proportionality between this purpose and the nature of the right.

Section 60(11)(a) of the CPA: "exceptional circumstances"

[58] It would now be convenient to turn to a consideration of the constitutional validity of s 60(11) as it now reads after its amendment by the 1997 amendment. This subsection, it will be remembered, singles out for more rigorous treatment applicants for bail who are awaiting trial on serious charges.[87] The subsection was criticised in the court below in the two Cape cases of *Schietekat* and *Joubert*[88] and is also challenged in *Dladla*. The

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86 In terms of s 39(2), any legislation is to be interpreted, and the common law is to be developed, by all courts so as to promote the spirit, purport and objects of the Bill of Rights.

87 The section now also distinguishes between serious and very serious charges, listed in schedules 5 and 6 to the CPA respectively.

88 The learned judge did not declare sub-s (11) constitutionally invalid but, when giving reasons for refusing leave for a further appeal in *Schietekat*, he intimated that he had originally intended doing so but had overlooked it.
In the light of the age of the complainant and the previous convictions, *Schietekat* fell under sub-s (11)(a) and seems to have been approached accordingly in the magistrates' court, the magistrate calling on the defence attorney to start. In the event the subsection played no actual role in the determination of the case, either in the first instance or on appeal. Both courts held that the risk that the accused would commit offences of the same kind if he were set free was simply too great to permit bail being granted. In *Joubert* the magistrate also dealt with the application as one governed by sub-s (11)(a), being a charge of premeditated murder, but on appeal the court held that it was not a case of premeditation and dealt with the appeal on the basis that sub-s (11)(b) was applicable.

constitutional validity of several of the individual provisions of sub-s (11) were challenged by defence counsel in *Schietekat* and *Dladla*, while the combined effect of those provisions was said to constitute an infringement of the liberty right protected under s 35(1)(f) of the Constitution.

[59] Section 60(11)(a), it will be recalled, provides that where an accused is charged with an offence listed in sch 6,[89] "the court *shall* order that the accused be detained . . .

Whether a court is entitled under sub-s (11) to make its own evaluation of the facts in order to allocate the case to the one paragraph of sub-s (11) or the other, is open to considerable doubt. On the wording of the subsection and of sub-s (11A), and having regard to the informal and interlocutory nature of bail proceedings, it seems that the formulation of the charge - if necessary supported by a certificate - is ordinarily decisive on this question. However, as the point is not really in issue here and was not fully argued, no more should be said about it.

89 Schedule 6 provides:
"Murder, when -
(a) it was planned or premeditated;
(b) the victim was -
(i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or
(ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1;
(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences :
(i) Rape; or
(ii) robbery with aggravating circumstances; or
(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.
Rape -
(a) when committed -
(i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;
(ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
(iii) by a person who is charged with having committed two or more offences of rape; or
(iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
(b) where the victim -
(i) is a girl under the age of 16 years;
(ii) is a physically disabled woman who, due to her physical disability, is rendered

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 the release of the accused." Section 60(11)(b) provides that where an accused is charged with a sch 5 offence[90], the court shall refuse bail "unless the accused

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particularly vulnerable; or
(iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act, 1973 (Act 18 of 1973);
(c) involving the infliction of grievous bodily harm.
Robbery, involving -
(a) the use by the accused or any co-perpetrators or participants of a firearm;
(b) the infliction of grievous bodily harm by the accused or any of the co-perpetrators or participants; or
(c) the taking of a motor vehicle.
Indecent assault on a child under the age of 16 years, involving the infliction of grievous bodily harm.
An offence referred to in schedule 5 -
(a) and the accused has previously been convicted of an offence referred to in schedule 5 or this Schedule; or
(b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 5 or this Schedule."

90 Schedule 5 provides:
"Treason.
Murder.
Attempted murder involving the infliction of grievous bodily harm.
Rape.
Any offence referred to in section 13(*f*) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992), if it is alleged that -
(a) the value of the dependence-producing substance in question is more than R50 000,00; or
(b) the value of the dependence-producing substance in question is more than R10 000,00 and that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
(c) the offence was committed by any law enforcement officer.
Any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament.
Any offence in contravention of section 36 of the Arms and Ammunition Act, 1969 (Act 75 of 1969) on account of being in possession of more than 1 000 rounds of ammunition intended for firing in an arm contemplated in section 39(2)(a) (i) of that Act.
Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft -
(a) involving amounts of more than R500 000,00; or
(b) involving amounts of more than R100 000,00, if it is alleged that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or
(c) if it is alleged that the offence was committed by any law enforcement officer -
(i) involving amounts of more than R10 000,00; or
(ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

. . . adduces evidence which satisfies the court that the interests of justice permit his or her release."

[60] The difference between the two subsections, therefore, lies in the requirement that an accused on a sch 6 charge must adduce evidence to satisfy a court that "exceptional circumstances" exist which permit his or her release. An accused on a sch 5 charge, while obliged to adduce evidence, need only satisfy the court that "the interests of justice" permit his or her release. The main thrust of the objection to s 60(11) was directed at the requirement of "exceptional circumstances" in s 60(11)(a).

[61] The subsection says that for those awaiting trial on the offences listed in sch 6, the ordinary equitable test of the interests of justice determined according to the exemplary list of considerations set out in sub-ss (4) to (9) has to be applied differently. Under sub-s (11)(a) the lawgiver makes it quite plain that a formal onus rests on a detainee to "satisfy the court". Furthermore, unlike other applicants for bail, such detainees cannot put relevant factors before the court informally, nor can they rely on information produced by the prosecution; they actually have to adduce evidence. In addition, the evaluation of such cases has the predetermined starting point that continued detention is the norm. Finally, and crucially, such applicants for bail have to satisfy the

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Indecent assault on a child under the age of 16 years.
An offence referred to in Schedule 1 -
(a) and the accused has previously been convicted of an offence referred to in Schedule 1; or
(b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1."

court that "exceptional circumstances" exist. All of this, so it was submitted, rendered the subsection an effective bar to persons charged with sch 6 offences being released on bail, and consequently infringed their constitutional right to a just evaluation of their claim for release from custody pending trial.

[62] Mr d'Oliveira, on behalf of the prosecution in *Dladla*, vigorously defended sub-s (11), saying that its wording had been well chosen with a view to the pressing social need to strengthen confidence in the criminal justice system. While conceding that there was widespread public misunderstanding as to the purpose and effect of bail, which had to be resolved by educating the public, he submitted that the misconception was not limited to the lay public. Many judicial officers, so he submitted, labouring under a misapprehension as to the true meaning and scope of the Bill of Rights, granted bail to hardened recidivists who abused their liberty right by committing further offences. That was the evil at which sub-s (11) was aimed and, if it be held that the subsection does infringe s 35(1)(f) of the Constitution, it is a permissible limitation under s 36 of the Constitution.[91] The retort from the side of the accused was that the provision was too invasive to be saved by s 36. Less invasive means could be devised and in any event the right to liberty was too elemental to permit of so serious a limitation.

[63] Section 60(11)(a) applies only when an accused is charged with one of the serious

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91 Above n 83.

offences listed in sch 6. It is true that the seriousness of the offence, and with it the heightened temptation to flee because of the severity of the possible penalty, have always been important factors relevant to deciding whether bail should be granted. So, too, have been the possibility of interference with the course of the case, and the accused's propensity to interfere in the light of his or her criminal record.[92] Indeed, those are factors that are expressly mentioned in the list of "ordinary" circumstances contained earlier in s 60.

[64] These are factors, therefore, which in the past would have been considered in determining whether bail should be granted. However, s 60(11)(a) does more than restate the ordinary principles of bail. It states that where an accused is charged with a sch 6 offence, the exercise to be undertaken by the judicial officer in determining whether bail should be granted is not the ordinary exercise established by sub-ss 60(4) - (9) (and required by s 35(1)(f)) in which the interests of the accused in liberty are weighed against the factors that would suggest that bail be refused in the interests of society. Section 60(11)(a) contemplates an exercise in which the balance between the liberty interests of the accused and the interests of society in denying the accused bail, will be resolved in favour of the denial of bail, unless "exceptional circumstances" are shown by the accused to exist. This exercise is one which departs from the constitutional standard set by s 35(1)(f). Its effect is to add weight to the scales against the liberty interest of the accused

92 See n 68 above and the authorities cited there.

and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the "interests of justice" were to be applied.

[65] This view is strengthened by a consideration of s 60(11)(b). That subsection stipulates that an accused must satisfy a magistrate that the "interests of justice" permit his or her release. It clearly places an onus upon the accused to adduce evidence. However, apart from that, the exercise to determine whether bail should be granted is no different to that provided for in sub-ss 60(4) - (9) or required by s 35(1)(f). It is clear that an accused on a sch 5 offence will be granted bail if he or she can show, merely, that the interests of justice permit such grant. The additional requirement of "exceptional circumstances" imposed by s 60(11)(a) is absent. A bail application under s 60(11)(a) is more gravely invasive of the accused person's liberty right than that under s 60(11)(b). To the extent, therefore, that the test for bail established by s 60(11)(a) is more rigorous than that contemplated by s 35(1)(f) of the Constitution, it limits the constitutional right. The question that then arises is whether that limitation may be justified in terms of s 36 of the Constitution.

[66] As recorded above, Mr D'Oliveira argued that if s 60(11)(a) were a limitation of s 35(1)(f), that limitation was one which was reasonable and justifiable. He pointed to the grim statistics which show that our society is racked by a surge in violent criminal activity which has made all ordinary law-abiding citizens fearful for their safety and that

of their family and friends. He also pointed out that the crimes identified in sch 6 are those very crimes which are in their nature violent and which are most damaging to the rights of personal security of ordinary South Africans. He also submitted that there had been a tendency to grant bail too readily in such cases. The purpose of s 60(11)(a), he argued, was to ensure that judicial officers would not grant bail unless they were satisfied that exceptional circumstances existed which made it clear that the grant of bail would not be prejudicial to the administration of justice or to the interests of the broader community. In our current situation, he stated that that was an important and legitimate government purpose.

[67] There can be no quibble with Mr D'Oliveira's submission that over the last few years our society has experienced a deplorable level of violent crime, particularly murder, armed robbery, assault and rape, including sexual assault on children. Nor can there be any doubt that the effect of widespread violent crime is deeply destructive of the fabric of our society and that accordingly all steps that can reasonably be taken to curb violent crime must be taken. Mr D'Oliveira was correct when he argued that it is against this background that we should assess the provisions of s 60(11)(a).

[68] Although the level of criminal activity is clearly a relevant and important factor in the limitations exercise undertaken in respect of s 36, it is not the only factor relevant to that exercise. One must be careful to ensure that the alarming level of crime is not

used to justify extensive and inappropriate invasions of individual rights. It is well established that s 36 requires a court to counterpoise the purpose, effects and importance of the infringing legislation on the one hand against the nature and importance of the right limited on the other. Parliament enacted s 60(11)(a) with the clear purpose of deterring and controlling serious crime, an indubitably important goal. Its effect is to limit, to an appreciable extent, the right of an arrested person to bail if the interests of justice permit. The question we need to answer is whether the extent of that limitation is justifiable.

[69] In order to determine whether the limitation is permissible in terms of s 36, it is necessary to consider whether the limitation would be considered reasonable and justifiable in democratic societies based on freedom equality and dignity. In many democratic societies, there are legislative provisions which permit a court to deny bail to accused persons in certain circumstances. In considering statutory provisions in other jurisdictions, a cautionary note must of course be sounded. Each system of criminal justice will vary and the application of substantive rules will depend upon procedures and practices peculiar to each system. The following brief consideration of the rules governing bail in jurisdictions other than our own demonstrates merely that bail is not an absolute right in any jurisdiction, and that limitations on the right to bail vary considerably.

[70] In the United Kingdom, the Bail Act provides that an accused person charged with

an imprisonable offence need not be granted bail if the court is satisfied that there are "substantial grounds" for believing that the defendant would amongst other things commit an offence while on bail. In deciding whether bail should be granted, the court is required to have regard to a range of factors, including the character, antecedents, associations and community ties of the defendant and the defendant's prior bail record.[93]

[71] In the United States of America, the Bail Reform Act provides that a federal judge "shall order the detention" of a person accused of a federal crime if he or she finds that "no conditions or combination of conditions will reasonably assure the appearance of the [defendant] as required and the safety of any other person . . . before trial".[94] In *US v Salerno*,[95] the Supreme Court dismissed a constitutional challenge to the Bail Reform Act. The court held that the "incidents of pretrial detention" permitted by the Bail Reform Act were not excessive in relation to the regulatory goals sought by Congress. In many states, as well, the state constitution provides a variant of the following clause in the Connecticut Constitution:

> "In all criminal prosecutions, the accused shall have a right . . . to be released on bail upon sufficient surety, except in capital offenses, where the proof is evident or the presumption

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93 Section 4(1), read with sch 1, part 1 paras (1) and (2) of the Bail Act 1976 (c 63).

94 18 USC 3142(e) (1984). By 3142(f), the judge is required to determine whether there are conditions of release that would reasonably assure the safety of others and the community. The judge must take into account in this determination, among other factors, the nature and seriousness of the danger to any person or the community that would be posed by the prisoner's release.

95 481 US 739 (1987).

great."[96]

The Supreme Court stated in *Carlson v Landon*[97] that a limit on bail for a specific capital crime was not a breach of the Eighth Amendment.

[72] In Canada, s 515(10) of the Criminal Code provides that pre-trial detention in custody will be justified only if one or more of the following grounds exist:

> "(a) where the detention is necessary to ensure [the accused person's] attendance in court to be dealt with according to law;
> (b) where the detention is necessary for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if released from custody, commit a criminal offence or interfere with the administration of justice;
> (c) on any other just cause being shown and, without limiting the generality of the foregoing, where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment."

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96 The Northwest Ordinance of 1787 contained the first provision of this sort. At least 35 state Constitutions limit the right to bail in a similar manner.

97 342 US 524 (1952): "The Eighth Amendment has not prevented Congress from defining the classes of cases in which bail shall be allowed in this country. Thus in criminal cases bail is not compulsory where the punishment may be death. Indeed, the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases." (Per Reed J at 545). In *Hunt v Roth* 648 F2d 1148 (8th Circuit, 1981), the Eighth Circuit held a Nebraska state constitutional amendment prohibiting bail in "sexual offenses involving penetration by force or against the will of the victim . . . where the proof is evident or the presumption great" to be in violation of the Eighth Amendment. Lay CJ distinguished *Carlson*'s case on the ground that the offences referred to in the state constitutional amendment were not capital cases (at 1162). See also discussion in WR La Fave and JH Israel *Criminal Procedure* (2nd ed) (West, 1992) at 612 - 4.

An earlier provision of s 515(10)(b) of the Code was declared unconstitutional in *R v Morales*.[98] That provision had provided that a refusal of bail would be justified if:

> ". . . detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice."

The court held that it was impossible to give the "public interest" standard a settled meaning and that it was incapable of "framing the legal debate in any meaningful manner or structuring discretion in any way."[99] It was in breach of s 11(e) of the Charter in that it authorised a denial of bail without just cause and therefore invalid. It was also held, however, that the protection of public safety provision did not infringe the Charter. The statutory provisions cited above contain amendments adopted subsequent to the decision in *Morales*. They have not, to our knowledge, been the subject of a Charter challenge.

[73] In Australia, the Bail Act provides a rebuttable presumption in favour of bail for certain offences. However, this presumption is reversed in the case of particular drug offences where there is a "presumption against granting bail". The Act further outlines an extensive list of offences involving violence, including conspiracy to murder, aggravated sexual assault, sexual intercourse with a child under 16 and kidnapping, which

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98 (1992) 77 CCC (3d) 91 (SCC).

99 Note 98 (per Lamer CJC) at 103f-g.

are excluded from this favourable presumption, as well as domestic violence offences, where the accused has a history of violence.[100] Factors relevant to determining whether the presumption has been rebutted include "the protection and welfare of the community".[101] It is clear from the above discussion that bail is limited in open and democratic societies, although it is also clear that the limitation imposed by s 60(11)(a) is an unusual one, which may well be more invasive than those described above.

[74] Mr D'Oliveira also argued that s 60(11)(a) was narrowly tailored to fit its purpose, and that therefore the limitation on the right was not unnecessarily invasive. He relied, first, on the fact that s 60(11)(a) applies only to a narrow category of the most serious crimes. Premeditated murder, armed robbery, vehicle hijacking, rape and indecent assault on children where the rape or assault involves the infliction of grievous bodily harm are all violent crimes that are, unfortunately, widespread and which give rise to great concern. Secondly, he relied on the fact that the requirement of "exceptional circumstances" lent itself to particular application in particular cases, and therefore avoided the potential injustice of an outright ban on bail for certain types of offences. I accept that that is so. Section 60(11)(a) does not contain an outright ban on bail in relation to certain offences, but leaves the particular circumstances of each case to be considered by the presiding officer. The ability to consider the circumstances of each

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100 See respectively ss 8A, 9 and 9A of the Bail Act No 161 of 1978.

101 Section 32(1)(c) of the Bail Act.

case affords flexibility that diminishes the overall impact of the provision. What is of importance is that the grant or refusal of bail is under judicial control, and judicial officers have the ultimate decision as to whether or not, in the circumstances of a particular case, bail should be granted.

[75] In this regard, I am not persuaded that there is any validity in the complaint raised in argument that the term "exceptional circumstances" is so vague that an applicant for bail does not know what it is that has to be established. An applicant is given broad scope to establish the requisite circumstances, whether they relate to the nature of the crime, the personal circumstances of the applicant, or anything else that is particularly cogent. The contention was moreover that if one adds that those circumstances must "in the interests of justice permit . . . release", the subsection becomes an insurmountable obstacle in the way of bail. In my view the contrary is true. Inasmuch as we are not dealing with the obstacle itself but with ways of bypassing it, the wider the avenue, the more advantageous it is to freedom. A related objection[102] that the requirement is constitutionally bad for vagueness falls to be rejected for basically the same reason. In any event, one can hardly expect the lawgiver to circumscribe that which is inherently incapable of delineation. If something can be imagined and outlined in advance, it is probably because it is not exceptional.

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102 Which was raised but tentatively.

[76] Likewise I do not agree that, because of the wide variety of "ordinary circumstances" enumerated in sub-ss (4) to (9), it is virtually impossible to imagine what would constitute "exceptional circumstances", and that the prospects of their existing are negligible. In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond, and generically different from those enumerated. Under the subsection, for instance, an accused charged with a sch 6 offence could establish the requirement by proving that there are exceptional circumstances relating to the his or her emotional condition that render it in the interests of justice that release on bail be ordered notwithstanding the gravity of the case.[103] Other examples are readily to hand in the small body of case law that has already been established in the short period since the 1997 amendment came into operation on 1 August 1998. Thus an otherwise dependable man charged with consensual sexual intercourse with a fifteen year old girl, and who has a minor previous conviction dating back many years, would technically fall within the ambit of sub-s (11)(a). Yet a prudent judicial officer could find those circumstances sufficiently exceptional to warrant bail provided there were no other factors adverse to the grant. *Schietekat* on the other hand also falls under sch 6 and sub-s (11)(a) (indecent assault on a child under 16 and previous

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103 The example is taken from *Joubert*. There is no reason to believe that courts will find it impossible to find that release on bail is justified where an "ordinary" circumstance is present to an exceptional degree. This is exemplified by three of the unreported judgments that were handed up, namely *Coetzee v the State* an unreported decision of the Cape of Good Hope High Court, case A942/98 (26 November 1998); *Adams v The State* an unreported decision of the Cape of Good Hope High Court, case A781/98 (6 October 1998); and *Hendriks v The State* an unreported decision of the Cape of Good Hope High Court, case A714/98 (1 October 1998). If anything those cases suggest that the stringency of sub-s (11)(a) has been undervalued.

convictions for the same offence), but in his case the test for exceptional circumstances produced the opposite answer. In the final analysis, the evaluation is to be done judicially, which means that one looks at substance, not form.

[77] In conclusion, therefore, I am of the view that although the inclusion of the requirement of "exceptional circumstances" in s 60(11)(a) limits the right enshrined in s 35(1)(f), it is a limitation which is reasonable and justifiable in terms of s 36 of the Constitution in our current circumstances.

[78] Then there is the question of the onus under sub-s (11)(a). It was not suggested that the imposition of an onus on an applicant for bail is in itself constitutionally objectionable, nor could such a submission have been sustained. This Court has in the past unhesitatingly struck down provisions that created a reverse onus carrying the risk of conviction despite the existence of a reasonable doubt;[104] but what we have here is not a reverse onus of that kind. Here there is no risk of a wrong conviction, the objection that lies at the root of the unacceptability of reverse onuses. All that the subsection does in this regard, is to place on an accused, in whose knowledge the relevant factors lie, an onus to establish them in a special kind of interlocutory proceeding not geared to arriving at factual conclusions but designed to make informed prognoses.

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104 Above note 73.

[79] It should of course never be forgotten that the Constitution does not create an unqualified right to personal freedom[105] and that it is inherent in the wording of s 35(1)(f) that the Bill of Rights contemplates - and sanctions - the temporary deprivation of liberty required to bring a person suspected of an offence before a court of law. The hypothesis, indeed the very reason for the existence of s 35(1)(f), is that persons may legitimately and constitutionally be deprived of their liberty in given circumstances. This clearly establishes that unless the equilibrium is displaced, an arrestee is not to be released. Section 60(11)(a) therefore does not create an onus where nothing of the kind existed before. It describes how it is to be discharged, and adds to its weight. As in the case of reliance on any other right in the Bill of Rights, if accused persons wish to rely on the provisions of s 35(1)(f), they must bring themselves within its ambit. The words "interests of justice permit" form part of the definition of this right; they delineate its ambit. The court must be satisfied that "the interests of justice permit" the release from detention. Where all the relevant facts are common cause, the matter is decided by the presiding judicial officer exercising a value judgment according to all the relevant criteria on the basis of these facts in the manner described in this judgment. If facts indispensable for establishing that the interests of justice permit the arrestee's release are not established, the arrestee is not entitled to the remedy under the subsection.

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105 Section 12(1)(a) of the Constitution expressly prohibits deprivation of freedom "arbitrarily or without just cause". This court has dealt with s 12(1)(a)'s equivalent under the interim Constitution in *Nel v Le Roux NO and Others* 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) and with s 12(1)(a) in *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC).

[80] But it was argued that the subsection imposes an onus which is so difficult to discharge that the right to release on bail is illusory. In practice, so it was submitted, the accused would face an impossible hurdle: the onus is on the accused to prove the exceptional circumstances; so is the duty to begin; evidence has to be adduced, but an accused, with no knowledge of the prosecution case, cannot hope to discharge the onus in the dark.[106] If that were indeed what the subsection demanded, the contention would probably have been well founded. However, the argument overlooks the important qualification built into sub-s (11)(a) that the accused must be "given a reasonable opportunity" to establish what the subsection requires. The lawgiver did not specify how that is to be done, nor what would be necessary to qualify as "reasonable". This much is clear, however: an opportunity has to be afforded and it has to be reasonable; and it has to be reasonable having regard to the limits that the subsection places on the category of arrestees concerned. They are indeed faced with an uphill battle, and they have to be given a fair chance, e.g. by ordering the prosecutor to furnish sufficient details of the charge(s) to enable the applicant to show why the circumstances are exceptional. Freedom is a precious right protected by the Constitution, that is why the subsection specifically requires that sch 6 arrestees facing the more formidable hurdle of sub-s (11)(a) be afforded this opportunity. The requirement of reasonableness is peremptory, though the subsection does not spell out what that means. Nor need it do so. What is or is not a reasonable opportunity must depend upon the facts of each particular case. But

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106 Section 60(14), which is discussed in the next paragraph, severely restricts access to the police docket at the bail stage.

no accused can ever be lawfully confronted with the dilemma postulated - the presiding judicial officer would be failing in his or her duty were that to be permitted to happen. In this context it would be salutary to note the clear exposition by Schutz JA in *Naude and Another v Fraser*:[107]

> "It is one of the fundamentals of a fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be apprised of the case which he faces."

The principle is clearly applicable where an accused must try to make out a case under s 60(11)(a).

Section 60(14) of the CPA: Docket access

[81] An important related question concerns s 60(14). This provision, which was introduced together with the new sub-s (11) by the 1997 amendment, seems to have been aimed at clearing up uncertainty about the impact of this Court's judgment in *Shabalala*[108] on bail applications. In the course of argument, counsel for the prosecution in *Schietekat, Joubert* and *Dladla* emphasised that there was a widely held perception that an accused person's legal representatives had a right of access to the police docket right from the outset of the prosecution, even at the accused's first appearance in court, and that this was

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107 1998 (4) SA 539 (A) at 563E - F.

108 Above n 31.

causing consternation among investigating officers and state prosecutors. Often the investigation was still far from complete and premature disclosure of the contents of the docket could seriously prejudice the course of justice. For instance, witnesses whose identities and whereabouts were thus revealed, could be intimidated or even eliminated. Sub-s (14), in no uncertain terms, puts an end to that uncertainty insofar as it relates to bail applications.

[82] Not that there should really have been much uncertainty in any event. Nothing that was said in *Shabalala* should lead anyone to believe that the defence is entitled to look over the prosecution's shoulder as the investigation runs its course. Mahomed DP, who expressed the unanimous view of this Court, was at pains to confine the judgment to an assessment of the impact of the fair trial demand of s 25(3) of the interim Constitution[109] on (a) the rule in *Steyn's* case[110] and (b) the rule barring the defence from interviewing prosecution witnesses.[111] The judgment makes it clear (in paragraph 56) that disclosure of material in the police docket depends, among others, on the timing of the request, and that the risk of interference with the investigation is a factor to be weighed. The judgment in *Shabalala* is no authority for the proposition that applicants for bail, or their legal representatives, are entitled to access to the police docket. The case was

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109 That section's equivalent in the Constitution is s 35(3).

110 *S v Steyn* 1954 (1) SA 324 (A), which affords blanket privilege to the contents of the police docket.

111 It is a long-standing rule of practice in South Africa which has been elevated to a rule of professional conduct for advocates that state witnesses are not to be interviewed by the defence otherwise than with the consent of the prosecutor concerned.

concerned with the trial and what is fair in relation thereto. It had nothing to do with bail. What is in issue at the stage of a bail application, is not the fairness or otherwise of the trial, but the qualified right of an arrestee under s 35(1)(f) of the Constitution to be released from custody if the interests of justice permit. And what is more particularly in issue here is the effect that sub-s 60(14) may have on that right.

[83] The argument that was advanced in support of the invalidation of sub-s (14) was that the combined effect of sub-ss (11)(a) and (14) was in reality to deny bail to persons arrested on sch 6 offences and to consign them to continued detention in breach of the right protected by s 35(1)(f) of the Constitution. Indeed, the argument was not confined to arrestees struck by sub-s (11)(a) but, as they represent the highwater mark of the complaint, this discussion can focus on their plight. It has already been noted that there is substance in the contention that applicants for bail who have to discharge the heavy burden of proving exceptional circumstances which permit their release in the interests of justice, cannot be expected to do so without their knowing the grounds against their being granted bail.[112]

[84] Of course, if possible statutory provisions should be interpreted as being consistent with the Constitution and two subsections of the same statute ought not to be read as being mutually contradictory. Therefore, notwithstanding the provisions of sub-s (14),

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[112] Above at para 80.

a prosecutor may have to be ordered by the court, under sub-s (11), to lift the veil in order to afford the arrestee the reasonable opportunity prescribed there. Sub-s (14) can therefore not be read as sanctioning a flat refusal on the part of the prosecution to divulge any information relating to the pending charge(s) against the arrestee, even where the information is necessary to give effect to the "reasonable opportunity" requirement of sub-s (11). And there is a ready - and less absolute - interpretation of sub-s (14) which is both consistent with its language and in harmony with sub-s (11). The words "have access to" in sub-s (14) are to be interpreted as barring physical access to the contents of the docket, in the sense of having sight of or perusing such contents.[113]

[85] In the result sub-s (14), read restrictively as indicated, does no more than make plain that, whatever access to the police docket an accused may have to be afforded in order to protect the right to a fair trial guaranteed by the Constitution, there is no correspondingly general right at the bail stage. And in order to make that intention completely plain, the proviso to the subsection expressly excludes access required for trial purposes from its prohibitory ambit. It follows that there is no constitutional fault to be found with the subsection.

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113 Reference to a standard dictionary, eg the Shorter Oxford English Dictionary, shows that the word "access" ("toegang" in the Afrikaans text) is inexact enough to mean approaching in either the physical or the figurative or notional sense.

Section 60(11B)(c): Admissibility of bail proceedings at trial

[86] We can now turn to the last provision that is due for constitutional scrutiny in this judgment, namely s 60(11B)(c), the constitutionality of which was challenged in *Dladla* and *Schietekat*. Although *Dlamini* was not concerned with s 60(11B)(c) of the CPA, [114] the basic debate regarding infringement of the right to silence - or the privilege against self-incrimination - is common to all three cases. It was the pivotal feature in *Dlamini* and it would be best to approach the question from the perspective of that case. There, it will be recalled, the prosecution case had included evidence of disclosures the accused had made in the course of an application for bail which, though intended to be exculpatory, had contradicted an alibi defence he advanced at the trial. The evidence was admitted despite a constitutional challenge to its admissibility. On appeal to this Court counsel renewed the challenge.[115] Although we are still concerned with bail and with an impugned enactment which forms part of s 60, and relates to the record of bail proceedings, the constitutional focus here does not really fall on bail. What is in issue here is not so much the right of an arrested person to be released on bail,[116] but the different constitutional right enjoyed by every person, upon arrest and thereafter, to

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114 The 1997 amendment, containing sub-s (11B)(c), had not yet come into operation then and, in any event, the impugned evidential material in *Dlamini* was not evidence given by the accused, but an unsworn *statement* from the dock.

115 The challenge has elicited considerable judicial comment: See e.g. *S v Botha and Others* 1995 (11) BCLR 1489 (W); 1995 (2) SACR 598 (W); *S v Nyengane en Andere* 1996 (2) SACR 520 (EC); *S v Aimes and Another* 1998 (1) SACR 343 (C); *S v Chavulla en Andere* 1999 (1) SACR 39 (C).

116 Under s 35(1)(f).

remain silent. That right is expressed in a number of complementary ways in the Constitution -

> to remain silent while under arrest;[117]
>
> not to be compelled while under arrest to make any confession or admission that could be used in evidence against that person;[118]
>
> to be presumed innocent, to remain silent, and not to testify at trial;[119] and
>
> not to be compelled to give self-incriminating evidence at trial.[120]

[87] The precise meaning and scope of those rights and immunities, the distinction between them, and their effect, singly or jointly, in given situations need not be pursued here.[121] In the narrow context of the right to be released from detention the crux of the issue is that sub-s 60(11B)(c)[122] not only makes the record of the bail proceedings[123] part of the subsequent trial record, but makes any evidence the accused elects to give at the bail hearing admissible against him or her at trial provided the court hearing the bail

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117 Under s 35(1)(a).

118 Under s 35(1)(c).

119 Under s 35(3)(h).

120 Under s 35(3)(j).

121 That is as well, for the terms "the right to silence" and "the privilege against self-incrimination" seem to embrace an ill-defined and disparate number of ideas in different common law jurisdictions. See *Osman and Another v The Attorney General, Transvaal* 1998 (4) SA 1224 (CC); 1998 (11) BCLR 1362 (CC).

122 Quoted in para 7 above.

123 Which s 64 of the CPA requires to be kept in full.

application had warned the accused of the risk of such use. The first part of sub-s (11B)(c), which automatically incorporates the bail record into the trial record, is an unremarkable procedural provision which merely allows a shortcut: under s 235 of the CPA a certified copy of the bail record can in any event be handed in at the trial.

[88] The second leg of the subsection, relating to the admissibility of the accused's testimony, is where the snag lies. The judgment in *Schietekat*[124] found this provision to be unconstitutional by reason of its infringement of the protection against self-incrimination, and asked the rhetorical question: "Is it by fashioning this weapon that those who would seek their liberty are to be discouraged from asking for it?"

[89] Counsel for Schietekat was content to attack the subsection on narrower grounds, concentrating on applications for bail by persons struck by s 60(11)(a).[125] It was argued that in such cases, whatever the letter of the law may say, the accused was in fact caught in a legal trap. The accused is entitled to a reasonable opportunity to make out a case; without the testimony of the accused there is no hope of proving the requisite exceptional circumstances, especially as there is no access to the information in the police docket,[126] and such testimony may be used against the accused at trial. In many cases such circumstances add up to compulsion on an accused to testify. Sub-s (11B)(c) is therefore

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124 Above n 41 at 248C-F.

125 As was the case in *Schietekat.*

126 By virtue of sub-s (14).

to be struck down for the same reasons as had s 417(2)(b) of the Companies Act 61 of 1973 in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*.[127]

[90] As far as sub-s (11B)(c) is concerned, counsel for the appellants in *Dladla* confined himself to brief submissions in his written argument. There he supported the broader reasoning in *Schietekat*, and also relied on a judgment that had been foundational to the argument that had been advanced by counsel in *Dlamini*, namely *S v Botha and Others*.[128]

[91] In *Dlamini*, counsel relied on the judgment in *S v Botha and Others* in juxtaposing two constitutionally entrenched fundamental human rights, the right to bail[129] and the privilege against self-incrimination.[130] Submitting that those rights were impermissibly brought into conflict with one another in cases such as *Dlamini* (and *Botha*), where utterances by or on behalf of an accused during bail proceedings were subsequently allowed to be used to the detriment of the accused, counsel for the appellant urged this Court to adopt the reasoning and endorse the conclusion in *Botha's* case. That was that

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127 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

128 Above n 115.

129 Protected in s 35(1)(f) of the Constitution.

130 Protected in paras (1)(a), (b) and (c) and (3)(h) and (j) of s 35 of the Constitution. The corresponding provisions of the interim Constitution, which was in force at the time of *Botha's* case, were ss 25(2)(d) and 25(3)(c) and (d).

Botha could not have a fair trial[131]if he were to be ". . . cross-examined on the incriminating evidence he gave at the bail application if he did so in ignorance of the right to refuse to answer incriminating questions."[132] In a later passage the learned judge concluded as follows regarding the conflict between the two rights in question:

> "If the evidence given by an accused at a bail application is admissible later at trial, the accused faces a dilemma: if he fails to give evidence or refuses to answer incriminating questions, he may be refused bail, yet, if he does give evidence and answers incriminating questions in order to get bail, he foregoes his right to remain silent and the privilege against self-incrimination. In the interests of a fair trial, the accused should not have to choose."[133]

The court below rejected the reasoning in *Botha*'s case, holding that it rendered an accused "free to perjure himself . . . [and] would bring the administration of justice into disrepute . . .".

[92] Counsel's argument that the trial court had erred stands or falls with its resort to the judgment in *Botha*. If that judgment is either inapplicable or, if applicable is unsound, the argument collapses for lack of foundation. And in my view it fails on both scores. *Botha*'s case was a criminal trial in which the prosecution unsuccessfully tried to put in

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131 As guaranteed by s 25(3) of the interim Constitution, which was in force at the time. In analysing the dictates of that provision, the learned judge relied on the observations by Kentridge AJ, on behalf of this Court, in *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC).

132 At 1494D and following.

133 At 1495E and following.

a transcript of incriminating evidence that the eponymous accused had given when applying for bail. The evidence was excluded on two separate grounds; and foundational to both was a finding that the accused had given the contested evidence in ignorance of his right against self-incrimination.[134] By contrast, in *Dlamini* the prosecution established conclusively that the accused, having been fully informed by the magistrate of his right to remain silent and of the risk of self-incrimination should he testify, proceeded to make the damaging disclosures while arguing his innocence. The facts in the two cases are therefore fundamentally different and the judgment in *Botha* is inapplicable.

[93] In any event, I disagree with the reasoning and conclusion in *Botha* that the record of bail proceedings should be kept distinct from the evidence as to guilt, on the analogy of evidence in a trial-within-a-trial as to the voluntariness of a confession. It is true that evidence given at a bail hearing may ultimately redound to the prejudice of the accused. It can therefore not be denied that there is a certain tension between the right of an arrested accused to make out an effective case for bail by adducing all the requisite supporting evidence, and the battery of rights under s 35(1) and (3) of the Constitution.[135] But that kind of tension is by no means unique to applicants for bail. Nor does its mere existence sound constitutional alarm bells. Choices often have to be faced by people living in open and democratic societies. Indeed, the right to make one's own choices is

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134 See 1492C and 1494D-G. The first ground was that the use of the evidence against the accused was in conflict with the common law privilege against self-incrimination and the second that it breached the right under the interim Constitution to a fair trial.

135 See para 86 and n 116 -120.

an indispensable quality of freedom. And often such choices are hard.

[94] Litigation in general, and defending a criminal charge in particular, can present a minefield of hard choices. That is an inevitable consequence of the high degree of autonomy afforded the prosecution and the defence in our largely adversary system of criminal justice. An accused, ideally assisted by competent counsel, conducts the defence substantially independently and has to take many key decisions whether to speak or to keep silent: Does one volunteer a statement to the police or respond to police questions? If one applies for bail, does one adduce oral and/or written evidence and if so by whom? Does one for the purposes of obtaining bail disclose the defence (if any) and in what terms? Later, at the trial, does one disclose the basis of the defence under s 115 of the CPA? Does one adduce evidence, one's own or that of others? Each and every one of those choices can have decisive consequences and therefore poses difficult decisions.[136] As was pointed out in *Osman*'s case[137] "[t]he choice remains that of the accused. The important point is that the choice cannot be forced upon him or her." It goes without saying that an election cannot be a choice unless it is made with proper appreciation of what it entails. It is particularly important in this country to remember that an uninformed

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136 In *McGautha v California* 402 US 183 (1971) the Supreme Court, albeit in a different context, made an observation (at 213) which is in point here:

> "The criminal process, like the rest of the legal system, is replete with situations requiring `the making of difficult judgments as to which course to follow . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved."

137 Above n 121 at para 23.

choice is indeed no choice. The responsibility resting upon judicial officers to ensure the requisite knowledge on the part of the unrepresented accused need hardly be repeated.[138]

[95] In effect the reasoning in *Botha* wishes to give the accused the best of both alternatives or, as it was put bluntly in *Dlamini*, the right to lie: one can advance any version of the facts without any risk of a come-back at the trial;[139] and there one can choose another version with impunity. However, the protection of an arrestee provided under the right to remain silent in the Constitution - or the right not to be compelled to confess or make admissions - offers no blanket protection against having to make a choice. It is true, the principal objective of the Bill of Rights is to protect the individual against abuse of state power; and it does so, among others, by shielding the individual faced with a criminal charge against having to help prove that charge. That shield against compulsion does not mean, however, that an applicant for bail can choose to speak but not to be quoted. As a matter of policy the prosecution must prove its case without the accused being compelled to furnish supporting evidence. But if the accused, acting freely and in the exercise of an informed choice, elects to testify in support of a bail application, the right to silence is in no way impaired. Nor is it impaired, retrospectively as it were, if the testimony voluntarily given is subsequently held against the accused.

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138 See for example *S v Lwane* 1966 (2) SA 433 (A); *S v Botha*, above n 115; *Magmoed v Janse van Rensburg and Others* 1993 (1) SA 777 (A); *S v Nomzaza* 1996 (2) SACR 14 (A).

139 Compare *US v Kahan* 415 US 239 (1974) where, in the course of the court holding that false statements made by an accused in enforcing his right to counsel, could be proved at his subsequent trial, the following was said at 243: "The protective shield . . . is not to be converted into a licence for false representations . . .".

[96] Of course the real problem with *Botha* is that the court incorrectly diagnosed the ill that had befallen the accused and accordingly went unnecessarily far in propounding a broad and radical remedy for an ill that could and should have been treated conservatively and selectively. In principle there was no reason to look beyond the decision of the Supreme Court of Appeal in *S v Nomzaza.*[140] That judgment was expressly based on the law as it stood before the advent of the constitutional era and was directly in point in *Botha* with regard to the common law. As explained in *Nomzaza*, there is no general rule at common law excluding, from the evidentiary material at trial, incriminatory or otherwise prejudicial evidence given by an accused at a prior bail hearing;[141] but if the admission of such evidence would render the trial unfair, the trial court ought to exclude it. Botha did not know of his right to refuse to answer incriminatory questions when he testified in support of his application for bail. In the result, when he was cross-examined skilfully on the merits of the charges, he effectively convicted himself out of his own mouth and, on the authority of *Nomzaza*, the incriminatory evidence thus elicited should have been excluded at the trial.

[97] The general approach to evidence obtained under constitutionally doubtful circumstances was outlined in *Key v Attorney-General, Cape of Good Hope Provincial*

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140 Above n 138. See also *S v Venter* 1996 (1) SACR 664 (A).

141 On the contrary, the general rule at common law is to admit relevant extra-curial statements by the accused if freely and voluntarily made: *R v Barlin* 1926 AD 459 at 462; *S v Yolelo* 1981(1) SA 1002 (A) at 1009C.

Division and Another:[142]

> "What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.
>
> If the evidence to which the applicant objects is tendered in criminal proceedings against him, he will be entitled at that stage to raise objections to its admissibility. It will then be for the trial Judge to decide whether the circumstances are such that fairness requires the evidence to be excluded."

It would be as well to repeat that in such cases the flexible approach advocated by Ackermann J in *Ferreira v Levin*[143] and subsequently endorsed unanimously by this Court in *Bernstein v Bester*,[144] is to be adopted.

[98] Although there are differences between the wording of the relevant protections in the interim Constitution and the Constitution, the differences are immaterial with regard to the point now under discussion. The principle remains the same. The question to be asked in *Dlamini* and in *Schietekat* is therefore still not whether, somehow or other, the right to silence was imperilled by the accused having on advice elected to speak. Under

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142 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (CC) at paras 13 - 14.

143 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC).

144 In *Bernstein and Others v Bester and Others NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) and *Nel v Le Roux* above note 105.

the Constitution the more pervasive and important question is whether the admission of the resultant evidentiary material would impair the fairness of the trial. If it would, the evidence ought generally to be excluded. If not, there is no basis for excluding it. There is no warrant for creating a general rule which would exclude cogent evidence against which no just objection can be levelled. The trial court must decide whether it is a valid objection, based on all the peculiar circumstances of the particular case, not according to a blanket rule that would throw out good and fair evidence together with the bad. Thus, in *Dlamini* there can be no conceivable objection to the trial court having taken into account what the accused had said when pressing his bail application. Then again, if the case against Schietekat should ever be reinstituted, the trial court will have to decide whether it would render the trial unfair to include the transcript of the bail application. The mere fact that such evidence might cogently corroborate a single identifying state witness would not be decisive in deciding fairness, but the fact that the prosecutor was allowed to range unchecked may.

[99] Provided trial courts remain alert to their duty to exclude evidence that would impair the fairness of the proceedings before them, there can be no risk that evidence unfairly elicited at bail hearings could be used to undermine accused persons' rights to be tried fairly. It follows that there is no inevitable conflict between s 60(11B)(c) of the CPA and any provision of the Constitution. Subsection (11B)(c) must, of course, be used subject to the accused's right to a fair trial and the corresponding obligation on the

judicial officer presiding at the trial to exclude evidence, the admission of which would render the trial unfair. But it is not only trial courts that are under a statutory and constitutional duty to ensure that fairness prevails in judicial proceedings.[145] The command that the presiding judicial officer ensure that justice is done applies with equal force to a bail hearing. There the presiding officer is duty bound to ensure that an accused who elects to testify, does so knowing and understanding that any evidence he or she gives may be admissible at trial.

[100] What happened in *Botha* and to an extent in *Schietekat* is not an inevitable consequence of the tension between the accused's liberty interests and the interests of society that the wrong people be not released pending trial. What went wrong there was directly ascribable to the respective prosecutors being allowed to abuse the right to cross-examine an accused who elects to enter the witness-box in support of a bail application. By doing so, the accused is not delivered up to an inquisition aimed at ascertaining and - worse - destroying the accused's defence. The issue before the court hearing a bail application is not the accused's guilt. It may be a factor which has to be probed, but not necessarily nor, where it is, with no holds barred. *Joubert* is an example of the type of case where the accused's guilt is relatively insignificant to the question of bail. Stronger

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145 The message in *R v Hepworth* 1928 (AD) 265 remains as valid today as it ever was. At 277, Curlewis JA stated:

> "A criminal trial is not a game where the one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to the recognised rules of procedure but to see that justice is done."

examples can be imagined. Indeed, it could well happen that an arrestee adopts the attitude that, for the purposes of the bail application, guilt is conceded but a compelling case for release is still made out. It would also be proper for an arrestee when testifying in support of bail to refuse to answer any questions relating to the merits of the charge and the defence thereto. Not only the innocent are entitled to their release on bail pending trial. On the contrary, even those who have been convicted and sentenced to imprisonment can be and often are released on bail pending appeal.

Summary

[101] To sum up:

1. None of the provisions of the CPA impugned in the four cases before the Court infringes the Constitution on any of the grounds advanced here.
2. None of the provisions of the Constitution presents any major obstacle to the application of those impugned provisions.
3. Bail as an institution is well known; so are its objectives and broad criteria. The advent of the Constitution and the adoption of the 1995 and 1997 amendments to s 60 of the CPA properly construed, have provided a norm and guided the evaluation process.
4. Section 35(1)(f) of the Constitution acknowledges that persons may be arrested and detained for allegedly having committed offences but such

arrestees are entitled to be released on reasonable conditions if the interests of justice permit.

5. Deciding whether the interests of justice permit such release, and determining appropriate conditions, is an exercise to be performed judicially in accordance with the procedure laid down in s 60 of the CPA.

6. Although a bail application is a formal court proceeding, it is relatively informal, inherently urgent and serves a uniquely interlocutory purpose distinct from that of the trial; the issue is not guilt but where the interests of justice lie in relation to bail.

7. In determining where the interests of justice lie, the essential exercise is to ascertain the relevant circumstances by using as a guide the check-list of relevant factors against the grant of bail provided in sub-s (4), as particularised in sub-ss (5) to (8A), and of those for the grant of bail provided in sub-s (9).

8. With regard to the factors both for and against the grant of bail, the checklist is not exhaustive, and the court has to consider any other relevant factor.

9. In seeking to establish the presence of such factors the court is to act as pro-actively and inquisitorially as may be necessary.

10. Having established all relevant factors, the court must weigh up the pros and cons of bail judicially, keeping in mind the possibilities of using

appropriate conditions to minimise possible risks.

11. Where the public peace is a factor, i.e. where sub-ss (4)(e) and (8A) are invoked, the court should proceed with great caution and establish that the requisite exceptional circumstances are indeed present.

12. Likewise, where sub-s (11)(a) is involved, the court should be astute to ensure that the right to bail under s 35(1)(f) of the Constitution is not rendered illusory by the effect of sub-s (14), the incidence of the onus and the need to adduce evidence. The accused is entitled to a reasonable opportunity to establish exceptional circumstances. The latter term holds no hidden meaning and is to be applied judicially

13. Although the accused's guilt may be relevant in a bail application, evidence thereon should be confined to the central issue whether the interests of justice permit the release of that accused on bail. Abuse by the prosecution of the right to cross-examine on that issue may result in the evidence being excluded at trial.

14. The record of bail proceedings is neither automatically excluded from nor included in the evidentiary material at trial. Whether or not it is to be excluded is governed by the principles of a fair trial.

15. Bail serves not only the liberty interest of the accused, but the public interest by reducing the high number of awaiting trial prisoners clogging our already overcrowded correctional system, and by reducing the number

of families deprived of a breadwinner.

Order

[102] It remains to express the findings regarding the constitutionality of the various impugned provisions of s 60 of the CPA in the form of appropriate orders:

Dlamini

The appeal is dismissed.

Dladla

1. The appellants are granted direct access to this Court in terms of s 167(6)(a) of the Constitution and rule 17(2) of the Constitutional Court Rules.
2. It is declared that sub-ss (11)(a), (11B)(c) and (14) of s 60 of the Criminal Procedure Act 51 of 1977 are not unconstitutional on any of the grounds argued in this case.

Schietekat

1. The appeal is upheld.
2. The order in the court below declaring sub-ss (4) to (9) and (11B)(c) of s 60 of the Criminal Procedure Act 51 of 1977 to be unconstitutional is not confirmed.

Joubert

1. The appeal is upheld.
2. The order in the court below declaring sub-ss (4) to (9) and (11B)(c) of s 60 of the

Criminal Procedure Act 51 of 1977 to be unconstitutional is not confirmed.

Chaskalson P, Langa DP, Ackermann J, Goldstone J, Madala J, Mokgoro J, O'Regan J, Sachs J and Yacoob J concur in the judgment of Kriegler J.

Appearances:

Dlamini

For the appellant:	PJ Blomkamp, pro deo.
For the respondent:	FH Buntting instructed by the State Attorney, Durban.

Dladla

For the appellant:	J Engelbrecht SC instructed by Groenewald & Jordaan Inc.
For the respondent:	JA van S d'Oliveria SC and van Jaarsveld instructed by the State Attorney, Pretoria.

Schietekat / Joubert

For the appellant:	J Slabbert instructed by the Director of Public Prosecutions: Cape of Good Hope.
For the respondent:	AM Breytenbach and GH Rossouw instructed by Malan Lourens Inc., Strand.