SOUTH AFRICAN LAW COMMISSION

WORKING PAPER 31

PROJECT 66

BAIL REFORM IN SOUTH AFRICA

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INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

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PREFACE

This working paper was prepared by the research staff of the Commission to serve as a basis for the Commission's deliberations. The points of view, conclusions and recommendations contained herein should not, at this stage, be regarded as the Commission's final views. The working paper is being published in full so as to provide persons and bodies wishing to comment or make suggestions for the development, improvement, modernisation or reform of this particular branch of the law with sufficient background information to enable them to place substantiated submissions before the Commission.

Any request to treat comments or parts of comments on the working paper as confidential will be respected. If no request for confidentiality or anonymity is made the Commission will assume that the commentators agree to the Commission's quoting from or refering to comments and attributing comments to commentators.

Any person or body wishing to make verbal representations to the Commission, in addition to written submissions, should submit a brief summary of his or its proposed representations together with a request to be heard by the Commission, in writing.

It would be appreciated if written comments, representations or requests could reach the Commission by 31 March 1991 at the address that appears on the previous page.

The researcher responsible for the investigation, who may be contacted for further information, is Miss M M Bekker. The project leader and chairman of the project committee is Mr G G Smit.

HIERDIE STUK IS OOK IN AFRIKAANS BESKIKBAAR.

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D.48.3.1, 2, 3, 4	T Mommsen, P Krueger & A Watson Digest of Justinian Vol IV Philadelphia: University of Pennsylvania Press 1985
Dugard	J Dugard South African Criminal Law and Procedure Vol IV Cape Town: Juta 1977
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Forsyth	C F Forsyth Caney's - The Law of Suretyship 3rd edition Cape Town: Juta 1982
Gardiner (preface)	F G Gardiner & C W H Landsdown S A Criminal Law and Procedure 3rd edition. Preface to first edition Cape Town: Juta 1930
Hiemstra 1967	V G Hiemstra Suid-Afrikaanse Strafproses eerste uitgawe Durban: Butterworths 1967
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Background and scope of investigation

(a) Origin of investigation

1.1 In March 1986 Mr T.J. Nel, a Cape Town, attorney submitted his LLM dissertation with suggestions for the reform of South African bail law to the Commission for consideration. These suggestions had been preceded by a similar suggestion that he submitted to the Commission in 1983, which suggestion was supported only by an article by him in the South African Journal of Criminal Law and Criminology.[1] The Commission decided in January 1984 that there was insufficient evidence to justify a general investigation into South African bail law on a jurisprundential basis and that the matters raised in Mr Nel's suggestions could be more conveniently dealt with by the Department of Justice in the ordinary course of its activities. The matter was therefore not included for investigation in the Commission's programme.[2]

1.2 The current proposal is substantaiated by a thorough study in which numerous problems regarding South African bail law are discussed.[3] The LLM dissertation has been followed by a publication entitled Borgtoghandleiding,[4] which is based largely on the dissertation. Problems regarding the application of bail itself, evidential matters applicable to bail applications, factors that are relevant in the consideration of bail applications, the bail order and higher appeal against the bail decision are highlighted and substantiated. Recommendations are proposed for the reform of the status quo[5].

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1 Nel in 1983 SACC South African Journal of Criminal Law and Criminology.

2 SA Law Commission. Document 33, January 1984 10; SA Law Commission Minutes January 1984 par 18.

3 Nel Magister Legum.

4 Nel Borgtoghandleiding, hereinafter Nel.

5 Nel 243 et seq.

1.3 The Commission's project committee decided in June 1987[6] that the legal community (judiciary, advocacy, attorneys, academics, etc.) should be approached to ascertain whether there was really a practical need for a jurisprudential investigation into bail law. From the comments received it seems that there are widely differing opinions regarding the need for such an investigation and different questions involving bail. During the meeting of the project committee on 25 February 1988[7] it was decided on the basis of the comments received that an investigation under the desingnation "Bail" should be included in the Commission's programme.

Problems

1.4 From Mr Nel's representations and the comments received it appears that inter alia the following problems regarding bail should receive attention: the first, and certainly the most important question, is whether a detainee should in principle have a right to bail. Opinions differ on this question. Pre-trail detention is widely considered as a serious violation of individual freedom. This violation of individual freedom must however be weighed up against the sound administration of justice and the interests of the community that would be prejudiced if the accused were to abscond and thereby escape trial.

1.5 It is alleged that the fact that the onus of proof rests on the accused in a bail application and the accusatorial procedure that is followed in our criminal procedure are inappropriate to bail applications. The emphasis in a bail application should be on the accumulation of information, and bail proceedings should therefore be conducted in an inquisatorial manner. It has been further contended that more complete information can be obtained by using a bail questionnaire and that

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6 SA Law Commission Report 1987.

7 SA Law Commission Report 1988.

the function of gathering information should be left to a specialised body (bail unit) at a prison.

1.6 Ways should be found to expedite the release of persons on bail. Judical officers should be available at night, over weekends and during holidays to consider bail applications. Cases in which bail has been refused to an accused should enjoy priority over cases in which the accused has been released.

1.7 Section 59 of the Criminal Procedure Act 51 of 1977 currently provides for a police official of or above the rank of non-commissioned officer to consider and grant bail in respect of less serious offences in an informal manner. The question is whether this method of granting bail should not be extended and whether provision should not be made for attaching conditions to bail that is granted in this manner.

1.8 It is alleged that the power of the Attorney-General to prevent the release of someone on bail constitutes a sharp and arbitrary violation of the freedom of the individual and the independence of the courts. It is proposed that the legislation that provides for this power, namely section 61 of the Criminal Procedure Act 51 of 1977 and section 30 of the Internal Security Act 74 of 1982, should be removed from the statute book.

1.9 It is proposed that the failure of a person who has been released on bail to attend his trial should be made a statutory offence. It is felt that such a step would give judical officers greater confidence in the bail system and that this would engender a more liberal attitude towards the granting of bail. Such an offence should also induce people who have been released on bail to attend their trials to the end.

1.10 It is proposed that a sui generis procedure for a higher appeal against bail decisions should be instituted. The current procedure according to which such appeal is treated as a normal criminal appeal is unsuitable because of the urgent nature of such cases. This procedure is too formalistic and time consuming.

Even the current review procedure has the same shortcomings and offers no solution. It is proposed that a sui generis automatic review procedure should be introduced by law. It is suggested that consideration should be given to granting the power of review to regional court magistrates.

1.10.1 The execution of the sentence or order is suspended as a result of the granting of bail pending appeal or review. In terms of section 307(6) of the Criminal Procedure Act 51 of 1977 certain provisions in Chapter 9 of this Act are at present mutatis mutandis applicable to such release on bail. No mention is, however, made of sections 69, 70 and 71, and this leaves a lacuna. It is suggested that section 307(6) be amended to incorporate section 69 (the payment of bail money by a third person) section 70 (remission of bail by the Minister) and section 71 (the placement of a juvenile in a place of safety in lieu of release on bail or detention in custody) in order to make it applicable to the granting of bail pending appeal or review. (See par 9.15 et seq.)

1.10.2 If the Chief Justice refuses an appeal or pending the decision of the State President after a petition for clemency or a petition has been made to him, the court has no jurisdiction to grant bail. It is suggested that section 316(9) of the Criminal Procedure Act 51 of 1977 should be amended by adding of a proviso to the effect that the Supreme Court has the competency to hear new facts and to release an accused on bail up to the last day of the serving of a sentence.

1.11 It is alleged that bail conditions are not used sufficiently and that the judicious use of bail conditions can in many cases eliminate the State's objections to bail.

1.11.1 It is also alleged that the system of cash bail, by its nature, discriminates against poor people. Such people are in many cases unable to pay even a small amount and then have to be kept in custody. Should a right to bail be recognised such a

right would be available only to people of means if no alternatives to the cash bail system could be found.

1.11.2 The question arose whether a person to whom bail has been refused wrongly or unreasonably should have a remedy in the form of a right to damages or satisfaction. There is at present a common law delictual remedy that can only be used in the case of mala fide conduct. This delictual remedy is for various reasons regarded as inadequate.

1.11.3 Legal representation at bail applications should be available freely, at own cost or through the agency of the Legal Aid Board. In this regard it is submitted that a sui generis procedure should be introduced in order to expedite applications for legal aid at bail applications. Legal representation at bail applications would lead to a greater number of successful bail applications.

1.11.4 It is alleged that the existing administrative instructions of the South African Police, the Prisons Service and the Directorate of Justice regarding bail are inadequate superficial and by no means exhaustive. It is suggested that the existing instructions be improved.

1.11.5 The Supreme Court has jurisdiction to grant bail to a detainee who is being detained in terms of section 10 of the Extradition Act 67 of 1962 pending the Minister's decision in terms of section 11 of the Act. It is suggested that statutory provision be made that bail can be granted up to the moment of extradition to a foreign state and that Act 67 of 1962 be amended so as to incorporate the provisions of Chapter 9 of Act 51 of 1977.

1.11.6 It is submitted that a statutory provision be created according to which a presiding officer would be compelled to take into consideration at the imposition of sentence the period which the accused spent in custody before his trial. The court could

then, according to its discretion, grant this period as credit when passing sentence.

2. Historical review

2.1 It would appear that the release of a detainee pending his trial for an offence for which he has been charged (in short, bail as we know it today) can be traced back historically to the legal principles regarding surety.[1] Surety is an accessory contract that is designed to grant security for an obligation that the surety donor has against the surety accepter. Applied to the release of a detainee who is awaiting trial, the surety donor undertakes to ensure that if the detainee is released he will in fact attend his trial at the prescribed time and place. The guarantee takes the form of a debt obligation that he takes upon himself and that binds him contractually should he fail to meet his obligation in terms of the main agreement (ensuring that the accused attends court for his trial).

2.2 Van der Berg[2] gives another explanation for the origin of bail. According to him bail originates from English law. An accused had to pay an amount of money ('borh') to the complainant as temporary damages in order to prevent family feuds and self-help. The money was refunded to the accused if he was found not guilty. The emphasis later shifted from damages to bail. The accused had to pay an amount of money for his freedom with the undertaking that he would attend his trial on the appointed day. Friends and family members also undertook to ensure that the accused attended his trial at the appointed time and place, and if the undertaking was not complied with they had to give themselves up.

2.3 It would appear that the release of a person in the early Roman-Dutch period was applied only in respect of less serious offences.[3] This trend continued until the first half of

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1 C F Forsyth Carneys's - The Law of Suretyship 3rd edition Cape Town: Juta 1982 27.

2 J van der Berg Bail - A Practitioner's Guide Cape Town: Juta 1986 2.

3 D. 48.3.1, 2, 3, 4.

this century. It should, however, kept in mind that the periods for which people were detained pending their trial were probably shorter in general than they are today.

2.4 The development of bail law in South Africa can be divided in to different periods. The first period was from 1652 to 1806. Roman-Dutch criminal procedure was applied following the occupation of the Cape in 1652 by the Dutch East India Company. The common law of the province of Holland applied at the Cape.[4] Bail was allowed only in respect of less serious offences and was in the discretion of the magistrate. In the case of serious offences the accused was detained from the date of his arrest up to the completion of the trial, and torture was not considered undesirable to persuade an accused to make a confession.[5] The procedure that was followed was inquisitorial.

2.5 The second period was from 1806 (second British occupation of the Cape) to 1878. After this occupation the Roman-Dutch system remained in existence. Bail was allowed in the case of less serious offences only. What is of importance is the pre-trail investigation that was held in camera and during which information regarding the alleged offence was gathered. On the basis of this information the court could order that the accused be arrested and brought before the court, or in the case of a less serious offence a summons could be issued. Such an accused had then to be tried within eight days and a bill of indictment was given to the accused three days before the date of trial. Should the accused have any objection of the bill of indictment was he obliged to answer the questions put to him by the prosecutor. If the accused refused to answer the questions he was detained for the duration of the trial, which in effect amounted to a refusal of bail.

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4 F J van Zyl & J D van der Vyver Inleiding tot die Regswetenskap 2nd edition Durban: Butterworths 1982.

5 J Dugard South African Criminal Law and Procedure Vol IV Cape Town: Juta 1977 3.

2.6 The third period was from 1827 to 1910. As a result of the recommendations of the report by Bigge and Colebrook[6] drastic changes were made to criminal procedure in Cape law. These recommendations were implemented in the Cape by Ordinances 40 of 1828 and 72 of 1830. A right to bail before the completion of the preliminary examination was not recognised, but bail could be granted at the discretion of the magistrate. After the completion of the preliminary examination an accused could be released on bail by the court with the approval of the attorney-general. After an accused had been committed for trial he was entitled to bail except in the case of capital offences, in which case the Supreme Court could grant bail. Criminal procedure in the Transvaal was regulated by Ordinance 5 of 1864 and Ordinance 9 of 1866. In terms of section 66 of Ordinance 5 of 1864 and an amended provision in section 2 of Act 7 of 1896 the attorney-general had a discretionary power to grant bail.[7] Criminal procedure in the Transvaal and Orange Free State Republics was based largely on the law that applied in the Cape.[8] In 1903 a criminal procedure code was adopted in the Transvaal[9] which was based inter alia on the criminal codes of Canada, Queensland and India. Bail is dealt with in Chapter VIII of the Code.[10] All accused persons (except in the case of murder and high treason) were entitled to bail as soon as they were committed to trial.[11] The application for bail could be made verbally during the committal[12] and thereafter in writing to the appropriate

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6 In 1823 a two-man commission consisting of two gentlemen, Bigge and Colebrooke, was appointed by the British Government tc investigate affairs regarding the legal system and to make any recommendations that they regarded necessary. See further Botha 1923 SALJ.

7 Hildebrandt v The Attorney-General 1897 4 OR 120.

8 Strauss 1960 Acta Juridica.

9 Ordinance 1 of 1903.

10 Sections 97 to 113.

11 Section 97.

12 Section 98.

magistrate or judge of the Supreme Court.[13] A magistrate had to decide, within 24 hours after such an application had been made, whether bail could be granted and, if so, fix the amount of bail. An application for bail was decided on the facts that appeared in the charge sheet.[14] The Supreme Court had the power to grant bail at any stage of the proceedings and in respct of any offence.[15] The bail amount could not be excessive and an accused could take any bail decision on appeal to a higher court.[16] Bail could be received from the accused or his surety in cash. The guarantee given by the surety was that the accused would appear at the prescribed time and place for his trial. The conditions regarding bail could be amended at any time or bail could be withdrawn.[17] Section 271 provided that an appeal in a criminal case did not suspend the enforcement of a sentence (except capital punishment or corporal punishment) unless the court against whose judgment or sentence the appeal was made had released the accused on bail. Section 39 of the Administration of Justice Proclamation 14 of 1902 (Transvaal) allowed appeal to the Privy Council (of Britain) in civil cases where the amount involved was 2 000 pounds or more. In the Cape, if the amount was less than 500 pounds, permission first had to be granted by the Cape Supreme Court for appeal to the Privy Council. If permission was refused a request for permission to appeal could be directed to the Privy Council itself. The code largely formed the basis of the later Criminal Procedure and Evidence Act of 1917.[18]

2.7 Criminal procedure in the Orange Free State was regulated by Ordinance 12 of 1902, which was based on the Cape Ordinance 40 of 1828 and Ordinance 72 of 1830. Bail is dealt with

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13 Section 99.

14 Section 100.

15 Section 101.

16 Sections 103 and 104.

17 Sections 105 and 110.

18 Act 31 of 1917.

in eight sections.[19] No accused was entitled to bail before the preliminary examination had been completed. Bail could be granted in bailable cases at the discretion of the magistrate. Except in the case of a capital offence an accused was entitled to bail after he had been committed for trial. The application could be made verbally during commital for trial, and after this it could be made in writing. The amount of bail was in the discretion of the court, but an exessive amount could not be set. A decision regarding bail had to be made within 24 hours. A fine of 100 pounds could be imposed by the magistrate if the accused failed to meet the requirements. A bail decision (including the amount of bail set) could be taken on appeal to a higher court. The higher court had the power to grant bail at it's discretion in all cases. In Port Natal the position was the same as in the Cape Colony[20], in other words Roman-Dutch law as amended by the English procedural Acts was applied.[21]

2.8 At the time of Union in 1910 there was no uniform criminal procedure legislation in South Africa. It was only in 1917 with the Criminal Procedure and Evidence Act 31 of 1917 that an uniform arrangement was made for the Union. This Act placed criminal procedure in all four provinces on the same footing and was described as "the most ambitious attempt at consolidation hitherto known in South Africa."[22] As mentioned above, Act 31 of 1917 was based largely on Ordinance 1 of 1903 of the Transvaal. Bail was regulated by sections 86 and 99 to 117 of the Act. Section 86 provided that a magistrate could in his discretion, before the completion of a preliminary examination, grant bail in all cases except murder, rape or high treason. At this stage of the proceedings the accused was not entitled to bail. The position after the completion of the preliminary examination was

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19 Sections 52 - 60.

20 Strauss supra and Dugard 26 - 33.

21 Ordinance 12 of 1845.

22 F G Gardiner & C W H Landsdown. SA Criminal Law and Procedure 3rd edition. Preface to first edition Cape Town: Juta 1930.

regulated by sections 99 to 105. At this stage of the proceedings the accused was entitled to bail except in case of murder, rape and high treason. When the accused was commited for trial he could apply verbally for bail to the magistrate. The application was considered by the magistrate on the face value of the charge sheet and an amount or surety could be fixed. If the application was unsuccessful it could be taken on appeal to a higher court regarding the amount of surety and the question of whether bail should be granted. The Supreme Court had the power to grant bail in respect of all the offences and at any stage of the proceedings. It was further expressly provided that no excessive amount of bail could be fixed. Bail in the form of surety by the accused and other persons or a combination of these could also be used to gain the freedom of an accused before trial. In the case of offences that were subject to summary jurisdiction a magistrate could release an accused on bail after an adjourment or remand or surety to a subsequent date, time and place for the completion of the trial. In terms of section 116(2) a police official with the rank of sergeant or higher could release an accused on cash bail in the case of a minor offence. Section 98 of the Magistrates' Courts Act 32 of 1917 provided that an accused who had already been convicted could appeal against the decision of a lower court, that he was entitled to have bail set and that the execution of his sentence would not be suspended unless he was released on bail. A convicted person who appealed against the decision of a higher court could in terms of section 373 of Act 32 of 1917 request his release on bail from such court and the execution of his sentence was not suspended by the noting of appeal unless such application for bail was granted. The power of magistrates to grant bail was extended in 1926.[23] A magistrate was given the power to grant bail in his discretion for the crimes of rape and murder by a mother of her newborn baby or where the accused was under 16 years of age.

2.9 The Criminal Procedure Act 56 of 1955 repealed the 1917 Act. Chapter VII dealt with bail, and followed the same pattern

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23 Section 16 of Act 39 of 1926.

as its predecessors. The authority to release a person on bail was essentialy a judicial power. The broad power that rested in the Supreme Court by section 109 of the 1917 Act was repealed in section 98 of the 1955 Act, namely that a higher court with jurisdiction in respect of an offence could grant bail in any court at any stage of the proceedings. Section 368 of the 1955 Act empowers a higher court to suspend the execution of a sentence that was given by such court pending an appeal by releasing the accused on bail.

2.10 In terms of section 108bis of the 1955 Act the Attorney-General had the power to prohibit the release of an accused on bail or otherwise by issuing a certificate. The offences for which this certificate could be issued were the more serious offences contained in Part II of the Second Annexure. This section was introduced in its original form in 1961.[24] The section was initially only valid for one year and was thereafter extended on an annual basis until it became a permanent provision in 1965.[25] Hiemstra[26] is of the opinion that this section brought little change because the courts would in any case have refused bail in such cases because of the seriousness of the offence.

2.11 In 1977 the present Criminal Procedure Act 51 of 1977 was placed on the statute book. This Act repealed the 1955 Criminal Procedure Act. Act 51 of 1977 did not change the position regarding bail radically. An important provision in the Act is section 72. This section now makes it possible that a person may be released on his own recognisance by a competent police official or court on condition that he will at a later date attend his entire trial. This procedure can take the place of bail and is intended for less serious offences.[27] An important

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24 Section 4 of Act 39 of 1961.

25 Section 6(a) of Act 96 of 1965.

26 Hiemstra 1967 126.

27 This provision eliminated the uncertainty in S v O'Neill 1967
vervolg op volgende bladsy

change in the present Act is the elimination of the distinction between the different stages of the trial process. An accused may be released on bail immediately after arrest by a police official with the rank of warrant officer or higher in the case of a limited number of offences.[28] After arrest an accused may apply for bail at his first appearance in a lower court or at any subsequent stage.[29] The first date of appearance is not necessarily during normal court hours and a first appearance can at the request of the accused be after normal court hours.[30] Bail need not necessarily entail the immediate deposit of a sum of money in cash and may also entail the provision of a guarantee in the discretion of the court that a sum of money will be paid to the State. The court may also add bail conditions other than the payment of a sum of money to a court order in order to ensure that the accused does in fact attend his entire trial.[31]

2.12 Bail is at present defined in section 58 of Act 51 of 1977. Prior to this bail was not defined. An accused who has been detained is released on payment of a specified sum of money or by the granting of a guarantee that he will pay, on condition that he must appear on a particular date and at a particular time and place for the continuation of his trial and that such release shall continue until the end of the proceedings. Sections 58 to 71 at present regulate the position regarding bail. The law regarding bail is, however, not found exclusively in the existing legislation but also in decisions relating to this aspect of the law.[32]

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vervolg van vorige bladsy
4 SA 84 (SWA) regarding release on warning.

28 Section 59.

29 Section 60.

30 Twayie v Minister of Justice 1986 2 SA 101 (O).

31 Section 62.

32 Nel 1.

2.13 The Act also makes provision for the granting of bail in the following situations: by a lower court, pending the finalisation of a review by a provincial division of the Supreme Court;[33] by a provincial division as a result of review;[34] by a lower court, pending the finalisation of an appeal to the provincial division;[35] by a provincial division because of the appeal[36]; and by a provincial division as trial court of first instance pending appeal to the Appellate Division (or to a full bench of the provincial division).[37] It is interesting to note that the wide powers of a division of the Supreme Court that has jurisdiction regarding an offence to grant bail to the accused at any stage of any proceedings in any court have not been incorporated in the 1977 Act.

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33 Section 307.

34 Section 304(2)(c)(vi).

35 Section 309(4)(b) read with section 307.

36 Section 309(3) read with section 304(2)(c)(vi).

37 Section 321(1)(b) and (2).

3. A right to bail

Introduction

3.1 This involves the question of whether someone who has been taken into custody on a charge should have the right to be released on bail or should merely have the right to apply for bail to a competent officer. If a right to bail is in fact recognised, the question concerns the limitations of that right.

Historical review

3.2 The procedure that applied in terms of the Criminal Procedure and Evidence Act 31 of 1917 distinguised between proceedings at a summary trial and those at a preparatory examination, and also between the different stages of a preparatory examination. At a summary trial a magistrate could in his discretion release an accused on bail if he had been in custody. In the case of a preparatory examination section 86(1) of the said Act provides as follows:

> Until the warrant for commitment for trial or sentence is made out no prisoner can insist on being admitted to bail; but, except when the crime is treason, murder or rape, it shall be in the discretion of the magistrate to admit an accused person to bail before the preparatory examination is concluded.

But on the other hand section 99 of the said Act provides as follows:

> Every accused person committed for trial or sentence in respect of any offence, except treason, murder, or rape, is entitled, as soon as the warrant of commitment for trial or sentence is made out, to be admitted to bail.

From section 102 of the Act it is clear that the magistrate in the latter stage of the proceedings did not have a discretion regarding the question of whether bail should be refused or granted (except regarding treason, murder and rape) but only regarding the determination of the amount of bail. The right to

bail for which section 99 of Act 31 of 1917 made provision was therefore an absolute right.[1] In Rex v Shaw and Others[2] it was pointed out by Judge President Wessels that the situation as regulated by the said provisions was totally illogical. The reason was that an accused could not apply for bail at all during the preliminary examination, even if the case against him was not very strong, whereas he had a right to bail when his case was committed for trial, even if the case against him was very strong. These provisions were not retained in later legislation.

Bail as a qualified right

3.3 An absolute right to bail in the sense that a detainee is entitled to be released on bail irrespective of the seriousness of the offence or his personal circumstances is naturally quite unacceptable because it would impede the administration of justice. The question is, however, whether criminal procedure should be arranged in such a way as to recognise a qualified right to bail. In other words, should it not be accepted as a premise that a detainee can be released on bail pending the finalisation of the case against him unless there are sound reasons why he should be kept in custody? The current view in our law seems to be that an accused can only be released on bail if he so requests and if the prosecution has no objection to the granting of bail or if the accused makes out an acceptable case for his release on bail.

3.4 The idea underlying a right to bail derives from the principle that every person has a right to personal freedom. The right to personal freedom is acknowledged in all Western democracies. In fact, certain bills of rights contain the right of a detainee to be released on reasonable bail pending the finalisation of criminal proceedings against him as an element of the right to personal freedom. The underlying idea is the

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1 See also Leibman v Attorney-General 1950 1 SA 607; S v Baker; S v Doyle 1965 1 SA 821 (W).

2 1922 TPA 203.

assumption that every accused is innocent until proved guilty according to the current legal process and that he may only be deprived of his personal freedom after he has been proved guilty.

3.5 South Africa does not at present have a written bill of rights. Our law does, however, recognise the principle of the freedom of every person. The law therefore lays down detailed rules concerning the circumstances under which a person may be lawfully arrested. Our law also recognises the principle that a person is innocent until his guilt has been proved. There are remedies against the unlawfull arrest and detention of people. There are also measures to prevent the unnecessary detention of people and to limit the necessary detention of people. It can certainly be said that our law has a high regard for the right of the individual to personal freedom. It is therefore strange that not so much attention is given to the release of detainees on bail as would be expected. Looking at other legal systems one finds that bail is usually seen as a qualified right of the detainee and not as a concession that may be granted at the discretion of the court. The approach adopted in a few other legal systems is sketched briefly below by way of comparison.

The position in other countries

3.6 England

Section 4(1) of the Bail Act, 1976, of the United Kingdom provides as follows:

> A person to whom this section applies shall be granted bail except as provided in Schedule 1 to this Act.

Subsection (2) indicates the persons to whom these provisions apply. They are persons that have been charged with an offence before a magistrate's court or a Crown Court and also certain other persons that have already been found guilty but not yet sentenced.

Schedule 1 to the Act contains the exceptions to the right to bail or the circumstances under which bail may be refused. A distinction is made between imprisonable offences and non-imprisonable offences. Paragraph 2 of the Schedule provides as follows regarding the first-mentioned category of offences:

> 2. The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would -
>
> (a) fail to surrender to custody, or
>
> (b) commit an offence while on bail, or
>
> (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

There are also further exceptions relating to the detention of a young person for his own safety; the detention of a person where the court does not have sufficient information to decide concerning bail; and the detention of a fugitive or someone who has previously failed to comply with his conditions of bail.

Paragraph 9 of the schedule sets out the considerations on which the court must base its decision. The paragraphs reads as follows:

> 9. In taking the decisions required by paragraph 2 of this Part of this Schedule, the court shall have regard to such of the following considerations as appear to it to be relevant, that is to say -
>
> (a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it),
>
> (b) the character, antecedents, associations and community ties of the defendant,
>
> (c) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings,
>
> (d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength

of the evidence of his having committed the offence or having defaulted,

as well as to any others which appear to be relevant.

The limitations regarding non-imprisonable offences are much less, and are as follows:

2. The defendant need not be granted bail if -

(a) it appears to the court that, having been previously granted bail in criminal proceedings, he has failed to surrender to custody in accordance with his obligations under the grant of bail; and

(b) the court believes, in view of that failure, that the defendant, if released on bail (whether subject to conditions or not), would fail to surrender to custody.

3. The defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a child or young person, for his own welfare.

4. The defendant need not be granted bail if he is in custody in pursuance of the sentence of a court or of any authority acting under any of the Services Acts.

5. The defendant need not be granted bail if, having been released on bail in or in connection with the proceedings for the offence, he has been arrested in pursuance of section 7 of this Act.

3.7 Australia

The Bail Act, 1978, draws a distinction between minor offences and other offences. In terms of section 8(1) minor offences are those that are not punishable (except as an alternative to fines) by imprisonment, or offences that are summarily justiciable or that are prescribed for the purposes of the provision concerned. A right to bail applies in respect of all these offences. Section 8(2) - (4) provides as follows:

(2) A person accused of an offence to which this section applies -

(a) is entitled to be granted bail in accordance with this Act unless -

(i) the person has previously failed to comply with a bail undertaking given or bail condition imposed in respect of the offence;

(ii) the person is, in the opinion of the authorised officer or court, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection;

(iii) the person stands convicted of the offence or his conviction for the offence is stayed; or

(iv) the requirement for bail is dispensed with, as referred to in section 10; and

(b) is entitled to be so granted bail either -

(i) unconditionally; or

(ii) subject to such bail condition or bail conditions imposed on the grant of bail to him as, in the opinion of the authorised officer or court, is or are reasonably and readily able to be entered into,

to the intent that he shall be, subject to section 7, released (if in custody) as soon as possible after he gives the bail undertaking.

(3) Subject to subsection (4), a person is entitled under this section to be granted bail in respect of an offence to which this section applies, notwithstanding that he is in custody also for some other offence or reason, in respect of which he is not entitled to be granted bail.

(4) A person is not entitled under this section to be granted bail in respect of an offence to which this section applies, if -

(a) he is in custody serving a sentence of imprisonment in connection with some other offence; and

(b) the authorised officer or court is satisfied that the person is likely to remain in custody in connection with that other offence for a longer period than that for which bail in connection with the firstmentioned offence would be granted.

There is a presumption in favour of the granting of bail in respect of other offences. Section 9 provides as follows:

9.0 Presumption in favour of grant of bail for certain other offences

9. (1) This section applies to all offences, except -

(a) offences referred to in section 8(1);

(b) offences against section 51; and

(c) offences under section 95, 96, 97 and 98 of the Crimes Act, 1900.

(2) A person accused of an offence to which this section applies is entitled to be granted bail in accordance with this Act unless -

(a) the authorised officer or court is satisfied that he or it is, pursuant to a consideration of the matters referred to in section 32, justified in refusing bail;

(b) the person stands convicted of the offence or his conviction for the offence is stayed; or

(c) the requirement for bail is dispensed with, as referred to in section 10.

(3) Subject to subsection (4), a person is entitled under this section to be granted bail in respect of an offence to which this section applies, notwithstanding that he is in custody also for some other offence or reason, in respect of which he is not entitled to be granted bail.

(4) A person is not entitled under this section to be granted bail in respect of an offence to which this section applies, if -

(a) he is in custody serving a sentence of imprisonment in connection with some other offence; and

(b) the authorised officer or court is satisfied that the person is likely to remain in custody in connection with that other offence for a longer period than that for which bail in connection with the firstmentioned offence would be granted.

Section 32 contains detailed criteria that have to be taken into consideration in the application of the presumption in favour of the granting of bail. For the sake of completeness the criteria are set out below:

32.0 Criteria to be considered in bail applications

32. (1) In making a determination as to the grant of bail to an accused person, an authorised officer or court shall take into consideration the following matters (so far as they can reasonably be ascertained), and the following matters only: -

(a) the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered, having regard only to -

(i) the person's background and community ties, as indicated by the history and details of his residence, employment and family situations and his prior criminal record (if known);

(ii) any previous failure to appear in court pursuant to a bail undertaking or pursuant to a recognizance of bail entered into before the commencement of this section;

(iii) the circumstances of the offence (including its nature and seriousness), the strength of the evidence against the person and the severity of the penalty or probable penalty;

(iv) any specific evidence indicating whether or not it is probable that the person will appear in court; and

(v) the rating obtained in relation to the person in the test referred to in section 33;

(b) the interests of the person, having regard only to-

(i) the period that the person may be obliged to spend in custody if bail is refused and the conditions under which he would be held in custody:

(ii) the needs of the person to be free to prepare for his appearance in court or to obtain legal advice or both;

(iii) the needs of the person to be free for any lawful purpose not mentioned in subparagraph (ii); and

(iv) whether or not the person is, in the opinion of the authorised officer or court, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection; and

(c) the protection and welfare of the community, having regard only to -

(i) whether or not the person has failed, or has been arrested for an anticipated failure, to observe a reasonable bail condition previously imposed in respect of the offence;

(ii) the likelihood of the person interfering with evidence, witnesses or jurors; and

(iii) the likelihood that the person will or will not commit an offence while at liberty on bail,

but the authorised officer or court may only have regard to the likelihood that the person will commit such an offence if the officer or court is authorised to do so under subsection (2).

(2) The authorised officer or court may, for the purpose of subsection (1)(c)(iii), have regard to the likelihood that the person will commit an offence while at liberty on bail if the officer or court is -

(a) satisfied that the person is likely to commit it;

(b) satisfied that it is likely to involve violence or otherwise to be serious by reason of its likely consequences; and

(c) satisfied that the likelihood that the person will commit it, together with the likely consequences, outweighs the person's general right to be at liberty.

(3) For the purpose of this section, the authorised officer or court may take into account any evidence or information which the officer or court considers credible or trustworthy in the circumctances.

3.8 Canada

The Bail Reform Act (1970 - 1971), which commenced on January 1972, contains detailed provisions aimed at keeping to a minimum the detention of persons pending the completion of their trials. This Act also proceeds from the assumption that the detainee must be released unless there are valid grounds for his detention. By way of example only section 457(1) is quoted:

457(1) Where an accused who is charged with an offence other than an offence mentioned in section 457.7 and who is not

required to be detained in custody in respect of any other matter is taken before a justice, the justice shall unless a plea of guilty by the accused is accepted, order that the accused be released upon his giving an undertaking without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause why the detention of the accused in custody is justified or why an order under any other provision of this section should be made.

3.9 Viewpoints against a right to bail

From preliminary consultations with the Department of Justice it appears that the Directorate of Justice, certain of the Attorneys-General and certain magistrates are opposed to the idea of a qualified right to bail for all persons who are arrested on charges of having committed offences. Some magistrates are, however, in favour of the idea of a qualified right to bail.

The most important objection to a right to bail is that the granting of such a right would result in a liberalisation of bail, which might hamper effective criminal justice. It is feared that if a right to bail were to be recognised bail would be granted too readily. This would in turn impair the image of the judicial system. The ordinary law-abiding citizen is not sympathetic towards the release of an alleged criminal on bail, especially in respect of serious offences. This attitude is strengthened by cases that occur of persons who commit further crimes while they are out on bail.

It is also felt that an individual's right to freedom only applies for as long as he behaves in accordance with the laws of the land. If a person commits an offence he forfeits the right to freedom and has only himself to blame for having lost his freedom. Such a person therefore cannot claim the right to have his freedom restored. It is therefore only right that the accused should, in accordance with the current legal position have to apply for bail and substantiate his application with sufficient evidence or facts.

It has also been pointed out that the South African situation cannot be compared with that in European or other Western countries. We have a large underdeveloped population and a comparatively small police force. People who wish to avoid attending their trials can do so without much difficulty. The large scale evasion of trials would seriousy prejudice the administration of justice.

Finally it has been pointed out that under the present system voices have been raised from time to time by the public against the easy way in which bail is granted, even for serious offences. If a right to bail were also introduced bail would probably be granted with even greater ease and there would probably be more cases that would give the public reason to complain.

3.10 Provisional conclusion

In its investigation into group and human rights the Commission published a working paper[3] in which it was provisionally recommended, inter alia, that a bill of rights be accepted for the Republic. In section 24(3) of the draft bill it was suggested that a person who is taken into custody should be put to trial within a reasonable period and that while awaiting trial he should be released on bail unless the court orders on substantive grounds that he be further detained. The Commission's provisional opinion is that this viewpoint should be accepted for the reform of the law of bail. The Commission is of the opinion that the acceptance of this viewpoint does not imply that bail would be granted in cases where it should have been refused when all the relevant factors are taken into consideration. The sound administration of justice is naturally of real importance and must be taken into careful account when considering whether there are valid reasons for detaining an accused.

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3 SA Law Commission Working Paper 25 Group and Human Rights.

The grating of a right to bail does imply a shift in the onus of proof. This matter will be discussed below.

4. Bail proceedings

Introduction

4.1 This chapter deals with the nature of bail proceedings, the onus of proof and the question of whether the court should consider mero motu the release of an accused on bail.

The current position

4.2 Section 60 of the Criminal Procedure Act 51 of 1977 provides that an accused who is in custody in respect of any offence can apply to the court to be released on bail. The application is brought verbally by the accused or, if he has a legal representative, by the latter. If the application is not opposed by the prosecution the proceedings are generally altogether informal. As a rule the prosecutor proposes an amount of bail. The acceptability of the amount and the accused's ability to procure it are established by way of questions and answers between the presiding officer and the accused or his legal representative. If there is no point at issue in this regard, conditions that are linked to the bail can be established in the same way. If however there are points at issue concerning the question of whether the accused should be released on bail or concerning the amount of bail or any bail conditions to which the accused's release are to be made subject, such questions should be resolved in the normal manner, namely by evidence and argument.

4.3 If there is a dispute regarding bail, the onus of proof rests on the accused. He must make out a prima facie case that he will stand trial and that the administration of justice will not be defeated if he is released.[1] A mere statement by the accused that he will not abscond, is not sufficient.[2] The accused must adduce facts that show the improbability that he will abscond or

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1 Leibman v Attorney-General 1950 1 SA 607 (W); Hiemstra 1987 143.

2 S v Hudson 1980 4 SA 145 (D).

that he will interfere with the course of justice. The prosecutor must in turn rebut the prima facie case. The proceedings are conducted according to the normal accusatorial procedure.

Nel's view regarding the onus of proof

4.4 Regarding the onus of proof on the accused in bail applications Nel has the following criticism:[3]

(a) There are no convincing reasons why bail proceedings should deviate from the normal procedure according to which the onus of proof in criminal cases is on the prosecution. The mere fact that the accused is the applicant does not justify the reversing of the onus of proof. The fact that the accused must formally apply for bail is in any case a ground for objection.

(b) Some judical officers in any case follow a procedure whereby the prosecution is expected to initiate objections to the granting of bail. This reversed procedure illustrates the juridical inconsistency of placing the onus of proof on the accused.

(c) The undefendend accused is prejudiced because he does not know how to discharge the onus of proof.

(d) The state has at its disposal detailed knowledge regarding the nature and circumstances of the offence and the factors that have to be weighed up against the granting of bail. The state's objections must indeed be based on information. There should therefore be no objection to the fact that the state have to disclose this information first.

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3 Nel 48.

4.5 If one's approach is that an accused is entitled to bail unless there are substantial reasons against it, it follows logically that the onus of proof should rest on the prosecution to adduce reasons why the accused should not be released on bail. The same applies to the conditions that the prosecution wishes to attach to the granting of bail.

4.6 The preliminary consultations indicate that there are magistrates who approve of the shifting of the onus of proof in bail proceedings from the accused to the prosecution and that there are those who oppose it. It has been submitted by those who are in favour of shifting the onus of proof that this would mean that the prosecution would investigate the accused's personal circumstances from the very start, and that this would in turn help to expedite bail proceedings. Those opposing the shifting of the onus of proof claim that bail proceedings are not criminal proceedings, and must carry the ordinary civil onus of proof. It is also submitted that if the onus of proof were to rest on the prosecution it would be difficult for the prosecution to make out a case that the accused would probably not attend his trial or that he would interfere with witnesses. The prosecution might also find it difficult to obtain facts that fall within the personal knowledge of the accused.

4.7 Regarding the procedure at bail proceedings, Nel[4] contends that the accusatorial process is inappropriate and that a more inquisatorial process should be followed that is based on the gathering of information rather than on litigation: the judical officer should be able to raise the release on bail of the accused of his own accord and should be free to ask questions. In the exercise of its discretion regarding bail the court has to rely on information that derives primarily from the accused, the prosecutor and the investigating officer. The more complete and accurate this information the better will the court be able to give a sound decision.

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4 Nel 36 and 244/5.

4.8 Nel[5] refers to overseas systems in which prescribed questionnaires are used which are aimed at making the necessary information available to the authority that has to make a decision regarding bail. In some cases the mandatory bail sheet is completed by the presiding officer. In other cases this is done by officers who are specially appointed for this purpose. In certain cases a scale of points is even used to give an indication of whether the accused is a good or bad candidate for bail.

Provisional conclusion and recommendations

4.9 The Commission's provisional view, on which comments are requested, is that it should be clear from legislation regarding bail that the onus of proof rests on the prosecution if there is an objection against the granting of bail. As regards the rest of the procedure it would appear undesirable to make any drastic changes. It should nevertheless be clearly shown in legislation that the presiding officer is competent and indeed obliged to go into the release of an accused on bail mero motu. As regards a bail questionnaire, some presiding officers might find it handy while others might find it burdensome and unnecessarily prescriptive. The Commission's provisional view is that something of this nature should not be prescribed, but comments will nevertheless be welcome. In any case, it would appear that, with the possible exception of a few larger magistrate's offices, we do not have the infrastructure to introduce proper pre-trial examinations by appointed officers into applications for bail. If a presiding officer were obliged to consider the release of a detainee on bail and a prosecutor were obliged, if he objected to the granting of bail, to convince the court of the merits of his objection, prescriptions regarding all the different factors that have to be taken into consideration by the court should not be necessary.

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5 Nel 46.

5. The urgent nature of bail applications

Introduction

5.1 The arrest and subsequent detention of a person obviously constitute an infringment of such person's freedom. It is therefore obvious that bail, which is aimed at restoring a person's freedom, at least temporarily and conditionally, should receive urgent attention. Our legislation does not at present contain imperative provisions in this regard, however.

The current position

5.2 Section 60(1) of the Criminal Procedure Act 51 of 1977, which regulates the right to apply for bail, reads as follows:

> **60. Bail after first appearance of accused in lower court. -**
>
> (1) An accused who is in custody in respect of any offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in a superior court, to that court, to be released on bail in respect of such offence, and any such court may, subject to the provisions of section 61, release the accused on bail in respect of such offence on condition that the accused deposits with the clerk of the court or the registrar of the court, as the case may be, or with a member of the prisons service at the prison where the accused is in custody or with any police official at the place where the accused is in custody, the sum of money determined by the court in question.

Section 60(2) makes provision for the furnishing of a guarantee for the sum of bail money that has been determined in lieu of payment thereof in cash.

5.3 The expression 'at his first appearance in a lower court' is particularly important when considering the subject under discussion. When should or can the accused's appearance before a lower court take place? Section 50 of the Criminal Procedure Act 51 of 1977 determines the procedure after the

detention of a person. In terms of this section someone who is detained must be taken to a place of detention as soon as possible and if he is not released because no charge has been brought against him he may be detained for 48 hours only, unless he has been brought to court earlier and his further detention has been ordered. In terms of the proviso to section 50(1) the period of 48 hours may be longer in certain cases, for example where the period expires on a day which is not a court day or where the arrested person is outside the area of jurisdiction of the court or where he cannot be brought before the court because of illness.

Hiemstra[1] points out that the predecessor of section 50(1), namely section 27 of the Criminal Procedure Act 56 of 1955, did not make provision for a maximum period of detention before an accused was brought before the court, but merely provided that he had to be brought before a judicial officer as soon as possible.

5.4 The expression 'at his first appearance in a lower court' in section 60(1) of the Criminal Procedure Act 51 of 1977, was interpreted in the case of Twayie v. Minister van Justisie.[2] The question which was put before the full bench of the Orange Free State Provincial Division of the Supreme Court of South Africa, was formulated as follows: "Of 'n laer hof die bevoegdheid het om op ander dae as normale hofdae en/of buite normale hofure op 'n bepaalde hofdag borgaansoeke in terme van die Strafproseswet 51 van 1977 aan te hoor en te bereg." The court came to the conclusion that the first appearance to which section 60(1) refers is not only the obligatory appearance in terms of section 56, but also an appearance at the request of the accused to enable him to apply to be released on bail. The court therefore held that the stated legal question is to be answered in the affirmative and that lower courts may and should hear bail applications during weekends, on holidays and outside working hours on weekdays.

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1 Hiemstra 1987 109.

2 1986 2 SA 101 (O).

Provisional conclusion and recommendations

5.5 One cannot fault the view that the doors of the court should be open at all times to hear bail applications. In the following chapter a proposal is made that would have the result that only in cases where bail is refused by the police or where an accused is not satisfied with the bail granted by the police would a need arise for the availability of a court to which the accused could turn outside normal court hours. Besides the practical problems that might be experienced in the constitution of courts outside normal court hours, the settlement of opposed bail issues would often require the giving of formal evidence, which would not always be available during such hours. It is however submitted that all possible steps should be taken to enable a detainee to get a decision regarding his bail application at the earliest opportunity.

5.6 One may ask whether the Twayie decision means that the police are obliged to bring an accused before the court on his request within the period contemplated in section 50 of the Criminal Procedure Act 51 of 1977 if he wants to apply for bail. The introductory part of section 50(1) reads as follows:

> A person arrested with or without warrant shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant, and, if not released by reason that no charge is to be brought against him, be detained for a period not exceeding forty-eight hours unless he is brought before a lower court and his further detention, for the purposes of his trial, is ordered by the court upon a charge of any offence or, if such person was not arrested in respect of an offence, for the purpose of adjucation upon the cause for his arrest ... .

5.7 In cases where it has already been decided to bring the detainee before the court on a specific charge it probably does not make any difference to the police if the person is brought before the court before the end of the maximum period of detention allowed by section 50(1). The same cannot however be said

regarding a person who is detained for questioning or any other lawful reason. See for example Duncan v Minister of Law and Order.[3] The question is whether there is a need for section 50 to be amended to compel the police to bring an accused before the court on his own request to enable him to apply for bail and, if so, to what limitations such a right should be subject. Comments on this matter will be welcomed.

3 1986 2 SA 805 (A).

6. Police bail

Historical review

6.1 The first provision in terms of which a police official acquired the power to release persons on bail was contained in section 116(2) of Act 31 of 1917. The policeman had to have the rank of sergeant or higher and he could only fix bail if no judicial officer was available. Provision was initially made for cash bail only. A number of offences were specified for which a police official could not fix bail. These were treason, sedition, murder, culpable homicide, rape, statutory offences of a sexual nature against a girl under a prescribed age, sodomy, bestiality, indecent assault, robbery, assault in which a dangerous wound was inflicted, arson, breaking or entering, theft, receiving stolen goods or property, fraud, forgery or uttering, offences relating to dealing in or possession of precious metals or, precious stones, the supply of intoxicating liquor to certain persons, offences that are punishable with a period of imprisonment exceeding six months without the option of a fine, and any conspiracy, incitement or attempt to commit any such offences.

The current position

6.2 The current provisions regarding the granting of bail by the police are contained in section 59 of the Criminal Procedure Act 51 of, 1977. The list of offences for which a police official cannot grant bail differs slightly from the original list, but still contains most of the common law offences and a number of serious statutory offences. Unlike the previous provision, section 59 does not grant the necessary power to a police official only when a judicial officer is not available. In terms of the present section a police official with or above the rank of warrant officer may release an accused who has been charged with an offence, other than an offence referred to in Part II or Part III of Annexure 2 of the Criminal Procedure Act, 1977, or in Annexure 3 of the Internal Security Act 74 of 1982, before his first appearance in a lower court in respect of such offence.

Such release takes place by the depositing of an amount of money that is fixed by the police official. There is no limit to the amount that may be fixed. The current provision provides for cash bail only, while section 116(2), as amended by section 19 of Act 48 of 1935 and section 105 of Act 56 of 1955, also provided for the granting of a guarantee instead of the depositing of an amount of money.

6.3 It is clear from the aforegoing that the power of the police to grant bail is limited to offences of a less serious nature. These offences are in fact the same as those on which a police official can release an accused on warning in terms of section 72 of the Criminal Procedure Act. Nel[1] is in favour of extending the offences in respect of which the police can grant bail. He does not however define the scope of his recommendation for extension. According to the example that he gives, it seems that he still has minor offences in mind. Nel also submits[2] that the entire process of granting bail by the police is too narrow and that it should be extended. According to him, the procedure should be formalised. The proceedings should be minuted. If bail is refused by a police official, further applications by the accused should be considered and a process of automatic review of the official's decision should be possible, presumably by the night and weekend courts that he proposes. Finally he suggests that the police should have the power to attach bail conditions to the bail set by a police official.

6.4 The question of whether bail should be granted or refused is a question that has traditionally vested in the courts. The question should be judicially decided on facts that are judicially determined. The power that is vested in the police with regard to bail should be seen as an exception to the rule that has been introduced for practical reasons. The police official who grants bail, performs an administrative or

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1 Nel 7.

2 Nel 246.

quasi-judicial function.[3] Formalising the process as suggested by Nel and making provision for bail conditions and a higher appeal would amount to vesting police officials with judicial functions. This would appear to be undesirable, inter alia because of the interest that the police have in the matter.

Provisional conclusion and recommendations

6.5 It is submitted that police officials are not the appropriate party to decide on bail should a dispute arise concerning the question of whether bail should be granted or whether the amount of bail is fair and costable, or whether the bail should be subject to any additional conditions. The police are after all an interested party in the case. On the other hand, if the police have no objection to the release of the accused on bail, it seems unnecessary that the accused should be detained until the court can grant bail or until the accused can, at great cost and inconvenience be brought before a judicial officer after office hours just because the police are not authorised to grant bail in respect of the offences concerned. The question is therefore whether it is necessary to have restrictions on the offences for which the police can grant bail. It could certainly be expected that the police would not grant bail in cases where the offence is serious and where the accused was traced and apprehended with difficulty. As an additional safety measure it could if necessary be determined that a police official cannot grant bail in respect of certain defined offences without consulting the investigating officer and with the authority of the station commander or an officer or official appointed by him.

6.6 A further question is whether there should be a limit on the amount of bail that a police official may grant. There is at present no such limit, but the offences for which bail can be granted are of such a nature that extremely high amounts almost never occur. If the limit on the offences in respect of which bail can be granted by the police were to be lifted, however

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3 Nel 6.

the question of a maximum amount would be of importance. The bail that a police official may give in Canada is limited to 500 dollars. It is provisionally submitted that an amount of R5 000 should be fixed for the Republic or such amount as the Minister may prescribe from time to time by notice in the Government Gazette.

6.7 The idea that provision should be made for internal appeal to a higher authority and for immediate review in cases where bail is refused by a police official, is not supported at this stage. It is provisionally suggested that in cases where bail is opposed by the police or where the amount to be fixed is in dispute or where the police are of the opinion that bail should be made subject to conditions, the decision should rest with the court. In any other case the police may grant bail, subject to the proposed maximum amount.

7. The power of the Attorney-General to prevent the release of someone on bail

7.1 Historical review

The power of the Attorney-General to prevent the release of someone on bail was introduced into our law for the first time by section 4 of the General Laws Amendment Act 39 of 1961, which inserted section 108bis in the Criminal Procedure Act 56 of 1955. This section provided that an Attorney-General could, if he deemed it necessary in the interests of the safety of the public or the public order, direct that any person who had been detained on a charge could not be released on bail or otherwise before the expiry of a period of 12 days from his arrest. This provision initially only applied for 12 months, but it could be extended by a decision of both Houses of Parliament for further periods of 12 months. It was in fact extended every year until it was replaced by a new provision in 1965.

7.2 As a reason for the introduction of this provision it was pointed out that the courts do not refuse bail on security grounds but merely go into the question of whether the accused would probably fail to appear for his trial or would interfere with the course of justice.[1]

7.3 Section 108bis of Act 56 of 1955 was replaced by section 6 of the Criminal Procedure Amendment Act 96 of 1965. This section introduced a much more drastic measure, in terms of which an Attorney-General could prevent someone who had been detained on certain charges from being released on bail before sentence or acquittal. The charges involved not only offences against public safety, but also common law offences such as murder, arson, kidnapping and robbery. The Attorney-General's order for the detention of an accused only applied if the evidence against the

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1 Debates of the House of Assembly. Hansard 8 May 1961, Col 6176 and 6177 and cases quoted therein.

accused on the charge had not been led within 90 days after his arrest.

7.4 With the introduction of this measure the then Minister of Justice, Mr B J Vorster, pointed out, inter alia:[2]

> Nou mag agbare lede vir my sê dat dit 'n drastiese maatreël is. Ek wil byvoeg dat dit bedoel is om drasties te wees.

The Minister distinguished between the detention of persons on charges under security legislation and on general common law offences. He pointed out that this measure was necessary regarding both types of offences - in the first case because bail, no matter how high it has been set, is always paid, and in the second case because it appears that people who have been charged with robbery and similar serious offences frequently commit further crimes while they are out on bail.[3]

7.5 In S v Hartman; S v Jacobs[4] the court placed a restrictive interpretation on the expression "in the interest of the safety of the public or the maintenance of public order" in section 108 bis as if it applied to the safety of the public in general and not only to individuals in the public. In this case the Attorney-General had made an order refusing bail in a common murder case where the safety of certain witnesses appeared to be in danger. Section 108bis was amended by section 39 of the General Law Amendment Act 70 of 1968 by making the decision of the Attorney-General subject to the interest of the legal administration on the safety of the public or the keeping of public welfare.

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2 Debates of the House of Assembly. Hansard 11 June 1965 Col 8185.

3 Debates of the House of Assembly. Hansard 11 June 1965, Col 8186.

4 1968 1 SA 278 (T).

The underlined words were introduced specifically to overcome[5] the restrictive interpretation in S v Hartman; S v Jacobs.[6]

7.6 In 1976 a distinction was made for the first time between the power of the Attorney-General regarding certain common law offences and certain statutory offences regarding the safety of the State. Section 6 of the Internal Security Amendment Act 79 of 1976 introduced a provision similar to section 108 bis of the Criminal Procedure Act 56 of 1955, as section 12A of the Internal Security Act 44 of 1950. The said section 12A was applicable to the offences mentioned in the Annexure to the Internal Security Act 44 of 1950. Those offences were formerly listed in Part IIbis of the Second Annexure of the Criminal Procedure Act 56 of 1955 and therefore fell under section 108 bis of that Act.

7.7 The current position

The power of an Attorney-General to prevent the release of an accused who has been detained is at present contained in two separate provisions. Section 61 of the Criminal Procedure Act 51 of 1977 regulates the position regarding the offences mentioned in Part III of Annexure 2 to that Act. Those offences are arson, murder, kidnapping, robbery and housebreaking. Section 30 of the Internal Security Act 74 of 1982 regulates the position regarding the offences mentioned in Annexure 3 of that Act, namely: treason, subversion, contravention of section 13(1)(a)(iv) and offences prescribed in sections 54 and 55 of the Act. The particular offences are the partaking in the activities of an illegal organisation, terrorism, subversion and sabotage.

7.8 The considerations on which the Attorney-General must base his decision differ depending on whether the accused is in custody on a charge mentioned in Part III of Annexure 2 of Act 51 of 1977 or the Internal Security Act 74 of 1982. In the first

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5 See also Debates of the Senate 17 June 1986, Col 4357; Hansard 13 June 1968 Vol 24, Col 7208.

6 1968 1 SA 278 (T).

case he must be of the opinion that the release of the accused would probably have an adverse effect on the administration of justice or holds a threat to public safety or the maintenance of public order. The Attorney-General must also be of the opinion that the information on which his opinion is based cannot be made public without prejudicing the administration of justice. In the case of an offence mentioned in Annexure 3 of the Internal Security Act 74 of 1982, the Attorney-General can make an order that bail may not be granted if he regards this to be necessary in the interest of the safety of the State or the maintenance of law and order.

7.9 Section 61(3) of the Criminal Procedure Act 51 of 1977 makes provision for a court to release an accused to whom bail has been refused in terms of the said provision in its discretion on bail if no evidence has been led within 90 days. The Attorney-General must submit his objection to bail within 14 days after the case has been postponed or the court may decide in its discretion concerning the bail application.

7.10 It is interesting to note that in terms of section 61 the Attorney-General must submit an objection to the bail application and no longer (as was previously the case) merely issue an order to prevent bail from being granted. Nevertheless, the result is the same if the conditions and prescriptions are complied with because the court is then obliged to refuse bail. On the other hand, section 30 of the Internal Security Act 74 of 1982 retains the wording that the Attorney-General may issue an order that bail shall not be granted. This section does not contain a provision to the effect that bail may be granted if no evidence has been led against the accused within 90 days. It does, however, contain a corresponding provision regarding the court's power to grant bail if the Attorney-General does not exercise his power to issue an order refusing bail within 14 days.

Evaluation of the current position

7.11 The legislation according to which an Attorney-General can intervene to prevent the release of an accused has been sharply critisised over the years. The attitude of the courts is revealed, inter alia, in the following comment by Mr Justice Kumleben in the case Buthelezi and Others v Attorney-General, Natal:[7]

> It will be observed that the effect of section 30(1) is to constitute the Attorney-General, should he decide to exercise the right and issue an order, the first and final arbiter on whether bail should be granted. He is not in terms empowered to refuse bail but in effect does so. The court in such a case is deprived of the right, which it ordinarily and traditionally exercises, to decide on the merits at a hearing whether bail should be granted or refused. Plainly this measure is a serious inroad into the rights of the individual and the liberty of the subject.

In S v Ramboqin and Others[8] Mr Justice Friedman refered to the courts' traditional role in deciding bail applications. He put this as follows at 588E:

> It is right and proper that the courts should exercise this power. It is only through the courts exercising their powers, fearlessly and impartially, that a proper balance can be achieved between the interest of the individual's liberty and the interest of the State in bringing alleged wrongdoers to justice.

After the pointing to the power of the Attorney-General in terms of section 30 of the Internal Security Act 74 of 1982 the judge continued as follows:[9]

> These sections constitute serious inroads into the traditional role of the courts. Why the legislature should have found it necessary thus to place in the hands of the Attorney-General a power which ought properly to repose in the courts is not clear.

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7 1986 4 SA 377 (D) at 379 C - D.

8 1985 3 SA 587 (N).

9 At 588 I - J.

The judge continued by pointing out that the courts take the security of the State in to careful consideration and refuse bail on that ground. He remarked as follows at 589F:

> It is to me a complete anathema that an Attorney-General should be, at least in a manner of speaking, a judge in his own cause. He is not an independent officer; unlike the courts, he does not exercise his powers free of executive control.

7.12 The provisions under discussion have also been critisised in academic circles. Dugard[10] points out that in English law the power to grant bail has rested in the courts since the 14th century. In Roman-Dutch law, too, from early times only a judicial officer could release an accused on bail. He considers the right to veto which the Attorney-General has in certain cases as an infringement of the power of the courts and the freedom of the individual.

7.13 In his professorial inauguration speech at Potchefstroom University on 11 August 1972[11] Professor J A Coetzee discussed section 108bis of Act 56 of 1955 and other measures related to internal security from a philosophical perspective. He pointed out that the principle that a person is presumed to be innocent until he is found guilty is a judicial safety measure, but not a realistic concept in reality. The authorities have to do with the ordering of society in general. The actual guilt or innocence of the accused is therefore of great importance to the authorities. The authorities have to weigh up a variety of interests, the freedom of the individual being only one of these. Among other things, the authorities have to take into account any threat to the order of the State and they are sometimes obliged to act in a preventive manner. The provisions in question are therefore justifiable in principle. The necessity for applying them is in the discretion of the authorities, which are, inevitably, in the

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10 1968 SALJ.

11 Coetzee in 1974 THRHR.

best-informed position. Whether the legislation under discusssion gives too much power to officials is, however, another question, and one which the professor did not go into.

7.14 The Commission of Inquiry into Criminal Procedure and Evidence (the Botha Commission) remarked as follows in paragraph 11.05.3 of its report regarding section 108 bis of Act 56 of 1955:

> The general objection against section 108bis is that it transfers a purely judicial function to the Attorney-General which is exercised by him administratively and ex parte without hearing the accused. That that is wrong in principle and indefensible, stands to reason, and in normal circumstances I would not have hesitated to recommend the repeal of the section. From the history of the section itself it is however clear that it had its origin in circumstances which were in no way normal, and in which the safety of the State itself was threatened.

It should be remembered that section 108bis did not at that stage apply to the offences which are at present covered by section 30 of the Internal Security Act 74 of 1982. Regarding the offences that are covered by section 61 of the Criminal Procedure Act 51 of 1977, the Commission of Inquiry into Security Legislation (the Rabie Commission) remarked as follows in paragraph 10.126 of its report:

> 10.126 Those offences are all offences which don't endanger the security of the State normally in contrast with the offences on which section 12A are applicable, and also in contrast with certain of the offences which the Botha-Commission had in mind when he decided not to recommend that the power which section 108bis of the Criminal Procedure Act, 1955 gives to the Attorney-General to refuse bail, be taken away from him and given to the courts.

7.15 It is worth noting that both the above-mentioned Commissions base their recommendations for the retention of the Attorney-General's power of veto regarding the granting of bail on the abnormal security situation, which constitutes a threat to the security of the State. In the words of the Botha Commission, the power to veto cannot be defended on the basis of principle. As

the Rabie Commission shows in the quoted part of its report, however, consideration of the threat to the security of the State scarcely applies with regard to the common law offences in respect of which section 61 of the Criminal Procedure Act, 1977, at present gives the Attorney-General what is in effect a power of veto.

7.16 As a law reformer, the South African Law Commission is obliged to be led by legal principles. Any deviation from a legal principle can only be allowed in urgent circumstances. In principle, a bail application is a judicial decision that should be dealt with by the courts. To take away the courts' power to consider bail in certain cases and to give that power to a public official shows a lack of confidence in the courts. It also deprives the accused of the right to an impartial and unbiased judicial decision regarding a matter that is of real importance to him, namely his personal freedom. Such a provision is in fact detrimental to the image of our jurisprudence. We stand on the threshold of constitutional changes in which the acknowledgement of individual human rights will probably play an important role and our courts will feel more obliged to watch over human rights as is at present the case. It is quite obvious that the power of veto of the Attorney-General regarding bail applications is in direct conflict with the protection of human rights.

7.17 The Commission believes that there is no reason to fear that the courts would release a person on bail who is a threat to the security of the State or the maintenance of law and order. In cases where confidential information should not be disclosed bail applications can be heard in camera and a prohibition can be placed on the publication of such information.

7.18 Provisional conclusion and recommendation

Neither section 61 of the Criminal Procedure Act 51 of 1977 nor section 30 of the Internal Security Act 74 of 1982 can be justified on legal principles. The Commission recommends that both provisions be repealed.

8. Failure to comply with bail conditions

Introduction

8.1 This chapter deals with the sanctions that are available against persons who fail to comply with their bail conditions. Specific attention is given to the question of whether provision should be made for a penalty clause in addition to the forfeiture of bail. Finally, consideration is given to the question of whether the court should have discretion with regard to the forfeiture of bail.

The current position

8.2 Section 66 of the Criminal Procedure Act 51 of 1977 regulates cases where an accused fails to observe a condition of bail. The conditions under discussion are those imposed in terms of section 62 or 63 of the Act, i.e. conditions additional to the main condition that the accused must appear at a specific time and place. The section makes provision for the hearing of evidence in order to enable the court to determine whether the failure of the accused was due to fault on his part. If necessary, the presence of the accused can be obtained by way of arrest. If the court finds that the accused's failure was due to fault on his part the bail is withdrawn and the bail money is forfeit to the State.

8.3 Section 67 of the Criminal Procedure Act 51 of 1977 regulates cases where an accused who has been released on bail fails to appear on the date and at the place determined for his trial and to remain present during the proceedings. In the case of such a failure the court must withdraw bail provisionaly, declare the bail money provisionaly forfeit and issue a warrant for the accused's arrest. If the accused appears before the court within 14 days, he can convince the court that the failure was not due to fault on his part. If he succeeds in convincing the court, the provisional withdrawal of the bail and the forfeiture of the bail money lapse. If he does not succeed in convincing the court, the withdrawal of the bail and the

forfeiture of the bail money are confirmed. If the accused does not appear within 14 days of the issue of the warrant the withdrawal of the bail and the forfeiture of the bail money become final. Even if the accused appears at a later stage and shows that the failure was not due to fault on his part the forfeiture stands and he is not again entitled to bail. He may, however, approach the Minister for remission of the whole or any part of the forfeited bail money (section 70 of the Act).

8.4 According to the current provisions regarding bail it is not an offence for an accused who has been released on bail to fail (whether intentionally or negligently) to appear on the trial date or to comply with the bail conditions. Nor was there any such offence in terms of the previous bail provisions. On the other hand, someone who has been properly summoned to attend court or someone who has been released on warning instead of bail in terms of section 72 of the Criminal Procedure Act 51 of 1977 is guilty of an offence if he fails to appear and remain present.[1]

8.5 This matter was also referred to by Van Dam in The Magistrate[2] under the heading "Failure to comply with bail conditions - does this amount to contempt of court?" The writer mentions that it was apparently common practice at one time in the Magistrates' Office in Johannesburg for an accused who had been released on bail and who failed to appear on the trial date to be sentenced because of his failure, besides the forfeiture of the bail money. He then quotes the unreported judgment of Mr Justice Melamet in the case of S v Samuel Letsebe.[3] From the judgment it appears that the accused, who had been on bail, was summarily sentenced to a fine of R40 or 40 day's imprisonment because of his failure to appear on the trial date. The magistrate purported to have acted in terms of section 55(2) of the Criminal Procedure Act 51 of 1977. The court rightly found on review that section

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1 Sections 55(2) and 72(2) of Act 51 of 1977.

2 Van Dam in 1978 Die Landdros.

3 TPA H 49/78 dated 15 February 1978 (unreported).

55(2) was not applicable in this particular case. However the court appeared to agree obiter with the submission that the accused could have been punished by the lower court for contempt of court ex facie curiae if he had been summoned for that offence. As authority for this statement reference is made to R v Van Rooyen[4] and Rex v Keyser.[5] In Van Rooyen's case it was held that contempt of court is a common law offence in respect of which a magistrate's court has jurisdiction provided the charge has been brought before the court in a proper manner, i.e. by way of a summons. This case involved an accused who had made derogatory remarks about the magistrate outside the court.

8.6 Keyser's case involved a witness in a criminal case in the Supreme Court who ignored a summons on the instructions of his employer. The court conducted a summary inquiry in terms of section 65 of Act 31 of 1917, inter alia into the employer's instruction, and sentenced him. The Appellate Division found that the statutory provision concerned was not applicable and that such a case should have been dealt with by way of a summons for contempt ex facie curiae.

8.7 None of the above-mentioned cases dealt with an accused who was on bail and who failed to comply with his bail conditions and these cases can scarely be taken as authority that such a person be charged with contempt of court. Contempt ex facie curiae is admittedly a common law offence that can be prosecuted in the usual way. In the appropriate circumstances, if the necessary intent can be proved, the breach of bail conditions would probably constitute contempt ex facie curiae. In practice, however, the case against someone who has been brought to court on a summons would be finalised and the question of the forfeiture of bail decided, if this had not already been done, without summonsing the person once again to stand trial on a charge of contempt of court. If there is justification for the criminal prosecution of such a person, provision should be made for summary

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4 1958 2 SA 558 (T).

5 1951 1 SA 512 (A).

trial as in the case of failure to comply with a summons or warning. The question concerning the estreatment of bail and the criminal liability are in any case the same, namely whether the failure is the fault of the accused.

8.8 There may be a difference of opinion as to the moral justification of a criminal sanction over and above the estreatment of bail. Although estreatment is not a criminal sanction in the true sense of the word it does nevertheless have a penalising effect. On the other hand, one could argue that the amount of bail that was fixed originally in no way envisaged a possible punishment, but merely served as an encouragement to comply with the conditions. The amount therefore has no connection with the moral blameworthiness of the accused for his failure. It is true that the combined effect of the estreatment and the sentence can be taken into account in sentencing. The idea behind the additional punitive measure is to impress upon the accused the seriousness of compliance with the conditions and the authority of the law. The deterrent value of the punitive measure should in other words lead to bail being granted more readily. The estreatment of bail money, which is often paid by others, is not always a sufficient incentive for compliance with bail conditions.

The position in other countries

8.9 From a review of other legal systems it appears that in the USA, the UK, Canada and Australia provision has been made for criminal liability in addition to estreatment of bail money in the case of failure to comply with bail conditions. It should, however, be kept in mind that in most of these countries seldom use is made of cash bail. In the case where an accused merely undertakes to be liable on his failure for the amount of the bail money an additional punitive measure is probably needed.

8.10 Nel[6] points out that in the case of an accused's failure to comply with his bail conditions as contemplated in section 66 of the Criminal Procedure Act 51 of 1977 (in other words additional conditions imposed in terms of section 62 or amended in terms of section 63) the court has a discretion to withdraw the bail and estreat the bail money. In the case of an accused's failure to appear as contemplated in section 67 the court is however obliged to withdraw the bail and estreat the bail money, even if only provisionally at first. Nel feels that a criminal sanction should be introduced and that the estreatment of the bail money should always, in other words even in the last-mentioned case, be in the discretion of the court.

8.11 The reason for the distinction between forfeiture in terms of section 66 and section 67 is of course that the accused is present in the first case and not in the second. When the accused is present the court is in a postion to assess his guilt with regard to his failure and to decide accordingly concerning the forfeiture. The section 67 case involves a practical problem. The bail money is kept in a deposit account. If the accused fails to attend his trial, an indefinite period may elapse before he is traced and brought before the court on the summons. It is also possible that he may not be traced at all. At some stage finality has to be reached concerning what is to be done with the money in the deposit account. At what stage may one assume that the accused is deliberately evading his trial? The legislature has decided that this period shall be 14 days after the issue of summons. Perhaps this is too short. A back door is however left open in that the Minister may refund to the accused in whole or in part the forfeited bail money, which has in the mean time been transferred from the deposit account to the general revenue account. It would appear to tbe unsatisfactory that there is, for an indefinite period, uncertainty as to how the bail money is to disposed. It therefore appears that Nel's proposal in this regard cannot be accpeted without further ado.

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6 Nel 151.

Provisional conclusion and recommendations

8.12 It is tentatively recommended that provision be made for criminal liability for someone who, because of guilt on his part, fails to appear in court in accordance with his bail conditions. A draftprovision based on section 55 of the Criminal Procedure Act 51 of 1977, appears in clause 6 of the accompanying Bill. It is also recommended that section 67(2) be ammended to grant the court a discretion to exstreat the bail money of an accused who failed to appear in court within the period of fourteen days or to introduce above mentioned criminal sanction.

9. Higher appeal against bail decisions

Introduction

9.1 Nel[1] devotes a chapter to the different forms of higher appeal against the decision of a bail application. He also indicates by way of legal comparison how this matter is dealt with in certain other legal systems. He comes to the conclusion[2] that the existing appeal and review procedures regarding bail proceedings are inadequate. The reason is that it is time-consuming and costly to obtain a decision from a higher authority. He suggests that a new distinctive form of higher appeal should be introduced to provide for expeditious decisions. The court of higher appeal should have wide powers, among others to take new facts into consideration. He also suggests a new form of automatic review for cases where bail has been denied or granted but where the accused is still in custody after 72 hours. Provision should be made for a maximum period (96 hours) within which the decision must be reviewed. Consideration could be given to granting regional magistrates the power to review certain bail decisions.

The current position

(a) Appeal

9.2 The present provisions regarding an appeal against a bail decision of a lower court are contained in section 65 of the Criminal Procedure Act, 1977 which reads as follows:

> **65. Appeal to superior court with regard to bail. -**
>
> (1) (a) An accused who considers himself aggrieved by the refusal by a lower court to admit him to bail or by the imposition by such court of a condition of bail, including a condition relating to the amount of bail money and including an amendment or supplementation of a condition of bail, may

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1 Nel 171 et seq.

2 Nel 192 and 248.

appeal against such refusal or the imposition of such condition to the superior court having jurisdiction or to any judge of that court if the court is not then sitting.

(b) The appeal may be heard by a single judge.

(c) A local division of the Supreme Court shall have jurisdiction to hear an appeal under paragraph (a) if the area of jurisdiction of the lower court in question or any part thereof falls within the area of jurisdiction of such local division.

(2) An appeal shall not lie in respect of new facts which arise or are discovered after the decision against which the appeal is brought, unless such new facts are first placed before the magistrate or regional magistrate against whose decision the appeal is brought and such magistrate or regional magistrate gives a decision against the accused on such new facts.

(3) The accused shall serve a copy of the notice of appeal on the attorney-general and on the magistrate or, as the case may be, the regional magistrate, and the magistrate or regional magistrate shall forthwith furnish the reasons for his decision to the court or judge, as the case may be.

(4) The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his opinion the lower court should have given.

9.3 The most important objection to this provision is that a bail appeal is treated like an ordinary criminal appeal. The normal procedure must be followed of a notice of appeal that sets out the grounds for appeal. The magistrate must furnish his reasons for the decision in writing and a typed record of the proceedings must be submitted to the court of appeal. All this takes time. In the mean time the accused remains in custody. Furthermore, the court cannot take new facts into account on appeal and it must be convinced that the decision is wrong before it can give a decision that it feels the lower court should have given. In this regard the corresponding provisions of the Criminal Procedure Act 56 of 1955 gave the court greater leeway. Sections 97 and 98 of the Act provided as follows:

97. (1) Whenever an accused considers himself aggrieved by the refusal of any magistrate or of an inferior court to

release him on bail or by such magistrate or court having required excessive bail or having imposed unreasonable conditions, he may appeal to the superior court having jurisdiction, or, in case such court is not then sitting, to any judge thereof against such refusal or excessive bail.

(2) The superior court to which or judge to whom an appeal is made under sub-section (1) may make such order on the appeal as to it or him in the circumstances of the case seems just.

98. A superior court having jurisdiction in respect of any offence may at any stage of any proceedings taken in any court in respect of that offence, release the accused on bail, whether the offence is or is not one of the offences referred to in section eighty-eight.

9.4 In the case of S v Mohamed[3] the court investigated the nature of an appeal in terms of section 97 of Act 56 of 1955. According to Trollip J A the appeal can be one of three types, namely:

(i) An appeal in the wide sense; that is, a complete re-hearing and re-adjudication of the merits of the application for bail, with or without additional information.

(ii) An appeal in the well-known narrow technical sense; that is a re-hearing on the merits, but one that is limited to the information on which the magistrate's decision was given, and in which the only issue to determine is whether that decision was right or wrong;

(iii) A review; that is, a limited re-hearing, with or without additional information, to determine not whether the magistrate's decision was right or wrong but whether he exercised his powers and discretion honestly and properly ...

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3 1977 2 SA 531 (A).

The court came to the conclusion that section 97, which was quoted above, falls in the first category, namely an appeal in the broad sense. It seems that when the legislator, promulgated the present section 65 of Act 51 of 1977, he intended to alter the position so that an appeal in terms of this section means an appeal in the narrow sense as referred to in S v Mohamed.

9.5 No appeal is available against the refusal of bail by a court higher than the court of first instance.[4] Appeal can, however, be noted by an accused against a bail decision on appeal given by a higher court. In such a case the consent of that court is necessary, or, should it refuse, that of the Appellate Division. The prosecutor does not have a right to appeal against a decision regarding bail. There appears to be a difference of opinion as regards the question of whether an appeal is available against the withdrawal and forfeiture of bail in terms of section 66 of Act 51 of 1977. Hiemstra[5] contends that such a decision is not subject to appeal. He points out that the opposite viewpoint was taken in R v McInnes[6] and S v Casker[7], but he bases his viewpoint on Pillay v Regional Magistrate, Pretoria[8] and Sebe v Magistrate Zwelitsha[9].

(b) Review

9.6 Nel[10] also discusses review as a form of higher appeal against a bail decision of a lower court. In terms of section 24 of the Supreme Court Act 59 of 1959, a provincial division of the

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4 S v Mohamed 1977 2 SA 531 (A).

5 Hiemstra 1987 153.

6 1946 WLD 386.

7 1971 4 SA 504 (N).

8 1977 1 SA 533 (T).

9 1984 3 SA 885 (CK).

10 Nel 186.

Supreme Court may review the proceedings of a lower court on one of the following grounds:

(a) Absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings;

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

In addition, the Supreme Court also has a common law power of review.[11]

The procedure for a review according to the said provisions is contained in rule 53 of the rules for higher courts.[12] The process is relatively cumbersome and totaly unsuitable for the speedy adjudication by a higher court of a refusal of bail by a lower court. Furthermore, the review precedure is only available in exceptional circumstances before the finalisation of a case in a lower court.[13]

A higher court may also review an order regarding bail in terms of section 304(4) of the Criminal Procedure Act 51 of 1977. The application field of this section, is however, limited. In addition we are dealing here with the stage of the proceedings where the accused has already been sentenced by a lower court. The review of the law regarding a higher appeal against a bail decision specifically involves the earliest possible opportunity at which the decision of the court of first instance can be reviewed.

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11 S v Zunqu 1984 1 SA 376 (N) and sec. 24(3) Act 59 of 1959.

12 Nathan 351.

13 Hiemstra 1987 703.

The position in other countries

9.7 England

Nel[14] investigated the laws of England, the USA, Canada and Australia in order to determine how the question of an appeal against a bail decision is dealt with in those legal systems. Regarding England, he refers to three different forms of higher appeal that are possible in terms of the Criminal Justice Act of 1967 and the court rules. All three cases involve a retrial and new facts or information can be taken into consideration.

9.8 United States of America

In terms of the United States Code there are various steps that can be followed regarding a bail application. First a "release hearing" takes place during which the possible release of the accused is considered and during which bail and bail conditions can be fixed. If the accused is still in custody 24 hours later a further step, known as a review hearing, takes place. In the process the necessity of the further detention of the accused is considered more thoroughly, as well as the question of whether the bail amount or other conditions are not beyond the means of the accused. The court must furnish written reasons for its decision. The proceedings can then be taken on review by a judge of the district court. This is known as an amendment hearing. The application is, in fact, considered anew and new facts can be presented to the court.

9.9 Canada

In Canada higher appeal against a decision concerning bail is governed by section 457 of the Canadian Criminal Code. An accused can request that a decision where bail has been refused or where onerous conditions have been imposed be reviewed by a judge. The

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14 Nel 189 e.s.

judge can hear and consider new evidence on review. He can also give such order regarding bail as he considers fit. The prosecutor can also request the review of a bail decision.

9.10 Australia

The Australian Bail Act of 1978 makes provision (section 22) for an accused to apply repeatedly for bail. The Act governs the powers of the various courts in the hierarchy to grant bail. Each has the power to review its own decision regarding bail (section 44). The higher court has the power to review any decision of an "authorised officer, magistrate or justice or of the District Court or Supreme Court (however constituted)" regarding bail (section 45). Section 48(3) provides that:

> The review of a decision shall be by way of rehearing, and evidence or information in addition to or in substitution for the evidence or information given or obtained on the making of the decision may be given or obtained on review.

9.11 Evaluation of the current position

To enable a court of appeal or review to review a bail decision or the bail proceedings of a lower court properly, it is necessary for the higher court to be in possession of the record of the proceedings, the accused's objection to the decision and the magistrate's reasons for his decision. It would also in most instances be necessary for the case to be thoroughly argued before the court of appeal. If there are new facts, it is desirable that the court of first instance should also consider those facts before an appeal to a higher court is made. This is precisely what section 65 of the Criminal Procedure Act 51 of 1977 makes provision for.

9.12 A provision such as section 98 of the Criminal Procedure Act 56 of 1955, which was referred to in paragraph 9.3 above, according to which the higher court as court of first instance has concurrent jurisdiction with lower courts regarding bail, would appear to be undesirable. It also seems inappropriate that a bail

appeal should result in a rehearing and that a decision should once again be made on the merits of the bail application. This could lead to the abuse of process in the Supreme Court and to a delay in the finalisation of the appeal.

9.13 Consideration has been given to the review of bail proceedings in a lower court by a judge in chambers at the request of the accused. The judge should have the power to confirm the order of the lower court or to place the case on the roll for argument or for further evidence in the appropriate division of the Supreme Court. The last-mentioned step also amounts to a rehearing. The problem with such a procedure is that there is a real danger that a great many cases with no merits would have to be subjected to this process of review. Judges could in fact be inundated with bail reviews. Nothing prevents the accused from having proceedings reviewed in the lower court. He merely has to express the opinion that the court has made a mistake. Furthermore, the court of review would in most cases probably not be able to give a proper decision without the merits of the case being argued. This takes one back to the current appeal procedure.

Conclusion

9.14 Apart from the fact that intervals between the different stages that are necessary to finalise a bail appeal could be reduced slightly, it seems as if the current system cannot be improved much without impeding justice and the proper course of the law. Suggestions in this regard would nevertheless be welcomed.

Bail after sentencing

9.15 A lower court's power to release an accused on bail after sentencing is embodied in section 307(2)(b) of the Criminal Procedure Act 51 of 1977, in the case of proceedings that are reviewable and in section 309(4) in the case of an appeal. In terms of section 307(6) certain provisions of Chapter 9 of the

Criminal Procedure Act 51 of 1977 are mutatis mutandis applicable to such a release on bail.[15] Nel[16] points out that sections 69, 70 and 71 of Act 51 of 1977 are however not made applicable as such and thinks this leaves a gap. He is of the opinion that the said sections should also be applicable in the case of an appeal against the decision of a higher court (section 321).[17] In the last-mentioned case he also raises the question of whether the provisions of sections 63 and 307(5) of the Criminal Procedure Act should not also be made applicable in respect of bail at such an appeal.

9.16 Section 69 provides that bail money can also be deposited by another person for the accused, but that it can only be refunded to the accused or the depositor even though it has been ceded to another. The section futher provides that no person is allowed to deposit bail for an accused if the official concerned has reason to believe that the depositor has been or will be indemnified by any person against loss of the bail money or that he will receive any financial benefit in this regard. There is no apparent reason why the provisions should not also be applicable in respect of bail granted pending review or appeal.

9.17 Section 70 merely provides that the Minister may in his discretion remit the whole or any part of any bail money forfeited under section 66 or 67. Sections 66 and 67 are among the provisions that have been made applicable mutatis mutandis by appeals and reviews. It therefore seems that there is no necessity to include section 70 in these provisions.

9.18 Section 71 provides that if an accused under the age of 18 years is in custody in respect of any offence he may, instead of being detained or released on bail, be placed in a place of

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15 Sections 63 to 68 of Act 51 of 1977.

16 Nel 13.

17 Nel 15.

safety as defined in the Child Care Act 74 of 1983, pending his appearance or further appearance before a court. The question is raised of whether there is a need for the application of this provision to sections 307, 309 and 321.

9.19 Nel[18] discusses the question of whether the Supreme Court has inherent jurisdiction to grant bail besides the statutory powers that are contained in the various provisions of the Criminal Procedure Act 51 of 1977. In the light of the decision in Beehari v Attorney-General[19] and other decisions to which he refers, he comes to the conclusion that the court does not have such an inherent power. He believes that the Act should be amended to grant the Supreme Court the discretion to grant bail at any stage. He suggests[20] that section 316(9) of the Criminal Procedure Act 51 of 1977 be amended by the addition of a proviso to the effect that the Supreme Court has the power to hear new facts and release the accused on bail up to the last day of the serving of the sentence.

9.20 In the case S v Hlongwane[21] Mr Justice Eloff went into the question of whether the Supreme Court has the inherent power to grant bail. The history of the development of bail in South Africa was dealt with in full. A translation of the court's summary of the current position is given in full below.

1. The Supreme Court has the common law power to use the interdictum de homine libero exhibendo to inquire into the lawfulness or unlawfulness of the detention of any person and where such detention is unlawful, to order his release. That wide common law power could possibly include the narrower power to order the conditional release on bail of a person in appropriate circumstances.

2. That the Supreme Court does have a general common law power to release a prisoner on bail has been accepted or

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18 Nel 16 e.s.

19 1956 2 SA 598 (N).

20 Nel 19.

21 1989 4 SA 79 (T).

presupposed in various decisions. Ex Parte Reckling 1920 CPD 567; R v Blumenthal 1924 TPD 358; R v Innes 1925 CPD 58; Ex Parte Graham: In re United States of America v Graham 1987 1 SA 368 (T) at 372D - 373I.

3. When a person has been lawfully arrested on a charge and for the purpose of criminal proceedings, his right to be released on bail until he is sentenced in the trial court is regulated by Chapter 9 (sections 58-71) of the Criminal Procedure Act 51 of 1977. Chapter 9 contains a codification of such rights from detention to arrest to sentence. An accused cannot therefore during such period rely on any common law power of the Court to release on bail except possibly if particular circumstances occur where such a common law power can be excercised within the framework of Chapter 9, and without conflicting with it. Compare Beehari v Attorney-General Natal 1956 2 SA 598 (N), at 603B; S v Kaplan 1967 1 SA 634 (T); Chunilall v Attorney-General Natal 1979 1 SA 236 (D); S v Baleka and Others 1986 1 SA 361 (T) at 374I - 376D.

4. After sentencing in a criminal trial in the Supreme Court the Court has a common law power to control its sentence. The Court can accordingly suspend the sentence pending the determination of any further steps which may be performed in a Court (including application for leave to appeal, a petition to the Chief Justice, appeal, a special entry or the reservation of a question of law) and temporarily release the sentenced person. The Court may also impose a condition, for instance that the person lodge bail in order to secure his release. The Court has therefore, after sentence, a common law power to release on bail. Ngedlane and Roux v Rex 1935 NPD 638, 647; R v Wessels 1935 AD 8; R v Lee 1949 1 SA 1134 (AD), at 1149; R v Milne and Erleigh (7) 1951 1 SA 791 (AD), at 881H.

5. A part of (4) above overlaps with section 321(1)(b) and (2) of Act 51 of 1977 and where this occurs section 321 (1)(b) and (2) replaces the common law.

6. A Provincial Division's power to release on bail a person convicted in the Supreme Court and sentenced to imprisonment does not expire after the Court grants leave to appeal to the Appellate Division. R v Mathembu 1961 3 SA 468 (D); R v Milne and Erleigh (7) 1951 1 SA 791 (AD) at 882B.

7. After sentence in an inferior court the Supreme Court has a common law power to release on bail pending further proceedings in a superior Court. Where the Court is asked to excercise that common law power, the statutory power of the inferior court has to be borne in mind. Head v Wollaston and the Attorney-General 1927 TPD 19.

8. A part of the area covered by the common law power refered to in (7) above, is also governed by section 304(2)(c)(vi) (release on bail by a review court) and by section 309(3) read with section 309(2)(c)(vi) (release on bail by a provincial division of the Supreme Court as a court of appeal). Where this occurs the statutory power replaces the comman law power.

9. After sentence in an inferior court, the inferior court itself has a statutory power to release on bail pending the determination of a review (section 307) or an appeal (section 309(4)(b) read with section 307).

10. After disposal of an appeal by the Appellate Division, and since the abolition of appeals to the Privy Council, no Court has any power, common law or statutory, to release a sentenced prisoner on bail, neither pending a petition to the State President for clemency (compare Beehari v Attorney-General Natal 1956 2 SA 598 (N)), nor pending a petition to the State President in terms of section 327 of Act 51 of 1977 for the hearing of evidence which only became available subsequent to the trial. (compare Chunilall v Attorney-General Natal 1979 1 SA 236 (D); Hoosain v Attorney-General Cape (2) 1988 4 SA 142 (C)).

Provisional conclusion and recommendations

9.21 It is suggested that there is justification for a difference of approach regarding the granting of bail where an accused has already been tried and sentenced, as opposed to the trial-awaiting accused. Obviously there can be no talk of a right to bail or a presumption in favour of bail with a sentenced person. At most, the release of such a person should be in the discretion of the court, pending further judical proceedings such as review or appeal. As regards bail pending a petition to the State President for clemency, the Commission's provisional view is that the court's power to release a person on bail should terminate at the final completion of the proceedings concerned, in other words when any higher appeal to a court of law has terminated.

9.22 In preliminary negotiations it was suggested that the Commission should give attention to the question of convicted persons whose appeals were unsuccesful or whose sentences were confirmed on review, but who failed to surrender themselves in

terms of an order under section 307(3)(b) of the Criminal Procedure Act 51 of 1977, so that the sentence could be carried out. It has been ascertained that there are many such cases and that the search for persons who have to serve their sentences sometimes takes years. The existing procedure is that, inter alia, section 67 applies mutatis mutandis. In other words, if the person fails to surrender himself at the specified time and place, a warrant for his arrest is issued and the bail is provisionally declared forfeit. After 14 days the estreatment of bail becomes final.

The only solution suggested is that the appelant should be obliged to attend the hearing of the appeal and to surrender himself immediately if the appeal fails. This does not, however, seem to be a workable solution. In some cases judgment is reserved. In other cases the appellant has absconded before judgment has been delivered. It is also not clear how the appellant's presence is to be guaranteed and what is to happen if he does not appear. The case cannot merely be left unfinished. Eventually one is faced with the same type of case as when the accused who is awaiting tried fails to attend his trial. The only effective solution appears to be the more careful screening of cases where bail is granted pending appeal or review.

10. Diverse matters regarding bail

10.1 In this chapter attention is briefly given to the remaining matters that are referred to in Chapter 1.

Bail conditions

10.2 The idea that appropriate bail conditions should be more readily applied and that this might lead to bail being more readily granted probably has merit. However, this is not a matter for legal reform or statutory intervention. It could possibly be brought about by way of guidance or training for public prosecutors and legal officials.

Cash bail

10.3 It is alleged that the system of depositing bail in cash discriminates against indigent persons who do not have the necessary means. In the first place it should be pointed out that the alternative of the furnishing of a guarantee (with or without sureties) already exists - see section 60(2) of the Criminal Procedure Act 51 of 1977. A person who cannot obtain the prescribed amount in cash will in any case find it difficult to persuade the court that his gurantee for that amount is acceptable. Furthermore, he will find it difficult to obtain suitable sureties for that amount.

The bail must at least bind the accused to compliance with the bail conditions whether it has been deposited in cash or by way of a provisional debt obligation. A guarantee under which nothing can be recovered inevitably has no binding power. In addition, an effort to enforce it can involve expense for the State.

The alternative of a guarantee instead of cash bail is perhaps appropriate for an accused who has the necessary means, but who finds it difficult or inconvenient to unfreeze those means immediately to make then available in cash. Section 72 of the Act

provides the indigent accused with a better alternative in so far as circumstances justify its application.

Damages

10.4 Regarding the question of whether remedy of damages for the unlawfull detention of a person should be extended to cover the situation where bail has been refused wrongly or unreasonably, the provisional opinion is that there is no need for such an extension. It would in fact create an untenable situation if a judicial officer could be held liable in a civil action for a decision that was interpreted as being wrong or unreasonable. It is felt that in this regard the requirement of mala fides should not be deviated from. Furthermore, an effort is made to limit the prejudice for the detainee as far as possible, in the first place by obtaining a bail decision at an early stage and in the second place by expediting the review of such a decision.

Legal representation

10.5 As regards legal representation at bail applications, it is to be doubted whether the intervention of the Legal Aid Board would serve any purpose. Legal Aid is not usually considered separately from bail, but is considered regarding the defence of the accused against the charge, including interim release on bail. If the proposed procedure is followed, according to which a court must mero motu consider the release of an accused on bail, the need for legal representation is probably much less. There are however cases where bail is a point of contention that has to be decided by way of evidence, examination and argument. In those cases the accused is free to approach the Legal Aid Board for legal assistance if he cannot provide for his own defence. The comments of the Legal Aid Board specifically regarding the rapid provision of legal aid for the hearing of bail applications would nevertheless be appreciated.

Administrative prescriptions

10.6 The Commission does not wish to comment on the administrative prescriptions of the South African Police, the Prisons Service and the Directorate of Justice regarding bail. Those prescriptons will in any case probably have to be reviewed after the completion of the investigation and the implementation of its recommendations.

Bail pending extradition

10.7 Nel points out that the provisions of the Criminal Procedure Act 51 of 1977 that relate to bail are not applicable regarding persons who are detained pending their extradition to a foreign state.[1] Extradition is regulated by the Extradition Act 67 of 1962. The procedure is briefly that a request for the extradition of a person who finds himself in the Republic can be directed to the Minister of Justice by a foreign state via diplomatic channels and that the Minister can in turn request a magistrate to issue a warrant of arrest for the person concerned. When this person has been detained and brought before a magistrate the magistrate investigates whether the person should be extradited in terms of section 9 of the Act. After the investigation, the magistrate may either release the person or detain him pending extradition. The person can appeal against the latter decision within 15 days to the Supreme Court.

10.8 The only provision in the Act that refers to bail is section 9(2). This provision reads as follows:

> "(2) Subject to the provisions of this Act the magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic and shall, for the purposes of holding such enquiry, have the same powers, including the power of committing any person for futher examination and of admitting to bail any person detained, as he has at a preparatory examination so held."

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1 Nel 22

10.9 Briefly stated, the position is that the magistrate can release the person on bail during the investigation period, but as soon as he decides that the person can be extradited the magistrate is obliged to issue an order for detention and he cannot grant bail. Nel comments as follows:[2]

> No ratio could be found for the exclusion of the normal bail provisions from extradition proceedings. No reason could be found for believing that it was the legislator's intention to base bail pending extradition on grounds other than the normal cases of bail. It would appear that the present situation is merely the result of an oversight or unfortunate wording. It is suggested that section 9(2) of the Extradition Act be amended so as to incorparate the provisions of Chapter 9 of the Criminal Procedure Act. (translation)

10.10 In Ex Parte Graham: In re United States of America v Graham[3] Mr Justice Harms investigated the provisions of the Extradition Act 67 of 1962 and a court's power to grant bail in extradition proceedings. The court confirmed that a magistrate's power to grant bail in such proceedings is limited to the investigation stage in terms of section 9(2). When a magistrate decides that a person can be extradited is he obliged to issue an order for detention.

10.11 The court went into the origin of the present provisions and referred to the Extradition Act 1879 (33 and 34 Vict Chap 32) and the Fugitive Offenders Act 1881 (44 and 45 Vict Chap 69), in which similar provisions applied. The court also investigated English jurisprudence in order to determine a court's power to grant bail in extradition cases. With reference to R v Spilsbury,[4] Ex parte Reckling[5] and R v Blumenthal[6] it came

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2 Nel 22.

3 1987 1 SA 368 (T)

4 1894 2 QB 615.

5 1920 CPD 567.

6 1924 TPD 358.

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to the conclusion that the Supreme Court has the inherent power to grant bail in extradition proceedings. The court pointed out, however, that in R v Spilsbury and in R v Blumenthal it was held that this power should be used sparingly.

10.12 Regarding proceedings before a magistrate the court remarked that the historical reason why a person must be detained in custody pending extradition, is probably because such a person is "a fugitive from justice in the other country". More important, however, is the fact that the Minister of Justice has a real interest in extadictiory proceedings and that in a bail application in such proceedings he must be joined as a party to the proceedings. The state that requested extradition also has a real interest in the proceedings and is entitled to notice and a right to be heard when the release of the person on bail is considered.

10.13 It should be clear from the above that the legislator had well-founded reasons for not simple making the provisions of the Criminal Procedure Act, 1977, applicable to bail proceedings and that his failure to do so is not, as Nel alleges, the result of an oversight or unfortunate wording. It is even more remarkable that Nel can still write as follows after a detailed discussion of and tribute to the judgment in Ex parte Graham:[7]

> It is however clear that there are large dificiencies and great uncertainty regarding bail matters during extradition proceedings. (translation)

However, he does not say what these deficiencies and uncertainties are, but merely repeats that the bail provisions of the Criminal Procedure Act should be made applicable mutatis mutandis to extradition proceedings and that it should be possible to grant bail up to the moment of extradition.

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7 Nel 26.

10.14 Offences for which the extradition of a person is requested are usually of a fairly serious nature. In most cases the person whose extradition is sought is a fugitive from the law of the foreign state concerned or he is at best unwilling to submit himself to trial in that state. The risk of granting bail to such a person is fairly great. In South Africa, which has common borders with various independent states across which illegal access is fairly easy, the risk is so much greater. The extradition of a person is often a politicaly sensitive affair. It involves relations between states. The bad handling of the extradition of a person can easily inpair good relations between states. It is therefore understandable that bail cannot be granted lightly in extradition proceedings, and especially not without consultation between the executive authorities of the different states. The Commission's provisional conclusion is that the present legal position should remain unchanged.

Credit

10.15 The idea that a court should be obliged to take into consideration the period that the accused was in detention before and during his trial does not have any connection with bail but is a sentencing matter. Sentence is essentially a matter that should be left in the discretion of the court. The idea is not supported.

11. Bill

The provisional recommendations contained in this working paper are embodied in the accompanying Bill. Comments in this regard will be welcomed.

B I L L

EXPLANATORY NOTE:

[ ] Words in square brackets indicate omissions from existing enactments.

_____ Words underlined with a solid line indicate insertions in existing enactments.

To amend the Criminal Procedure Act, 1977, so as to extend the power to grant bail of certain police officials; to make provision for an accused to be entitled to bail in certain circumstances; to regulate the onus of proof regarding bail issues that are in dispute; to further regulate bail procedings; to revoke the power of the Attorney-General to prevent the granting of bail in certain cases; and to make provision for additional matters.

Introduced by the Minister of Justice

BE IT ENACTED by the State President and the Parliament of the Republic of South Africa, as follows:

Admendment of section 59 of Act 51 of 1977

1. Section 59 of the Criminal Procedure Act, 1977 (Act 51 of 1977), hereinafter referred to as the principal Act, is hereby amended -

(a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:

"(a) An accused who is in custody in respect of any offence, other than an offence referred to in [Part II or Part III of Schedule 2, or in] Schedule 3 to the Internal Security Act, 1982 (Act 74 of 1982), may, before his first appearance in a lower court, be released on bail in respect of such offence by any police official of or above the rank of non-commissioned officer, if the accused deposits at a police station the sum of money determined by such police official, which sum of money shall not exceed fivethousand rand or such sum as that the Minister may determine from time to time by notice in the Goverment Gazette."; and

(b) by the insertion of the following subsection:

"(3) Bail shall not be granted in terms of subsection (1) to

any person who is in custody in respect of an offence contemplated in Part 11 or part 111 of Schedule 2, except by or with the approval of the stationcommander of the place where the accused has been arrested or detained, or somebody acting on his authority".

Substitution of section 60 of Act 51 of 1977

2. The following section is hereby subtituted for section 60 of the principal Act:

"60. Bail after the first appearance of accused in the lower court.

(1) An accused who is in custody in respect of any offence, other than an offence contemplated in Schedule 3 of the Internal Security Act, 1982 (Act 74 of 1982), shall at or after his first appearance in a lower court be entitled to bail in respect of such offence, unless the court finds that there are valid grounds why he should be detained in custody.

(2) When an accused who is in custody is brought before a lower court for the first time and the case against him is not finalised on the same day the court must decide whether he can be released on bail or otherwise.

(3) The court may acquire the information that is needed for its decision or order in respect of bail in an informal manner in respect of matters that are not in dispute between the accused and the prosecutor. As regards the matters that are in dispute the court shall give its decision on the evidence, and the onus of proof regarding the question of whether the accused should be kept in custody shall rest with the prosecution.

(4) If the court does not at its first consideration have sufficient evidence to decide whether the accused may be released on bail, the proceedings may be adjourned for not more than five days and the accused detained in custody.

(5) The court may make the release of an accused on bail subject to such conditions as it deems fit.

(6) The court shall endeavour to grant bail that is not beyond the means of the accused, but that will still induce the accused to attend his trail and to comply with the bail conditions.

(7) The court may order that the accused furnish a guarantee, with or without sureties, that he will pay and forfeit to the State the amount that has been set as bail or that has been

increased or decreased in terms of section 63(1) in circumstances in which the amount would, had it been deposited, have been forfeit to the State.

Repeal of section 61 of Act 51 of 1977

3. Section 61 of the principal Act is hereby repealed.

Insertion of section 63A in Act 51 of 1977

4. The following section is hereby inserted after section 63 of the principal Act:

"63A Lower court may reconsider the granting of bail from time to time. In the case where bail has been refused, a lower court may from time to time reconsider whether changed circumstances justify the granting of bail and such a decision may be made by a judicial officer other than the one who made the original decision".

Substitution of section 64 of Act 51 of 1977

5. The following section is hereby substituted for section 64 of the principal Act:

"64. Proceedings with regard to bail and conditions to be recorded in full.

The court which considers [an application for] bail under section 60 or which imposes any further conditions under section 62 or which, under section 63, amends the amount of bail or amends or supplements any condition, shall record the relevant proceedings in full, including the conditions imposed and any amendment or supplementation thereof, and where such court is a magistrate's court or a regional court, any

document purporting to be an extract from the record of procedings of that court and purporting to be certified as correct by the clerk of the court, and which sets out the conditions of bail and any amendment or supplementation thereof, shall, on its mere production in any court in which the relevant charge is pending, be prima facie proof of such conditions or any amendment or supplementation thereof.

Amendment of section 67 of Act 51 of 1977

6. Section 67 of the principal Act hereby amended by paragraph (a) of subsection (2) of the following paragraph:

"(a) If the accused appears before the court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall investigate in the manner precribed in section 67A(2) the accused's failure and if the court finds that such failure was due to fault on part of the accused the court may, in addition to any other punishment imposed in terms of the said section 67A(2), declare the bail money forfeit in whole or in part.".

Insertion of section 67A

7. The following section is hereby inserted after section 67 of the principal Act:

"67A Criminal liability of accused who is on bail and who fails to appear.

(1) Any person who has been released on bail and who fails to appear on the date and at the place determined by the court, or who fails to remain in attendance until the procedings in which he must appear are finalised, shall be guilty of an offence.

(2) When a person is brought before the court on a warrant that has been issued in terms of section 67(1) the court shall conduct a summary investigation into that person's failure to appear in accordance with the bail conditions that were applicable to him or to remain in attendance and, unless the accused satisfies the court that his failure was not due to fault on his part, the court may find him guilty of the offence specified in subsection (1) and sentence him to a fine not exceeding one thousand rand or to imprisonment not exceeding one year.".

8. Short title

This Act shall be called the Criminal Procedure Amendment Act 19 ...