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Problematic aspects with regard to bail under South African law: The reverse onus provisions and the admission of the evidence of the applicant for bail at the later criminal trial revisited

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Abstract

In the article I revisit the burden bestowed on an applicant for bail with regard to certain offences, and the fact that the testimony of the applicant for bail is admissible as evidence at his later criminal trial under South African law. I consider and compare the South African position with selected foreign jurisdictions and international human rights instruments. I argue that these provisions give reason for concern their own. I submit that the cumulative effect of these provisions, and especially so the exploitation thereof by the South African prosecution, is a failure of liberal democracy.

Keywords: Bail; Pre-trial release; Reverse onus; Privilege against self-incrimination; Constitutional liberalism; Due process

1. Introduction and background

With the Interim Constitution[1] a new constitutional democracy with protected fundamental rights came into force in South Africa in 1994. The Interim Constitution, and the Constitution

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[1]Constitution of the Republic of South Africa, Act 200 of 1993 (referred to as the Interim Constitution).

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of South Africa, 1996[2] that replaced the Interim Constitution, were universally applauded as representing a break from the past.

In the area of pre-trial release and detention, South African history before 1994 had caused concern in that the attorney-general was empowered to prohibit the release of an accused on certain serious or "political offences", effectively removing the decision from the discretion of the court.[3] Because history had taught its citizens the value of freedom and security (or liberty), including the right to bail, it was not surprising that the right to freedom and security,[4] and right to bail,[5] were taken up as fundamental rights provisions in the Interim Constitution.

However, memories soon faded and in the wake of a massive crime wave under the new dispensation, a watered down "right" to bail in the Constitution, 1996[6] and amendments to the Criminal Procedure Act were introduced in which the policy-makers pushed the limits in tightening up the conditions under which bail may be granted.[7]

In my thesis Problematic aspects of the right to bail under South African law: A comparison with Canadian law and proposals for reform (1999),[8] I *inter alia* found that policy makers had neglected due process to some extent and opted for the crime control approach with regard to bail. I also held the opinion that policy makers had overstepped the mark in combatting crime. While being aware of the underlying problems and emotions created by the unprecedented wave of crime in South Africa I found that some provisions tended to indicate that the authorities had fallen back on the old way of thinking. Instead of creating new mechanisms to ensure the protection of human rights, they acted in conflict with the requirements of a human rights culture. In doing so the government threatened rather than served the values of an open democratic society based on freedom, security and equality. This is unfortunately still the position today.

While the many problematic aspects remain some 15 years later I only revisit two aspects in this article. The first aspect is the burden bestowed on the applicant for bail with regard to certain serious offences to convince the court that the interests of justice permit his release. The second aspect is the fact that the testimony of the applicant for bail is admissible as evidence at his later criminal trial. While each of these aspects gives reason for

[2]Constitution of the Republic of South Africa, Act 108 of 1996 (referred to as the Constitution of South Africa, 1996 or the Constitution).

[3]§ 61 of the Criminal Procedure Act 51 of 1977 (hereafter referred to as the Criminal Procedure Act). Repealed by § 4 of the Criminal Procedure Second Amendment Act 75 of 1995.

[4]§ 11(1) provided that: "Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial".

[5]§ 25(2)(d) provided that: "Every person arrested for the alleged commission of an offence shall have the right to be released from detention with or without bail, unless the interests of justice require otherwise".

[6]In terms § 35(1)(f) "[e]veryone who is arrested for allegedly committing an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions". The qualifying reservation "unless" of the Interim Constitution was therefore substituted with the word "if" in § 35(1)(f). Under the Interim Constitution an applicant for bail had the right to be released on bail, unless the interests of justice required otherwise. Release from detention under § 35(1)(f) depends on whether the interests of justice permit. The Constitutional Court *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* 1999 7 BCLR 771 (CC) accordingly indicated that § 35(1)(f) did not bestow an unqualified right to personal freedom. It rather created a circumscribed one.

[7]By way of the Criminal Procedure Second Amendment Act 75 of 1995 and the Criminal Procedure Second Amendment Act 85 of 1997.

[8]Available at http://upetd.up.ac.za/thesis/available/etd-03202006-154631/ (last visited 16 September 2013).