BAIL REFUSAL ON THE BASIS OF PUBLIC INTEREST AND ADMINISTRATION OF JUSTICE IN NAMIBIA: A CRITICAL APPRAISAL OF SECTION 61 OF THE CRIMINAL PROCEDURE AMENDMENT ACT 5 OF 1991

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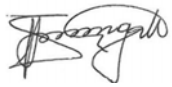
BORNFACE SISEHO KONGA 

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ABSTRACT

Namibia has acceded to various international and regional instruments that guarantee rights to personal liberty and the presumption of innocence which values have been incorporated in the Constitution. However, there is a discontent as to how this right to liberty and presumption of innocence are curtailed in the denial of bail based on public interest and administration of justice which terms are not defined in any act of parliament or the Namibian Constitution. The denial of personal liberty is one of the biggest sanctions that government can impose on an individual. However, the right to liberty should not be interpreted in isolation but in the context of general interest of the public. This research concludes by finding that the denial of bail based on the public interest and administration of justice is well founded but the only shortcoming is the lack of certainty as to what constitutes public interest or administration of justice. The research recommends that in order to provide legal certainty, the Namibian Constitution should incorporate the right to bail just like in other jurisdictions and list grounds upon which a person can be denied bail, as this will inform the accused as to which grounds he or she can rely upon in challenging such a judicial decision.

DEDICATION

I dedicate this research to my mother Christina Balwizi Muuba, my late father Bernard Konga Mauta, my wife and kids as well as my entire extended family for their support.

ACKNOWLEGMENTS

Words of gratitude go to Dr Ferdie Mundia for his comments and guidance during the early stages of the research proposal.

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LIST OF ABBREVIATIONS

AU	-	African Union
CPA	-	Criminal Procedure Act
CPAA	-	Criminal Procedure Amendment Act
CPSAA	-	Criminal Procedure Second Amendment Act
ECHR	-	European Court of Human Rights
ICCPR	-	International Covenant on Civil and Political Rights
UDHR	-	Universal Declaration of Human Rights

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CHAPTER 1

INTRODUCTION

1 Background of the study

It is a common principle of law that denying bail to a person accused of crime should be reasonably necessary in achieving a legitimate objective.[1] In Namibia, the Constitution[2] guarantees the right to liberty[3], which can only be curtailed if requirements under article 22[4] are met. Further to the right to liberty, the Constitution guarantees the right to be presumed innocent until proven guilty.[5]

It must be emphasised here that these fundamental rights and freedoms under chapter 3 of the Constitution are entrenched[6] as a measure of safeguard. Despite these guarantees, it is a pity that the Constitution does not have any provision pertaining to bail. In denying bail therefore, our courts rely on the provisions of the Criminal Procedure Act (herein referred to as CPA)[7]

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1 See *R. v. Safarzadeh-Markhali* SCC 14, [2016] 1 S.C.R. 180 at para 50. This legitimate objective is based on acceptable norms as to how one ought to behave in preserving a legal order. See in this regard Kelsen, H (1982) "The Concept of the Legal Order" *The American Journal of Jurisprudence"* vol. 27 (1) 64-68.

2 Act 1 of 1990.

3 Article 7 states "No persons shall be deprived of personal liberty except according to procedures established by law."

4 Article 22 provides: Whenever or wherever in terms of this Constitutions the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:
(a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

5 Article 12(d) states "All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them."

6 Article 131 entrenches these fundamental rights and freedom in that it provides that: "No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect."

7 Act 51 of 1977.

as amended by the Criminal Procedure Amendment Act (herein referred to as CPAA). [8] This indicates that in terms of Namibian law, bail is not a legal right at all.

The presumption of innocence restricts powers of the state in that they have to follow due process of law.[9] The non-application of this principle in pre-trial detention means that courts are using pre-trial detention as punishment before conviction.[10] If pre-trial detention is permitted in light of the presumption of innocence, it might lead to an assumption that any person arrested for a crime must have violated the law. It is therefore argued that if the practice of bail law is not improved, the basic rights of liberty and presumption of innocence will be eroded.[11]

In the absence of provisions pertaining to bail in the Constitution, an accused (who is presumed innocent) will always think that he/she has the right to be released on bail if the ends of justice will not be defeated. This is evident from the case of *Ganeb v State*.[12] According to Omar, releasing an accused on bail requires a balancing procedure of the interest of the individual on one hand and that of the public on the other.[13]

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8 Act 5 of 1991.

9 Mackor, AR and Geeraets, V (2013) "The Presumption of Innocence" *Netherlands Journal of Legal Philosophy*, vol. 42(3), 168.

10 Ibid, 169.

11 Aduba, JN and Alemika, EI (2009) "Bail and Criminal Justice Administration in Nigeria" in *The theory and practice of criminal justice in Africa*. African Human Security Initiative, Monograph 161, 85-109 at 88.

12 (CC 3/2016) [2016] NAHCMD 309 (06 October 2016) at para 8 where the accused applied to be released on bail as he believed that he was innocent on the charges levelled against him. See also *De Klerk v S* (Ruling in Bail Application) (CC 06/2016) [2017] NAHCMD 67 (09 March 2017) at para 16.

13 See Omar, J (2016) "Penalised for poverty: The Unfair Assessment of 'flight risk' in bail hearings" *SA Crime Quarterly*, Vol. 57, at page 29 who states that the balancing of categories of interests may or may not conflict with each other. This requires the court to balance the rights of the accused of being presumed innocent and not to be deprived of his or her liberty without just cause, with the rights of society in general to safety and security. These rights (of the accused and society) must be balanced to the interests of the criminal justice system (that of ensuring effective investigation and prosecution of crimes. See further Van der Merwe, SE (2016) "A basic introduction to criminal procedure" in Joubert J.J (ed) *Criminal Procedure Handbook*. Pretoria, Juta & Co, Ltd, at page 9.

Crime in any given society is destructive and therefore it is up to government to uphold the rule of law.[14] Sarkin *et al*[15] states that the refusal of bail to any person not yet convicted of crime shows that public perception plays a role. The resultant refusal of bail in this regard, can be regarded as being inconsistent with the right to personal liberty.[16] One would submit to Davidson's argument that denial of bail based on maintaining confidence in the judicial system is not logically consistent as it allows public opinions to be considered in denial of bail while failing to take into account the rights of an individual before court.[17] This public repute (public justification theory) discourse,[18] requires judges to enquire whether their decisions undermine public confidence in the system by analysing how such decisions may appear to the public.[19]

From the court's decision in *S v du Plessis and Another*[20] it can be inferred that the CPAA[21] must be seen as an expression of the concern of the legislature at the very serious escalation of crime and the similar escalation of accused persons absconding before or during trial when charged with a serious crime. Thus, it can be argued here that the CPAA was enacted to combat this phenomenon by giving the court wider powers and additional grounds for

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14 The impact of crime are severe in that they undermine development and human security as demonstrated by Achu *et al* (2013) "Conflict and Crime in the Society: A Bane to Socio-Economic Development in Nigeria" *Studies in Sociology of Science*, vol. 4(1), 21-24 at page 21. See also Canter, D and Youngs, D (2016) "Crime and Society" *Contemporary Social Science*, vol. 4 (11), 283-288.

15 Sarkin *et al* (2000) "The Constitutional Court's Bail Decision: Individual Liberty in Crisis? *S v Dlamini*" *South African Journal on Human Rights*, vol. 16, 293.

16 Mokoena, MT (2012) *A Guide to Bail Applications*. Cape Town, Juta & Co. at page 37.

17 Davidson, C (2012) "May it Please the Crowd? The Role of Public Confidence, Public Order and Public Opinion in Bail for International Criminal Defendants" *Columbia Human Rights Law Review*, vol. 43(2), 353.

18 This theory according to Davidson (2012: 353) is based on the justification on denying bail to an accused person in order to maintain public confidence in the criminal justice system and public order.

19 Davidson (2012:357).

20 1992 NR 74 (HC) page 82 F-G.

21 Particularly in light of section 61.

refusing bail in the cases of serious crimes and offences listed in the new Part IV of Schedule 2 of the CPA.[22]

Namandje, AJ in *Dausab v State*[23] succinctly summarised the essence of the new CPAA on bail by stating that:

> It must however be remembered that the ever-increasing number of violent crimes in our country and the growing number of offenders committing further offences while on bail, or suspects evading justice, may be partly a product of failure on the part of the law enforcement agencies to carry out their duties effectively and, at times due to courts giving less consideration to the needs of the administration of justice and the public interest when dealing with all aspects of serious offences. It is therefore imperative that there should be, at all times during a bail application, a meaningful and active inquiry as to whether the release of the accused would be against the interests of the public and the administration of justice or not.

Despite the CPAA, the Namibian Constitution is the supreme law of the land[24] and thus the liberty of the individual can only be taken away in accordance with established procedures that meet the limitation enquiry in terms of article 22.[25] This limitation enquiry is based on considering whether the scope of a particular right should be limited and if so to what extent based on fundamental principles of democratic societies based on human dignity, equality and

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22 The offences under this schedule are amongst others: Treason, Sedition, Murder, Kidnapping, Child stealing, Rape, Robbery, Arson, Public violence, Bribery, Housebreaking, whether under the common law or a statutory provision, with intent to commit an offence, Breaking or entering any premises, whether under the common law or a statutory provision, with intent to commit an offence, Theft, whether under the common law or a statutory provision, receiving stolen property knowing it to have been stolen, fraud, forgery or uttering a forged document knowing it to have been forged, in each case if the amount or value involved in the offence exceeds N$600, Any offence under any law relating to the illicit dealing in or possession of precious metals or precious stones in each case if the value involved in the offence exceeds N$600, Any offence under any law relating to the illicit possession, conveyance or supply of dependence- producing drugs, Any offence relating to the coinage, Any offence under the Controlled Wildlife Products and Trade Act 9 of 2008.

23 Case No.: 38/2009, Unreported Judgment of the High Court, delivered on 16 September 2010 at para 4.

24 Article 1(3) of the Constitution.

25 This article states that whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall: (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual; (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

freedom.[26] Furthermore, since the presumption of innocence is guaranteed, the detention of a person who is not yet found guilty might be seen to be in conflict with the Constitution.[27]

Ultimately, it is up to the courts in a given situation to decide whether the principle of utility has been satisfied in denying or granting bail to an accused person.[28] This requires the courts to decide which of the rights in the Constitution should or should not receive much protection.[29] The approach by our courts should be that of granting bail to an accused unless there are 'relevant and sufficient reasons' that warrants the detention of an accused.[30]

1.2 Problem Statement

Any Namibian legal framework should be aligned to human rights norms and standards set out in the Constitution. This is centred on the supremacy of the Namibian Constitution.[31] The issue of granting or refusing bail in Namibia has been drastically changed since the coming into being of the CPAA.[32] The previous section 61 of the Criminal Procedure Act[33] was amended by the CPAA in that bail in respect of certain offences referred to in Part IV of Schedule 2 can be refused even if it is in the interest of the public or the administration of justice.

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26 See Iles, K (2007) "A Fresh Look at Limitations: Unpacking Section 36" *South African Journal of Human Rights*, vol. 23, 68-92 at 71.

27 Van der Merwe (2016: 19). See Article 12(1) (d) of the Constitution as well.

28 White, RF (n.d.) "The Principle of Utility" available at https://faculty.msj.edu/whiter/utility.htm (accessed 16 April 2018), the principle of utility states that actions or behaviours are right in so far as they promote happiness or pleasure, wrong as tend to produce unhappiness or pain. The principle of utility therefore requires the sacrifice of some rights for the good of all in order to achieve happiness or general well-being (such as punishing of conducts that are disapproved by society). See Jones, H (1978) "Mill's Argument for the Principle of Utility" *International Phenomenological Society* 338-354 and Brown, DG (1973) "What is Mill's Principle of Utility?" *Canadian Journal of Philosophy* 1-12.

29 Woolman, S (1997) "Out of Order? Out of Balance? The Limitation Clause of the Final Constitution" *South African Journal on Human* Rights, vol. 13, 105.

30 Northern Ireland Law Commission (2010) *Consultation Paper: Bail in Criminal Proceedings.* Available at http://www.nilawcommission.gov.uk/nilc7__2010__consultation_paper_bail_in_criminal_proceedings.pdf (accessed 18 August 2018).

31 Article 1(6) of the Namibian Constitution.

32 Act No. 5 of 1991.

33 Act No. 51 of 1977.

The CPAA provides that:

> If an accused who is in custody in respect of any offence referred to in Part IV of Schedule 2 applies under section 60 to be released on bail in respect of such offence, the court may, notwithstanding that it is satisfied that it is unlikely that the accused, if released on bail, will abscond or interfere with any witness for the prosecution or with the police investigation, refuse the application for bail if in the opinion of the court, after such inquiry as it deems necessary, it is in the interest of the public or the administration of justice that the accused be retained in custody pending his or her trial.[34]

The said section should be read in conjunction with what the Namibian Constitution provides under article 12(1)(d) which guarantees the presumption of innocence[35] as an entrenched right. This study analyses the refusal of bail in terms of section 61 of the CPAA in light of the right to liberty and presumption of innocence as contained in the Constitution. The study will assess how our courts have implemented the new grounds of refusal of bail and the challenges in assessing the eligibility of granting or denying an accused bail.

There is no doubt that judicial officers face challenges in exercising the discretion to refuse bail based on public interest or administration of justice. The discretion whether to grant or deny bail may result in violation of a person's right and or creating some inefficiencies in the criminal justice system. The amending provision on bail shows that bail can be denied even if there is no strong case against an accused.[36] It is therefore imperative to investigate the relationship that exist, if any, between the right to liberty, the presumption of innocence and the legislative amendment in question. Thus, despite the discretion granted to presiding officers, one has to look at the right to liberty of the individual as contained in the

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34 Section 61.

35 See also Bekker *et al* (2003) *Criminal Procedure Handbook*, 6th ed. Pretoria. Juta & Co. Ltd, 129.

36 In terms of section 61 of the CPAA, one can be denied bail even if for example there is evidence that he or she will not interfere with investigations as long as it is shown that it will not be in public interest or the administration of justice to release him or her on bail thereby infringing the person's right to liberty and the right to be presumed innocent.

Constitution as to whether it is indeed just or not to deny an accused person bail in light of the presumption of innocence of an accused person who will not interfere with the ends of justice.

In *Awaseb v State*[37] the court stated that completed investigation, fixed address and deteriorated health condition do not address the issue of public interest or interest of the administration of justice and bail can still be denied on the fact that it is not in the public interest to release applicant on bail. The question of public interest or administration of justice therefore presents difficulties in Namibia, as there is no settled definition as to what constitutes these concepts.

1.3 Objective of the study

Challenges on granting or denying bail will be identified in order to propose recommendations as to how the practice and use of bail law in Namibia (i.e. granting or denying of bail based on public interest or administration of justice) can be strengthened. Furthermore, it is expected that the criminal justice system will implement the legislative framework governing bail and will do so consistently in accordance with human rights approach.

1.4 Research Question

The research shall proceed from the following question:

Is the refusal of bail based on public interest or administration of justice consistent with the Namibian Constitution?

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[37] (Bail Application Ruling) (CC 8/2017) [2018] NAHCMD 128 (16 May 2018) at para 14-16. The court considered the seriousness of the offence in denying bail to the applicant.

1.5 Hypothesis of the study

The hypothesis to be tested is whether the limitations (introduced by the CPAA) to refuse bail even if the ends of justice will not be defeated are in contravention to the right to liberty[38] and the presumption of innocence.[39]

1.6 Theoretical Framework

The Namibian Constitution does not at all have provision pertaining to bail. An accused therefore in terms of our law, although presumed innocent, does not have a right to be released on bail like in other jurisdictions such as South Africa and Canada.[40] Since there is no constitutional provision in relation to bail, an accused has only the right to apply for bail in terms of the CPA. The issue of whether to grant or refuse bail is therefore regulated by the CPA.

Section 60(1) of the CPA reads:

> Any accused who is in custody in respect of any offence may at his or her 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 the High Court, to that court, to be released on bail in respect of such offence…

The theoretical framework of this dissertation is based on the legality principle of the rule of law. The rule of law according to Meyerson[41] means that the law is supreme over the individual will. Dicey argues that in terms of the rule of law, every man is subject to the same

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38 Article 7 of the Namibian Constitution.
39 Article 12(d) of the Namibian Constitution.
40 The right to bail in terms of these countries will be discussed in chapter 4.
41 Meyerson, D (2004) "The Rule of Law and the Separation of Powers" *Macquarie Law Journal*, vol. 4, 1-6 at 1.

kind of laws and should not be punished arbitrarily except if there is a breach of law.[42] This therefore implies that the legality principle of the rule of law prohibits pre-trial punishment.[43]

One submits to the views expressed by Dicey that the right to liberty (guaranteed in terms of the Constitution) is a right granted by power (the Constitution) above the ordinary law of the land (such as the CPA) and therefore it is not a privilege but a right granted in terms of supreme law of the land.[44] As Yadav argued, a country governed by the rule of law (such as Namibia), subscribes to the Constitution as the basic and core law from which all other laws derive their authority.[45] The theoretical basis for granting bail in Namibia can be seen to emanate from article 7 of the Constitution, which guarantees the right to liberty subject to reasonable limitations in terms of article 22 of the Constitution.

Since this research stems from a human rights perspective, specifically the right to personal liberty and the right to be presumed innocent, the broadening of grounds for refusal of bail (based on public interest or administration of justice) by the courts have now limited these rights. It is for this reason that this research has been undertaken to see whether this widened scope of refusal giving discretion to presiding officers infringes upon a person's right to liberty and the presumption of innocence guaranteed in the Constitution.

1.7 Significance of the study

The significance of this research is that challenges identified can be used to propose recommendations in relation to the practice of bail law in Namibia and these flaws, in bail law implementation, can assist policy makers to propose or amend current laws on bail.

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42 Dicey, AV (1982) *Introduction to the Study of the Law of the Constitution*. Indianapolis: Liberty Fund, page 147-149.

43 Van der Berg, J (2012) *Bail: A Practitioner's Guide*. 3rd ed. Cape Town, Juta & Co, Ltd, p. 26.

44 Dicey (1982:155).

45 Yadav, AK (2017) "Rule of Law" *International Journal of Law and Legal Jurisprudence Studies*, vol. 4(3), 205-220 at 205.

1.8 Limitation(s) of study

This study will be based on theoretical research and not empirical evidence and therefore may lead to various conclusions. This study will not focus on denial of bail after conviction or pending appeal.

1.9 Delimitation of study

This research undertakes an analysis of bail refusal based on public interest or the administration of justice in Namibia as compared to that of Canada and South Africa. Canada has been selected because of its rich jurisprudence as well as advanced criminal and evidence laws developed through its historic ties with the United Kingdom. In respect of South Africa, Namibia shares common history and many of our jurisprudence (such as case laws and legislations) have been developed from the South African perspective.

1.10 Literature Review

The writ to *habeas corpus*[46] was hailed as one of the greatest safeguard of personal liberty whose purpose was to ensure the release of a person upon the production of the writ.[47] This safeguard is now incorporated in many democratic constitutions including that of Namibia in that persons should not be arbitrarily deprived of their right to liberty taking into consideration the presumption of innocence. The Namibian Constitution ensures that any

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46 This is a component of the right to fair trial developed as a result of arbitrary detention and gives a right to detained persons to be released by authorities and if there is refusal to be released the authorities are required to justify such imprisonment. See in this regard Udombana, NJ (2006) "The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa" *African Human Rights Law Journal*, vol. 6, 299-331 at 303.

47 Oaks, DH (1965) "Habeas Corpus in the States -1776-1865" *The University of Chicago Law Review*, vol. 32(2), 243 228 at 243.

infringement of any fundamental human right should be justified and denial of such rights could attract liability under article 25(2).[48]

Apart from the Namibian Constitution, many international legal instruments prohibit arbitrary denial of personal liberty.[49] Luepke argues that permissible denial of liberty before trial creates risk of abuse of this right and therefore there is a necessity to curtail this risk.[50] The measure of denying accused persons their right to liberty by states can be seen to a certain extent to be a threat to the rights enshrined in the Constitution, such as that of liberty and the presumption of innocence.[51]

The question of pre-trial detention based on public interest, administration of justice in Namibia has received no attention in literature, and hence no serious analysis has been done. Thus, there has been no study of bail decisions in Namibia that has been undertaken to test directly the validity of pre-trial detention based on public interest or administration of justice. It is no doubt that Namibian courts deny bail to accused persons based on public interest or administration of justice, hence a need to analyse the impact of these denials with the constitutional provisions.

The denial of bail is common in many legal systems, and Namibia is no exception. However, this measure of detaining accused persons should be judged in line with the prescripts of the Constitution. Undoubtedly, denial of bail is an extreme measure of control that limits an

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48 Article 25(2) provides: Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

49 A discussion of these legal instruments is in chapter 2.

50 Luepke, H (1992) "Pre-trial Detention in the U.S" in Frankowski, S & Shelton, D (eds) *Preventive Detention: A Comparative and International Law Perspective*, Martinus Nijhoff Publishers, 53-111 at 53.

51 Ashworth, A (2006) "Four Threats to the Presumption of Innocence" *South African Law Journal*, 63-97 at page 64. See also Tadros, V (2014) "The Ideal of the Presumption of Innocence" *Criminal Law and Philosophy,* vol. 8, 449-467 at 457 and also Weigend, T (2014) "Assuming that the Defendant Is Not Guilty: The Presumption of Innocence in the German System of Criminal Justice" *Criminal Law and Philosophy,* vol. 8, 285-299.

individual's right to liberty based not on proven transgression but rather as a precautionary measure.[52]

One therefore can argue that the CPAA, on denying bail on public interest and administration of justice is actually a perpetuation of punitive bail policy, which introduces a system of presumption against bail. The presumption against bail therefore implies that an accused person should satisfy court that bail should not be refused. Such an amendment erodes the right to liberty or the presumption of innocence.[53] The interest of the community should therefore not be entitled to greater weight than that of the accused and vice versa.

The refusal of bail based on public interest and administration of justice, reflects the intention of the government in making the community a first consideration while the rights of the accused (the right to liberty and presumption of innocence) are given less consideration.[54] The blanket refusal of bail to people who pose no risk at all in terms of the CPAA surely results in erosion of the presumption of innocence and the general right to liberty as contained in the Constitution.[55] It is required therefore that any pre-trial detention should have due regard to the principle of presumption of innocence and the right to liberty as fundamental values underpinning the Namibian Constitution.[56]

Thus, one would subscribe to the idea that the constant use of pre-trial detention based on public interest and the administration of justice, reflects a vital lack of rationality on how the

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52 Cook, H (1992) "Preventive detention – International Standards and the Protection of the Individual" in Frankowski, S & Shelton, D (eds) *Preventive Detention: A Comparative and International Law Perspective*, Martinus Nijhoff Publishers, 1-52 at 1.

53 See Townsley, L (2015) "Returning to Presumptions and the Erosion of Fundamental Rights: The *Bail Amendment Act 2014* (NSW)" *Alternative Law Journal*, vol. 40(1), 42-45 at 42. Denial of bail on public interest or administration of justice might even force accused persons to plead guilty in order to avoid pre-trial incarceration. See Sherrin, C (2012) "Excessive Pre-Trial Incarceration" *Saskatchewan Law Review*, vol. 75, 55-96.

54 Ibid, 44. See also Jones, S (2003) "Guilty until Proven Innocent – The Diminished Status of Suspects at the Point of Remand and as Unconvicted Prisoners" *Common Law World Review*, vol. 32, 399-417 at 404 and Makar, Z (2018) "Displacing Due Process" *DePaul Law Review*, vol. 67, 425-472 at 442.

55 Townsley (2015:44) argue that no matter the degree of risk an accused pose, there should be proper grounds for refusal of bail.

56 Jones (2003:400).

presumption of innocence and the right to liberty should be balanced against the need to protect the public.[57] This is evident from the discretion given to the courts in terms of the CPAA with no guidelines as to what constitutes public interest or administration of justice. Our model of refusal of bail in terms of the CPAA can be said to be modelled against 'preventative justice' in that accused persons are denied bail because they will commit further offences or simply because they have been charged with a crime.[58]

Generally, the purpose of granting bail to an accused is to ensure that he or she appears for trial.[59] The denial of bail to an accused person has various consequences such as the denial of personal liberty before judgment by a court of law and may have implications for an accused person not to conduct his defence properly.[60] This may be caused by lack of adequate time and facilities for one to consult properly with his or her chosen legal representative. The effects of remaining in detention are severe and may result in the loss of job, respect in the community, and ill feelings toward the family of the accused, even if the accused is subsequently acquitted.[61] In addition, the accused's defence is put in jeopardy as accused will not be free to locate important witnesses and the opportunity to frequently contact an attorney and if detention has resulted in loss of job, accused will not be able to engage the services of a lawyer of his or her own choice.[62]

In deciding whether to deny bail, Lindermayer states that various considerations have to be taken into account such as the fact that the release of an accused might instil fear in the

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57 Open Society Justice Initiative (2014) *Presumption of Guilt: The Global Overuse of Pretrial Detention.* New York, Open Society Foundation, 95.

58 Ibid, 96.

59 Lindermayer, A (2009) "What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail" *Fordham Law Review*, vol. 78, 267-310 at 273.

60 Ibid, 271.

61 Wald, P (1964) "Pretrial Detention and Ultimate Freedom: A Statistical study" *New York University Law Review*, vol. 39, 631-640 at 632. See further Rankin, A (1964) "The Effect of Pretrial Detention" *New York University Law Review*, vol. 39, 641-655.

62 Sachs, AR (1967) "Indigent Court Costs Bail: Charge them to Equal Protection" *Maryland Law Review*, vol. 27, 154-168 at 166 and also Von Pollern, BD and Robert, CN (1992) "Pre-trial Detention in Switzerland" in Frankowski, S & Shelton, D (eds) *Preventive Detention: A Comparative and International Law Perspective*, Martinus Nijhoff Publishers, 145-166 at 162.

community or even the integrity of the judiciary such as interfering with investigations.[63] The ultimate consideration is whether it is in the interest of society to detain a person who is suspected of having committed an offence.[64] This in itself must be balanced with the presumption of innocence, which is a key factor to be taken into account in granting bail so that an accused may be able to engage the services of his or her chosen counsel and initiate his or her investigation in the case.[65]

The balancing of conflicting interest of the accused such as the right to liberty and presumption of innocence and the interest of the public is a difficult one.[66] This difficulty arises, as Okpaluba argues, because of the fact that these rights (liberty and presumption of innocence) are constitutionally guaranteed.[67] Our courts are however alive to this aspect as demonstrated in the case of *Lukas v State*[68] where the court stressed that in considering the granting or denial of bail to an accused person, a balance should be struck by considering the presumption of innocence and the right to liberty of the accused and the interests of society on the other hand.[69]

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63 Lindermayer (2009:273).

64 *S v Bullender* 1973 (1) SA 264 (C) at 269.

65 Wald (1964:633).

66 This is demonstrated by Laudan, R and Allen, RJ (2010) "Deadly Dilemmas II: Bail and Crime" *Chicago-Kent Law Review*, vol. 85(1), 23-42. See further Meyerson, D (2007) "Why Courts Should not Balance Rights Against the Public Interest" *Melbourne University Law Review*, vol. 31, 873-902 at 882, who argues that this balancing approach has consequence of putting rights and interests at the same level instead of treating the bill of rights as a practical authority. This same view is shared by Mitchell, T (2011) "The Presumption of Innocence: Evidential and Human rights Perspectives" *Current Issues in Criminal Justice*, vol. 22(3), 505-509 at 506, who argue that differing rights cannot be measured by using a common currency and cannot be weighed against each other.

67 Okpaluba, C (2014) "Protecting the right to personal liberty in Namibia: Constitutional, delictual and comparative perspectives" *African Human Rights Law Journal*, vol. 14, 580-608 at 584.

68 (CC 15/2013) [2013] NAHCMD 334 (13 November 2013) at para 10. The interests that are involved in this process include that of accused who has the right to liberty and wants to ensure that he or she prepares for the trial adequately; the courts and other law enforcement agencies whose interest is to maintain confidence in the administration of justice and also society who must be protected from criminal activities by the state. See in this regard Demetrick, DE (1968) "Bail in Canadian Criminal Law" *Saskatchewan Law Review*, vol. 33, 195-208 at 197.

69 See also *Silvanus Amunyela v State*, Case No. CA 24/2012 delivered on 28 June 2012 by Siboleka, J at para 17 where the court granted bail to the applicant with stringent bail conditions as a way to balance the interests of the accused who is still innocent and the administration of justice.

The legality (such as denial of bail based on public interest and the administration of justice) of any action taken must be consistent with the Constitution. To this end, Okpaluba argues that:

> The legality of the actions of the executive in the administration of criminal justice under a bill of rights regime must constantly be tested against the supreme law under which the source of both the executive and legislative authorities emanates…it is the supreme instrument…enshrines the right not to be deprived of personal liberty other than in accordance with the procedures established by law.[70]

The balancing act according to Meyerson must be aimed at achieving a particular government objective and any measure taken that seems to be ineffective or goes against a particular right, should not be seen as a preference of public interest but only a way of eliminating conflicts by showing that it is practical to achieve the purpose of government on one hand while at the same time respecting the rights of an individual.[71]

De Villiers states that before the advent of an independent South Africa, the Attorney General had the power to prohibit the release of an accused for certain offences thereby removing the discretion from the courts.[72] In *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[73] the court recognised the fact that crime is destructive to society and all efforts to curb it must be taken including the assessment of granting of bail.

Further to this, is the fact that there is a need to ensure that the judicial process is completed unhampered by denying bail to accused persons if their release would undermine the proper

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70 Okpaluba (2014:584).

71 Meyerson (2007:878). See also Ulväng, M (2013) "Presumption of Innocence Versus a Principle of Fairness" *Netherlands Journal of Legal Philosophy*, vol.42 (3), 205-224.

72 De Villiers, W (2015) "Problematic aspects with regard to bail under South African law: the reverse onus provision and the admission of evidence of the applicant for bail at the later criminal trial revisited" Available at http://repository.up.ac.za/handle/2263/41286?show=full (accessed 12 March 2017).

73 1999(4) SA 623 (CC) at para 67.

administration of justice.[74] Thus, as is a position in India, the basic rule is that an accused should therefore be released on bail unless there are grounds or circumstances that suggests that the accused will flee and not appear before court for his or her trial.[75]

The wave of crime in South Africa, coupled with perceptions from the public that bail was being granted too easily led to the incorporation of the right to bail in the Constitution.[76] Thus, the introduction of tighter bail laws was in response to serious offences being committed in order to avoid the perception that bail was being granted too easily by the courts.[77] The inclusion of these rights in the Constitution ensures that there is observance of human rights standards including the denial of bail based on public interest of the administration of justice.[78] This ultimately is the position that Namibia has taken as well.[79]

The common trend in granting bail is for the appearance of an accused before court. However, the current trend (of retaining accused persons in custody) seems not to be based on ensuring the attendance of an accused before court but rather on a belief that if accused is released, it is likely that he will commit further offences or intimidate witnesses.[80] This trend shows that the denial of bail or the granting thereof is premised on the fact of keeping an

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74 Raifeartaigh, UN (1997) "Reconciling Bail Law with the Presumption of Innocence" *Oxford Journal of Legal Studies,* vol. 17, 1-21 at 4.

75 Rustogi, A (2009) "The Right to Bail Under Indian Criminal Procedural Law" available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1437977 (accessed 15 August 2018).

76 De Villiers (2015).

77 Steyn, E (2000) "Pre-trial detention: Its impact on crime and human rights in South Africa" *Law Democracy & Development*, vol. 4, 209-220 at page 209.

78 Amoo, SK (2008) "The Bail Jurisprudence of Ghana, Namibia, South Africa and Zambia" *Forum on Public Policy*, 1-29 at 13.

79 The state has a legal duty to take steps of protecting citizens from crime. See Ashworth (2006: 64). See also Borgers, M and Van Sliedregt, E (2009) "The meaning of the precautionary principles for the assessment of criminal measures in the fight against terrorism" *Erasmus Law Review*, vol. 2 (2), 171-195, at 172.

80 Schnacke, TR., Jones, RM and Brooker, CMB (2010) *The History of bail and pretrial release.* Pretrial Justice Institute. Available at http://w1.cejamericas.org/index.php/biblioteca/biblioteca-virtual/doc_view/5865-the-history-of-bail-and-pretrial-release-2010.html (accessed 13 March 2017) See further Baradaran, S (2011) "Restoring the Presumption of Innocence" *Ohio State Law Journal*, vol. 72(4), 1-59.

accused in detention in order to protect society or certain individuals[81] at the expense of the rights of the accused (i.e. the right to liberty and the presumption of innocence) which are fundamental in any democratic society. This is done to a certain extent purely on preventative grounds.[82]

It is argued that deprivation of liberty should have legitimate purpose i.e. state interests of protecting the public and safeguarding the integrity of the trial process and criminal justice system.[83] The presumption of innocence is a cornerstone in any democratic country. This presumption applies throughout the whole criminal processes from pre-trial to trial itself and cannot be compromised. Shrestha stresses the fact that the presumption of innocence is a fundamental principle of the common law and now found in many Constitutions and is seen as a golden thread.[84]

Shrestha argued that:

> …modern bail is linked to the 'notions of release and liberty based on the fundamental concept of the presumption of innocence'…pre-trial procedures should be conducted as far as possible as if the accused were innocent. This presumption acts as a restraint on the measures that may be taken against suspects in a period before trial. As a legally innocent member of society, an accused has the right to be secure from detention and punishment prior to

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81 Schnacke, Jones and Brooker (2010) http://w1.cejamericas.org/index.php/biblioteca/biblioteca-virtual/doc_view/5865-the-history-of-bail-and-pretrial-release-2010.html (accessed 13 March 2017).

82 King, S, Bamford, D and Sarre, R (2009) "Discretionary Decision-Making in a Dynamic Context: The Influences on Remand Decision-Makers in Two Australian Jurisdictions" *Current Issues in Criminal Justice*, vol. 21(1), 24-40 at 28. See also Omodi, S (2015) "Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya" *Journal of Research in Humanities and Social Science*, vol. 3(2), 23-44.

83 Ballard, C (2011) "Research report on remand detention in South Africa: An overview of the current law and proposal for reform" https://acjr.org.za/resource-centre/Remand%20detention%20in%20South%20Africa.pdf (Accessed 5 July 2018).

84 Shrestha, P (2015) "Two Steps back: The Presumption of Innocence and Changes to the *Bail Act 2013* (NSW)" *Sydney Law Review*, 147-154 at 148. See further Fox, WF (1979) "The Presumption of Innocence as Constitutional Doctrine" *Catholic University Law Review*, vol. 28(2), 253-269; see also Sliedregt, EV (2009) "A Contemporary Reflection on the Presumption of Innocence" *International Review of Penal Law*, vol. 80(1), 247-267 at 247 citing Blackstone, W (1765) *Commentaries on the Laws of England.* 1st ed, Clarendon Press, Oxford at page 358 where it was stated that "Better that ten guilty person's escape, than that one innocent person suffers."

> conviction… denial of bail is the clearest repudiation of the presumption of innocence…all bail laws should have the presumed innocence of the accused as a starting point and the deprivation of liberty should only occur in certain exceptional circumstances.[85]

Judge Liebenberg has argued that:

> In determining whether or not to grant bail, the court is required to balance competing interests. On one hand, the court must not unnecessarily keep an accused in detention, who might later be found not guilty for lack of evidence, while on the other hand, due consideration must be given to the risk of harm posed to the community if such person were to be released, or that he may reoffend or fail to appear before the court if not held in custody. The court thus has to balance the individual liberties of the accused against the interests of any victims, the effective administration of the criminal justice system, and the safety of the wider community. The difficult task is often harmonised by the granting of bail, but in addition, to attach conditions to ensure the accused's reappearance for trial. Stringent conditions such as regular reporting to the police or a complete prohibition on travelling could be attached, all of which are aimed at making it difficult for the accused to abscond after being admitted to bail. There are however no guarantees, and as history has shown, even where bail had been set very high and coupled with impeding conditions, the accused notwithstanding, absconded.[86]

Mahomed AJ in *S v Acheson* emphasised the said presumption and stated as follows:

> An accused cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilty has been established in court.

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85 Shrestha (2015:149).

86 *New Era Staff Reporter* "Misconceptions of Bail in Namibia" *New Era* (08 August 2016), available at https://weekend.newera.com.na/2016/08/08/misconceptions-of-bail-in-namibia/ (accessed 15 August 2018).

> The court will therefore ordinarily grant bail to an accused person unless this is likely to prejudice the ends of justice.[87]

Packer[88]emphasises the difference between the two models of criminal justice - due process of law model and crime control model. Clearly, the Namibian Constitution follows the due process of law model, which incorporates the presumption of innocence, and thus cannot be compromised but the considerations taken into account in denying bail shows that the crime control model also plays a role. The due process model is premised on the fact that the rights of an individual must be respected throughout the criminal justice process.[89]

The presumption of innocence should not be influenced by a consideration that such persons might be convicted with a crime in the future or when a case goes on trial.[90] One would subscribe to the idea that detention of any person should therefore only be imposed if it is necessary for the maintenance of security and denial of bail should not be a substitute for the right to be presumed innocent.[91] Denial of the right to liberty likewise should be done when it is absolutely necessary and states should respect this right.[92] The consideration here is that the right to liberty should not be restricted unnecessarily and detention should be based on precaution rather than punitive and should not be a norm to persons who are charged with a crime.[93]

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87 1991 NR 1 (HC) at 19 E. See also Stevens, L (2009) "Pre-Trial Detention: The Presumption of Innocence and Article 5 of the European Convention on Human Rights Cannot and Does Not Limit its Increasing Use" *Criminal Law and Criminal Justice,* vol. 17, 165-180 at 168.

88 Packer, HL (1964) "The Two Models of Criminal Processes" *University of Pennsylvania Law Review*, 1-68.

89 Ferguson, PR (2016) "The Presumption of Innocence and its role in the criminal process" *Criminal Law Forum*, vol. 27 131-158 at 133 who state that the right to be presumed innocent is a human right in itself which is fundamental in the criminal justice system as a safeguard for procedural fairness.

90 Lawyers' Rights Watch Canada (2013) "Pre-trial release and the right to be presumed innocent: A handbook on international law rights to pre-trial release." Available at www.lrwc.org/ws/wp.../Pre-trial-release-and-the-right-to-be- presumed-innocent.pdf (accessed 12 March 2017).

91 Ibid.

92 Ibid.

93 Ibid.

Although there is nothing wrong with giving attention to public interest in bail decisions, one subscribes to the argument by Ofili who states that a proper functioning bail system is the one that is not too strict nor is it the one that is too harsh or insensitive by allowing innocent people to suffer under detention.[94] Detention should therefore only be allowed based on genuine ground of public interest, which balances the right of the individual and that of the state on the other hand.[95]

In terms of Dutch Law, considerations such as the dangerousness and incapacitation of an accused in determining detention in order to protect society from dangerous individuals through their conduct are paramount considerations.[96] Despite the presumption of innocence (in terms of Dutch law), if an accused is likely to receive a lengthy prison sentence, pre-trial detention is normally ordered.[97]

The justification of pre-trial detention on public interest despite the presumption against innocence in the view of Davidson outweighs the right to liberty and should not be limited to flight risk or being a danger to society.[98] The European Court on Human Rights (ECHR) has held that the seriousness of the charges are insufficient reasons to justify detention.[99]

One agrees with Baradaran who argues that denial of bail to an accused based on preventative grounds is detrimental to the protection of human rights (such as that of liberty and the presumption of innocence).[100] A typical example is the refusal to admit an accused to bail

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94 Ofili, OU (2014) "Bail Decision Support System" *The International Journal of Engineering and Sciences (IJES)*, vol. 3(8), 45-66 at 47.

95 Davidson, CL (2010) "No Shortcuts on Human Rights: Bail and the International Criminal Trial" *American University Law* Review, vol. 60(1), 1-67 at 20.

96 Stevens, L (2013) "The Meaning of the Presumption of Innocence for Pre-trial Detention: An Empirical approach" *Netherlands Journal of Legal Philosophy*, vol. 42(3), 239-248 at 242-243.

97 Ibid, 243.

98 Davidson (2012:351-352).

99 Ibid, 352.

100 Baradaran, S (2010) "The Presumption of Innocence and Pre-trial Detention in Malawi" *Malawi Law Journal,* vol. 4(1), 124-147 at 142. See also Stewart, H (2014) "The Right to be Presumed Innocent" *Criminal Law and Philosophy*, vol. 8, 407-420 and Stuckenberg, CF (2014) "Who is Presumed Innocent of What by Whom?" *Criminal Law and Philosophy*, vol. 8, 301-316.

based on the fact that he or she will commit an offence if released. This in itself according to Baradaran violates the right of individual liberty as this is based on a prediction that once released an accused might commit an offence.[101] What the court should focus on is the current offence and not what the accused can do once released, which in itself is an uncertain prediction.

In *S v Kabotana*[102] the Supreme Court in dealing with the 48-hour rule within which an accused must be brought to court, stated that article 11(3) should be read with article 7, which is the right to liberty guaranteed by the Constitution. The court highlighted the fact that these provisions are crucial rights accorded to an arrested person and in light of our own history, injustices to these articles should be guarded at all costs.[103]

1.11 Research Methodology

The research is based on mixed methodology, namely historical and comparative analysis. A historical analysis of bail is necessary in order to see how bail law has developed. On the other hand, a comparative analysis will help in understanding the issue of public interest and administration of justice from different settings (these settings may help shape these concepts due to influence of political and social considerations). A comparative analysis on the issue of liberty and presumption of innocence will be looked at from a perspective of other countries, namely, Canada and South Africa.

The Namibian Constitution contain almost similar provisions of fundamental rights and freedoms as that of Canada and South Africa. This is because the development of the legal

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101 Ibid. See also Ferzan, KK (2014) "Preventive Justice and the Presumption of Innocence" *Criminal Law and Philosophy*, vol. 8, 505-525 at 514.

102 2014 (2) NR 305 (SC). See also *Katofa v Administrator-General for SWA & Others* 1985 (4) SA 211 (SWA) 220I-221D where the court stated that the right to liberty is one of fundamental features upon which any democratic society is built.

103 *S v Kabotana*, para 16.

regime in all these countries have been influenced by Commonwealth law and thus influence between Commonwealth states cannot be ruled out.[104] The Canadian Charter and the South African Constitution has explicit provisions contemplating the criteria for limiting rights just as Namibia and therefore they provide an excellent model and a suitable source of reference for human rights in Namibia.

Canada and South Africa, just like Namibia, has placed high value on the presumption of innocence of persons accused of crimes and the right to liberty. A comparative study of these countries is therefore necessary to survey both positive and negative features of detention laws on how the courts have interpreted these laws in relation to bail and the right to personal liberty and presumption of innocence.

1.12 Chapter Outline

Chapter 1: *Introduction*, will give a general overview of the background of the research problem as well as the research question that the study intends to answer.

Chapter 2: *The Historical Context of Bail and Legal Instruments*, highlights how this right together with the presumption of innocence developed to become the pillars of democratic countries. The chapter also looks at international and regional human rights instruments on bail.

Chapter 3: *Namibian Perspective on Bail* looks and analyses the refusal of bail based on the interest of justice or public administration in light of the constitutional provisions of the right to personal liberty and the presumption of innocence.

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[104] See Horwitz, S and Newman, D (2010) "A legal-historical consideration of links between Canadian and South African racial policies" *Commonwealth Law Bulletin*, vol. 36(4), 691-706 at 601.

Chapter 4: Comparative analysis of *Canadian and South African Law* looks at how the detention of a person based on public confidence in the administration of justice even where a defendant poses neither a risk of flight nor a danger to the community has been interpreted. The chapter will further look at the presumption of innocence contained in these countries' Constitution in refusal of bail and what guidelines have been developed for such refusal based on the interest of the public or the administration of justice.

Chapter 5: *Summary, Conclusion and Recommendations*, this will include a summary, findings and recommendations of the research undertaken.

1.13 Ethical considerations

This work is purely a desk top research in which all primary and secondary sources used will be referenced. As such, no individual or group interviews/questionnaires will be used as an instrument of research with the objective of holding discussions concerning any topics or issues that might be sensitive, embarrassing or upsetting. No criminal or other disclosures requiring legal action and having potential adverse effects, risk or hazards for research participants will be made in the respect of the study. There is therefore no need for arrangements to be made in respect of insurance and /or indemnity to meet the potential legal liability of the University of Namibia for harm to participants arising from the conduct of the research.

CHAPTER 2

THE HISTORICAL CONTEXT OF BAIL AND OVERVIEW OF LEGAL INSTRUMENTS

2.1 Introduction

Bail is defined by Castle as "the concept of depositing a sum of money or property with an authorised person as a surety for one's promise to make restitution or to appear at a later date."[105] Personal freedom has long been recognised under common law in that a person should only be punished to imprisonment if it is good for society (imprisonment that results out of absolute necessity).[106] However, even if this is the case, the right to personal liberty should not be overlooked in this assessment.

Bail has evolved over a period of time and in order to understand the fundamental nature of bail in today's context, it is important to examine its historical overview by looking at the origins and development of bail law under Namibian Law. This examination is necessary to ascertain whether the granting of bail under Namibian law is being done judiciously taking into account the fundamental principles contained in the Namibian Constitution.

This chapter will examine how the individual's right to liberty and the interest of society have been developed through the concept of bail. It has been argued that *habeas corpus*[107] is a crucial safeguard of the right to liberty and "the best and only sufficient defence of personal

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105 Castle, SC (1980) "Trends Restricting the Right to Bail: The Constitutionality of Pre-trial Detention in Non-capital offenses" *Criminal Justice Journal*, vol. 3, 433-450 at 434. See further Vedantam, TM (1914) "Bail in Criminal Law" *The Canadian Law Times*, vol. 34, 660-675 at 660 who state that bail is more of a contract between the State and the surety to appear on a specified date instead of going to gaol.

106 Duker, WF (1977) "The Right to Bail: A Historical Inquiry" *Albany Law Review*, vol. 42, 33-120 at 33.

107 See Duker, WF (1978) "The English Origins of the Writ of Habeas Corpus: A Peculiar Path to Fame" *New York University Law Review*, vol. 53(5), 983-1054 at 985 who defines the word *habeas corpus* to "indicate a command by some individual in authority requiring that the recipient of the command, presumably a person having the capacity to exert control over the subject of the precept, bring a certain party before the directing officer."

freedom" and also a sign and guarantor of individual liberty.[108] This examination of bail law will assist to understand how modern law has modified the question of bail by balancing the interest of the individual such as personal liberty and the interest of society at large.

Furthermore, the discussion of the history of bail will be confined to Roman law, English law and how it has been incorporated into Namibian law to date. This will be followed by an analysis of international human rights instruments that deals with the presumption of innocence, the right to liberty in relation to bail

2.2 Roman law

Under Roman law, true criminal law never existed and each household (grouped under *paterfamilias*) could avenge a crime committed against any member of the group.[109] Self-help was the order of the day and bail was unknown as the injured party was the only person who could prosecute and punish the offender.[110]

Different strategies to avoid self-help developed and it is for this reason that the history of bail can be traced back to the Roman Empire.[111] Stephen notes that Roman citizens had rights of freedom prior to trial although the process itself was tainted with arbitrariness.[112] Under Roman law, the concept of "*Vindex*" was developed which meant the same as bail in that an accused arrested for serious offence could languish in jail unless he could find surety

108 Wright, CA (1983) "Habeas Corpus: Its History and Its Future" *Michigan Law Review*, vol. 81(4), 802-810 at 803.

109 De Villiers, W (2001) "An investigation into the origins and development of the principles of bail under South African Law (part 1)" *De Jure*, vol. 34, 247-262 at 248.

110 Ibid, 249. This state of affairs did not change even when the law of Twelve Tables was in force as it was largely based on the right of an injured party to private vengeance and the state could only impose punishment in limited situations only.

111 Stephen, C (2007) "Lengthy Trial: A Brief History of Bail" http://citylimits.org/2007/10/01/lengthy-trial-a-brief-history-of-bail/ (Accessed 16 June 2017).

112 Ibid.

that ensured his release.[113] On the date of trial if the surety could not produce the offender, the penalty to be imposed on the offender was in store for such a person as well.[114]

In Ancient Rome, "a citizen in good standing" was generally free from being detained in order to prepare his defence.[115] Under the Roman Empire, Tribunes and magistrates had complete control over the people.[116] The Tribunes had the power to summon any citizen for trial or even discharge the debtor from arrest (based on the fact that justice should not be delayed).[117] It is believed that Rome is where the true origin of *habeas corpus* came from when considering the judicial decisions of the Roman court decisions called *Pandects* or the *Digest* which were compiled by order of Justinian.[118]

The *habeas corpus* is said to have been similar to the Praetorian Interdict (found under Roman Civil Law called *"de homine libero exhibendo"* in which the Praetor could order that a person be liberated if the restraint on his liberty was not done in good faith.[119] Therefore in terms of Roman law, the Praetor had the power to ensure the attendance of a person who has been unlawfully detained by means of the writ *"de homine libero exhibendo"*(produce the person).[120] This meant that every person detained "might be instantly produced before the praetor to enquire into his detention."[121] In respect of serious crimes, an offender had little chance of having liberty before trial.[122]

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113 Vedantam (1914: 662).
114 Ibid, 663.
115 Stephen (2007).
116 Glass, AS (1934) "Historical Aspects of Habeas Corpus" *St. John's Law Review*, vol. 9(1), Article 3, 55-70 at 55.
117 Ibid, 55-56.
118 Ibid, 56.
119 Ibid.
120 Ibid.
121 Ibid.
122 Vedantam (1914: 663).

However, certain restrictions were put on sureties in that it was dependent on the rank of the offender as it was declared that for one of the better class let a man of the better class be a *vindex*; for a citizen that is a mere workman, let any one that will.[123]

From the above, for the writ to have been given the emphasis on the status of the person who applied for the writ and nothing else but this stance softened as years passed as ordinary common people could invoke the writ.[124] This meant that a person could only be imprisoned only if he confessed to the crime; convicted of the crime or charged with a capital offence and in respect of minor offences a person could be released under own recognisance.[125]

Clearly, the writ of *habeas corpus* originated from Roman law and Glass thus argues that:

> The writ must have been used in England during the four centuries of Roman occupancy. After the Romans withdrew, a period of confusion and chaos followed but the writ was revived and became an integral part of English law when order was once more established.[126]

This could be perhaps one of the reasons why some people confuse the writ to indicate that it is of English origin. However, it must be acknowledged that English law developed this writ even further.

2.3 English law

The collapse of the Roman Empire during the medieval period led to further development of the bail process in England where it found room to be used and abused at the same time.[127] In early Anglo-Saxon England, an accused could not be brought before any judicial authority, as

123 Ibid, 662.
124 Glass (1934: 56-57).
125 De Villiers (2001: 258-259, part 1). Military custody could be ordered where surety could not be allowed and persons who occupied lesser positions in society were committed to sureties by paying the fixed sum of money or by way of guarantee under oath that he will stand trial if release.
126 Glass (1934: 56).
127 Stephen (2007).

"blood feud" was the order of the day whereby vengeance could be exacted by the injured party or by the next of kin if the victim dies.[128] However, the "blood feud" was replaced by a system called *wergeld* (which meant the price set upon the life and bodily faculties of a man) based on compensation which was gradually developed through judicial procedures.[129] In terms of the *wergeld* procedure, compensation could be paid to a victorious party and there was no need that it be paid immediately but it could be done through instalment upon the oath of the party who lost the case (normally the accused person).[130]

According to Van der Berg, the issue of bail can be traced from English Law during the reign of English Kings Hlothaere (AD 673-685) and Eadric (AD 685-687).[131] During this period, the accused was required to give surety or any order made by the judicial officer.[132] It was required from accused persons to pay a sum of money called "borth" to the victim of crime but this money could be returned to the depositor if the accused was found not guilty.[133] Servants could be placed under "borth" of their masters and foreign visitors under the care of their hosts and the aim thereof just like surety was to ensure the attendance of an accused at trial to answer to the charges and to insure payment of compensation if the accused were to be found guilty.[134]

During the Norman Conquest in 1066, the money was no longer paid to the victim of crime as security but was paid to the Sherriff in order to avert pre-trial detention but this money was likewise returned if accused was found not guilty.[135] Due to a limited number of magistrates

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128 Duker (1978: 985).
129 Ibid.
130 Duker (1977:35).
131 Van der Berg, J (2001) *Bail: A Practitioner's Guide*. 2nd ed. Juta & Co, Ltd, Cape Town at 2.
132 Castle (1980:434).
133 Van der Berg (2001: 2), 2nd ed.
134 Duker (1977:35-36).
135 Van der Berg (2001: 2) 2nd ed. See also Duker (1977: 987-8) who argue that when the Normans arrived in England, there were no central court system in place and that is how the introduction of justice from the King emerged.

who had to travel throughout the country to preside over cases, the Sheriffs could hold an individual accused of committing a crime until such time that a magistrate arrived.[136]

In subsequent years that followed, emphasis was more on the fact whether the suspect could attend his trial.[137] However, it must be noted that bail under common law was discretionary in nature in that every accused person was eligible to be released on bail before conviction.[138] Even those charged with serious crimes could seek release through a writ *de odio et atia* ("for hatred and malice") the predecessor to *habeas corpus*[139] and here the Sheriff could consider factors such as the personal traits of the individual charged.[140]

The discretion given to the Sheriff was uncontrolled in that even persons charged with utmost serious crimes had the privilege of obtaining the writ *de odio et atia* (concerned the fact whether hatred alone was the basis of the charge) and in the end there were no clear standards set and this led to inconsistencies, abuse as well as oppressive and frequent use of the writ.[141] This led to the development of statutory law by the enactment of the Magna Carta.[142] The Magna Carta developed to such an extent that it became a "customary means of investigating imprisonment."[143]

During the Middle Ages, a *capias* (warrant of arrest) was developed which dealt with the indictment of a person in custody for non-statutory offences.[144] Under *capias* several writs were developed depending on the purpose they were designed to achieve. Among the writs developed was *capias ad respondendum* (allowed the Sherriff to keep defendant safely so that

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136 Schnacke, Jones and Brooker (2010) http://w1.cejamericas.org/index.php/biblioteca/biblioteca-virtual/doc_view/5865-the-history-of-bail-and-pretrial-release-2010.html (accessed 13 March 2017).

137 Van der Berg (2001:2) 2nd ed.

138 Lindermayer (2009: 278).

139 See Clark, JW (2007) "Habeas Corpus: Its Importance, History, and Possible Current Threats" http://trace.tennessee.edu/utk_chanhonoproj/1057 (accessed 17 June 2018) who states that this term means 'you have your body'.

140 Lindermayer (2009:278).

141 Ibid.

142 Magna Carta of 15 June 1215.

143 Glass (1934:57).

144 Ibid.

he could be produced on a certain day in order to answer to the allegations of the plaintiff); *capias utlagatum* (dealt with a person who has been outlawed in an action and the Sherriff was mandated to keep him in custody until the return date) and *capias ad satisfaciendum* (which allowed the Sherriff to bring a prisoner to court in order to satisfy a judgment against him).[145]

The Magna Carta prohibited excessive fines. The 39th Chapter of the Magna Carta[146] brought some fundamental changes to the concept of individual liberties and the presumption of innocence.[147] It provided that "no free man shall be arrested or detained in prison…unless…by the law of the land."[148] This clearly shows that the due process model was being contemplated to replace the crime control model.

In 1275, the *Statute of Westminster*[149] which changed the perspectives of bail by distinguishing between three categories of offences namely those in which one must be admitted to bail, may be admitted to bail and those where one cannot be admitted to bail (by considering the nature of the offence, the probability of conviction and the history of the accused).[150] Offences to which an accused could not be admitted to bail were capital offences and other serious offences and because many of these offences were punishable by death, bail was only guaranteed for minor offences.[151] Perhaps the rationale was that an accused could abscond and not attend his trial if he was released on bail knowing that if he is found guilty, he could be punished to death.

145 Ibid.
146 The 39th Chapter of the Magna Carta, 28 Edw. 3, c.3 (1354).
147 Castle (1980: 434).
148 Ibid.
149 Statute of Westminster, The First (1275).
150 Lindermayer (2009: 279).
151 Ibid, 279-280.

Lindermayer states that:

> …viewed the risk of flight when charged with a capital offence to be so great that no bail could serve as security equivalent to the actual custody of the person.[152]

The *Westminster* regime was without problems as well such as the frequent granting of bail to the wealth which in turn threatened the legitimacy of the system regarding bail at the time and this led to the adoption of new rules for all accused persons to access bail.[153] The Kings Bench Judges were given discretionary powers (absolute and unlimited) to release an accused on bail irrespective of the crime charged with as this was within the ambit of the law.[154]

In 1628, *Petition of Rights Act*[155] was enacted which contained similar provisions like the Magna Carta but it required giving of bail in cases allowed by statute but this changed as there were no clear cut rights to bail and therefore a defendant could still be detained even arbitrarily by the Kings Court.[156] The King's Court continued to disregard the individual right to liberty despite the fact that there was a statutory right to bail and this led to the enactment of *The Habeas Corpus Act of 1679*[157] which allowed a defendant an early appearance in order for the Chancellor to assess whether the offence was bailable or not.[158] However, the *Habeas Corpus Act* set the amount of bail very high which in itself was an obstacle to pre-trial

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152 Ibid, 280.

153 Ibid, 281.

154 Ibid.

155 *Petition of Rights Act 16 Car. I, c. 1088 (1628)* which prevented the King from ordering arbitrary imprisonment. The act came into being as a result of *Darnel's Case 3 CAR I (1627)* where King Charles I requested a loan from Darnel and four other knights but they refused to contribute and were then thrown into prison with a warrant signed by the Privy Council. Darnel applied to the King's Bench for a writ of *habeas corpus*, which was issued, but upon trial, they were remanded in custody by the judges who served at the pleasure of the King.

156 Castle (1980: 435).

157 *Habeas Corpus Act 31 CAR II, c. 2 (1679)* which provided that a writ could be granted at any time other than the legal term by the Lord chancellor and heavy penalties were imposed on those judges that did not comply with the act.

158 Castle (1980: 435).

detention and this led to the adoption of *Bill of Rights of 1689*[159] that was aimed at curtailing abuse of excessive bail amount.[160]

2.4. Namibian Law

Namibia was under colonialism for hundred years, twenty-five years under the German colonial rule and seventy-five years under the South African colonial rule. Before colonialism, Namibian communities used traditional models in controlling crime. However, it must be noted that just like under English and Roman law, aggrieved individuals used the system of private vengeance to settle disputes and this led to an unsatisfactory state of affairs that led to a social contract to give power to the State to deal with individuals who committed offences.[161]

This unsatisfactory state of affairs led to *wergeld* (compensation) in that the wrongdoer had to pay the victim and this was (and is still) common among Namibian traditional authorities.[162] However, it must be noted that the concept of bail law only developed later on in statutory nature from 1977 when the CPA of 1977 was passed.

2.4.1 Germany Period

Germany ruled Namibia from as early as 1884 and ended in 1915 when Germany lost World War I. Just like under Roman and English law, the application of criminal laws by the

159 *Bill of Rights, 1689, 1 W. & M., ST. 2, c.2.*

160 Foote, C (1965) "The Coming Constitutional Crisis in Bail: I" *University of Pennsylvania Law Review*, vol. 113(7), 959-999 at 967-8.

161 Kemp *et al*. (2015) *Criminal Law in South Africa*, at 6, 2nd ed.

162 Nandago, E (2009) "Compensation in murder cases: Owambo customary law" http://wwwisis.unam.na/theses/nandago2009.pdf (accessed 23 June 2017).

Germans was selective in nature. Existing laws at the time were applied based on distinction of a native and non-native.[163]

This is demonstrated by the fact that:

> If a native was killed or seriously injured as a result of a collision with a German it was a matter of small moment, to be disregarded if the authorities were not forced to take notice of it…on the other hand, had the German the slightest of grievances against a native, the latter was made to suffer severely under lash. [164]

Clearly, from its application one can infer that pre-trial detention was common in that an accused could be detained for a longer period of time as was the case under Roman and English law. The State was obliged to bring every criminal they hear before court except where the direct interest of the state was not involved.[165] Thus, where the interest is of an individual only, such case could only be brought to court by the party concerned.[166]

Germanic law did not adequately have a developed law on pre-trial detention and Namibia's development in this area came during the colonialism by South Africa when they took over from the Germans.

2.4.2 Early years of bail law (1955-1977)

The development of bail under Namibian law is intrinsically linked to that of South Africa due to historic ties. Inroads into the aspect of bail can be traced from the 1955 period when statutory inroads into the right to bail came into being through the enactment of the *Criminal*

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163 Ruppel, OC and Ruppel-Schlichting, K (2011) "Legal and Judicial Pluralism in Namibia and Beyond: A Modern Approach to African Legal Architecture?" *Journal of Legal Pluralism*, vol. 64, 34-63 at 36.

164 Union of South Africa (1918) Report on the Natives of South West Africa and their treatment by Germany, prepared in the Administrator's Office, Windhuk, South-West Africa, p.151 and this was provided for in terms of 1896 Imperial Ordinance that was made applicable to South West Africa.

165 Krüger, FK (1914) "The Judicial System of the German Empire With Reference to Ordinary Jurisdiction" *California Law Review*, vol. 2(2), 124-136 at 131.

166 Ibid.

Procedure Act.[167] This act was not made applicable to Namibia. In terms of this Act, the Attorney General had powers unlike the judiciary to prevent the release of an accused for a period of 12 days if the offence committed related to the aspect of public safety being threatened (a certificate could be issued in this regard in the event of more serious offences such as murder).[168] The power to refuse bail under these circumstances was valid for a year and could therefore be extended for another year.[169]

Various laws in South Africa were enacted[170] whereby an accused could be incarcerated for up to 90 days without being released and anyone charged for terrorism had no right to bail unless the Attorney-General gave consent in that regard.[171] This increased denial of personal liberty led to a commission which was established in 1971 which made certain recommendations of which some were incorporated in the 1977 CPA.[172] The CPA of 1977 was made applicable to Namibia (then being South West Africa) and it is the current law that addresses the question of bail in Namibia.

2.5 Overview of international and regional legal instruments on bail

2.5.1 International instruments

After the end of the Second World War, the international community felt that there was a need to develop and protect international human rights. The founding document in this regard is the UN Charter of 1945, which gave birth to many legal instruments.[173]

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167 Criminal Procedure Act 56 of 1955. See De Villiers, W (2001) "An investigation into the origins and development of the principles of bail under South African Law (part 2)" *De Jure*, vol. 34, 500-514 at 509.

168 De Villiers (2001:509, part 2). See further s. 108 bis of *General Amendment Act* 39 of 1961.

169 This was done in terms of section 17 of Sabotage Act General Laws Amendment Act No. 76 of 1962 and also section 9 of the General Law Amendment Act No. 37 of 1963.

170 Such as the General Law Amendment Act 37 of 1963.

171 De Villiers (2001: 510, part 2).

172 Ibid, 511.

173 *Charter of the United Nations*. http://United Nations, Charter of the United Nations, 1945, 1 UNTS XVI.

2.5.1.1 *The Universal Declaration of Human Rights*

The Universal Declaration of Human rights (UDHR), although not binding upon states, provide that everyone charged with an offence has the right to be presumed innocent until proven guilty according to law.[174] Furthermore, it prohibits arbitrary arrest and detentions.[175]

2.5.1.2 *The International Covenant on Civil and Political Rights*

Namibia became a state party to the International Covenant on Civil and Political Rights (ICCPR)[176] on 28 November 1994. The ICCPR also contains a similar prohibition and states that if there is detention, it should be done on grounds and procedures established in terms of law and prohibits arbitrary detention and arrest.[177]

2.5.1.3 *United Nations Standard Minimum Rules for Non-Custodial Measures*[178]

The Rules call for the avoidance of pre-trial detention in that where pre-trial detention is used; it should be a measure of last alternative and should not last longer than is necessary.[179]

2.5.1.4 *United Nations Standard of Minimum Rules for the Administration of Juvenile ("The Beijing Rules")*[180]

The Beijing Rules provide safeguards such as the presumption of innocence and detention-pending trial shall be used only as a measure of last resort and for the shortest possible period of time.[181]

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174 Universal Declaration of Human Rights, 1948, article 11(1).

175 Article 9. In terms of article 9(3), it shall not be a general rule that persons awaiting trial shall be detained in custody.

176 The International Covenant on Civil and Political Rights, 1966. See Nicol-Wilson, MC (2007) "The realisation of the right to bail in the Special Court for Sierra Leone: Problems and prospects"*African Human Rights Law Journal*, vol. 7, 496-521 at 497 who argue that in terms of this ICCPR provision, bail is a right that accrues to arrested and detained persons.

177 Article 9(1).

178 Adopted by General Assembly Resolution 45/110 of 14 December 1990.

179 Clause 6 of the UN Standard Minimum Rules for Non-Custodial Measures (1990).

180 Adopted by the General Assembly resolution 40/33 of 29 November 1985.

181 Rule 7 and 13 of the Beijing Rules respectively.

2.5.1.5 *United Nations Standard Minimum Rules for Non-custodial Measures ("The Tokyo Rules")*[182]

In terms of the Tokyo Rules, it is fundamental that there should be a set of basic principles to promote the use of noncustodial measures and member states shall endeavour to ensure a proper balance between the rights of individual offenders, the rights of victims, and the concern of society for public safety and crime prevention.[183]

2.5.1.6 *The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*[184]

The principles state that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law.[185] Further to this is that a detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.[186]

2.5.2 **Regional Instruments**

Africa also in ensuring the protection of human rights on the continent enacted various legal instruments guaranteeing the fundamental rights and freedoms, such as the right to liberty and the presumption of innocence.

182 Adopted by General Assembly resolution 45/110 of 14 December 1990.
183 Rule 1 of the Tokyo Rules.
184 Adopted by General Assembly resolution 43/173 of 9 December 1988.
185 Principe 2.
186 Principle 36.

2.5.2.1 *The African Charter on Human and Peoples' Rights*[187]

The African Charter on Human and Peoples' Rights (the African Charter) guarantees the right to be presumed innocent and not to be detained arbitrarily.[188]

2.5.2.2 *Principles and Guidelines on The Right to a Fair Trial and Legal Assistance in Africa*[189]

The principles re-affirms also the fact that no one shall be subjected to arbitrary arrest or detention, and that arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law.[190] The guideline provide also that unless there is sufficient evidence that deems it necessary to prevent a person arrested on a criminal charge from fleeing, interfering with witnesses or posing a clear and serious risk to others, States must ensure that they are not kept in custody pending their trial.[191]

2.5.2.3 *The Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa, 2002*[192]

The Ouagadougou Declaration emphasises the importance of a criminal justice policy that controls the growth of the prison population and encourages the use of alternatives to

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187 *Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"),* 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: http://www.refworld.org/docid/3ae6b3630.html [accessed 24 April 2018], which entered into force on 21 October 1986. Namibia ratified the African Charter on 16 September 1992. For status of countries that have signed and ratified The Charter, see http://www.achpr.org/instruments/achpr/ratification/ (accessed 24 April 2018).

188 Article 6 and 7 of the African Charter.

189 Retrieved http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf (accessed 24 April 2018). This was adopted in 2003 and this was as a result of a Resolution on the Right to Fair Trial and Legal Assistance in Africa in 1999 (Dakar Declaration and Resolution) retrieved http://www.achpr.org/sessions/26th/resolutions/41/ (accessed 24 April 2018).

190 Paragraph M(1)(b).

191 Paragraph M(1) (e).

192 Available at http://www.achpr.org/instruments/ouagadougou-planofaction/ (accessed 15 March 2019).

imprisonment. The Plan of Action put in place to implement the Ouagadougou Declaration sets out strategies for reducing the number of unsentenced prisoners. The strategies are that detention should be the last resort and only for a short period, improved access to bail through the widening of police powers, involving community representatives in the bail process, and setting time limits for people in remand detention.

2.5.2.4 *The Robben Island Guidelines for the Prevention of Torture in Africa*[193]

The Guidelines set out safeguards for pre-trial detention, including access to legal representation, the right to challenge the lawfulness of the detention, and the right to be brought before a judicial authority promptly.[194]

2.5.2.5 *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa ("The Luanda Guidelines")*[195]

The guidelines stipulate that detention of persons shall be the last resort and all persons detained in police custody shall have a presumptive right to police bail or bond.[196] Part 3 of the Luanda Guidelines states that pre-trial detention is a measure of last resort and should only be used where there are no other alternatives. Further to this is that judicial authorities shall only order pre-trial detention if there are reasonable grounds to believe that the accused has been involved in an offence that carries a custodial sentence, and there is a danger that the

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193 Available at http://www.achpr.org/mechanisms/cpta/robben-island-guidelines/ (accessed 15 March 2019).

194 Articles 21-23 of the Robben Island Guidelines.

195 These guidelines were adopted by the Adopted by the Commission at the 55th Ordinary Session, 2014, available at http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_on_arrest_police_custody_detention.pdf (accessed 15 March 2019).

196 Part 1 & 2 of Luanda Guidelines.

accused will abscond, or commit further serious offences, or if the release will not be in the interests of justice.[197]

2.6 Conclusion

Overall, it has been demonstrated that the writ of *habeas corpus* has been an established remedy aimed at restoring liberty to any person denied of it in accordance with the law. The writ originated as a method of ensuring appearance before various organs that existed and in some instances, individual personal freedom was denied and it has now developed or transformed into a catalyst for individual freedom. It must be noted that the writ, as it developed, had nothing to do with guilt or innocence of an accused person. This should be a stance that our courts should continue to develop in order to preserve the right to personal liberty as well as presumption of innocence.

It must be emphasised that the coming into being of the Constitution has strengthened this right, which should be guarded jealously against encroachment. In addition to the Constitution, Namibia has ratified and signed many international and legal instruments to give effect to these rights.[198]

197 Part 3 (Pre-trial detention), clause 11 of the Luanda Guidelines.

198 The effect of international law's applicability to Namibia is provided for under article 144 of the Constitution.

CHAPTER 3

NAMIBIAN PERSPECTIVE ON BAIL

3.1 Introduction

The Namibian Constitution does not have any provision regarding the right to bail like other countries.[199] Our courts in determining whether to grant bail or not are required to give due consideration to the right of liberty.[200] The jurisprudence of the bail system in Namibia has been developed largely, along lines similar to the South African system as it has been demonstrated in chapter 2.

There has been perception created in Namibia that our bail system does not meet the expectations of society in that although the police arrest suspected offenders, our court system lets them out easily.[201] This in itself creates tension as to how to balance an individual's right to liberty taking into account the presumption of innocence and public safety on the other hand. Thus, it is argued that when courts take public safety as an important aspect than the rights of an accused person detained, the existence of the presumption of innocence contained in the Namibian Constitution becomes questionable. This therefore requires a determination whether our Courts should detain persons accused of crimes merely on the ground of necessity without due regard to the rights contained in the Constitution.

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199 Countries such as Canada have specific provision pertaining to the right to bail as will be demonstrated in the next chapter. It is argued that whether or not the accused must be admitted to bail is a procedure envisaged in the Namibian Constitution (see *New Era Staff Reporter* "Misconceptions of Bail in Namibia" *New Era* (08 August 2016), available at https://weekend.newera.com.na/2016/08/08/misconceptions-of-bail-in-namibia/ (accessed 15 August 2018).

200 See *Kabotana* case, para 16 where the essence of the right to liberty was emphasised.

201 See Amakali, M "Outrage over easy bail for habitual offenders" *New Era* (18 May 2018), available at https://www.newera.com.na/2018/05/18/outrage-over-easy-bail-for-habitual-offenders/ (accessed on 15 August 2018) where the public opined that our bail system seems to be weak. See also *New Era Staff Reporter* "Misconceptions of Bail in Namibia" *New Era* (08 August 2016), available at https://weekend.newera.com.na/2016/08/08/misconceptions-of-bail-in-namibia/ (accessed 15 August 2018).

Thus, considering the CPAA on bail, one might ask whether or not an accused charged for offences covered therein is entitled to apply for bail? Further analysis is whether or not an application for bail under the said amendment is an application for formality?

This chapter gives a perspective of bail law in Namibia and how our courts have attempted to define the concept of public interest or administration of justice under case law.

3.2 Bail law in Namibia

In Namibia, the aspect of bail is governed by the CPA[202] as amended and did change the position of bail in certain aspects as compared to the position under Roman or English law.

Chapter 9 of the CPA governs the aspect of bail and as it has demonstrated under the history of bail, the effect of bail under Namibian law is that:

> … bail granted in terms of the succeeding provisions is that an accused who is in custody shall be released from custody upon payment of or the furnishing of a guarantee to pay, the sum of money determined for his bail, and that he shall appear at the place and on the date and at the time appointed for his trial or to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned, and that the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in question relates, or, where sentence is not imposed forthwith after verdict and the court in question extends bail, until sentence is imposed.[203]

Less serious crimes are governed by bail procedures under section 59 in which an accused can be released by a police officer of a commissioned rank before such person's first appearance before court. Police bail has limitation in that only cash money can be accepted and no guarantee. Such bail, subject to the court adding further conditions shall remain in

202 Act 51 of 1977.
203 Section 58.

force after the first court appearance and be treated in the same manner as bail granted by the court in terms of section 60 (Section 59(1)(c) of the CPA). In terms of section 62[204], a police officer cannot add discretionary conditions to bail granted to a suspect. If bail has been granted with conditions, such conditions can be varied or amended at any stage of the proceeding.[205]

Section 63 provides that:

> A court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, increase or reduce the amount of bail determined under section 59 or 60 or amend or supplement any condition imposed under section 62, whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application. Release on own recognisance has also been recognised under section 72.

Bail granted to an accused person could be cancelled under different circumstances such as the failure by the accused to observe bail conditions,[206] failure by the accused to appear before court,[207] and when an accused is about to abscond.[208]

The CPAA brought about a change to the release of persons charged with certain offences in that they could be refused bail (even if there is evidence that they will stand trial) if the interest of justice or public administration requires.

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204 This section allows the court to add further bail conditions to an accused who has been admitted to bail.
205 Section 63 of the CPA.
206 Section 66.
207 Section 67.
208 Section 68 as amended by CPAA.

In the unreported judgment of *Noble v State,*[209] Hoff J, opined that:

> The question when it would be in the interest of the public or in the interest of the administration of justice has previously been considered by this court and it was held that these concepts should be given a wide meaning. One of the factors which may be considered are the pronouncements of the courts over a long period or where there is a strong prima facie case against an accused person. In such an instance a court would be entitled to refuse bail since the enquiry is now much wider even if there is a remote possibility that an accused would abscond or interfere with State witnesses or with the police investigation.[210]

This is a departure from the traditional approach to bail which as it has been discussed herein was to secure the attendance of the accused person before court. It is for this reason that this research has been undertaken to see whether this amending provision is in compliance with the right to the principles of liberty[211] and the presumption of innocence[212] contained in the Constitution.

3.3 Presumption of innocence and bail

The Constitution provides in no uncertain terms[213] that all persons charged with an offence shall be presumed innocent until proven guilty in terms of law and further the right to liberty[214] which cannot be taken away except through procedures that have been established by law. The limitation of this right can be found in the court practice of denial of bail. The established law upon which bail is being denied is in terms of the CPAA.

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209 (CA 02/2014) NAHCMD delivered on 20 March 2014.

210 *Noble* case at para 33.

211 Article 7 of Namibian Constitution provides for Protection of Liberty in that no persons shall be deprived of personal liberty except according to procedures established by law.

212 This is provided for under article 12(1)(d) which provides that 'all persons charged with an offence shall be presumed innocent until proven guilty according to law.' See Pennington 2003 *The Jurist* 106-124 who discusses the origin of the maxim 'innocent until proven guilty'.

213 Article 12(1) (e).

214 Article 7.

It is no doubt; therefore, that denial of bail to a person for whatever reason might be seen to be in contradiction with the Constitution. The detaining of a person before being found guilty has a penal element – namely the denial of personal freedom.[215]Vedantam notes that imprisonment in jail for whatever cause diminishes the status of a citizen and disqualifies him in many respects, to say nothing of social dishonour.[216]

In countries such as India, the consequences are severe in that it results in excommunication among higher classes and the refusal of family members of an accused to attend social functions.[217] Similarly, in Namibia, wrong perceptions can be created for somebody who has been arrested and denied bail in that he or she is guilty of the offence charged.

The presumption of innocence has been described as a golden thread in our criminal law.[218] This presumption applies throughout the criminal process (pre-trial and trial)[219] and this right cannot be compromised. The importance of this right has been summed up as follows:

> …is an integral component of the rule of law…integral to the general protection of life, liberty and security of person and fundamental to the protection of human rights.[220]

To support this view, the court in *Nhlabathi v Adjunk-Prokureur-general, Transvaal*[221] held that illegal deprivation of liberty is a threat to the very foundation of a society based on law and order is a golden standard for the interpretation of any statute which applies to the

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215 Van der Berg (2012:16) 3rd ed.
216 Vedantam (1914:661).
217 Vedantam (1914: 661).
218 Van der Berg (2012: 19) 3rd ed. See further *S v Acheson* 1991 (2) SA 805 (Nm) 822.
219 Van der Berg (2012:19) 3rd ed. See further Weigend, T (2013) "There is Only One Presumption of Innocence" *Netherlands Journal of Legal Philosophy*, 42(3), 193-204 at 193 who argue that the presumption of innocence is universally recognised as a basic tenant of a fair criminal process.
220 Van der Berg (2012: 19) 3rd ed.
221 1978(3) SA 620 (W).

prosecution of citizens where the curtailment of freedom of movement or liberty is concerned.[222]

The presumption of innocence does not only apply at trial but throughout the criminal justice system process.[223] To support this position the European Court of Human Rights (ECHR) in *Minelli v Switzerland*[224] in deciding whether there has been a violation of article 6(2) of the European Convention on Human Rights[225] stated as follows:

> … the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning suggesting that the court regards the accused as guilty.[226]

Thus, in interpreting the Constitution with a Bill of Rights, the courts have to promote values that underlie any democratic society based on respect of dignity of persons, freedom as well as equality.[227] The court correctly observed in *Cultura 2000 and Another v Government of the Republic of Namibia and Others* that:

> … (t)he Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a `mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit

222 At page 630 A-D.
223 Van der Berg (2012: 20) 3rd ed.
224 *Minelli v Switzerland*, Merits and Just Satisfaction, App No 8660/79, A/62, [1983] ECHR 4.
225 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: http://www.refworld.org/docid/3ae6b3b04.html [accessed 23 January 2018].
226 At para 37 of the judgment.
227 Van der Berg, J (2012) *Bail: A Practitioner's Guide*. 3rd ed. Juta & Co, Ltd, Cape Town at 21. See a perspective on why the right to liberty should be jealously guarded taking into account historical context of transitional societies by Hinds, LS (1985) "Apartheid in South Africa and Universal Declaration of Human Rights" *Crime and Social Justice*, vol. 24, 5-43.

and the tenor of the Constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.[228]

This therefore implies that the right to be presumed innocent should be interpreted more broadly and be applied to all pre-trial procedures that will, in the end have an impact on the fairness of the ultimate trial.[229] The Courts are therefore called upon, during interpretation of the Constitution to adopt a broader approach that is beneficial to an individual to the fullest.[230]

3.4 Bail and the Namibian Criminal Justice

Increase in crime in any given country calls for speedy solutions to crime to ensure improved public safety. Namibia just like any other country is no exception in this regard. The background introduction in chapter 1 has highlighted that the establishment of various laws was a genuine response to the rising increase in crimes and as a result of concerns of public safety. Crime by its very nature induces fear and infringes upon the right to security and is 'disruptive and destructive'.[231]

However, in considering the above one should not lose focus as to what constitutes purpose of bail. Justice Jackson in *Stack v Boyle*[232] summarised the purpose of bail as follows:

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228 1992 NR 110 (HC) at page 122. See further *Ex Parte Attorney-General, Namibia: In re Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS) at 86.

229 Van der Berg (2012: 21) 3rd ed.

230 Naldi, GJ (1995) *Constitutional Rights in Namibia: A comparative analysis with international human rights.* Kenwyn: Juta at 12. See further *Minister of Defence, Namibia v Mwandinghi* 1992 (2) SA 355 (NmS) at 364 where the court emphasised that in construing a Constitution, the construction most beneficial to the widest possible amplitude must be adopted.

231 Terblanche, SS (1999). *The Guide to Sentencing in South Africa*. Butterworths, Durban at 27.

232 *Stack v Boyle* 342 U.S. 1, 7-8 (1951).

> The spirit of the [bail] procedure is to enable…[defendants] to stay out of jail until a trial has found them guilty and the resulting danger to society is a calculated risk which the law takes as a price of our system of justice.[233]

The above concern, as Aguila-García[234]argues calls upon a need for a criminal justice system that addresses specific needs such as putting an end to crimes and an approach that replaces the traditional systems that violated fundamental human rights to a system that upholds and protects these rights. Although the current regime contains provisions that respect fundamental human rights and freedoms under the Bill of Rights, the Constitution also contains restrictions on such rights under article 22. These general restrictions conversely apply also to laws relating to pre-trial detention. Aguila-García is of the view (to which one agrees) that the restriction of rights such as the right to liberty by imposing mandatory pre-trial detention is intended 'to improve public safety'.[235]

To support this argument, it is stated that:

> The response to a demand for public safety cannot be abstract, as this can result in the hardening of the justice system, greater restrictions on rights, and increased penalties. Thus, the clear identification of a specific problem allows for rational, concrete responses.[236]

This clear, rationale and concrete responses should not emanate from an abstract application of the principle without the consideration of the rights of an individual enshrined in the Constitution.

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233 Foote (1965: 964).

234 Anguilar-García, A (2014) "Presumption of Innocence and Public Safety: A Possible Dialogue" *Stability: International Journal of Security & Development* 1-12 at 1.

235 Ibid, 2.

236 Ibid.

3.5 Namibian court's approach to bail before CPAA

Bail hearings have an effect on the right to liberty of most accused persons.[237] It is at this stage that a person will either be denied his right to liberty or not.[238] Our court's approach was to merely determine whether an accused if released on bail will stand trial and nothing else. In the *Acheson* case, the court outlined factors that must be taken into consideration whether to deny a person bail or not.[239]

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237 Karnow, CE (2008) "Setting Bail for Public Safety" *Berkeley Journal of Criminal Law*, vol. 13(1), 1-30 at 1.

238 See *S v Pineiro* 1992 (1) SACR 577 (Nm) at 580-C-D where the court tried to outlined the value-ridden assessment of traditional approach to bail.

239 The court (in the *Acheson* case) stated the following as considerations in deciding whether to grant or deny bail to an accused person:

(1) Was it more likely that the accused would stand his trial or was it more likely that he would abscond and forfeit his bail? The determination of that issue involved a consideration of sub-issues such as

(a) how deep his emotional, occupational, and family roots within the country where he was to stand trial were;

(b) what his assets in that country were;

(c) what means he had to flee from the country;

(d) how much he could afford the forfeiture of the bail money;

(e) what travel documents he had to enable him to leave the country;

(f) what arrangements existed or might later exist to extradite him if he fled to another country;

(g) how inherently serious was the offence in respect of which he had been charged;

(h) how strong the case against him was and how much inducement there would be for him to avoid standing trial;

(i) how severe the punishment was likely to be if he were found guilty; and

(j) how stringent the conditions of his bail were and how difficult it would be for him to evade effective policing of his movements.

(2) Was there a reasonable likelihood that, if the accused were released on bail, he would tamper with witnesses or interfere with the relevant evidence or cause such evidence to be suppressed or distorted? The determination of this issue involved an examination of other factors, such as

(a) whether or not the accused was aware of the identity of such witnesses or of the nature of such evidence;

(b) whether or not the witnesses concerned had already made their statements and had committed themselves to giving evidence or whether it was still the subject-matter of continuing investigations;

(c) what the accused's relationship with such witnesses was and whether or not it was likely that they might be influenced or intimidated by him; and

(d) whether or not any condition preventing communication between such witnesses and the accused could effectively be policed.

(3) How prejudicial might it be for the accused in all the circumstances to be kept in custody by being denied bail? This involved an examination of issues such as

(a) the duration for which the accused had already been incarcerated;

(b) the duration for which he would have to be in custody before his trial was completed;

(c) the cause of any delay in the completion of his trial and whether or not the accused was wholly or partially to be blamed for such delay;

(d) the extent to which the accused needed to keep working in order to meet his financial obligations;

In the *Acheson* case the state vehemently objected to bail on the grounds that there was a danger that the accused would not stand trial, regard being had to the fact that he was an Irish citizen with no real roots in Namibia or in any African country; that there was no existing extradition treaty with Ireland; and that the Namibian borders were extensive and difficult to police.

However, after applying the above considerations to the circumstances of the case, the Court concluded that bail should be allowed subject to stringent conditions designed to minimise the danger that the accused might abscond or otherwise prejudice the interests of justice. It was accordingly ordered that the accused be released on bail of R4 000, subject to stringent conditions as to reporting to the police and subject to strict limitations upon (a) the accused's freedom to leave his home address outside of working and reporting hours and (b) his freedom of movement between his home address, his work address and the police station. After being granted bail, Acheson disappeared and could not be located.

In response to the outcry that followed the *Acheson* case (which involved a prominent SWAPO member who was killed), Namibian Parliament then enacted the *Criminal Procedure Amendment Act* 5 of 1991, which amended section 61 of the CPA and brought the concept of the refusal of bail based on **public interest and interest of the administration of justice**. According to Amoo, this created a new jurisprudence of bail in Namibia which vested discretion in the presiding officer whether to grant or refuse bail taking into account the legal convictions of society.[240] This adopted crime policy by Namibian Parliament could be seen as punitive in nature as it denies liberty to those who are refused bail.

(e) the extent to which he might be prejudiced in engaging legal assistance for his defence and in effectively preparing his defence if he were to remain in custody; and

(f) the health of the accused.

240 Amoo (2008: 17-18).

In justifying the amendment, the court in *S v Timotheus* [241] stated that:

> The amending legislation was obviously enacted to combat the very serious escalation of crime and the escalation of accused persons absconding, or for that matter tampering with the police investigation, by giving the court wider powers and additional grounds for refusing bail in the case of the serious crimes and offences listed in the new Part (IV) of the Second Schedule of the Criminal Procedure Act 51 of 1977.[242]

However, the discretion granted by the amended CPA does not give blanket discretion to the presiding officer but requires the taking into account of the legal convictions of society. The Court in in the case of *Charlotte Helena Botha v The State*[243] held that 'a judicial officer will therefore obviously have to make a value judgment of what are the legal convictions of society and what is the impact of such convictions on the particular case where the court must adjudicate on an application of bail'.

The court further stated that:

> The legal convictions of the community, in my view, will hold that an accused person should not be released on bail in the situations … provided there is prima facie proof against such person that he or she has committed the type of serious crime … and is therefore in the opinion of the Court, a potential threat to the victims or to other innocent members of society or is perceived by them on reasonable grounds to be such a threat.[244]

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241 1995 NR 109 (HC).

242 At page 113-114. See further *S v du Plessis and Another* 1992 NR 74 (HC) at page 82. See further *Johannes Gaseb v The State*, Unreported Judgment of the High Court of Namibia, Case No. CA 157/06 delivered on 11 May 2007 at para 9.

243 Unreported judgment of the High Court of Namibia, CA 70/95 delivered on 20.10.1995.

244 *Charlotte Helena Botha vs The State* Case No. CA 70/1995 delivered on 2 October 1995 at 24.

When the court reaches this conclusion, then a risk of releasing an accused on bail should be avoided as this might to a certain extent create fear in the minds of the community members that the justice system is unable to protect them.

3.6 Public interest or interest of the administration of justice

It is worth mentioning that the legislature did not define what constitute public interest or administration of justice, as this was left in the discretion of the courts. [245] It has therefore been left to the courts to interpret what constitutes public interest or interest of administration of justice. As it will be demonstrated herein, our courts have not properly outlined circumstances that constitute public interest or administration of justice in that consideration that falls under public interest might at the same time be viewed as a consideration under the administration of justice.

What is quite clear is the fact that granting bail to somebody who will not attend his trial will not be in the best interest of justice (if this occurs, it might lead people to feel helpless against the criminal justice system and take the law in their own hands) and also it will not serve justice by denying bail to an accused who will attend his trial and not interfere with administration of justice.[246]

The constitutional rights of an accused should not hang in a balance in deciding whether to grant bail or not. In *S v Jonas* the court observed that:

> It must however be borne in mind that any court seized with the problem of whether or not to release a detainee on bail must approach the matter from the perspective that freedom is a

245 Amoo (2008: 17).

246 Van der Merwe SE "Bail and Other Forms of Release" in Joubert J.J (ed) *Criminal Procedure Handbook* (Juta & Co, Ltd, Pretoria 2016) 190-222 at 194. As it will be demonstrated in this section, there is no clear cut difference between the two as sometimes the court denies bail on both grounds by considering same factors and sometimes on only one of the grounds.

> precious right protected by the Constitution. Such freedom should only be lawfully curtailed if the interests of justice so require…. The fundamental objective of the institution of bail in a democratic society based on freedom is to maximize personal liberty. The proper approach to a decision in a bail application is that: The court will always grant bail where possible, and will lean in favour of and not against the liberty of the subject provided that it is clear that the interests of justice will not be prejudiced thereby.[247]

The court in *S v Smith and Another* [248] citing the case of *S v Essack,*[249] alluded the fact that in dealing with an application for bail, it is necessary to strike a balance, as far as that can be done, between protecting the liberty of the individual and safeguarding and ensuring the proper administration of justice. The court reached the same conclusion in *Lukas v State*[250] where it was stated that the balancing act itself requires the court to look at public policy where there is a risk that an accused will interfere or not at the end undermining the administration of justice.

The amending proviso to bail now provides a wider enquiry to bail. The court in *Shaduka v State*[251] emphasised that since the enquiry is now wider a court will be entitled to refuse bail in certain circumstances even where there may be a remote possibility that an accused will abscond or interfere with the police investigations. The crucial criterion is thus the opinion of the presiding officer as to whether or not it would be in the interest of the public or the administration of justice to refuse bail. This therefore requires that evidence should be adduced by the accused to show that his or her release will not in any way jeopardise the administration of justice.

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247 1998 (2) SACR 677 (SE). See also *S v Dreyer* 2014 (2) NR 414 (HC) where the court in considering bail pending appeal indicated that imprisonment should be the last resort as the right to liberty was important.

248 1969 (4) SA 175 (N) at 177H.

249 1965 (2) SA 161.

250 *Lukas v State* (CC 15/2013) [2013] NAHCMD 334 (13 November 2013) at para 10.

251 Case No. CA 119/2008, unreported judgement of the High Court of Namibia, delivered on 24 October 2008.

In *Boois v S* the court found that the applicant was not a flight risk but this itself did not entitle him to be admitted to bail.[252] The court reasoned that if an accused is charged with a serious case and if convicted, a substantial period of imprisonment is likely to be imposed; such factor alone entitles the court to refuse bail based on public interest or administration of justice.[253] The same approach was used in *Noble v S* where there court *a quo* found that the appellant was not a flight risk nor would he interfere with witnesses for the prosecution.[254] The court, in the *Noble* case, stated that public interest comes into being where there has been a public outcry or indignation over the commission of certain type of offences, in this case, the effect of drugs on the community.[255] The court reasoned such refusal is not punishment but only part of the process to enable the proper functioning of the administration of justice.[256]

In further support of this approach is the fact that the application of the traditional approach in this respect has not been effective in the circumstances presently prevailing in Namibia, to prevent the dramatic and grave escalation of crime and of instances where persons accused of serious crime have absconded. For this very reason, wider powers and responsibilities have been vested in courts to deal more effectively with the problem.[257]

In *S v du Plessis* the court emphasised that:

> The application of the provisions of s 61 cannot depend exclusively or even mainly on whether or not there was a `public outcry or indignation over the commission of certain types of offences or in respect of a particular offence', although of course an outcry if notorious or

252 *Boois v S* (CC 08/2016) [2017] NAHCMD 85 (16 March 2017) at para 26.
253 *Boois* case, para 27.
254 *Noble v S* (HC-MD-CRI-APP-CAL-2018/00079) [2019] NAHCMD 12 (5 February 2019) at para 30.
255 *Noble* case at para 31.
256 *Noble* case at para 36.
257 *Du Plessis* case at 86.

> clearly established, could be given some weight provided it is clear that it was or is spontaneous and not artificially induced or incited. But even then it can only be one of several indicators of what is to be regarded by a court as in the public interest or in the interest of the administration of justice. Certainly more weighty indicators of what is to be regarded as in the public interest or the interests of the administration of justice, are the pronouncements of the courts over a long period and of the Legislature, as crystallised in its legislation.[258]

The considerations as to what constitute public interest or administration of justice will differ from case to case. In *Jose Kambungura and Another v The State*[259]the court stated that in bail applications for a court to refuse bail, there must be credible evidence placed before it, showing a reasonable prospect that the accused will not stand trial or that the accused will interfere with witnesses or will in any other manner frustrate the cause of justice. The court further clarified the fact that the seriousness of the offence in itself has no relevance to the ultimate question of bail. If it did, custody pending trial will be a form of anticipatory punishment which is not permissible.[260]

3.7 Namibian court's approach to what constitute administration of justice

The court went on to state in the *Du Plessis* case that where there is a prima facie case shown that the accused is guilty of one or more of the serious crimes or offences listed in the aforesaid part IV of the second schedule or where at least the witnesses for the State testify that there is a strong case against the accused or the accused admits that he or she is guilty of such a crime or offence, then the court, after considering all the relevant circumstances, will be entitled to refuse bail, even if there is only a reasonable possibility that the accused will

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258 At page 84.

259 Unreported judgment of the High Court of Namibia, Case No. 67/2001delivered on 5 December 2001, at page 2.

260 At page 4. In *S v Yugin and Others* 2005 NR 196 (HC) at 200, the court stated that there is an incentive by an accused to abscond if the offence is so serious that it calls for a substantial period of imprisonment.

abscond or interfere with State witnesses or with the investigation.[261] This is one of the situations whereby the court is entitled to refuse bail based on administration of justice.

The court further emphasised the fact that when the investigation is not complete and/or where stolen goods or other exhibits have not yet been recovered in serious and/or where a large number of accused are involved and charged as co-accused in the same case, that the State's case against all or several accused will be severely prejudiced if one or more of the co-accused abscond.[262]

In such case there may even be a real danger that the accused persons, other than the particular applicant, or persons not yet detained, may interfere with the applicant if released, because the applicant's evidence should he testify in the trial, may be potentially very damaging to such other accused or person and in such a case it may very well be that it will be in the interest of the administration of justice not to take the risk to allow such applicant out on bail even where it is not likely or probable that applicant will abscond or himself interfere with State witnesses or with the prosecution.[263]

In *De Klerk* case, the applicant while on bail on a rape charge committed a crime of rape falling within the provisions of the Combating of Domestic Violence Act 4 of 2003. The court in denying bail on administration of justice indicated that the conduct of the accused of committing offences while on bail shows that he is a person who has little respect and therefore poses a threat to the interest of the administration of justice and this disqualifies him

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261 *Du Plessis* case page 84.

262 *Du Plessis* case page 85.

263 *Du Plessis* case page 85. See also *The State v Gariseb and Another*, Unreported Judgment of the High Court, Case No. CC16/2010, delivered on 3 November 2010 at para 15 where the court in denying bail to the accused indicated that based on the evidence placed before court, they were very dangerous accused persons and the public cannot feel safe with the two roaming the streets.

from obtaining his liberty as the state also had a strong case linking the accused directly to the crime committed.[264]

The more serious the offence is, the likelihood that the accused will be retained in custody pending his or her trial. In *Awaseb v S*[265]the court stated that the nature of the crimes committed and the strength of the state's case are extremely relevant during bail applications and in this case, the applicant faced multiple charges (murder, attempted murder and firearm offences) and therefore interest of administration of justice demand that he be retained in custody.[266]

In *Matali v S*[267] the applicant was denied bail in that that he was a flight risk as he is married to a foreign national and there was further evidence that they had travelled in and out of the borders of Namibia. The court also considered that the applicant is facing serious multiple charges (murder, robbery with aggravating circumstances and conspiracy to commit murder) and there is a likelihood for him to be sentenced to a longer term of imprisonment if convicted, thus that the more severe the sentence is likely to be imposed on him will tempt him to abscond and as a result the interests of justice will not be served. What is further important in the *Matali* case is that the likelihood of heavy sentence to be imposed should not be the only deciding factor, but the court need to consider the likelihood of conviction on

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264 *De Klerk* case, para 20. This same conclusion was reached in *Ilukena v The State* (Bail Application Judgment) (CC 06/2014) NAHCND 1 (16 JANUARY 2015); *Kennedy v State* (CA 23/2016) [2016] NAHCMD 163 (08 June 2016) and in *Pienaar v State* Case No: SA 13/2016, delivered on 13 February 2017.

265 (CC 8/2017) [2018] NAHCMD 128 (16 May 2018) at para 15. See also *Namiseb v State* (CC 19/2011) [2014] NAHCMD 251 (25 August 2014), where it was held that the allegations were very serious in nature, coupled with the fact that the victims were a defenceless elderly couple (aged 69 and 72 years old). It was held that it would not be in the interest of the public and the proper administration of justice to release the applicants on bail.

266 See *Kauejao v The State* (Ruling) (CC 06/2014) [2014] NAHCMD 316 (29 October 2014)also where the court refused bail based on fact that the state had a strong case and therefore the administration of justice demand that he be detained.

267 (Bail Application Ruling) (CC 17/2016) [2017] NAHCMD 295 (17 October 2017) at para 9. See also *Miguel v The State* (CA 11/2016) [2016] NAHCMD 175 (20 June 2016) where bail was refused because the applicants were considered a flight risk although during the bail application the state did not make out a case against them (investigation was likely to take longer because of the complexity of the case.

such charged by assessing the evidence adduced by the accused against the apparent strength of prosecution's case it intends to present at the trial.

In *Abraham Brown v The State*[268] appellant was refused bail based on public administration of justice in that since he had ties in South Africa, and the fact that the charge against the appellant of theft of motor vehicle was considered to be serious as it warrants a minimum imprisonment of five years without an option of a fine.

In *Dausab v The State*,[269] the court concluded that an accused who is charged with a serious offence like in this case where there is a strong case to answer does not justify the release of the accused based on the administration of justice. The court opined that:

> Any court hearing a bail application especially where the relevant offences are alleged to be serious and committed in brutal and violent circumstances should therefore carefully and fairly consider the question of the ever-present direct or collateral risk if an accused is released notwithstanding circumstances that warrant his remand in custody pending trial. Central to the role of the Judiciary is the protection of the integrity of the criminal justice system. When suspects evade justice following their release on bail, an injustices done to the law-abiding citizens in general, and to those who are directly affected by crimes.[270]

The above will ensure that the justice system is not frustrated by the release of accused persons who will frustrate prosecution of criminal prosecution against such an accused. Namandje, AJ in the *Dausab* case emphasised that the public has a sovereign and sacred interest in the proper functioning of the criminal justice system and should not be let down by

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268 Case No. CA 158/2003 delivered in the High Court of Namibia on 28 April 2004 by Silungwe J and Damaseb, AJ.

269 Case No.: 38/2009, Unreported Judgment of the High Court, delivered on 16 September 2010 at para 25. The court stated that the way the crimes were committed in this case (killing of two persons) were so brutal and therefore the court should not take a risk in releasing the accused.

270 *Dausab v State*, at para 5.

criminal suspects evading justice or commit further offences after being released on bail (this may lead to people taking the law into their own hands).[271]

However, the approach, to which I subscribe to, is the one in *Gadza v S* where the court reasoned that the question of *prima facie* case is a wrong criterion for a bail application as this is applicable in the trial after the state has closed its case.[272] This approach in my view should be a consideration in all bail applications in order to give substance to the presumption of innocence.

In *Endjala v State* the court reasoned that murder is a serious offence and giving bail in such cases, would undermine the proper functioning of the bail system especially if police investigations had not yet been completed.[273] In *Gowaseb v S*, the court stated that gender based violence has reached a crisis point in Namibia and the court has a duty to ensure that justice prevail by denying bail as it will not be in the interest of the administration of justice.[274]

The court in *Onesmus v The State*[275] released the applicant on bail reasoning that it is not in the administration of justice to be kept in custody for 4 years and 6 months where his co-accused are the cause of delay in finalizing the case. In this case, the court after assessing all facts concluded that applicant has proved his case on a balance of probability that he will stand trial and cannot interfere with state witnesses.

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271 *Dausab* case at para 5.

272 *Gadza v S* (CA 55/2016) [2017] NAHCNLD 31 (11 April 2017) at para 24.

273 *Endjala v State* (CA 17-2016) [2016] NAHCMD 182 (24 June 2016) at para 9.

274 *Gowaseb v S* (HC-MD-CRI-APP-CALL-2018/00021) [2018] NAHCMD 369 (20 November 2018) at para 16. The court in *Nicodemus v S* (CC 15/2017) [2018] NAHCMD 331 (19 October 2018) also refused bail to an accused who was charged with two counts of murder committed in a domestic setting.

275 (Bail Application Judgment) (CC 14/2012) 2016 NAHCND 20 (10 March 2016).

In *Tjizu v S* [276] the court denied bail by stating that the likelihood of interference by the appellant was real and even the imposition of bail conditions could not curtail this and thus in safeguarding the proper administration of justice, bail was denied.

3.8 Namibian court's approach to what constitutes public interest

Similarly, what constitute public interest was elaborated in *Charlotte Helena Botha v The State*.[277] The court stated that when accused person is alleged to be dangerous, or having committed brutal and callous murder(s) or robbery using dangerous weapons or rape where serious injuries were inflicted or where a small child had been raped or where the accused is a habitual criminal or where he has a personality of being violent, dangerous and uncontrollable without warning and at slight provocation, his release creates a legitimate fear in the victims' minds even if there is no proof that, that would occur.

It may be created in the minds of the public that the police, the courts and the state is unable and unwilling to protect them. This fear has become real especially that the state is compelled to disclose case dockets including witness statements to the accused. The public will thus fear that they are not safe because they might become victims of the same accused. The court further emphasized that the public needs to be protected and not to be exposed to such dangers and risks and the said perceptions should be avoided by considering all factors in bail proceedings provided that the relevant facts are placed before the judicial officer. [278]

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276 (Judgment) (CA 01/2017) [2017] NAHCMD 131 (08 May 2017). This case concerned a public prosecutor who was charged with various counts of corruption.

277 Unreported judgment of the High Court of Namibia, Case No. 70/1995 at page 23. See also *Dausab v The State* Case No.: 38/2009, Unreported Judgment of the High Court, delivered on 16 September 2010 at para 25 where the court concluded that an accused who is charged with a serious offence like in this case where there is a strong case to answer does not justify the release of the accused based on the administration of justice.

278 See further *Timotheus Joseph v State*, Case No. 63/1995 Unreported judgment of the High Court of Namibia, delivered on 11 August 1995, at page 6. In *Charlotte Helena Botha vs The State* at page 25 the court stated that there must be proof as to why an accused should be detained as the accused has constitutional rights enshrined in the Constitution.

The court further stated that:

> The legal convictions of the community, in my view, will hold that an accused person should not be released on bail in the situations … provided there is *prima facie* proof against such person that he or she has committed the type of serious crime … and is therefore in the opinion of the court, a potential threat to the victims or to other innocent members of society or is perceived by them on reasonable grounds to be such a threat.[279]

The court in *De Klerk* case stated that in considering what constitute public interest, the court has to assess the situation under which the offence was committed and whether the public needs to be protected from such an offender and the fact whether there were public outcry in relation to the offence committed and then decide whether the public interest is an important component whether bail should be granted or not.[280]

The applicant in the *De Klerk* matter was charged with a case falling under domestic violence and the court outlined how the principle of public interest can be applied by stating as follows:

> The nature of the crimes and the circumstances under which it was committed. Looking at the manner in which the present crimes were committed, it is evident that this was a callous act in which a young vulnerable girl had been brutally violated and murdered. This country at present suffers an unprecedented wave of violent crime committed against the most vulnerable in society. Women and children as a class of persons constituting a significant portion of society, have the most immediate, compelling and direct interest that the court protect them against those in society who has no respect for the rights to life, dignity and integrity of others, rights which are enshrined in our Constitution. Women are entitled to demand that these rights are upheld by the courts who, in circumstances as the present, must be alive to protect these rights even at pre-trial stage. The public cannot be left at the mercy of

279 *Charlotte Helena Botha vs The State*, page 24 of the record.
280 At para 19.

> merciless criminals where neither the police nor the courts can effectively protect them. To this end, public interest becomes an important factor and where there is proper evidence before the court in support thereof, this may lead to the refusal of bail even if the possibility of abscondment or interference with State witnesses is remote.

In trying to elaborate what may constitute public interest, the court in *Shekundja v S* held that:

> It has been long settled in our law that public interest may, in appropriate circumstances, demand that where there is a strong *prima facie* case of murder against the applicant such person may not be released on bail because of the potential threat to the other members of the society. Put differently, bail may be refused if there is strong *prima facie* evidence to suggest that the applicant has committed the type of a serious crime which if released on bail, may on reasonable grounds be perceived as a potential threat not only by the members of the public generally, but also by the victims or survivors of his or her alleged crimes. Similarly, the applicant's admission to bail may be denied if his release on bail will create a legitimate fear in the minds of the victims that such crimes may be repeated against them even if there is no proof that that would be the case.[281]

In the case of *Mumbango v S*, the suspect had admitted during bail application that it was he who provided his own ear tags and brand marks to be placed on suspected stolen cattle.[282] Since the suspect was denied bail in the court *a quo*, he appealed to the High Court. The High Court stated that if the trial court had granted bail to the appellant that in itself would have created a legitimate fear in the minds of the victims (cattle owners) that such crimes may be repeated even if there is no proof that it would be the case.[283]

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281 *Shekundja v S* (CC19/2017) [2018] NAHCMD 374 (22 November 2018) at para 15.

282 *Mumbango v S* (CA 55/2017) [2017] NAHCMD 215 (09 August 2017).

283 *Mumbango v S* case, para 7. The court reasoned further (at para 8) that a perception that the police and the courts are unable and unwilling to protect the community would have been appropriate if bail was granted. This would be the case because the community and the public out there would clearly have seen that a suspect who is on bail need not behave. They would have observed that it did not matter even if he is arrested on fresh allegations similar to those on which he has already been granted bail, he will continuously be released on bail and nothing would happen to him.

In *Tjizu v S*[284] bail was refused based on public interest. The court stated in trying to define what might constitute public interest stated that there is no need that there should have been petitions or public demonstration against the granting of bail.[285] The public had interest in the case by virtue of the fact that the appellant held public office and therefore an interest in the case arises.[286] However, the court cautioned itself against the reliance to refuse bail because he occupied public office by emphasising that section 61 of the CPAA requires 'something more tangible for a court to refuse bail simply because the offender holds a public office'.[287]

In *Matias Nafuka v The State*[288] the court denied bail despite the fact that accused satisfied all requirements to be released on bail. The reasoning of the court being that the case involved a minor which was in the setting of domestic violence.[289] The court stated that the public had interest where rights of women and children were disregarded and the courts were duty bound to protect them and therefore it will be an injustice to admit appellant on bail as even the attachment of bail conditions would not suffice.[290]

In *Ganeb v State*[291] the court denied bail based on public interest having regard to the brutal way in which the deceased boys met their death. This was based on the fact that the appellant had no regard for human life by having regard to the exhibits such as photos which were handed up depicting how gruesome the murders were committed.

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284 (Judgment) (CA 01/2017) [2017] NAHCMD 131 (08 May 2017).
285 *Tjizu* case at para 19.
286 Ibid.
287 Ibid.
288 Unreported Judgment of the High Court of Namibia, Case No. CA 18/2012 delivered on 26 June 2012 by Liebenberg J and Tommasi, J.
289 *Nafuka* case at para 29.
290 *Nafuka* case at para 29. The court found that based on the evidence presented, appellant had previously shown signs of being a violent person and hence the late reporting of the crime in question (at para 22).
291 (CC 3/2016) [2016] NAHCMD 309 (06 October 2016) at para 38.

In *Solomon Hlalela and Two Others v The State*[292]the dictum was stated that where there is a likelihood that a substantial term of imprisonment is likely to be imposed, that in itself alone is sufficient to permit the magistrate to form the opinion that it will not be in the interests of either the public or the administration of justice to release the appellants on bail, particularly in a case where apparently the police investigations into the matter had not yet been completed.[293]

In *Eichhoff v State*[294] the court upheld the state's submission that a finding that an appellant is a flight risk is one of the factors to be taken into account in determining whether in the interest of the public or administration of justice the applicant should be retained in custody pending his or her trial.

The public should feel protected by the law enforcement agencies and the commission of offences by these members of the law enforcement agencies against civilians demands a stricter approach to bail. This was what the court found in *S v Gideon Andreas Hashiyana*[295] where it was stated that:

> I respectfully agree with the State counsel's submission that it is in the interest of the public when an officer uses a firearm to kill a member of public and because such condition is diametrically opposed to what a police officer is supposed to do i.e. to protect society, these

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292 Unreported judgment of the High Court of Namibia, Case No. 89/1995 delivered on 04 December 1995.

293 At page 46. In *Johannes Gaseb v The State* Case No. CA 157/06, Unreported Judgment of the High Court delivered on 11 May 2007 by Parker, J and Manyarara, AJ at para 10, the court argued that sexual assault on women and children were a great concern and therefore public interest in granting or denying bail should be considered.

294 CA 26/2014) [2014] NAHCMD 154 (9 May 2014) at para. In *Ephraim Kariko v State* Case No: CC 18/2009, Unreported Judgment of the High Court delivered on 08 July 2009 by Hinda, AJ where the court granted bail arguing that public interest demands that he be released on bail as he discharged the onus required in terms of law. Although the accused in this case was charged with serious offences such as murder and robbery, he was released on bail, which was later cancelled, and the appeal court concluded that during the period he was on bail, he did not at all interfere with investigations. Further to this, the court considered the fact that the appellant had some defences to the charges which was for the trial court to decide.

295 Unreported Judgment of the High Court of Namibia, CC 04/2010 delivered on 29/03/2010 by Liebenberg, J at para 15. This case was about a member of the police force who was charged with murder and attempted murder.

> cases do receive a lot of attention from public whom ultimately want to see justice to be done. To achieve that, justice system must not fail them and courts must as far as possible strike a balance between the rights of the accused on the one hand and public interest and the administration of justice on the other. In my view, there is sufficient reason to come to the conclusion that it would not be in the interest of the public or administration of justice to release accused on bail pending his trial which is due to start in the near future

Clearly, from above, the duty of a police officer is to serve and protect and once they commit murders such as in the above case, their release will undermine the proper administration of justice or public interest.

3.9 Conclusion

It is clear therefore clear that the release of an accused person has now turned into non-financial considerations such as the risk of fleeing, committing further crimes or tampering with evidence.[296] This therefore means that if the risk is substantially high, release can be denied all together or less strict measures can be employed.[297]

Sight should not be lost in that perception exists in some circles that the fundamental right to a fair trial focuses exclusively on the rights and privileges of accused persons. These rights, however, must be interpreted and given effect to in the context of the rights and interests of the law-abiding persons in society and particularly the persons who are victims of crime, many of whom may be unable to protect themselves or their interests because they are dead or otherwise incapacitated in the course of crimes committed against them.[298]

In *Timotheus* case, the court emphasised that fundamental rights are not absolute and must be viewed and considered subject to exceptions. There are obviously limitations to these

296 Foote (1965: 963).
297 Ibid.
298 *S v Van den Berg* 1995 NR 23 (HC) at page 33.

fundamental rights. An example is article 7 of the Namibian Constitution, which provides that 'no persons shall be deprived of personal liberty except according to procedures established by law. However, article 11 provides for deprivation of one's liberty by 'arrest and detention' provided certain specified safeguards are met. Thus, any rights that a person has must therefore be read in conjunction with other provisions of the Constitution, which provide for the protection of the fundamental rights of all the citizens or subjects.

In *Valombola v The State*[299] the court in dismissing an appeal for refusal of bail stated that since rights are not absolute in nature, the court *a quo* cannot be said to have infringed the appellant's rights by refusing to admit him to bail as these fundamental rights enshrined in our Constitution are not absolute. It must be noted that it was also inherent in the Namibian Constitution that the State must protect its subject, as well as the Constitution, by combating crime, by apprehending alleged criminals and taking all reasonable steps to ensure that they will stand their trial. The fundamental right to a fair trial contained in article 12 will be jeopardised if the trial itself could not take place because the accused had absconded.[300]

299 CA 93/2013 [2013] NAMHCMD 279 (9 September 2013).
300 *Du Plessis* case, page 75.

CHAPTER 4

CANADIAN AND SOUTH AFRICAN PERSPECTIVE ON BAIL

4.1 Introduction

This chapter examines the legal regime on bail both under Canadian and South African law. The chapter further analyses the interpretations that the courts have used in determining what constitutes administration of justice or public interest in either granting or denying bail to a person charged with an offence.

4.2 Canadian law

This part will concentrate on the issue of bail in terms of Canadian law by looking at the relevant legislation governing bail and the judicial pronouncements that have been made pertaining to bail. These judicial pronouncements are refusal based on public interest and or just cause as well as the refusal of bail based on administration of justice or the issue of maintaining confidence in the criminal justice system.

4.2.1 Legislative framework

The right to be presumed innocent is a fundamental right in Canada just like under other jurisdictions.[301] Thus, it has been argued that the presumption of innocence:

> …has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognised as an essential element of a system for the

[301] De Villiers, W (2002) "The operation of the presumption of innocence and its role in bail proceedings under Canadian and South African law (part 1)" *De Jure* 92-108 at 92. See also Heerema, M (2005) "Uncovering the Presumption of *Factual* Innocence in Canadian Law: A Theoretical Model for the Pre-Change Presumption of Innocence" *The Dalhousie Law Journal*, vol. 28, 443-472.

> administration of justice, which is founded upon a belief in the dignity and worth of the human person and on the rule of law.[302]

This implies that since a charge is not a proven fact but merely an allegation, it is insufficient to interfere with the rights of individuals and generally, an accused has the right to be freed from detention and punishment before conviction.[303] As it has been demonstrated under the historical context of bail, in Canada the concept of 'just cause' to deny an accused bail was limited to secure attendance of accused at trial but the decision in *R v. Phillips*[304] brought preventative detention as an independent basis to consider whether to grant bail or not.[305]

By 1869 already, bail was discretionary in Canada for all offences.[306] In deciding whether to release the accused, courts considered factors such as the need to ensure the accused's attendance in court, the nature of the offence, the severity of the penalty, the evidence against the accused, and the character of the accused.[307]

In 1972, the Bail Reform Act[308] codified the reasons for keeping an accused in custody: to ensure the accused's attendance in court; as protection against criminal offences before the trial; in the public interest.

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302 McLellan, MF (2010) "Bail and the Diminishing Presumption of Innocence" *Canadian Criminal Law Review*, Vol. 15(1), 57-74 at 58.

303 Ibid.

304 (1947), 32 Cr.App.Rep. 47 (C.C.A.). See McLellan (2010: 58).

305 See Metzmeier, KX (1996) "A Comparison of Bail Refusal Practices in the United States, England, Canada and Other Common Law Nations" *Pace International Law Review*, vol. 8(2), 399-438 at 417-423.

306 Valiquet, D 2007 bill c-35: *An act to amend the Criminal Code* (reverse onus in bail hearings for firearm-related offences). Parliamentary Information and Research Service https://lop.parl.ca/Content/LOP/LegislativeSummaries/39/1/c35-e.pdf (accessed 08/03/2018). See also Roach, K (1999) "The Effects of the Canadian Charter of Rights on Criminal Justice" *Israel Law Review*, vol. 33, 607-637 at 610 and Kiselbach, D (1989) "Pre-trial Criminal Procedure: Preventive Detention and the Presumption of Innocence" *Criminal Law Quarterly*, vol. 3, 168-196 at 1169.

307 Ibid.

308 Bail Reform Act, S.C. 1970-71-72, c. 37.

Subsequent laws have been passed to address the question of bail such as the Criminal Code of Canada.[309] The *Criminal Code of Canada* under section 515(10) titled justification for detention in custody sets grounds upon which a justice of peace might detain a suspect.[310]

Furthermore, *Canadian Charter of Rights and Freedoms* (The Charter)[311] outlines under section 11(e) that any person charged with an offence has the right '*not to be denied reasonable bail without just cause*.' The Charter further reiterates the right to be presumed innocent[312] and everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.[313]

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309 Criminal Code, RSC 1985, c C-46.

310 Criminal Code, RSC 1985, c C-46, <http://canlii.ca/t/532qx> retrieved on 2018-03-08. These grounds are:

(a) where the detention is necessary to ensure his or her attendance in court in order to be dealt with according to law;

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

(c) if the detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances, including

(i) the apparent strength of the prosecution's case,

(ii) the gravity of the offence,

(iii) the circumstances surrounding the commission of the offence, including whether a firearm was used, and

(iv) the fact that the accused is liable, on conviction, for a potentially lengthy term of imprisonment or, in the case of an offence that involves, or whose subject-matter is, a firearm, a minimum punishment of imprisonment for a term of three years or more.

311 *The Constitution Act, 1982,* being schedule B to the Canada Act 1982 (U.K.), 1982, c.1. Available at http://laws-lois.justice.gc.ca/eng/Const/page-15.html (accessed 08/03/2018). This provision is similar to section 2(f) of the *Canadian Bill of Rights* which also provides that a person charged with a criminal offence is not to be deprived of the right to reasonable bail without just cause.

312 Section 11(d) provide that any persons charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

313 Section 7. However, section 469 of the *Criminal Code* outlines offences where accused should show cause why he should be released. These offences are: treason; alarming Her Majesty intimidating Parliament or a legislature; inciting to mutiny, seditious offences, piracy, piratical acts, or murder; the offence of being an accessory after the fact to high treason or treason or murder; an offence under section 119 (bribery) by the holder of a judicial office; an offence under any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act* etc. See further *R v. Sanchez* 1999 CanLII 4220 (NS CA).

These provisions according to De Villiers entitles an accused to be released on bail unless the contrary is proved.[314]

4. 3 Judicial Interpretation in Canada

Section 515 of the *Canadian Criminal Code* has been interpreted to encompass two grounds of refusal; the primary ground being that of ensuring the attendance of the accused before court and if detention is not justified on this ground then the secondary ground of detention based on public interest then comes into play.[315]

In *R v. Thomson*[316] the court laid down the general principle that bail can be denied where such accused is a danger to society and the offence itself will merit a long custodial sentence. The court reasoned that ordinarily, bail would be granted to an accused person because this is guaranteed in section 11(e) of the Charter that no one shall be denied reasonable bail without just cause and thus public opinion should not count.[317]

In *R v. Blind*[318] the court stated that it is not sufficient to show that the charges are grave, potential punishment will be lengthy, and that the Crown has a strong case. There must be something more in order to override the presumption of innocence and the right to trial before punishment.[319] There is a residual discretion to detain, but it is only in rare cases that it would arise where detention was not justified under the first two criteria under section 515(10).

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314 De Villiers, W (2004) "The scope of the right to bail provided for by section 11(e) of the Canadian Charter and section 35(1)(f) of the Constitution (part 3)" *De Jure* 66-84 at 66. See further *R v. Sanchez* 1999 CanLII 4220 (NS CA) at para 7 where the court stated that under the Charter a person who is charged with an offence is entitled to reasonable bail unless the Crown can show just cause for a continuance of his detention.

315 Raifeartaigh (1997:10).

316 2004 CanLII 17255 (ON SC) at para 5.

317 *R v. Thomson* case at para 9.

318 1999 CanLII 12035 (SK CA).

319 *R v Blind* at para 16.

4.3.1 Canadian court's approach on public interest and/or just cause

In R v Morales[320] the court stated that detention is necessary in the public interest or for the protection or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will, if he is released from custody, commit a criminal offence or interfere with the administration of justice.[321]

The court in *R v. Morales* defined public interest as follows:

> "Public interest" involves many considerations, not the least of which is the "public image" of the *Criminal Code*, the *Bail Reform Act amendments*, the apprehension and conviction of criminals, the attempts at deterrence of crime, and ultimately the protection of what overwhelming percentage of citizens of Canada who are not only socially conscious but law-abiding.[322]

In *Morales*, the court considered the validity of section 515(10) (b) which allowed detention where there is a possibility of committing further offences and found that the restriction did not offend the provisions of *Charter*. In the *Morales* case, the court stated that:

> Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public". Moreover, detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous.[323]

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320 *R v. Morales* [1992] 3 S.C.R. 711.
321 *Morales* case at page 736 of the judgment.
322 At page 730 of the judgment where the court quoted this definition from the case of *Re Powers and the Queen* (1972), 9 C.C.C. (2d) 533 (Ont. H.C.) at page 544-545.
323 *Morales* case at page 737 of the judgment.

While s. 515(6) (d) provides for persons to be "detained" within the meaning of section 9[324] of the *Charter*, those persons are not detained "arbitrarily". The court found that the "public interest" component violated the accused right not to be denied bail under section 11(e) of the *Charter*.[325]

The court found that the phrase "in the public interest" was vague and imprecise, and so could not be used to frame a legal debate that could produce a structured rule.[326] The reasoning of court seems to be based on the fact that in the absence of legal criteria set as to what might constitute public interest, it might be difficulty for the judiciary to reach a just decision.[327] Thus, the phrase “public interest” violated the doctrine of vagueness and authorized detention without "just cause" and therefore not rationally connected to pre-trial detention.[328]

In the case of *R v. Bagri*[329] the accused was alleged to have committed murder, conspiracy to commit murder, and attempted murder in connection with terrorist attacks and a plot to kill a political opponent.[330] The nature of the offence committed couples with strong evidence against the accused and the manner the offence was committed made the court to conclude that any reasonable, fair-minded person, aware of all these circumstances, including the curves and bumps in the evidence, and cognizant of the presumption of innocence, would not have confidence in the justice system if the accused were released from custody.[331]

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324 This section of the Charter provides that everyone has the right not to be arbitrarily detained or imprisoned.

325 This section requires just cause as a basis to deny bail.

326 *Morarels* case at page 726-727 of the judgment.

327 See *R v. Morales* at page 727 of the judgment where the court opined that such kind of vague law violates section 7 of the Charter which provide that everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. A vague law does not provide fair notice to the citizen and might give wide discretion to courts.

328 *Morales* case at page 734 of the judgment.

329 2001 BCCA 273 (CanLII).

330 *Bagri* case at para 1 and 11.

331 *Bagri* case at para 21.

The court reasoned that there is greater chance and opportunity, by detaining the accused, that the proper administration of justice will not be compromised.[332]Thus, the court reasoned that the more serious the crime, the more the perpetrator's participation is characterized by planning and the commission of the most violent acts (as was the case in question), the greater the risk for society. [333]

Since public interest permitted a 'standardless sweep'[334] in denying bail, parliament introduced the *Criminal Law Improvement Act*[335] by incorporating a provision (under section 515(10) of the *Criminal Code*) to deny bail on any other just cause being shown where the detention is necessary in order to maintain confidence in the administration of justice, having regard to all of the circumstances, including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.[336]

The use of 'just cause' in terms of the Charter is a standard on which to grant or deny bail by courts. De Villiers argues that the just cause principle is designed to ensure that people who are accused of committing offences are released unless the state show cause why such an accused should not be released.[337]

The Supreme Court in *R .v. Pearson*[338]and in the case *R .v. Morales*[339] interpreted the application of section 11(e) of the Charter.[340] Both cases involve the constitutionality of the

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332 *Bagri* case at para 6.

333 *Bagri* case at para 8.

334 *Morales* case at page 728 of the judgment. See also the case of *R v. Thomson* at para 36.

335 1996, S.C. 1997, c.18, s.59.

336 These standards set in terms of section 515(10) are deemed to be public interest grounds upon which bail can be denied or granted as was stated in *R v. Nguyen* 1997 CanLII 10835 (BC CA) at para 6.

337 De Villiers, W (2003) "The scope of the right to bail provided for by section 11(e) of the Canadian Charter and section 35(1)(f) of the Constitution (part 1)" *De Jure* 48-70 at 67. See further section 515(10) in expanding the basic entitlement to bail establishes grounds under which an accused might be denied bail.

338 [1992] 3 S.C.R. 665. In this case where the accused was charged with five counts of trafficking in narcotics, the court said that if there is a substantial likelihood that the accused will engage in criminal

bail provisions of the *Criminal Code* and for the first time required the court to examine the scope of the right to bail under section 11(e) of the *Charter*.

Morales was being investigated in his participation in a cocaine importation ring in Canada. At his bail hearing, the judge denied his release and ordered him to be detained until the trial. The detention was based on section 515 of the Code,[341] which allowed detention where it is necessary in the public interest or for the protection, or safety of the public, having regard to all the circumstances including any substantial likelihood that the accused will commit a criminal offence or interfere with the administration of justice.

In the *Pearson* case, the court stated that section 11 (e) of the Charter creates a broad right guaranteeing both the right to obtain bail and the right to have that bail set on reasonable terms. The meaning of "bail" in section 11 (e) includes all forms of judicial interim release. While section 515(6)(d) of the Criminal Code requires the accused to demonstrate that detention is not justified, thereby denying the basic entitlement under section 11 (e) of the Charter to be granted bail unless pre-trial detention is justified by the prosecution, it provides "just cause" to deny bail in certain circumstances and therefore does not violate section 11 (e).

The court outlined the fact that the section has two elements: namely the right to reasonable bail and other conditions that impose restrictions on an accused's liberty and also the right not to be denied bail without just cause in that the section impose constraints on the criteria by

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activity pending trial, it furthers the objectives of the bail system to deny bail. See further *R v. Reddick* 2016 NSSC 228 (CanLII) where an accused who was on bail was ordered back in custody because of committing further offences.

339 [1992] 3 S.C.R. 711.

340 Provides that any person charged with an offence has the right "not to be denied reasonable bail without just cause."

341 The section provides for judicial interim release of an accused unless there is good cause shown.

which bail is granted is granted or denied.[342] The 'just cause' denial of bail is a constitutional standard to be met when granting or denying bail.[343]

The court stated that in respect of what constitutes 'just cause' denial of bail is allowed if such denial is in respect of narrow set of circumstances and also if such denial is to ensure the proper functioning of the bail system.[344] The existence of the special rules to deny bail the court reasoned, was due to the fact that the normal considerations in bail hearings were incapable of functioning properly.[345]

The majority of the Supreme Court in *Pearson* found that there were reasons for a more rigorous approach to bail in relation to drug traffickers in that they are a flight risk and have money from their drug operations that makes it likely that they will abscond once granted bail.[346] In considering the above, the court concluded that the administration of justice is likely to be prejudiced and thus bail was not denied [347]without "just cause".

4.3.2 Canadian court's approach on what constitute public confidence in the administration of justice

In the case of *R v. Oland*[348]the court outlined that what constitute public confidence in the administration of justice in terms of section 515(10)(c)[349] in that the risk of flight and public safety are some of the paramount considerations that the court have to look at.[350] This

342 Page 689 of the judgment.
343 *Pearson* case, page 689 of the judgment.
344 Ibid, page 693 of the judgment.
345 Ibid.
346 Ibid, page 696 of the judgment.
347 Ibid, page 700 of the judgment.
348 [2017] 1 S.C.R 250 at page 251.
349 Factors to consider include the fact that the state has a strong case, gravity of the offence and how it was committed and the likelihood of sentence to be imposed.
350 *R v. Oland* at para 39-40 of the judgment.

assessment should be done based on a reasonable member of the public who respects society's fundamental values.[351]

In *R v. AB*[352] which dealt with gun possession, the question that the court had to decide was whether to maintain public confidence in the administration of justice, persons charged with offences involving firearms must be denied bail, even when they pose no risk of absconding or committing further offences if released.[353]

The court stated that denial of bail was justified on tertiary grounds in that the state had a strong case against A.B. and if convicted he could be sentenced to a long term of imprisonment.[354] Furthermore, the court concluded that there has been a lot of media attention that focused on guns and violence and therefore to release the defendant would cause any reasonable, thinking person in this community to be shocked and appalled.[355] The court stressed the fact that denial of bail should not be based on public opinion, as people tend to adopt an emotional attitude towards criminals.[356]

In *R v. Hall*[357] the Supreme Court was once again called upon to give an interpretation of section 515(10) (c) of the *Criminal Code*. In the *Hall* case, the court outlined the implications of section 11(e) of the Charter in that:

> Section 11(e) of the Canadian Charter of Rights and Freedoms calls particularly on courts, as guardians of liberty, to ensure that pre-trial release remains the norm rather than the exception to the norm, and to restrict pre-trial detention to only those circumstances where the

351 *Oland* case at para 69.
352 2006 CanLII 2765 (ON SC).
353 *R v. AB* at para 7.
354 At para 8. See further *R v. Bhullah* 2005 BCCA 409 (CanLII) at para 31.
355 *R v. AB* at para 17 and para 28.
356 *R v. AB* at para 18.
357 [2002] 3 S.C.R. 309.

> fundamental rights and freedoms of the accused must be overridden in order to preserve some demonstrably pressing societal interest.[358]

The facts of *Hall* were briefly as follows: In 1999, a woman's body was found with 37 wounds to her hands, forearms, shoulder, neck and face. Her assailant had tried to cut off her head. The murder caused significant public concern and a general fear that a killer was at large. Based on compelling evidence linking the accused to the crime, he was charged with first-degree murder. He applied for bail. The bail judge held that pre-trial detention was not necessary "to ensure . . . attendance in court" nor for the "safety of the public". He denied bail, however, under s. 515(10) (c) in order "to maintain confidence in the administration of justice" in view of the highly charged aftermath of the murder, the strong evidence implicating the accused.[359] The court emphasised the fact that to allow an accused to be released into the community on bail in the face of a heinous crime and overwhelming evidence may erode the public's confidence in the administration of justice.

The portion of s. 515(10) (c) permitting detention "on any other just cause being shown" is unconstitutional. Because the impugned phrase confers an open-ended judicial discretion to refuse bail, it is inconsistent with both s. 11 (e) of the *Canadian Charter of Rights and Freedoms* , which guarantees a right "not to be denied reasonable bail without just cause", and the presumption of innocence.

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358 At para 12. It is in this same judgment where the court stated that the role of every court is to staunchly uphold constitutional standards especially when the public mood is one which encourages increased punishment of those accused of criminal acts and where mounting pressure is placed on the liberty interest of these individuals. Courts must be bulwarks against the tides of public opinion that threaten to invade these cherished values. Although this may well cost courts popularity in some quarters, which can hardly justify a failure to uphold fundamental freedoms and liberty.

359 *Hall* case at page 310.

The court in conclusion stated that:

> Section 515(10)(c) sets out specific factors which delineate a narrow set of circumstances under which bail can be denied on the basis of maintaining confidence in the administration of justice. . . . [S]ituations may arise where, despite the fact the accused is not likely to abscond or commit further crimes while awaiting trial, his presence in the community will call into question the public's confidence in the administration of justice. Whether such a situation has arisen is judged by all the circumstances, but in particular the four factors that Parliament has set out in s. 515(10)—the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for lengthy imprisonment. Where, as here, the crime is horrific, inexplicable, and strongly linked to the accused, a justice system that cannot detain the accused risks losing the public confidence upon which the bail system and the justice system as a whole repose.[360]

One would subscribe to the outline made in the case of *R v. St-Cloud*[361]where the court outlined four crucial factors determining whether the detention of an accused is necessary to maintain confidence in the administration of justice, namely the justice must determine the apparent strength of the prosecution's case[362]; the objective gravity of the offence in comparison with the other offences in the *Criminal Code*[363]; the justice must then consider the circumstances surrounding the commission of the offence, including whether a firearm

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360 *Hall* Judgment, pages 40-41.

361 [2015] 2 S.C.R.

362 The prosecutor is not required to prove beyond a reasonable doubt that the accused committed the offence, and the justice must be careful not to play the role of trial judge or jury: matters such as the credibility of witnesses and the reliability of scientific evidence must be analysed at trial, not at the release hearing. The justice must nevertheless consider the quality of the evidence tendered by the prosecutor in order to determine the weight to be given to this circumstance in his or her balancing exercise. The justice must also consider any defence raised by the accused. If there appears to be some basis for the defence, the justice must take this into account in analysing the apparent strength of the prosecution's case (*R v. St-Cloud* case at page 330 of the judgment).

363 This is assessed on the basis of the maximum sentence — and the minimum sentence, if any— provided for in the *Criminal Code* for the offence.

was used[364] and the fourth circumstance to consider is the fact that the accused is liable for a potentially lengthy term of imprisonment.[365]

The court further outlined the fact that:

> …balancing of all the circumstances under s. 515(10)(*c*) must always be guided by the perspective of the "public", that is, of a reasonable person. The person in question is a thoughtful person, not one who is prone to emotional reactions, whose knowledge of the circumstances of the case is inaccurate or who disagrees with our society's fundamental values. However, this person is not a legal expert, and, although he or she is aware of the importance of the presumption of innocence and the righto liberty in our society, expects that someone charged with crime will be tried within a reasonable period of time, and knows that a criminal offence requires proof of culpable intent and that the purpose of certain defences is to show the absence of such intent, the person is not able to appreciate the subtleties of the various defences that are available to the accused. This reasonable person's confidence in the administration of justice may be undermined not only if a court declines to order detention where detention is justified having regard to the circumstances of the case, but also if it orders detention where detention is not justified.[366]

Detention will be justified on the 'just cause ground' if sufficient reasons are placed before court that in a way justifies the deprivation of personal liberty.[367] Anything that falls short of

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364 Those that might be relevant under s. 515(10)(*c*) include the following: the fact that the offence is a violent, heinous or hateful one, that it was committed in a context involving domestic violence, a criminal gang or a terrorist organization, or that the victim was a vulnerable person. If the offence was committed by several people, the extent to which the accused participated in it may be relevant. The aggravating or mitigating factors that are considered by courts for sentencing purposes can also be taken into account (*R v. St-Cloud* case at page 330 of the judgment).

365 These factors are substantive considerations that the court must be able to look at if denial of bail is based on the confidence in the administration of justice.

366 At page 331 of the judgment.

367 Ballard, C (2012) "A Statute of liberty? The right to bail and a case for legislative reform" *South African Journal of Criminal Justice*, vol. 1, 24-43 at 28.

safeguarding public interest and integrity of the criminal justice system should warrant the release of an individual from detention.

4.4 South African law

This part of the research looks at the framework of law of South Africa and the pronouncements of courts on what amounts to refusal of bail based on the concept of interest of justice that encompasses both public interest and administration of justice.

4.4.1 Legislative framework

Section 35(1) (f) of the Constitution of the Republic of South Africa, 1996 determines the issue of bail as follows:

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

The words, released from detention according to De Villiers indicates that there is an entitlement to be released from detention but this is not a standalone provision as it has to be read with the limitation clause.[368]

Although the 1996 Constitution did not make reference to bail, the clause itself finds application in that an accused could be released taking into account whether the interests of justice permits.[369] The court in *S v Tshabalala*[370] emphasised that the words interest of justice should bear a wider meaning to involve an assessment of the right to personal freedom and the prejudice that such person might suffer if detained.

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368 De Villiers, W (2003) "The scope of the right to bail provided for by section 11(e) of the Canadian Charter and section 35(1) (f) of the Constitution (part 2)" *De Jure*, 386-396 at page 395.

369 Ibid, 395-396.

370 1998 (2) SACR 259 (C).

Section 60(1) (a) of the Criminal Procedure Second Amendment Act (CPSAA)[371] as amended provides the following in this regard:

> An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit.[372]

The above provision implies that the state has a burden of leading evidence to show that the interest of justice demand that the accused be kept in custody.[373] If the state fails to satisfy the court that the interest of justice justifies further incarceration of the accused, then the accused should be released as the mere submission by the prosecutor will not suffice in this regard.[374]

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371 Act 75 of 1995. This amended certain provisions of the Criminal Procedure Act 51 of 1977.

372 Section 50(6) provides in order to determine under what circumstances it will not be in the interests of justice to release an accused person from detention, the stipulations of Section 60(4)(a) to (e) of the Act should be considered, which read as follows:

(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

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

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

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

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

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security."

373 Viljoen, F (1994) "The Impact of fundamental rights on criminal justice under the interim constitution (pre-trial to prison)" *De Jure*, 231-251 at 235. See also *S v Tshabalala* 1998 (2) SACR 259 (C) at 256. However, section 60 (11) (a) of the CPSAA provides that notwithstanding any provision of this Act, where an accused is charged with an offence referred to in schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release.

374 Ibid. Schedule 6 requires that accused should show exceptional circumstances why he should be released and this include the following offences: Treason Murder. Attempted murder involving the infliction of grievous bodily harm; rape; any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992); any offence relating to the dealing in or smuggling of ammunition, firearms, explosives or armament, or the possession of an automatic or semi-automatic firearm, explosives or armament. Any offence in. Any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft— Indecent assault on a child under the age of 16 years. An offence referred to in Schedule 1— (a) and the accused has previously been convicted of an offence referred to in Schedule 1; or (b) which was allegedly committed whilst he or she was released on bail in respect of an offence referred to in Schedule 1 etc.

4.4.2 Presumption of innocence and the right to liberty and the Constitution

The South African Constitution provides for the fact that an accused is presumed to be innocent.[375] The presumption of innocence is premised on the fact that this right should be enjoyed until a person has been convicted by a competent court law based on admissible evidence unlike in bail applications where the evidence of the state is premised on hearsay evidence of the investigating officer.[376]

In *Nhlabathi v Adjunk-Prokureur-General, Transvaal* [377]the court stated that:

> …illegal deprivation of liberty is a threat to the very foundation of a society based on law and order is a golden standard for the interpretation of any statute which applies to the prosecution of citizens where the curtailment of freedom of movement or liberty in general is concerned.

Clearly, the right to liberty is a foundation of democratic constitutions. However, the presumption of innocence and the right to be released on bail should be viewed as parallel rights whose application will differ depending on the stage of proceedings.[378] The right to liberty according to Axam should be reconciled to the fundamental norms and values in the Constitution.[379]

The right to freedom and security of a person is guaranteed in terms of the South African Constitution.[380] States should therefore take measures to minimise the denial of the right to liberty.[381] In *S v Smith*[382] reiterated the fact that in considering whether to grant bail or not to

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375 Section 35(3) (h) provide that one is to be presumed innocent, to remain silent, and not to testify during the proceedings.

376 Mokoena (2012: 37).

377 1978(3) SA 620 (W) 630A-D.

378 Van der Berg 2012: 24) 3rd ed.

379 Axam, HS (2001) "If the Interests of Justice Permit: Individual Liberty, the Limitations Clause, and the Qualified Constitutional Right to Bail" *South African Journal on Human Rights*, vol. 17, 320-340 at 321.

380 Section 12(1). The section indicates that one should not be deprived of his or her right to liberty without just cause.

381 Stuart, D (2003) "Zigzags on Rights of Accused: Brittle Majorities Manipulate Weasel Words of Dialogue, Deference, and Charter Values" *Supreme Court Law Review*, 267-291 at 281.

382 1969(4) SA 175 (N) at 177 E-F.

an accused person, the court should be able to lean in favour of the liberty of the accused as long as this is premised on the interest of justice. Thus, the foundational basis is to ensure that the interest of justice is upheld. From this judgment, the court recognised that it is necessary in certain circumstances to interpret the right of an individual in relation to the interest of justice.

In *S v Essack* the court formulated the following proposition:

> In dealing with an application of this nature, it is necessary to strike a balance, as far as that can be done, between protecting the liberty of an individual and safeguarding and ensuring the proper administration of justice…the presumption of innocence operates in favour of the applicant even where it is said that there is a strong *prima facie* case against him, but if there are indications that the proper administration of justice and the safeguarding thereof may be defeated or frustrated if he is allowed out on bail, the court would be fully justified in refusing to allow him bail…before it can be said that there is any likelihood of justice being frustrated through an accused person resorting to the known devices to evade standing trial, there should be some evidence or some indication which touches the applicant personally in regard to such likelihood…[383]

Therefore the court correctly held in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* that the introduction of the interest of justice concept was because of the experience of violent crimes however it is not the only factor that must be taken into consideration as the level of crime cannot be used to justify the invasion of rights of individuals such as the right to liberty.[384]

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383 1965 (2) SA 161 (D) at 163H.

384 *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* case, para 68.

4.4.3 Public interest and administration of justice in South Africa

The South African Constitution does not define what amounts to interest of justice but rather refers to normal considerations which are taken during bail applications.[385] Thus, there is reliance on common law criteria in determining the release of an accused on bail.[386] These grounds include whether an accused is likely to stand his trial; whether he or she has a propensity to commit further offences while on bail and the risk of interfering with evidence or pending investigations.[387] Therefore, the courts are required in every case to make an assessment whether the release of an accused will be detrimental to the interests of justice.[388]

De Villiers is of the view that if the interests of justice permit it gives an automatic right for one to be granted bail as this is a standard set up in terms of the Constitution.[389] In *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*[390]the court stated that sight should not be lost of the fact that the law authorises people to be arrested for committing offences which itself places limitation on the right to liberty.[391] This in itself is not the end of enquiry as the court emphasised that one is entitled to be released on bail if the interest of justice permit.[392] The court further indicated that one of the purposes of bail was that of investigation and

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385 See *S v De Kock* 1995 (1) SACR 299 (T) at 308E-F. In this case the court indicated that the usual factors outlined in the *Acheson* case are the ones to be taken into account. The Second Amendment Act removed the words public interest and expanded it in terms of public order and public peace and security. My research has found that South African courts fail to distinguish in most instances between administration of justice and public interest. It seems, as my research has established that these two concepts are abstract concepts and are thus all grouped under the concept of the interest of justice.

386 Cowling, MG (1996) "Bail reform: an assessment of the Criminal Procedure Second Amendment Act 75 of 1995" *South African Journal of Criminal Justice*, vol. 9, 50-60 at 55.

387 Ibid.

388 Sarkin *et al* (2000: 297).

389 De Villiers, W (2003) "The scope of the right to bail provided for by section 11(e) of the Canadian Charter and section 35(1) (f) of the Constitution (part 3)" *De Jure*, 66-84 at 66.

390 1999(4) SA 623 (CC).

391 *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* case, para 7.

392 Ibid.

prosecution of cases without any hindrance, the aim of law was to deter and control serious crimes and therefore necessary to restrict bail in certain situations.[393]

In *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat*, the court found that denial of bail indeed infringes the right of an accused person but such infringement was justified in terms of section 36 which provides for limitation of fundamental human rights and freedoms. The court recognised the fact that indeed it is quite unfair and disturbing that the rights or interests of an accused should be subjected to the interests of the broader society.[394] However, the court went on to justify that sometimes public peace and security are compromised by the release of persons awaiting trial from custody.

The court further indicated that what might be in the interest of justice involves a value judgment of what will be fair and just to all concerned. The weakness and strength of its application will depend on the context it is used and how it is interpreted. Therefore, because of its adaptability approach in any given case, it is prone to loose application and unfitting use.[395]

The court in *S v Swanepoel*[396] the court emphasised that section 60(4) required that an accused should be released on bail unless the interests of justice dictates otherwise. In upholding the appeal where the accused were charged with six counts of murder, robbery and unlawful possession of firearm, the court emphasised that the reliance by the state that if the appellant was released on bail, the safety of the public could be harmed was unconvincing. It is clear form this case that while taking into account the serious nature of the offence in

393 Ibid, paras 70-77.
394 Ibid, at paras 54-55.
395 Ibid, at para 45. In *Mooi v The State* (162/12) [2012] ZASCA 79 (30 May 2012) an accused was released in the interest of justice because of delay by State in concluding its investigations coupled with weakness of State's case.
396 1999(1) SACR 311(O). See also *S v Block* 2011 (1) SACR 622 (NCK).

question, bail can be granted if interests of justice so permit by attaching appropriate bail conditions.

The same kind of conclusion was reached in *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* where the court stated that where there is a risk that a detainee will endanger a particular individual or commit a serious offence, the interest of justice does not permit his release.[397] The court further indicated that people for example who are charged with gang related violence in community such as brutal murders, their arrest and detention (on these serious charges) has an effect of instilling confidence in the criminal justice system.[398]

The consideration of the seriousness of an offence committed by an accused with a temptation to flee because of possible sentence to be imposed, the possibility coupled with the prosperity of interfering with investigations due to a person's criminal record are some of the ordinary considerations whether to grant bail which an accused should rebut by satisfying the court that his or her release is permitted by the interest of justice.[399]

In *S v Mabena and Another*[400] the court stated that the effect of denial of bail based on interest of justice demands that ordinary constitutional test of what constitutes interest of justice should not be applied as it might lead to absurd results. What is required is a more stringent approach showing exceptional circumstances that exists for one to be admitted on bail.

397 *S v Dlamini; S v Dladla; S v Joubert; S v Schietekat* case para 53.
398 Ibid, para 55.
399 Ibid, para 63-64.
400 (373/06) [2006] ZASCA 178; [2007] 2 All SA 137 (SCA) (17 October 2006) at para 6.

4.5 South African court's approach to what constitute administration of justice

As earlier indicated, what constitute public administration has not been defined under South African law. However, section 60(4)(d)[401] of the CPSAA takes into consideration the fact that there might be situations where the administration of justice requires that an accused be remanded in custody. In considering the release or refusal thereof of bail to an accused, the accused relies on grounds listed in terms of section 60(8)[402] of CPSAA.

In *S v Khumalo*[403]the court denied bail to an accused who was charged with the rape of a 13 year old female child and kidnapping, after finding that the offence committed by the accused were so serious and the state had a strong case against him (of which he adduced only little persuasive evidence) and therefore in case of conviction, he is likely to abscond. The court refused bail reasoning that releasing an accused on bail in such circumstances where there has been evidence of inducing the victim to drop the charges against him compromises the administration of justice.

If an accused has a propensity to commit offences, the court can deny bail based on administration of justice. This is demonstrated in the case of *Snyders v S*[404] where the court stated that because the accused had previous convictions relating to schedule 1, he has shown that he has a propensity to commit crimes. The court further reiterated that the interests of justice demands that he be remanded in custody as his release on bail will jeopardise his

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401 The section provides that bail can be denied where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardies the objectives or the proper functioning of the criminal justice system, including the bail system.

402 This section provide that the court should consider the following whether to deny bail or not in terms of section 60(4)(d):
(a) the fact that the accused, knowing it to be false, supplied false information at the time of his or her arrest or during the bail proceedings;
(b) whether the accused is in custody on another charge or whether the accused is on parole;
(c) any previous failure on the part of the accused to comply with bail conditions or any indication that he or she will not comply with any bail conditions; or
(d) any other factor which in the opinion of the court should be taken into account.

403 (1957/2012) [2012] ZAKZPHC 27 (4 May 2012).

404 (A455/2015) [2015] ZAGPPHC 618 (21 August 2015) at para 31.

safety and that of his family as was demonstrated by the petition handed by members of the public.

In *S v Yanta*[405]the court felt that the lack of evidence that was presented before the court to link the accused to the offence justified the admission of the accused on bail as the administration of justice will not be jeopardised. The court however in *S v Petersen*[406]bail was denied on the basis that the administration of justice will be prejudiced if the accused is released on bail as evidence placed before court showed that she had a history of attempted suicides.

4.6 South African court's approach to what constitute public interest

Public interest[407] or interest of society can be said to be closely linked to the interest of justice. In *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat* the court stated that the 'interests of justice' is closely related and interlinked to 'interests of society' or the interest of the state representing society.[408] Thus, in the view of the court the word 'interest of justice' bears the same narrow meaning to 'the interest of society' (which incorporates the interest of justice minus the interest of the accused who wants to be admitted on bail).

Furthermore, the court in concurring with the decision of the court *a quo* in the *Dladla* case stated that it is in the interest of society that where crimes of violence are involved affecting the rights and personal security of ordinary people, the court should lean in favour of not granting bail.[409]

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405 2000 (1) SACR 237 (Tk).

406 2008(2) SACR 355 para 31.

407 This term was expanded into the public order or public peace or security criterion by the Criminal Procedure Second Amendment Act 85 of 1997 by virtue of section 4.

408 *S v Dlamini, S v Dladla, S v Joubert, S v Schietekat* at para 47. These remarks were made in reference to the issues in *Dladla and Others* where the accused were charged with nine counts of murder and five counts of attempted murder.

409 Ibid, at para 66-67.

In *S v Porthen*[410] it was held that without in any way detracting from the courts' duty to respect and give effect to the clear legislative policy inherent in the provisions of section 60(11)(a) of the CPA (safe in exceptional circumstances) it is in the public interest that persons charged with the class of particularly serious offences listed in Schedule 6 to the CPA should forfeit their personal freedom pending the determination of their guilt or innocence

In considering what might constitute public interest the court in *S v Hudson*[411] (which dealt with bail pending appeal) outlined the test of bail in relation to public interest and administration of justice by stating that:

> Considering the granting of bail involves, as is well known, a balancing of the interests of the administration of justice against the wishes of the accused. But that is, of course, not accurate. Those interests are not fully in opposition. It is also to the public good and part of public policy that a person should enjoy freedom of movement, of occupation, of association, etc. That public interest is qualified, when appropriate, in the interests of the administration of justice. Secondly, considering bail involves a balance between unequal considerations. Risk of harm to the administration of justice involves unquantifiable and unprovable future possibilities. The interests of the accused generally turn upon extant facts and intentions. But it remains the chances that the administration of justice may be harmed which may justify the impact of detention despite a pending appeal.[412]

Clearly, from this judgment public interest seems to be clearly linked to the administration of justice in that a consideration based on public interest might impact on the administration of

410 2004 (2) SACR 242 (C).
411 1996 (1) SACR 431 (W) at 433.
412 The court in *S v DV* (A72I/2010) [2011] ZAGPPHC 226; 2012 (2) SACR 492 (GNP) (17 November 2011) at para 45 the court cautioned that public interest in a particular case should not be allowed to dictate to courts what to do in a particular case and there is a need of education to dispel any perception the public might have in a particular case or circumstances.

justice as well. This is a reason perhaps why an embracing concept of ‘interest of justice’ was introduced in South African law.

4.7 Conclusion

It has been demonstrated in this chapter that in all the compared jurisdictions the ultimate consideration is whether detention is necessary to maintain confidence in the administration of justice by taking into account public interest. This test in both Canada and South Africa emanates from standards set out in the respective constitutions. However, in deciding whether bail should be granted or not, the courts do so from constitutionally construed provisions granting the right to bail and the relevant statutes outlining grounds which should be considered in this regard. The courts therefore do not have a blanket discretion of their own but an open-ended judicial discretion which should balance the rights of the accused and the need to maintain justice in the community.

In Canada for example, bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood “endangers "the protection or safety of the public". Moreover, detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous. This implies that it should be proven on what grounds the state relies in denying bail.

In avoiding the vagueness of what public interest is, the Canadian courts have actually incorporated these concepts in what is termed as just cause in deciding whether to deny bail or not. The South African courts have actually avoided defining public interest and administration of justice and the denial of bail is based on what is termed the interest of

justice. However, what is clear is that in deciding what is just cause or what is in the interest of justice still seems to be determination of issues that were dealt with in the *Acheson* case but have now been incorporated into law in these respective countries.

CHAPTER 5

SUMMARY, LESSONS, RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

This chapter highlights what has been discussed in the previous chapters by providing recommendations to the crux of this dissertation whether the refusal of bail based on public interest or administration of justice is in line with constitutional principles of the right to liberty and the right to be presumed innocent until proven otherwise. The recommendations made in this chapter are in line with the research questions outlined in chapter 1. The lessons in this chapter emanate from what has been discussed from chapters 1-4.

5.2 The principle of bail

Bail as it has been demonstrated in this research:

> …enables a person in custody who is charged with a criminal offence to be released from custody on the condition that he or she undertakes to appear in court and observe any specified conditions. Bail laws attempt to strike the right balance between, on the one hand, not infringing upon the liberty of an accused person who is entitled to the presumption of innocence and, on the other hand, ensuring that an accused person attends court and does not interfere with witnesses or commit other offences.[413]

The principles of bail are well founded in terms of our law. In *S v Visser*[414] it was stated that bail is not at all a means of deterring offenders but a way of ensuring that bail is granted to

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413 Snowball, L, Roth, L and Weatherburn, D (2010) "Bail presumptions and risk of bail refusal: An analysis of the NSW Bail Act" *Crime and Justice Statistics,* Issue paper no. 49, 1-8 at 1.

414 1975(2) SA 342 at 342.

those who will not prejudice the administration of justice taking into account the liberty of individuals.

As it has been demonstrated in this research, the decision whether to grant or deny bail brings about conflicting values of the criminal justice systems. The tension is mainly between the individual's right to liberty and the interest of justice generally.[415] These values according to Packer is the Due Process and Crime Process models of criminal justice.[416]

Each of these models has specific purposes that it wants to be achieved. Under the crime control model, the concern is that of risks posed by an accused person (such as absconding or tempering with police investigations or committing further crimes)[417] and while the remand of the accused in terms of the due process of law the concern is for the limitation of power of state which results in loss of liberty which is viewed as the heaviest deprivation that government can inflict on an individual.[418]

It is no doubt that the application of both these models still find application in our system. The judiciary during adjudication of whether to grant bail or not should balance these two criminal processes model. However, such a balancing act should not arbitrarily deny a person the profound right to liberty and the presumption of innocence contained in the Constitution. The supremacy of the Namibian Constitution should not be overridden by either political or public opinion considerations. Denial of bail should therefore be necessary in a country that is based on values of equality and dignity of all the people.

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415 Chaskalson, J and De Jong, Y (2009) "Bail" in *Criminal (In)justice in South Africa: A Civil Society Perspective.* Institute for Security Studies, 86-97 at 86.

416 Packer (1964: 1-68).

417 These grounds are generally used by the courts to ensure that the administration of justice is not prejudiced in any way. See a discussion of public safety criterion by Karnow (2008: 1-30).

418 Robertshaw, P (1992) "The political economy of bail reform" *Contemporary Crises*, vol. 7, 329-352 at 331. Packer (1964:9) argue that the crime control model is premised on the fact that the failure to bring criminals to book is viewed as leading to breakdown of public order and people might resort or disregard legal mechanisms and resort to self-help. This differs to the due process model which is premised on formal structures of law which must be followed at all times.

Ferguson argues that any restriction imposed on an individual should be for the purpose of attendance before court and also it is justified to deny one the right to liberty for the prevention of crime.[419] This denial should be minimized in order to ensure that an accused attends and prepares for his or her trial. Our courts have emphasized that although the right to liberty enjoys constitutional protection and so fundamental, it is not absolute itself as it can be subject to exceptions.[420]

5.3 The right to liberty and presumption of innocence

There is no doubt that the right to be presumed innocent until the contrary is proved finds application in many judicial democratic systems and Namibia is no exception. The common law tradition of denying bail and allowing officials to imprison a person before being convicted or sentenced of a crime should not override constitutional values that are dear to the Namibian nation.[421]

Both the UDHR[422] and the African Charter[423] recognize this right. It is a long held tradition that the right to be presumed innocent is an integral component of fair trial that safeguard the rights of an individual. Thus, refusal of bail to an accused who has not yet been found guilty by a competent court of law might be seen to go against the prescripts of this right. One subscribes to the idea by Enochong that pre-trial detention has been used to uphold order and security but at the same time operates as a sanction.[424]

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419 Ferguson (2016: 152).

420 *Onesmus v The State* (Judgment) (CA 01/2013) [2013] NAHCNLD 22 (22 April 2013) at para 11 the court stated that the Constitution protects the fundamental rights of all citizens which include the maintenance of law and order.

421 See Robertshaw (1992: 329).

422 Article 11(1).

423 Article 7(1) (b).

424 Enonchong, N (2002) "The African Charter on Human and Peoples' Rights: Effective Remedies in Domestic Law?" *Journal of African* Law, vol. 46(20, 197-215 at 202.

Moreover, there is no doubt that in some cases preventative detention is a measure of control by the state.[425] However, such measure of control must meet acceptable standards of fairness to both the accused and the entire society. However, preventative detention, historically important, is by no means absent from the modern approach to some constitutional values that are so dear to the Namibian society. It is argued that an accused during pre-trial phase should be treated from the perspective of being innocent and not on any unconstitutional assumption that he or she is guilty of an offence.[426]

In support of the significance of the right to liberty, Husak states that:

> If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so. Rights are legal or moral considerations which mere utilitarian grounds are insufficient to deny.[427]

One tends to agree with the above argument and adds further that although the right to liberty can be denied on the principle of utility, that alone should not be a consideration to the exclusion of other factors considering that it is an entrenched right in terms of our Constitution.[428] It is not wrong that interest of the public and that of administration of justice should receive some recognition in the refusal of bail by our courts, and it is not irrelevant to bear in mind that if people are released from time to time on bail for serious offences, it might create a perception that our courts are too lenient and the administration of justice may fall into disrepute and victims of crime may incline to take the law into their own hands.

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425 Cook, H (1992) "Preventive detention – International Standards and the Protection of the Individual" in Frankowski, S & Shelton, D (eds) *Preventive Detention: A Comparative and International Law Perspective*, Martinus Nijhoff Publishers, 1-52 at 1.

426 Goro, T (2014) "Restoring the Right to Bail and the Presumption of Innocence" available at www.uzstudentjournal.org (accessed 15 June 2018).

427 Husak, DN (1979) "Ronald Dworkin and the Right to Liberty" *Ethics*, vol. 90(1), 121-130 at 122.

428 See also *Lang v S* (CA 53/2013) [2013] NAHCMD 248 (23 AUGUST 2013) at para 7 where the court stated that the most common deprivation of one's liberty is imprisonment and should not be easily resorted to, as it is a human right and as such is sacrosanct.

However, righteous anger should not becloud judgment in considering the release of an accused on bail.[429]

The concept of denying of bail should be welcomed. The purpose of this concept was well elaborated in *S v Aikela*[430] where it was stressed that:

> The administration of justice in general and the trial of the accused persons and the need to bring them before court and ensure that they will stand their trial is not a little game but a matter of fundamental national interest and importance.[431]

Thus, any deprivation of a person's freedom should be for a just cause and if this threshold is not reached, stricter measures will always be employed in analysing whether detention is done for the purposes of protecting society or an individual from harm or exclusively for the punishing of a person in the wrong.[432]

5.4 Recommendations

Having considered what has been discussed in this research, the following recommendations are made:

5.4.1 Define public interest or confidence of administration of justice

The term administration of justice or public interest, does not provide any legal certainty in the Namibian jurisprudence. The absence of legal certainty in this regard is caused by the fact that our Constitution does not provide for the right to bail and grounds upon which bail may

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429 See *S v Branco* 2002(1) SACR 531 (WLD)where it was decided that the release of a suspect on bail must be approached from the perspective that freedom is a precious right protected by the Constitution and must only be curtailed if the interest of justice so require.

430 1992 NR 30 (HC).

431 *Aikela* case at page 33.

432 Currie, I and De Waal, J (2013) *The Bill of Rights Handbook,* 6th ed, Juta & Co. Cape Town, at 275.

be granted as is the case in other jurisdictions.[433] The two concepts are likely to be abused by presiding officers and makes it difficult if not impossible for those denied bail to challenge the basis of the decision.

Thus, as it has been seen from the jurisprudence of Namibian cases, these two terms are difficult to define and therefore their definition might lead to different interpretations. It is imperative that the legislature consider defining circumstances that fall under public interest or administration of justice.[434]

The laying down of these guidelines will bring about certainty and consistency in the application and interpretation of the concepts and it will be easier for those affected by denial or granting of bail to properly have grounds upon which to base their appeal. In doing the amendment to the CPA, the legislature should for example in denying bail based on the danger posed by the accused indicate detail standards for determining such persons. In doing this, there should be some procedural safeguards for people falling under this category (of being a danger to society) of having an opportunity of bringing their version to court before being denied or granted bail.

This is the approach followed by Canada as illustrated in the case of Hall.[435] In this case the court emphasized that section 515(10)[436] of the Code delineates a narrow set of circumstances under which bail can be denied on the basis of maintaining confidence in the administration of justice. Moreover, the court must be satisfied that detention is not only advisable but

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433 In Austria for example, their law lists specific instances under which bail may be denied such as prevention of flight, prevention of collusion (tampering with evidence, intimidating witnesses, etc) or for the prevention of future crimes or preventing the fulfillment of any threats. See in this regard Miklau, R, Morawetz, I and Stangl, W (1992) "Pre-trial Detention in Austria" in Frankowski, S & Shelton, D (eds) *Preventive Detention: A Comparative and International Law Perspective*, Martinus Nijhoff Publishers, 135-144 at 140.

434 It is therefore necessary to come up with an approach based on consensus as to what constitute public interest or administration of justice. See in this regard a general discussion on defining public interest by MacNair, MD (2006) "In the Name of the Public Good: "Public Interest" as a Legal Standard" *Canadian Criminal Law Review*, 1-26.

435 *Hall* case at 465.

436 This section is about the maintenance of confidence in the administration of justice.

necessary. The judge must, moreover, be satisfied that detention is necessary not just to any goal, but to maintain confidence in the administration of justice.

The word necessary does not mean that if there is strong evidence (as a general rule) one should be detained, but rather the court should consider a variety of factors before making a decision in this regard. In *R.v. Perron*[437] in considering s. 515(10) (c) of the Canadian Criminal Code, the court emphasised that even if there is strong evidence, even overwhelming evidence, it is only one factor to be considered among several others. It alone must not lead the judge to order the detention of the accused.

This approach could become effective in Namibia if it is outlined in terms of legislation and indicating circumstances upon which one might be denied bail just like in Canada and South Africa.

5.4.2 Constitution should incorporate the right to bail

In Namibia, an accused generally has no right to bail but the only right that an accused has is to apply for bail if he or she has been denied such. Such right to apply for bail is found only in the CPA. The Namibian Constitution does not have any single article on bail. This in itself is a loophole in our criminal justice system which can be argued to have created a lacuna which is detrimental to the administration of justice in that in some instances one might be denied bail without just cause as there is no standard set out in terms of the Constitution in denying a person his or her right to liberty.

The right to liberty is one of the rights that is entrenched in terms of the Namibian Constitution. However, the adequacy of its protection leaves much to be desired when it

437 (1989), 51 C.C.C. (3d) 518 (Qué. C.A.) at 530.

comes to the denial of bail based on public interest or administration of justice. South Africa for example, as it has been demonstrated in the previous chapter, has incorporated the right to bail in their Constitution and outlined specific circumstances under which an accused will be required to show cause why his or her release will not be detrimental to justice.[438] Only if Namibia incorporate this right to bail, then there will be a measurable standard set in terms of the supreme law when bail should be denied and when it should not. For now, the discretion granted to presiding officers is too broad and cannot be sustained in a democratic system such as ours.

One would therefore subscribe to the idea of Harding and Hatchard who states that preventative detention laws should be enacted only under constitutional provisions that sets out clearly the conditions of justification and the limitation thereof.[439] Although our article 22 of the Constitution provides for general limitation clause to the rights in the Constitution, its application and interpretation might be different depending on the type of right in question. Although our Constitution provides for the right to liberty and presumption of innocence, the absence of specific provisions relating to bail brings some difficulty in identifying the limit of the right (i.e. liberty) which has been infringed.

It is therefore argued herein that the Constitution as a guarantor of human rights should incorporate the right to bail and the procedural requirements for the purposes of predictability.[440]

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438 In Namibia, the legislature has tried but not substantively like in other jurisdictions to set out circumstances of considerations whether to release an accused on bail in terms of the Criminal Procedure Act 25 of 2004 (Chapter 11) which although signed by the President in 2004 has not become law until today.

439 Harding, AJ and Hatchard, J (1993) "Introduction" in Harding, AJ and Hatchard (eds) *Preventive Detention and Security Law: A Comparative Survey*, Martinus Nijhoff Publishers, 1-21 at 7.

440 See Alberts, S (2009) "How Constitutions Constrain" *Comparative* Politics, vol. 41(2), 127-143 at 129 who argue that 'predictability is enhanced when power is constrained by democratic norms and procedures for long term collective gains'.

5.5 Conclusion

There is therefore, no doubt that the right to liberty and presumption of innocence are important in Namibian constitutional system and deprivation of liberty should be well founded after due and serious considerations between the interest of society and that of the individual. One agrees to the observation made by Sreenu that:

> Society has a vital interest in grant or refusal of bail because every criminal offence is an offence against the State. The order granting or refusing bail must reflect perfect balance between the conflicting interests, namely, sanctity of individual liberty and the interest of society.[441]

The above can be perfectly achieved where there is an outlined law granting the right to bail and indicating circumstances under which bail might be refused in terms of substantive procedural law such as the adoption of the Canadian approach which lays down instances where one might not be admitted to bail.[442]

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441 Sreenu, S.M (n.d.) "Bail, Anticipatory Bail, Mandatory Bail & Bail After Conviction" available at http://ecourts.gov.in/sites/default/files/6-Bail%20Anticipatory%20Bails%20-%20Sri%20M%20Sreenu.pdf (accessed on 20 June 2018).

442 Even in countries where the right to bail is incorporated in the Constitution such as Canada, this right is not absolute and may result in bail being refused if the interests of justice do not permit such as where the safety of the public is at risk. See in this regard Allan, A *et al* (2005) "An Observational Study of Bail Decision-Making" *Psychiatry, Psychology and Law*, vol. 12(2), 319-333 at 319.

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