

ADVERSE REPORT

OF THE

PARLIAMENTARY LEGAL COMMITTEE

ON THE CRIMINAL PROCEDURE AND

EVIDENCE AMENDMENT BILL

[H. B. 2, 2015]

In pursuit of its constitutional mandate as provided in section 152(2) of the Constitution of Zimbabwe, the Parliamentary Legal Committee met on the 20<sup>th</sup> of October 2015 at 1000hrs to consider the Criminal Procedure and Evidence Amendment Bill [H.B. 2B, 2015]. After deliberations the Committee resolved that an adverse report be issued in respect of clause 30 of the Bill amending section 121 of CAP 9:07. In compliance with Standing Order 32(3), members of the Committee legally qualified as envisaged by section 152(2) of the Constitution unanimously agreed (present were Honourables Samukange, Chasi, Ziyambi and Majome) the Bill contained provisions that, if enacted would violate the Constitution. The adverse report was issued due to the following considerations.

Section 121(3) has not changed, as it still provides that a magistrate or judge's decision to admit an accused person to bail shall be suspended if, immediately after the decision, the magistrate or judge is notified that the Prosecutor- General or a public prosecutor wishes to appeal against the decision. The mere difference is that an accused person shall now remain in custody despite being found to be a proper candidate for bail, a further for seventy two hours as opposed to the seven days.

The controversy surrounding this provision is the suspension of the court's order to admit an accused person to bail upon prosecution notifying the court of its intention to appeal against such an order. It is clear that the provision creates "inequality of arms" and tilts the scale of justice unfairly to the prosecution side at the expense of the accused. The principle of "equality of arms" is recognised in international human rights law as integral to the right to a fair trial entitling both parties to the same procedural and substantive rights and powers before the courts, in order to present their cases without any party suffering substantial disadvantage. The court's decision to admit a person to bail is overridden by the notification made by the Prosecutor to the court resulting in the further detention of the accused person for a further period of seventy two hours. The further detention of the accused violates section 49 of the Constitution which guarantees the right to personal liberty save in certain circumstances listed in section 86 and 87 of the Constitution.

Section 86 of the Constitution provides that the fundamental rights and freedoms are not absolute in the sense that they have to be exercised with due regard to the rights and freedoms of others. These rights may be limited only in terms of law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all factors. The provisions of section 86 must be interpreted generously in favor of the rights rather than in favor of their restriction. It is important to note that the courts in arriving at the decision to grant bail it does that after weighing all the factors listed in section 86. The Constitution in section 3(2)(e) recognizes the doctrine of separation of powers thereby recognizing the exclusive jurisdiction of the courts in the determination of an accused person's rights in order to avoid unjustified pre-trial incarceration. The courts are empowered by the Constitution in section 46 to give effect to the Bill of Rights through interpretation and application of the law, section 46 states that "when interpreting [Chapter 4], a court or tribunal must give full effect to the rights and freedoms enshrined in Chapter 4". The courts through several decided cases have exhibited a liberal attitude in interpreting the provisions regarding bail leaning towards granting bail to accused persons. The purpose of bail is to ensure that the accused's right to liberty is safeguarded as an a guaranteed right in terms of the Constitution. The courts in considering bail applications as alluded to above are aware of the limitations in this right but at the same time have a duty in protecting the rights of an accused person weighed against the interest of justice. A law that limits rights should not use a sledgehammer to crack a nut. To determine whether the limitation does more damage to rights than is reasonable for achieving its purpose first requires an assessment of how extensive the infringement is.

*Section 70(1) (a)* provides for the presumption of innocence; it states that any person accused of an offence has the right to be presumed innocent until proved guilty. This is the primary rationale for the requirement of the Constitution that an arrested person has the right to be released on bail. The presumption of innocence dictates that the accused persons should be released on bail whenever possible.

The tenets of the Constitution with regards to the presumption of innocence also requires that pre-trial detention should not constitute punishment, and the fact that the accused persons are not convicts should reflect in their treatment and management. For example as contemplated by the amendment the accused person must not remain in custody for a further seventy two hours after being admitted bail and must not be subjected to the same treatment as convicted persons. In bail applications, the presumption of innocence in, *favorem vitae libertatis et innocentia Omnia praesumuntur* is in favour of the accused person. In other words, the court should always grant bail where possible and should lean in favour of the liberty of the applicant provided that the interest of justice will not be prejudiced. The Courts in doing so will be guided by the limitation provisions in section 86 and will seek to strike a balance between the interest of society (i.e. the applicant should stand trial and there should be no interference with the administration of justice) and the liberty of an accused (who, pending the outcome of his or her trial, is presumed to be innocent).

The Court in the case of *S v Biti 2002 Vol. 1 ZLR 115 HC* stated that bail is non- penal in character, and the courts should only refuse bail to grant bail the accused in not a suitable candidate for bail and the granting of bail would be in the best interest of justice.

The South African system relating to appeals against bail decisions might be important for comparison purposes. Section 65 of the South African Criminal Procedure Act 51 of 1977, regulates appeals regarding bail decisions. Subsection (1) of the said Act entitles a person who is aggrieved by a bail decision to seek relief from a superior court. Such an appeal is therefore treated as an urgent matter and must be dealt with promptly. The notification of the State of its intention to appeal against the granting of bail to an accused person does not suspend the court's decision pertaining to bail. The bail conditions as ordered by the court will stand pending the determination of the appeal. If the appeal succeeds the appellate court will issue a warrant of arrest for the apprehension of accused thereby revoking the decision of the lower court.

The South African position is analogous to that of Namibian jurisdiction, *Section 69(2) (a)* of the Namibian Criminal Procedure Act 25 of 2004. States that—

*“where a magistrate’s court has ordered the release of an accused on bail and an appeal is noted by the Prosecutor- General under subsection (1) (a) the order for the release of the accused remains in force pending the decision on appeal, unless the court granting the release suspends the order for the release and orders the continued detention of the accused pending the decision on appeal”*

The Namibian position allows the court to exercise discretion on whether to further detain the accused pending the determination of the appeal or allow the decision of the court to stand on the same conditions as stated in its order.

There is no doubt that *section 121(3)* of the Criminal Procedure Act is unconstitutional as held in the case of *S v Fanuel Kamurendo and others CCZ 84/2015*, in which the court ordered that section 121(3) of the Criminal Procedure and Evidence Act violated section 13(1) and 18(1) of the former Constitution which are iterated in section 49 and 50 of the current Constitution. The Constitution is more progressive and goes a step further a protecting fundamental freedoms and rights. The Constitution in terms of *section 2* is the supreme law of the Country and is the capstone of all laws regulating the Zimbabwean criminal justice system and most of these laws have to some extent adopted fundamental international human rights standards and infused established principles and procedures aimed at protecting and promoting the respect of fundamental rights without unnecessarily compromising the administration of the criminal justice.

It appears that the Constitution is being overshadowed by the effects of *section 121(3)* of the Criminal Procedure and Evidence Act as it authorises pre- trial detention of accused persons who would have been admitted to bail. It is the Committee’s opinion that *section 121(3)* should be replaced with a requirement that a warrant of arrest be issued to apprehend the accused person in the event of the appeal succeeding as prevailing in other jurisdictions.

Due to the aforesaid, the Committee resolved on a majority of 4:0 to issue an adverse report on the Bill.

**Hon. J. Samukange**

**CHAIRPERSON**

**PARLIAMENTARY LEGAL COMMITTEE**