

REPUBLIC OF SOUTH AFRICA

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# CRIMINAL PROCEDURE SECOND AMENDMENT BILL

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*(As introduced)*

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(MINISTER OF JUSTICE)

[B 84-97]

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REPUBLIEK VAN SUID-AFRIKA

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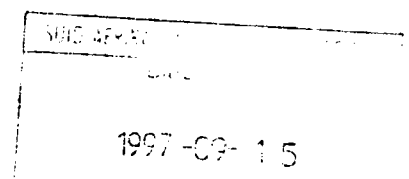
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(MINISTER VAN JUSTISIE)



[W 84—97]

ISBN O 621272809

**GENERAL EXPLANATORY NOTE:**

- [                      ] Words in bold type in square brackets indicate omissions from existing enactments.
- \_\_\_\_\_ Words underlined with a solid line indicate insertions in existing enactments.

## **BILL**

To amend the Criminal Procedure Act, 1977, so as to amend the definition of “aggravating circumstances”; and to further regulate the hearing of bail applications and the release on, and the cancellation of, bail; and to provide for matters connected therewith.

**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 1 of Act 51 of 1977, as amended by section 1 of Act 107 of 1990, section 1 of Act 5 of 1991, section 35 of Act 122 of 1991, section 16 of Act 116 of 1993, section 38 of Act 129 of 1993 and section 1 of Act 49 of 1996**

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1. Section 1 of the Criminal Procedure Act, 1977 (hereinafter referred to as the principal Act), is hereby amended by the insertion before paragraph (b) of the definition of “aggravating circumstances” of the following paragraph:

“(a) housebreaking with intent to commit an offence, means—

(i) the possession of a dangerous weapon or fire-arm as defined in the Dangerous Weapons Act, 1968 (Act No. 71 of 1968); or

(ii) the commission of an assault with intent to do grievous bodily harm or a threat to commit an assault with intent to do grievous bodily harm;”.

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**Amendment of section 50 of Act 51 of 1977, as amended by section 1 of Act 56 of 1979, section 37 of Act 122 of 1991 and section 1 of Act 75 of 1995**

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2. Section 50 of the principal Act is hereby amended—

(a) by the substitution for the proviso to subsection (6) of the following proviso:

“Provided that—

(a) a person arrested outside ordinary court hours or during ordinary court hours under circumstances where it is not reasonably possible to bring him or her before the lower court in question within ordinary court hours, may not request to be brought before a lower court but shall be brought before the lower court on the next court day;

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- (b) the bail application of a person who is charged with an offence referred to in Schedule 5 or 6 shall be considered by a regional court, unless such court is not available;
- (c) the lower court before which a person is brought in terms of this subsection, may postpone any bail proceedings or bail application to any date or court, for a period not exceeding seven days at a time, on the terms which the court may deem proper and which are not inconsistent with any provision of this Act, if—
- [(a)](i) the court is of the opinion that it has insufficient information or evidence at its disposal to reach a decision on the bail application: **[or]**
  - (ii) ~~the~~ prosecutor informs the court that the matter has been or is going to be referred to an attorney-general for the issuing of a written confirmation referred to in section 60(11A)(a);
  - (iii) the prosecutor informs the court that the person is going to be charged with an offence referred to in Schedule 5 or 6;
  - [(b)](iv) it appears to the court that it is necessary to provide the State with a reasonable opportunity to—
    - [(i)](aa) procure material evidence that maybe lost if bail is granted;
    - [(ii)](bb) perform the functions referred to in section 37; or
  - [(c)](v) it appears to the court that it is necessary in the interests of justice to do so.”; and
- (b) by the substitution for subsection (7) of the following subsection:
- “(7) If a person is arrested on suspicion of having committed an offence but a charge has not been brought against him or her because further investigation is needed to determine whether a charge may be brought against him or her. the investigation in question shall be completed as soon as it is reasonably possible and the person in question shall, subject to subsection (6), as soon as it is reasonably possible thereafter, and in any event not later than the **[day after]** next ordinary court day succeeding his or her arrest contemplated in subsections (1) and (2), be brought before an ordinary court of law to be charged and enabled to institute bail proceedings in accordance with subsection (6) or be informed of the reason for his or her further detention, failing which he or she shall be released.”.

**Amendment of section 60 of Act 51 of 1977, as substituted by section 3 of Act 75 of 1995**

3. Section 60 of the principal Act is hereby amended—

- (a) by the substitution for paragraph (b) of subsection (1) of the following paragraph:
- “(b)**[If]** Subject to the provisions of section 50(6)(b), if a court refers an accused to another court for trial or sentencing, the court referring the accused retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time.”;
- (b) by the substitution for paragraph (a) of subsection (4) of the following paragraph:
- “(a) Where there is **[the]** a likelihood that the accused, if he or she were to be released on bail, will endanger the safety of the public or any particular person **[or the public interest]** or will commit a Schedule 1 offence; or”;
- (c) by the insertion in subsection (4) after paragraph (a) of the following paragraph:
- “(aA) where there is a likelihood that the release of the accused will disturb the public order or undermine the public peace or security; or”;
- (d) by the insertion after subsection (5), of the following subsection:
- “(5A) In considering whether the ground contemplated in subsection (4)(aA) has been established, the court may take into account the following factors, namely—

- (a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
- (b) whether the shock or outrage of the community might lead to public disorder if the accused is released;
- (c) whether the safety of the accused might be jeopardized by his or her release;
- (d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused;
- (e) whether the release of the accused will undermine or jeopardize the legitimacy or efficiency of the criminal justice system; or
- (f) any other factor which in the opinion of the court should be taken into account.”;
- (e) by the substitution for subsection (11) of the following subsection: 15
- “(11 ) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-
- (a) (i) in Schedule 6; or
- (ii) in Schedule 5—
- (aa) and the accused has previously been convicted of an 20
- offence referred to in Schedule 5 or 6; or
- (bb) which was allegedly committed whilst he or she was
- released on bail in respect of a Schedule 5 or 6 offence,
- 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, 25
- having been given a reasonable opportunity to do so, satisfies the court that exceptional circumstances exist why he or she should be released; or
- (b) (i) in Schedule 5; or
- (ii) in Schedule 1— 30
- (aa) and the accused has previously been convicted of an
- offence referred to in Schedule 1; or
- (bb) which was allegedly committed whilst he or she was
- released on bail in respect of a Schedule 1 offence,
- 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, 35
- having been given a reasonable opportunity to do so, satisfies the court that the interests of justice do not require his or her detention in custody.”; and
- (f) by the insertion after subsection (11) of the following subsection: 40
- “(11 A) (a) If the attorney-general intends charging any person with an offence referred to in Schedule 5 or 6 the attorney-general may, irrespective of what charge is noted on the charge sheet, at any time before such person pleads to the charge issue a written confirmation to the effect that he or she intends to charge the accused with an offence referred to in Schedule 5 or 6. 45
- (b) The written confirmation shall be handed in at the court in question by the prosecutor as soon as possible after the issuing thereof and forms part of the record of that court.
- (c) Whenever the question arises in a bail application or during bail proceedings whether any person is charged or is to be charged with an offence referred to in Schedule 5 or 6, a written confirmation issued by an attorney-general under paragraph (a) shall, upon its mere production at such application or proceedings, be *prima facie* proof of the charge against that person.”. 50 55

**Substitution of section 68 of Act 51 of 1977, as substituted by section 10 of Act 75 of 1995**

4. The following section is hereby substituted for section 68 of the principal Act:

### “Cancellation of bail

68. (1) Any court before which a charge is pending in respect of which [the accused has been released on] bail has been granted may, upon information on oath that—
- (a) the accused is about to evade justice or is about to abscond in order to 5 evade justice; [or that]
  - (b) the accused [interferes or threatens or attempts] has interfered or threatened or attempted to interfere with witnesses; [or that]
  - (c) the accused [defeats] has defeated the ends of justice; [or that he or 10 she]
  - (d) the accused poses a threat to the safety of the public or of a particular person; [or that]
  - (e) further evidence has become available which might have affected the decision to grant bail; or,
  - (f) it is in the public interest to do so, 15
- issue a warrant for the arrest of the accused and make such order as it may [seem] deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.
- (2) Any magistrate may, in circumstances in which it is not practicable to 20 obtain a warrant of arrest under subsection ( 1 ), upon the application of any peace officer and upon a written statement on oath by such officer that—
- (a) he or she has reason to believe that—
    - (i) an accused who has been released on bail is about to evade justice or is about to abscond in order to evade justice; [or that] 25
    - (ii) the accused [interferes or threatens or attempts] has interfered or threatened or attempted to interfere with witnesses; [or that]
    - (iii) the accused [defeats] has defeated the ends of justice; or [that he or she]
    - (iv) the accused poses a threat to the safety of the public or of a 30 particular person; [or that]
  - (b) further evidence has become available which might have affected the decision to release the accused on bail; or
  - (c) it is in the public interest to do so, 35
- issue a warrant for the arrest of the accused, and may, if satisfied that the 40 ends of justice may be defeated if the accused is not placed in custody, cancel the bail and commit the accused to prison, which committal shall remain of force until the conclusion of the relevant criminal proceedings unless the court before which the proceedings are pending sooner reinstates the bail.”.

### Addition of Schedule to Act 51 of 1977

5. The following Schedule is hereby added to the principal Act:

#### “Schedule 6

(Section 60 (11) and (11A))

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|---|----|
| Murder, when—   | 45 |
| (a) it was planned:   |    |
| (b) the victim was a law enforcement officer acting in the course of his or her duty as such;                                 |    |
| (c) the death of the victim was caused by the accused while committing or attempting to commit one of the following offences: | 50 |
| (i) Rape;   |    |
| (ii) robbery with aggravating circumstances;  |    |
| (iii) housebreaking with aggravating circumstances;   |    |
| (iv) kidnapping;  |    |
| (v) public violence;  | 55 |

- (vi) any offence other than public violence of which violence and intimidation is an element; or
- (d) a firearm was used, whether or not such firearm caused the death of the victim.

Rape.

Robbery, involving—

(a) the use of a fire-arm;

(b) the infliction of grievous bodily harm; or

(c) the taking of a motor vehicle or an attempt to do so.”.

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#### **Short title and commencement**

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**6.** This Act shall be called the Criminal Procedure Second Amendment Act, 1997, and shall come into operation on a date fixed by the President by proclamation in the *Gazette*.

## MEMORANDUM ON THE OBJECTS OF THE CRIMINAL PROCEDURE SECOND AMENDMENT BILL

1. During September 1995 the Criminal Procedure Second Amendment Act, 1995 (Act No. 75 of 1995), introduced various new provisions in respect of bail legislation. The main features of that legislation are to—

- (a) clearly define a court's discretion in respect of bail applications: and
- (b) place an onus on the accused, in respect of the most serious offences, to satisfy the court that the interests of justice do not require his or her detention in custody.

Through those provisions an attempt was made to strike a balance between the personal interests of the accused on the one hand and the interests of society and the administration of justice as a whole on the other.

2. Although the present bail system works reasonably well and a balance is struck between the interests of the offenders and those of the victims and society as a whole, there is still vehement criticism against the bail system. There is a perception, as well as indications, that persons who have committed serious offences are released on bail too easily, or that persons who are released on bail commit serious offences whilst on bail. There are also allegations that police officials, prosecutors and magistrates are not properly trained or that they do not show the necessary understanding during the consideration of bail applications.

3. The proper training of police officials and court officials is of the utmost importance and this matter is receiving urgent attention in the business plans of the National Crime Prevention Strategy. The Bill seeks to deal with the criticisms against the bail legislation. The Bill also seeks to bring to the fore the Legislature's serious desire to combat crime and to ensure that the prosecuting authority and presiding officers are aware of it.

4. The following amendments are proposed:

4.1 In clause 2(a) an amendment of section 50(6) of the Criminal Procedure Act, 1977 (Act 51 of 1977) ("the Act"), is proposed.

4.1.1 In the proposed subsection (6)(a) provision is made that bail applications may only be heard during court hours. According to comments received from prosecutors and magistrates, bail applications outside ordinary court hours cause various problems. The proper constitution of a court is often difficult due to the non-availability of either the investigating officer or an interpreter. This makes the proper weighing up of interests very difficult. Furthermore, the rights of the public, and in particular the rights of victims, are almost always not given due recognition, either because they are not aware of the bail application or because the application is heard when it is impossible to attend the proceedings, for example at midnight. There is therefore often a lack of transparency during bail applications outside ordinary court hours leading to the representation of a one-sided version, often favouring the accused. In addition thereto court officials are not always in a position to give proper attention to applications as a result of the unusual hours.

4.1.2 In terms of the proposed subsection (6)(b) bail applications in respect of the offences listed in Schedule 5 or 6 (the most serious offences), will only be heard by a regional court, unless such court is not available. This will ensure that bail applications in respect of the more serious offences are dealt with by experienced prosecutors and presiding officers. If therefore, a suspect appears in a magistrates' court and the offence with which he or she is charged is an offence listed in Schedule 5 or 6, the prosecutor may request the court to postpone the bail application so that a competent court can hear the bail application (see the proposed section 50(6)(c)(iii)).

4.2 Clause 3 proposes an amendment of section 60 of the Act. A new paragraph (aA) is inserted in subsection (4) in terms of which the refusal to grant bail will be in the interests of justice where there is a likelihood that the release of the accused will disturb the public order or undermine public peace or security. A new subsection (5A) is inserted which sets out the factors which the court may take into account in considering the criteria inserted by paragraph (aA). The following factors may be taken into account:

- \* The fact that the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed,

- \* The fact that the safety of the accused might be jeopardized by his or her release.
- \* The fact that the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused.
- \* The fact that the release of the accused will undermine or jeopardize the legitimacy or efficiency of the criminal justice system.

4.3 Clause 3 also proposes the substitution of section 60(11) of the Act and the insertion of a new section 60( 11A) in the Act.

4.3.1 The new subsection (11) contains the following proposals:

- (a) A court is empowered to order that an accused charged with any offence listed in Schedule 6 be detained in custody unless the accused satisfies the court that exceptional circumstances exist which justify his or her release. The offences listed in Schedule 6 are the most serious violent crimes, namely murder, rape and robbery. The crimes of murder and robbery are, however, qualified in order to indicate clearly that the limitation placed on the rights of the accused will only apply in the most extreme circumstances, namely in the case of—
- \* premeditated murder;
  - \* the murder of a law enforcement officer acting in the course of his or her duties;
  - \* murder, where the death of the victim was caused by the accused while committing another serious crime;
  - \* murder where a fire-arm was used, whether or not such fire-arm caused the death of the victim;
  - \* robbery, involving the use of a fire-arm, the infliction of bodily harm or the taking of a motor vehicle or an attempt to do so.
- (b) Where an accused is charged with an offence referred to in Schedule 5 and it is proved that—
- (i) the accused has previously been convicted of an offence referred to in Schedule 5 or 6; or
  - (ii) the offence was allegedly committed whilst he or she was released on bail in respect of a Schedule 5 or 6 offence,
- the court must detain the accused in custody, unless the accused satisfies the court that exceptional circumstances exist which justify his or her release.

4.3.2 The new section 60( 11A) empowers an attorney-general to issue a written confirmation to the effect that he or she intends to charge the accused with an offence listed in Schedule 5 or 6. The written confirmation may be handed in at the court and upon its mere production will be *prima facie* proof of the charge against the accused. In terms of the proposed section 50(6) (c)(ii) prosecutor may request the court to postpone the bail application in order to obtain such a written confirmation.

4.4 Clause 4 seeks to amend section 68 of the Act in order that an accused who has been released on bail may be arrested if further evidence indicates that the accused should not have been so released. The accused may then be brought before the court in order to reconsider the bail application and the court may order the detention of such an accused if the interests of justice so require.

5. In respect of most of the amendments the Minister of Justice has held personal discussions with the main spokespersons of the different political parties. The proposals were also distributed among representatives of the provinces and during a meeting of the Select Committee on Security and Justice (National Council of Provinces) the proposals were discussed comprehensively. In meetings between the Minister and the President of the Constitutional Court, the Chief Justice, judges president and attorneys-general the proposed amendments were also brought to their attention. The Bill was also distributed for comment among the regional representatives in the Department of Justice, the attorneys-general, regional court presidents, magistrates and prosecutors.

In the opinion of the Department and the State Law Advisers this Bill must be dealt with in terms of section 75 of the Constitution.