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# Previous convictions at bail proceedings: Are bail applicants duty bound to disclose previous convictions that have fallen away in terms of Section 271A of the CPA?

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## ABSTRACT

The disclosure of previous convictions during bail proceedings remains an important procedural requirement in South African criminal law. However, legal uncertainty arises where an accused has a conviction that has fallen away under section 271A of the Criminal Procedure Act 51 of 1977. Conflicting judicial approaches have resulted in uncertainty: some courts require disclosure of such convictions during bail proceedings, while others hold that convictions that have fallen away under section 271A are no longer legally recognized as previous convictions and therefore need not be disclosed. This paper critically examines the impact of section 271A on bail proceedings and the legal consequences of convictions that have fallen away. Using a qualitative desktop research methodology, the study analysed legislation, case law, and relevant legal literature. It finds that convictions falling within the ambit of section 271A cease to have legal effect as previous convictions and should not be disclosed by an accused applying for bail. The paper argues that compelling disclosure of such convictions undermines the purpose and legal effect of section 271A and contributes to inconsistent bail practices. It concludes that greater judicial clarity is required to promote legal certainty and uniformity in the application of section 271A during bail proceedings. This paper contributes to the existing literature by clarifying the legal effect of section 271A in bail proceedings and providing guidance for courts to ensure a consistent and legally sound approach to the disclosure of previous convictions.

**Keywords:** Judicial Approaches, Previous Convictions, Bail Proceedings, Detention, Section 271A of the CPA.

## INTRODUCTION

The right of an arrested and detained person to apply for release on bail is a fundamental component of South Africa's constitutional criminal justice system.[1] For instance, the Constitutional Court further held

[1] The right of an arrested and detained person to apply for release on bail is indeed a fundamental component of the constitutional criminal justice system. According to Section 35 of the Constitution, arrested individuals have the right to be released from detention if the interests of justice permit, subject to reasonable conditions. This right is crucial for ensuring fairness and protection under the law, as it

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in Dlamini that:[2]

> "Sections 60(4), 60(9), and 60(10) of the Criminal Procedure Act[3] should not be interpreted as creating a fundamentally new approach to bail. Rather, they require courts to perform the task they have always been expected to undertake: to exercise a careful, reasoned, and balanced judgment when determining whether an accused should be released on bail. In doing so, courts must give proper weight to the accused's constitutional rights to liberty, dignity, and freedom of movement. At the same time, these rights are not absolute. Section 35(1)(f) of the Constitution recognises that an accused's right to liberty may be limited where the interests of justice require continued detention. Consequently, an accused is not automatically entitled to release. Instead, the court must actively evaluate all the relevant circumstances. Sections 60(2)(c), 60(3), and 60(10), together with the factors listed in sections 60(4) to 60(9),[4] require courts to adopt a proactive approach by considering the full range of factors that may either support or justify the refusal of bail."[5]

Furthermore, section 35(1)(f) of the Constitution of the Republic of South Africa, 1996 guarantees every arrested person the right to be released from detention if the interests of justice permit, subject to reasonable conditions.[6] This constitutional guarantee is given legislative effect through Chapter 9 of the Criminal Procedure Act, which regulates the granting of bail and seeks to balance the accused's right to personal liberty with the interests of justice.

Depending on the nature and seriousness of the offence, bail may be granted by a police official, a prosecutor, or a court. This study focuses exclusively on bail applications determined by a court under section 60 of the CPA. In deciding whether the interests of justice permit the release of an accused, the court considers several statutory factors, including the likelihood that the accused will evade trial, interfere with witnesses or the investigation, commit further offences, or undermine public order. The accused's criminal record also constitutes a relevant consideration in this assessment.[7] Consequently, the CPA requires an accused applying for bail to disclose any previous convictions.

Although the obligation to disclose previous convictions is well established, uncertainty arises where an accused has a conviction that has fallen away under section 271A of the CPA. Section 271A provides that, after the expiry of a prescribed period and subject to specified conditions, certain convictions cease to constitute previous convictions for legal purposes.[8] However, the CPA does not

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allows individuals to seek legal representation and a fair trial. The rights outlined in Section 35 are designed to safeguard individuals' rights from the moment of arrest through their trial, ensuring they are treated equitably and fairly.

2 *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC).

3 Act 51 of 1977 (CPA).

4 Sections 60(2)(c), 60(3), and 60(10), together with the factors listed in sections 60(4) to 60(9) of CPA.

5 See also *Nando v S* [2020] ZAGPJHC 108 (8 May 2020) para 16.

6 Section 35(1)(f) of the Constitution of the Republic of South Africa, 1996.

7 The accused's criminal record is indeed a relevant consideration in assessments, particularly in sentencing and employment contexts. In sentencing, previous convictions can significantly impact the court's decision, as they may indicate a higher risk of reoffending. In employment, the relevance of a criminal record is evaluated based on its direct connection to job requirements, ensuring that employers do not discriminate against applicants solely on the basis of their criminal history. The Criminal Procedure Amendment Act allows for the expungement of certain criminal records after a specified period, which can be a relevant factor in assessing an individual's suitability for employment. Thus, the accused's criminal record plays a crucial role in various legal and employment contexts, influencing decisions made by the court and employers.

8 Furthermore, section 271A of the Criminal Procedure Act states that where a court has convicted a person of—
any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine, may be imposed but—(i) has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297(3); or (ii) has discharged that person with a caution or reprimand in terms of section 297(1)(c); or
any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine, may be imposed, that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period such person has been convicted of an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine.

expressly indicate whether such convictions must nevertheless be disclosed during bail proceedings.[9] This legislative silence has produced conflicting judicial approaches, and, for instance, some courts require the disclosure of convictions that have fallen away, reasoning that section 271A does not apply during bail proceedings, while others regard such convictions as having lost their legal status as previous convictions and therefore not requiring disclosure. These divergent approaches undermine legal certainty and create inconsistency in the administration of bail. The uncertainty surrounding the application of section 271A in bail proceedings has received little attention in South African legal scholarship. Existing literature on bail focuses predominantly on constitutional rights, the interests of justice, reverse onus provisions, and the factors governing the grant or refusal of bail, while the implications of convictions that have fallen away under section 271A remain largely unexplored.

Similarly, judicial decisions have not provided a coherent interpretation of the relationship between section 271A and the duty to disclose previous convictions during bail proceedings.[10] The absence of sustained scholarly and judicial engagement leaves an important question of criminal procedure unresolved. The article argues that once a conviction has fallen away under section 271A, it ceases to be legally recognized as a previous conviction and should therefore not be disclosed in bail proceedings. Following Part I, which introduces the study, Part II examines the constitutional framework governing bail, with particular emphasis on the rights to liberty and bail under the Constitution, as well as the statutory principles governing bail proceedings. Part III considers the statutory duty imposed on bail applicants to disclose previous convictions and analyses the legal effect of section 271A of the Criminal Procedure Act. Part IV discusses the existing legal uncertainty surrounding the disclosure of previous convictions that have fallen away under section 271A. Part V critically evaluates the competing interpretations of section 271A and assesses their implications for legal certainty, fairness, and the rule of law. The final part presents the study's discussion summary, conclusion, and recommendations.

## METHODOLOGY

This study adopts a qualitative doctrinal (desktop-based) legal research methodology to examine the effectiveness of the Criminal Procedure Act (CPA). This study relies on primary legal sources, including the Constitution of the Republic of South Africa, 1996, the Criminal Procedure Act 51 of 1977, and relevant case law, as well as secondary sources such as peer-reviewed law journals, legal textbooks, and official reports. These sources are critically analysed to evaluate the existing legal framework, identify gaps and inconsistencies, and assess whether the CPA effectively balances the constitutional rights of accused persons with the interests of justice.

## DISCUSSION

### Constitutional Framework Governing Bail

As already mentioned, bail is a constitutionally guaranteed right. It is, therefore, imperative herein to begin with an analysis (albeit briefly) of the provisions of the Constitution of the Republic of South Africa, 1996, to the extent that they are relevant to the institution of bail. The right to liberty of every individual is guaranteed in terms of section 12 of the Constitution.[11] Section 12(1) provides:-

> '(1) Everyone has the right to freedom and security of the person, which includes the right –
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;

[9] Jamil Ddamulira Mujuzi, "The Admissibility of Foreign Convictions in Bail Applications in South Africa: A Comment on Lewis-Springfield VS (Ca&R40/2022)[2022] Zanchc 54 (4 October 2022)," *Journal for Juridical Science* 49, no. 1 (2024): 101–12.Mzwandile Reuben Matshoba, "Bail and the Presumption of Innocence: A Critical Analysis of Section 60 (1-1) of the Criminal Procedure Act 51 of 1977 as Amended" (UWC, 2012).

[10] C M Van Der Bank, "Justification For Expungement Legislation In South Africa: Expungement And Competing Constitutional Rights," *International Journal of Arts & Sciences* 9, no. 1 (2016): 571.

[11] The Constitution, Section 12(1).

The right to liberty has stood the test of time (both prior to and after the advent of constitutional democracy) as one of the most jealously guarded rights by the South African judiciary.[12] In *In re Willem Kok and Nataniel Ballie*[13] Devilliers CJ acknowledged that the courts have a duty to protect an individual's personal liberty when it is illegally infringed. In *Ochse v King William's Town Municipality,*[14] the court emphasized that the right to personal freedom is a right which has always been jealously guarded by the SA courts, and that '*our law has always regarded the deprivation of personal liberty as a serious injury'* [my emphasis].

The same sentiments were echoed in *Mthimkhulu v Minister of Law and Order.*[15] The right to liberty plays a central role in the consideration of bail. In *Dlamini et al.* v S, the Constitutional Court, per Krigler J, held that the basic objective traditionally ascribed to bail is to maximize the accused's liberty.[16] As earlier alluded to herein, the general rule is that the State bears the onus of proving that it will not be in the interests of justice to release the accused on bail. In *Zwakala v S,*[17] it was held that the fundamental premise in bail applications is that section 12(1) of the Constitution confers on everyone the right to freedom, which includes the right not to be detained without trial, subject to constitutionally permissible limitations in terms of Section 36 of the Constitution. The above principles clearly demonstrate that courts must generally approach bail with a view to promoting the bail applicant's personal freedom, so that, absent any good reasons for continued detention, release should be ordered.

The *Grundnorm* and *fons et origine* of the South African bail jurisprudence is section 35(1)(f) of the Constitution. The section guarantees an arrested person a constitutional right to bail if the interests of justice permit the release.[18] It provides that '[e]veryone who is arrested for allegedly committing an offence has the right … to be released from detention if the interests of justice permit, subject to reasonable conditions. Dissecting section 35(1)(f), Kriegler J in *S v Dlamini et al.* asserted that the section, in its context, provides three basic propositions, namely:-

(a) that a person who is accused of having committed an offence may be arrested and detained;
(b) that upon arrest and detention, the accused is entitled to be released on bail subject to reasonable conditions; and
(c) that the criterion for the release of the accused is whether the interests of justice permit the release.

Further, in its context, section 35(1)(f), while it guarantees the accused's constitutional right to bail and affirms the constitutional right to liberty, it also clearly places restrictions on these two rights. This limitation is patent from the proviso in the section itself to the effect that the release on bail is conditional upon the interests of justice permitting the release. Thus, if the interests of justice do not permit, bail will be denied.

In determining whether the accused is entitled to be released on bail, the court conducts a judicial assessment of various factors that constitute the criterion of the interests of justice.[19] The presence of previous convictions on the part of the accused is one of such factors, and, as will be shown hereunder, it plays a very critical role in the court's judicial exercise and decision-making.

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[12] See In *re Willem Kok & Nathaniel Balie* (1879) 9 Buch 45; *Ochse v King William's Town Municipality* 1990 (2) SA 855 (E*); Mthimkhulu & Another v Minister of Law & Order* 1993 (3) SA 432 (E); *Zealand v Minister of Justice & Constitutional Development & Another* 2008 (2) SACR 1 (CC); *Theobald v Minister of Safety & Security* 2011 (1) SACR 379 (GSJ).

[13] In re Willem Kok & Nathaniel Balie (1879) 9 Buch 45.

[14] *Ochse v King William's Town Municipality 1990 (2) SA 855 (E).*

[15] *Mthimkhulu & Another v Minister of Law & Order* (fn. 12).

[16] *Mthimkhulu & Another v Minister of Law & Order* par.[7]. At par. [49] the court further reiterated the importance of the right to liberty when it remarked that section 60(4),(9)&(10) requires a court hearing bail "… to bring a reasoned and balanced judgement to bear in an evaluation, where the liberty interests of the arrestee are given the full value accorded by the Constitution".

[17] *CA & R* 10/23) [2023 ZANCHC 20 (14 April 2023).

[18] *Van Zyl & Others v S* (CA & R 7/2024) [2024] ZANCHC 43 (3 May 2024); *S v Dlamini et al.*

[19] *S v Dlamini et al (ibid)* at par. [6].

***Interpretation of the Constitution***

In *S v Letoana,*[20] it was held that in any further development of the principles of bail, every judge (and by extension, every magistrate, commissioner, arbitrator, etc.) is obliged to take full account of the Constitution in the light of section 39(2) thereof. Section 39 provides, *inter alia*: -

> '(1) When interpreting the Bill of Rights, a court, tribunal, or forum –
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law.
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights.'

Thus, as asserted in *Zwakala v S*,[21] courts are constitutionally enjoined to ensure that fairness prevails in all judicial proceedings, including bail proceedings.

**Statutory Duty to Disclose Previous Convictions**

*Duty to Disclose Previous Convictions*

In terms of section 60(11B)(a)(i) of the CPA, a bail applicant has a duty to disclose to the court in bail proceedings whether or not he or she has any previous conviction(s) against him or her. The section provides thus:

> '(11B)(a) In bail proceedings, the accused, or his or her legal adviser, is compelled to inform the court whether-
>
> (i) the accused has previously been convicted of any offence;
>
> (ii) whether there are any charges pending against him or her and whether he or she has been released on bail in respect of those charges;
>
> (iii) an order contemplated in section 5 or 6 of the Domestic Violence Act, 1998, section 3 or 9 of the Protection from Harassment Act, 2011, or any similar order in terms of any other law, was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, and whether such an order is still in force; and
>
> (iv) the accused is, or was at the time of the alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998.'

Failure by a bail applicant to disclose previous convictions has very serious negative repercussions for him or her. First, in terms of section 60(11B)(d), it is an offense to willfully fail or refuse to disclose, or give false information relating to, previous convictions. Secondly, section 68(1)(e) authorizes the court to cancel bail where the accused has failed to disclose, or has incorrectly disclosed, his or her previous convictions. Thus, the bail applicant's duty to disclose all his or her previous convictions accurately and honestly is not a discretionary duty, but an obligatory one. Depending on the nature and seriousness of the offense the accused was previously convicted of and the one he or she is currently facing during the bail proceedings, there are a number of serious implications for a bail applicant with previous convictions. These include (but are not necessarily limited to) the following: -

[20] 1977 (11) BCLR 1581 (W); see also *Majali v S* 41210/2010 ZAGPJHC 74 (19 July 2011).
[21] *Zwakala v S* (CA & R 10/23) [2023] ZANCHC 20 (14 April 2023).

***Conversion of the Offence to a More Serious or Severe One***

In South Africa, crimes are categorized according to their nature and severity and listed in different schedules of offenses under the CPA, namely schedules 1, 2, 3, 5, 6, and 7. For the purposes of this discussion, the focus will be on schedules 1, 5, and 6, as the offenses listed under these schedules constitute a significant portion of South African bail jurisprudence.

Schedule 1 lists serious crimes, such as *murder, treason, culpable homicide, rape, robbery, fraud, theft*, just to mention a few. Schedule 5 lists offenses that are more serious and severe than those listed under Schedule 1. Some, if not most, of the schedule 5 offenses are, in nature, the same crimes as those listed in Schedule 1 (e.g., murder, treason, rape, etc). However, the difference is that for the crime (which would ordinarily be a Schedule 1 offense) to fall under Schedule 5, it must have been committed whilst the accused had a previous conviction for a Schedule 1 offense. Schedule 6 lists more serious and severe offenses than those listed in the other schedules. These include, *inter alia*, crimes such as: -

> Premeditated (planned) murder; murder of a police officer who was performing his or her duties; murder of a witness who was to testify in a case involving a schedule 1 offence; Killing of the victim of rape or of any type of robbery; Gang rape; rape of an under sixteen-year-old child; multiple rapes on one victim; rape by a person who knowingly is HIV, positive; rape of a physically and vulnerable disabled person; rape of a mentally ill person; rape involving the infliction of a grievous bodily harm; Robbery involving the use of a firearm; robbery involving the infliction of grievous bodily harm; robbery of a motor vehicle; Indecent assault on an under sixteen-year-old child; Schedule 5 offence committed whilst the accused has a previous conviction in respect of a schedule 5 or six offenceor whilst the accused was on bail in respect of a schedule 5 or 6 offence.

From the brief discussion above of schedules 1, 5, and 6, it is clear that the existence of previous convictions in the accused's criminal record directly results in the conversion of less serious charges to more serious and/or more severe charges. The conversion occurs in the following manner: -

(a) A *schedule 1 offence* committed whilst the accused has a previous conviction in respect of a schedule 1 offence converts to a *schedule 5 offence*. Mathematically, this can be demonstrated as follows: -

*Schedule 1 (current charge) + Schedule 1 (previous conviction) = Schedule 5.*

Thus, when the accused applies for bail, he or she will be facing a schedule 5 offense, rather than a schedule 1 offense, which he or she would face if he or she did not have the previous conviction.

(b) A *schedule 5 offence* committed whilst there is a previous conviction in respect of a schedule 5 or 6 offence converts to a *schedule 6 offence*. Again, borrowing from math, this will read as follows: -

*Schedule 5 (current charge) + Schedule 5 or 6 (previous conviction) = Schedule 6.*

Thus, when the accused applies for bail, he or she will be facing a schedule 6 offense, rather than a schedule 5 offense, which he would face but for the previous conviction.

*Formal Bail Applications and Reverse Onus*

Facing a Schedule 5 or 6 offense brings its own devils for a bail applicant, in that it triggers the operation of section 60(11) of the CPA. The section provides thus: -

> '(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to–
>
> (a) 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;

(b) in Schedule 5 …, 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 the interests of justice permit his or her release'.

Subsection (11) of section 60 drastically changes the entire normal ballgame applicable to bail applications. First, the bail inquiry becomes a *formal proceeding*, wherein the accused must adduce evidence on oath or affirmation (as the case may be) to satisfy the court that he or she is entitled to bail. This must ensue irrespective of whether or not the bail application is opposed by the State. Evidence may be presented in writing (through affidavits) or orally. By contrast, in the case of a Schedule 1 bail application, there is no need to present formal evidence if the State does not oppose the accused's release.

Secondly, a *reverse onus* applies, in that the onus shifts to the accused to prove on a balance of probabilities his or her entitlement to bail. This is a drastic shift from the principles applicable to Schedule 1 bail applications, where, as mentioned earlier, the onus is on the State to prove that the interests of justice do not permit the release of the accused.

Thirdly, the accused's constitutional *rights to liberty and bail are drastically limited*, in the sense that the aforesaid rights are provisionally suspended pending production of convincing evidence before the court by the accused. This is so because the accused will now not be entitled to such rights unless he or she passes the test of proving, on a balance of probabilities, that the interests of justice, and/or the existence of exceptional circumstances (as the case may be), permit his or her release. This is in contrast to the principles applicable to Schedule 1 bail applications, where the accused is entitled to be released unless the State convinces the court that release would not be in the interests of justice.

In a Schedule 5 bail application, the accused has the onus of proving, on the balance of probabilities, that the interests of justice permit his or her release on bail. He or she must do so by convincing the court that the grounds for refusal of bail envisaged in section 60(4) of the CPA, read with sub-sections (5) to (9), are not applicable.[22] If the accused fails to discharge the onus bestowed on him or her, then the bail application must fail.

Whilst facing a schedule 5 offence is not an easy task for bail applicants, facing a schedule 6 offence is even more onerous. This is so because, in terms of section 60(11)(a), the accused has the arduous burden of proving (1) the existence of exceptional circumstances and (2) that the interests of justice permit his or her release. For practical purposes, this burden of proof has proven to be a very mammoth task for bail applicants, who, as evident in a long line of cases,[23] have had to witness their bail applications dismissed for want of exceptional circumstances. Acknowledging the bail applicant's onerous task in Schedule 6 offences, the Western Cape High Court in *Mafe v S,* per Thulare J, remarked that the effect of section 60(11)(a) '… is to add weight to the scales against the liberty of the accused and to render bail more difficult to obtain than it would have been if the ordinary constitutional test of the "interests of justice" were to be applied'.[24]

### *Propensity to Commit Schedule 1 Offences*

As alluded to above, proof of the accused's previous convictions is one of the factors the court considers when balancing the interests of society against those of the accused. Unfortunately for the accused, such a factor is one of those negative factors counting against him or her. It often leads to an adverse inference against him or her to the effect that he or she has a propensity to commit Schedule 1 offenses, with the upshot that bail will likely be refused. Such a finding indicates that, if released on bail, he or she is likely to commit a Schedule 1 offense. In terms of section 60(4)(a), read with section 60(5)(e), of the CPA, it is not in the interests of justice to release a bail applicant where there is a likelihood that, if released, he

[22] Section 60(4)-(9) sets out the criteria and factors which should generally guide the courts in balancing the interests of society against the interests of the accused to his or her personal freedom in bail applications.

[23] *S v Schietekat* 1998 (2) SACR 707 (C); S v Mbaleki & Another (1) SACR 165 (KZD); Lupuwana v S (CA & R03/2015) [2015] ZAECPEHC 12 (11 March 2015); Mafe v S (A49/22) [2022] ZAWCHC 108 (31 May 2022); Barendse & Another v S (A01/2023) [2023] ZAWCHC 125; [2023] 3 All SA 381 (WCC) (22 May 2023); Dubula & Another v S (SS59/2023) [2024] ZAGPJHC 383 (20 March 2024); Sogidashe & Others v S ( CA & R97/2024) [2025] ZAECMHC 3 [28 January 2025), just to mention but a few cases.

[24] *Mafe v S* (ibid fn 23) at par.[74].

or she will, *inter alia*, commit a Schedule 1 offense. Generally, courts regard bail applicants with previous convictions as having a propensity to commit Schedule 1 offenses.[25]

**Legal Effect of Section 271A**

Section 271A of the CPA provides for the prescription of certain previous convictions after a period of ten years. The section provides: -

> 'Where a court has convicted a person of –
>
> (a) any offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine may be imposed but –
>
> (i) has postponed the passing of sentence in terms of section 297(1)(a) and has discharged that person in terms of section 297(2) without passing sentence or has not called upon him or her to appear before the court in terms of section 297(3); or
>
> (ii) has discharged that person with a caution or reprimand in terms of section 297(1)(c); or
>
> (b) any offence in respect of which a sentence of imprisonment for a period not exceeding six months without the option of a fine may be imposed, that conviction shall fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction of the said offence, unless during that period the person has been convicted of an offence in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine may be imposed'.

Even though the section is entitled, '*Certain convictions fall away as previous convictions after expiration of 10 years'*, the Western Cape High Court in *Jacobs v S* pronounced that: -

> 'A sentence of imprisonment for a period not exceeding six months without the option of a fine may, depending upon the circumstances, be imposed for practically any offence. The 2009 version of paragraph 271A(b) of the CPA, compared to the 1992 version, thus radically enlarged its ambit to include virtually all offences'.[26]

This means that the scope of section 271A is not restricted to previous convictions in respect of minor offences, as it used to be the case prior to the amendment of the section in 2009,[27] but includes practically all offences. Therefore, irrespective of the nature and seriousness of the offence for which the accused was convicted, such previous conviction automatically falls away (i.e. prescribes) after the expiration of an uninterrupted period of ten years.[28]

Defining the phrase, 'fall away', in section 271A, the Appellate Division (now Supreme Court of Appeal) in *S v Zondi*[29] held that section 271A does not merely provide that the previous convictions envisaged by the section must not be taken into consideration when passing a sentence, but that they automatically fall away, which means that *they lose their validity, or value*. This principle was quoted

[25] See *Johannes v S* (A218/2023) [2023] ZAWCHC 312; 2024 (2) SACR 318 (WCC) (1 December 2023); *S v Stanfield* 1997 (1) SACR 221 (C) AT 226.

[26] (A322) [2014] ZAWCHC 192; 2015 (2) SACR 370 (WCC) (10 December 2014) at par.[46]. See also Hiemstra's Criminal Procedure 27-3; *S v Matiwane* 2013 (1) SACR 107 (WCC).

[27] The present version of section 271A is the third version of the section, and it came into effect on 6 May 2009 through section 2 of the Criminal Procedure Amendment Act 65 of 2008. The version was preceded by the 1991 and 1992 versions, which covered only previous convictions for minor offenses.

[28] 'Uninterrupted', in the sense that the accused must not have been convicted of an offense in respect of which a sentence of imprisonment for a period exceeding six months without the option of a fine may be imposed within the ten-year period following the previous conviction in question.

[29] 1995 (1) SACR 18 (A).

with approval by the Western Cape High Court in *Jacobs v S.*[30] This clearly means that previous convictions that fall within the purview of section 271A are invalid and, therefore, legally nonexistent.

**The Existing Legal Uncertainty**

The pertinent legal question that this article seeks to address is: Does the mandatory duty imposed on a bail applicant by section 60(11B) of the CPA to disclose previous convictions also include disclosing *convictions that have fallen away as previous convictions in terms of section 271A?* As will be shown hereunder, this question, without being properly addressed, will remain the proverbial elephant in the (court) room, exasperating bail applicants, as it debunks legal uncertainty on the issue. In practice, this legal uncertainty has reared its ugly head on several occasions in the lower courts and has, unfortunately, been met with divergent views. To understand the legal uncertainty, consider the following practical scenario:

> *[**X** applies for bail in the Magistrates' Court on a charge of ordinary rape that occurred in March 2025. In terms of section 60(11B), his attorney informs the court that he has no previous convictions or pending cases. However, the prosecutor produces a SAP69 report[31] which reveals that in 2010, **X** was convicted of robbery. In response, **X**'s attorney argues that the aforesaid conviction has fallen away in terms of section 271A and should, therefore, not be regarded as a previous conviction in the bail proceedings; hence it was not disclosed. In counterargument, the prosecutor asserts that the provisions of section 271A are irrelevant for bail purposes, as they are only meant for the purpose of sentencing.]*

In practice, most often than not, when faced with the above scenario, district magistrates would be quick to rule, without more, that the provisions of section 271A are not relevant in bail proceedings, but only for sentencing purposes. The upshot of such a ruling is that the bail applicant would be compelled to disclose the previous conviction despite it having been prescribed in terms of section 271A. This, in turn, will negatively affect the bail applicant's application for bail in the manner explained above.

However, on very rare occasions, some magistrates would rule in favor of the bail applicant, holding that the conviction has prescribed in terms of section 271A and therefore need not be disclosed. These conflicting views from judicial officers on exactly the same issue clearly debunk a legal uncertainty, which needs to be urgently addressed. Bail applicants need to know with certainty whether the law requires them to disclose even those convictions that have fallen away as previous convictions under section 271A. This clarity of the law would eliminate any potential risks in the bail applicant's decision about whether to disclose the previous convictions. Unfortunately, without clarity (as things stand), the bail applicant's decision-making on this issue is susceptible to the following serious potential risks: -

*(a)* If he or she *fails to disclose* the said previous convictions, whereas he or she was legally obliged to have done so: -

- (i) He or she may face prosecution in terms of section 60(11)(d) of the CPA;
- (ii) An adverse inference of dishonesty may be made against him or her in the bail proceedings, culminating in the denial of bail;
- (iii) If bail was initially granted, it may later be cancelled in terms of section 68 of the CPA upon revelation of the previous convictions.

*(b)* If he or she *discloses* the previous convictions, whereas he or she was not obliged to have done so, all the consequences of having previous convictions as explained above will be

[30] Supra. See fn 26 at par. [37].
[31] This is an official SAPS report that details the criminal record (previous convictions and/or pending cases) of a person.

applicable, with the resultant denial of bail. This would occur in circumstances where, if the previous convictions were not disclosed, the chances of him or her being granted bail would have been so high.

The far-reaching and devastating ramifications of denial of bail on an accused person cannot be overemphasised. An analysis of the South African jurisprudence reflects that the consequences of detention pending trial are equivalent to, or even more severe than, those of a custodial sentence. Acknowledging the devastating impact of detention pending trial on an accused, Goldestein J in *S v Vilakazi,*[32] remarked:

> 'Imprisonment in our country, whether awaiting trial or after sentence, constitutes, as no doubt it always has done here, a far-reaching and all-encompassing deprivation of liberty and subjects the prisoner in many cases if not all cases to boredom, indignity, loneliness, danger, lack of privacy and quite profound suffering and loss'.

In *S v Stephen and Another,*[33] Chutz J had this to say – 'imprisonment whilst awaiting trial is the equivalent of a sentence of twice that length'. Schwartzman J fully endorsed this reasoning in *S v Brophy.*[34]

Adding more weight to the difficulty an awaiting-trial prisoner faces is the strain he or she suffers in preparation for the trial, as it is often a struggle to consult with his or her lawyer and organise the defence witnesses. It is particularly egregious that the refusal of bail stemmed from the unlawful disclosure of spent convictions, which should have been excluded pursuant to section 271A.

Unfortunately, there is too little data in the South African bail jurisprudence to address the problem with boldness, a factor that further rubs salt in the wounds of bail applicants. Considering the aforementioned legal uncertainty and the potential risks it poses for bail applicants, it is apposite to provide a broad overview of the constitutional principle of legal certainty, as it fits snugly into the discussion at hand.

Legal certainty is a constitutional principle that requires that laws be clear, precise, and predictable in their application. It is one of the fundamental principles that make up the rule of law, to the extent that it has been characterized as the cornerstone of the rule of law.[35] The Constitutional Court in *Qwelane v SA Human Rights Commission & Others*[36] held that the rule of law requires, amongst other things, that the law must be coherent, clear, stable, and practicable.

Legal certainty brings a bagful of benefits for the state's subjects. A few of such benefits are worth mentioning: -

(a) It provides a clear legal framework which helps the state subjects to understand their rights and obligations.
(b) It allows for consistent and predictable application of the law, thus forestalling arbitrary and/or inconsistent interpretations.
(c) It inculcates confidence in, and reliance on, the law.
(d) It provides fairness and equity in the legal system, preventing arbitrary and/or inconsistent application of laws.

The South African judiciary has consistently stressed the importance of legal certainty. In *National Credit Regulator v Opperman,*[37] the Constitutional Court held that for a law to be valid, it must be reasonably clear and certain. In *Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd in re: Hyundai Motor Distributors (Pty) Ltd v Smith N.O,*[38] it was held that 'the Legislature is under a

[32] 2000 (SACR) 140 (W).
[33] 1994 (2) SA 163 (W).
[34] (A06/06) [2006] ZAGPHC 83; 2007 (2) SACR 56 (W) (29 August 2006).
[35] Sibongile Siyali, *Purposive Interpretation in Miya: Implications for Legal Certainty* ( De Rebus, 2024).
[36] (CCT13/20) [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (31 July 2021).
[37] (2012) ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC) @ par. [46].
[38] [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC).

duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them'.

In *Affordable Medicines Trust v Minister of Health,*[39] it was held that the law must indicate with reasonable certainty to those bound by it what is required of them, so that they may regulate their conduct accordingly. It is important to emphasize that the rule of law, of which the principle of certainty is an integral part, is one of the core founding principles of our Constitution. Thus, legal uncertainty vitiates the rule of law.

**Critical Evaluation of the Competing Interpretations: Is Section 271A Applicable to Bail Applications?**

As stated above, in practice, some district magistrates hold the view that section 271A is applicable only for sentencing, not bail, purposes.[40] They would hold this view without any substantiation. The said view (hereinafter referred to as the 'impugned view') is without any basis, and hence falls to be frowned upon and rejected for the following reasons: -

***(a) Section 271A falls under Chapter 27, not Chapter 28***

Chapter 27 addresses previous convictions, whereas Chapter 28 addresses sentencing. Thus, the characterization of section 271A as a section designed only for sentencing is misplaced and baseless. There is nothing, whether directly or indirectly, in the section itself or the CPA that suggests that the provisions of section 271A are only meant for sentencing purposes.

***(b) The view defeats logic and reasonableness***

It would be illogical and unreasonable to expect the section to only benefit a person who has already been convicted of the offence, to the exclusion of an awaiting-trial accused, who, at that stage, is presumed innocent until proven guilty. This study argues that such a perception runs counter to policy considerations and public policy, as it would be absurd and shock society. How can a convict be treated with kid gloves more than an 'innocent' person in the application of the provisions of the CPA? It does not make any sense.

The impugned view suggests that the provisions of section 271A take leave of absence when the court is dealing with bail. Distancing itself from the perception that the presumption of innocence has no bearing on bail applications (a view which was seemingly gaining momentum in our bail jurisprudence), the Western Cape High Court, in *Mafe v S,* remarked that the Constitution does not take a leave of absence simply because the court is sitting with a bail application.[41] The court further held that the presumption of innocence does not pause during a bail inquiry. In the same vein, the study contends that the provisions of section 271A do not take leave of absence or a break simply because the court is dealing with a bail application. The view controverts and undercuts the legal principle enunciated in *S v Zondi*.[42] As already mentioned, in this case it was held that a conviction that has fallen away under section 271A loses its validity or value. This means that it no longer legally exists as a previous conviction. If the conviction is no longer valid and of no value, what could then possibly resuscitate it when the court is dealing with bail? Thus, the perception flies in the face of the judgment in *S v Zondi*.

**(c) The view is unconstitutional as it undermines the rule of law**

It has been demonstrated in the preceding paragraph that the impugned view contradicts and undermines the legal principle laid down in *Zondi*. This, in turn, creates and exacerbates legal uncertainty and confusion regarding the impact of section 271A on bail applications. In that way, the impugned view negates and undermines the judicially celebrated and jealously guarded principle of legal certainty. The principle of legal certainty is the cornerstone of the rule of law and, alongside constitutional supremacy, a foundational principle of the Constitution. Thus, by promoting legal

[39] [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR) 529 (CC); see also R v Jopp & Another 1949 (4) SA 11 (N).
[40] The first author, as practicing attorney, has come across the view a number of times in the District Court, and therefore, has personal experience of the view.
[41] Supra. (fn. 23).
[42] *Supra.* fn.29).

uncertainty, the view vitiates the rule of law, a state of affairs which should be rejected with the strongest contemptuous terms it deserves.

***(d) The view directly negatively, unreasonably and unfairly limits the bail applicant's chances of getting bail***

As demonstrated above, the upshot of the impugned view is that the bail applicant is obliged to disclose an invalid previous conviction, resulting in the dire legal consequences faced by bail applicants who have previous convictions (as discussed above). This directly, unfairly and unreasonably limits or nullifies the bail applicant's chances of being granted bail.

**Previous Convictions and the passage of time**

Equally relevant to the present discussion is the long-established judicial approach that, over time, previous convictions lose much of their legal significance, and courts therefore generally attach reduced, if any, weight to such convictions.[43] Upholding the principle of passage of time, Van Dijkhorst J in *S v Mqwathi*[44] pointed out that a previous conviction should not be taken into account in the imposition of a sentence if it was more than 10 years old. The court held this view even though at the time (i.e. 1980s):

> [T]he Criminal Procedure Act 62 of 1966, which made provision for the aforesaid principle, had already been repealed by the current Criminal Procedure (i.e. Act 51 of 1977), but the latter Act did not contain a similar provision; and Section 271A had not yet been promulgated.

In *Jacobs v S,* it was held that the courts have, in principle, attached less weight to a previous conviction the longer the period that had elapsed since the date of such conviction.[45] Judicial officers generally attach no weight to an old conviction.[46] These authorities clearly demonstrate the judiciary's and legal writers' less interested attitude towards and approach to more than ten-year-old previous convictions.

Whilst the principle of the passage of time with regard to previous convictions has been mainly applied by our courts in the context of sentencing, it, however, demonstrates that our courts generally attach very little or no value to convictions more than ten years old. The study submits that nothing impedes the principle that the passage of time is equally applicable in bail applications, if regard is had to logic, fairness, constitutionalism, public policy, and policy considerations. If courts generally attach less or no weight to old previous convictions, why should bail applicants not benefit from such a judicial approach? The same question should equally be asked of the provisions of section 271A.

**Discussion Summary**

The study has highlighted some of the most important issues to come out of this research and explored whether bail applicants are obliged to disclose prior convictions which were no longer legally valid according to Section 271A of the CPA, and found that there is considerable legal uncertainty surrounding these matters; specifically, regarding bail hearings, some judges and magistrates require that such prior convictions be disclosed even though they no longer exist from a legal perspective. Some judges and magistrates consider this type of information irrelevant for purposes of bail. The study, therefore, argued that convictions that have fallen away should no longer be treated as previous convictions in bail proceedings and, consequently, bail applicants should not be under a legal duty to disclose them, thereby promoting legal certainty and fairness in the administration of justice.

**RECOMMENDATIONS**

The study recommends that section 60(11B)(a) of the Criminal Procedure Act 51 of 1977 be amended to expressly provide that an accused is not required to disclose previous convictions that have fallen

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[43] See Jacobs v S *(supra)*; S v Matiwane 2013 (1) SACR 507 (WCC) (13 August 2012); S v Mqwathi 1985 (4) SA 22 (T) at 25A-F; Hiemstra's Criminal Procedure 27-3;S S Terblanche, "Sentencing Guidelines for South Africa: Lessons from Elsewhere," *South African Law Journal* 120, no. 4 (2003): 858–82.

[44] 1985 (4) SA 22 (T) at 25A-F.

[45] Jacobs v S *(supra)* fn 26.

[46] Hiemstra's Criminal Procedure 73-3.

away in terms of section 271A. Such an amendment would remove the current legal uncertainty surrounding the disclosure of prescribed convictions and promote consistency in bail proceedings. It would also align the disclosure requirement with the legal effect of section 271A, which treats qualifying convictions as no longer constituting previous convictions. In practice, the amendment should include a proviso stating that convictions falling within the scope of section 271A are excluded from the disclosure obligation. This would provide clear guidance to accused persons, legal practitioners, prosecutors, and judicial officers, reduce inconsistent judicial interpretations, and strengthen the constitutional principles of legal certainty, fairness, and the rule of law.

## CONCLUSION

This study sought to find out whether section 60(11B) of the Criminal Procedure Act 51 of 1977 requires bail applicants to disclose previous convictions that have fallen away under section 271A. It has been demonstrated that the absence of clear legislative guidance has created legal uncertainty and inconsistent approaches in bail proceedings. The study further established that convictions which have fallen away under section 271A no longer constitute legally recognised previous convictions and should therefore not be treated as such for the purposes of bail. Requiring their disclosure undermines legal certainty, creates inconsistent judicial outcomes, and is inconsistent with the constitutional values of fairness and the rule of law. Accordingly, legislative clarification is necessary to ensure that the application of sections 60(11B) and 271A is coherent, predictable, and consistent with constitutional principles.

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