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Committee on the Human Rights of Parliamentarians

SWZ-02 – Mduduzi Bacede Mabuza
SWZ-03 – Mthandeni Dube
SWZ-04 – Mduduzi Gawuzela Simelane

Report by Mr. Abdool Rahim Khan (Botswana) on the trial proceedings of Mr. Mduduzi Bacede Mabuza, Mr. Mthandeni Dube and Mr. Mduduzi Gawuzela Simelane before the Crown Court of the Kingdom of Eswatini

Introduction

1. In October 2022, I was requested by the IPU to observe the trial of two members of parliament appearing in court in Eswatini on various criminal charges. These are set out hereunder. The trial had already commenced in July 2021 and more than 62 witnesses for the prosecution had given their evidence and been cross-examined by the defence counsel.

2. The matter was due for continuation for 8, 9 and 10 November 2022 as well as 15, 16 and 17 of the same month.

3. My report covers these two weeks.

4. I wish to thank the Speaker of Parliament for his courtesy in providing transport as well as security during the period under review. I must further express my gratitude to Ms. G. Mnisi and Ms. Faith Munyati for their notes on the trial.

5. A courtesy call on the registrar explaining my role in the proceedings was made in the morning when the trial commenced. A letter from the IPU was then handed over to the registrar for her information. When a request was made to the presiding judicial officer to introduce myself as an observer, such request was declined with no explanation offered. Upon commencement of the matter and during a short adjournment, the judge “noted” the presence of former judge Khan from Botswana.

(a) A copy of the charges is annexed hereto
(b) See letter by the IPU dated 26 October 2022

6. The matter is due to continue on 13 December 2022 when there are two issues to be determined: one is an application to call a secret witness at the close of the trial; and, second, the lodging of a fresh bail application. Both matters will be decided on by the judge on 13 December 2022.

7. On 13 December 2022, the Crown argued the application to call a witness when the proceedings had been completed. The defence objected to the application as the Crown had ample opportunity to elicit such evidence during cross-examination of the defence witness.

8. The matter was postponed to Thursday, 15 December 2022.

9. On the 15 December 2022, the application to re-open the case was refused but the bail application was unsuccessful.

10. In respect of both matters, judgment will be delivered on the 31 January when the court commences the 2023 session.

11. I am not surprised about the re-opening of the case, as there was very little evidential value on this point. The matter of the refusal of bail is very serious, as she gave no reasons when delivering her ruling the effect of which is the accused will spend their second Christmas in custody.

12. It is clear that she has not devoted any serious consideration to the issue before her. The Crown's case has now effectively closed and she has requested Heads of Argument to be prepared. This will probably last a day and then she will reserve her judgment. How long this will take is anyone's guess. But what is clear is that there is no urgency to finalize this matter.

Gaborone, 9 January 2023

1. Trial proceedings

1. On 8 November 2022, the trial continued with the evidence of Timothy Myeni, a defence witness who testified that petitions were discussed in parliament. These are petitions being gathered from their respective constituencies that they received as members of parliament and which they took to parliament for a discussion as to their implementation. It transpires from his evidence that no consensus could be achieved, which resulted in the matter being referred to a caucus for further deliberation. It was his recollection that there was agreement that these petitions should be received by parliament for further discussion as they were representatives of the people. He completed his testimony.

2. The prosecuting counsel advised the court that he was applying for an adjournment to cross-examine him on what had transpired in parliament. He claimed to have served a copy of Hansard on the defence counsel, which turned out to be a complete misrepresentation. This is, of course, highly irregular and he should have been reprimanded by the judge, who said nothing about this. As a result, the matter was postponed to the next day for the purposes of obtaining a copy of Hansard with a translation into English.

3. On the following day (9 November 2022), the cross-examination continued. The prosecution averred that there had never been a resolution that the petitions be received but this was denied by the witness. His understanding was that a resolution was taken at the caucus.

4. A further defence witness, Vincent Zwane, testified as a member of parliament that there was a resolution taken in parliament about the petition.

5. The court heard from the Constituency Headman, who narrated the sequence of events at a meeting that was held during the COVID-19 pandemic and confirmed that he had organized this meeting. The member of parliament (Mabuza) was not instrumental in convening the meeting and he (the Headman) had directed all the proceedings. When it came to non-compliance, there were police officers around, none of whom ever suggested that the entire meeting was unlawful. The question of sanitizing and maintaining a distance was not discussed and it was abundantly clear that the Headman was the person in charge and not the member of parliament. It soon became clear that there was no evidence to implicate the accused on this count. If any person was implicated, it was the Headman and no reason was proffered as to why he was not charged.

6. On 10 November 2022, the second accused, Mthandeni Sifiso Dube, gave evidence. In respect of the first charge of inciting violence, he stated that his mandate was to serve the people and to campaign for political and democratic reforms. With regard to the second count, his response was that he never committed any acts or conduct amounting to terrorism; in fact, he respected the monarchy and was not opposed to its existence nor its functions. In respect of the meeting where he is alleged to have committed the offence, he encouraged Swazis to deliver their petitions as an expression of democratic participation. Despite what has been alleged, he is for the monarchy but believes that the Prime Minister should be elected for public accountability. His view, however, was that the monarchy must be removed and separated from government, which is riddled with corruption that must be eliminated from society for the social good. His exhortation for change was not the cause of the violence and destruction that took place in June 2021. His position was that the unrest occurred because the Government had failed to note popular unrest, the killing of a student and the failure to accept the petitions were merely contributory causes of the unrest. There are many legitimate grievances in the Kingdom, the standard of living being very low, and people living in poverty.

2. Trial of 15 and 16 November 2022

7. On 15 November 2022, the trial continued with the cross-examination of Dube. During his cross-examination he restated his position clearly that he was not in any way implicated in the violence, was never at the scene of the crime and throughout all the unrest maintained his belief in the monarchy and respected the role and function of the King. However, the Prime Minister had to be elected as this made him accountable to the people instead of answerable to the King.

8. There was a lot of repetition in the questions, which he answered patiently, and even though the defence counsel did not object at all simply to allow the Crown Prosecutor to complete his uneventful and monotonous list of questions. He was of the view that to object at each and every occasion would simply have extended the trial unnecessarily. His evidence was factual and short. At no stage could the prosecution prove his role and conduct with respect to all charges. He was not implicated in any way whatsoever.

9. This was the close of the defence case. It was at this stage that the Crown applied to re-open its case to call a secret witness whose identity was not disclosed for fear of victimization. This application was strenuously opposed by the defence. They were allowed to file their opposing documents by 7 December 2022.

10. Finally, the defence lodged a fresh application for bail for both accused. The judge stated that she was not clear about the effect of a Supreme Court decision on the matter and intended to write to the court to ascertain what the effect of a ruling on the matter was about. This was unheard of for a judge to make such a statement as any judicial officer must interpret a judgment on her/his own and no one, let alone a high court judge, has the authority to communicate with a superior court for an explanation as to the effect of its judgment. This I found absolutely surprising.

11. The issue of bail as well as my comments on the compliance with accepted standards of trial adjudication will be dealt with separately.

12. The matter was postponed to 13 December 2022 for further argument.

3. Bail application

13. The two members of parliament were arrested on 25 July 2021 on charges under the Terrorism Act, Law on Sedition, murder and violations of the COVID-19 regulations.

14. An application for bail was brought on an urgent basis at the High Court, which was refused on 6 August 2021. A subsequent bail application was dismissed on 14 September 2021 by the court, finding that it was functus officio having previously dismissed this application despite the members of parliament stating new and further facts, thereby justifying a fresh application in accordance with the principle that you are entitled to apply for bail at any time before conviction.

15. An appeal against both judgments to the Supreme Court was unsuccessful as the Court found that the appeal was noted out of time and that the application for condonation was lacking in detail. In respect of the second bail application, the court found that the judge's ruling that she was functus officio was correct and that this appeal could not proceed without leave of the court having been obtained first.

16. It took a separate application before a different judge to hear the application, which was delayed between the registrar and the Chief Justice and a ruling by Judge Tshabalala to obtain any movement in the bail application. The presiding judge delayed hearing the bail application due to what she claimed was her busy court schedule.

17. The prosecution has in its opposition taken the view that the presiding judge is functus officio and as the new bail application contains no new averments it should not be allowed. As indicated earlier, this fresh bail application was argued on the morning of 16 November 2022. Judgment has been reserved to 13 December 2022, when this matter will be heard.

18. I have prepared notes on bail, which I consider relevant and explain the prospects I found these lacking in the approach of the presiding judicial officer.

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The two members of parliament have been denied bail essentially as they are considered a flight risk, notwithstanding their official positions as members of parliament, have fixed assets in the country, have clean records, have not interfered with witnesses, and are willing to offer a sum of money to secure their attendance. Whilst it is true that Simelane, another accused, fled the country, the two members of parliament have emphasized that they wished to stand trial and complete the proceedings. It appears extremely surprising that their bail has been consistency refused. Their continued incarceration has served as their rallying point for those who are articulating for change. This repeated denial of bail is a violation of the constitutional rights and they should be allowed bail to be prepared in a better environment. This principle has never been emphasized in this matter. At no stage during the proceedings did the judge ever refer to the inconvenience, the violation of the constitution or the great prejudice suffered by the accused in the interminable delays of the prosecution.

4. General comments and assessment of the trial

19. The trial had almost been completed when I arrived in Eswatini. It had started in July 2021, with 62 witnesses having appeared for the Crown, and the first accused had given his evidence and been cross-examined by the Crown. The second witness for the defence had been called and was under cross-examination. Therefore, a detailed review of the entire case is not within my brief. However, I was able to observe the proceedings over a two-week period and form an opinion of the nature of the trial during this period as an indication of the observance of the adherence to legal principles and practice in Eswatini.

20. The first is that the trial is being continuously postponed mainly at the instance of the Crown. On the very first day (8 November 2022) there was an application for a postponement by the Crown for purposes of referring to Hansard. The prosecutor claimed that he had given a copy of Hansard to the defence counsel, which turned out to be false. However, even after the adjournment to the following day upon production of a voluminous Hansard record, the importance and value of which was unclear, the Crown did not advance their case by references to what was decided. The only real issue was what the effect of a decision by parliament would have been, which was to confirm that petitions had been accepted by the caucus, but as it transpires rejected by the King when it was handed over to him by the Prime Minister.

21. The following day, evidence was given by the second accused, Dube. Again, his cross-examination did not damage his credibility his evidence; was factual, precise and his credibility remained intact.

22. However, an important witness in respect of the violation of the COVID-19 regulations was the Constituency Headman, who related what transpired at the meeting during the COVID-19 pandemic, which he had organized. He was the convenor of the meeting at which he notified the member of parliament about it. Accordingly, it appeared surprising that he was never charged, as clearly he had arranged the entire meeting. In addition, he had stated emphatically that the member of parliament had nothing to do with the organization of the event. It is clear from his evidence that he does not implicate the first accused under any circumstances.

23. I must add that, although this has nothing to do with the trial itself, has everything to do with the political; consequences of having parliamentarians locked up with no bail for a period of over 15 months were that there was a general “stay away” on this date to protest their incarceration. There was no public transport available and the roads were completely deserted, with the rallying cry being the release of the leaders incarcerated in prison. Demands were made for the release of the leaders.

24. Upon completion of his cross-examination, the defence closed its case. It was at this stage that the Crown applied for permission to call another witness to give evidence about what had transpired in parliament. However, the Crown had ample opportunity during the cross-examination of both accused as well as their witnesses to do so but failed.

25. Generally, the presiding judicial officer does not direct any detailed questions to the Crown in their cross examination as well as the production of a document from Hansard and the necessity of re-opening a trial. She grants them far too much latitude to conduct the trial as they

wish. Applications for postponement are granted without establishing their necessity and in all of these delays, it is the accused who are being prejudiced by the constant delays.

26. With regard to the judge, she has been conducting this trial since July 2021. However, there is no urgency in the manner in which she conducted the trial. Hearings are set on the day but rulings are reserved to a postponed day often with no reasons. In addition, in two instances, she does not deliver a reasoned judgment but hands down an order. This is again a very disturbing feature of her conduct of the trial.

5. General Comments on violations of the Constitution of the Kingdom of Eswatini

1. This section will provide general comments on the pretrial and trial process with the aim of illustrating the fact that the pretrial process followed in this instance resulted in the infringement of the first and second accused's constitutional rights and was not compliant with the provisions of the international instruments that have been ratified by the Kingdom of Eswatini. The section will begin with an examination of the relevant national and international human rights frameworks and conclude with an explanation of the manner in which the rights protected by these frameworks were infringed.

- **Relevant National and international statutory provisions**

2. The Kingdom of Eswatini has a robust human rights framework that has been put in place with the intention of acknowledging and protecting an individual's fundamental human and rights and freedoms.

3. Section 14 of the ***Constitution of the Kingdom of Swaziland, 2005*** provides as follows:

"*(1) The fundamental human rights and freedoms of the individual enshrined in this Chapter are hereby declared and guaranteed, namely –*
(a) respect for life, liberty, right to fair hearing, equality before the law and equal protection of the law;
(b) *freedom of conscience, of expression and of peaceful assembly and association and of movement;*
(c) protection of the privacy of the home and other property rights of the individual;
(d) protection from deprivation of property without compensation;
(e) protection from inhuman or degrading treatment, slavery and forced labour, arbitrary search and entry; and
(f) respect for rights of the family, women, children, workers and persons with disabilities.

(2) The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, the Legislature and the Judiciary and other organs or agencies of Government and, where applicable to them, by all natural and legal persons in Swaziland, and shall be enforceable by the courts as provided in this Constitution.

(3) A person of whatever gender, race, place of origin, political opinion, colour, religion, creed, age or disability shall be entitled to the fundamental rights and freedoms of the individual contained in this Chapter but subject to respect for the rights and freedoms of others and for the public interest."

4. Section 16 of the ***Constitution*** enshrines the right to personal liberty and freedom. The section provides as follows:

"(1) A person shall not be deprived of personal liberty save as may be authorised by law in any of the following cases –
(a) …
(b) …
(c) …
(d) …
(e) upon reasonable suspicion of that person having committed, or being about to commit, a criminal offence under the laws of Swaziland;

(3) A person who is arrested or detained –
(a) for the purpose of bringing that person before a court in execution of the order of a court; or
(b) upon reasonable suspicion of that person having committed, or being about to commit, a criminal offence, shall, unless sooner released, be brought without undue delay before a court.

(4) Where a person arrested or detained pursuant to the provisions of subsection (3), is not brought before a court within forty-eight hours of the arrest or detention, the burden of proving that the provisions of subsection (3) have been complied with shall rest upon any person alleging that compliance.

5. Section 23 of the ***Constitution*** provides for the protection of the right to freedom of conscience or religion. The section stipulates that:

"(1) A person has a right to freedom of thought, conscience or religion.

(2) Except with the free consent of that person, a person shall not be hindered in the enjoyment of the freedom of conscience, and for the purposes of this section freedom of conscience includes freedom of thought and of religion, freedom to change religion or belief, and freedom of worship either alone or in community with others."

6. In addition to the above protection, section 24 of the ***Constitution*** provides for the protection of the right to Freedom of Expression. The section states:

"(1) A person has a right of freedom of expression and opinion.
(2) A person shall not except with the free consent of that person be hindered in the enjoyment of the freedom of expression, which includes the freedom of the press and other media, that is to say –
(a) freedom to hold opinions without interference;
(b) freedom to receive ideas and information without interference;
(c) freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of persons); and
(d) freedom from interference with the correspondence of that person.

7. The Kingdom of Eswatini's efforts to protect and promote human rights is bolstered by its ratification of various International Law Instruments. When a country ratifies international law instruments it voluntarily accepts to become bound by those provisions and adopt measures to implement them. The Kingdom of Eswatini is thus required to adopt political, legislative, administrative and other measures to fully protect, promote and respect the enjoyment of the rights recognised in the instruments it ratified. The Kingdom of Eswatini has ratified the following instruments:

7.1. African Charter on Human and People's Rights (ratified 15 September 1995);
7.2. International Covenant on Civil and Political Rights (ratified 26 March 2004);
7.3. International Covenant on Economic, Social, and Cultural Rights (ratified 26 March 2004);
7.4. Convention against Torture and other Cruel, Inhuman or Degrading Treatment (ratified 26 March 2004).

8. Article 9(1) of the ***International Covenant on Civil and Political Rights, 1967*** states that:

"*(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."*

9. Article 1(1) of the ***International Covenant on Economic, Social and Cultural Rights, 1966*** provides that:

> "*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development*"

10. The ***Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment*** provides a rubric for the definition of torture – in that way stipulating the forms of treatment that are prohibited by the Convention. Torture is defined in Article 1, paragraph 1 as being:

> "*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions*"

- **The Infringement of nationally and internationally enshrined constitutional rights**

11. The facts indicate that the first and second accused (two members of parliament) were arrested on 25 of July and charged with acts of Terrorism, Sedition, Murder, and violations of COVID-19 protocols/regulations. The basis of the charges were statements made by the two accused persons in which they encouraged members of the public to deliver petitions, and to reject the appointment of the acting Prime Minister.

12. The Accused persons made an application for bail on 6 August 2021 and later applied again on 16 November 2021. Both applications were unsuccessful. In total, the accused persons were detained for a period of over 15 months before a determination of their guilt – relating to the charges levelled against them – was attempted.

13. Under section 16(1)(d) of the ***Constitution***, the right to personal liberty and freedom can only be withheld from an individual under the strictest circumstances. One such circumstance is where there is a reasonable suspicion that the individual whose right has been restricted is reasonably suspected of having committed a criminal offence under the laws of Eswatini. A limitation to this proviso is that, where an individual has been detained for the above reason, he/she must be brought before a court within a reasonable period of time. Section 16(4) of the ***Constitution*** provides that where an individual is detained for the above reason, he/she must be brought before a court within 48 hours of their detention.

14. In this instance, the accused was arrested and detained on 25 July 2021 and only brought before a court to make their application for bail on 6 August 2021. The period between their arrest and their detention far exceeds the 48-hour period stipulated by section 16 of the ***Constitution*** and therein lies the root of the infringement of their rights to personal liberty and freedom.

15. As a consequence of having ratified various International Instruments, the Kingdom of Eswatini is beholden to observe the provisions of these instruments. Article 9(1) of the ***International Covenant on Civil and Political Rights, 1967*** promotes the rights to freedom and personal liberty by prohibiting arbitrary detention. In this instance, no reason was given for the extended delay between the accused's' arrest and their first hearing on 6 of August 2021 (where they made their first application for bail). It can therefore be concluded that, in addition to contravening section 16 of the ***Constitution***, there was also a failure to adhere to article 9 of the ***International Covenant on Civil and Political Rights, 1967.***

16. Section 23 of the ***Constitution*** expressly prohibits the hindrance of an individual's enjoyment of the right to freedom of thought and conscience. As has been stated above, although neither of the Accused persons explicitly encouraged or incited any acts of violence, they were arrested on charges of acts of terrorism and sedition because they expressed a lack

of support for the appointment of the acting Prime Minister. It is submitted that their arrest and detention on that basis was a direct infringement of their rights to freedom of thought and conscience. They expressed an opinion that proved to be controversial but they neither encouraged violence against any members of society who agreed with them, nor incited public displays of disobedience. Arresting them on the basis of an expressed opinion was essentially an arrest carried out because it did not align with parliamentary thought and conscience on which member of parliament would be most appropriate to select as acting Prime Minister. Their arrest and detention was an infringement of their constitutional rights to freedom of thought and conscience.

17. In addition to the above is the fact that freedom of expression is a constitutionally protected right as provided by section 24 of the ***Constitution***. Section 24(2) specifically states that all persons are empowered with the right to freely communicate their ideas and information without interference, and furthermore that all persons have the right to express their opinions and ideas through all forms of media. In this instance, the two accused persons made statements at a public gathering in which they expressed their opinions on the acting Prime Minister. These opinions did not include explicitly hateful speech, nor explicit incitement of acts of public disorder or acts of terrorism. Therefore, their arrest and detainment on the basis of these statements was essentially punishment for their exercise of the rights to freedom of expression and opinion. Their arrest and detainment on that basis was an infringement of their constitutionally protected rights as stated in section 24 of the ***Constitution***.

18. The right to freely determine one's political status is explicitly enshrined in the ***International Covenant on Economic, Social and Cultural Rights***. The arrest and detention of the two accused persons on the basis of their expression of their political status with regard to the appointment of the acting Prime Minister was a direct contravention of the provisions of article 1(1) of this Covenant.

19. The judiciary has had a long history of weighing the right to freedom of expression against the requirement to follow the laws of the land aimed at maintaining public stability. In the landmark judgment of ***Thulani Maseko and Others v. Rex [2015] SZSC 03***, Bheki Makhubu, editor in charge of The Nation newspaper, spent fifteen (15) months in prison for exposing misconduct in the judiciary. The Supreme Court noted the following:

> "*Whatever issues that arose with regard to the need to balance freedom of expression or of the press with the protection of fair hearing and authority of the courts; those issues were not properly handled. The importance of freedom of expression in promoting democracy and good governance cannot be over emphasized. Equally important is the need to strengthen and promote the independence and accountability of the judiciary.*"

20. It is submitted that the present matter has similarly also not been properly handled. It was within the State's authority to arrest and detain the two accused persons for making statements thatthey believed to be detrimental to public stability and contributing towards acts of terrorism, acts of sedition and other acts of violence. However, the delay between the accused's' detention and their first opportunity to make an application for bail was an infringement of their right to personal liberty and freedom of movement. Furthermore, the nature of their statements did not justify their detention for 15 months in the interim between their arrest and the adjudication upon their matter. It submitted that their arrest and extended detention was an infringement of their rights to freely express themselves and their right not to be arbitrarily detained.

GENERAL PRINCIPLES OF BAIL

1. Swaziland (Eswatini)

The right to personal liberty is entrenched in section 16 of the Constitution of Eswatini. However, in practice the full scope of the protection guaranteed under international standards is missing. Section 21(1) of the Constitution of Eswatini provides for the right to a fair public trial, except when exclusion of the public is necessary in certain limited situations. The principle of presumption of innocence is enshrined in section 21(2)(a), which provides that a person who is charged with a criminal offence shall be presumed to be innocent until that person is proved or has pleaded guilty.

Suspects can request bail at their first appearance in court, except in the most serious cases such as murder and rape, where bail may be granted only by the High Court. The law pertaining to bail in Swaziland has undergone changes since 1991 when the legislature enacted various laws designed to restrict the availability of bail to accused persons.

The Criminal Procedure and Evidence Act is the principal statute in criminal matters. Sections 95 and 96 of the Act provides for bail, predicated on the principle of presumption of innocence. As the right to personal liberty is specially entrenched in the Constitution of Eswatini through limited grounds permitting deprivation of liberty under section 16(1), an accused is entitled to be released on bail unless doing so would prejudice the interests of justice.

Section 95 provides as follows:

"*(1) Notwithstanding any other law the High Court shall be the only Court of first instance to consider applications for bail where the accused is charged with any of the offences specified in the Fourth, the Fifth Schedules or under subsection 95 (6).*

(2) Notwithstanding any other law the High Court may, subject to this section and section 96 of this Act, at any stage of any proceedings taken in any court or before any magistrate in respect of any offence, admit the accused to bail.

(3) Subject to the provisions of this Act, the High Court shall, where an accused person is charged with any of the offences listed in the Fourth Schedule, if it determines that the circumstances warrant that the accused may be admitted to bail, admit the accused to bail and fix the amount of bail in an amount not less than E 15,000.00 (Emalangeni fifteen thousand), in addition to any other conditions it deems fit.

(4) Where the court is satisfied that substantial and compelling circumstances exist which justify that the amount of bail be fixed in an amount less than E15 000, it shall enter these circumstances on the record of proceedings and may thereupon fix the amount of bail at such lesser amount.

(5) Where an accused person is charged with any of the offences listed in the Fourth Schedule and it appears to the Court, or the prosecution submits to the satisfaction of the Court, that aggravating circumstances exist, or where an accused person is charged with any of the offences listed in the Fifth Schedule, and the Court is of the opinion that the circumstances warrant that the accused may be admitted to bail, subject to the provisions of this Act, admit the accused to bail and fix the amount of bail in an amount not less than E50 000 (Emalangeni fifty thousand) in addition to any other conditions it deems fit.

(6) Where an accused person is charged with any offence, other than the offences covered by the provisions of this section but not excluding an offence under the Theft of Motor Vehicles Act, 1991, the amount of bail to be fixed by the Court shall not be less than half the value of the property or thing upon which the charge relates or is based upon and where the value cannot be ascertained without any form of speculation the Court may, for purposes of this subsection, without or with the assistance of any person the Court deems could be of assistance to it, also fix an amount to be the value of the property or such thing.

(7) Where the High Court refuses an application for bail, it may upon application give appropriate directives to expedite the procedure under section 88.

(8) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the grounds under the provisions of section 96(4) are established."

Section 96 provides as follows:

"(1) In any court –

(a) an accused person who is in custody in respect of an offence shall, subject to the provisions of section 95 and the Fourth and Fifth Schedules, be entitled to be released on bail at any stage preceding the accused's conviction in respect of such offence, unless the court finds that it is in the interests of justice that the accused be detained in custody;

(b) subject to section 95, an accused who desires to be released on bail may make a written application in the form of a petition, or in any other form if the court so directs, to the appropriate court;

(c) subject to the provisions of section 95, the court referring an accused to any other court for trial or sentencing 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 and where the commitment is on a warrant issued by the High Court, it shall only be competent to apply for bail to the High Court;

(d) if the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether the accused wishes that question to be considered by the court.

(2) In bail proceedings the court –

(a) may postpone any such proceedings;

(b) may, in respect of matters that are in dispute between the accused and the prosecutor, enquire in an informal manner the information that is needed for its decision or order regarding bail;

(c) may, in respect of matters that are in dispute between the accused and the prosecutor, require of the prosecutor or the accused, as the case may be, that evidence be adduced;

(d) shall, where the prosecutor does not oppose bail applications in the High Court in respect of matters referred to in subsections (12)(a) and (12)(b), require of the crown's counsel to place on record the reasons for not opposing the bail application.

(3) If the court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer shall order that such information or evidence be placed before the court.

(4) The refusal to grant bail and the detention of an accused in custody shall be in the interests of justice where one or more of the following grounds are established

(a) where there is a likelihood that the accused, if released on bail, may endanger the safety of the public or any particular person or may commit an offence listed in Part II of the First Schedule; or

(b) where there is a likelihood that the accused, if released on bail, may attempt to evade the trial;

(c) where there is a likelihood that the accused, if released on bail, may attempt to influence or intimidate witnesses or to conceal or destroy evidence;

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

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

(5) In considering whether the ground in subsection (4) (a) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the degree of violence towards others implicit in the charge against the accused;
(b) any threat of violence which the accused may have made to any person;
(c) any resentment the accused is alleged to harbour against any person;
(d) any disposition to violence on the part of the accused, as is evident from past conduct;
(e) any disposition of the accused to commit offences referred to in Part II of the First Schedule as is evident from the accused's past conduct;
(f) the prevalence of a particular type of offence;
(g) any evidence that the accused previously committed an offence referred to in Part II of the First Schedule whilereleased on bail; or
(h) any other factor which in the opinion of the court should be taken into account.

(6) In considering whether the ground in subsection (4)(b) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the emotional, family, community or occupational ties of the accused to the place at which the accused shall be tried;
(b) the assets held by the accused and where such assets are situated;
(c) the means, and travel documents held by the accused, which may enable the accused to leave the country;
(d) the extent, if any, to which the accused can afford to forfeit the amount of bail which may be set;
(e) the question whether the extradition of the accused could readily be effected should the accused flee across the borders of the Kingdom of Eswatini in an attempt to evade trial;
(f) the nature and the gravity of the charge on which the accused shall be tried;
(g) the strength of the case against the accused and the incentive that the accused may in consequence have to attempt to evade his or her trial;
(h) the nature and gravity of the punishment which is likely to be imposed should the accused be convicted of the charges against him or her;
(i) the binding effect and enforceability of bail conditions which may be imposed and the ease with which such conditions could be breached; or
(j) any other factor which in the opinion of the court should be taken into account.

(7) In considering whether the ground in subsection (4)(c) has been established, the court may, where applicable, take into account the following factors, namely-

(a) the fact that the accused is familiar with the identity of witnesses and with the evidence which they may bring against him or her;
(b) whether the witnesses have already made statements and agreed to testify;
(c) whether the investigation against the accused has already been completed;
(d) the relationship of the accused with the various witnesses and the extent to which they could be influenced or intimidated;
(e) how effective and enforceable bail conditions prohibiting communication between the accused and witnesses are likely to be;
(f) whether the accused has access to evidentiary material which is to be presented at his or her trial;
(g) the ease with which evidentiary material could be concealed or destroyed; or
(h) any other factor which in the opinion of the court should be taken into account.

(8) In considering whether the ground in subsection (4)(d) has been established, the court may, where applicable, take into account the following factors, namely-

(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 (where applicable);
(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 factors which in the opinion of the court should be taken into account.

(9) In considering whether the ground in subsection (4)(e) has been established, the court may, where applicable, 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 public confidence in the criminal justice system; or
(f) any other factor which in the opinion of the court should be taken into account.

(10) In considering the question in subsection (4) the court shall decide the matter by weighing the interests of justice against the right of the accused to his or her personal freedom and in particular the prejudice the accused is likely to suffer if he or she were to be detained in custody, taking into account, where applicable, the following factors, namely-

(a) the period for which the accused has already been in custody since his or her arrest;
(b) the probable period of detention until the disposal or conclusion of the trial if the accused is not released on bail;
(c) the reason for any delay in the disposal or conclusion of the trial and any fault on the part of the accused with regard to such delay;
(d) any financial loss which the accused may suffer owing to his or her detention;
(e) any impediment to the preparation of the accused's defence or any delay in obtaining legal representation which may be brought about by the detention of the accused;
(f) the state of health of the accused; or
(g) the age of the accused, especially where the accused is under sixteen (16) years;
(h) where a woman has murdered her newly born child;
(i) any other factor which in the opinion of the court should be taken into account.

(11) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (10) to weigh up the personal interests of the accused against the interest of justice.

(12) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(a) in the Fifth Schedule 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 interest of justice permit his or her release;
(b) in the Fourth Schedule but not in the Fifth Schedule 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.

(13) Notwithstanding any law to the contrary –

(a) if the Director of Public Prosecutions intends charging any person with an offence referred to in the Fourth Schedule or Fifth Schedule, the Director of Public Prosecutions 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 the Director of Public Prosecutions intends to charge the accused with an offence referred to in the Fourth Schedule or Fifth Schedule;
(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; and

(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 the Fourth Schedule or Fifth Schedule, a written confirmation issued by the Director of Public Prosecutions under paragraph (a) shall, upon its mere production at such application or proceedings, be prima facie proof of the charge to be brought against that person.

(14) Notwithstanding any law to the contrary –

(a) in bail proceedings the accused, or the legal representative, is compelled to inform the court whether
(i) the accused has previously been convicted of any offence; and
(ii) there are any charges pending against the accused and whether the accused has been released on bail in respect of those charges;

(b) where the legal representative of an accused on behalf of the accused submits the information contemplated in paragraph(a), whether in writing or orally, the accused shall be required by the court to declare whether he or she confirms such information or not;

(c) the record of the bail proceedings, excluding the information in paragraph (a) shall form part of the record of the trial of the accused following upon such bail proceedings and where the accused elects to testify during the course of the bail proceedings the court shall inform the accused of the fact that anything the accused says, may be used against him or her at the trial and such evidence becomes admissible in any subsequent proceedings; and

(d) an accused who intentionally or wilfully-
(i) fails or refuses to comply with the provisions of paragraph (a); or
(ii) furnishes the court with false information required in terms of paragraph (a), commits an offence and is liable on conviction to a fine not exceeding E5000 (Emalangeni five thousand) or to imprisonment for a period not exceeding two years, or to both the fine and imprisonment.

(15) The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice.

(16) The court releasing an accused on bail in terms of this section, may order that the accused –

(a) files a Government Revenue Office receipt with the clerk of the court or the registrar of the court, as the case may be, or with a Correctional Services Department official at the prison where the accused is in custody or with a police official at the place where the accused is in custody, reflecting that the sum of money determined by the court in question has been paid; or
(b) shall furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the amount that has been set as bail, or that which has been increased or reduced in terms of subsection (19), in circumstances in which the amount would, had it been deposited, have been forfeited to the State.

(17) Notwithstanding anything to the contrary contained in any law, no accused shall, for the purposes of bail proceedings, have access to any information, record or document relating to the offence in question, which is contained in, or forms part of, a police docket, including any information, record or document which is held by any police official charged with the investigation in question, unless the court otherwise directs and this subsection shall not be construed as denying an accused access to any information, record or document to which the accused may be entitled for purposes of the trial, at the time of the trial.

(18) Any court before which a charge is pending in respect of which bail has been granted, may at any stage, whether the bail was granted by that court or any other court, on application by the prosecutor, add any further condition of bail –

(a) with regard to the reporting in person by the accused at any specified time and place

to any specified person or authority;
(b) with regard to any place to which the accused is forbiddento go;
(c) with regard to the prohibition of or control over communication by the accused with witnesses for the prosecution;
(d) with regard to the place at which any document may be served on him under this Act;
(e) which, in the opinion of the court, will ensure that the proper administration of justice is not placed in jeopardy by the release of the accused;
(f) which provides that the accused shall be placed under the supervision of a probation officer or a correctional official.

(19) Subject to the provisions of this Act –

(a) any 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, subject to the provisions of sections 95 (3) and 95 (4),increase or reduce the amount of bail so determined, or amend or supplement any condition imposed under subsection (15) or (18) 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;
(b) *if the court referred to in paragraph (a) is a superior court,an application under that paragraph may be made to any judge of that court if the court is not sitting at the time of the application.*

(20) The court dealing with bail proceedings as contemplated herein or which imposes any further condition under subsection (18) or which, under subsection (19), amends the amount of bail or amends or supplements any condition or refuses to do so, shall record the relevant proceedings in full, including the conditions imposed and any amendment or supplementation thereof and where such court is a magistrate's court, any document purporting to be an extract from the record of proceedings of that court and purporting to be certified as correct by the clerk of the court, and which sets out the conditions of bail and any amendment or supplementation thereof, shall, on its mere production in any court in which the relevant charge is pending, be prima facie proof of such conditions or any amendment or supplementation thereof.

(21) In this section, a refusal to admit an accused to bail after commitment to trial shall be without prejudice to the rights of the private party mentioned in sections 10 and the proviso to 1 section 108 is subject section 95 and this section."

Case Law:

1. Ntshangase and others v. Prince Tfohlongwane et al. [2007] SZSC 13
2. Thulani Rudolph Maseko and Bheki Makhubu v. The Honourable Chief Justice and three others (161/2014) [2014] SZHC 77 (6 April 2014).
3. Gumedze v. The King Jan Sithole NO et al. v. The Prime Minister of Swaziland et al. unreported Supreme Court of Appeal Case 35/2007
4. Mary Dlamini v. The King unreported High Court Case 126/1991
5. Mbuyisa Dlamini v. The King unreported High Court Review Case .../2008 Methula and another v. The King Minister of Home Affairs et al. v. Mliba Fakudze et al. Mkhangezi Gule v. Mashikilisana Fakudze et al. unreported High Court Case .../2010
6. Ray Gwebu and Lucky Nhlanhla Bhembe v. The King unreported Court of Appeal Cases 19 and 20/2001

2. Botswana

The Botswana Constitution guarantees a right to be presumed innocent. It forms part of the provisions that secure protection of the law.

Section 10 of the Constitution provides as follows:

"(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established or recognized by law.

(2) Every person who is charged with a criminal offence—

(a) shall be presumed to be innocent until he is proved or has pleaded guilty;
(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;
(c) shall be given adequate time and facilities for the preparation of his defence,
(d) shall be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice;
(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution…"

The above provision makes an important guarantee, namely that a person who has been charged would be brought before a court within a reasonable time. This provision is an important aspect of the right to be presumed innocent. The Botswana model provides for a limited list of circumstances that constitute the exceptions to the guarantee of personal liberty. Section 36 of the Criminal Procedure Act provides as follows:

"(36) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say—
(a) in execution of the sentence or order of a court, whether established for Botswana or some other country, in respect of a criminal offence of which he has been convicted;
(b) in execution of the order of a court of record punishing him for contempt of that or another court;
(c) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;
(d) for the purpose of bringing him before a court in execution of the order of a court;
(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Botswana;
(f) under the order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of 18 years;
(g) for the purpose of preventing the spread of an infectious or contagious disease;
(h) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;
(i) for the purpose of preventing the unlawful entry of that person into Botswana, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Botswana, or for the purpose of restricting that person while he is being conveyed through Botswana in the course of his extradition or removal as a convicted prisoner from one country to another;
(j) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Botswana or such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Botswana in which, in consequence of any such order, his presence would otherwise be unlawful; or
(k) for the purpose of ensuring the safety of aircraft in flight."

The Botswana Criminal Procedure Act (CPA) provides for bailable offences. However, bail may be granted even where the offence is non-bailable. Section 104 of the Botswana CPA provides that: "Every person committed for trial or sentence in respect of any offence except treason or murder may be admitted to bail in the discretion of the magistrate: Provided that- (i) the refusal by the magistrate who has committed any person for trial, to grant such person bail shall be without prejudice to such person's rights under section 113, and (ii) the magistrate may admit to bail a person under the age of 18 committed for trial on a charge of murder". This provision is not the only provision where bail may be granted for a non-bailable offence. The High Court of

Botswana is empowered, under section 114 of the Botswana CPA, to grant bail for all offences.

Case Law:

1. Attorney General v. Patile 2011 2 BLR 209 CA
2. State v. Tawenga [1981] BLR 264
3. State v. James Seven [1971 0 1973] BLR 59

3. United Kingdom

Bail in the United Kingdom is the practice of releasing individuals from remand subject to certain conditions that are designed to enable criminal justice outcomes, primarily trials and police investigations, to be completed efficiently and effectively. Bail in this context is distinct from the bail bond system applied in the United States and the approaches of the two systems differ markedly.

The primary source of legislation governing bail decisions is the ***Bail Act, 1976*** (BA 1976). Other legislation that impacts on bail includes ***the Bail (Amendment) Act 1993*** *(B(A)A 1993)*, ***the Police and Criminal Evidence Act 1984*** *(PACE 1984)* and the ***Senior Courts Act 1981*** *(SCA 1981)*.

There are broadly three categories of bail:

1. Police bail before charge

Bail may be imposed on a person arrested elsewhere than at a police station, if certain conditions are satisfied accordance with the ***PACE 1984***, section 30A(1A). Where a person has been arrested elsewhere than at a police station (street bail), there is a presumption that they will be released without bail being imposed. When a person is made subject to street bail, they will be under a duty to attend a police station but they cannot be made subject to conditions of recognizance, security, surety, or residence. Other conditions may be imposed.

- The custody officer is satisfied that releasing the person on bail is necessary and proportionate in all the circumstances (having regard, in particular, to any conditions of bail which would be imposed), and
- An officer of the rank of inspector or above authorizes the release on bail (having considered any representations made by the person or the person's legal representative)
- A custody officer has the power under the ***PACE 1984*** to vary any conditions imposed.

Upon first imposing bail, there is a duty on the custody officer to appoint a bail return date in accordance with the applicable bail period (ABP). This is the window during which the officer can set and vary the bail return date. There is no power to extend the ABP once it has expired. In standard cases, the ABP is 28 days (unless it is designated as being exceptionally complex) and can be extended (before it has expired) for a period of up to two months (to a maximum of three months).

2. Police bail after charge and before the first court appearance

3. Court bail

- **Right to court bail and grounds for refusing bail**

BA 1976, section 4 gives a general right to bail to:

- any person appearing before a magistrates' court, youth court or the Crown Court
- any person who has been convicted of an offence but only if the court is adjourning the case for the preparation of pre-sentence reports, and

- any person appearing before the court for alleged breach of a community order requirement

Where a person appears before the magistrates' court or Crown Court and applies to the court for bail, there is a presumption in favour of granting bail under the ***BA 1976***.

The right does not apply to an accused who has been charged with (or convicted of) offences specified in the ***Criminal Justice and Public Order Act 1994***. These offences include murder, attempted murder, manslaughter, rape or attempted rape. Bail can only be granted in these cases if there are exceptional circumstances that justify it, for example in cases where the prosecution evidence is very weak or contradictory. The presumption in favour of bail in other cases can be overturned if any of the exceptions contained in the ***BA 1976*** are made out. The three main exceptions are where there is a risk of the defendant:

- failing to appear
- committing further offences, or
- interfering with witnesses

Appealing the refusal to grant bail in the magistrates' court or Crown Court

A person who is refused bail by the magistrates' court or who wishes to vary or remove conditions imposed on bail may appeal to the Crown Court. The **Crim PR, SI 2020/759** provides a comprehensive procedural code for making bail applications to the Crown Court. A defendant has a statutory right of appeal to the Crown Court against the imposition of certain bail conditions. This right of appeal can only be exercised if the defendant has previously made an application to the magistrates' court to vary conditions of bail or if the conditions were imposed or varied following an application by the prosecution under the ***BA 1976***. The prosecution can also appeal to the Crown Court against the grant of bail by the magistrates' court under the ***B(A)A 1993***. The prosecution right of appeal is limited to offences punishable by imprisonment and where, before bail was granted, the prosecution made representations that it should not be granted. It is generally only used in cases of grave concern.

- **High Court bail applications**

The High Court may grant bail to a defendant under the Criminal Justice Act 1967. Applications for bail to the High Court are made to a judge in chambers in the High Court. The procedure is set out in the Rules of the Supreme Court. Exceptionally, a refusal to grant bail may also be challenged by way of judicial review.

Statutes:

Bail Act (1976) https://www.legislation.gov.uk/ukpga/1976/63/section/1

4. United States of America

Bail is the temporary release of a person awaiting trial for a crime. This simple decision – to detain or release a defendant – is made all over the United States in courtrooms every day. It is a decision that often takes less than five minutes, does not require evidence, and usually only involves one lawyer and a judge.

America is one of only two countries in the world that requires individuals to pay money to be released on bail awaiting trial. In most countries in the world, it is a constitutional right for most defendants to be released on bail awaiting trial. In a cash-bail system, the court permits an individual charged with a crime to go free pending their trial. In exchange, the court sets a cash amount, bail, that the person must pay to the court to ensure their appearance at trial. In this way, the cash bail operates as a kind of collateral: when the person appears, the court returns the money. If the person fails to appear, though, the court keeps it.

Most jurisdictions set a standard bail amount for any particular alleged crime. But judges often

have wide discretion to vary that amount (or even waive bail entirely). In setting bail for a defendant, a judge might also look at the person's prior criminal history, the likelihood that the person will not appear at trial (the flight risk), and the danger that person might pose to the community if they were released. In theory, more serious crimes, lengthier criminal histories, and greater flight and danger risks would result in higher bail. The higher bail, in turn, would create a greater incentive for the highest-risk individuals to actually return for their trials in recoup their money.

In the wake of the 1964 National Conference on Bail and Criminal Justice and the 1966 Federal Bail Reform Act, various organizations began issuing standards designed to address relevant pretrial release and detention issues at a national level. The American Bar Association (ABA) was first, in 1968, followed by the National Advisory Committee on Criminal Justice, the National District Attorneys Association, and finally the National Association of Pretrial Services Agencies (NAPSA).

Support for pretrial detention can be found in the 1979 Supreme Court decision of Bell v. Wolfish where pretrial detention was found not to violate the defendant's constitutional right to the presumption of innocence (Laudan, 2005). The Supreme Court justices found that presumption of innocence has, "no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun" and that the presumption of innocence is unique to the jurors at the trial (Laudan, 2005).

After arrest, a defendant is subject to a bail hearing by a judicial officer. Bail hearings decide whether to grant bail, determine the appropriate amount and set conditions of release.

In 1982, the Federal Government passed the Pretrial Services Act with the goal of reducing unnecessary detention.

Case Law:

1. Fields v. Henry County, 70*1 F.3d 180 (2012)*
2. U.S. v. Salerno, 481 U.S. 739, 742 (1987)
3. Schilb v. Kuebel, 404 U.S. 357 (1971)
4. Bell v. Wolfish, 441 U.S. 520, 533 (1979).
5. Stack v. Boyle, 342 U.S. 1 (1951)
6. Carlson v. Landon, 342 U.S. 524, 545-46 (1952)
7. Coffin v. United States, 156 U.S. 432, 453 (1895)